CONTEMPORARY ISSUES IN THE LAW OF EXTERNAL SELF-DETERMINATION AND SECESSION BEYOND DECOLONISATION AND DISSOLUTION

Marieke Ehlers, LLB (The Hague)

Dissertation submitted to the University of Kent for the degree of

LLM in International Law with International Relations

KENT LAW SCHOOL

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ABSTRACT

Ethnic and self-determination conflicts within nation states remain some of the greatest threats to peace and security worldwide. Thousands of people lose their lives each year in an attempt to determine and ensure their own political, physical, social, economic and cultural survival. The restrictive doctrine that has been applied to the notion of self-determination in the twentieth century has failed to address the root causes of these conflicts. The twentieth-century argument that the right to external self-determination is limited to situations of decolonisation has become untenable in the light of recent developments in state practice following the independence of Kosovo and South Sudan. It is important in the twenty-first century to shift the focus to uphold the notion that human rights are universal, and that the right to self-determination is a right of all peoples and not only of those under colonial or alien rule or domination.

This dissertation examines historical and recent developments in the exercise of the right to self-determination, and contends that this right includes the possibility of exercising external self-determination and secession. It critically re-evaluates principles such as the territorial integrity of states and the *uti possidetis* rule. It further identifies and develops various guidelines, requirements and criteria that need to be taken into consideration when external self-determination is pursued, to ensure that international law is not violated in the process. Adherence to these requirements will also increase the probability of gaining international recognition, which is crucial for a newly seceded entity to become a fully independent and successful state.

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LIST OF ABBREVIATIONS

AJICL	African Journal for International and Comparative Law
Am. Indian L. Rev.	American Indian Law Review
AMJIL	American Journal of International Law
ASIL	American Society of International Law
AU	African Union
CERD	Committee on the Elimination of Racial Discrimination
DENJILP	Denver Journal of International Law and Policy
EJSS	European Journal of Social Sciences
GA	United Nations General Assembly
HJIL	Houston Journal of International Law
HRC	Human Rights Committee/Human Rights Council
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
NATO	North Atlantic Treaty Organisation
PICJ	Permanent International Court of Justice (predecessor of ICJ)
SC	United Nations Security Council
SFRY	Socialist Federal Republic of Yugoslavia
STJIL	Stanford Journal of International Law
UN	United Nations
UNAMET	United Nations Mission to East Timor
UN Doc.	Documents of the United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNOVER	United Nations Observer Mission to Verify the Referendum in Eritrea
UNTAET	United Nations Transitional Administration in East Timor
USSR	Union of Soviet Socialist Republics
YJIL	Yale Journal of International Law

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TABLE OF INTERNATIONAL TREATIES

TABLE OF ADVISORY OPINIONS, CASES AND DECISIONS

1. INTRODUCTION

The right to self-determination is invoked in international law more often than any other collective human right.

G.J. Simpson[1]

Worldwide there were 26 armed self-determination conflicts and 55 other campaigns to attain self-determination in 2008 alone.[2] Conflicts arising from the pursuit of self-determination and other forms of ethnic conflicts within nation states can be regarded as some of the most destructive forms of warfare in the world. Although almost 80 years have passed since the principle of self-determination was included in the international legal order,[3] the right to self-determination and the law of secession remains a controversial and ambiguous topic in academia as well as in practice. The attempt by certain states and scholars to apply a restrictive approach to self-determination and limit it to the colonial context has proven to be insufficient and unworkable, and state practice has changed to such an extent that the restrictive approach is no longer a satisfactory means of interpreting the right to self-determination.[4] This dissertation contends that external self-determination, or secession, is a legal means of exercising the right to self-determination under international law, subject to certain conditions.

Self-determination and secession are interdisciplinary topics rooted not only in public international law, but also in international relations, politics, philosophical and moral approaches. Rubin argues that claims for secession should be viewed from a legal, moral and political perspective in order to draw satisfactory conclusions.[5] However, due to limitations, this dissertation will focus in particular on the legal considerations relating to self-determination and secession. Even though the right to self-determination can morally be justified for various reasons, an in-depth

[1] G.J. Simpson, 'The diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255, 258.
[2] D. Quinn, 'Self-Determination Movements and their Outcomes' in J.J. Hewitt, J. Wilkenfield and T.R. Gurr, *Peace and Conflict 2008* (Paradigm Publishers 2007) 33.
[3] The principle of self-determination was for the first time formally included in an instrument of international law in 1945 (UN Charter of 26 June 1945).
[4] M. Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff Publishers 2008).
[5] A.P. Rubin, 'Secession and Self-Determination: A Legal, Moral, and Political Analysis' (2000) 36 STJIL 253.

discussion of the moral implications is beyond the scope of this study. The right to self-determination in this dissertation will be limited to the right conferred to 'peoples' in particular, even though indigenous and minority groups have also asserted this right. In the broad sense, indigenous and minority groups constitute peoples and can therefore be included in the discussion of the rights of peoples in general.

The right to self-determination has been developed to ensure that distinct peoples can freely determine their political status and freely pursue their economic, social and cultural interests and development. Its application, however, is complex and the exact meaning and scope of the right remains vague and uncertain.[6] Particularly since the recent secession of Kosovo and South Sudan, the notion of self-determination has entered a new era, outside the context of colonialism and dissolution.

This dissertation will deal in particular with the right to external self-determination and the international framework for the law of secession and not with the various forms of internal self-determination or limited autonomy. Authors continue to assert that the right of self-determination and secession is ambiguous, and uncertain, since under international law it is neither prohibited nor permitted.[7] The aim of this research is to determine what the scope and extent of the right to self-determination is, and to draw conclusions on what the international legal and political requirements relating to external self-determination and secession include.

1.1 Research methodology

The research includes as many primary sources as possible. Where primary sources were nonexistent, unattainable or unavailable, an attempt was made to identify and utilise the most authoritative secondary sources available. A myriad of academic works exists on the topic of the right to self-determination, particularly in the colonial and Yugoslav context, but this seems to have attracted less academic interest after the end of the twentieth century. However, if and where possible, the

[6] A. Xanthaki, 'The Right to Self-Determination: Meaning and Scope' in N. Ghanea and A. Xanthaki (eds) *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Martinus Nijhoff Publishers 2005) 15.

[7] See for instance V.P. Nanda, 'Self-Determination and Secession Under International Law' (2001) 29 DENJILP 305.

most modern and relevant sources are used, since those written pre-twenty-first century particularly refer to self-determination as a right limited to the colonial context. Recently, there has been a paradigm shift in the understanding of the right of self-determination in academic thought. Therefore, an attempt was made to limit the amount of colonial context resources in order to ensure that the dissertation portrays a contemporary overview of the issues involved. However, not all of the colonial context sources could be excluded since they serve as important evidence regarding the basic principles and the evolution of the right to self-determination. The examples that have been chosen for case studies were identified primarily for their relevance to this particular topic, namely the exercise of external self-determination, and do therefore not include cases where internal self-determination or limited autonomy was exercised. They have also been identified to serve as evidence for the requirements deduced from them in the final section.

As with any research, this research has its limitations, particularly since the right to self-determination and the legal aspects of secession is a very broad topic; therefore it focuses only on the right of self-determination of peoples, and is limited to external self-determination, in other words secession, beyond the colonial context.

1.2 Approach

The primary aim of the research was to conduct qualitative data analysis of the legal issues arising from the right to self-determination and secession. The approach that is taken in this dissertation is to identify the current legal framework regarding the right to self-determination in order to determine whether secession as a form of self-determination is legal. Subsequently, the dissertation aims to analyse critically the works of other academics on the subject and an attempt will be made to come to a more concise conclusion regarding the controversies surrounding the matter of external self-determination. In the final part, the requirements for statehood are set out, and requirements for secession are deduced from case studies and academic work. A critical and progressive approach is taken in the research; it is critical of the vagueness of the international legal regime and the current world order, and also includes a critical analysis of the work of other academics. It is furthermore critical of the ‘hypocrisies and contradictions’ in international law and legal discourse,

particularly relating to state practice and the recognition of putative states.[8] The interrelatedness of international relations and international law requires an interdisciplinary approach that understands and appreciates this fact – thus an interdisciplinary approach is also taken in this dissertation. Furthermore, a third-world approach (TWAIL) is followed in the sense that it is critical of the approach taken in decolonisation, in particular relating to the post-colonial application of the *uti possidetis* rule.[9]

1.3 Emerging themes

One of the most predominant and recurring themes related to self-determination is the constant tension between the interests of people and those of the state: although people have the right to self-determination, it is the state who possesses sovereignty and territorial integrity. Another theme that can be identified is the shift in international law from a state-centred approach to a human rights approach. Also, a clear distinction in academic publications can be drawn between those published before the disintegration of Yugoslavia and those published thereafter. Another theme that particularly relates to self-determination and secession is the interplay between politics, international relations and international law.[10] Perhaps the theme that raises the most concern is the one of uncertainty. Crawford describes self-determination as *lex lata* (established law), *lex ferenda* (developing law) and *lex obscura* (unclear law) combined[11] – certain principles are well established, others are still developing, but most principles relating to self-determination are downright unclear and uncertain.

As mentioned earlier, the recent secession of Kosovo and South Sudan has had a significant impact on the theories and legal aspects surrounding self-determination and secession, and these recent developments are one of the reasons why this topic was chosen. The dissertation aims to identify the international legal requirements for secession. Most of the academic work in this area has focused on secession and self-determination in the colonial context, whereas this work will

[8] For a more detailed discussion of the various methods of international law see A. Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 AMJIL 291.
[9] M. N. Shaw, *International Law* (5th ed, Cambridge University Press 2003).
[10] H. Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947).
[11] J. Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in P. Alston (ed) *Peoples'Rights* (Oxford University Press 2005).

focus in particular on the post-colonial issues relating to secession and self-determination.

Chapter 2 of the dissertation discusses the legal right to self-determination, the history thereof, its development and its legal basis in international law in order to determine its contemporary application beyond decolonisation. Chapter 3 critically evaluates arguments and issues relating to the exercise of external self-determination. Chapter 4 aims to identify the requirements for exercising external self-determination, based on assertions by other academics, the criteria for statehood set out in the Montevideo Convention and other requirements deduced from case studies relating to secessions.

2. THE RIGHT TO SELF-DETERMINATION

This section will first provide an introductory definition of the right to self-determination. Subsequently, it provides a brief historical overview of the development of the right to self-determination which is followed by a discussion and analysis of the international legal regime on the right to self-determination. Thereafter, the theories of secession as a form of self-determination are discussed.

2.1 Defining the right to self-determination

The definition of the right that is provided in almost all UN documents and other international instruments is that self-determination is the right of all peoples to freely determine their political, economic and social status and development. Hilpold admits that the concept of self-determination is 'open to widely diverging interpretations'.[12] McCorquodale defines the right of self-determination as 'a right that protects a group as a group entity in regard to their political participation, as well as their control over their economic, social and cultural activity as a group. It is a right that applies to "peoples" in all states and can be exercised in many ways.'[13]

The right to self-determination is both an individual right (in the sense that each person has autonomy over his or her own being and his or her own economic, social and political status) and collective or group right.[14] For purposes of this dissertation, the collective right to self-determination will be discussed. The right of all peoples (as a collective group) to self-determination is thus the right of such a group to freely determine its political, economic, and social status and/or development as a collective.[15] The UN Human Rights Committee reiterated the importance of this collective right:

[12] P. Hilpold, 'Self-determination in the 21st Century – Modern Perspectives for an Old Concept' (2006) 36 *Israel Yearbook on Human Rights* 247, 249.
[13] R. McCorquodale, 'Rights of Peoples and Minorities' in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2010) 365.
[14] M. Weller, *Escaping the Self-Determination Gap* (Martinus Nijhoff Publishers 2008).
[15] H. Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, (E/CN.4/Sub.2/405/Rev.1), 1980.

> The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that states set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.[16]

As will become clear from the discussion in the following sections, the parameters of the right to self-determination are by no means fixed; on the contrary, they are constantly in flux.[17] However, two broad categories of the right to self-determination can be identified; these are internal self-determination and external self-determination. Internal self-determination refers to various forms and degrees of autonomy that groups obtain within the framework of the existing nation state.[18] External self-determination refers to a situation when a certain territorial part secedes from the nation state to form a new independent state with its own sovereignty and territorial integrity.[19] This dissertation will focus in particular on the right to external self-determination, in other words, secession from the existing state to form an independent and sovereign state with rights and obligations under international law.
As stated previously, the right to self-determination is possessed by all peoples. However, an attempt to define 'people(s)' more clearly will be made in subsequent sections, since the definition thereof has also been a contentious issue in the discussion relating to self-determination. It is, however, worthwhile to note that indigenous and minority groups may also constitute 'peoples', although this is a point of controversy amongst academics.

Weller identifies various modes of self-determination; [20] these include classical self-determination; constitutional self-determination and remedial self-determination.[21] Classical self-determination refers to the exercise of external self-determination in the context of decolonisation. It is widely accepted that external self-determination is a right in the context of decolonisation.[22] However, since this

[16] HRC, General Comment No 12, HRI/GEN/1/Rev. 9 (Vol I) 183 at 1.
[17] R. Falk, *Human Rights Horizons* (Routledge 2000).
[18] See for example Kosovo, prior to its secession, or Friesland in the Netherlands.
[19] V.P. Nanda, 'Self-Determination and Secession Under International Law' (2001) 29 DENJILP 305.
[20] The list is by no means exhaustive.
[21] M. Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff Publishers 2008).
[22] K. Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002).

dissertation particularly deals with self-determination beyond colonialism, this category will not be discussed in further detail.

Constitutional self-determination refers to national constitutions that provide for the possibility of exercising the right to self-determination. Certain constitutions even provide expressly for the right to external self-determination; even though this is usually limited to federal territorial units. One example of a federal unit providing for secession is the Constitution of the USSR of 7 October 1977.[23] In the same vein, the SFRY Constitution also provided for the possibility nations had to secede from the SFRY.[24] However, national constitutions can also provide for the right of people to secede; this right can be conditional[25] or unconditional.[26] The Constitution of Ethiopia provides as follows in article 39(1):[27] 'Each Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.' One would assume that certain limitations would be put on this right by narrowly defining 'people'. However, subparagraph 5 of article 39 provides a surprisingly broad definition:

> A "Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable predominantly contiguous territory.

