

The attainment of self-determination in African states by rebels

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Declaration

I, Zikamabahari Jean de Dieu, hereby declare that this thesis, entitled "The attainment of self-determination in African states by rebels" is my own work and expressed in my own words. Each significant contribution to, and quotation in this thesis from the work of other people has been properly indicated and acknowledged in the footnotes as well as in the list of references. I hereby also declare that this work has not been previously submitted in whole, or in part, to any institution of higher learning for the conferral of any degree.

Zikamabahari Jean de Dieu

Dedication

In memory of my late father Zikamabahari Fabien.

To the memory of those who dedicated their lives to the liberation of Rwanda. They changed our lives and gave us the opportunities we enjoy today.

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Epigraph

.... all peoples have the right of self-determination. 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.¹

1 Human Rights Committee General Comment 12 Article 1 (Twenty-first session, 1984) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev 1 (1994).

Abstract

Self-determination is a peoples' right to freely determine their political, economic and cultural destiny without external interference. However, the cultivation of a culture of respect for self-determination remains the greatest challenge to post-colonial Africa. Dictatorships and other oppressive regimes very substantially affected Africa's efforts to develop a culture of constitutionalism and respect for the right of peoples to self-determination. Most African countries typify the failed effort of trying to establish an enduring democracy and respect for the right of peoples to take part in the government. After five decades of transition from colonialism to constitutional democracy, most African peoples are still under the yoke of governments they consider undesirable or oppressive. This work primarily sets out to investigate if the denial of the right of peoples to self-determination justifies the use of force to secure such a right. Since independence, Africa has experienced armed rebel groups seeking either to effect radical transformation of the whole state or to separate from the state to which they belong in order to create a new state. In the main, this study explores the extent to which rebel groups acting on behalf of peoples are or are not allowed to use force for the attainment of self-determination.

The thesis begins with an historical development of the right to self-determination in international law. It initially examines how self-determination has developed from a political principle to a legal right. Despite the fact that self-determination is one of the core principles of the UN Charter, there are still many controversies over its precise meaning, scope and application. The thesis considers the two aspects of self-determination: external self-determination and internal self-determination. The external aspect implies the right of people to form a new, sovereign and independent state, whereas the internal aspect implies the right of people to participate in the political framework of an existing state.

The thesis also assesses the state of the academic literature over the right of peoples to self-determination, with a view to determining whether the right can be used by a group of people whose internal self-determination has been denied to effect secession from the state. It advocates that, outside the colonial context, the right of self-determination does not equal to a "right to secession and independence". The thesis argues, however,

that in exceptional circumstances such as gross violations of human rights and the denial of internal self-determination, people should be endowed with a right to secession in the manifestation of a right to unilateral secession as a remedy of such injustices.

The thesis further turns to the mechanisms for the protection of the peoples' right to self-determination, the problems and challenges in Africa. The challenges do not only include the legality of the use of force by rebel groups and national liberation movements in seeking to attain self-determination, but also the right of other states to assist them in their struggles. The work probes the nature of international law and critically assesses whether the persistent denial of demands for self-determination led to calls for drastic remedies, including the use of armed force. Before this theory is critically assessed, the thesis defines the differences between national liberation movements and rebel groups. It argues that as far as self-determination struggles are concerned, there must be representative organisations acting on behalf of people whose right of self-determination has been denied.

In the light of these contentions, the study examines the general ban on the use of force as laid down by the UN Charter, and finds that the Charter does not expressly refer to self-determination as a situation where people may resort to the use of force for the attainment of such a right. It then turns to the history of and circumstance surrounding the use of force, examines the *jus ad bellum* regarding "liberation struggles", and concludes that the use of force by national liberation movements against colonial and racist regimes has strong theoretical foundations and support in state practice.

Outside of the colonial and *apartheid* contexts, however, the argument that rebels acting on behalf of oppressed peoples may legitimately use force in pursuit of self-determination thus remains ambiguous. In that context, this thesis examines the practice relating to the use of force by rebel groups and the laws of war provisions that apply in civil wars, and concludes that none of them proves that the international community of states accepts rebels' right to use force as a legal entitlement.

Finally, based on the lessons learned from and *lacunae* identified in all norms relating to the enforcement mechanisms of the right of self-determination, this study concludes with a set of suggestions and recommendations.

Keywords: Self-determination, internal self-determination, external self-determination, secession, remedial secession, states, people, territorial integrity, national liberation movements, rebel groups, colonial rule, racist regimes, use of force, international law, international customary law.

Opsomming

Selfbeskikking is die reg van 'n volk om hul politieke, ekonomiese en kulturele lot vrylik, sonder inmenging van buite, te bepaal. Die kweek van 'n kultuur van respek vir selfbeskikking bly egter die grootste uitdaging vir postkoloniale Afrika. Diktature en ander onderdrukkende regimes het 'n baie groot invloed gehad op Afrika se pogings om 'n kultuur van grondwetlikheid en respek te skep vir volkere se reg op selfbeskikking. Die meeste Afrika-lande is tipiese voorbeelde van lande wat onsuksesvol poog om 'n standhoudende demokrasie en respek vir die reg van volke om aan die regering deel te neem, te skep. Na vyf dekades van oorgang vanaf kolonialisme na konstitusionele demokrasie gaan die meeste volke in Afrika steeds gebuk onder regerings wat hulle as onwenslik of onderdrukkend beskou. Die hoofdoelmerk van hierdie werk is om ondersoek in te stel na die vraag of die ontkenning van mense se reg op selfbeskikking regverdiging bied vir die gebruik van geweld om hierdie reg te verseker. Sedert onafhanklikwording is daar talle gewapende rebellegroepe in Afrika wat hulle beywer vir die radikale transformasie van die staat in sy geheel of afskeiding van die staat waaraan hulle behoort om 'n nuwe staat te skep. Hierdie studie ondersoek hoofsaaklik die mate waarin rebellegroepe wat namens volke optree, toegelaat word of nie toegelaat word nie om geweld ter bereiking van selfbeskikking aan te wend.

Die verhandeling begin met 'n historiese ontwikkeling van die reg op selfbeskikking in die internasionale reg en ondersoek aanvanklik hoe selfbeskikking van 'n politieke beginsel tot 'n reg ontwikkel het. Ten spyte daarvan dat selfbeskikking een van die kernbeginsels van die VN-handves is, bestaan daar steeds heelwat kontroversie oor die presiese betekenis, omvang en toepassing daarvan. Die verhandeling bekyk die twee aspekte van selfbeskikking: eksterne selfbeskikking en interne selfbeskikking. Die eksterne aspek impliseer die reg van volkere om 'n nuwe, soewereine en onafhanklike staat te vorm, terwyl die interne aspek die reg van mense om aan die politieke raamwerk van 'n bestaande staat deel te neem, behels.

Die verhandeling evalueer ook die stand van die akademiese literatuur oor die reg van volke op selfbeskikking met die oog daarop om vas te stel of die reg gebruik kan word deur 'n groep mense wie se interne selfbeskikking hul ontsê is, om sesessie van die staat te bewerkstellig. Daar word aangevoer dat die reg op selfbeskikking, buite die

koloniale konteks, nie gelykstaande is aan die reg op sesessie en onafhanklikheid nie. In die verhandeling word daar egter geredeneer dat mense in buitengewone omstandighede, soos in die geval van growwe skendings van menseregte en die ontsegging van interne selfbeskikking, die reg op sesessie in die vorm van 'n reg op eensydige sesessie behoort te verkry om sodanige onregte te herstel.

Die verhandeling ondersoek voorts die meganismes vir die beskerming van volkere se reg op selfbeskikking, die probleme en uitdagings in Afrika. Hierdie uitdagings is nie beperk tot die vraag oor die wettigheid van die gebruik van geweld deur rebellegroepe en nasionale bevrydingsbewegings wat selfbeskikking nastreef nie, maar behels ook die reg van ander state om hiermee bystand te verleen. Die werk ondersoek die aard van internasionale reg en evalueer krities of die voortdurende hardnekkige weiering van eise om selfbeskikking gelei het tot krite vir drastiese stappe, insluitend die gebruik van wapengeweld. Voor hierdie teorie krities evalueer word, definieer die verhandeling die verskille tussen nasionale bevrydingsbewegings en rebellegroepe. Daar word geredeneer dat sover dit die stryd om selfbeskikking betref, daar verteenwoordigende organisasies moet wees wat namens mense optree wie se reg op selfbeskikking hul ontsê word.

In die lig van hierdie bewerings ondersoek die studie die algemene verbod op die gebruik van geweld soos deur die VN-handves bepaal en word daar bevind dat die Handves nie uitdruklik verwys na selfbeskikking as 'n situasie waarin mense hulle tot geweld mag wend vir die verwesenliking van sodanige reg nie. Daar word dan gekyk na die geskiedenis van en omstandighede rondom die gebruik van geweld en die werk ondersoek die *jus ad bellum* wat betref "bevrydingstryd" en kom tot die gevolgtrekking dat die gebruik van geweld deur nasionale bevrydingsbewegings teen koloniale en rassistiese regimes sterk teoretiese grondslae het en steun in staatspraktyk geniet.

Buite die koloniale en apartheidskonteks bly die argument dat rebelle wat namens onderdrukte volke optree, regtens geweld kan gebruik ter bereiking van selfbeskikking, dus dubbelsinnig. In daardie konteks ondersoek hierdie verhandeling die praktyk met betrekking tot die gebruik van geweld deur rebellegroepe en die regsbeginsels ten aansien van burgeroorloë en kom tot die gevolgtrekking dat daar niks is wat vereis dat die internasionale gemeenskap rebelle se reg om geweld as 'n reg te gebruik, hoef goed te keur nie.

Uiteindelik, op grond van die lesse geleer uit en die gapings geïdentifiseer in alle norme met betrekking tot die afdwingingsmeganismes van die reg op selfbeskikking, sluit hierdie studie af met 'n stel voorstelle en aanbevelings.

Sleutelwoorde: Selfbeskikking, interne selfbeskikking, eksterne selfbeskikking, sesessie, regstellende sessie, state, mense, territoriale integriteit, nasionale bevrydingsbewegings, rebellegroepe, koloniale oorheersing, rassistiese regimes, gebruik van geweld, internasionale reg, internasionale gewoontereg.

List of abbreviations and acronyms

ACHPR	African Commission on Human and Peoples' Rights
ALN	National Liberation Action (Spanish: <i>Ação Libertadora Nacional</i>)
AMU	Arab Maghreb Union
ANC	African National Congress
AU	African Union
CAL	Armed Commandos of Liberation (Spanish: <i>Comandos Armados de Liberación</i>)
CAR	Central African Republic
CLF	Congolese Liberation Front
CNDD–FDD	National Council for the Defence of Democracy – Forces for the Defence of Democracy (French: <i>Conseil National Pour la Défense de la Démocratie – Forces pour la Défense de la Démocratie</i>)
CPA	Comprehensive Peace Agreement
DRC	Democratic Republic of the Congo
EAC	East African Community
EC	European Community
ECCAS	Economic Community of Central African States
ECOMOG	Economic Community of West African States Monitoring Group
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ELF	Eritrean Liberation Army
ELN	National Liberation Army (Spanish: <i>Ejército de Liberación Nacional</i>)
EPLF	Eritrean Peoples' Liberation Front
ETA	Basque Homeland and Freedom (Spanish: <i>Euskadi Ta Askatasuna</i>)
FARC	Revolutionary Armed Forces of Colombia
FLCS	Front for the Liberation of the Somali Coast (French: <i>Front de Libération de la Côte des Somalis</i>)

FLN	National Liberation Front (French: <i>Front de Libération Nationale</i>)
FLQ	Quebec Liberation Front (French: <i>Front de Libération du Québec</i>)
FMLN	Farabundo Martí National Liberation Front (Spanish: <i>Frente Farabundo Martí para la Liberación Nacional</i>)
FNL	National Forces of Liberation (French: <i>Forces Nationales De Libération</i>)
FNLA	National Front for the Liberation of Angola (Portuguese: <i>Frente Nacional de Libertação de Angola</i>)
FNLKS	Kanak and Socialist National Liberation Front (French: <i>Front de Libération Nationale Kanak et Socialiste</i>)
FRELIMO	Mozambique Liberation Front (Portuguese: <i>Frente de Libertação de Moçambique</i>)
FSLN	Sandinista National Liberation Front (Spanish: <i>Frente Sandinista de Liberación Nacional</i>)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGAD	Intergovernmental Authority on Development
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IRA	Irish Republican Army
KLA	Kosovo Liberation Army
KNP	Polish National Committee (Polish: <i>Komitet Narodowy Polski</i>)
KOFOR	Kosovo Force
MIRA	Armed Revolutionary Independence Movement (Spanish: <i>Movimiento Independista Revolucionario Armados</i>)
MNLA	National Movement of Azawad

MPLA	Popular Movement for the Liberation of Angola (<i>Portuguese: Movimento Popular de Libertação de Angola</i>)
MPLA	Popular Movement of Liberation of Azawad
NATO (1)	North Atlantic Treaty Organisation
NATO (2)	Northern Arts Tactical Offensive
NTC	National Transitional Council of Libya
OAU	Organisation of African Unity
ONUC	United Nations Organization in the Congo
PAC	Pan Africanist Congress
PAIGC	African Party for the Independence of Guinea and Cape Verde (<i>Portuguese: Partido Africano da Independência da Guiné e Cabo Verde</i>)
PALIPEHUTU	Party for the Liberation of the Hutu People (French: <i>Parti pour La Libération du Peuple Hutu</i>)
Par	Paragraph
PCIJ	Permanent Court of International Justice
PERI	Political Economy Research Institute
PLO	Palestine Liberation Organization
POLISARIO	Popular Front for the Liberation of Saguia el-Hamra and Río de Oro (<i>Spanish: Frente Popular de Liberación de Saguía el Hamra y Río de Oro</i>)
PUK	Patriotic Union Kurdistan
RCD	Rally for Congolese Democracy
RDF	Rwandan Defence Forces
RENAMO	Mozambican National Resistance (<i>Portuguese: Resistência Nacional Moçambicana</i>)
RPF	Rwandan Patriotic Front
RUF	Revolutionary United Front
SADC	Southern African Development Community
SFRY	Socialist Federal Republic of Yugoslavia

SNM	Somali National Movement
SPLA	Southern People's Liberation Army
SPLM	Sudan People's Liberation Movement
SPUP	Seychelles People's Progressive Front (French: <i>Front Progressiste du Peuple Seychellois</i>)
SWAPO	South West Africa People's Organization (Namibia)
THKO	People's Liberation Army of Turkey (Turkish: <i>Türkiye Halk Kurtuluş Ordusu</i>)
UAE	United Arab Emirates
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCIO	United Nations Conference on International Organisation
UNDHR	Universal Declaration of Human Rights
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
UNITA	National Union for the Total Independence of Angola (Portuguese: <i>União Nacional para a Independência Total de Angola</i>)
UNSC	United Nations Security Council
UPDF	Uganda People's Defence Forces
USA	United States of America
Vol	Volume
WW I	First World War
WW II	Second World War
ZANU	Zimbabwe African National Union
ZAPU	Zimbabwe African People's Union

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Chapter 1: Introduction

... a country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing Government, they can exercise their 'constitutional' right of amending it or their "revolutionary" right to dismember or overthrow it.²

1.1 Contextual background

1.1.1 The right to self-determination

From the beginning of the 1960s, Africa's one-party states and other authoritarian regimes have experienced armed rebel groups which claimed to have the right to use force on behalf of people whose right to self-determination has been forcibly denied. It is noted that at least ten African states have experienced a secessionist movement struggling for independence or a regionalist movement seeking greater autonomy for a particular region.³ It is also estimated that 30 African states have experienced at least one non-secessionist internal armed conflict.⁴ However, the struggles for self-determination in Africa are not to be found only in the past. Today several secessionist rebel groups as well as non-secessionist rebel groups can be counted in all corners of Africa, ranging from west African countries, such as Mali and Nigeria, and from Central African states, such as Democratic Republic of Congo and Central African Republic, to the Horn of Africa, that is Somalia, to list a but few. It is for this reason that this study examines the current debate concerning the right of rebel groups to use force with the aim of attaining self-determination in Africa.

In the language of international law, self-determination consists of the right of all peoples to decide their internal and external political, economic and cultural status.⁵ In general term, the right to self-determination, whatever it may mean and whoever may claim it, has usually two aspects: internal and external.⁶ The internal aspect implies the right of the people to pursue their political, economic, social and cultural

2 Lincoln 1861 "Inaugural Address" online by Peters and Woolley *The American Presidency Project* <http://www.presidency.ucsb.edu/ws/?pid=25818>.

3 Mkandawire 2002 *Journal of Modern African Studies* 191.

4 Ekeh 1975 *Comparative Studies in Society and History* 91-112; see also Englebert and Hummel 2005 *African Affairs* 399-400.

5 Common a 1 of *International Covenant on Civil and Political Rights* (1966); *International Covenant on Economic, Social and Cultural Rights* (1966).

6 McCorquodale 1992 *African Journal of International and Comparative Law* 595-596.

development within the framework of an existing state.⁷ The external self-determination involves the process by which a people or a particular group seeks to separate itself from the state to which it belongs, and to create a new state.⁸ According to the *Quebec* case, the right to external self-determination can be the basis for secession.⁹ As such, external self-determination is viewed as being exercised through the creation of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other political status freely determined by a people.¹⁰

Self-determination, as a right of a people to determine its own form of government, has a long history in international relations.¹¹ However, the point at which it begins to become relevant to contemporary international law is its expression in the *Charter of the United Nations*.¹² Self-determination is mentioned twice in the Charter, first in article 1(2) and secondly in article 55. Both articles consider "respect for the principle of equal rights and self-determination of peoples as one of the bases for the development of friendly relations between states".¹³ The *UN Charter*, however, did not provide a definition of self-determination or identify who were to be regarded as the "peoples" entitled to self-determination. It is noted that, although articles 1(2) and 55 of the Charter are important for the reason that they placed self-determination in the context of international law, they remain vague, and it is doubtful if they lend themselves to establishing specific rights and duties.

The concept of "self-determination" was also broadly proclaimed in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁴ This Declaration was framed explicitly in the context of colonial peoples and dependent territories. The first paragraph declared that subjugation by foreign

7 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 126.

8 Crawford 1999 *British Yearbook of International Law* 85.

9 GA Res 2625 (XXV) (1970); *Reference re Secession of Quebec* 1998 2 (SCR) 217; Mustafa 1971 *International Lawyer* 479-483.

10 *Reference re Secession of Quebec* 1998 2 (SCR) 217; Nanda 2001 *Denver Journal of International Law and Policy* 307.

11 See Chapter One of the present study.

12 *Charter of the United Nations* (1945).

13 Aa 1(2) and 55 of the *Charter of the United Nations* (1945).

14 GA Res 1514 (XV) (1960) – *Declaration on the Granting of Independence to Colonial Countries and Peoples*.

domination or exploitation violates peoples' fundamental human rights.¹⁵ The second paragraph provides that "all peoples have the right to self-determination, and thus to determine freely their political status".¹⁶ The 1960 Declaration is regarded as making an important change in the development of self-determination as it considers self-determination as a "right" rather than a "principle". In exercising this right, however, a people may not seek to dismember the national unity or territorial integrity of an existing state.¹⁷ This formulation demonstrates that the application of self-determination was primarily limited to the process of decolonisation.

Further development of the right to self-determination took place with the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The common article 1 of both Covenants is considered to contain the modern definition of the right to the self-determination of peoples, and commences with the phrase "all peoples have the right of self-determination".¹⁸ As will be expounded in chapter 2, article 1 of Human Rights Covenants extends the right to self-determination beyond the colonial context. As such, common article 1 of the ICCPR and ICESCR intended to be universally applicable.¹⁹

As further evidence of the view about the legal nature of the right to self-determination, reference can also be made to regional legal instruments.²⁰ The formulation adopted in these instruments considers self-determination as a right of "all peoples", and an essential condition for the effective guarantee and observance of individual human rights.²¹

The right to self-determination has not only evolved in international instruments, but also has acquired a prominent place in case law. In the *Namibia Advisory Opinion*,

15 Par 1 of the GA Res 1514 (XV) (1960)

16 Par 2 of the GA Res 1514 (XV) (1960).

17 Par 6 of the GA Res 1514 (XV) (1960).

18 A 1 of the *International Covenant on Civil and Political Rights* (ICCPR) (1966); *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966); *Anaya Indigenous Peoples* 97-114.

19 Common a 1 of the ICCPR and ICESCR (1966); see also Collins 1980 *Case Western Reserve Journal of International Law* 138; *Anaya Indigenous Peoples* 97-114.

20 *African Charter on Human and Peoples' Rights* (1981); *Helsinki Final Act* (1975).