This kind of constitutional provision is extremely rare and very progressive, but serves as evidence that secession is permitted under certain national laws and, as will become evident below, certainly under international law.

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[23] *Constitution of the USSR*, 7 October 1977, available at http://www.friends-partners.org/oldfriends/constitution/const-ussr1977.html, accessed on 22 April 2012. Article 72 states that 'Each Union Republic shall retain the right freely to secede from the USSR'.

[24] *Constitution of the SFRY*, Basic Principles, Section 1, available at http://hague.bard.edu/reports/hr_kristan-pt2.pdf, accessed on 22 April 2012.

[25] See for instance the Law on the Special Legal Status of Gagauzia, 23 December 1994, which provides that the people of Gagauzia have a right to secede should the status of the Republic of Moldova change (article 1(4)).

[26] See for instance article 4(2) of the Constitution of the Principality of Liechtenstein.

[27] C*onstitution of the Federal Democratic Republic of Ethiopia*, 21 August 1995, available at http://www.unhcr.org/refworld/docid/3ae6b5a84.html, accessed on 22 April 2012.

The doctrine of remedial self-determination or secession is purported by various authors, including Weller and Buchanan.[28] According to this doctrine, people can claim a right to external self-determination if (i) they are under colonial rule or another form of oppressive government; (ii) where they are ruled by a racist regime; (iii) where their human rights have been seriously violated; or (iv) where they cannot effectively participate politically within the existing state. According to this doctrine, secession is therefore an exceptional solution and should only be exercised as a remedy of last resort. Examples of remedial secessions include the recent independence gained by both Kosovo and South Sudan. Interestingly, authority for the application of this theory can be traced as far back as the Aaland Islands case of 1921 where the Commission of Rapporteurs appointed by the arbiter, the League of Nations, held the following:

> 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.[29]

This view was shared by the African Commission on Human and Peoples' Rights in the *Katanga* case, as well as by the Canadian Supreme Court in the *Quebec* case; both of which will be discussed in greater detail in subsequent sections. However, it is my contention that the exercise of external self-determination is a privilege of all peoples who no longer wish to be ruled by a government which they no longer see as representative of them,[30] since there is no prohibition on secession under international law.[31] I therefore contend that secession is permitted under international law, with a remedial right to secession. However, secession has to take place in accordance with international law.

From the above it becomes evident that the right to self-determination is a collective human right that is provided for by international law and which can be exercised in various ways. This dissertation particularly focuses on external self-determination beyond decolonisation. External self-determination takes place in the

[28] A. Buchanan, 'Theories of Secession' (1997) 26:1 *Philosophy and Public Affairs* 31.
[29] Report to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc B.7.21/68/106 (1921), 28.
[30] See for instance the proposed independence of Scotland from the United Kingdom.
[31] J. Crawford, *The Creation of States in International Law* (Oxford University Press 2006).

form of secession, which is the non-consensual separation of a certain part of the territory and population of an existing state in order to create an independent and sovereign state, completely separate from the existing state.[32] Buchanan has identified two theories relating to secession; the 'remedial right only' theory which is derivative upon other rights being violated, and the 'primary rights' theory, which is further divided in the ascriptivist theory (where an identifiable group has a right to secede) and the plebiscitary theory (where based on popular will a group of persons can secede). This dissertation contends that the right to secession is a combination of all these theories, since the deduced guidelines propose that there should be an identifiable group of people that have suffered human rights violations and who express the will to secede.

2.2 Brief historical overview

Most publications on the right to self-determination provide detailed accounts of its development, citing the French Revolution, Woodrow Wilson and Marxism; what can be deduced from these works is that the principle of 'self-determination' was for the first time formally and legally developed in the twentieth century. Since then self-determination, in its scope and its application, has developed at a tremendous pace and it is still evolving to this day. Falk even asserts that 'the evolution of the right of self-determination is one of the most dramatic normative developments in this century'.[33] Self-determination changed the traditional state-orientated approach in international law;[34] states are no longer the only entities with a say in international law, but also persons within states. According to Cassese self-determination is 'eroding' one of the most fundamental principles of traditional international law, namely the territorial sovereignty of states.[35]

Although reference was made to peoples' inherent autonomy by philosophers and jurists, including Hugo Grotius in the seventeenth century, most authors agree that the first real crystallisation of self-determination in the modern sense was at the

[32] B.R. Farley, 'Calling a State a State: Somaliland and International Recognition' (2010) 24 *Emory International Law Review* 777.
[33] R. Falk, 'Revisiting the Right of Self-Determination' in R. Falk, *Human Rights Horizons* (Routledge 2000) 124.
[34] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).
[35] *ibid*.

end of World War I[36] and most refer in this regard to former US President Woodrow Wilson's famous 'Fourteen Points' speech to Congress in 1918, in which he stated that peoples 'may now be dominated and governed only by their own consent'.[37] However, some also attribute the origin of the notion of self-determination to the nineteenth-century nationalist movements[38] and according to Cassese, the French Revolution first proclaimed the principle of self-determination.[39]

Brownlie asserts that the key development was the appearance of the principle of self-determination in article 1(2) and article 55 of the Charter of the United Nations.[40] Note that it was incorporated as a principle rather than a right. The right of self-determination was subsequently adopted in various General Assembly resolutions and by colonised peoples, particularly those in Africa that gained their independence as a result of these developments in the law of self-determination. These instances and references to self-determination were restrictive and limited to decolonisation; consequently self-determination is now widely accepted as a legal right in the context of colonisation,[41] and it is argued by various authors that the right of self-determination is a part of customary international law, and that it applies to all peoples under colonial rule.[42]

Higgins identifies two phases in the law of self-determination; the first phase relates to independence from colonial rule and the second relates to self-determination and human rights.[43] The right to self-determination in the context of independence from colonial rule became a well-established right and principle in international law. Although the exercise of external self-determination for human rights purposes proved to be an uncertain and controversial issue, subsequent state

[36] R. Falk, 'Revisiting the Right of Self-Determination' in R. Falk, *Human Rights Horizons* (Routledge 2000).
[37] D. Thürer and T. Burri, *Self-Determination*, Max Planck Encyclopedia of Public International Law (2008), available at http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e873&recno=24&, accessed on 19 April 2012.
[38] See for instance J. Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in P. Alston (ed) *Peoples' Rights* (Oxford University Press 2005).
[39] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).
[40] I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008).
[41] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995).
[42] R. McCorquodale, 'Rights of Peoples and Minorities' in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2010).
[43] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995), Chapter 7.

practice indicated that the right of self-determination can be applied outside the colonial context. Two cases are illustrative of this: the first is the unification of East and West Germany for purposes of the exercise of self-determination of the German people.[44] The second is the dissolution of the Soviet Union and Yugoslavia.[45] The ICJ's advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[46] confirmed the right to self-determination of the Palestinian people. Two recent developments have shown that the right to self-determination in the external sense can definitely be extended beyond the decolonisation context; these are the successful and internationally recognised secessions of Kosovo (2008) and of South Sudan (2011). In fact, since 1960, no international or regional instruments have referred to the right of self-determination as a right belonging solely to colonised peoples.[47] The question then arises how and under what circumstances external self-determination and secession can be exercised outside the colonial context.

From the brief overview of the development of the right to self-determination, it becomes evident that this right has developed significantly in less than a century. However, the contemporary scope of the right remains uncertain [48] and this dissertation attempts to determine what the requirements are for peoples to exercise external self-determination under international law in a non-colonial context.

2.3 International legal basis for peoples' right to self-determination

Self-determination is a human right and states have the obligation to respect, protect and fulfil the right of self-determination.[49] However, the international legal framework that provides for this human right remains a 'grey area of legal controversy'.[50] According to Cassese 'the current legal regulation of self-determination exhibits a

[44] Treaty on the Final Settlement with Respect to Germany (1990).
[45] R. McCorquodale, 'Rights of Peoples and Minorities' in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2010).
[46](2004) ICJ Report 136, at 118.
[47] R. McCorquodale, 'Rights of Peoples and Minorities' in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2010).
[48] J. Vidmar, 'Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition' (2007) 3 *Hanse Law Review* 73.
[49] F. Mégret, 'Nature of Obligations' in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2010).
[50] R. Falk, *Human Rights Horizons* (Routledge 2000).

number of lacunae, ambiguities, and loopholes'.[51] Even though I fully agree with this statement, it is nonetheless necessary to identify the international legal basis for peoples' right to self-determination.

The most widely recognised account of the sources of international law[52] is set out in the Statute of the ICJ.[53] According to article 38(1) the binding sources are international conventions, customary international law and general principles of law. Judicial decisions and academic work of the 'most highly qualified publicists' can serve as subsidiary means of establishing the law. Although declarations and non-binding resolutions and recommendations of the United Nations are not included in the Statute, these will also be used as subsidiary means for determining and interpreting the law for purposes of this dissertation. This section will identify treaty law, customary international law and general principles of international law, as well as judicial decisions and General Assembly resolutions relevant to the right of self-determination in an attempt to define this right and to determine its scope and application under international law.

2.3.1 Treaty law

The principle of self-determination was included in an internationally binding document for the first time in the Charter of the United Nations.[54] Article 1(2) states that one of the purposes of the UN is the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. Article 55 also reiterates the importance of equality and self-determination in the furtherance of other human rights. This first reference to self-determination in codified international law regarded it as a principle rather than a right. Higgins refers to the 'cautious way' in which self-determination is referred to in the Charter.[55] However, the limited approach taken in the UN Charter is understandable, since sovereignty and territorial integrity of states were still predominant features in

[51] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).
[52] I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008).
[53] Statute of the International Court of Justice.
[54] Charter of the United Nations, 26 June 1945.
[55] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 113.

international law at the time of its entry into force.[56] Despite the limitations, the fact that it was included in the UN Charter was a major development in international law since it established self-determination as a principle of international law for the first time.

The Universal Declaration of Human Rights of 1948 makes no mention of self-determination. However, the International Covenant on Civil and Political Rights (ICCPR)[57] and the International Covenant on Social, Economic and Cultural Rights (ICSECR)[58] both provide for a right to self-determination in common article 1:

> 1. All peoples 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.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

States party to the ICCPR and ICESCR are bound by this common provision. However, from the time of adoption to this day, there is no consensus on the meaning and scope of the right of self-determination included in the two covenants.[59] It was uncertain at the time of the entry into force of the two Covenants whether

[56] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).
[57] 16 December 1966, entered into force 23 March 1976.
[58] 16 December 1966, entered into force 3 January 1976.
[59] P. Harris, *Is Tibet Entitled to Self-Determination?* University of Hong Kong, Centre for Comparative and Public Law, Occasional Paper No 18 (2008), available at http://www.law.hku.hk/ccpl/pub/Documents/ OccasionalpaperNo.18Eng.pdf, accessed on 19 April 2012.

common article 1 would apply beyond decolonisation[60] – a question that is still deliberated almost 50 years later. According to Harris, since the inclusion of the right to self-determination in the ICCPR, 'there has been widespread concern that if the right to self determination in article 1 applied literally this could lead to the break-up of many existing states'.[61] Particularly for this reason, states and academics have argued that this right should be interpreted in the narrow sense. These narrow interpretations vary from arguments that it only applies to colonised people, to assertions that it only provides for internal forms of self-determination.[62]

However, states such as the Netherlands, Germany and France have strongly objected to such a restrictive interpretation:[63]

> The right of self-determination as embodied in the Covenants is conferred upon all peoples. This follows not only from the very language of Article 1 common to the two Covenants but as well from the most authoritative statements of law concerned, that is the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of the right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself…[64]

If the restrictive approach is followed it would mean that groups that ordinarily constitute 'peoples' would be excluded from the provision's application.[65] The Vienna Convention on the Law of Treaties[66] provides that treaties should be interpreted in the ordinary meaning of the words.[67] The word 'peoples' should

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[60] R. McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 HRQ 857.

[61] P. Harris, *Is Tibet Entitled to Self-Determination?* University of Hong Kong, Centre for Comparative and Public Law, Occasional Paper No 18 (2008), available at http://www.law.hku.hk/ccpl/pub/Documents/ Occasionalpaper No.18Eng.pdf, accessed on 19 April 2012, 4.

[62] See for example A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).

[63] J. Crawford, 'The Right of Self-Determination in International Law: Its Future and Development' in P. Alston (ed) *Peoples' Rights* (Oxford University Press 2005). See also H. Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 19.

[64] The Netherlands' objection to the reservations submitted by India on ICCPR Article 1, CCPR/C/2/Add.5 (1982), 3. See also Centre for Human Rights, *Human Rights: Status of International Instruments* (1978) 9, UN Sales No E.87.XIV.2 at 19.

[65] For example the Kurds, Palestinians and various African tribes.

[66] 1969, entered into force 27 January 1980, United Nations, *Treaty Series*, vol. 1155, 331.

[67] Article 31(1).

therefore be defined in its ordinary meaning, which would indicate that it is not only limited to colonised people or those under foreign military occupation as Cassese suggests.[68] Knop further remarks that there is no provision in the two Covenants that would indicate a restrictive interpretation.[69] Higgins confirms this assertion and argues that there is nothing that requires a restrictive or narrow interpretation of the right to self-determination.[70] I concur with this view; if states had envisaged a narrow interpretation of this right, limited to colonisation and internal forms of self-determination, this would have been made clear in the Covenants. Instead of narrowly defining the right, the wording leaves the door wide open for a myriad of interpretations. Furthermore, according to the legal principle *ubi lex voluit, dixit; ubi noluit, tacuit,*[71] interpretations should adhere to what is present in the text and not draw any substantive conclusions from a text's silence on a matter. If this right were to be limited to colonised peoples alone, it would not have made reference to all peoples. If it was meant to include only internal forms of self-determination this would have been expressly stated. One should thus not limit the interpretation of the Covenants to the narrow sense, since there are no clear limitations placed on the application of the right to self-determination. The Covenants refer to all states and all peoples without any restrictions. The Human Rights Committee confirms this in General Comment 12:

> The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination.[72]

Furthermore, state practice during the disintegration of the Soviet Union and Yugoslavia, the declaration of the ICJ that the Palestinians have a right to self-determination[73] and the recent secessions of Kosovo and Sudan points to the *de facto*

[68] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).
[69] K. Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002).
[70] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994).
[71] Loosely translates to 'if the law wanted to regulate, it would, if it did not, it remains silent'.
[72] HRC, General Comment 12, par 6, A/39/40 (1984).
[73] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Reports 136, at 118.

situation that the application of these covenants are not limited to internal self-determination or to colonised peoples.

Doehring even contends that under the UN Charter and the two Covenants, traditionally thought to apply only in the context of decolonisation, remedial self-determination is possible:

> [D]iscrimination against ethnic minorities could potentially give rise to a right of secession […] if the minority discriminated against is exposed to actions by the sovereign state power which consists in an evident and brutal violation of fundamental human rights, eg. through killing or unlimited imprisonment without legal protection, through destroying family relations, through exploitation without any regard for the necessities of life, through special prohibitions against following religious professions or using one's own language, and lastly, through executing all these prohibitions with brutal methods or measures. Consequently, one could argue that the right of self-determination laid down in Art. 1 of the Covenants includes the right to resist such violations as a form of self-defence, and that secession, even through the use of force, might offer the only possible defensive relation to brutal oppression.[74]

I therefore contend that the Covenants should be interpreted in the broad sense, to include the possibility of all forms of self-determination for all peoples, based on certain requirements and qualifications that will be identified in subsequent sections. Raič, who has conducted an in-depth analysis of the *travaux préparatoires* of these Covenants, has also concluded that a qualified right of secession exists under international law.[75]

A legal basis for the right to self-determination can also be found in the African Charter on Human and Peoples' Rights in article 20:

> 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

[74] K. Doehring, 'Self-determination' in B Simma (ed) *The Charter of the United Nations: A Commentary* (Oxford University Press 1995) 66.
[75] D. Raič, *Statehood and the Law of Self-Determination* (Martinus Nijhoff Publishers 2002).

> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
>
> 3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

The African Charter thus provides for the right to self-determination of all peoples and specifically of colonised and oppressed peoples, which makes its application clearer. Despite this distinction, it remains silent on the modes of self-determination that can be exercised. The AU is adamant that the right to self-determination does not include secession and argues that territorial sovereignty and the *uti possidetis* rule are paramount. These two principles of international law lead to tensions that form one of the themes of this dissertation, namely the tension between the rights of the state, and the rights of its people. The rule of *uti possidetis* 'provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence'[76] – in other words, borders must be upheld. The arguments underlying this rule will be discussed in greater detail in subsequent sections.

Article 2 of the Arab Charter on Human Rights also provides for the right of self-determination of all peoples.[77] Interestingly, the European[78] and American[79] human rights conventions, and the Charter of Fundamental Rights of the European Union[80] are silent on the matter of self-determination.[81] However, the Helsinki Final Act of 1975 of the CSCE in Principle VIII does recognise the right of peoples to self-determination.[82]

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[76] S.R. Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States' (1996) 90:4 AJIL 590, 590.
[77] S.M. Akram, Arab Charter on Human Rights 2004, 'Translation by Dr Mohammed Amin Al-Midani and Mathilde Cabanettes' (2006) 47 *Boston University International Law Journal* 147.
[78] European Convention on Human Rights, Council of Europe, 1950.
[79] Inter-American Convention on Human Rights of 1969.
[80] (2000/C364/01).
[81] H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1990).
[82] Conference on Security and Cooperation in Europe, Helsinki Final Act of 1975.

2.3.2 Customary international law and general principles of international law

The right to self-determination is not only a part of customary international law, but it is also a fundamental principle of international law.[83] The scope and extent of the right still remains uncertain, but perhaps through an analysis of state practice and *opinio juris* (the two elements required for the determination of a rule of customary international law) in subsequent sections, evidence can be found for the existence of customary international law regarding the parameters of the right to self-determination. In the *Frontier Dispute* case of 1986, the ICJ argues that the *uti possidetis* doctrine is firmly established and applied generally in connection with independence, thereby becoming part of customary international law.[84]

Both rules of customary international law and general principles of international law can be utilised to fill *lacunae* in international treaty law.[85] Where the law was unclear regarding the right to self-determination, the customary rule of *uti possidetis* provided some guidance in resolving the issue. I shall contend in a subsequent section (par 3.3) that the *uti possidetis* rule has been cast aside in recent years and no longer forms part of customary international law.

Gros Espiell, Brownlie and Parker further submit that the right to self-determination has a *jus cogens* character, in other words, it is a peremptory norm of international law which overrides general rules of law in the international law hierarchy.[86] However, the *jus cogens* character thereof is argued to be limited to the right of self-determination for colonised or oppressed peoples.[87] I do not agree with this view; based on the universality of human rights and the principles of equality and non-discrimination, the *jus cogens* character of self-determination should be upheld in relation to all peoples.

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[83] A.A. Idowu, 'Revisiting the Right to Self-Determination in Modern International Law: Implications for African States', (2008) 6:4 EJSS 43.

[84] *Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ Reports (1986) 554.

[85] T. Treves, *Customary International Law*, (Max Planck Encyclopedia of Public International Law 2006), available at http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1393&recno=35&, accessed on 20 April 2012.

[86] I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008); H. Gros Espiell, 'Study Prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities' (E/CN.4/Sub.2/405/Rev.1) 1980; K. Parker, *Understanding Self-Determination: The Basics*, Presentation to First International Conference on the Right to Self-Determination (UN, Geneva 2000), available at http://www.guidetoaction.org/ parker/selfdet.html, accessed on 28 June 2012.

[87] H. Gros Espiell, 'Self-Determination and Jus Cogens' in A. Cassese (ed) *UN Law/Fundamental Rights: Two Topics in International Law* (Martinus Nijhoff Publishers 1979).

2.3.3 Judicial developments

This section will discuss, analyse and interpret various cases before the ICJ and other regional courts in order to come closer to a conclusion regarding the scope and extent of the right to self-determination under international law. The cases are discussed in chronological order, so that the development of the right can be clearly illustrated.

One of the first judgments relating to the exercise of self-determination was before the League of Nations in 1921 regarding the situation between Finland and Sweden. The Council of the League of Nations established a Commission which concluded that there was no legal right to separatist self-determination.[88] However, at the time, no right to self-determination existed and state sovereignty very much played a fundamental role in international law, since states were considered to be the only subjects of international law at the time. It was only later that human rights became a fundamental issue and consequently state sovereignty was increasingly being limited in this regard.[89] The principle of self-determination was only fully established by the Charter of the United Nations in 1945.[90] However, as was noted earlier, the Commission did allow for remedial secession in extreme circumstances.

The first key judicial development that impacted on the right to self-determination was the *Barcelona Traction* case of 1970, which interestingly had no link to self-determination.[91] The court held that certain obligations were owed to the international community as a whole, and that states did not have to show a particular interest in a case to bring it before the ICJ; these obligations are *erga omnes*.[92] The *erga omnes* status of the right to self-determination was later confirmed in the 1995 *East Timor* case[93] and in the 2004 *Construction of a Wall* case.[94]

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[88] League of Nations Doc. B.7.21/68/106 (1921).
[89] A. Cassese, *Self-Determination: A Legal Reappraisal.* (Cambridge University Press 1995).
[90] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996).
[91] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v *Spain)* ICJ Reports (1970) 3.
[92] *ibid* 32.
[93] *East Timor* case *(Portugal* v *Australia)* ICJ Reports (1995) 90, 29.
[94] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Reports (2004), 155–159.

In the 1971 *Namibia* Opinion,[95] the ICJ referred to the importance of the principle of self-determination – this decision was a major leap from the Court's earlier ruling of 1966 where it largely disregarded self-determination of the peoples of Namibia.[96] According to Crawford, there was a decisive move between 1960 and 1971 to include self-determination in the corpus of international law.[97] The *Western Sahara* Advisory Opinion of 1975 also affirmed the principle of self-determination.[98] In a separate opinion, Judge Hardy Dillard stated that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people.'[99] However, these cases concerned self-determination in the colonial context.

In the *Frontier Dispute* case of 1986, the Court upheld the principle that colonial boundaries had to be upheld (*uti possidetis*).[100] It will be argued later in this dissertation that the *uti possidetis* rule is only applicable in the colonial context, and no longer holds any ground in contemporary forms of self-determination. In the same year, in the *Nicaragua* case the ICJ held that the principles regarding self-determination set out in General Assembly Resolution 2625 (XXV), entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', reflected customary international law.[101]

The Arbitration Commission on Yugoslavia also favoured the application of the *uti possidetis* rule:[102]

> [I]nternational law as it currently stands does not spell out the implications of the right to self-determination. However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis*) except where the States concerned agree otherwise.

[95] *Nabimia Opinion*, ICJ Reports (1971) 12.
[96] *South West Africa Cases (Second Phase)*, ICJ Reports (1966).
[97] J. Crawford, 'The Right of Self-Determination in International Law: Its Future and Development' in P. Alston (ed) *Peoples' Rights* (Oxford University Press 2005).
[98] *Western Sahara Advisory Opinion* ICJ Reports (1975) 3, 12.
[99] *Western Sahara Opinion* ICJ Reports (1975) 3, 122.
[100] *Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ Reports (1986) 554.
[101] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America),* (Merits) ICJ Reports 1986, 101–103, at 191–193.
[102] Arbitration Commission Opinion No. 2 of 11 January 1992, 1498 at 1.

In the *Katanga* case before the African Commission on Human and Peoples' Rights the Commission was requested to recognise the independence of Katanga.[103] In the 1995 decision, the Commission held the following:

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

To summarise, the Commission was of the opinion that external self-determination could only be exercised where serious human rights violations were taking place and where people could not effectively participate in politics. If these violations were not present, then the territorial integrity of the state could not be impeded.

The Court in the *East Timor* case (1995) acknowledged the *erga omnes* status of the right of self-determination.[104] The right to self-determination is therefore owed to the international community as a whole, which indicates that any state may issue a complaint regarding an *erga omnes* breach. It has been argued that the right to self-determination's erga omnes character only applies in a colonial context – this has been proven to be incorrect, since the court in the *Construction of a Wall* case (2004) upheld the decision outside of the colonial context.[105] Despite the *erga omnes* character of self-determination, the Court in the *East Timor* case did not grant the right any special status which would allow it to override the limitations on the Court's jurisdiction. The Court did however affirm the right of self-determination as a part of international law and concluded that the people of East Timor had a right to self-determination. The Court further considered self-determination to be 'one of the essential principles of contemporary international law'.[106]

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[103] African Commission on Human and Peoples' Rights, 8th Annual Activity Report of the Commission on Human and Peoples' Rights, 31st session, Case 75/92, *Katangese Peoples' Congress* v *Zaire* (1995).

[104] *East Timor Case* (*Portugal* v *Australia)* ICJ Reports (1995) 90, 102–103.

[105] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports (2004), 136 at 171.

[106] *East Timor Case (Portugal* v *Australia)* ICJ Reports (1995) 102.

In the *Loizidou* v *Turkey* case,[107] Judges Ryssdal and Wildhaber in their concurring opinion also conceded that a people or peoples may exercise a right of external self-determination if their human rights have consistently been violated or if their right to internal self-determination has been denied in a discriminatory fashion. The European Court of Human Rights thus also recognised a right to remedial secession.

The question of whether the right to self-determination included the right to secede was raised before the Supreme Court of Canada in *Reference re Secession of Quebec* when the Court in 1998 stated the following:

> [T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[108]

The Canadian Supreme Court therefore proposes remedial secession, and argues that the right to self-determination does not include a *right* to secession. However, international law also does not *prohibit* secession.

In the 2004 advisory opinion regarding the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ held the following:

> The principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which 'Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] … of their right to self-determination.' Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the State parties the obligation to promote the realisation of that right and to

[107] *Loizidou* v *Turkey* [1997] 23 E.H.R.R. 513.
[108] [1998] 1 SCR 217, 289–290.

> respect it, in conformity with the provisions of the United Nations Charter.[109]

Up to this point in time, it was argued that territorial integrity and the *uti possidetis* rule were primary concerns that more often than not trumped the exercise of external self-determination. The only exceptions to this rule of thumb were in exceptional circumstances where people were oppressed, their human rights violated or when they could not effectively exercise their right to self-determination.

However, in 2010 the ICJ once again ruled on the issue of secession and self-determination in its *Kosovo* Advisory Opinion.[110] Many academics were disappointed by the Court's narrow interpretation of the request, since it did not expressly decide on the parameters of the right to self-determination.[111] The Court also avoided the question of whether a right to remedial secession exists. However, it did clarify two contentious issues that have been used often as arguments against the exercise of external self-determination. Firstly, the Court concluded that an analysis of general international law and state practice led to the conclusion that there is no prohibition under international law to declare unilateral independence.[112] The Court relied on the *Lotus* judgment[113] in concluding that a permissive rule does not need to exist, as long as there is no prohibition (in other words, that which is not prohibited under international law, is allowed).[114] The Court continued the discussion relating to declarations of independence and stated that during the past two centuries, there have been numerous declarations of independence, some contested, others not. The Court also stated that '[i]n no case, however does the practice of states as a whole suggest that the act of promulgating the declaration [of independence] was regarded as contrary to international law'.[115] Secondly, the Court asserted the following:

> Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of

[109] ICJ Reports (2004), 136 at 171.
[110] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* ICJ Reports (2010).
[111] E. Circovic, 'An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence' (2010) 11:8 *German Law Journal* 895.
[112] *ibid* 99.
[113] *Lotus* judgment No 9, 1927 PCIJ (ser A) No 10, at 18.
[114] E. Circovic, 'An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence' (2010) 11:8 *German Law Journal* 895.
[115] *ibid* 99, 78.

> independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:
>
> 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'
>
> In General Assembly resolution 2625 (XXV), entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', which reflects customary international law (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 101–103, paras. 191–193), the General Assembly reiterated '[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that '[t]he participating States will respect the territorial integrity of each of the participating States' (Art. IV). Thus, *the scope of the principle of territorial integrity is confined to the sphere of relations between States*. [Emphasis added.][116]

The Court therefore concluded that people or groups of people cannot affect the territorial integrity of a state, but only other states can, thereby discarding the territorial integrity rule as a valid argument against the exercise of self-determination. In a separate opinion, Judge Cançado Trindade further elaborated on this point:

> No State can invoke territorial integrity in order to commit atrocities…and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimized…The basic lesson is clear: no

[116] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* ICJ Reports (2010), 30 at 80.

> State can use territory to destroy the population. Such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not vice-versa.[117]

The state submissions made during the *Kosovo* Advisory Opinion were mixed. Albania reiterated that the right to self-determination has an *erga omnes* character and that states have an obligation to promote the realisation of that right. It further emphasised the human rights violations that took place in Kosovo, and implicitly recognised a right to remedial secession.[118] Various states as well as jurists have argued that Kosovo is a case *sui generis*, in other words a 'special case' which should not create a precedent.[119] This is certainly true – almost all secessions beyond decolonisation have a unique history and can be categorised as 'special'. However, what is significant about the *Kosovo* judgment, is that it addressed issues such as territorial integrity which up till then had always been seen as a limiting factor.

There is no doubt that 'all peoples have the right to self-determination' is a rule of treaty and customary international law.[120] The exact scope and extent of this right remains unclear. However, it is clear that secession is not prohibited under international law.[121] According to the *Lotus* principle, which generally applies to the actions of states, if an action is not prohibited under international law, it is allowed.[122] I contend that this principle can be extended to self-determination and secession; if there is no law that prohibits secession, it is consequentially allowed under international law, provided that certain requirements are met. The aim in the remainder of the dissertation will be to determine what these requirements are, in order to avoid violations of international law in the process of seceding or claiming external self-determination.

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[117] Separate Opinion of Judge Cançado Trindade, 175.
[118] State Submission of the Republic of Albania of 16 April 2009 in the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion).*
[119] Written Comments submitted by the Federal Republic of Germany of July 2009 in the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion).*
[120] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996).
[121] *ibid*.
[122] *The Case of SS Lotus (France* v *Turkey)* PCIJ (1927) Series A, No 10 of 7 September.

2.3.4 General Assembly Resolutions and Declarations

Even though General Assembly Resolutions and Declarations are not binding, they are included here for interpretation purposes and potentially to serve as proof for the development of customary international law. It is, however, important to note that most of the General Assembly resolutions that have been adopted in relation to the right to self-determination, apply mainly to the colonial context, and therefore not all General Assembly resolutions relating to self-determination will be included. Only those that are regarded as asserting significant principles will be discussed.

Self-determination as a right in the colonial context was confirmed by the adoption of General Assembly Resolution 1514 (1960).[123] Subsequently, General Assembly Resolution 2625 of 1970 [124] was adopted which balanced self-determination with territorial integrity and provided a legal basis for the Roman principle of *uti possidetis* which had created various problems, especially in Africa where borders were drawn in an arbitrary way by colonial powers.[125] Paragraph 7 of the Declaration states that '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'.

Vagueness in the wording of these resolutions resulted in the debate and uncertainness regarding the current status of self-determination. Various authors argue that these earlier resolutions only apply to the colonial context and that external self-determination can only take place in this context. Until 1989 there was relative consensus that the right to self-determination was limited to the colonial context and that the right had to be exercised in such a manner as to not change existing external boundaries (*uti possidetis* rule).[126] However, even during this period there were exceptions – one example was the secession of East Pakistan which became Bangladesh. The secession changed the external boundaries of Pakistan and was nonetheless recognised by the international community. Outside of the colonial context, the right to self-determination for peoples subject to foreign or

[123] GA Resolution 1514 (XV) of 14 December 1960.

[124]UN General Assembly Resolution 2625 (XXV). Declaration On Principles Of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations, of 24 October 1970.

[125] M. wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 *Michigan Journal of International Law* 1113.

[126] R. Falk, *Human Rights Horizons* (Routledge 2000).

alien domination was also confirmed and, although these terms were never properly defined, apartheid in South Africa serves as an adequate example of what is meant by the phrase.[127] The subsequent recognition of South Sudan and Kosovo also serve to prove that state practice now effectively disregards the *uti possidetis* rule.

Article 7 of GA Resolution 3314[128] (XXIX) on a definition for aggression provides that:

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

This resolution clearly draws a distinction between all peoples and those under colonial rule. Consequently it can be argued that the right of self-determination and independence is conferred to all peoples, but in particular to those under colonial rule. GA Resolution 637A[129] confirms this approach where it states that 'the States Members of the United nations shall uphold the principle of self-determination of all peoples and nations' – this also suggests that a 'people' is not a synonym for 'nation' since the resolution distinguishes between the two notions.

The 'Declaration on Principles Guiding Relations between Participating States' of the Helsinki Final Act of the CSCE (1975), in principle VIII stipulates that states have to respect the equal rights of peoples and their right of self-determination, and that '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'.

[127] UN General Assembly Resolution 2625 (XXV). Declaration On Principles Of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations, of 24 October 1970.
[128] GA Resolution 3314 (XXIX) of 14 December 1974.
[129] (VII) of 16 December 1952.

As mentioned earlier, indigenous groups may also constitute 'peoples' that have a right to self-determination. However, positivist and doctrinal approaches to self-determination issues have often excluded such groups from the right's application.[130] The right of indigenous peoples to self-determination is confirmed in article 2 of the United Nations Declaration on the Rights of Indigenous Peoples[131] which provides for the right of indigenous peoples to self-determination. In article 4 the right to self-determination is defined to include internal autonomy; however, this does not mean that secession is prohibited – it is merely not expressly provided for. This is once again a sign of the reluctance of states to encourage secessionist movements.[132]

From the analysis of the legal framework, it has become clear that states are reluctant to formulate clear rules regarding the laws of self-determination and secession. Despite the controversy surrounding the scope and extent of self-determination, it is now widely accepted that it is in fact a right.[133]

Russia's recognition of the independence of Abkhasia and South Ossetia,[134] as well as the recent developments and recognition of Kosovo[135] and South Sudan[136] have proven that state practice is deviating from the once restrictive approach followed before the twenty-first century. As becomes clear from the historical overview and legal regime analysis provided above, the right to self-determination has developed and evolved significantly in less than a century. Weller argues that these developments may even put an end to governments' attempts to limit self-determination to the internal or colonial context.[137]

What remains important to keep in mind is the fact that external self-determination is not illegal or prohibited under international law. It follows that the

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[130] R.A. Miller, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination' (2007) 31:2 *American Indian Law Review* 341.

[131] Adopted by GA Resolution 61/295 of 13 September 2007.

[132] E. Circovic, 'Self-determination and Indigenous Peoples in International Law' (2007) 31:2 *American Indian Law Review* 375.

[133] H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1990).

[134] The New York Times, *Russia Backs Independence of Georgian Enclaves*, 26 August 2008, available at http://www.nytimes.com/2008/08/27/world/europe/27russia.html?pagewanted=all, accessed on 22 April 2012.

[135] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* ICJ Reports (2010), 30 at 80.

[136] Reuters, *South Sudan Admitted to UN as 193rd Member*, 14 July 2011, available at http://uk.reuters.com/article/2011/07/14/uk-sudan-un-membership-idUKTRE76D3I120110714, accessed on 22 April 2012.

[137] M. Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff Publishers 2008).

pursuit of external self-determination is a valid form of exercising the right to self-determination. However, as will become evident, it relies on political support and this dissertation therefore attempts to provide a framework in which external self-determination can be exercised in order to ensure the greatest possible political support from the international community.

3. ARGUMENTS AND PERCEIVED OBSTACLES RELATING TO EXTERNAL SELF-DETERMINATION

This section critically analyses arguments and perceived obstacles relating to law and exercise of external self-determination.

3.1 The definition of 'people(s)'

The question of who constitutes a 'people' has become one of semantic interpretation. Academics and government representatives have often argued that 'people(s)' for purposes of the right to self-determination, in fact means the nation as a whole. One example of such a definition is that of the renowned scholar Brownlie, who defines peoples as 'cohesive national groups'.[138] However, as became evident from the earlier discussion above regarding the definition of a people under the ICCPR and ICESCR, the term 'people(s)' cannot be construed as meaning 'nation' – in other words all people living within a sovereign state. Firstly, the linguistic definition of a people is not the same as the definition for nation. Since the Vienna Convention on the Law of Treaties provides that international conventions should be interpreted using the ordinary meaning of words, this argument holds no ground. Secondly, international instruments distinguish between 'nations' and 'peoples' which would also imply that these two terms clearly do not have the same meaning. Summers, however, argues that 'people' is synonymous with 'nation', but that 'nation' should not be defined to be synonymous with 'state'. He contends that a 'nation' refers to those who have a common language, culture, ethnicity, descent, history or territory and who form a community. He makes it clear that it does not mean all people living within a state.[139]

The question that remains unanswered is what would constitute an adequate definition for the term 'people(s)'. Countless attempts have been made to define the

[138] I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008), 580.
[139] J. Summers, 'The Right to Self-Determination and Nationalism in International Law' (2005) 12 *International Journal on Minority and Group Rights* 325.

term;[140] however, the one that has relatively consistently been used in academic work is the description of a people provided by UNESCO experts in 1989:[141]

> (a) A group of individual human beings who enjoy some or all of the following common features:
>
> i. A common historical tradition;
> ii. Racial or ethnic identity;
> iii. Cultural homogeneity;
> iv. Linguistic unity;
> v. Religious or ideological affinity;
> vi. Territorial connection;
> vii. Common economic life.
>
> (b) The group must be of a certain number who need not be large (eg the people of micro-states) but must be more than a mere association of individuals within a State.
>
> (c) The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness.
>
> (d) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.[142]

Based on this definition, it becomes clear that a people can be any sub-entity of persons within a nation stated which possess most or all of the above-mentioned characteristics. These include a number of objective criteria, and a subjective criterion which refers to the psychological aspects of the group – 'we-consciousness' – which is based on those objective elements.[143] Quite similar to the definition provided by the UNESCO experts, is a more concise version purported by Nanda: (i)

[140] R.N. Kiwanuka, 'The meaning of "People" in the African Charter of Human and Peoples' Rights' (1988) 82 AJIL 80.
[141] UNESCO, International Meeting of Experts on further study of the concept of the rights of peoples, Final Report and Recommendations, SHS-89/CONF.602/7 of November 1989.
[142] Final Report and Recommendation of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, SNS-89/CONF.602/7 (2 February 1990).
[143] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996).

race or ethnicity; (ii) language; (iii) culture; (iv) religion; (v) history; (vi) geography; (vii) economy; and (viii) ethos, which is a subjective state of mind.[144]

The African Commission on Human and Peoples' Rights noted the controversies surrounding the definition of 'peoples', but concluded that a collective of individuals possessing objective features may be considered to be a people.[145] Although the Commission did not consider itself bound by the definition of the UNESCO experts, it did rely on it.[146]

Examples of peoples that have been identified for purposes of peoples' rights under international law include, but are most certainly not limited to, the Scots in the United Kingdom, the Basques in Spain and the Aceh people in Indonesia.[147] The peoples in this non-exhaustive list have the right to self-determination. Recognition of a group as 'a people' by the state they live in or by other states can be useful for the group, but not conclusive since this would mean that the existence of a group as a people is reliant on the political motivation of states.[148] In my opinion certain indigenous groups and minorities within nation states may also constitute a people as defined above and, if so, they may have an even more justified cause for claiming external self-determination.

3.2 Doctrinal and restrictive approach versus progressive and broad approach

Traditionally, international law academics readily purport the restrictive and doctrinal view of the right to self-determination, which to a lesser or greater extent limits self-determination to internal autonomy and reserves external self-determination only for those under colonial or foreign domination. These doctrinal academics particularly rely on the importance of the territorial integrity of states as support for their argument. However, the ICJ has made it clear in the *Kosovo*

[144] V.P. Nanda, 'Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect' (1978–1979) 1 HJIL 71.
[145] *Kevin Mgwanga Gunme* v *Cameroon*, Communication No. 266/2003 ACHPR 26th Annual Activity Report (2008/2009) at par 69.
[146] D. Shelton, 'Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105:1 *AMJIL* 60.
[147] R. McCorquodale, 'Rights of Peoples and Minorities', in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2010).
[148] R. McCorquodale, 'Rights of Peoples and Minorities', in D. Moeckli, S Shah. and S. Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2010).

judgment that the principle of territorial integrity refers solely to relations between states and does not apply to individuals in their quest to obtain self-determination.[149]

Special Rapporteur Héctor Gros Espiell argued in 1967 that self-determination only applied to colonies and people under 'alien domination' (defined as colonial rule or racist regimes) and not to people that are already organised in the form of a state.[150] However, the principle of equality and non-discrimination suggests that the right does apply to all peoples, not only to those subject to alien, foreign, or colonial rule, or to those subject to alien domination or exploitation. The aim of the right to self-determination is to eliminate the 'imposition of "foreign will" upon a people – this foreign will can also be present outside the colonial context where minorities are outvoted by a different-minded majority'.[151]

Weller states that the restrictive doctrine is inadequate since it fails to address the following cases: (i) cases arising outside the colonial context (such as Chechnya and Basque country); (ii) cases where the territorial definition of former colonial entities are challenged (such as Burma and the Philippines); and (iii) cases that challenge the implementation of self-determination in the context of decolonisation (such as Comoros and Somaliland).[152] Furthermore, the recognition of states which seceded outside of the colonial context serve as evidence that the doctrinal approach to self-determination is not mirrored in fact. This in turn reminds of the legal maxim *ex factis jus oritur* or the 'law-creating influence of facts'.[153] The recognition of Kosovo has proven that the right to self-determination extends beyond the colonial context.