21 Human Rights Committee *General Comment 12 Article 1 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/REV 1 at 12 (1994) par 1.

the International Court of Justice (ICJ) clarified the aim and scope of the right of the people of Namibia to self-determination and obliged states not to recognise the illegal situation created by the colonial power.²² It should be noted that by condemning the policy of *apartheid* as practised by South Africa in Namibia, the Court contributed to linking respect for fundamental human rights with the right to self-determination. Self-determination as a genuine legal right was also reaffirmed in the *Western Sahara Advisory Opinion*. In his separate opinion, Judge Dillard pointed out that it is for the people to determine the destiny of the territory, and not the territory the destiny of the people.²³ At present, the right of peoples to self-determination is widely acknowledged to be a rule of customary international law, and enjoys an "*erga omnes*" character. This character of the right to self-determination was affirmed in the relevant case law of the ICJ, as well as in the *Quebec case*.²⁴

A number of authors also affirm the view that self-determination has an *erga omnes* character in the light of international realities.²⁵ Espiell,²⁶ among others, is of the opinion that the right of people to self-determination in the modern world constitutes an example of a *jus cogens* norm.²⁷

22 *Legal Consequences for States of Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports

23 *Western Sahara Advisory Opinion (Separate Opinion of Judge Dillard)* 1975 ICJ Reports par 122.

24 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports; *Western Sahara Advisory Opinion* 1975 ICJ Reports; *Frontier Dispute (Burkina Faso v Mali) Judgment* 1986 ICJ Reports par 554, 566-567; *East Timor (Portugal v Australia) Judgment* 1995 ICJ Reports; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* 2004 ICJ Reports par 136; *Barcelona Traction, Light and Power Company Limited Judgment (Separate Opinion of Judge Ammoun)* 1970 ICJ Reports; *Reference re Secession of Quebec* 1998 2 (SCR) 217; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

25 As Harris explains, self-determination was a reason for the secession of territory from the state to which it belongs and the creation of a new state. According to Harris, peoples have the right, in full freedom, to choose their own state and government and not to be passed on from one sovereign to another as if they were property. Crawford *The Creation of States* 108; Brownlie *Principles* 579-582; Cassese *Self-determination of Peoples* 133-140; McCorquodale 1994 *South African Journal of Human Rights* 4-30; Harris *Cases and Materials* 112.

26 Espiell "Self-determination" 167-195.

27 Crawford *The Creation of States* 108; Brownlie *Principles* 579-582; Cassese *Self-determination of Peoples* 133-140; McCorquodale 1994 *South African Journal of Human Rights* 4-30.

Notwithstanding the fact that international legal scholarship paved the way for development of self-determination, in the contemporary context little remains uncertain regarding its external dimension. Academic commentators hold different views on the present-day interpretation of a legal right to secede by virtue of self-determination.²⁸ In fact, international law does not clearly recognise the right to self-determination in the manifestation of secession. The right to secession is controversial both in theory and in practice. Theoretically, it is questionable whether it is universally accepted. In practice, it is not always easy to clearly identify who possesses the right to secession, and under which circumstances such a right may be exercised.²⁹ Some scholars argue that there is a consensus regarding the fact that secession applies in the context of decolonisation.³⁰ This argument was also affirmed in the *Quebec* case where the Supreme Court of Canada stated that the right to independence or secession as a mode of self-determination applies to peoples under imperial power.³¹

In non-colonial situations, however, secession is permissible if the people possess a constitutional right thereto (e.g. the Soviet Union) or in the absence thereof, it can take place with the approval of the parent state (e.g. Eritrea). It may also be achieved through plebiscites, as in the case of South Sudan. In parallel with these developments, it is not clear whether a right to secession can be applied beyond the colonial context without the accord of the parent state. In this matter, it is questionable whether international law recognises the right to external self-determination in the form of unilateral secession.³² As will be seen in the present study, international law has always favoured the territorial integrity of states, and it is

28 Harris *Cases and Materials* 111-129; Cassese *Self-determination of Peoples* 67-159; Dugard *International Law* 99-111.

29 Vidmar 2010 *St Antony's International Review* 37-56; Crawford *The Creation of States* 108; Brownlie *Principles* 579-582; Dahlitz (ed) *Secession* 26.

30 Knop *Diversity and Self-determination* 34; *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports par 16, 31; Crawford *The Creation of States* 375-418.

31 *Reference re Secession of Quebec* 1998 2 (SCR) 217.

32 As for the meaning of "unilateral secession", the Supreme Court of Canada stated that it is the right to effectuate secession without prior negotiations with the other provinces and the federal government. *Reference re Secession of Quebec* 1998 2 (SCR) 217. Unilateral secession involves non-consensual separation of part of the territory of a state for the creation of a new state. International Court of Justice *Accordance with International Law of Unilateral Declaration of Independence by the Provisional Institutional of Self-government of Kosovo (Request for Kosovo Advisory Opinion)* Written Statement of the United Kingdom (17 April 2009) par 87.

unclear if modern law of self-determination authorises external self-determination in the form of unilateral secession.³³ Most academic commentators argue that secession falls chiefly within the frame of domestic law rather than international law.³⁴ The support for secession in municipal law is well-captured in the *South African Constitution*. Most important is section 235, which reads:

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way determined by national legislation.³⁵

In this context, the question is whether any group of peoples such as the inhabitants of Orania and others living within the borders of South Africa could be allowed to unilaterally secede from South Africa. In this matter, De Vos argues that section 235 provides for internal self-determination, unless Parliament passes a law to provide some form of self-rule for the inhabitants of Orania or for others who want to secede. He concluded that since unilateral secession is seen to conflict with the territorial integrity of states, only a consensual right to secede might be granted explicitly in the constitution.³⁶

Dugard, however, does not espouse De Vos' view. As he pointed out, unilateral secession is lawful when it is characterised by two phenomena: first, the separate identity of the seceding region in geographical, historical and constitutional terms; and secondly, the denial of internal self-determination, accompanied by the systematic and a gross violation of human rights.³⁷ Bolton and Visoka further argue that unilateral secession is allowed when a state does not respect the principle of the equal rights and self-determination of peoples, and is not possessed of a government representing the whole people belonging to the territory without any distinction.³⁸

33 Borgen 2009 *Chicago Journal of International Law* 8.

34 International law is silent as to secession, which is viewed as a matter of domestic law, not international law. Borgen 2007 *Oregon Review of International Law* 485. International law is neutral to secession. Crawford *The Creation of States* 390; Borgen 2009 *Chicago Journal of International Law* 8.

35 *Constitution of the Republic of South Africa*, 1996.

36 De Vos P 2010 <http://www.constitutionallyspeaking.co.za>.

37 Dugard *International Law* 104.

38 Bolton and Visoka 2010 "Recognising Kosovo's Independence" 3-5.

The support for unilateral secession is also to be found in jurisprudence. The *Aaland Islands* case in 1921 articulated the following requirements for justifiable unilateral secession: 1) where those wishing to secede constitute "a people"; 2) when they are subject to serious violations of human rights at the hand of the mother state; and no other remedies are available to them.³⁹ The Supreme Court of Canada applied a similar standard in its decision on the secession of the Province of Quebec.⁴⁰ In their separate opinions, Judge Trindade and Yusufu further argue that if the parent state forcibly denies peoples their right to internal self-determination, accompanied by discrimination, persecution and egregious violations of human rights,⁴¹ then international law recognises the right of the afflicted group to secede from the offending state.⁴²

Following the above reasoning, Vidmar⁴³ suggests that unilateral secession may be the last resort for ending oppression. In this regard, it is often referred to as "remedial secession". In this respect, Buchanan⁴⁴ identifies three forms of injustice that give rise to the remedial right to secede: 1) large-scale and persistent violations of basic individual human rights; 2) unjust annexation of a legitimate state's territory or 3) the state's persistent violations of intrastate autonomy agreements. When seen from this perspective, it may be argued that Buchanan tends to see secession as a legal right which is triggered by oppression.

However, the above conception is contentious on every point. As has been said, there is no clear provision with respect to unilateral secession or remedial secession in international law. The relevant judicial decisions and academic writings do not, furthermore, provide sufficient evidence to suggest that in international legal doctrine "remedial secession" is a universally accepted practice.⁴⁵ The argument based on

39 Borgen 2009 *Chicago Journal of International Law* 8.

40 *Reference re Secession of Quebec* 1998 2 (SCR) 217.

41 *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Separate Opinion of Judge Yusuf)* 2010 ICJ Reports par 11.

42 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Separate Opinion of Judge Cançado Trindade)* 2010 ICJ Reports par 175; see also Seymour 2010 <http://www.soc.kuleuven.be/web/files/11/72/W16-117>; Tancredi "A Normative 'Due Process' in the Creation of States through Secession" 176.

43 Vidmar 2010 *St Antony's International Review* 37-56.

44 Buchanan *Justice* 351-353.

45 Franck "Postmodern Tribalism and the Right to Secession" 13; see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

discrimination becomes invariably circular and leads to the following question: to what extent has a right to external self-determination as a remedy for extreme oppression emerged in contemporary international law? This question will be addressed in chapter IV of this study.

1.1.2 The right holders of self-determination

The stipulation that the peoples are beneficiaries of the right to self-determination does not add any clarity. The international instruments cited above grant the right to self-determination to "peoples", and despite their huge number, no precise meaning of the term has been construed.⁴⁶ For the purpose of this study, peoples are defined as any national group possessing certain national features such as a common language, a common culture or a common ethnicity. Subjective criteria refer to the common sentiment and will of a group of persons to be a people, and a political will to live together as such.⁴⁷ The group must also be one that shares memories of common suffering in its historical or political background and holds the desire to live together as a people on the same territory.

In this sense, the concept of a "people" includes all of the inhabitants of a territory to whom the principle of self-determination applies as a matter of right. This right involves a legal right to dismember or overthrow any government which is unresponsive to their needs and wishes. A crucial question, however, is if all inhabitants of a concerned territory are legally permitted to take some sort action to enforce their right to self-determination. In this regard Cassese⁴⁸ argues that in the struggle for self-determination there must be armed movements acting on behalf of people whose self-determination has been denied.

As defined in this study, there are two categories of armed opposition movements. The first category is referred to as "national liberation movement", while the other is referred to as "rebel groups". Since these movements will be at the centre of the present thesis, it is important to formulate their definitions for the purpose of the present study. For the present purpose, a "national liberation movement" is defined

46 See Chapter One par 1.1.1 above.

47 Franck "Postmodern Tribalism and the Right to Secession" 39; see also Anaya *Indigenous Peoples* 100-102.

48 Cassese *Self-determination of Peoples* 146.

as an organised armed group fighting on behalf of a people against colonial and alien domination and racist regimes in seeking to attain self-determination.⁴⁹ Rebel groups, however, are defined as:

Armed opposition groups generally fighting against a government in power, in an effort to overthrow such a government, or alternatively to secede from the state that they belong to, and to create a new state. They are entities possessing the public and representative capacities, a body that will articulate and act for the relevant people in internal and international affairs.

Following this view, one may ask how a rebel group becomes an authentic representative of a people and to what extent it can use force against an established government. There is a further question, which is if international law gives rebel groups the authority to wage a struggle. And if so, do these struggles include struggles for mines and the control of natural resources? Basically, this thesis intends to deal only with the struggles for attaining the right of peoples to self-determination. Evidently, there is an absence of a coherent set of rules relating to the interaction of the right to self-determination with the norm relating to the use of force. In such an environment, the question is whether or not rebel armed conflicts fall under the concept of *jus ad bellum*. In this respect, it must be established what the law prescribes in respect of rebels' conflicts, what the recent position in respect of the international law is, and what the proposed position is. In each instance, it is necessary to investigate this matter so as to provide clarity on what the legal position is concerning the rebels' action in attainment of self-determination.

1.2 Statement of the problem

While peoples have been accorded the right to self-determination, it remains uncertain if the denial of this right justifies the use of force for the attainment of it. In this respect, Şahin⁵⁰ argued that when the right of self-determination is not peacefully attained, the use of force is considered as one of the ways of realising it. In practice, it has been national liberation movements and rebel groups which have

49 Cassese *International Law* 75.

50 Şahin 1999 *Dış Politika-Foreign Policy* 30.

claimed the authority to use force on behalf of peoples denied meaningful access to government to pursue their political, economic, cultural and social development.⁵¹

In 1998 the African Commission on Human and Peoples' Rights (ACHPR) stated that government by force is in principle not compatible with the rights of peoples to freely determine their political status.⁵² The Commission, however, did not provide for an available way out for people whose exercise of internal self-determination is prevented or violated by the repressive regimes. From this, it is not clear whether or not rebel groups acting on behalf of peoples may have the right to overthrow such oppressive regimes and establish themselves in their place in order to enjoy their right to self-determination.

Support for the proposition that persistent denial of the right to self-determination led to calls for remedies, including the use force, can also be found in the *Loizidou v Turkey* case. In their dissenting opinion, Judges Wildhaber and Ryssdal argued that:

.... in recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively underrepresented in an undemocratic and discriminatory way.⁵³

From this paragraph, it can be deduced that the denial of the right to self-determination is a tool which may be used to justify the use of force for the attainment of it. The two concurring judges nevertheless did not refer to the use of force to overthrow the government or to secede from it. The issue now is whether or not the use of force against an oppressive government in pursuit of self-determination has enough support in legal doctrine and state practice to be considered an actual entitlement under international law. In 2000, for instance, the ACHPR condemned the military coup in the Gambia.⁵⁴ In the same vein, in 2006 the Peace and Security Council of the African Union strongly condemned the attempt by

51 Wilson *International Law* 91.

52 *Media Rights Agenda and Others v Nigeria* Comm Nos 105/93, 128/94, 130/94 and 152/96 (1998).

53 *Loizidou v Turkey (Application No 15318/89) Judgement (Concurring opinion of Judge Wildhaber, Joined by Judge Ryssadal)* (1996) par 23.

54 *Dawda Jawara v The Gambia* Comm Nos 147/95 and 149/96 (2000).

Chadian rebels to overthrow President Idriss Deby's government,⁵⁵ without reference to the possible merits of the peoples' claims to the right of self-determination.

In the light of the above, the question arises if the use of force is possible to remedy violations of self-determination. The *UN Charter* does not expressly describe self-determination as a situation in which people may resort to force against a colonial, foreign or any other oppressive regime.⁵⁶ It appears that there is no clear provision regulating the use of armed force for attaining the right of peoples to self-determination in the *UN Charter*. Put differently, the use of force by peoples struggling for self-determination is neither condemned nor condoned under the *UN Charter*.

Contrary to the *UN Charter*, General Assembly resolutions have recognised clearly enough that national liberation movements may use force to attain the right of self-determination on behalf of peoples under colonial rule.⁵⁷ In the process of decolonisation, GA Resolution 2649 (XXV) recognised the legitimacy of the "struggle" of peoples entitled to the right to self-determination to restore to themselves that right by "any means at their disposal". The wording "struggle" was then repeated in several resolutions without clarifying its meaning.⁵⁸ This led Third World Countries to interpret it to mean "armed struggle", whereas the Western Countries interpreted it to mean "peaceful struggle".⁵⁹ In the same perspective, the GA Resolution 2105 (XX) affirmed the legitimacy of the struggle by the peoples under colonial rule and invited all states to provide material and moral support to their national liberation movements.⁶⁰ To help fulfil this aim, African states and the Organisation of African Unity (OAU) gave financial and diplomatic support to the liberation movements of Guinea-Bissau, Angola, and Mozambique to name just a few.⁶¹

55 Teklu 2006 <http://business.highbeam.com/3548/article-1G1-144586361/au-condemns-chad-rebel-attacks-overthrow-government>.

56 Shaw *International Law* 1148-1155.

57 GA Res 2105 (XX) (1965); GA Res 2625 (XXV) (1970); GA Res 2787 (XXVI) (1971).

58 GA Res 2708 (XXV) (1970); GA Res 2652 (XXV) (1970); GA Res 3295 (XXIX) (1974).

59 Wilson *International Law* 94-102.

60 GA Res 2105 (XX) (1965).

61 Byman *et al Trends in Outside Support* 1-15; Kamanu 1974 *Journal of Modern African Studies* 355-376.

Beyond the context of decolonisation, however, it is questionable whether the language used in the above resolutions is sufficiently expansive to include modern rebel groups. The UN Security Council sanctions against the rebel groups in Angola and Abkhazia show that the international community of states has been reluctant to consider and accept the post-colonial use of force for the attainment of self-determination. Since colonialism came to end, the legal status as well as the legitimacy of the struggles of the post-independence rebel groups remains uncertain.

The status of post-independence rebel groups in international law has been the subject of much controversy among scholars.⁶² The increasingly progressive trend and view in international law and diplomatic circles is that such rebel groups are considered to have *locus standi* in international law when they are fighting on behalf of peoples against alien subjugation, domination or exploitation outside the colonial situations.⁶³ The question remains, however, whether or not rebel groups constitute subjects of international law and, if so, to what extent international law permits state support for rebel groups fighting for self-determination.

As will be seen in the present study, there is no clear rule under international law that would give states the authority to support rebels on behalf of peoples in their action to overthrow a government or to secede from a state. Resolution 2625 (XXV) provides that in their struggle for self-determination peoples are entitled to seek and receive support from third states.⁶⁴ Yet this resolution does not state the nature of the support that may be offered. Therefore it is not clear if third states can intervene and fight alongside rebels in their struggle for self-determination. The Resolution is open to very wide interpretation.

Under international law, assisting rebels may be regarded as interfering in the internal affairs of other states, and it is generally prohibited.⁶⁵ In the *Nicaragua* case the ICJ held that the arming and training of *contras* might be regarded as a threat to use force or the use of force, or might amount to intervention.⁶⁶ The principle of non-

62 Wilson *International Law* 9-179; Abi Saab "Wars of National Liberation" 149-151.

63 Wilson *International Law* 60-121; Shaw *International Law* 1150.

64 GA Res 2625 (XXV) (1970).

65 Harris *Cases and Materials* 900.

66 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 195.

intervention prevents all states or group of states from intervening directly or indirectly in the internal affairs of another state. Article 8 of the *Montevideo Convention* provides that "no state has the right to intervene in the internal or external affairs of another".⁶⁷ The principle of non-intervention also prohibits international organisations from intervening in matters that are essentially within the domestic jurisdiction of any state.⁶⁸

In state practice, however, it appears that state support has had a profound impact on the effectiveness of many rebel groups. In Asia, Africa, Europe, and the Middle East, states have supported many rebels in their struggle for self-determination.⁶⁹ In Africa, for instance, both Rwanda and Uganda assisted the Congolese rebels to overthrow Mobutu's regime in the former Zaire (currently the Democratic Republic of the Congo – DRC); and Uganda supported the Front Patriotic rebels to overthrow Habyarimana's regime in Rwanda.⁷⁰ In addition, the Eritrean rebels had long received support from Arab nations, such as Iraq, Syria, Iran, Egypt, etc. In the same realm, several states had offered various aids to the Somali and South Sudanese rebels in their secessionist struggles.⁷¹ In the Middle East both the United States and Iran supported the Patriotic Union of Kurdistan (PUK) in their struggle to achieve their right to secession from Iraq.⁷² In 2008 Russia supported South Ossetia separatists against Georgia. Even today Russia continues supporting separatist rebel groups in the Eastern part of Ukraine.

Moving beyond the parameters of the practice of states, valuable insight may also be garnered from the practice of African organisations. Africa has been the principal home of rebel groups. Many of these movements were supported by the OAU, which is currently the African Union (AU). For instance, Eritrea and South Sudan received such support, while others were not supported and recognised, examples being the Katangese and Biafarans, Somaliland, and so forth.⁷³ This shows that African

67 *Montevideo Convention on the Rights and Duties of States* (1933).

68 A 2(7) of the *Charter of the United Nations* (1945).

69 Byman *et al Trends in Outside Support* 1-15.

70 African Union 2000 <http://www.refworld.org/docid/4d1da8752.html>; Wafula and Ikelegbe (eds) *Militias, Rebels And Islamist Militants* 9-10.

71 Jackson *Jimmy Carter and the Horn of Africa* 108.

72 O'Connell 1992 *Indiana Law Journal* 911.

73 Crawford 1999 *British Yearbook of International Law* 85; Aust *Handbook of International Law* 23.

practice has not been entirely consistent with regard to the use of force by rebel groups to attain the right of peoples to self-determination.

With the above background, it could be argued that there is no common understanding of the conditions a group of rebels acting on behalf of a people has to fulfil in order to be able to legally overthrow a government or secede from a state to which it has belonged, by way of armed force. The support of some rebels and the condemnation of others show the confusion and lack of consistent practice with regard to self-determination and the use force to attain it. This thesis examines the legality of the use of force by rebel groups as well as the legality of aiding rebels in their struggle to secure the right of their peoples to self-determination.

1.3 Central research question

How and to what extent do rebel groups have a right to use force on behalf of peoples to overthrow or secede from an oppressive regime in the exercise of the right to self-determination in African states?

This key question raises a number of inter-related sub-questions, among them being: who are the people to whom the right to self-determination applies? What is the international legal status of the entities, namely "national liberation movements" and "rebel groups", which use force on behalf of peoples for the attainment of self-determination? What is meant by the exercise of peoples' right to self-determination? Is there an authority under international law that would give rebels the right to use armed force for the attainment of self-determination? What is the role of third states in conflicts of self-redetermination? Does a third state's involvement in respect of self-determination conflicts constitute interference in the internal affairs of another state, and is it therefore unlawful and illegitimate? What is the extent of or the form that the third state's support is likely to take?

1.4 Assumptions and hypothesis

1.4.1 Assumptions underlying the study

This study is based on the following assumptions:

- 1) Peoples have a great interest in human rights such as the right to self-determination, which is a right of all peoples rather than only of colonial peoples, and is now seen to involve two dimensions, one internal and the other external.
- 2) While internal self-determination should be attained within the framework of the existing state, external self-determination may be exercised through the peaceful dissolution of a state, through consensual merger with another state, or through constitutional secession.
- 3) Outside the colonial context, scholars hold different views on the full meaning and implementation of self-determination in the form of unilateral secession in general, and "remedial secession" in particular. This study assumes that the situation requires clarification.
- 4) Article 1(2) of the *UN Charter* expressly refers to the principle of equal rights and self-determination. Article 1 of both of the *Covenants on Human Rights* provides that "all peoples have the right of self-determination". This includes colonial peoples as well as others under post-colonial oppressive regimes. However, in several cases peoples living under the oppressive regimes are treated differently from those living under colonial domination. This constitutes a *prima facie* infringement of the principle of "equal rights and self-determination" contained in the *UN Charter*.
- 5) Colonial peoples have been accorded the right of self-determination and they also have a *jus ad bellum* in order to achieve such a right in case it has been forcibly denied.
- 6) In the post-colonial situations, international law remains neutral in regard to the use of force by rebel groups for the attainment of self-determination: it neither prohibits, nor authorises the use of force.

1.4.2 Hypothesis

The following hypothesis will be used to test the primary question:

The right of peoples to self-determination has proved to be a principle of great importance in international law since 1945, and it is now well established that *jus ad bellum* has been amended to include wars of self-determination involving national liberation movements, but not armed struggles involving rebel groups in order to attain self-determination.

1.5 Objectives of the study

The primary objective of this thesis is to describe and explain the issue of self-determination, both as a right and as a principle, and how it might be achieved by rebel groups on behalf of their peoples. In order to achieve this objective, the following secondary objectives are set:

- 1) To review the historical development of the right to self-determination from an essentially political concept into a legal right, as well as its relationship with the concepts of territorial integrity and international stability.
- 2) To clarify the concepts, such as "national liberation movements" and "rebel groups", which will contribute to strengthening the study. The researcher will also probe the matter through an exploration of the right to self-determination and the role that these movements play in attaining self-determination.
- 3) To critically discuss and evaluate the external aspect of the right to self-determination, with emphasis on the issues of the right to unilateral secession and remedial secession.
- 4) To examine if peoples forcibly deprived of the right to self-determination are entitled to use force to attain either internal or external self-determination. It is to be argued that while self-determination is expressly enshrined in articles 1(2) and 55 of the Charter, how to achieve this right is not completely clear. Most *UN General Assembly* (GA) resolutions state that peoples who are deprived of their legitimate right to self-determination and complete freedom

are entitled to pursue their right by "all means at their disposal", and that they may seek and receive assistance from other states.

- 5) To estimate and evaluate the meaning of the wording "all means at their disposal" in order to establish if the GA intended sanctioning the use of force in pursuit of self-determination without stating its intention explicitly.
- 6) To critically analyse the *UN Charter* within the provisions regarding self-determination and the use of force. It must be determined if rebels can legitimately use force to attain internal or external self-determination.
- 7) To reach a conclusion and make recommendations based on the understanding of customary international law regarding rebel struggles in pursuit of self-determination.

1.6 Research methodology

In the study, the doctrinal research methodology will be adopted.⁷⁴ In the field of public international law, this involves an examination of the various sources of international law. In this regard, case law, international conventions and statutes will be used to gather information for the benefit of the study. In addition, textbooks and law journals will be used to trace the historical development of the right to self-determination and to provide information on current trends and analyses. Internet sources will also be used as a source of information on current activities in the field of study and of factual data compiled by the international community.

While the classical doctrinal research methodology will be used throughout the present study as a whole, the study begins with theoretical research⁷⁵ which fosters a more complete understanding of the concepts of self-determination. In order to clarify the meaning, content and scope of self-determination, it is necessary to turn to articles 1(2) and 55 of the *UN Charter* and to the common article 1 of both

74 Doctrinal research is research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments. Hutchinson and Duncan 2012 *Deakin Law Review* 111.

75 Theoretical research is research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity. Hutchinson and Duncan 2012 *Deakin Law Review* 111.

Covenants on Human Rights (ICCPR, ICESCR). The research furthermore investigates, by way of a critical review, the present-day interpretation of the right to self-determination. At this stage the study will consider under which circumstances a people's right to self-determination might possibly become a right to external self-determination in the form of unilateral secession or remedial secession. The analysis of self-determination inevitably also requires an evaluation of related principles of international law, including the prohibition of the use of force, territorial integrity and *uti possidetis*.

The study will also proceed with reform-oriented research⁷⁶ which helps to evaluate the *jus ad bellum* regarding the struggles of rebels. In order to determine the cases in which peoples may resort to armed force to attain self-determination, and the form it would take, it is necessary to reach a scientific and objective definition of the concepts of "peoples" to which it is applicable. Indeed, it would be logical to critically evaluate the terms "rebels" and "national liberation movements" and the criteria that a group of rebels should meet in order to be considered as a representative of a people.

Finally, the African practice will be investigated in order to examine recent applications of the principle and the significance of the practice for the contemporary world. As part of such an analysis the provision of self-determination in chapter 1 of the *African Charter on Human and Peoples' Rights* will critically be evaluated and applied to the African context. The analysis of the *African Charter* and the OAU practice will be followed by an examination of the *jus ad bellum* regarding the struggles of rebel movements in post-colonial African states.

1.7 Framework of the thesis

Apart from this introductory chapter, the study consists of a further five chapters. Chapter Two traces the historical origins and development of the concept of self-determination. It examines how self-determination evolved from a political thought into a legal right. Chapter Three will therefore be devoted to the development of the concepts of "peoples", "nations", "national liberation movements" and "rebel groups".

76 Reform-oriented research is research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting. Hutchinson and Duncan 2012 *Deakin Law Review* 111.

The chapter further investigates whether "national liberation movements" and "rebel groups" have an international legal capacity to represent peoples in their struggles for self-determination. Chapter Four will assess the external aspect of self-determination. It is in this respect that unilateral secession and remedial secession will be construed. Chapter Five examines briefly the relationship between the right of self-determination and the international legal framework relating to the use of force. It first looks at the history of and the circumstances surrounding the use of armed force in international relations. Secondly, it examines the *jus ad bellum* pertaining to the armed struggles for the attainment of self-determination. Most importantly, the chapter assesses the legality of the use of force by national liberation movements and rebel movements in the framework of public international law. Finally, Chapter Six contains the general conclusions and offers some reflections and recommendations with regard to self-determination and the use of force for the attainment of it.

Chapter 2: Historical development of self-determination

The historical process of emancipation of peoples in the recent past (mid-XXth century onwards) came to be identified as emanating from the principle of self-determination, more precisely external self-determination. It confronted and overcame the oppression of peoples as widely-known at that time. It became widespread in the historical process of decolonisation. Later on, with the recurrence of oppression as manifested in other forms, and within independent States, the emancipation of peoples came to be inspired by the principle of self-determination, more precisely internal self-determination, so as to oppose tyranny.⁷⁷

2.1 Introduction

Gaius⁷⁸ pointed out that it is inappropriate to deal with legal subjects by starting with the subject matter and without tracing their history and origins, not even giving one's hands a preliminary wash. In respect of self-determination, one cannot expect to understand it in the 21st century if one does not trace its antecedents from the beginning. In order to gain a full understanding of the dramatic implications brought about by the incorporation of the concept of self-determination within international law, it is necessary to wash one's hands in the waters of history, sometimes even in the waters of Greece and Rome.⁷⁹

The concept of self-determination has a long and controversial pedigree in international law.⁸⁰ The ideological root of self-determination is much older than most

77 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Separate Opinion of Judge AA Cançado Trindade)* 2010 ICJ Reports par 174.

78 Gaius was born, probably in Rome, somewhere circa 110 AD. He studied law in the Sabinian school under Aburnius Valero, and possibly Tuscianus. From 130 until his death, Gaius taught the law to Roman students. Gaius was a second-century jurist and the most influential of classical jurists. He developed the "first system in the history of law," dividing the law into persons, things, and actions (*ad personas, res, actiones*), thus distinguishing between substantive law and procedural law. Gaius was also father to the classic division between contract and tort (*delict*), although he recognised that there were cases that appeared to share in features of both (i.e. *quasi-contract*, *quasi-delict*, or what we call contorts). It is Gaius who first distinguished between corporeal or tangible and incorporeal or intangible property. He was the true architect of Justinian's collection and the model for many later constructions as well, including national codes like the *Siete Partidas* and the *Code Napoléon*, legal treatises like *Antoine Loisel's Institutes of Customary Law*, Savigny's own *System of Modern Roman Law*, and a variety of more tangential philosophical ventures. Gaius' pedagogical role was almost as various and substantial as that of Aristotle. See Kelley 1979 *American Historical Review* 619-648; Harris and Greenwell 2006 <http://www.harrisgreenwell.com>.

79 Harris and Greenwell 2006 <http://www.harrisgreenwell.com>.

80 Batistich argues that the concept of self-determination is virtually as old as the concept of statehood itself. Likewise, Van Walt van Praag notes that the doctrine of self-determination is as old as government itself. See generally Batistich 1995 *Auckland University Law Review* 1013; Van Walt van Praag 1979 *Wayne Law Review* 280-282.

people and even most legal scholars may often think.⁸¹ Some scholars argue that the right of people to decide their own affairs has probably existed since the dawn of humankind.⁸² At the core of human rights stand the ideals of equality and liberty as well as the idea that each individual has certain inborn and inalienable rights that may not be violated by authorities.⁸³ It follows that of all human rights, the right to equality and human dignity is far and away the most important.⁸⁴ The right to equality is the right which has been longest recognised in ancient times in natural law.⁸⁵

81 The roots of the doctrine of human rights are contained in more than twenty centuries of philosophy concerning the individual person, the individual's autonomy, freedom and his/her relationship with the government and with other people. The idea of human rights developed from and is still borne by the ideals of humanism and liberalism. At the root of the doctrine of human rights lies the idea that each individual has certain inborn and inalienable claims that may not be infringed upon by the government. It is generally accepted that what is understood of human rights today should be attributed amongst others to the Sophists, the successors of Socrates, the Stoics of the Fourth Century BC, classical Roman jurists, Grotius, Locke, Rousseau and Kant, Wolff, Blackstone and Fichte. See Venter *Constitutional Comparison* 127.

82 Margalit and Raz 1990 *Journal of Philosophy* 439-461.

83 Venter indicates that human rights doctrine has to do *inter alia* with the idea that there exists a so-called "higher law" that is elevated above the positive law, the perception that respect for human rights is a prerequisite for justice, and the view that the state and government as institutions of authority are the greatest potential threats to human rights. Venter *Constitutional Comparison* 127-128.

84 Human dignity or *dignitas hominis* in classical Roman thought largely meant "worth" or "intrinsic" worth". With respect to human rights, Kant argued that respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others. Schachter 1983 *American Journal of International Law* 848-854. This argument has been generally accepted as an ideal and incorporated in different legal system. In international law, for example, human dignity appears in the Preamble to the Charter of the United Nations as an ideal that "we the peoples of the United Nations" are determined to achieve. Also the first par of the Universal Declaration of Human Rights recognises that the inherent dignity and the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world. Kretzmer and Klein (eds) *The Concept of Human Dignity* 3-5. The concept of human dignity has become a central concept not only in international law, but also in many domestic laws as well. The *English Bill of Rights*, for instance, referred to the Crown and royal dignity. See the *English Bill of Rights (Act)* of 1689. Thus, a 1 of the German Basic Law states that the dignity of man is inviolable. To respect and protect it shall be the duty of all public authority. Israel's Basic Law on Human Dignity and Liberty declares that its object is to protect human dignity and liberty. See Englard 1999 *Cardozo Law Review* 1903-1928. Furthermore, the concept of "human dignity" is incorporated in several modern constitutions – in 1917 Mexico; in 1919 Germany and Finland; in 1933 Portugal; in 1937 Ireland; and in 1940 Cuba, to name just a few. For more details, see McCrudden 2008 *European Journal of International Law* 664. South Africa's new Constitution also grants a central place to the concept of human dignity. A1 provides that the Republic of South Africa is founded on certain values, the first-mentioned of which are "human dignity, the achievement of equality and the advancement of human rights and freedoms". The Bill of Rights included in the constitution affirms the democratic values of human dignity, equality and freedom. See s 1(a), ss 7-39 of the *Constitution of the Republic of South Africa*, 1996; Kretzmer and Klein (eds) *The Concept of Human Dignity* 1-19.

85 The principle of equality has been part of natural law ever since Zeno of Sidon and his earliest disciples. It is in countries outside Europe that the provenance of the concept itself, as also of its most ardent present-day defenders, must be sought. Like Christianity, which later espoused the same premises, the philosophy of Zeno reflected the revolt of the humble and the oppressed. *Legal Consequences for States of Continued presence of South Africa in Namibia*

According to natural law theory, all individual men were born equal.⁸⁶ As such, the idea that all human beings should be equally free to translate their impulses and desires into action has been part of natural law ever since the time of Zeno and his earliest disciples.⁸⁷ It is no wonder, as the issues that were relevant at the time of Zeno are still relevant today and applicable in modern democratic states.⁸⁸

Tracing the evolution of self-determination in theory and practice, as this chapter will do, is therefore a way of opening a window to a multifaceted, hugely important phenomenon. Theoretically, self-determination related to the 17th and 18th century's doctrines of individual liberty and nationalism. Practically, there remain a bitter struggle between the people and the state, often focused on the right to self-determination. Almost every day there are a media reports from around the world about demands for the right to self-determination.⁸⁹ Currently, on every continent there are ethnic struggles and most of them concern issues of the right to self-determination.⁹⁰ The question remains, however, to what extent a group of rebels is entitled to use force for the attainment of the right to self-determination.

(South-West Africa) *Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion (Separate Opinion of Vice-President Ammoun)* 1971 ICJ Reports par 55.

- 86 Hobbes stated that liberty and right are identical (*jus libertas est*). This right in a general sense, *jus naturale*, is *jus ad omnia*. It has given to everyone by nature the right to ensure his self-preservation. Man is free and should be free as long as this is compatible with order and peace. Spits "Hobbes' Views on the War and Peace" 111-120; Strauss 1950 *Review of Politics* 422-442.
- 87 Zeno, the Greek philosopher, was born in the city of Sidon on the Mediterranean coast of what today is Saida in Lebanon in about 150 BC. Zeno was a man of great learning who wrote on a very wide range of topics. According to Diogenes Laertes, a statue was erected to him in the city of Sidon, and also in Athens, where he had gone to teach and where he founded the school which first bore his name but was later called the Stoic school. The philosophy of Zeno reflected the assumption of equality. When Zeno died his work was completed by his disciples and the notion of equality definitively received and propagated throughout the world of that era by the same, namely Chrysippos of Phoenician Cyprus; Herillos of Carthage; Cato of Utica; Perseus, the friend of Zeno; Posidonios of Hama in Syria, a Phoenician halting-place on the road to Babylon; and Diogenes of Babylon, to mention a few of them. See *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion (Separate Opinion of Vice-President Ammoun)* 1971 ICJ Reports par 65.
- 88 Wells *United Nations Decisions* 1.
- 89 This demand has been heard from Western Saharan people, Palestinians, Quebecois, Kurds, South Ossetia and Abkhazia peoples, Tibetans and Kashmiri, South Sudanese, Somalis, and more recently the Tuareg people in Northern Mali, and from indigenous and racial groups, among many others. It has been estimated that there are about 5,000 ethnic or national groupings in the world and most dramatically in Africa. McCorquodale 1994 *International and Comparative Law Quarterly* 857; Brilmayer 1991 *Yale Journal of International Law* 177-202.
- 90 McCorquodale 1994 *International and Comparative Law Quarterly* 85; Brilmayer 1991 *Yale Journal of International Law* 177.

In support of this research question, this chapter identifies and evaluates different approaches to the existence and meaning of the concept of self-determination generally. It reveals different types of self-determination and assesses whether the modern law of self-determination authorises external self-determination in the form of self-determination. Stripped of any elevated meaning, self-determination refers to the "freedom of a people to determine for itself" contained in instruments such as the International Bill of Rights,⁹¹ regional human rights instruments and domestic constitutions. The following broad definition of the right to self-determination is proposed and employed in this study:

Self-determination as a peoples' right is a right of members of a group inhabiting a territory to determine its political status and organisation in order to redress political or territorial injustice within the framework of respect for human rights. Whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government.⁹²

According to this definition, self-determination encompasses the right to determine who is going to rule the community and to participate in public affairs. It includes also the right to secession as well as statehood.⁹³ Yet although this right epitomise in holistic fashion and in legal terms the integrated interrelationship between human beings and the state, its precise scope is highly contested.⁹⁴ Therefore it is helpful to consider the historical development of the right to self-determination to shed some light on this indeterminacy. To put it into perspective, this chapter will demonstrate

91 The International Bill of Human Rights comprises of the *Universal Declaration of Human Rights* (1948); ICCPR and ICESCR (1966); and its two Optional Protocols of 1966 and 1989.

92 It is acknowledged that self-determination may have different contextual and substantive meanings in different legal instruments and literature. Berman states that the existence of a legal right of self-determination continues to be hotly disputed, from logical, jurisprudential and practical perspectives. Nevertheless, the contention that such a right has come into being in the period following World War II rests on strong grounds. Berman confirms that "self-determination" refers to the right claimed by "peoples" to control their own destiny - despite the fact that such peoples have not yet achieved the status of "statehood" under international law. Berman 1989 *Wisconsin International Law Journal* 54; Nanda 2001 *Denver Journal of International Law and Policy* 307-310; Batistich 1995 *Auckland University Law Review* 113. Among other international legal instruments, the *Helsinki Final Act* provides 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, and to pursue as they wish their political, economic, social and cultural development". *Helsinki Final Act* (1975).

93 Tésón A *Philosophy of International Law* 129.

94 Xanthaki "The Right to Self-Determination" 15-33.

how self-determination evolved from a political thought into a legal norm which is currently acknowledged as a non-derogable norm.⁹⁵

The structure that will steer the line of discussion naturally divides into two main periods: the concept of self-determination preceding the *UN Charter* era, and the concept of self-determination in the Charter period. Accordingly, the chapter will follow this division by falling into two parts. The first part of the chapter will examine early writings on self-determination from indefinite time to the end of the Second World War (WWII). The second part of the chapter, as noted above, is devoted to the development of self-determination since the adoption of the *UN Charter* to date.

2.2 The genesis and understanding of the concept of self-determination

To understand the guises and passions which accompany the theory of self-determination into the 21st century, it is essential to comprehend its origin. In his concurring opinion in the *Namibia* case, Judge Ammoun stated:

... one is bound to recognize that the right of peoples to self-determination, before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of the peoples, in the finally awakened conscience of humanity.⁹⁶

In order to understand Ammoun's discussion of the right to self-determination, it is necessary to analyse its psychological, sociological and philosophical aspects.⁹⁷ Psychologically, self-determination is analysed as a basic human desire to associate primarily with one's immediate fellows (family, clan, tribe and village), and it is often reinforced by a suspicion of "alien" authorities.⁹⁸ In this connection Kelly⁹⁹ said that in the beginning of history there was the homogenous family. Families grouped

95 In the *Western Sahara* case, the ICJ accepted that the right to self-determination is part of international customary law. In the *East Timor* case, the ICJ recognised its *erga omnes* character. *Western Sahara Advisory Opinion* 1975 ICJ Reports; *East Timor (Portugal v Australia) Judgement* 1995 ICJ Reports. In the view of some writers, the right to self-determination is also considered as a *jus cogens* norm. See for instance, Brownlie *Principles* 513; Cassese *Self-determination of Peoples* 111; Harris *International Law* 111-130; Saul 2011 *Human Rights Law Review* 609-644.

96 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion (Separate Opinion of Judge Ammoun)* 1971 ICJ Reports par 74.