The other view (which has been referred to in the literature as a broad, progressive or flexible approach) allows 'state-shattering practices' to various degrees in a 'reformulated legal approach'.[154] The latter approach accepts that the scope and extent of the right of self-determination is as yet not fully determined. Falk argues as follows:

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[149] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* ICJ Reports (2010), 30 at 80.
[150] UN Doc E/CN.4/Sub.2/377 (1976), 22.
[151] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996), 78.
[152] M. Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20:1 EJIL 111, 112.
[153] T. Hillier, *Sourcebook on Public International Law* (Cavendish Publishers 1998) 217.
[154] R. Falk, *Human Rights Horizons* (Routledge 2000).

> The flexible approach, to be sure, is not immune to criticism, but to deny the complexity of the situation is to attempt by legalistic sleight-of-hand to contain self-determination in the doctrinal box of a statist world. It is high time to realize that such a world has been definitely eroded. To pretend otherwise is to place an unacceptable strain on the descriptive and prescriptive character of international law.[155]

Higgins follows the restrictive approach and contends that the right to self-determination 'now faces a new danger: that of being all things to all men'.[156] However, self-determination is a fast evolving right; limiting its external application to the colonial context and following a strict doctrinal approach might mean that the right to self-determination faces an even greater danger: that of being worthless to all men. Harris, however, confirms that '[t]he recognition of Kosovo would seem to extend the right of self-determination beyond the traditional colonial or foreign occupation situation.'[157]

3.3 *Uti possidetis iuris*

Nanda states that the primary difficulty of applying the right to external self-determination to the non-colonial context is to reconcile it with the principle of *uti possidetis, ita possideatis*, which he roughly translates as 'you may keep what you had'.[158] The rule of *uti possidetis* was applied in the colonial context to ensure that decolonisation took place in an orderly fashion.[159] Until recently, it was held to be one of the primary legal principles that had to be applied in cases of external self-determination and secession. It has been argued that the *uti possidetis* rule has been applied in the past in order to limit border conflicts. However, arbitrary borders drawn by colonial powers were and still are a major source of ethnic and border conflicts. Why should one uphold a principle that in its essence already gives rise to conflicts, if the very reason for purporting it is to limit those conflicts? The rule was used to encourage international peace and security, but has had little effect on

[155] *ibid* 112.
[156] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994).
[157] P. Harris, *Is Tibet Entitled to Self-Determination?* Centre for Comparative and Public Law, University of Hong Kong, Occasional Paper No 18 (2008) par 36.
[158] V.P. Nanda, 'Self-Determination and Secession under International Law' (2001) 20 *Denver Journal of International Law and Policy* 305.
[159] J. Castellino, *International Law and Self-Determination* (Martinus Nijhoff Publishers 2000).

resolving ethnic conflicts and boundary disputes. Lord Salisbury was aptly quoted in the separate opinion of Judge Abijbola in the *Libya Territorial Dispute* case:[160]

> [We have been] drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.

Even though Higgins contends that international law does not recognise a right to secession as such, she concedes that there is nothing under international law that prohibits secession or the formation of a new state:

> The principle of *uti possidetis* provides that **states** accept their inherited colonial boundaries. It places no obligation upon minority groups to stay a part of a unit that maltreats them or in which they feel unrepresented. If they do in fact establish an independent state, or join with an existing state, then that new reality is one which, when its permanence can be shown, will in due course be recognized by the international community. [Emphasis added.][161]

Higgins' remarks regarding 'minority groups' would be applicable to indigenous peoples or other distinct peoples. She continues:

> Where no principle of *ex injuria non oritur* applies, international law will recognize new realities. And where secession has in fact occurred, and a new state has emerged with its own government, not dependent on another, and functioning effectively over the territory concerned, then recognition will follow.[162]

Recognition of states that have been created without taking into consideration the *uti possidetis* rule, creates new law, limiting the application of *uti possidetis* to the colonial context. McCorquodale concludes that 'the principle of *uti possidetis juris* is of questionable legitimacy as a limitation on the right of self-determination. It should only apply, if at all, in (the now very few) situations of decolonisation.'[163]

Johanson also follows this approach by stating the following:

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[160] Separate Opinion of Judge Ajibola, *Territorial Dispute (Libya* v *Chad)* ICJ Reports (1994) 6, 53.
[161] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 125.
[162] *ibid* 126.
[163] R. McCorquodale, 'Self-Determination: A Human Rights Approach (1994) 43 HRQ 857.

> Applied as a rule of international law not requiring the consent of all parties for application, *uti possidetis* has proved to reduce the options for settlement to either acceptance or the use of force. As a rule it does not harmonise with the primary goal of peace laid down in the UN Charter, and in that light can have no impact on self-determination, other than as one option to be applied in boundary disputes by the consent of the parties. The denial of '*uti possidetis* as law', that consideration of the interests of all groups within a state entity, not the subjection of the minority by the majority, is fundamental to peace within and between states, provides one of its most important flaws.[164]

Academic work relating to *uti possidetis* primarily discusses the application of the right to self-determination in the colonial context. Kaczorowska also states that the *uti possidetis* rule imposes a limitation on colonial peoples' exercise of their right to self-determination in the sense that colonial frontiers had to be maintained.[165] I therefore contend that the application of *uti possidetis* should be confined to the colonial context, and should not limit secessionist movements in exercising their right to self-determination. State practice in relation to recent secessions such as those of South Sudan and Kosovo confirm this assertion.[166]

Interestingly, Jankov and Ćorić argue that *uti possidetis* never actually prevailed as a general principle of international law, and that it was the Badinter Commission that declared it as such – they argue that the principle can therefore not apply outside the context of decolonisation and dissolution since it lacks state practice and *opinio iuris*, both of which are required to be present in order to determine the existence of customary international law.[167] They further argue that a *jus cogens* human rights norm cannot be denied in the face of a rule that was primarily created for practical and administrative reasons at a time of large-scale decolonisation.[168]

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[164] M.C. Johanson, *Self-Determination and Borders: The Obligation to Show Consideration for the Interests of Others* (Åbo Akademis Förlag 2004).
[165] A. Kaczorowska, *Public International Law* (4th ed, Routledge 2010) 576.
[166] S. Dersso, 'International Law and the Self-Determination of South Sudan', *Institute for Security Studies Paper No 231*, February 2012.
[167] F.F. Jankov and V. Ćorić, 'The Legality of *Uti Possidetis* in the Definition of Kosovo's Legal Status' (2011), available at http://www.esil-sedi.eu/fichiers/en/Agora_Fernandez_117.pdf, accessed on 2 August 2012.
[168] *ibid*.

3.4 Territorial integrity of the state

Secession was always thought to involve the clash of two international law principles; the right to self-determination and the territorial integrity of the state.[169] The territorial integrity of states is a well-established rule of international law.[170] The General Assembly confirmed this in paragraph 6 of Resolution 1514 (XV) where it reiterated that '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the United Nations'.

However, even though governments readily claim the principle of territorial integrity in an attempt to curb secessionist movements, Crawford concludes that individuals or groups of individuals are not bound by the principle of territorial integrity:

> [T]he reason why seceding groups are not bound by the international law rule of territorial integrity is not that international law in any sense favours secession. It is simply that such groups are not subjects of international law at all, in the way that states are, even if they benefit from certain minimum rules of human rights and humanitarian law […][171]

This was confirmed by the ICJ in 2010 in the *Kosovo* case when it ruled that the principle of territorial integrity is limited to the relations between states.[172] Austria also followed this view in its submission made during the aforementioned proceedings, and stated that international law 'does not prohibit any part of a population of a State to declare its independence. As such it is not subject to the obligation to respect the territorial integrity of States'.[173] Hilpold also argues that territorial integrity is directed at the protection from infringements by other states and 'surely no directed against changes coming from the inside'.[174]

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[169] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996).
[170] M. Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff Publishers 2008).
[171] J. Crawford, 'The Right to Self-determination in International Law: Its Development and Future' in P. Alston (ed) *Peoples' Rights* (Oxford University Press 2001) 50.
[172] See *Kosovo Advisory Opinion* discussed in section 2.
[173] Statement by the Government of Austria of 16 April 2009 in the *Kosovo Advisory Opinion.*
[174] P. Hilpold, 'What Role for Academic Writers in Interpreting International Law? A Rejoinder to Orakhelashvili' (2009) 8:2 *Chinese Journal of International Law* 291, 295.

A further argument against the territorial integrity defence was articulated in a separate opinion by Judge Cançado Trindade in the *Kosovo* judgment in which he concluded that states cannot invoke the principle of territorial integrity where the state has grossly violated human rights of the people asserting a right to external self-determination.[175] This is also asserted by McCorquodale when he argues that a state can only claim territorial integrity if it internally provides for self-determination.[176] According to Simpson, the aim of territorial integrity is to 'safeguard the interests of the people living in that territory'.[177] The defence of territorial integrity is only legitimate as long as the interests of all people living within the territory are taken into account. Territorial integrity is therefore relative in the face of human rights violations[178] and the fact that the principle can ordinarily only be invoked in relation to infringements by other states, and not by a people or peoples living within the state in question. Furthermore, state practice contradicts the argument that the principle of territorial integrity trumps claims of secession. Hannum summarises as follows:

> Lip service is also routinely paid to the principle of territorial integrity, but the shattering of the Soviet Union, Yugoslavia, Czechoslovakia, and Ethiopia is a precedent not lost on many 'nations' that would be states.[179]

In recent times Kosovo and South Sudan could be added to Hannum's examples. It becomes evident that the argument that secession would violate the territorial integrity of a state is no longer a valid argument, since only states can violate the territorial integrity of another state under international law, and not individuals. Furthermore, the state cannot assert territorial integrity and sovereignty when it is violating the human rights of those pursuing self-determination.

[175] *ibid* separate opinion of Judge Cançado Trindade.
[176] R. McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857.
[177] G.J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255.
[178] J. Summers, 'Relativising Sovereignty: Remedial Secession and Humanitarian Intervention in International Law' (2010) 6 *St Anthony's International Review* 16.
[179] H. Hannum, 'The Specter of Secession: Responding to Claims for Ethnic Self-Determination' (1998) 77:2 *Foreign Affairs* 13, 13.

3.5 Peace and security

The Committee on the Elimination of Racial Discrimination in 1996 asserted the following:

> International law has not recognised a general right to peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (paras. 17 and following), namely that a fragmentation of States may be detrimental to the protection of human rights, as well as the preservation of peace and security.[180]

This is only one of an array of statements where it is argued that the exercise of self-determination should be limited due to the adverse affect such practice would have on peace and security.[181] However, the twentieth and twenty-first centuries have been marred by conflicts relating to self-determination claims[182] – and the denial of these claims have more often than not resulted in even more bloodshed. Ratner suggests that ethnic-based violence poses the greatest threat to peace, order and human rights in the post-Cold War era.[183] Falk elaborates on this by stating the following:

> Conflicts in Chechnya, Kashmir, Tibet, and in the Kurdish territories of Iraq and Turkey are all situations in which the legal and political ideal of territorial unity causes moral havoc and social, economic, and cultural injustice resulting in great suffering and endless strife for these entrapped peoples.[184]

There are many more examples apart from those identified in the statement by Falk above and it is possible that supervised and organised secession might limit the suffering of all peoples affected. It can also be asserted that the denial of self-determination claims has also lead to more flagrant human rights violations than cases where self-determination (in its various forms) was in fact granted. Van Der

[180] CERD, General Recommendation XXI (48), CERD/C/49/CRP.2/Add.7, adopted in March 1996.
[181] See also the Report of the Secretary-General, *An Agenda For Peace*, UN Doc A/47/277 (June 1992), par 17.
[182] S. Wolff, 'Managing Ethnic Conflict: The Merits and Perils of Territorial Accommodation' (2011) 9 *Political Studies Review* 26.
[183] S.R. Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States' (1996) 90:4 AMJIL 590.
[184] R. Falk, 'Revisiting the Right of Self-Determination, in R. Falk, *Human Rights Horizons* (Routledge 2000) 102.

Vyver argues, and I concur, that organised secession with strict guidelines and criteria may limit civil wars around the world.[185]

3.6 Fragmentation

Falk argues that the reason why self-determination is such a contentious issue, is because it involves a clash of two world order principles, namely that the number of states that are practical is close to its limit and the creation of more states would lead to an inefficient world order.[186] He argues that the manageable number of states in the current world order is 250 – it is uncertain how he pinpointed this particular number. Without discussing this point further, it is my opinion that the traditional state-centred world order is changing, and that it should always be kept in mind that the people make the state, not the other way round. Thus if some people have a right to statehood, why should others not have that right?[187] Furthermore, the current world order is already inefficient and archaic, not because of the number of states, but rather because of the hierarchical nature of the current world order, where some states (particularly the Security Council's permanent five) are, in George Orwell's words, more equal than others.

It has also been argued that fragmentation could lead to the creation of numerous micro-states. However, Héctor Gros Espiell contended that he could not find a legal basis for denying the right to self-determination in cases where the population or the territory is small.[188]

Even states sometimes argue that the right to self-determination includes the right to secede, despite the fact that they are not expected to act to their own detriment and have no interest in promoting an idea that threatens their very existence.[189] During discussions relating to the adoption of the ICCPR eight states argued against secession: Australia, Columbia, Egypt, Greece, Iraq, Saudi Arabia,

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[185] J.D. van der Vyver, 'The Right to Self-Determination and its Enforcement' (2004) 10 *ILSA Journal of International and Comparative Law* 421.

[186] Chapter 6, 'Revisiting the Right of Self-Determination' in R. Falk, *Human Rights Horizons* (Routledge 2000).

[187] *ibid*.

[188] Study Prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/405/Rev.1), 1980, par 108.

[189] P. Hilpold, 'What Role for Academic Writers in Interpreting International Law? A Rejoinder to Orakhelashvili' (2009) 8:2 *Chinese Journal of International Law* 291.

Syria and Venezuela.[190] However, seven states argued that secession was inherent to the right to self-determination: Denmark, Lebanon, New Zealand, Philippines, the Soviet Union, the United Kingdom and the United States.[191] Rubin states that 'there is no legal right to secession or independence. But the lack of a legal right does not mean that secession, nearly always illegal under the municipal law of the pre-existing state is illegal as a matter of international law; that those seeking independence must, as a matter of law, suffer under a legal order they find unacceptable.'[192] Arguments relating to fragmentation can therefore not hinder the exercise of the right to self-determination or secession.