97 Hiwet 1987 *Wisconsin International Law Journal* 78.

98 Buchheit *Secession* 2.

99 Kelly 1999 *Drake Law Review* 211.

together into the clan or tribe.¹⁰⁰ The tribes begot the nation and the nations begot the kingdom.¹⁰¹ Eventually, kingdoms became empires and empires became nation-states.¹⁰² The conquest and subjugation of people as well as people's revolts resisting this state expansion and annexation have been a constant theme throughout history.¹⁰³ In that time, these revolts and resurgences were self-determination based.¹⁰⁴

Sociologically, self-determination connotes an expression of disapproval of involuntary political associations, which were historically accomplished through conquest, forced annexation, subjugation, dynastic union, and colonial expansion.¹⁰⁵ In fact, "if history were a chronicle of the voluntary association of human groups, there would be no need for a doctrine of self-determination".¹⁰⁶ It is sufficient to recognise that a demand for self-determination will often be deeply rooted in the wish to perpetuate the sense of comfort and security that attends a parochial environment, including local self-government, and it may be reinforced by a prejudice that "alien" government will always be harsher, less receptive, and, by definition, supportive of alien values.¹⁰⁷ Strictly speaking, government should be based on the consent of the governed, individual preferences, or individual rights.¹⁰⁸

However, there is a debate between supporters of individual rights and group rights¹⁰⁹ among scholars. Jones¹¹⁰ argues that human rights are the rights of human beings and, self-evidently, each human being is an individual being. Groups may

100 Kelly 1999 *Drake Law Review* 211.

101 Kelly 1999 *Drake Law Review* 211.

102 Kelly 1999 *Drake Law Review* 211.

103 Porter 2003 *San Diego International Law Journal* 2.

104 Self-determination is the legal term for the age-old force behind the Celtic, Pictish, and Jewish resistance to Roman domination; the Scottish revolts against the British Crown; the Arabic insurgence against the Ottoman Sultanate; and the Native American fight against the United States. See, Kelly 1999 *Drake Law Review* 201.

105 Hiwet 1987 *Wisconsin International Law Journal* 78.

106 Buchheit *Secession* 3.

107 Buchheit *Secession* 2.

108 Covell *Kant and the Law of Peace* 1-15.

109 Group rights are so-called "third-generation" or "solidarity rights," such as the rights to peace, development, a healthy environment, communication, humanitarian assistance, or a share in the common heritage of humankind. The holders of these rights must be distinct groups of human beings rather than individuals. It should be stressed that collective human rights retain their character as direct human rights. The group enjoys them communally rather than severally. Jones 1999 *Human Rights Quarterly* 96; see also Dinstein 1976 *International and Comparative Quarterly* 102-103.

110 Jones 1999 *Human Rights Quarterly* 80.

have rights of some sort, but whatever those rights might be they are human rights.¹¹¹ Other scholars insist that human rights can take collective as well as individual forms.¹¹²

Whatever one may think about the distinction between individual rights and group rights, both are interdependent, interrelated, mutual and self-reinforcing. Individual rights may be conceptually distinct from group rights, but the two sorts of rights are united by the same underlying values and concerns.¹¹³ It follows that collective rights are commonly placed within or alongside the doctrine of human rights. Nevertheless, not all individual rights are merely exercised collectively; there are some rights which are group rights by nature.¹¹⁴ An example is the right to self-determination, which is plainly a collective right rather than an individual right, although individuals are to be involved in its exercise.¹¹⁵ From this point of view, the right to self-determination is not vested in an individual but in the people concerned, who will conduct their lives according to their beliefs.¹¹⁶

In the light of this understanding, philosophers¹¹⁷ have linked self-determination to the idea that all human beings should be equally free to translate their impulses and desires into action through rational thought that defines their juridical existence as holders of a legal right. It is arguable that the principle of the equality of all as citizens

111 Jones 1999 *Human Rights Quarterly* 80.

112 See Burgers "The Function of Human Rights as Individual and Collective Rights" 63; Crawford "The Rights of Peoples" 159-192; Dinstein 1976 *International and Comparative Law Quarterly* 102; Felice 1996 *Ethics and International Affairs* 47; Freeman 1995 *Political Studies* 25-40; VanderWal "Collective Human Rights" 83; Cassese *Self-Determination of Peoples* 51-52. The issue of whether human rights might assume a collective form also figured in UN debates leading up to the adoption of common art. 1 of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, which referred together as the Human Rights Covenants. See Jones 1999 *Human Rights Quarterly* 81; Cassese *Self-determination of Peoples* 51-52; Morphet "Article 1 of the Human Rights Covenants" 75-76.

113 Jones 1999 *Human Rights Quarterly* 80.

114 These may be as follows: the right of peoples to self-determination, rights relating to international peace and security, rights in relation to development, and rights in relation to the environment, to mention just a few. See Crawford "The right of Peoples" 55-67.

115 Crawford "The right of Peoples" 58-59.

116 Ramcharan 1993 *International Journal on Group Rights* 27-43.

117 John Locke said that politics cannot be founded on anything but the consent of the people. Later Rousseau expressed his belief in self-determination and popular sovereignty by saying that "it is making fools of people to tell them seriously that one can at one's pleasure transfer people from one master to another, like herds of cattle, without consulting their wishes". Locke *Second Treatises* 61; Rousseau *Political Writings* 340-341 quoted in Van Walt van Praag 1979 *Wyne Law Review* 281; Morgan 1988 *New York University Journal of International Law and Politics* 355-358.

is as old as human societies,¹¹⁸ and recognised as a natural right – every person must have exactly the same rights as every other person.¹¹⁹ Individuals who are free are presumed to consent to their government, much as citizens in a liberal democracy are presumed to consent to the governance of the administration brought to power through the electoral system, even if they did not vote for that particular government.¹²⁰

According to Rousseau,¹²¹ no political government can be established without a social contract, which requires that every citizen be a co-legislator. The validity of government is based on the fact that it proceeds from the exercise of rational cognitive faculties by the members of the body politic.¹²² According to some writers, the government in the civil state should be based on the consent of the governed and a liberal idea of justice.¹²³ Kant,¹²⁴ for instance, has argued that sovereignty should be derived from the collective expression of free individuals. He went on to state that the equal capacity of all peoples allows them to govern themselves and to

118 Wilson *International Law* 55-56.

119 Tesón 1992 *Columbia Law Review* 70.

120 Tesón 1992 *Columbia Law Review* 70.

121 As Rousseau explained in his book *The Social Contract*, the general will was brought into being through the social contract that he saw as marking the transition made by men from the state of nature to the condition of political society. Essential to the act of contract founding political society was the total and unconditional alienation by each individual to the community of the rights and freedom that belonged to him in his natural condition, and, with this, the submission by each individual to the supreme direction of the general will which was embodied in the community and through which the community acted as a single person or entity. The form of association established through the social contract was the republic or body politic. In its passive condition, the body politic was the State, in its active role a sovereign, and in relation to other like associations a power. The individuals associated together in the State, considered in their collective aspect, were the people. When considered as individuals, they possessed the status both of citizens and subjects: citizens, in the respect that they shared in the sovereign power whose basis lay in the general will, and subjects in the respect that they were bound in obedience to the sovereign and to the laws of the state that issued from the sovereign. Rousseau *The Social Contract* 163-165; Covell *Kant and the Law of Peace* 42-43; see also a 21 of *Universal Declaration of Human Rights* (1948).

122 Tesón 1992 *Columbia Law Review* 67.

123 Kant denied that the State was to be regarded as a possession, and hence as something that could be acquired or disposed of through inheritance.....This was the argument that the State was to be thought of as originating in a contract, and hence (for Kant) as a form of association among men that existed to secure their rights and freedom as bearers of the capacities of citizenship. According to Kant justice contained three main elements: (i) a list of certain basic rights and liberties and opportunities (familiar from constitutional democratic regimes); (ii) a high priority given to these fundamental freedoms, especially with respect to claims of the general good and of perfectionist values; and (iii) measures assuring all citizens of adequate, general means to make effective use of their freedoms. See, Rawls 1993 *Critical Inquiry* Autumn 43; Covell *Kant and the Law of Peace* 103.

124 Kant *The Metaphysical Elements of Justice* 12-13; see also Hiwet 1987 *Wisconsin International Law Journal* 78.

legislate by majority vote, and ensure that the rights of everyone are respected.¹²⁵ Similar arguments have been made by other commentators. Kedourie,¹²⁶ for example, maintained that the origins of any state, whatever the title of its rulers, were under the periodic election of subjects to determine as free and moral beings.

In line with the above, scholars often cite the normative precepts of freedom and equality invoked in the American revolt against British rule and the overthrow of the French Monarchy as progenitors of the modern concept of self-determination.¹²⁷ The core values associated with the concept of self-determination, however, clearly are not solely within the province of the history of Western thought.¹²⁸ In this regard judge Ammoun identified:

Equality was not to the liking of the Greeks up to and including the time of Plato and Aristotle, who both found words to justify inequality and slavery, whereas for the Stoics: 'man is a slave neither by nature nor by conquest'. When Zeno died, his work was completed, and the notion of equality definitively received and propagated throughout the world of that era by his disciples, the distant forerunners of the eighteenth-century philosophers. Two streams of thought had become established on the two opposite shores of the Mediterranean, a Graeco-Roman stream represented by Epictetus, Lucan, Cicero and Marcus Aurelius; and an Asian and African stream, comprising the monks of Sinai and Saint John Climac, Alexandria with Plotinus and Philo the Jew, Carthage to which Saint Augustine gave new lustre; the two streams flowed together in Spain with Seneca. The stoic philosophy, sowing for the first time in mankind's history the seeds of equality between men and between nations, influenced the greatest of the Roman jurisconsults who were of Phoenician origin, Papinius and Ulpian, and then the doctors of Christianity through whom it was eventually transmitted to the Age of Reason.¹²⁹

From this background it is quite clear that these societies of ancient Greece and Rome were the first to apply self-determination, moderately and with qualification, in

125 Kant *The Metaphysical Elements of Justice* 12-13; see also Tésou 1992 *Columbia Law Review* 60-61.

126 Kedourie *Nationalism* 23-24.

127 Anaya *Indigenous Peoples* 98.

128 Anaya 1993 *Transnational Law and Contemporary Problems* 135.

129 For Aristotle, reason was a privilege of which certain people, for instance slaves, were deprived. His advice to his pupil Alexander, who was not yet called the Great, was "to treat Greeks as members of the family, the Barbarians as animals...." Yet had not the Barbarians already probed space – predicted eclipses and given names to the signs of the Zodiac; divided time into months, into weeks; invented the alphabet; and were they not soon to give the world the first really humane philosophy: namely, that founded upon equality? *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion (Separate Opinion of Judge Ammoun)* 1971 ICJ Reports par 65. For this flowering of the concept of equality in the ancient land of Phoenicia, its adoption by the Graeco-Roman world and Christianity, and its development through the vicissitudes of time, the following work may be consulted. Schulz *History of Roman Legal Science* 67.

their internal affairs.¹³⁰ In this respect Rousseau described this form of freedom and civil liberty as having its origin in the political communities of the Greek city-states and of the Roman Republic.¹³¹ In other words, Rousseau viewed sovereignty as belonging to the people, and as a power that was to be exercised in accordance with the common will through which the people acted collectively as a united citizen-body.¹³² By that time there was a question of secession, usually following conquest, and the view that the territorial and political rights of peoples are inalienable and inherent because they are given by natural law or divine law.¹³³

Pomerania, the lands of Culm and Michalow were inhabited and governed by the Poles who had given, in their language, names to mountains, rivers, towns and villages, well before the existence and establishment of the Teutonic order... The nobility, the bourgeoisies, and subjects of all kinds of the aforementioned lands, unable to bear the tyrannical, oppressive and usurping of the great masters, had returned to their former and original rights, obedient in that to laws both human and divine.¹³⁴

In 1464, Jacques de Szadek used these words to define the rights of the Poles of this region to return to their own traditions and ruler.¹³⁵ It follows that the consent of the *plebes* had to be given in a case of secession. Such was also the case of the

130 Abulof 2009 http://www.princeton.edu/~lisd/publications/abulof_workingpaper09.pdf.

131 Covell *Kant and the Law of Peace* 44-47.

132 Covell *Kant and the Law of Peace* 44-47. Sometimes once a government has been established its functioning does not merely follow the common will of the people. A state as an entity is different from its inhabitants. The state is the institution created to implement social cooperation grounded on the respect for liberty and human rights. Accordingly, the domestic system serves human beings, and promotes justice and human rights. In doing so, it is not necessary that it follow the will of all its citizens. For instance, in *S v Makwanyane* the Constitutional Court did not take into consideration public opinion. Par 88 of the judgment reads: "public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication... By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority". *S v Makwanyane and Another* 1995 3 SA 391 (CC) par 87-88. In domestic law there are always three competent organs: legislative power, executive power and judicial power. In a democratic state people take part in the conduct of public affairs through representation. A 21 of the *Universal Declaration of Human Rights* (1948). However, at international level the consent of states is always required. International law governs relations between independent states. In the *Lotus Case* the ICJ states: "the rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims". *Case of the SS Lotus (France v Turkey)* 1927 PCIJ Ser A No 10.

133 Wells *United Nations Decisions* 7.

134 Wells *United Nations Decisions* 7.

135 Wells *United Nations Decisions* 7.

earliest known popularly based secession: the transfer of the Lyonnais (currently Lyon) from the Holy Roman Empire to France in 1307.¹³⁶

In the early 16th century Erasmus condemned title acquired by conquest. He said that all power over men and beasts should be based on the consent of those concerned.¹³⁷ Francis put the emphasis in this way: "it is based in law that one cannot transfer cities or provinces to another against the will of their inhabitants".¹³⁸ A century later a similar opinion was expressed by Grotius, who stated that:

In the alienation of a part of the sovereignty, it is also required that the part which is to be alienated consent to the act. For those who united to form a state, contract a certain perpetual and immortal society, in virtue of their being integrant parts of the same; whence it follows that these parts are not under the body in such a way as the parts of natural body, and therefore may rightly be cut away for the utility of the body ..., and in like manner, on the other hand, a part has not a right to withdraw from the body, except evidently it cannot otherwise preserve itself: for case of extreme necessity is to be excepted, which reduces the matter to mere natural law... And hence it may be sufficiently understood, why, in this matter, the part has a greater right to protect itself than the body has over part; because the part uses a right which it had before the society was formed, and the body does not.¹³⁹

Grotius introduced the new threads of thought which also appear and reappear in succeeding centuries. It is important to note that for Grotius the monarch could not give away a part of his lands without the consent of the inhabitants. In the same vein, Kant¹⁴⁰ stated that a state is not a piece of territory, but rather a civil society created by a social contract. Kant saw individual freedom as the basis of a liberal theory of self-determination. In Kant's words:¹⁴¹

Now I say a man, and in general every rational being, exist as an end in himself, not merely as means for arbitrary use by this or that will. He must in all his actions, whether directed to himself or to other rational beings, always be

136 Abolof 2009 http://www.princeton.edu/~lisd/publications/abulof_workingpaper09.pdf.

137 It is submitted that traditionally any claim to self-determination should be subject to a free and fair democratic referendum or plebiscite as the way to establish consent. Moore 1997 *Political studies* 900-913. In this connection, a 21 of the *Universal Declaration of Human Rights* provides, among other rights, everyone's right to take part in the government of the country, directly or through freely chosen representatives. The last par reads: The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. *Universal Declaration of Human Rights* (1948); Beigbeder *International Monitoring of Plebiscites* 12.

138 Morgan 1988 *New York University Journal of International Law and Politics* 355-358.

139 Grotius *Hogonis Grotii: De Jure Belli Ac Pacis* 342-343 quoted in Wells *United Nations Decisions* 8.

140 Kant *Perpetual Peace* 107-108.

141 Kant *Perpetual Peace* 10; see also Tesón 1992 *Columbia Law Review* 53-75.

regarded at the same time as an end... rational beings are called persons inasmuch as their nature already marks them out as ends in themselves ... Such an end is one for which there can be substituted no other end to which such beings should serve merely as means, for otherwise nothing at all of absolute value would be found anywhere... The practical imperative will therefore be the following: Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.

The argument may be derived from this paragraph that persons should always be treated as ends in themselves, not merely as means.¹⁴² Kant seemed to conceive of the state in a holistic way as a moral person created to implement social cooperation grounded on the respect for liberty, autonomy and dignity of persons. As such, peoples who are free are presumed to consent to their government, much as citizens in a liberal democracy are presumed to consent to the governance of the administration brought to power through the electoral system, even if they did not vote for that government.

It follows that the above-mentioned philosophers believed that the world is governed by natural law. According to natural law, rights were universally distributed and inalienable - and all human beings were born equally.¹⁴³ This understanding has been reaffirmed by Kedourie. He said that if society was ordered according to natural law it would attain ease and happiness, and individuals were not bound together by any forces beyond the law of nature. Societies were merely groups of individuals living together in order to secure their security and wellbeing.¹⁴⁴

However, notwithstanding the efforts of these philosophers, self-determination did not obtain the status of a legal principle at that time. It remained nothing more than a theoretical principle, and there was relatively little practice of self-determination in international relations. For example, from the collapse of Rome until the twilight of the Middle Ages there is no evidence of a referendum having taken place.¹⁴⁵ As Wilson¹⁴⁶ noted, it was not until the time of the French and American Revolutions that the concept of self-determination or national self-determination really gained

142 Tesón *A Philosophy of International Law* 8-9.

143 Kedourie *Nationalism* 10.

144 Kedourie *Nationalism* 10.

145 Abulof 2009 http://www.princeton.edu/~lisd/publications/abulof_workingpaper09.pdf.

146 Wilson *International Law* 55.

prominence in international law. Further understanding of the concept of self-determination can be gained from a brief overview of its historical evolution.

2.3 The theory of self-determination in early international law

The first expression of self-determination as a political thought has not been clearly dated.¹⁴⁷ Some scholars argue that it first appeared in German writings in the late nineteenth century.¹⁴⁸ Others, such as Cassese, noted that self-determination as a term of art may be traced back to the American Declaration of Independence of 1776, and was echoed in the French Revolution of 1789.¹⁴⁹ What appears to be a thorny issue is whether self-determination is a right in international law or simply a principle of political thought which has assumed great prominence in international affairs at various periods since the eighteenth century.¹⁵⁰ It is of importance to resolving this conundrum to discuss the early foundations of self-determination and its application in history. It is also necessary to define the term "self-determination", which is divided into internal and external self-determination. In order to outline its development it is essential to review the prominent advocates, significant doctrine and international instruments which documented the right to self-determination.

2.3.1 The American and French Revolutions

As a political concept, self-determination may be traced back to the American Declaration of Independence of 1776, whereafter it was echoed in the French Revolution of 1789.¹⁵¹ In practice, it was these revolutions that proclaimed self-determination as a revolutionary principle against despotism and monarchic rule.¹⁵² Politically, self-determination has come to imply two types of rights which complement each other: the right of a nation to self-determination,¹⁵³ and the right of a people to have a government of its free choice without any external or internal

147 Collins 1980 *Case Western Reserve Journal of International Law* 138.

148 The German word for self-determination, Selbstbestimmungsrecht, appeared in an 1896 Resolution of the London International Socialist Congress. See Umozurike *Self-determination* 3.

149 Cassese *Self-determination of Peoples* 2.

150 Wilson *International Law* 55; Castellino *International Law* 11.

151 Cassese *Self-determination of Peoples* 2.

152 Cassese *Self-determination of Peoples* 2.

153 Sureta *The Evolution* 11.

domination. The American Revolution was based on this right, as expressed in its Declaration of Independence.¹⁵⁴ The second paragraph reads:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of people to alter or abolish it and institute new government, laying its foundation on such principles, and organising its power in such form, as to them shall seem most likely to effect their safety and happiness.¹⁵⁵

Similarly the French Revolution was based on the notion of the rights of people when in 1789 it declared popular sovereignty and the right of the people to resist oppression.¹⁵⁶ This was proclaimed in the Preamble to the *French Constitution* of 1793:

The French people, convinced that the forgetfulness of and contempt for the natural rights of man are the sole causes of the misfortunes of the world, have resolved to set forth these sacred and inalienable rights in a solemn declaration, in order that all citizens, being able constantly to compare the acts of the government with the aim of every social institution, may never permit themselves to be oppressed and degraded by tyranny, in order that the people may always have before their eyes the bases of their liberty and their happiness, the magistrate the guide to his duties, the legislator the object of his mission.¹⁵⁷

The *French Constitution* guarantees all Frenchmen equality, liberty and the enjoyment of all the rights of man.¹⁵⁸ It follows that the French Revolution established the idea that: "all men were born and remain equal in rights, and the relations between them were to be governed by justice and not by the favour of privileged heredity".¹⁵⁹ In fact, during the time of the French Revolution the concept of self-determination served as the principle of equality of all citizens before the law. This principle of equality associated with individual liberty led directly to the idea that the nation as well as the individual had natural and inalienable rights to determine its

154 *United States Declaration of Independence* (1776).

155 Par 2 of the *United States Declaration of Independence* (1776).

156 Umuzurike *Self-determination in International Law* 11.

157 *Declaration of the Rights of Man and Citizen from the Constitution of the Year I* (1793).

158 In November 1792 the French National Assembly declared that "In the name of the French people, the National Assembly declares that it will give help and support to all peoples wanting to recall their freedom. Therefore, the Assembly considers the French authorities responsible to give orders to grant all means of assistance to those peoples, to protect and compensate the citizens who might be injured during their fight for the cause of liberty". See Castellino *International Law* 11.

159 Collins 1980 *Case Western Reserve Journal of International Law* 139.

political status.¹⁶⁰ Thus, self-determination basically postulates the rights of a people to be organised within an established territory and to freely consent to their government. Sureda¹⁶¹ describes the relevance of the ideals of the French Revolution to the problem of international self-determination as follows:

The history of self-determination is bound up with the history of the doctrine of popular sovereignty proclaimed by the French Revolution: government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong should be able to secede and organise themselves as they wish. This meant that the territorial in a political unit lost its feudal predominance in favour of the personal element: people were not to be any more a mere appurtenance of the land.

In France, self-determination was conceived as a standard concerning the transfer of territory. Article 2 of Title XIII of the Draft of the Constitution presented by Condorcet to the *National Convention* 15 February 1793 stated that "no ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned".¹⁶²

To be sure, the French revolution marked a milestone in the early development of self-determination. The core principles associated with self-determination lie in the Declaration of the Rights of Man and of the Citizen, which states that "men are born free and remain free and equal in right".¹⁶³ It follows that men had to be autonomous and free from any political order to which they had not consented. This leads to an important point, that the concept of individual self-determination first appeared in international law during the time of the French Revolution.¹⁶⁴ It toppled beliefs in the absolutist political structure by introducing to the political stage a new political and moral right - when the people no longer support the ruling class or the political regime, they have the right to change it.¹⁶⁵ At that time self-determination was seen

160 Wells *United Nations Decisions* 9-15.

161 Sureda *The Evolution* 17.

162 A 53(3) of the *French Constitution* of 1958 reflects the norm which formed Title XIII of the Draft of the *French Constitution* of 1793: "No ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned". See Cassese *Self-determination of Peoples*; a 53(3) of the *French Constitution* of 1958.

163 A 1 of the *French Declaration of the Rights of Man and of the Citizen* (1789).

164 Marchildon and Maxwell 1992 *Virginia Journal of International Law* 583-399.

165 Kedourie *Nationalism* 12.

to be a simple corollary of democracy.¹⁶⁶ Basically, government was no longer to be based on the claim and consent of the monarch, but on that of the people.

In this period, revolts against the tyrannical state brought democratic values and nationalist movements together under the rubric of individual self-determination.¹⁶⁷ It is alleged that the right of self-determination paved the way for the annexations of Avignon and Venaissin to France in 1791, and of Nice and Savoy a year later.¹⁶⁸ In each of these contexts plebiscites were held to determine the populations' desire to unite with France.¹⁶⁹ However, self-determination through plebiscite was not consistently applied. Plebiscites were legitimate only if the vote was pro-France.¹⁷⁰ In addition, there was an internal limitation on the right of self-determination. During this period, a plebiscite was conducted only in relation to secession. The colonial peoples, minority or ethnic groups were not concerned. It is further argued that self-determination did not clearly refer to the peoples' right to freely determine their own political status - what is called today "the right to internal self-determination".¹⁷¹

Whatever the limitations and weaknesses of self-determination, it is of important to note that the core of self-determination as a governing political principle lies in the American and French Revolutions.¹⁷² It follows that the people were no longer the subjects of the King, and government became responsible and accountable to the people.¹⁷³ The modern-day right of peoples to external self-determination has its early origins in this principle, which justifies the maxim that a state's inhabitants should no longer be transferred from one state to another without their consent.¹⁷⁴

It should be noted that since the right to self-determination came into existence it has been disseminated from France into neighbouring countries and has played a major role in the development of the whole of Europe.¹⁷⁵ Thus, self-determination was

166 Marchildon and Maxwell 1992 *Virginia Journal of International Law* 599.

167 Marchildon and Maxwell 1992 *Virginia Journal of International Law* 599.

168 Wilson *International Law* 56; Cassese *International Law* 12.

169 Cassese *Self-determination of Peoples* 12.

170 Wambaugh *Monograph* 4-10; Cassese *Self-determination of Peoples* 12.

171 Cassese *Self-determination of Peoples* 12.

172 Sureda *The Evolution* 17.

173 Wise *Nation-Building in Multi-Ethnic Jurisdictions* 27.

174 Wippman (ed) *International Law* 8; Cassese *Self-determination of Peoples* 13.

175 In the nineteenth century Manzinni invoked "self-determination – in the form of a political postulate demanding that all nations should be allowed freely to choose their status". Quoted

deemed relevant in international relations during WWI.¹⁷⁶ At the end of the WWI, self-determination became the obvious vehicle for the re-division of Europe by the victorious allies.¹⁷⁷ Also, it created both a challenge and an alternative to the empires of Russia, Austria-Hungary and the Ottomans, and provided an ideological justification for the unifications of Italy and Germany and the independence of various Balkan states from Greece.¹⁷⁸ Although self-determination was the key to an eventual lasting peace in Europe, it was applied only to nations which were within the territory of the defeated empires, and not to overseas colonies.¹⁷⁹

2.3.2 *Lenin and the Soviet concept of self-determination*

Lenin was the first to insist, to the international community, that the right of the people to self-determination be established as a general criterion for their liberation.¹⁸⁰ Lenin's policy on self-determination was based on the principle that if true socialism were to be established, nations within the Soviet Union would not need to secede.¹⁸¹ Lenin strongly believed that socialism creates the possibility for a complete abolition of national oppression. He went on to say that "the possibility to end oppression becomes reality only when there is a complete democracy in all spheres, including the fixing of state boundaries in accordance with the 'sympathies' of the people, and including complete freedom of secession".¹⁸² Looking at various statements of Lenin's from the Revolution era, one is forced to argue that he envisaged self-determination as the right all nations to separate from alien rule, and from an independent state.¹⁸³ He advocates that each nation subject to the Empire should be given the free choice to separate from or to remain united with the great

by Beales "Mazzini and Revolutionary Nationalism" 151-154; Cassese *Self-determination of Peoples* 13.

176 Wippman (ed) *International Law* 8.

177 Hannum *Autonomy* 27-28.

178 Mazzini wrote that "the map of Europe will be remade. The countries of the people will rise, defined by the voice of the free, upon the ruins of the countries of Kings and privileged castes. Between these countries there will be harmony and brotherhood". Quoted by Beales "Mazzini and Revolutionary Nationalism" 151-154. Also see Cassese *Self-determination of Peoples* 13.

179 Hannum *Autonomy* 28.

180 Cassese *International Law* 14.

181 Page 1950 *Slavonic and East European Review* 342-358.

182 Page 1950 *Slavonic and East European Review* 346.

183 Lenin "The Right of Nations to Self-determination" 395.

Russian people.¹⁸⁴ This statement is the first equating national self-determination with sovereignty.

According to Lenin socialism and democracy were to go hand in hand, on the international plane, with the "full equality of nations" and "the right of oppressed nations to self-determination".¹⁸⁵ Indeed, Lenin grasped the dialectical relationship between national democratic struggles and the socialist revolution and asserted that the concept of national self-determination is none other than that of political liberty applied to a territorial area.¹⁸⁶ The concept was spelled out in his statement in July 1903:

In the project of the party programme we set up a demand for a republic with a democratic constitution, which guaranteed, among other things, the recognition of the right of self-determination for all nations entering into the form of a state. This programme demand seemed insufficiently clear to many... we explained its significance in the following manner. Social democracy will always struggle against any attempt to influence national self-determination by force or by any other unjust means. But unconditional recognition of the struggle for the freedom of self-determination in no way obligates us to support each demand for national self-determination. Social democracy, as the party of the proletariat, has as a positive and major task the achievement of self-determination not of peoples and nations, but of the proletariat within each nationality. We must always and unconditionally strive for the closest unity of the proletariat of all nationalities, and only in separate and exceptional cases can we express and actively support the demand leading toward the creation of a new class (i.e. bourgeois) state or to substitute for the full political unity of the state the weaker federal unity.¹⁸⁷

Thus, the right of national self-determination was incorporated both in the 1903 programme of the Russian Social Democratic Workers Party, and in the 1905 programmatic statement of the Socialist Revolutionary Party.¹⁸⁸ From this period, the principle of national determination was transformed into the principle of socialist self-determination, which was enunciated first by Lenin and then by Stalin.¹⁸⁹ Thus, at the

184 From the outset Lenin understood the right of self-determination to mean only the right of a nation with a clearly defined territory to decide to secede or to remain within an existing state association. That is, he accepted the possibility of independence for a nation-state, or territorial autonomy. Page 1950 *Slavonic and East European Review* 342.

185 Lenin "The Socialist Revolution" 143.

186 Lenin "The Socialist Revolution" 143-156; Senese 1989 *Social Justice* 21.

187 Lenin "The National Question" 452-461.

188 Meissner 1976 *International Journal* 57.

189 Hiwet 1987 *Wisconsin International Law* 81.

Seventh Conference of the Russian Social-Democratic Labour Party, held in April 1917, Stalin¹⁹⁰ expressed the party's attitude as follows:

... the recognition of the right of people to secession; the regional autonomy for people which remain within the given state; specific laws guaranteeing freedom of development for national minorities, and a single, indivisible proletarian collective body, a single party, for the proletarians of all the nationalities in the given state.

In Stalin's opinion, self-determination means that a nation can organise itself according to its own mind and free will.¹⁹¹ He added that no one has the right forcibly to interfere in the life of the nation.¹⁹² This means that the nation has the right to enter into relations with others. It has the right to secede completely. As such, nations are sovereign, and all have equal rights.¹⁹³

To understand Stalin's thesis on self-determination, it is necessary to place it within the context of Marxist theory. According to Marxist theory, self-determination was an aspect of nationalism.¹⁹⁴ Nationalism emerged as a political doctrine in the late

190 Stalin "Marxism and the National Question" 66.

191 According to Stalin a nation is "a historically constituted, stable community of people, which is united by a common language, territory, economic life, and a psychic individuality manifested in a common culture". In defining a nation, Stalin asserts that there is no single distinguishing characteristic of a nation. Instead, a nation represents the combination of all its characteristics taken together. For more details, see Stalin "Marxism and the National Question" 303-313.

192 Stalin "Marxism and the National Question" 321.

193 Stalin "Marxism and the National Question" 321.

194 *Wise Nation-Building in Multi-Ethnic Jurisdictions* 25. As a political doctrine, nationalism is subject to diverse uses and usually invoked by those enthusiastically seeking political legitimacy. Chu 2000 *Journal of Asian and African Studies* 303-321. Then there is the question of what nationalism is. Kendurie noted that nationalism is a doctrine invented in Europe during the nineteenth century. It pretends to supply a criterion for the determination of a unit of population proper to enjoy a government exclusively its own, for the legitimate exercise of power in the states. Briefly, the doctrine holds that humanity is naturally divided into nations, that nations are known by certain characteristics which can be ascertained, and that the only legitimate type of government is national self-government. Kendurie *Nationalism* 9. Gellner espoused the belief that nationalism was political ideology and that the idea of a nation was artificially created by the common desires of people. Gellner *Nation and Nationalism* 63-87. Summers stated that nationalism has been an extremely successful political doctrine and has become inextricable from the way modern states are perceived. He has suggested that "nationalism is a doctrine of statehood" that derives from viewing the nation as the basic political unit. He has two basic beliefs: the first is that the world is divided into peoples who comprise the bases for states and political borders; the second belief is that individuals can achieve freedom only through the nation and that the individual's dominant loyalty is to the nation. Summers *Peoples and International Law* 8-10. Yet, despite its wide intellectual currency, the concept of nationalism has remained an ambiguous term. Analytical writings on the subject raise a number of problems which, once understood, cause much of the historical literature based on the concept to lose its persuasiveness. Nationalism as an explanatory factor made its debut in European history, where the standard works of an earlier generation described how the new sentiment dissolved the old society with its kings, clerics, and local rather than national loyalties, and then provided a common allegiance that gave the

eighteenth century and early nineteenth century. It should be noted that nationalism and national self-determination are closely aligned political and legal doctrines, and that the Marxist idea of nationalism is often characterised as an independent, often divisive force, offering fragmented responses and expressing alternate solutions within the traditional society. Nationalist sentiments may seek to establish a sort of familial tie between the citizen and the state or group seeking secession. This individual-based self-determination was given a more group-centered understanding in the writings of socialist scholars such as Stalin and Lenin at the start of the twentieth century.

Keeping in mind the theories set forth in Marxist revolutionary theory, Stalin¹⁹⁵ pointed out, however, that:

The question of the right of nations freely to secede must not be confused with the question that a nation may automatically secede at any given moment. The question of secession must be settled by the party of the proletariat in each particular case independently, according to circumstances... A people has a right to secede, but it may not exercise that right according to circumstances. Thus, we are at liberty to agitate for or against secession, according to that interest of the proletariat, or the proletarian revolution.

From the methodological point of view, Stalin's concept of self-determination was merely linked with secession – what is called at this time external self-determination. Page¹⁹⁶ states that Stalin's view of self-determination meant "complete freedom to agitate for secession and for a referendum on secession by the seceding nation". However, emphasis should be placed on the manner of implementing self-determination advocated by Stalin. For him, secession was not necessarily to be

reconstructed nations an unprecedented cohesiveness. It is a force in its own right, a sentiment whose welling up will bend even the strongest social, economic, and political structures. It is a contingent phenomenon, itself the product of more basic causes, such as changes in the economy or in the ways in which information is communicated. See Waldron 1985 *World Politics* 416-433; Martin 1968 *Journal of the History of Ideas* 231-252. The recent literature on the subject from both the social sciences and history provides that nationalism is a multi-faceted phenomenon. Expressing both claims for recognition and for superiority, it is marked by an intrinsic moral ambivalence. Politically, its emergence has coincided with the affirmation of liberal and democratic ideas, and particular the notion of popular sovereignty. It expresses the political identification of citizens with their state, and the policies of governments to reinforce such identification. It is based on the existence of a shared national identity, relying on the presence of historical, cultural, language or religious ties. See also Avineri 1991 *Journal of Contemporary History* 637-657.

195 Stalin "Marxism and the National Question" 64.

196 Page 1950 *Slavonic and East European Review* 342-358.

carried out by forcible actions, but could be a result of the free expression of the popular vote- that is, a plebiscite.¹⁹⁷

After WWI the right of self-determination received a new boost. In 1917, in the famous Decree of Peace, Lenin¹⁹⁸ had written:

The international programme must bring all oppressed colonial peoples into the international scheme. The right of all people to secession or to home rule must be recognised.... The Negro and all other colonial peoples participate on an equal footing with European peoples in the conferences and commissions and have the right to prevent interference in their internal affairs.

It is clear that what Lenin meant by the right to self-determination was an anti-colonial postulate designed to lead to the liberation of all colonial peoples.¹⁹⁹ Thereafter, self-determination was purported to be the basis of decolonisation. Within this framework it had an enormous influence on the foreign policy of the various states and the corpus of international law. Similar views on self-determination were developed by the US President Woodrow Wilson, who related the principle to American ideals of democracy, promoting the self-determination of peoples as the foreign extension of American norms of political fairness.²⁰⁰

2.3.3 *Wilson and his Views Regarding Self-Determination*

As Lenin was championing self-determination with an eye towards a worldwide socialist revolution, another statesman who greatly contributed to the theory and practice of self-determination was the President of the US, Woodrow Wilson.²⁰¹ In his speech on 27 May 1916 he stated that "every people has a right to choose the sovereignty under which they shall live".²⁰² President Wilson is generally credited with having popularised the right to self-determination during the First World War.²⁰³ In his speech before the Senate in January 1917 Wilson²⁰⁴ stated:

No peace can last, or ought to last, which does not recognise and accept the principle that governments derive all their just powers from the consent of the

197 Cassese *Self-determination of Peoples* 17.

198 Lenin "Foreign Policy" 421 quoted in Cassese *Self-determination of Peoples* 16.

199 Page 1950 *Slavonic and East European Review* 342-358.

200 Cobban *The Nation-State* 136.

201 Cassese *Self-determination of Peoples* 19.

202 Wilson *President Wilson's Addresses* 70-71.

203 Manela *The Wilsonian Moment* 24.

204 President Woodrow Wilson's Fourteen Points 8 January 1918 http://avalon.law.yale.edu/20th_century/wilson14.asp.

governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.

Later in the same year, Wilson stated that national aspirations must be respected.²⁰⁵ People may be dominated and governed only by their own consent.²⁰⁶ However, Wilson did not make public use of the term self-determination until February 11, 1918. Before that date he had used the term "self-government", which implied the right of peoples to choose their own democratic government.²⁰⁷ Wilson intended the principle to apply immediately and unconditionally to the people as a standard for democracy.²⁰⁸

On the international level Wilson first used the term "self-determination" in a later speech of February 1918. In this speech Wilson²⁰⁹ pointed out:

There shall be no annexations, no contributions, no punitive damage. Peoples could not be handed on from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; people may now be dominated and governed only by their own free will and consent. Self-determination is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril.

The principles to be applied are the following:

First, that each part of the final settlement must be based on the essential justice of that particular case and on such adjustments as are most likely to bring a peace that will be permanent;

Second, that peoples and provinces are not to be bartered about from one sovereignty to another as if they were mere chattels and pawns in a game;

Third, every territorial settlement involved in the war must be made in the interest and for the benefit of the populations concerned and not as part of any mere adjustment or compromise of claims amongst rival States; and

Fourth, that all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe, and therefore of the world.²¹⁰

In short, this speech embodies the three variants of self-determination. First, he advocated the right of each people to opt for the form of government under which it

205 Wells *United Nations Decisions* 31.

206 Whelan 1994 *International and Comparative Law Quarterly* 99.

207 Whelan 1994 *International and Comparative Law Quarterly* 100.

208 Cassese *Self-determination of Peoples* 19.

209 President Woodrow Wilson's Fourteen Points 8 January 1918 http://avalon.law.yale.edu/20th_century/wilson14.asp.

210 *US Congressional Record* 65th Cong 2nd Sess 1918 LVI Part II 1936-1938 quoted in Wells *United Nations Decisions* 33.

would live.²¹¹ The second version of self-determination was related to the states of central Europe in accordance with national aspirations.²¹² Finally, Wilson championed self-determination as a criterion governing territorial change.

It is clear that at the time that Wilson made his points, he was using the term "self-determination" as a pseudonym for a right to democracy. In modern literature, this has been classified as internal self-determination.²¹³ The internal self-determination aspect implies the right of the people of a state already recognised by international law to determine their own form of government.²¹⁴ It means that identifiable peoples or nations should be given the means to govern themselves, within the spirit of internal self-determination. The peoples of each state were to be free to select their own state authorities and political leaders.

As for external self-determination, Wilson used the term sparingly, and in his war-time speeches seemed more concerned with the internal aspect rather than external self-determination.²¹⁵ By the way of example, Wilson was very much against the dismemberment of the Austro-Hungarian Empire.²¹⁶ For him, external self-determination meant two things: the right of peoples to choose their own sovereignty and their own allegiance, and to be free from alien sovereignty.²¹⁷ The problem of external self-determination was becoming more prominent in his thought, but it was still not clear that the "self" which was to free itself from alien rule had the right to secede from the state it belonged to and create a new state. As has been previously observed, Wilson never intended to endorse secession. A month before his Fourteen Points Address, Wilson pointed out that "we do not wish in any way to impair or rearrange the Austro-Hungarian Empire".²¹⁸ He went further to state that "it is not an affair of ours what they do with their own life, either industrially or politically".²¹⁹

211 Cassese *Self-determination of Peoples* 19.

212 Cassese *Self-determination of Peoples* 19.

213 Castellino *International Law* 13.

214 Mustafa 1971 *International Lawyer* 480.

215 Wells *United Nations Decisions* 39.

216 Castellino *International Law* 13-19.

217 Pomerance 1976 *American Journal of International Law* 17.

218 Pomerance 1976 *American Journal of International Law* 18; Heather *National Self-determination* 47-52.

219 Pomerance 1976 *American Journal of International Law* 18.

This shows that the Fourteen Points Address should not be interpreted as sanctioning the application of the right of self-determination via the dissolution of established states. Whereas Wilson openly supported the integrity of empires, he made it clear that peoples could be free to determine their own government under which they would live. It was in this conviction that Wilson proposed the post-war settlement. This implied: (1) a scheme whereby identifiable peoples were to be accorded statehood; (2) the fate of disputed border areas was to be decided by plebiscite; and (3) those ethnic groups too small or too dispersed to be eligible for either course of action were to benefit from the protection of special minority regimes supervised by the Council of the new League of Nations.²²⁰

Given this context, as well as Wilson's own political and intellectual development, self-determination had to be realised through plebiscites and in conformity with international law.²²¹ Whereas Lenin envisaged self-determination as a principle to be achieved by any means including a liberation struggle, Wilson did not envisage a violent struggle for self-determination. It is apparent that Lenin's and Wilson's views differ. Lenin saw self-determination as a revolutionary principle for radically (and, if necessary, by force of arms) granting independence both to oppressed peoples by their central governments and peoples subject to colonial rules. In contrast, Wilson envisaged self-determination as a principle to be realised in a logical and non-violent fashion.²²²

Although Wilson was the most public advocate of "self-determination" that became a guiding principle post WWI, neither he nor the other Allied leaders believed that it was to be absolute or universal.²²³ It follows that despite Wilson's efforts, self-determination was not incorporated in the Covenant of the League of Nations,²²⁴ and therefore it could not obtain the status of a legal principle during that period.²²⁵ In the twenty years before the Second World War (WWII) there was relatively little practice

220 Whelan 1994 *International and Comparative Law Quarterly* 100-101.

221 Heather *National Self-determination* 42-52; Pomerance 1976 *American Journal of International Law* 18.

222 Cassese *Self-determination of Peoples* 21.

223 Hannum 1993 *Virginia Journal of International Law* 3.

224 The proposal made by President Wilson was challenged by powerful opposition, not least by some among Wilson's own advisors, and was defeated. See Steiner, Alston and Goodman *International Human Rights* 1254.