In the next section a number of guidelines will be proposed that might assist in regulating self-determination and secession attempts, based on the international law position discussed in Chapter 2 as well as on the discussion of arguments and obstacles in this chapter.

[190] UN Doc. A/C/3/SR.646-475 (1955).
[191] UN Doc. E/CN.4/SR.396 (1953) 5 & 16.
[192] A.P. Rubin, 'Secession and Self-Determination: A Legal, Moral, and Political Analysis' (2000) 36 STJIL 253.

4. GUIDELINES TO EXERCISE EXTERNAL SELF-DETERMINATION

As mentioned earlier, self-determination can take various forms – in this dissertation the focus will particularly be on the exercise of external self-determination in the form of secession, which Horowitz also describes as a 'variable phenomenon'.[193] Under international law, no clearly identifiable rules exist regarding the exercise of self-determination. Ishay contends that the search for appropriate standards for the implementation of the right to self-determination started even prior to World War I.[194] Successful secession implicates various international legal issues, including the question of statehood, recognition, self-determination and other restrictive arguments such as the *uti possidetis* rule and territorial integrity, discussed above in Chapter 3. Due to the lack of identifiable rules regarding secession, various factors need to be considered in order to identify possible requirements for secession. This would include an analysis of international law principles, state practice and successful secessions. Furthermore, even though secession is not prohibited under international law, the Security Council has condemned certain secessions such as that of Southern Rhodesia because it involved a racist minority.[195] All these limitations need to be taken into consideration in order to identify certain guidelines that could be of value in ensuring that secessions are more regulated and peaceful. Copp calls for an international procedure in order to resolve the issue of secession – he suggests that the ICJ should broaden its jurisdiction to hear self-determination claims.[196] The guidelines developed below could assist in determining the legitimacy of self-determination claims.

4.1 Requirements for statehood

Firstly, it is important to identify the requirements for statehood, since secession would, when successful, ultimately result in the creation of an independent state.

[193] D.L. Horowitz, *Ethnic Groups in Conflict* (University of California Press 2000).
[194] M.R. Ishay, *The History of Human Rights* (University of California Press 2008).
[195] UN Security Council Resolution 215 of 12 November 1965.
[196] D. Copp, 'International Law and Morality in the Theory of Secession' (1998) 2:3 *The Journal of Ethics* 219.

There is no consensus regarding a definition of a 'state'.[197] The International Law Commission vaguely stated that the word 'state' would be used 'in the sense commonly accepted in international practice'.[198] Hoffman identifies four interrelated elements of statehood based on a definition provided by Max Weber; these are (i) monopoly; (ii) territory; (iii) legitimacy; and (iv) force. Duursma defines the state as 'an organization of human beings living together as a community. The population of a State comprises all individuals who, in principle, inhabit the territory in a permanent way.'[199] Many authors argue that the state cannot be defined since it is not a finite concept. Despite this, academics in international law consistently rely on article 1 of the Montevideo Convention[200] which sets out the requirements for statehood.[201] Before a secessionist movement can claim independence, these criteria need to be fulfilled in order for the entity to be recognised as a state with rights and obligations under international law.

The criteria for statehood of the Montevideo Convention serve as a restatement or codification of international customary law, and therefore apply to all subjects of international law, not only those signatory to the Convention.[202] Article 1 of said Convention provides that '[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states'.

The above criteria can be seen as prerequisite to any successful secession of territory the statehood of which will be recognised by other sovereign states. The four requirements set out in the Montevideo Convention merit further explanation. Firstly, the requirement of a permanent population refers to a stable community.[203] However, there are no standards regarding the size of the population; there is no prescribed minimum quantity of humans that need to inhabit the territory.[204]

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[197] Hoffman refers to this problem as the 'indefinability thesis' of the state in J. Hoffman, *Beyond the State* (Polity Press 1995).
[198] ILC YEARBOOK 1949, 61 at par 69.
[199] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996) 117.
[200] Montevideo Convention on Rights and Duties of States, signed 26 December 1933.
[201] I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008).
[202] J.D. Harris (ed), *Cases and Materials in International Law* (6th ed, Sweet and Maxwell 2004) 99.
[203] A. Kaczorowska, *Public International Law* (4th ed, Routledge 2010) 186.
[204] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1995).

Moreover, the society forming the population need not be homogenous. Secondly, the borders of the defined territory need not be final.[205] The ICJ, in the *North Sea Continental Shelf* case, held that there was 'no rule that the land frontiers of a State must be fully delimited and defined'.[206] Lauterpacht argues that the territory should be 'reasonably well defined'.[207] The German-Polish Arbitral Tribunal held that '[i]n order to say that a State exists […] it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory'.[208] The size of the territory also does not matter – see for instance Monaco,[209] Vatican City,[210] Liechtenstein[211] and Andorra.[212] Duursma confirms this by arguing that the size of the territory has never been a reason to deny statehood.[213]

The requirement of a government proposes that the government of the putative state should be in effective control of the territory and population. However, according to the Badinter Commission on the dissolution of Yugoslavia, effectiveness is not 'conclusively determinative'.[214] The capacity to enter into relations with other states is closely related to recognition, which will be discussed in further detail below. Farley notes that failure to satisfy all of the Montevideo criteria does not necessarily preclude statehood.[215] However, if these criteria are fully met, it can be argued that recognition from the international community may follow more readily.

4.2 Recognition

As mentioned earlier, successful secession results in the creation of a new independent state.[216] However, this entity needs to be recognised by the international

[205] See for instance Israel and South Sudan.
[206] *North Sea Continental Shelf (Federal Republic of Germany* v *Denmark)* ICJ Rep 1968, 32 at 46.
[207] H. Lauterpacht, *Recognition In International Law* (Cambridge University Press 1947).
[208] *Deutsche Continental Gas Gesellschaft* v *Polish State*, 5 AD (1929–1930) no. 5, 14–15.
[209] 195 ha.
[210] 44 ha.
[211] 160 km².
[212] 468 km².
[213] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996).
[214] Yugoslav Arbritration Commission, Opinion No 1, 92.
[215] B.R. Farley, 'Calling a State a State: Somaliland and International Recognition' (2010) 24 *Emory International Law Review* 777.
[216] *ibid*.

community (even if it is only by one state other than the parent state),[217] since without recognition, a state cannot enter into interstate agreements with other states.

In numerous cases, such as in the case of Biafra and Katanga, the failure to receive international recognition has led to the subsequent failure of the secession. Recognition is heavily reliant on international politics – this is illustrated by the case of the widely recognised state of Kosovo, compared to the questionable status of Abkhazia. If recognition were only a question of international law, both states should be recognised equally if one follows a doctrinal approach.[218] The case of Somaliland serves as an example where it becomes clear that recognition is not only a question of international law, but also of international relations. Somaliland declared its independence in May 1991 after 97 per cent of the constituents approved the provisional constitution and independence.[219] Somaliland is a representative democracy and held its first municipal and presidential elections in 2003.[220] A UNHCR report concluded that the central administration of Somaliland maintains functional control.[221] The country has international relationships with Ethiopia and liaison offices in Ethiopia, the US and the UK. However, it has not been recognised by a single state – despite the fact that it is a fairly stable and democratic country which fulfils all the criteria of the Montevideo Convention.[222] A further example of how recognition relies on international relations is the case of Nauro, where this state received US$ 50 million in aid from Russia to recognise the statehood of Abkhazia.[223] It becomes clear that the matter of recognition is an excellent example of the interplay that exists between international relations and international law.[224] It is therefore crucial to follow an interdisciplinary approach in this regard. However, it

[217] J. Dugard, *International Law: A South African Perspective* (Juta 2011).
[218] B.R. Farley, 'Calling a State a State: Somaliland and International Recognition' (2010) 24 *Emory International Law Review* 777.
[219] BBC News Africa Debate, *Does Somaliland Deserve Recognition?* 17 May 2011, available at http://www.bbc.co.uk/blogs/africahaveyoursay/2011/05/does-somaliland-deserve-recogn.shtml, accessed on 26 April 2012.
[220] The Economist, *Somaliland's Elections: Not So Failing*, 1 July 2010, available at http://www.economist.com/node/16488840, accessed on 26 April 2012.
[221] K. Menkhaus, *Somalia: A Situation Analysis and Trend Assessment* (commissioned by UNHCR, August 2003), available at http://www.unhcr.org/refworld/pdfid/3f7c235f4.pdf, accessed on 30 April 2012.
[222] B.R. Farley, 'Calling a State a State: Somaliland and International Recognition' (2010) 24 *Emory International Law Review* 777.
[223] *ibid*.
[224] H. Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947).

should be noted that even though recognition as such is highly politicised, it would be inaccurate to ignore the international legal aspects of this controversial issue.[225] Worster aptly refers to this tension and controversy surrounding recognition as a 'contest between law and politics' and suggests that the recognition of a putative state relies heavily on the legitimacy of the standards of recognition, but also on the legitimacy of the putative state.[226]

There is much controversy in international law academic circles regarding the nature of recognition. Two theories have been purported regarding international recognition of statehood: the constitutive theory and the declaratory theory. Brownlie refers to this as a 'doctrinal dispute'.[227] The constitutive theory purports that 'the political act of recognition is a precondition of the existence of legal rights: in its extreme form this is to say that the very personality of a state depends on the political decisions of other states'.[228] The declaratory theory suggests that the legal effects of recognition are limited. Recognition is thus a declaration of a state's political willingness to enter into relations with the putative state and that the latter has met the conditions for statehood.

Oppenheim argues that '[a] State is, and becomes, an International Person through recognition only and exclusively'.[229] Duursma argues that the *formation* of a state is a question of fact (that is, the Montevideo criteria) and whether it is a *subject of international law* is a question of law (that is, recognition).

According to Brownlie, there is substantial state practice that supports the declaratory view. Brownlie dismisses the constitutive approach by saying that the result of this approach is 'a matter of principle impossible to accept: it is clearly established that states cannot by their independent judgment establish any competence of other states which is established by international law and does not depend on agreement or concession.'[230] The constitutive theory supposes that statehood is dependent on the political whims of other states, and can therefore not

[225] *ibid*.
[226] W.T. Worster, 'Law, Politics, and the Conception of the State in State Recognition Theory' (2009) 27 *Boston University International Law Journal* 115.
[227] I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008) 86.
[228] *ibid* 87.
[229] L. Oppenheim, *International Law: A Treatise Volume I* (BiblioBazaar 2010) 125.
[230] I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008) 88.

be seen as the most desirable approach in this regard. Lauterpacht quotes Lorimer, *The Institutes of Law of Nations* of 1883 as follows:

> Any doctrine […] which professes to regard it [recognition] as an act of courtesy, comity or the like, the exercise of which may be jurally withheld – deprives international law of a permanent basis in nature.[231]

As mentioned earlier, state practice points to the declaratory theory: if the conditions of statehood are met and there is no duty of non-recognition, recognition should follow. The Badinter Arbitration Committee stated that the effect of recognition in international law is purely declaratory.[232] Kreuter also contends that the criteria for statehood set out in the Montevideo Convention constitutes the clearest statement of the declaratory theory and at the very least it provides strong guidelines for successful statehood.[233]

Recognition is a product of a social reality and reflects the law-creating influence of facts or *ex factis jus oritur*.[234] The opposite is also true: the principle of *ex injuria jus non oritur* purports that law does not arise from injustice. There is a duty of non-recognition in international law if the creation of the putative state is a result of a violation of a peremptory norm of international law.[235] Lauterpacht also argues that the duty of non-recognition is a rule of customary international law and also asserts that premature recognition may amount to unlawful intervention.[236] The international community therefore has a duty of non-recognition, should claims of self-determination in the form of secession violate peremptory norms in international law such as the prohibition of aggression, racial discrimination and violation of human rights.[237] However, if no duty of non-recognition arises from an illegal act or violation of a peremptory norm, Franck confirms that no international instrument

[231] As quoted in H. Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947).
[232] Conference on Yugoslavia Arbitration Commisssion, Opinion No 1 ILM 1488 (1992).
[233] A. Kreuter, 'Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession' (2010) 19:2 *Minnesota Journal of International Law* 363.
[234] H. Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947).
[235] J. Dugard, *International Law: A South African Perspective* (3rd ed, Juta 2005).
[236] H. Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947).
[237] B.R. Farley, 'Calling a State a State: Somaliland and International Recognition' (2010) 24 *Emory International Law Review* 777.

requires member states to deny recognition to a putative state after successful secession.[238]

Recognition can also be implied, for instance through the conclusion of international, multilateral and bilateral treaties; accepting diplomatic representatives; participation in conferences; or collective recognition through membership in international organisations.[239] According to Dugard, the UN has become an arbiter regarding the question of statehood through recognition and admission of the putative state as a member.[240] However, this is not a legal requirement for statehood, but rather a practical one. It would assist other states in coming to a conclusion regarding recognition, but it is not a formal and legal requirement for statehood as such. This is in line with the argument of Duursma, who says that membership of the UN is not a criterion for statehood, since there are entities that are undeniably states but for a long time were not members of the UN; these included for example Monaco, Nauru and Liechtenstein.[241]

Under international law, there is no duty on states to recognise another state, but there can be a duty of non-recognition. Non-recognition can take place if an illegal act has occurred or if the putative state violates peremptory norms of international law. For purposes of this discussion relating to external self-determination, the notion of recognition is limited to the recognition of states, and not to the recognition of governments which can be withheld for political reasons such as the undemocratic nature of the regime, or human rights violations.[242] Recognition can also be implicit or explicit; states can formally and explicitly recognise the existence of a state, but can also do so implicitly, for example, the conclusion of a bilateral treaty is an implicit recognition of the legal personality of a state and the existence of that state in the international arena. Recognition can also take place collectively, where the state is admitted into an international organisation such as the United Nations. According to Brownlie membership serves as prima facie evidence of statehood, but also as evidence of implied recognition.[243]

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[238] T. Franck, 'Postmodern Tribalism and the Right to Secession' in C. Brölmann *et al* (eds) *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers 1993) 12.
[239] H. Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947).
[240] J. Dugard, *Recognition and the United Nations* (Grotius Publications 1987).
[241] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996).
[242] I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008).
[243] *ibid*.