225 Cobban *The Nation-State* 37.

regarding self-determination in international law.²²⁶ It remained nothing more than a political principle on a wish-list.

2.3.4 *Self-determination in the aftermath of the First World War*

The First World War brought the right of self-determination to the fore in international politics.²²⁷ In fact, most of the Allies argued that the primary objective of the war was the realisation of the principle of nationality and of the right of people to determine their own destiny.²²⁸ Indeed, self-determination was the formal basis of negotiations of the armistice.²²⁹ It was generally believed by the international community in general and the national groups subject to domination in particular that the right of self-determination would be the guiding principle of the Paris Peace Conference.²³⁰ However, it should be noted that the Balkanisation of Europe was more a result of powerful forces of nationalism than the exercise of the right of self-determination.²³¹

In 1919, the Treaty of Versailles attempted in practice to legitimise the principle of national self-determination²³² by realigning the geographic boundaries of Eastern and Central Europe along national lines, which evidenced a belief that the "nation" and the "state" should coincide, in an effort to restore a lasting democratic peace to a historically troubled area. However, because of its ineffectiveness, the Versailles system did not implement a coherent theory of self-determination. Self-determination fell into disrespect and became a symbol of the Pyrrhic victory. Hence, on the whole, self-determination was regarded as irrelevant, where the peoples' will was certain to

226 Shaw "Self-determination and the Use of Force" 37.

227 Van Walt van Praag 1980 *Wayne Law Review* 279.

228 Cassese *Self-determination of Peoples* 24.

229 Brilmayer 1991 *Yale Journal of International Law* 180.

230 Cobban *The Nation-State* 57.

231 Nationalism is a revolutionary doctrine in that it suggests that any group of people who desire a separate status ought to be given an opportunity to have one... It stimulates a desire for self-determination on a national basis, an insistence that the sovereignty exercised by the state should be identified with the solidarity of allegiance and community consciousness found in the nation. See Johnson *Self-determination* 25.

232 National self-determination has been defined as the right of each "nation" to constitute an independent state and determine its own form of government. See Cobban *The Nation-State* 39. Also, national self-determination means a form of self-determination which would grant the right to secede from a pre-existing sovereign state based on a group's status as a "nation". It merely denotes the right of a sovereign state to self-governance, free from intervention or subjugation by an alien state, i.e. "sovereign self-determination". See the *Universal Declaration of Human Rights* (1948). A 21(3) reads: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

run counter to the victors' geographical, economic, and strategic interests.²³³ Where the conducting of a plebiscite was considered inappropriate or the interests of the Allies were likely to be imperilled, the inhabitant populations were not consulted.²³⁴ This argument is further supported by the fact that the Allies did not insist that the new states that emerged out of the peace process should adopt a democratic government. They were not required to govern based on the consent of the governed.²³⁵ It is a fact that the Allies attempted to avoid a plebiscite in every region, and that when they resorted to a plebiscite it was as a method of compromise, to escape from a dilemma rather than as a deliberate choice.²³⁶

Although the principle of self-determination had received much lip service in the aftermath of WWI, its application was limited to the defeated powers, and it was not clearly mentioned in the Covenant of the League of Nations.²³⁷ And yet it was mentioned in Wilson's draft of the Covenant. His original article III, which became article X of the completed Covenant, reads:

The Contracting Parties unite in guaranteeing to each other political independence and territorial integrity but it is understood between them that such territorial adjustments, if any, as may in future become necessary by reason of changes in present racial and political relationships, pursuant to the principle of self-determination, and also such territorial adjustments as may in the judgement of three-fourths of the delegates be demanded by the welfare and manifest interest of the people concerned, may be effected, if agreeable to those people; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.²³⁸

In the first sentence of this statement Wilson focuses on internal self-determination and democracy, while in the final sentence he focuses on peace as the priority of the

233 Cassese *Self-determination of Peoples* 25.

234 The *Treaty of Versailles* (1919) transferred German territories to the new States of Poland and Czechoslovakia without any consultation with the relevant populations, and in similar fashion Japan was given control over the Chinese territory of Kiaochow. Plebiscites were only rarely provided for, and then only with regard to small portions of territory. The Treaty provided for plebiscites for Upper Silesia, for the southern part of Eastern Prussia, for Northern Schleswig, and for Saarland. No plebiscite was held in Alsace-Lorraine, which was returned to France. Similarly, the treaty of peace with Austria of September 1919 allocated South Tyrol/Alto Adige to Italy without any plebiscite, provided for the cession to Poland and Romania of territories formerly belonging to Austria, and in addition banned Austria from joining Germany. Cassese *Self-determination of Peoples* 24-25.

235 Cassese *Self-determination of Peoples* 26.

236 Wabough *Plebiscite since the World War* 41-42.

237 Cobban *The Nation-State* 66.

238 Miller *The Drafting of the Covenant* 10-12.

Peace Conference. Self-determination postulates the right of the peoples organised within established territory to determine their collective political, social, economic and cultural destiny in a democratic way.²³⁹ Yet Wilson's commitment to self-determination was not given and for a long time was not to be given any concrete implementation. The States created in 1919 undertook no specific obligations to ensure a democratic form of government where people had political rights to participate in the process of their government. As discussed above, the concept of self-determination remained in Wilson's second and third draft, although a few slight changes were made in the third draft.²⁴⁰

It should be noted that despite the fact that Wilson championed the principle of self-determination the idea was diluted in the Covenant after Wilson's draft was combined with the British draft. It is to be found in the system of mandate provided for in article 22 of the Covenant League of Nations.²⁴¹ It should be highlighted that while the mandate system might be considered as an example of self-determination under the Covenant, in practice it did not place any obligation upon the administering powers to ensure eventual political independence.²⁴² For instance, Iraq was the only mandate to become independent between the wars. The tutelage mandate did not conform in theory or in practice to other requirements, particularly the free expression of the peoples' will in determining their future status.²⁴³ Thus, self-determination was not a principle to which the Mandates Commission felt itself bound. The legal extent of self-determination at the end of WWI is perhaps best demonstrated by examining the case of the Aaland Islands.

239 Franck 1992 *American Journal of International Law* 46-91; Tamil Information Center 1994 <http://tamilnation.co/selfdetermination/tamileelam/94tic.pdf>.

240 Wells *United Nations Decisions* 38.

241 A 22 para 1 and 2 read: To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League. *Covenant of the League of Nations* (1919).

242 Wilson *International Law* 57.

243 Wells *United Nations Decisions* 40-42.

2.3.5 The Aaland Islands case

Self-determination also found rhetorical support in *Aaland Islands* case. The Aaland Islands are situated in the Baltic Sea between Sweden and Finland, and their inhabitants are almost entirely of Swedish origin.²⁴⁴ They were under Swedish control from 1157 to 1809 and retained a Swedish linguistic and cultural heritage thereafter. In 1809 Sweden had ceded the islands, together with Finland, to Russia. Until the end of the First World War, both remained Russian. After the Russian Revolution in March 1917 Finland declared its independence from the Soviet Union, asserting the principle of self-determination of peoples that had been recognised by the Bolshevik leaders. In December 1917,²⁴⁵ a separatist movement arose on the Aaland Islands,²⁴⁶ and the Islanders expressed their wish to be attached to Sweden.²⁴⁷ Sweden supported the separatist movement, but Finland insisted on its sovereignty over the archipelago. Troops were dispatched to the Islands by Finland, and the separatist leaders were arrested. Peace in the Baltic region seemed threatened.

In 1920 the question was submitted to the newly founded League of Nations by the inhabitants of the Aaland Islands and the Swedish government.²⁴⁸ The *Aaland Islands* question could be divided into legal and political issues. The legal issue was dealt with by the Commission of Jurists,²⁴⁹ while the political issue was examined by the Commission of Rapporteurs.²⁵⁰ The main question was if, under international law, the inhabitants of the Aaland Islands were free to secede from Finland and join

244 Hannum 1993 *Virginia Journal of International Law* 9.

245 Finland declared its independence from Russia on November 15, 1917 and was finally recognised by the Soviet Government of Russia on January 4, 1918. The Swedish government recognised Finland on the same date. The United States extended its own recognition only after the establishment of the newly elected democratic government of Finland. Diggelmann 2007 *European Journal of International Law* 135-143.

246 Wilson *International Law* 57.

247 Diggelmann 2007 *European Journal of International Law* 137; Hasani *Self-determination* 85.

248 Brown 1921 *American Journal of International Law* 269.

249 This Commission of Jurists was organized as follows: Professor F Larnaude, Dean of the Faculty of Law at Paris, President; Professor A Struycken, Councillor of State of the Kingdom of the Netherlands; and Professor Max Huber, Legal Advisor of the Swiss Political Department. See Brown 1921 *American Journal of International Law* 269-270; Gregory 1923 *American Journal of International Law* 64.

250 The members of the Commission of Rapporteurs were: Baron Beyens, former Minister of Foreign Affairs of Belgium; M Felix Calonder, former President of the Swiss Federation; and Mr Abraham Elkus, former Ambassador of the United States at Constantinople. See Gregory 1923 *American journal of International Law* 65; Hassan *Self-determination* 64.

the Kingdom of Sweden.²⁵¹ To begin with, the Commission of Jurists decided that the matter was indeed one of international concern, and therefore within the League's competence,²⁵² because Finland had failed to get sovereignty over Aaland during the Russian empire's disintegration and prior to the Aalanders' expressing their wish to unite with Sweden.²⁵³ In dealing with self-determination the Commission of Jurists held that:

Although the principle of self-determination of people plays an important part in modern political thought... it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the law of Nations.²⁵⁴

The Commission of Jurists' report went on to note:

Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method is, exclusively, an attribute of the sovereignty of every State which is definitely constituted. A dispute between two states concerning such a question, under normal conditions therefore, bears upon a question which international law leaves entirely to the domestic jurisdiction of one of the states concerned. Any other solution would amount to an infringement of the sovereign rights of a state and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term 'state', but would also endanger the interests of the international community.²⁵⁵

Thus, the Commission of Jurists obviously supported the Finnish argument that the positive international law pertains exclusively to the sovereign states. Therefore, the disposing of a part of a state is within the jurisdiction of the state, which can decide whether it wants to hold a plebiscite or not.²⁵⁶ Hence, the Commission of Jurists announced that self-determination was not an absolute right but a right that was to

251 Cassese *Self-determination of Peoples* 27.

252 Hannum 1993 *Virginia Journal of International Law* 9.

253 Hannum 1993 *Virginia Journal of International Law* 9.

254 League of Nations 1920 *Official Journal* 5.

255 League of Nations 1920 *Official Journal* 5.

256 Castellino *International Law* 20. From the point of view of internal and international law, the formation, transformation and dismemberment of a state as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law. The fact must, however, not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. In addition, the report stated that even though it would be regarded as the most important of the principles governing the formation of states, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. League of Nations 1920 *Official Journal* 66-75; Cassese *Self-determination of Peoples* 29.

be realised on a case-by-case basis and upon agreement. This means that, apart from the will of the people, other factors such as economic and political interests and the security of the state concerned should be considered.²⁵⁷

On the general question of national self-determination, the Commission opined:

The fact must, however, not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. Even though it be regarded as the most important of the principles governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace.²⁵⁸

An examination of this report reveals that though the Commission of Jurists was silent on revolution, it upheld that the idea that self-determination might play a role in such situations, but not a principal role. In other words, the Commission of Jurists did not give an opinion concerning the question of whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give them the right to proclaim an independent state.²⁵⁹ Legally then, self-determination was described as a principle which might play a limited role in a period of violent change. However, this Commission concluded that under extreme oppression self-determination might be possible.²⁶⁰

The second body of experts, the Commission of Rapporteurs, had to deal only with the political aspects of the issue. This Commission investigated the historical, political, strategic, and other facts having a bearing on the matter in dispute.²⁶¹ The report certainly represented the most thorough and multidimensional treatment of self-determination, the basis for its application and the consequences. The Commission of Rapporteurs considered how to resolve the dispute, after having first determined that Finland became a fully constituted independent state following its declaration of independence from Russia in 1917. It follows therefore that the Commission of Rapporteurs reached a conclusion similar to that of the Commission of Jurists. It described self-determination as "a principle of justice and of liberty,

257 League of Nations 1920 *Official Journal* 6.

258 League of Nations 1920 *Official Journal* 5.

259 League of Nations 1920 *Official Journal* 5.

260 Hannum 1993 *Virginia Journal of International Law* 10.

261 Hannum 1993 *Virginia Journal of International Law* 10.

expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion".²⁶²

Although there was little development in the realm of self-determination under the *Aaland Islands* case, the Commission of Rapporteurs did suggest that in a case of extreme oppression, self-determination might be possible.²⁶³ It should be noted that those involved in the *Aaland Islands* case clearly perceived and emphasised the political importance of self-determination. However, at this time self-determination remained predominantly a concept of political rather than of legal character. Politically, the *Aaland* case envisaged the possible resort to self-determination in the conventional way (plebiscites) or in exceptional cases where minorities should prove a systematic repression and grave violations of human rights. Legally, then, self-determination was carefully circumscribed and reduced to a principle which might play a limited role in a period of violent change but which had no place in contemporary international law.²⁶⁴ It was only after the adoption of the *United Nations Charter* that the doctrine of self-determination was codified or brought into the realm of positive international law.²⁶⁵ As discussed below, the right of self-determination and effective participation in government owe their legitimacy at least as much to post-1945 human rights norms.

2.4 Self-determination in modern international law

The right to self-determination first appears in positive international law in articles 1 and 55 of the Charter. It is also included in a number of GA resolutions such as 1514

262 *League of Nations Council Doc B7 21/68/106/ (1921) 28.* The Commission of Rapporteurs went on to say that "the principle is not, properly speaking, a rule of international law and the League of Nations has not entered it in its Covenant. This is also the opinion of the Commission of Jurists... It is a principle of justice and of liberty, expressed by a vague and general formula which has given rise to most varied interpretations and differences of opinion... To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within states and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the state as a territorial and political unity... 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 guaranties". *League of Nations Council Doc B7 21/68/106/ (1921) 22-23*; see also Crawford *The Creation of States* 110-111.

263 *League of Nations Council Doc B7 21/68/106/ (1921).* For more comments, see Buchheit *Secession* 71-72; Crawford *The Creation of States* 108-111.

264 Cassese *Self-determination of Peoples* 33.

265 Sureda *The Evolution* 26.

(XV), 1541 (XV), and 2625 (XXV). Finally, it is referred to in article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966. This section is devoted exclusively to self-determination in the context of positive international law. For this purpose, the following instruments will be analysed: the *United Nations Charter*, the United Nations Covenants on Human Rights, and the UN General Assembly and Security Council resolutions.

2.4.1 Self-determination under the UN Charter

The principle of self-determination has been integrated into the Charter of the UN,²⁶⁶ and as a result the UN became the principal arena in which the claims and counterclaims of self-determination were advanced.²⁶⁷ Before looking at the UN provisions themselves, a brief description of the context which led to the inclusion of self-determination in the Charter is necessary.²⁶⁸

At its inception the Charter clearly did not include any general "right" to self-determination.²⁶⁹ The Dumbarton Oaks proposals, which originally constituted the basis of the Charter, did not mention any article referring to self-determination.²⁷⁰ This gives the impression that the Charter was destined, like the League of Nations Covenant, to be silent with regard to the rights of peoples. The inclusion of the word "self-determination" was the result of an amendment proposed by the Soviet Union in 1945, when the UN Conference on International Organisation (UNCIO) met in San Francisco. This amendment added that relations between states should be based on respect for the principle of equal rights and the self-determination of peoples.²⁷¹

266 A 1(2) and of the *Charter of the United Nations* (1945).

267 Ofuatey-Kodjo pointed out that claimers and counter-claimers who debated questions of self-determination at the United Nations include the following: the Palestinians and the Israelis, the black majority population of South Africa and the apartheid government of South Africa; the people of Guinea-Bissau, Angola and Mozambique and the former government of Portugal prior to their attainment of independence; the people of East Timor and the government of Indonesia, the people of Belize and the government of Great Britain; the people of Western Sahara and the government of Spain; and later Morocco and Mauritania. For more comments, see Ofuatey-Kodjo *The Principle* 1.

268 Sureta *The Evolution* 17.

269 Pomerance *Self-determination* 1982.

270 Cassese *Self-determination of Peoples* 38.

271 Wilson *International Law* 58-59.

After amending the Charter, self-determination was expressly included in its articles 1(2) and 55. Article 1(2) locates the principle among the purposes of the UN when describing one of them as:

... to develop 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 strength universal peace.²⁷²

Furthermore, article 55 provides that:

with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.²⁷³

Even though the concept of self-determination was thus inscribed in a major multilateral treaty, it is disputed whether the reference to the principle in these very general terms was sufficient to entail its recognition as a binding norm. Some scholars such as Lauterpach²⁷⁴ held the view that the international legality of human rights is derived from the fact that they prominently figure in the statement of the purposes of the UN, and that member states are under a legal obligation to act in accordance with these purposes. Another school of thought argued that human rights in the Charter had no juridical character, and therefore did not constitute legal norms under positive law.²⁷⁵ Wilson argues that the Charter nowhere mentions a "right" of self-determination, nor does it clearly define who the "self" is that enjoys this right which should be respected by nations.²⁷⁶

However, despite all these limitations and shortcomings, the principle of self-determination is mentioned twice in the Charter. It provides that relations among nations should be based on respect for the principle of equal rights and the self-determination of peoples. The reference to peoples clearly encompasses groups

272 A 1(2) of the *Charter of the United Nations* (1945).

273 A 55 of the *Charter of the United Nations* (1945).

274 Lauterpacht *International Law* 145-148.

275 Mustafa 1971 *International Lawyer* 480.

276 Wilson *International Law* 59.

beyond states and includes at least non self-governing territories whose peoples have not yet attained a full measure of self-government.²⁷⁷ It follows that the principle enshrined in the Charter established a right for colonial peoples and non-self-governing territories to achieve political independence. This can be clearly inferred from article 73, which provides:

Members of the United Nations which have or assume responsibilities for the administration of non self-governing territories will develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.²⁷⁸

With regard to the inhabitants of trust territories, article 76 states that the basic objectives of the trusteeship system,²⁷⁹ in accordance with the purposes of the United Nations laid down in article 1 of the present Charter, shall be:

to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.²⁸⁰

It follows that it is permissible to regard the entirety of Chapters XI and XII of the *UN Charter* as reflections on the basic idea of self-determination. Article 73 describes the development of self-government in non-self-governing territories as a "sacred

277 A 78 of the *Charter of the United Nations* (1945).

278 A 73 of the *Charter of the United Nations* (1945).

279 The trusteeship system is established under Chapter XII of the UN Charter for the administration and supervision of trust territories.

280 A 80 of the UN Charter reads: Except as may be agreed upon in individual trusteeship agreements, made under aa 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

Par 1 of this article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in a 77. See a 80 of the *Charter of the United Nations* (1945).

trust". Article 76 on the international trusteeship system refers to progressive development in the Trust Territories towards self-government or independence. This system resembled the mandate system of the League of Nations, although limited in its territorial application. Article 22 laid down the general principles underlying the mandates system and provided for three categories of mandated territories.²⁸¹ It also prescribed that the Mandatory must guarantee freedom of conscience and religion, subject only to the maintenance of public law and morals, the prohibition of the slave trade, the arms traffic and the liquor traffic, and the prevention of fortifications and military training of the natives.

In contrast to the mandate system, the trusteeship system set out in Chapters XII and XIII of the Charter of the UN goes considerably beyond the mandates system. The trusteeship system was not limited to specified territories formerly belonging to the enemy but was open to any territory placed under the system by means of a trusteeship agreement.²⁸² The trusteeship system also provided for the development of self-government or independence for all territories, whereas the League system of mandated territories had envisaged independence only for those territories it classified as sufficiently advanced. In fact, there were eleven United Nations trust territories, seven in mainland Africa and four island territories in the Pacific. By the early 1960s most of the trust territories in Africa had attained self-government or independence, choosing either to join a neighbouring state or to become a new state.²⁸³ From the preceding lines, it is apparent to note that the trusteeship system was a more effective tool for the process of decolonization than the mandates system would ever have been.

281 The so-called "A" mandates consisted of those former territories of the Turkish Empire which had reached a stage of development where they could be provisionally recognized as independent nations, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The "B" mandates consisted of those former German territories in Central Africa not yet ready for self-government where the Mandatory had to be responsible for the administration of the territory. The "C" mandates consisted of South West Africa and former German islands in the Pacific. They were to be administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards mentioned above in the interests of the indigenous population. See a 22 of the *Covenant of the League of Nations* (1919); Crozier 1979 *Journal of Contemporary History* 483-513; Sayre 1948 *American Journal of International Law* 263-298.

282 According to a 77 of the Charter of the UN, the trusteeship system applied not only to the former mandate, but also to the "territories which may be detached from enemy states as a result of the Second World War"; and the "territories voluntarily placed under the system by states responsible for their administration".

283 Knop *Diversity and Self-determination* 330.

In sum, the Charter marked an important turning-point in the evolution of the principle of self-determination. It signalled the maturing of the political postulate of self-determination into legal norms. The existence of this principle within the Charter means its recognition as a fundamental principle of international law.²⁸⁴ As a principle of international law, the self-determination of peoples was further developed through UN General Assembly resolutions and state practice in the context of decolonisation.²⁸⁵ In the following analysis a few of the current resolutions where the principle of self-determination has been voiced will be discussed, in particular those involving peoples within African countries.

2.4.2 *Self-determination under UN resolutions*

Self-determination was further developed through UN General Assembly and Security Council resolutions. In its first session, the UN General Assembly unanimously adopted Resolution 9(I)²⁸⁶ requesting the Secretary-General to include in his Annual Report a summary of the information on non-self-governing territories extended by the administering powers under article 73(e).²⁸⁷ The General Assembly further adopted a Resolution 66 (I) which provide for the *ad hoc* Committee²⁸⁸ to examine that summary and analyse the information transmitted under article 73(e) of the *UN Charter*.²⁸⁹ Although these resolutions did not reflect self-determination expressly, their implications were to give due respect to the right of self-determination and promote the realisation of this in non-self-governing territories.²⁹⁰

Again, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the General Assembly in its third

284 Collins 1980 *Case Western Reserve Journal of International Law* 142.

285 Dugard *International Law* 100.

286 GA Res 9 (I) (1946).

287 A 73(c) of the *Charter of the UN* provides "to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply". For further comments see Wilson *International Law* 61-63.

288 The composition of the *ad hoc* Committee under 73 was as follows: member transmitting the information under a 73 of the Charter, namely Australia, Belgium, Denmark, France, Netherlands, New Zealand, United Kingdom and United States of America. Members elected by the General Assembly: Brazil, China, Cuba, Egypt, India, Philippine Republic, Union of Soviet Socialist Republics and Uruguay. See GA Res 66 (I) (1946).

289 Par 6 of the GA Res 66 (I) (1946).

290 Wilson *International Law* 66.

session passed Resolution 217A (III),²⁹¹ paragraph 21 of which provides that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;" and "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage..."²⁹² It follows that the principle enshrined in the Universal Declaration of Human Rights (UNDHR) did not demonstrate the complete identification of self-determination. Clearly, in the era of the UNDHR, self-determination was viewed as a "political claim" and not a "right" in the full sense of the term.²⁹³

Since 1945, as pointed out above, the inclusion of self-determination in the *UN Charter* was surrounded by much controversy. The language used was vague – the concepts of "peoples" and "self-determination" remained undefined, contentious, and even a "conceptual morass" in international law.²⁹⁴ The first General Assembly Resolutions that were central to the emergence of self-determination as a legal norm are GA Res 1514 and 1541, which were passed in 1960. Resolution 1514(XV) is widely regarded as one of the United Nations' most important contributions to the development of the legal right to self-determination. The four first paragraphs read:

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.²⁹⁵

291 *Universal Declaration of Human Rights* (1948).

292 A 21 of the *Universal Declaration of Human Rights* (1948).

293 Dinstein 1976 *International and Comparative Law Quarterly* 106-110.

294 Muehlebach 2003 *Identities: Global Studies in Culture and Power* 241-268.

295 Par 1-4 of the GA Res 1514 (XV) (1960).

The final operative paragraph of the Resolution, paragraph 7, reads:

All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.²⁹⁶

Clearly this Resolution acknowledges the existence of the right of self-determination by which peoples may freely pursue their economic, social, cultural and political development. Indeed, Resolution 1514 (XV) is the most important resolution, as it associates the concepts of self-determination and decolonisation.²⁹⁷ In its preamble it proclaims that the peoples of the world passionately desire the end of colonialism in all its forms and manifestations, and that the process of liberation is irresistible and irreversible.

As to the question of whether Resolution 1514 (XV) applied only to peoples under colonial rule, the interpretation of paragraph 5 provides an answer. It states:

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.²⁹⁸

As indicated by this paragraph, Resolution 1514 (XV) was concentrated most obviously on the colonial people's right to self-determination. It intended to promote a "better standard of life in larger freedom" to the colonial peoples.²⁹⁹ The right to self-determination embodied in Resolution 1514 advocated and provided the basis for the decolonisation policy implemented by the United Nations in the 1960s and 1970s.

Like Resolution 1514 (XV), another famous anti-colonial resolution was Resolution 1541(XV), adopted on 15 December 1960. The purpose of this Resolution was to spell out a list of factors, known as principles, to guide member states in determining whether or not an obligation existed to transmit information under article 73(e) of the

296 Par 7 of the GA Res 1514 (XV) (1960).

297 Musgrave *Self-determination* 70.

298 Par 5 of GA Res 1514 (XV) (1960).

299 See the first par of the Preamble to the Res 1514 (XV) (1960); Castellino *International Law* 65.

Charter in respect of such territories whose peoples had not yet attained a full measure of self-government.³⁰⁰ It also suggests that the obligation to report on the situation exists as long as the territory concerned has not yet attained a full measure of self-government.³⁰¹ The Resolution declared that the obligation to transmit information is of an international legal nature.³⁰² Resolution 1541 called for a "speedy and unconditional end to colonialism" and reiterated the need for "respect for the principle of self-determination of peoples". Furthermore, it provided three ways for exercising the right of self-determination, that is, emergence as a sovereign independent state, free association with an independent state, and integration with an independent state.³⁰³

The development of self-determination reached a high-water mark with the adoption of General Assembly Resolution 2625 (XXV) (hereinafter the Declaration on Friendly Relations).³⁰⁴ By virtue of this Declaration the right to self-determination had a wider meaning, as it qualifies the right by declaring that:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle....³⁰⁵

These provisions reiterate the duty of states to promote the realisation of self-determination. They equally link this duty to the general aim of promoting friendly relations and co-operation between states, as well as the specific aim of ending colonialism. The use of the words "all peoples", coupled with the reference to "all states" and the enumeration of goals which did not necessary refer to colonial

300 Principle I of the GA Res1541 (XV) (1960).

301 Principle II of the GA Res1541 (XV) (1960).

302 Principle III of the GA Res 1541 (XV) (1960).

303 GA Res1541 (XV) (1960).

304 GA Res 2625 (XXV) (1970).

305 Para 1-2 of the GA Res 2625 (XXV) (1970).

situations were evidence of the Western desire to extend the principle of self-determination beyond the colonial context and make it of universal concern.³⁰⁶

In addition, paragraph 7 provides:

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of self-determination and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.³⁰⁷

In terms of this provision, self-determination is linked to representative government, and territorial integrity made subject to the maintenance of representative government. The fact that territorial integrity was predicated upon representative government implied that self-determination would be an ongoing process.³⁰⁸ In this connection, there are numerous resolutions relating to self-determination, adopted by either the General Assembly or the Security Council. Without reciting the entire litany, there are several resolutions regarding specific situations and territories, and other which are not linked to certain peoples or specific circumstances.³⁰⁹ Since

306 Musgrave *Self-determination* 75.

307 Par 7 of the GA Res 2625 (XXV) (1970).

308 Musgrave *Self-determination* 75.

309 For Rhodesia/Zimbabwe, see GA Res 1747 (XVI) (1962); GA Res 2024 (XX) (1965); GA Res 251 (XXI) (1966); GA Res 2262 (XXII) (1967); GA Res 2383 (XXIII) (1968); GA Res 2505 (XXIV) (1969); GA Res 2652 (XXV) (1970); GA Res 2769 (XXVI) (1971); GA Res 2945 (XXVII) (1972); GA Res 2946 (XXVII) (1972); GA Res 3115 (XXIII) (1973); GA Res 3316 (XXIII) (1973); GA Res 3297 (XXIV) (1974); GA Res 3298 (XXIV) (1974); GA Res 3396 (XXX) (1975); GA Res 3397 (XXX) 1975; GA Res 31/154A-B (1976); GA Res 32/116 (1977); GA Res 33/38A - B (1978); SC/Res/288 (1970); SC/Res/320 (1972); SC/Res/318 (1972); SC/Res/314 (1972); SC/Res/333 (1973); SC/Res/328 (1973); SC/Res/388 (1976); SC/Res/463 (1980); SC/Res/437 (1978); SC/Res/423 (1978); SC/Res/460 (1979); SC/Res/448 (1979); SC/Res/445 (1979); SC/Res/217 (1965); SC/Res/216 (1965); SC/Res/232 (1966); SC/Res/221 (1966); SC/Res/253 (1968); SC/Res/277 (1970); SC/Res/415 (1977); SC/Res/409 (1977); SC/Res/406 (1977); SC/Res/403 (1977). For Namibia, see GA Res 65 (I) 14 (1946); GA Res 215 (XXI) (1966); GA Res 2248 S-V (1967); GA/Res/31/14720 (1976); GA/Res/34/93A (1979); GA Res/35/227A-J (1981); GA Res 30/121 C (1981); GA Res 37/233 C (1982); SC Res 245 (1968); SC Res 246 (1968); SC Res 264 (1989); SC Res 269 (1969); SC/Res/283 (1970); SC/Res/284 (1970); SC/Res/276 (1970); SC/Res 301 (1971); SC/Res/323 (1972); SC/Res/319 (1972); SC/Res/310 (1972); SC/Res/309 (1972); SC/Res/342 (1973); SC/Res/366 (1974); SC/Res/385 (1976); SC/Res/439 (1978); SC/Res/435 (1978); SC/Res/432 (1978); SC/Res/431 (1978); SC/Res/539 (1983); SC/Res/532 (1983). For Palestine, see GA Res 2535B (XXIV) (1969); GA Res 2628 (XXV) (1970); GA Res 2672 (XXV) (1970); GA Res 2787 (XXVI) (1971); GA Res 2792 (XXVI) (1971); GA Res 2963 (XXVII) (1972); GA Res 3236 (XXIX) (1974); GA Res 3237 (XXIX) (1974); GA Res 3376 (XXX) (1975); GA/Res/37/86 (A-E) (1982); GA/Res/37/86e (1982); GA/Res/37/86d (1982); GA/Res/37/86c (1982); GA/Res/37/86b (1982); GA/Res/37/86a (1982); SC/Res/446 (1979); SC/Res/452 (1979); SC/Res/478 (1980); SC/Res/484 (1980); SC/Res/469 (1980); SC/Res/468 (1980); SC/Res/465 (1980); SC/Res/694 (1991). On East Timor, see GA

1960, the reaffirmation of the right to the independence and self-determination of peoples still under colonial power became almost an annual ritual for the General Assembly.³¹⁰

In summary, the aforesaid resolutions placed great emphasis on the achievement of independence as the normal outcome of self-determination. Some of these resolutions had declared independence to be the only way of achieving self-determination,³¹¹ while others³¹² provided three available options.³¹³ Nevertheless, self-determination as a "right" in positive international law was not established conclusively by these Resolutions. It is argued that resolutions are normally not binding. Arguably, they are not treaties, and consequently have the status of "soft law".³¹⁴ It has, for instance, been argued that the General Assembly was not established as a law-making body;³¹⁵ it can only make recommendations and not decisions of a binding character.³¹⁶ It was, however, also argued that resolutions are sources of international law when they are adopted by states from all the three of the main political groups (Socialist, Western and neutralist).³¹⁷ This means that in order to be binding as a source of law, a GA resolution should have the consensus of all states; otherwise it remains soft law.³¹⁸ Another thesis which is supported by some scholars argues that a certain category of decisions of the General Assembly is binding on members states, but not every resolution has a binding character.³¹⁹ Under the *UN Charter*, for example, Security Council resolutions are binding if they are taken under Chapter VII.³²⁰ Yet another view is that the binding nature of a

Res 3485 (XXX) (1975); GA Res 37/30 (1982); SC/Res/389 (1976). For Western Sahara, see GA Res 34/37 (1979); GA Res 37/28 (1982); SC/Res /688 (1991); SC/Res/690 (1991).

310 Wilson *International Law* 70.

311 GA Res 1514 (XV) (1960).

312 GA Res 1541(XV) (1960).

313 The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people. See GA Res 2625 (XXV) (1970).

314 O'Brien *International Law* 99.

315 O'Brien *International Law* 99.

316 Elias and Akinjide *Africa and the Development* 71.

317 Elias and Akinjide *Africa and the Development* 71.

318 Elias and Akinjide *Africa and the Development* 71.

319 Elias and Akinjide *Africa and the Development* 71.

320 O'Brien *International Law* 99.

resolution is based on the fact that it constitutes state practice or *opinio juris* as an element of a customary rule.³²¹

Although some resolutions relating to self-determination (GA Resolution 1514 (XV) 1960 and GA Resolution 2625 (XXV) 1970) had contributed to its development in international law, it could not be seen as having been universally accepted as a legal right. The development of self-determination as a universal legal right reached a high-water mark with the adoption of the post-1945 human rights instruments.

2.4.3 *Self-determination within the human rights legal framework*

The next important instruments to contribute to the understanding of the evolution of self-determination are the International Covenants of Human Rights.³²² Both instruments include an article on self-determination, which is phrased in exactly the same wording.³²³ By the same token, self-determination is a key right in these instruments in particular and in contemporary international law in general.³²⁴ Taking into account these global instruments, the African and American regional human rights systems have also contributed to the law of self-determination. This section aims to clarify the theory and practice of self-determination in the international and regional systems of human rights, and to indicate the different circumstances under which each variation of the right applies. In fact, this section includes a detailed examination of the content and scope of the right to self-determination, focusing exclusively on the African system of human rights, as this research focuses on this continent because of its history of colonialism.

321 It follows that, when discussing customary international law in the area of self-determination, particular emphasis should be put on two resolutions, that is, GA Res 1514 (XV) (1960) and GA Res 2625 (XXV) (1970). The former contributed to the gradual transformation of the "principle" of self-determination into a legal right for colonial peoples, while the latter was instrumental in crystallising a growing consensus concerning the extension of self-determination out of a colonial context. Both are vital in developing an understanding of how customary international law regulates self-determination. Cassese *Self-determination of Peoples* 70-74.

322 The ICCPR and ICESCR (1966).

323 All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. A 1 of the ICCPR and the ICESCR (1966).

324 Hillier *Sourcebook on Public International Law* 188-195.

2.4.4 Self-determination under the UN human rights covenants

The linking of self-determination, which was conceived as a political principle having weak legal content, to the political status of peoples can be viewed as an important step towards its inclusion in the International Covenants on Human Rights afterwards. The right of self-determination is a keystone in the UN human rights treaties, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³²⁵

The first article of both Covenants reads:

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.

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 people be deprived of their own means of subsistence.

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.³²⁶

A first reading of this article makes it clear that it presents self-determination as a human right. It is clear that self-determination of peoples is a collective right³²⁷ which does not belong to any individuals but to a certain group defined as people.³²⁸

325 The ICCPR and the ICESCR were adopted by the UN General Assembly in 1966.

326 The common a 1 of ICCPR and ICESCR (1966).

327 For more details for collective and individual rights see Chapter II par 2.1 above.

328 Although the rights set out in ICCPR and ICESCR are for the most part formulated in terms of individual rights, the right of peoples to self-determination is also recognized in their common a 1 as a collective right possessed by a group not by a person individually. Self-determination is a right held by the individuals who make up a nation or a people even though each individual will hold the right jointly with, rather than independently of, his fellow nationals. Jones 1999 *Human Rights Quarterly* 89. A 21 of the Universal Declaration of Human Rights proclaims that everyone has the right to take part in the government of his country, directly or through freely chosen representatives, that is internal self-determination. In fact, rights of political participation are, for any particular individual, rights held in relation to a particular state. Yet they can still be represented as rights possessed by people in terms of their exercise. It is quite significant that the "individuals forming any particular political community have a shared interest in determining, and arguably, therefore, a jointly held right to determine, the future of their political community. Understood in this way, peoples' right to self-determination is granted to a group and is held jointly by individuals in a politically defined entity". Jones 1999 *Human Rights Quarterly* 101. Crawford furthermore, adds that "self-determination is plainly a collective right rather than an individual right, although clearly enough individuals are to be involved in the exercise of the right, and the majority of them at least will benefit from it in the sense of

Brownlie³²⁹ treats it as "probably" a peremptory norm which has universal application. The wording of the first clause of article 1(1), that all peoples have the right to self-determination, affirms the universality of the right. The text and the *travaux préparatoires* support the view that the Covenants reach beyond the colonial situation.³³⁰ The Covenants do not limit the right to a colonised or oppressed people but include all peoples. This clearly means that all states have the right to be democratic (internally) with the consent of the people having elected a legitimate government which thereby gains legitimacy (externally) in the international society of states.³³¹ It is strikingly clear that the right to self-determination is associated with the right to democracy.³³² In this connection Franck³³³ states that self-determination postulates the right of a people organised in an established territory to determine its political destiny in a democratic fashion, and is therefore at the core of democratic entitlement. According to the *UN Vienna Declaration and Programme of Action*, democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and to take responsibility for all

retaining or achieving a measure of self-government in accordance with their wishes or preferences". Crawford "The Right of Peoples" 59.

329 Brownlie *Principles* 513.

330 The States Parties to the present Covenant, including those having responsibility for administering the Non-self-governing and Trust Territories, shall promote the realisation of the right of self-determination. It follows that the post-colonial future of self-determination was a matter of relative unconcern to many States, though Western States insisted on a continuing function. Among other states, Afghanistan stated that self-determination has to be proclaimed even in a world from which colonial territories have vanished. For more comments, see Bossuyt *Guide to the "Travaux Préparatoires"* 41-47; Thornberry 1989 *International and Comparative Law Quarterly* 878.

331 Castellino *International Law* 32.

332 The concept of "democracy" is a synthesis of the Greek words *demos*, meaning "people" and *kratos*, meaning rule. Semantically, the concept of "democracy" stands for rule by the people. Vidmar *Democratic Statehood* 15. According to Jones democracy is described as a political order that enables a people to realise its will to be, as a unified "self," self-determining. Jones 1999 *Human Rights Quarterly* 106. Crawford states that "democracy is a form of government in which political power is based on the will of the people, and all citizens have the opportunity to participate equally in the political life of their societies. Crawford "Democracy in International Law" 4. Also, Harris in his latest edition states that the right to self-determination "may require that governments generally have a democratic base". Harris *International Law* 104. Similarly, Vidmar points out that "the idea of a government representative of its people is the underlying principle of both democracy and the concept of self-determination". Vidmar 2010 *Human Rights Law Review* 239-268. According to the UN Vienna Declaration and Programme of Action, "democracy is based on the freely expressed will of the people to determine their own political, economic and cultural systems and their full participation in all aspects of their lives". *Vienna Declaration and Programme of Action* (1993). However, Wheatley points out that there is no paradigmatic model of democracy to apply in all places, at all points in time. He goes on to state that democracy may take different forms and evolve through many phases, depending on the particular characteristics and circumstances of a particular society. Wheatley *Democracy* 128.

333 Franck 1992 *American Journal of International Law* 52.

aspects of their lives.³³⁴ Following this declaration, self-determination in its modern meaning is associated with democratic political theory, most nobly the ideas of representative government, respect for human rights, popular participation and constitutional transfers of political powers.³³⁵ In such an understanding, democracy is the *sine qua non* of self-determination because it is the *sine qua non* of the right to political participation.

Furthermore, self-determination guaranteed to peoples does not stop merely at political or civil rights. It is the gateway to economic, social and cultural rights.³³⁶ In the same vein, article 1(2) of both Covenants provides the right to control a territory's natural resources and benefit from them. It means that the right of self-determination includes the simple and elementary principles that a nation or people should be master of its own natural wealth or resources. This right and the corresponding duty of the central government to use the resources in a manner which coincides with the interest of the people are the natural corollaries of the right to political self-determination.³³⁷ Finally, the Covenants call upon states parties, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, to promote and respect the norm of self-determination in accordance with the Charter.

It follows from the preceding that article 1 of both Covenants clearly and unreservedly accords the right of self-determination to all peoples. It is undisputed that this provision must be construed as containing a positive right as opposed to a mere political principle of a collective nature, the right holders being peoples rather than individuals as such. This collective character differentiates the right of self-determination from other rights recognised in the Covenants, which are individual rights. This was the view of the development of the concept of self-determination which was adopted by regional human rights systems.

334 *Vienna Declaration and Programme of Action* (1993).