Without recognition, putative states will struggle to survive independently. Despite this, recognition is not a *sine qua non* for statehood.[244] The exact requirements for secession remain uncertain and Simpson contends that the inconsistent application and 'haphazard' reaction of the international community[245] lead to the conclusion that certainty in this regard is needed. The subsequent section will attempt to identify the conditions that could assist in facilitating recognition from the international community – these can be regarded as 'guidelines' for secession based on the right to self-determination.

4.3 The proposed guidelines for secession

Various authors have proposed requirements or guidelines for secession as a form of self-determination. For instance, Raič argues that there is a qualified right to secession in the following instances: for the purposes of decolonisation; through agreement, and in the form of remedial secession.[246] He identifies the following criteria that need to be present in order to exercise a qualified right of secession: (i) the existence of a people; (ii) the existence of a territorial bond between the people and the territory; (iii) violation of the indirect or direct right to self-determination of said peoples (which includes widespread human rights violations); and (iv) the exhaustion of effective remedies.[247] This leads to the conclusion that he regards secession as an *ultimum remedium.*

Charney, after analysing the situations in Chechnya, Kosovo and East Timor, concludes that the international community will support a claim of self-determination in a non-colonial context if the following 'requirements' are ful-filled:[248] (a) peaceful methods for resolving the dispute must have been exhausted; (b) proof that those making the claims for self-determination of a people represent the will of the majority of those peoples; and (c) the use of force and a claim to independence is a tool of last resort.

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[244] H. Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947).
[245] G.J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255.
[246] D. Raič, *Statehood and the Law of Self-Determination* (Martinus Nijhoff Publishers 2002).
[247] *ibid*.
[248] J.I. Charney, 'Self-Determination: Chechnya, Kosovo, and East Timor' (2001) 34 *Vanderbilt Journal of Transnational Law* 455.

In 1993 Dugard argued that the right to self-determination generally does not include a right to secede. He did, however, provide certain exceptions to this general rule, which include that there must be (i) a distinct people who have a historical claim to the territory, (ii) the will of people to secede; (iii) an unjustifiable event through which the state gained control over said territory, and (iv) serious human right violations and the right to participate in government must be severely impeded.[249]

The Council of the European Communities in the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991 articulated their 'readiness to recognise' a state if it was based on democratic principles, accepted appropriate international obligations (which in my opinion would include human rights obligations) and guaranteed the rights of minorities living within the territory.

Borgen argues that '[w]hile international law does not foreclose on the possibility of secession, it does provide a framework within which certain secessions are favoured or disfavoured, depending on the facts'. He argues that the default rule of secession is internal self-determination and that external self-determination should only be exercised in extreme circumstances. He bases this conclusion on the Quebec judgment and concludes that in an attempt to claim legal secession the following must be shown: (i) the secessionists are a distinct 'people'; (ii) the state from which is being seceded violates their human rights and (iii) other effective remedies under international and domestic law have been exhausted or there are no effective remedies available to the secessionists.[250]

Falk states that one of the most interesting and surprising developments in recent years has been the success of secessionist movements and the emergence of new states as a result thereof.[251] From these instances of successful and unsuccessful attempts to secede, one can draw conclusions regarding state practice, and some form of 'requirements' or guidelines for successful and recognised secession could be deduced from such state practice

[249] J. Dugard, 'Secession: Is the Case of Yugoslavia a Precedent for Africa?' (1993) 5 AJICL 163, 173.

[250] C.J. Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition (2008) 12:2 ASIL Insight.

[251] Chapter 6, 'Revisiting the Right of Self-Determination' in R. Falk, *Human Rights Horizons* (Routledge 2000).

First of all, it is important to identify why certain secession attempts were, loosely termed, unsuccessful – in other words, secession attempts which did not result in internationally recognised statehood. Raič has identified various reasons why the secession of Chechnya was unsuccessful:[252]

- There was no denial of a right to internal self-determination (Russia was prepared to grant Chechnyans substantial autonomy).
- The claim for secession was not brought under international law (self-determination) but under Soviet law. Chechnyan elections were reported to have been unfair.
- It is questionable whether secession was actually the will of the people (a declaration of independence needs to be made on behalf of the holders of the right to self-determination).

The reasons why Abkhazia was unsuccessful according to Raič are as follows:

- The seceding population did not constitute a clear majority in Abkhazia.
- There was an absence of human rights violations.
- Georgia was willing to grant autonomy.
- The Abkhazians themselves have been accused of violating human rights.

Based on an analysis of unsuccessful and successful secession attempts; the above requirements purported by other academics, and established principles of international law, the subsequent section identifies the deduced guidelines for secession based on the right to self-determination.

[252] D. Raič, *Statehood and the Law of Self-Determination* (Martinus Nijhoff Publishers 2002).

4.3.1 Negotiation and agreement

It is fairly accurate to say that secession by agreement is one of the simplest ways of seceding. An example where secession has been based on agreement is found in the former Czechoslovakia, which is now known as the Czech Republic and Slovakia.[253] The first step for a secessionist movement would therefore be to enter into negotiations with the state that it aims to secede from. However, if the parent state is unwilling to negotiate an agreed secession with the secessionist movement, various other criteria need to be fulfilled in order for the secession not to violate international law and to, insofar possible, guarantee that the secessionist state gains international recognition.

4.3.2. Without the consent of the parent state

4.3.2.1 Existence of a distinct 'people'

Since the right to self-determination belongs to a 'people', it is first and foremost necessary that the seceding group constitutes a 'people' as defined in earlier sections of this dissertation. In 1971, Bangladesh became independent from Pakistan, and it was recognised as a state by more than 50 other states within four months.[254] Nanda explains the reasons why the Bangladeshi people could secede. Firstly, they constitute a distinct people and, secondly, the 'state of mind' of the Bengali people to be independent illustrates their separateness.[255] From this, two requirements for secession can be deduced: firstly, there must be an objectively determined, distinct people, and, secondly, there must be a subjective ethos, which indicates the people's 'we'-consciousness.

4.3.2.2 Lack of effective political participation or human rights violations

Buchanan argues that secession can only be exercised as a remedial right in exceptional circumstances where it can be proven that groups have suffered severe injustices. Cassese has argued that the right to internal self-determination has

[253] J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996).
[254] V.P. Nanda, 'Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect' (1978–1979) 1 HJIL 71.
[255] *ibid.*

become a rule of customary international law.[256] However, if this right is consistently violated, then the only remedy would be to exercise external self-determination. According to Cassese, minorities and indigenous peoples' rights should be protected through internal self-determination and he contends that external self-determination rights should only be granted and allowed for in exceptional circumstances 'subject to international consent and scrutiny'.[257] An example of violations of the right to self-determination and human rights, according to De Chand, is South Sudan, where the population fell victim to Islamic fundamentalism for more than 200 years. According to De Chand, the North and South could not co-exist as a heterogeneous society and because of these ongoing human rights violations the South had a justified cause to call for secession.[258] Furthermore, the reason why Quebec could not secede was because there were no human rights violations. Judge Cançado Trindade, in a separate opinion in the *Kosovo* Advisory Opinion, held that:

> Human nature being what it is, systematic oppression has again occurred, in distinct contexts; hence the recurring need, and right, of people to be freed from it. The principle of self-determination has survived decolonization, in order to face nowadays new and violent manifestations of systematic oppression of peoples. International administration of territory has thus emerged in U.N. practice (in distinct contexts under the U.N. Charter, as, e.g., in East Timor and in Kosovo). It is immaterial whether, in the framework of these new experiments, self-determination is given the qualification of 'remedial', or another qualification. The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.[259]

The former UN Working Group on Minorities stated the following:

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[256] A. Cassese, *UN Law/Fundamental Rights: Two Topics in International Law* (Martinus Nijhoff Publishers 1979).

[257] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).

[258] D. de Chand, 'South Sudan Claims for Right of Self-Determination' (2002) University of Pennsylvania: African Studies Center, available at http://www.africa.upenn.edu/ Articles_Gen/de_chand.html, accessed on 17 April 2012.

[259] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* ICJ Reports (2010) Separate Opinion by Judge Cançado Trindade at 175.

> Only if the representatives of the group concerned can prove, beyond reasonable doubt, that there is no prospect within the foreseeable future that the Government will become representative of the whole people, can it be entitled to demand and to receive support for a quest for independence. If it can be shown that the majority is pursuing a policy of genocide against the group, this must be seen as very strong support for the claim to independence.[260]

Klabbers and Lefeber content that there is 'considerable doctrinal support for legal entitlement to external self-determination, if a people have been deprived of its right of internal self-determination, in particular, if this is accompanied by serious human rights violations'.[261] There seems to be some consensus that flagrant and consistent human rights violations give rise to a right of remedial secession. According to Duursma,[262] denial of human rights does not make secession legal or legitimate per se, but other scholars differ and say that it is a principle that can be derived from the notion of self-determination itself. Systematic denial of human rights could thus give rise to a right of secession as a remedy of last resort.[263]

Even though secession will not be automatically be recognised as a result of serious human rights violations that have taken place, it would contribute to the legitimacy of the secession. However, I argue that even though the violation of human rights and of the right to internal self-determination may serve as justification and prima facie evidence for a just claim to external self-determination, it does not constitute a *sine qua non* for lawful secession; particularly since secession is not prohibited under international law, as stated earlier.

4.3.2.3 Connection to territory

A people wishing to secede must have a certain connection to the territory that will be separated from the parent state. Brilmayer states that '[t]he two supposedly competing principles of people and territory actually work in tandem'. She continues: '[M]y thesis is that every separatist movement is built upon a claim to

[260] A. Eide, *Possible Ways and means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities* UN Doc E/CN./Sub.2/1993/34, 10 August 1993, at 84.
[261] J. Klabbers and R. Lefeber, 'Africa: Lost Between Uti Possidetis and Self-determination' in C. Brölmann *et al*, *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers 1993) 48.
[262] J. Duursma, *Fragmentation and International Relations of Micro-States* (Cambridge University Press 1996) 92.
[263] T.J. Farer, 'The Ethics of Intervention in Self-Determination Struggles' (2003) 25:2 HRQ 382.

territory, usually based on an historical grievance, and that without a normatively sound claim to territory, self-determination arguments do not form a plausible basis for secession.'[264] Ten years later, she reconfirms this thesis again:

> In evaluating secessionist claims specifically, there are two different aspects of the claim on which one might focus. 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. There is another issue at stake, however: the objective validity of the claim that the particular group espouses. Thus (as I argued ten years ago) the claim to a particular piece of territory will be more or less convincing depending on the existence (or nonexistence) of a historical claim to land.[265]

Brilmayer thus suggests that two aspects should be taken into account when determining whether a secessionist movement has a valid claim; the one will focus on the identity of the group, in other words, whether they constitute a distinct people; and the other is whether the claim can be objectively justified based on 'historical fact, legal reasoning, moral argumentation, and so forth'.[266]

It is important to note that with regards to the requirement of a connection to territory where a people constitute a minority within the borders of a parent state, they must form a majority in the specific territory identified for purposes of secession.

4.3.2.4 Will of the people and democratic principles

Fan explains the importance of a link between the exercise of the right to self-determination and democratic principles.[267] It has been reiterated on numerous occasions and by various authoritative sources, that a claim of self-determination must be based on the will of the people exercising that right. In the *Western Sahara* case, the Court also focused on the will of the people, arguing that the freely expressed will of the people is a '*sine qua non* of all decolonisation'.[268] In various

[264] L. Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 YJIL 177.
[265] L. Brilmayer, 'Secession and Self-Determination: One Decade Later' (2000) 25 YJIL 283.
[266] *ibid*.
[267] H. Fan, 'The Missing Link Between Self-Determination and Democracy: The Case of East Timor' (2007) 6 NWUJIHR 176.
[268] Western Sahara ICJ Rep 1975, Judge Nagendra, 81.

other cases, secession was based on the democratic will of the people to secede – examples include East Timor, Eritrea, Kosovo and Sudan.

In the case of East Timor, Timor was divided in to East and West Timor by colonial powers. The West gained independence in 1949 as a part of Indonesia, but the East remained under Portuguese rule.[269] When Portugal finally evacuated East Timor in 1975, a civil war erupted; some people wanted to stay part of Portugal, some wanted to become part of Indonesia like West Timor, and the other group demanded complete independence. Independence was announced in November 1975, but Indonesia invaded and integrated East Timor as a part of its territory. The United Nations condemned the invasion and under the auspices of UNAMET, 78 per cent of the East Timor population voted against autonomy under Indonesian rule, which indicated the clear will of the people to be completely independent.[270] In the *East Timor* case before the ICJ the importance of the will of the people was also emphasised.[271]

In Eritrea, UNOVER was established by General Assembly resolution 47/114 of 16 December 1992 to oversee the referendum in Eritrea. The overwhelming majority voted for independence, and the newly established Republic of Eritrea received wide recognition in 1993.[272] This also proves the importance of UN support for secessionist movements.

In the 1991 referendum on the status of Kosovo, 87 per cent of eligible voters took part; 99 per cent of those voted in favour of declaring Kosovo an independent republic.[273] On 17 February 2008 Kosovo unilaterally declared their independence from Serbia.[274] What is noteworthy is the fact that so many other sovereign states recognised Kosovo's independence so soon after the Declaration of Independence. Suzuki concludes that secession must be supported by popular will and not only by an elite group – this is argued to be the reason why Katanga could not secede from

[269] G.J. Simpson, 'Judging the East Timor Dispute: Self-Determination at the International Court of Justice' (1993–1994) 17 *Hastings International and Comparative Law Review* 323.
[270] *ibid*.
[271] *East Timor* case (*Portugal* v *Australia*) ICJ Reports 1995, 90.
[272] D. Ntwiga, 'Ethiopia-Eritrea Conflict: Self-Determination of Peoples or "International Community" Interests?' Working Paper, March 2002, available at http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2066676, accessed on 19 June 2012.
[273] N. Malcolm, *Kosovo: A Short History* (New York University Press 1998).
[274] C.J. Borge, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition (2008) 12:2 ASIL Insight. The full text of the Declaration is available on the BBC NEWS website at http://news.bbc.co.uk/1/hi/world/europe/7249677.stm, accessed on 25 April 2012.

the Congo.[275] Furthermore, the seceding population cannot form a racist minority rule over the larger majority.[276] For this reason, among others, Dahbour asserts that the entire permanent population within the territory identified for secession should be entitled to vote in the referendum.[277] However, there is much debate among academics over who should be allowed to participate in the plebiscite for secession. Various options include: (a) all eligible voters of the parents state; (b) only the members of the people wishing to secede; (c) all eligible voters within the defined territory or (d) only members of the people wishing to secede who reside permanently within the borders of the defined territory. In my opinion, the logical approach would be that all eligible voters within the identified territory should vote in the referendum.

After a referendum has taken place the next requirement is for the people wishing to secede to issue a declaration of independence.[278]

4.3.2.5 Peaceful means

Article 2(4) of the UN Charter prohibits states from resorting to the threat or use of force against another state. It does not provide for a prohibition against the threat or use of force by a people claiming self-determination per se but there is a presumption that the use of force is illegal, unless it is in self-defence. The prohibition against the use of force is also a *jus cogens* norm. A violation of a *jus cogens* norm is not only a violation of international law but can also result in a duty of non-recognition as discussed earlier. According to Shaw the use of force to suppress self-determination movements is unacceptable under international law.[279] States can therefore not use disproportionate force against self-determination movements. However, should the state resort to the use of force in an attempt to curb the self-determination movement,

[275] E. Suzuki, 'Self-Determination and World Public Order: A Community Response to Territorial Separation' (1975–1976) 16 *Virginia Journal of International Law* 709.
[276] The Security Council did not recognise the racist minority rule in Southern Rhodesia and regarded their proclaimed independence as illegal (GA Res 2022 (XX) of 1965).
[277] O. Dahbour, *Illusion of the Peoples: A Critique of National Self-determination* (Lexington Books 2003).
[278] J. Crawford, 'State Practice and International Law in Relation to Secession' (1999) 69 *British Yearbook of International Law* 85.
[279] M.N. Shaw, 'Self-Determination and the use of Force' in N. Ghanea and A. Xanthaki (eds) *Minorities, Peoples and Self-Determination* (Martinus Nijhoff Publishers 2005).

said movement can seek assistance from the international community and act in self-defence. This is confirmed by the Declaration on the Principles of International Law:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations. [280]

However, third party assistance remains questionable since the principle of non-intervention is a rule of customary international law which developed as a result of the sovereignty and territorial integrity of states.[281] States could however intervene on humanitarian grounds based on a Security Council Resolution issued under Chapter VII of the UN Charter.[282]

4.3.2.6 Guarantees for human rights and minority protection

There are various reasons why the international community may not recognise a putative state; one of these scenarios is likely to occur when the secessionist movement violates the rights of others living within the state. This thus requires the secessionist movement and those claiming the right to self-determination to refrain from discrimination on the prohibited grounds and from violating the human rights of other peoples, including their right to self-determination.[283] Furthermore, other inhabitants cannot be left stateless as a result of the secession. [284] During the disintegration of Yugoslavia, the Badinter Commission also required the disintegrating states of Yugoslavia to provide human rights guarantees, and in particular minority rights guarantees, in order to assure later recognition by the international community.

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[280] UN General Assembly, *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, 24 October 1970.

[281] See *Corfu Channel* case ICJ Reports (1949) and *Nicaragua* case ICJ Reports (1986).

[282] See for example the recent intervention in Libya.

[283] R. McCorquodale, 'Rights of Peoples and Minorities' in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2010).

[284] In accordance with the UN Convention on the Reduction of Statelessness.

Racial discrimination in particular and acts of apartheid, as well as violations of other *jus cogens* norms may place a duty of non-recognition on other states, which will result in the putative state never having international recognition.[285] Dugard refers to the requirement of adhering to human rights standards as a 'double standard for ethical behaviour', since putative states may not attain sovereignty by violating human rights, but already sovereign states cannot lose their sovereignty as a result of violating human rights or *jus cogens* norms.[286]

4.3.2.7. Feasibility, practicality and stability

This final guideline could just as well have been the first – in order for external self-determination in the form of secession to be successful, it must be feasible and practically possible.[287] The seceding group must also have the capability to secede with a reasonable prospect of success and effectiveness.[288] The requirement of effectiveness is of particular importance, since successful secession is rather a question of fact than a question of law.[289]

This guideline also requires that the remainder of the population that is not seceding, experiences minimal disruption. If follows that secession should not create bigger friction than the status quo, and the stability of the region must also be taken into account. The secession should therefore aim to minimise possible negative effects.[290] Furthermore, the group that wishes to secede should only claim a share of the territory and its resources that is proportional to the number of persons living within the seceding territory. Tideman suggests that those people seceding should have the right to a share of territory which is proportional to their size.[291] This can be summed up as a requirement of reasonability in order for the secession to be legitimate.

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[285] J.R. Crawford, *The Creation of States in International Law* (Oxford University Press 2007).
[286] J. Dugard, *Recognition and the United Nations* (Grotius Publications 1987) 129.
[287] D. Copp, 'International Law and Morality in the Theory of Secession' (1998) 2:3 *The Journal of Ethics* 219.
[288] T. Christakis, 'L'état en tant que 'fait primaire': reflexions sur la portée du principe d'effectivité' in M.G. Kohen (ed) *Secession: International Law Perspectives* (Cambridge University Press 2006) 138.
[289] *ibid*.
[290] E. Suzuki, 'Self-Determination and World Public Order: Community Response to Territorial Separation' (1975–1976) 16 *Virginia Journal of International Law* 779.
[291] N. Tideman, 'Secession as a Human Right' (2004) 1:1 *Journal of Moral Philosophy* 9.

4.3.3 Montevideo Convention and recognition

Regardless of whether the secesion is agreed upon or not, the final guideline that should be followed in order to obtain recognition is to fulfil the Montevideo criteria for statehood, elaborated on earlier. If the international community provides the secessionist state with recognition, the full right to self-determination is acknowledged.[292] Recognition is not generally considered a condition *sine qua non* for secession or independence, but will determine whether the state can enter into relations with other states which would in turn affect its independence.[293]

[292] J. Duursma, *Fragmentation and the international Relations of Micro-States* (Cambridge University Press 1996).
[293] *ibid*.

5. CONCLUSION

From the discussions in previous sections it becomes evident that even though self-determination is a right afforded to all peoples under international law, its application beyond decolonisation and dissolution remains uncertain. International law has been state-centred for a very long time and it is therefore understandable that states are reluctant to endorse a new dispensation that threatens their status quo and very existence, and which would create a precedent for future secessions which might change the current world order.[294] International law, which is created by states, is not of a suicidal[295] nature and would therefore not explicitly provide for the right to secede. However, the world order has undergone a rapid transformation from being extremely state-centred to more human rights-centred and Falk aptly notes the following:

> At this stage, it is too late to put the genie of self-determination back in its colonialist bottle. Too many additional claims have now been validated, and too large a meaning has been invested in the language of self-determination. It is too late for a rhetorical, or even a doctrinal, retreat.[296]

International law is developing at a tremendous pace and is now also becoming more people-orientated. Traditional international law orbited around the notion that territory and territorial integrity hold a central position. Judge Cançado Trindade states the following in this regard:

> In the past, expert writing on statehood seemed obsessed with one of the constitutive elements of statehood, namely, territory. The obsessions of the past with territory became reflected, in the legal profession, in the proliferation of writings on the matter, in particular on the acquisition of territory. Those past obsessions led to the perpetration of the abuses of colonialism, and other forms of dominance or oppression. All this happened at a time when international law was approached from the strict and reductionist outlook of inter-State relations, overlooking – or appearing even

[294] L.C. Buchheit, *Secession: the Legitimacy of Self-Determination* (Yale University Press 1987).
[295] Reference to the non-suicidal nature of international law is made by various authors, see for instance P. Hilpold 'Self-determination in the 21st Century – Modern Perspectives for an Old Concept' (2006) 36 *Israel Yearbook on Human Rights* 247.
[296] R. Falk, *Human Rights Horizons* (Routledge 2000) 103.

> oblivious of – the needs and legitimate aspirations of the subjugated peoples.[297]

The right to self-determination remains elusive for some peoples – but it its existence can no longer be denied and it can certainly not be restricted to a strict doctrinal approach or to a colonial context. In the end, the success or failure of the exercise of external self-determination is reliant on the will of the international community. However, if the legal considerations are taken seriously and applied, then political recognition may follow more readily, than when they are ignored. Those who argue outright that secession cannot be possible since it leads to fragmentation and violates the integrity of the nation state, underestimate the fast pace at which the right to self-determination is developing, and with it customary international law. As Stavenhagen aptly notes:

> Self-determination is an idée force of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that also may be expressed, in one of its many guises, as a legal right in international law.[298]

It is not easy to draft a blueprint for the successful exercise of the right to self-determination and possible secession. Various peoples continue, often amidst much bloodshed, to fight for their freedom and independence – these include the Tibetans, the Somali people of Somaliland, etc. The best that they can do is learn from other cases in an attempt to govern themselves. The outcome will almost always be uncertain, because secession remains an unclear concept, not only under international law, but also politically and morally. It requires a balance of these forces.

The aim of this study is to determine the scope and extent of the right to self-determination beyond colonisation and dissolution, particularly relating to external self-determination and secession. Based on this analysis, a further objective was to address various arguments and perceived obstacles relating to external self-determination and secession. As a result of these analyses, state practice and case

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[297] Separate opinion by Judge Cançado Trindade in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010.

[298] R. Stavenhagen, 'Self-Determination: Right or Demon?' in D. Clark and R. Williamson (eds) *Self-Determination: International Perspectives* (Macmillan Press 1996) 12.

studies, guidelines for the exercise of external self-determination and secession were developed and deduced.

The study first sought to define the right to self-determination in the post-colonial and post-dissolution context of the twenty-first century. Subsequently, the international legal regime was analysed in order to create a legal framework for external self-determination and secession. In order to adequately portray the current stance of external self-determination and secession, various arguments and perceived obstacles relating to these notions were discussed critically. The discussion related in particular to controversial arguments against secession, which include upholding the *uti possidetis* rule, the risk of fragmentation, threats to peace and security, keeping territorial integrity of states intact and the definition of a 'people'. It was concluded that most of these arguments do not hold sufficient ground in the light of recent developments such as the successful secessions of Kosovo and South Sudan. It was concluded that the notion of self-determination has undergone a radical shift from its inception point in the twentieth century to the multi-faceted current thinking on the subject.

Many authors, with whom I concur, contend that there is a *privilege* of secession (since it is not prohibited under international law) and a *right* to remedial secession as a form of the right to self-determination in its external form. However, in order to exercise the right of remedial secession, I suggest that certain requirements must be fulfilled by the secessionist entity. Based on the aforementioned findings, the publications of international legal scholars, international law as it stands at present, state practice and case studies of successful and unsuccessful secession attempts, certain guidelines for the exercise of external self-determination and subsequent secession were identified and/or developed. This process led to the conclusion that the following guidelines might assist those wishing to exercise external self-determination and secession:

1. There must be a distinct 'people';

2. This group must lack effective political participation within the parent state;

3. In the alternative or in addition to Guideline 2 above, the group is subjected to human rights violations;

4. The people must have a connection to the territory identified for purposes of secession and self-determination;

5. The will of the people to secede must be shown through a plebiscite;

6. The potential state must be founded on democratic principles;

7. Secession and self-determination must be pursued through peaceful means;

8. The potential state must provide guarantees for minority and human rights protection;

9. Secession must be feasible, practical and take stability of the parent state and the potential state into account, and

10. The Montevideo Convention criteria for statehood must be fulfilled.

Current active secessionist movements include the Kabyles in Algeria; the Cabinda region in Angola; the Southern Cameroons in Cameroon; the Anjouan in Comoros; the Afrikaner and Venda in South Africa; the Northern Regions of Ivory Coast; the Katanga region in the Democratic Republic of the Congo; the Copts in Egypt; the Gambela region in Ethiopia; the Caprivi region in Namibia; the Batwa in Rwanda; the Chin people in Bruma; Hong Kong, Taiwan, Tibet and East Turkestan, all in China; West Papua in Indonesia; the Kurds in Iran; the Assyrians in Iraq; Palestine; Aden in Yemen; the Flemish region of Belgium; the Faeroe Islands and Greenland in Denmark; Åland in Finland; Basque country, Brittany and Corsica in France; Abkhazia and South Ossetia in Georgia; Bavaria in Germany; South Tirol and Tuscany in Italy; Friesland in the Netherlands; Chechnya in Russia; Basque and Catalonia in Spain; Northern Ireland and Scotland in the United Kingdom; Quebec in Canada; Alaska and Hawaii in the United States of America. This list is by no means exhaustive. Why should certain people have the right to determine by whom they want to be represented and others be excluded from this right? All peoples involved in these movements have a right to self-determination – and to deny them the exercise of their free political will in whichever form they chose on the grounds of potential fragmentation and loss of territorial integrity is illogical. History has

proven that the denial of the right to external self-determination and/or attempted secession has by no means curbed conflict and violence. Weller argues that 'the all-or-nothing game of self-determination has helped to sustain conflicts, rather than resolve them'.[299]

Perhaps another route should be followed. If secession was more readily accepted by the international community and more effectively regulated by international law, then these self-determination conflicts might be settled in a more peaceful and efficient manner. Falk argues that the solution requires a balance between political, legal and moral considerations. Self-determination remains one of the most controversial and contested norms of international law. However, those who argue that the right to self-determination has reverted back to a mere principle beyond decolonisation,[300] are inferring prohibitions and limitations in international law that quite frankly do not exist.

[299] M. Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20:1 EJIL 111, 114.

[300] See for example J. Klabbers 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28:1 HRQ 186.

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