335 The *African Charter on Democracy* goes further and links democracy to regular, transparent, free and fair elections. It also associates democracy with the right to freedom of expression, in particular freedom of the press, which enables people to obtain more information on the candidates and their programmes, and thus optimise their electoral choice. Aa 3, 4, 27 of the *African Charter on Democracy, Elections and Governance* (2007); Makinda and Okumu *African Union* 61.

336 *Castellino International Law* 32.

337 *Cassese Self-determination of Peoples* 56.

2.4.5 Self-determination in regional human rights conventions

The major regional systems of human rights are the European system, the Inter-American system, and the African system. A regional system is developing in the Middle East, marked by the adoption of the *Arab Charter on Human Rights* on 15 September 1994 by the League of Arab States.

Although the European system is to be considered as the father of self-determination, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*³³⁸ and the *European Social Charter*³³⁹ did not make any reference to the right of self-determination. Language referring to this right is to be found in the *Helsinki Final Act*.³⁴⁰ Its principle VIII (2) reads as follows:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.³⁴¹

Although the *Helsinki Final Act* is a regional, political document rather than a universal, legally binding agreement, some commentators have found its language much more expansive than previous international pronouncements regarding self-determination.³⁴² Arguably, the formulation of self-determination in the *Helsinki Final Act* reflects both internal and external aspects.³⁴³ This means that the right to self-determination is a continuing right, not a right exercised, once and for all, at the time of independence. Thus, in actual fact the Helsinki process has considerably contributed to refining the concept of self-determination by specifying the criteria for enabling peoples to make really free and genuine choices.³⁴⁴ This clarification was

338 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).

339 *European Social Charter* (1961).

340 *Helsinki Final Act* (1975). The *Helsinki Final Act* was an agreement signed by 35 nations that concluded the Conference on Security and Cooperation in Europe, held in Helsinki, Finland. The multifaceted Act addressed a range of prominent global issues and in so doing had a far-reaching effect on the Cold War and US-Soviet relations.

341 Principle VIII (2) of the *Helsinki Final Act* (1975).

342 Cassese "Political Self-determination" 137-152. Cassese provides that "the Helsinki Declaration provides a definition of self-determination that breaks new ground in international relations". See also Cassese *Self-determination of Peoples* 286. Democracy, then, describes a political order that enables a people to realize its will to be, as a unified "self," self-determining.

343 Principle VIII (2) of the *Helsinki Final Act* (1975).

344 Cassese *Self-determination of Peoples* 296.

also confirmed by the *Charter of Paris*.³⁴⁵ The relevant provision reaffirms the equal rights of peoples and their right to self-determination in conformity with the *Charter of the United Nations* and with the relevant norms of international law, including those relating to the territorial integrity of states.³⁴⁶ Plainly, the *Charter of Paris* makes a link between democracy, political pluralism, human rights and the rule of law. At the same time, it provides for periodic and free elections as the way of enabling peoples to exercise their right to self-determination.

In the Inter-American system, neither the American Declaration on the Rights and Duties of Man³⁴⁷ nor the *American Convention on Human Rights*³⁴⁸ mentions a right of self-determination. Language to include this right in the Draft American Declaration on the Rights of Indigenous Peoples under negotiation in the Organisation of American States remains in brackets without consensus.³⁴⁹

In contrast to the American and European human rights treaties, the *African Charter on Human and Peoples' Rights* contains a detailed right of people to self-determination. Given the context of decolonization in Africa in general and the struggle against apartheid in South Africa in particular, both of which are referred to, it is not surprising to find self-determination expressed in the *African Charter*. Article 19 protects "the principle of equality of peoples" and condemns the "domination of a people by another".³⁵⁰ In addition, article 20 sets forth the right of self-determination:

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.

345 *Charter of Paris for a New Europe* (1990). It was adopted in Paris on 21 November by a summit meeting of the heads of state or government of the following countries: Austria, Belgium, Bulgaria, Canada, Cyprus, Czech and Slovak Federal Republic, Denmark, Finland, France, Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy – European Community, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, Union of Soviet Socialist Republics, United Kingdom, United States of America and Yugoslavia.

346 Par 2 of the *Charter of Paris for a New Europe* (1990).

347 *American Declaration of the Rights and Duties of Man* OAS Res XXX (1948).

348 *American Convention on Human Rights "Pact of San Jose, Costa Rica"* (1969).

349 Permanent Council of the Organisation of American States Committee on Juridical And Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples *Report of the Vice Chair of the Working Group on Activities During The 2012-2013* OEA/Ser K/XVI GT/DADIN/doc XXXX/13 (2013).

350 A 19 of the *African Charter on Human and Peoples' Rights* (1986).

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.

All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.³⁵¹

The article recognises two distinct groups of peoples: those who are living under colonialism and oppression, and those who are not. The peoples under colonial power are entitled to independence while those people who are not under colonial rule are entitled to maintain their existence and exercise their self-determination, but within existing states.³⁵² In the same vein, the Preamble to the *African Charter* seems to apply broadly to indigenous and tribal groups who are not in colonial or oppressed states.³⁵³ In keeping with the respect for ethnic and cultural diversity reflected in the preamble's reference to "the peoples of Africa," and in response to numerous inter-ethnic conflicts in African history, article 20 begins with the right of peoples to existence. The right to existence is immediately followed by recognition of the right to self-determination, suggesting that all peoples entitled to existence are also entitled to self-determination, at least within the boundaries of existing states.

Concern with limiting self-determination so as not to undermine territorial integrity was evident in the Charter of the OAU,³⁵⁴ which was the predecessor to the current African Union. The *OAU Charter* made a brief reference to the right of peoples to self-determination, proclaiming the "absolute dedication of the African rulers to the total emancipation of the African territories which are still dependent",³⁵⁵ while also asserting a commitment to the principle of territorial integrity through respecting colonial frontiers.³⁵⁶ In the 1986 ICJ judgment in the *Frontier Dispute* case,³⁵⁷ the

351 A 20 of the *African Charter on Human and Peoples' Rights* (1981).

352 Shelton 2011 *American Journal of International Law* 64.

353 The Preamble to the *African Charter* conceived the duty of African States "to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions". *African Charter on Human and Peoples' Rights* (1981).

354 *Charter of the Organization of African Unity* (1963).

355 A 3(6) of the *Charter of the Organization of African Unity* (1963).

356 A 3(3) of the *Charter of the Organization of African Unity* (1963).

357 "The maintenance of the territorial *status quo* in Africa is often seen as the wisest course to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to

Court revealed its awareness of the problem of self-determination in the context of postcolonial Africa, but also referred to the importance of respecting colonial boundaries. Likewise, the 1999 Algiers Declaration adopted by the OAU Assembly of Heads of State and Government reaffirmed that the respect for borders inherited at independence retains its "validity and permanence as a fundamental norm".³⁵⁸

2.5 The right to self-determination in the jurisprudence of the ICJ

The principle of self-determination has figured in a number of decisions of the ICJ. The first was the *Case Concerning the Right of Passage over Indian Territory*.³⁵⁹ Both Portugal and India raised the issue of self-determination in their pleadings before the Court. Portugal referred to a declaration made on 6 September 1955 by the Indian Prime Minister that India would not tolerate the presence of the Portuguese in Goa even if the Goans want them to be there.³⁶⁰ Portugal submitted that this statement constituted "the very negation of the right of self-determination of peoples".³⁶¹ However, in its judgment the Court did not address specifically the issue relating to self-determination.³⁶² Judge Spiropoulos was the only one to make any reference to self-determination, although he did not explicitly use the term.³⁶³

consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples". *Frontier Dispute (Burkina Faso v Mali) Judgment* 1986 ICJ Reports par 25.

358 *Algiers Declaration* AHG/Decl 1 (XXXV) (1999).

359 *Case Concerning Right of Passage over Indian Territory (Portugal v India) (Merits) Judgment* 1960 ICJ Reports par 6-16. This case involved the status of two Portuguese enclaves within Indian Territory. In July and August of 1954 an insurrection occurred in the enclaves, whereupon India prohibited access to the enclaves by Portuguese authorities. Portugal sought a declaration from the Court that it possessed a right of passage to the two enclaves.

360 *Case concerning Right of Passage over Indian Territory (Merits) Judgment* 1960 ICJ Reports.

361 *Case concerning Right of Passage over Indian Territory (Merits) Judgment* 1960 ICJ Reports par 16.

362 Musgrave *Self-determination* 77.

363 Judge Spiropoulos noted that "It is a fact that after the departure of the Portuguese authorities, the population of the enclaves set up a new autonomous authority based upon the will of the population. Since the right of passage assumes the continuance of the administration of the enclaves by the Portuguese, the establishment of a new power in the enclaves must be regarded as having *ipso facto* put an end to the right of passage". *Case concerning Right of Passage over Indian Territory (Merits) Judgment (Declaration of Judge Spiropoulos)* 1960 ICJ Reports 53.

In the *Barcelona Traction* case,³⁶⁴ reference to self-determination was made by Judge Ammoun in his separate opinion. He stated that:

Self-determination was one of the higher ideals of international law – demanded for centuries by the nations which successively acquired their independence in the two Americas, beginning with the 13 Confederate States in North America, and in Central and Eastern Europe; many times proclaimed since the First World War; enshrined finally in the Charter of the United Nations, added to and clarified by the General Assembly's resolution of 16 December 1952 on the right of self-determination and the historic Declaration by the Assembly on 14 December 1960 on the Granting of Independence to Colonial Countries and Peoples, the consequences of which have not yet fully unfolded. The international lawmaking nature of these declarations and resolutions cannot be denied, having regard to the fact that they reflect well-nigh universal public feeling. They were, moreover, preceded by the similarly worded Pact of Bogota adopted by the American States in 1948 and the resolutions of the 1955 Bandung Conference, just as they were followed by the Addis Ababa Charter of African Unity of 1963 and the Resolutions of the Belgrade Conference in 1961 and the Cairo Conference in 1964 of Non- Aligned Countries, the latter comprising the majority of the Members of the United Nations, and, finally, by the declaration of 21 December 1965 by the General Assembly on the inadmissibility of intervention in the domestic affairs of States and the protection of their independence and sovereignty.³⁶⁵

From the above argument, it cannot be doubted that both the principle of equality and that of non-discrimination on racial grounds which follows thereafter, like the right to self-determination, are imperative rules of law. It is legitimate to consider that the inclusion of self-determination in the *UN Charter*, treaty laws and resolutions indicates that it is an integral part of positive law. In particular, this may be deduced from the Judgment of the ICJ in the Separate Opinion of Judge Ammoun.

The issue of self-determination also appeared before the ICJ in the *East Timor* case.³⁶⁶ In this case, the Court described self-determination as "irreproachable", and one of the essential principles of contemporary international law.³⁶⁷ The Court went on to state that the right of peoples to self-determination as it evolved from the *UN*

364 *Barcelona Traction, Light and Power Company Limited Judgement* 1970 ICJ Reports 3.

365 *Barcelona Traction, Light and Power Company Limited Judgement (Separate Opinion of Judge Ammoun)* 1970 ICJ Reports par 3.

366 In this case Portugal contested the right of Australia to conclude an agreement with Indonesia concerning the delimitation of the sea-bed boundary between northern Australia and East Timor. In 1975 East Timor, a non-self-governing territory administered by Portugal, was invaded and annexed by Indonesia. Portugal argued that Indonesia's invasion of East Timor was illegal. By illegally invading and occupying East Timor, Indonesia had deprived the people of East Timor of their right to self determination. *East Timor Case (Portugal v Australia) Judgment* 1995 ICJ Reports 90.

367 *East Timor Case (Portugal v Australia) Judgment* 1995 ICJ Reports par 90.

Charter and from UN practice has an *erga omnes* character. *Erga omnes*, which translated means "as against all", was dealt with in the *Barcelona Traction* case of 1970. In this case the ICJ recognized that international law places certain obligations upon states, *erga omnes* - that is, obligations owed to the international community as a whole - and that, consequently, all States can be held to have a legal interest in their protection. Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.³⁶⁸

A similar reference was made in the *Nuclear Test Cases*,³⁶⁹ where the ICJ analysed certain unilateral statements made by French government officials as having been made *erga omnes*, and held those statements to be legally binding. In the *East Timor Case* the Court further accepted that the right to self-determination is a rule which has an *erga omnes* character.³⁷⁰ The Court also dealt with the issue of self-determination in its 1971 *Advisory Opinion on the status of Namibia*.³⁷¹ The question was about the legal consequences for states of the continued presence of South Africa in Namibia, in spite of SC Resolution 276 (1970).³⁷² The Court pointed out the following:

The developments of self-determination leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this Court, if it has faithfully to discharge its functions, may not ignore it.³⁷³

368 *Case Concerning the Barcelona Traction, Light and Power Company Limited Judgement* 1970 ICJ Reports par 33; *East Timor Case (Portugal v Australia) Judgment* 1995 ICJ Reports par 102.

369 *Nuclear Tests (New Zealand v France) Judgment* 1974 Reports.

370 *East Timor Case (Portugal v Australia) Judgment* 1995 ICJ Reports par 102.

371 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports par 16.

372 SC Res 276 (1970), which declared South African control over Namibia illegal. See, also Lowe and Fitzmaurice *Fifty Years of the International Court of Justice* 353.

373 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports par 19-20.

In this case, the Court emphasised precisely that self-determination had become an overarching principle of the international community since 1945.³⁷⁴ Hence, it must apply to pre-existing legal institutions as well.³⁷⁵ Self-determination, therefore, applied not only to current and future international relations, but also constituted a fundamental standard of behaviour which, in a way, projected itself into past. Finally, the Court concluded that the development that was enshrined in the Charter, made the principle applicable to all non-self-governing territories.³⁷⁶

In addition to the above jurisprudence, the Court dealt with the principle in its 1975 *Advisory Opinion on the Western Sahara*.³⁷⁷ In this opinion the ICJ took up the statement made in the *Advisory Opinion on Namibia* to the effect that the principle of self-determination was applicable to all dependent peoples. All of them were entitled to opt for independence, if they so wished.³⁷⁸ In this connection the ICJ referred to self-determination as provided in articles 1 and 55 of the Charter, and stated that the provisions had direct and particular relevance for non-self-governing territories.³⁷⁹ The Court also discussed Resolution 1514(XV), and concluded that the application of the right to self-determination requires a free and genuine expression of the will of the peoples concerned.³⁸⁰

374 Cassese "International Court of Justice" 351-357.

375 Cassese "International Court of Justice" 351-357.

376 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports par 16.

377 The Western Sahara had been a colony of Spain since 1884, and was formerly known as the Spanish Sahara. In 1966 the GA adopted Resolution 2229 (XXI) which reaffirmed in par 1 the inalienable right of the peoples of Ifni and Spanish Sahara to self-determination in accordance with the Resolution 1514 (XV). See GA Res 2229 (XXI) (1966). Spain eventually agreed to hold a referendum in the Western Sahara in 1975. But before this occurred Morocco and Mauritania objected. These two states both claimed the territory of the Western Sahara on the basis of historic title predating Spanish colonisation. The GA sought, at the instigation of Morocco and Mauritania, an Advisory Opinion from the ICJ as to whether the Western Sahara was *terra nullius* prior to Spanish colonization.... [emphasis added]. *Western Sahara Advisory Opinion* 1975 ICJ Reports 12.

378 *Western Sahara Advisory Opinion* 1975 ICJ Reports par 54.

379 *Western Sahara Advisory Opinion* ICJ 1975 Reports par 12-68.

380 *Western Sahara Advisory Opinion* ICJ 1975 Reports par 12-68.

Finally, the Court further dealt with the principle of self-determination in the *Wall Advisory Opinion*.³⁸¹ The Court recalled article 2(4) of the Charter and Resolution 2625(XXV). Article 2(4) 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.

Resolution 2625(XXV)³⁸² provides that "no territorial acquisition resulting from the threat or use of force shall be recognised as legal". As to the principle of self-determination, the Court pointed out that the principle had been enshrined in the Charter and reaffirmed by the Resolution 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". The Court also recalled its findings in the *East Timor* and *Barcelona Traction* cases, which emphasised that the current development in international law regarding non-self-governing territories, as enshrined in the Charter, made the principle applicable to all such territories, and that the right of peoples to self-determination had today an *erga omnes* character.³⁸³

Thus, the central idea of an *erga omnes* obligation is that states are not permitted to derogate from the rule at all, not even by agreement in their mutual relations.³⁸⁴ In this respect, self-determination is associated with *jus cogens*.³⁸⁵ The concept of "*jus cogens*" literally translated means compelling law. It first appeared in modern positive international law in the 1969 *Vienna Convention on the Law of Treaties*. The Article 53 reads:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.³⁸⁶

381 *Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory, Advisory Opinion* 2004 ICJ Reports 136.

382 GA Res 2625 (XXV) (1970).

383 *East Timor (Portugal v Australia) Judgement* 1995 ICJ Reports par 29.

384 Whiteman 1977 *Georgia Journal of International and Comparative Law* 619.

385 Gareau 2005 *Leiden Journal of International Law* 490; Saul 2011 *Human Rights Law Review* 633.

386 A 53 of the *Vienna Convention on the Law of Treaties* (1969).

It follows that the language of this article did not define a "peremptory norm", and neither did it make any reference to it as such. However, the judge *ad Hoc* Krecua,³⁸⁷ in his separate opinion in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, stated that "the concept of *jus cogens* operates as a concept superior to both customary international law and treaty law". In the same case the ICJ stipulated that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*).³⁸⁸

Similar, the ICJ referred to the concept of *jus cogens* in the *North Sea Continental Shelf Cases*³⁸⁹ and the *Nicaragua Case*.³⁹⁰ In the latter case the ICJ stated that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*". Another example of *jus cogens* is found in the *Namibia Advisory Opinion*. In his separate opinion, judge Ammoun called the right of self-determination a "norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances".³⁹¹ Some scholars³⁹² repeatedly emphasize that *Jus cogens* rules are peremptory and non-derogable rules of international public law. In this regard, other scholars, such as Whiteman,³⁹³ state that *jus cogens* and *erga omnes* obligations take precedence in the realm of international law over customary and conventional international law.³⁹⁴

387 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) Judgement (Separate Opinion of Judge Ad Hoc Krecua)* 2007 Reports par 528-543.

388 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) Judgment* 2007 ICJ Reports par 161.

389 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgement (Dissenting Opinion of Judge Tanaka)* 1969 ICJ Reports par 182.

390 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) Merits* 1986 ICJ Reports.

391 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion (separate opinion of Judge Ammoun)* 1971 par 89-90.

392 Espiell "Self-determination" 167-173; Parker and Neylon 1988 *Hastings International and Comparative Law Review* 411-464.

393 Whiteman 1977 *Georgia Journal of International and Comparative Law* 609-628.

394 The relationship between *erga omnes* obligations and *jus cogens* norms remains unclear. Some scholars have suggested that the concepts involve different aspects of the same rules, and the terms have been used interchangeably in debates of the International Law Commission. International Law Commission *Yearbook* 247-253. Others have suggested that the concept of an *erga omnes* obligation is wider than that of *jus cogens*. It follows that

The *Wall Advisory Opinion*³⁹⁵ reiterated the previous cases, and clearly stated that the right to self-determination is applicable outside the colonial situation and is today a right *erga omnes*.³⁹⁶ The Court went on to state that "Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination". The Court would also recall that under the terms of General Assembly resolution 2625 (XXV) "every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".³⁹⁷

More recently, in *Kosovo Advisory Opinion*,³⁹⁸ the ICJ provided a comprehensive account of the legal meaning of self-determination. It noted that "during the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples living outside the

particularly "weighty" rules of international law are usually both *jus cogens* and *erga omnes* in character. Furthermore, *jus cogens* rules necessarily apply *erga omnes*. But *erga omnes* obligations are not *ipso facto* of a *jus cogens* character. Byers 1997 *Nordic Journal of International Law* 211-239. *Erga omnes* obligations are therefore best seen as being more than just rules of bilateral relationships that have been fully generalised. As was explained by the International Court of Justice in the *Barcelona Traction* case, there are two parts to every *erga omnes* obligation. Firstly, as with ordinary rules, each *erga omnes* obligation contains a series of rights and corresponding obligations concerning its substantive content. It is these rights and obligations which form the principal bilateral relationships between any of the many pairs of states which are subject to the rule. Secondly, according to the Court each state has a "corresponding right of protection". In other words, each State not only has rights and obligations with respect to the substantive content of the rule, giving rise to State responsibility vis-a-vis injured States in the event of a violation, but it is also subject to a series of additional, bilateralised rights and obligations. The additional rights enable it to make claims against any State which is bound by and violates the substantive rule, while the additional obligations require that it not violate that same substantive rule in its relations with any other similarly bound State. *Barcelona Traction, Light and Power Company Limited Judgement* 1970 ICJ Reports par 33-36.

395 *Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory, Advisory Opinion* 2004 ICJ Reports. The Court also noted that "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'". A 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 States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the *United Nations Charter*.

396 *Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory, Advisory Opinion* 2004 ICJ Reports par 88.

397 GA Res 2526 (XXV) (1970).

398 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

colonial context".³⁹⁹ However, it also remains one of the peremptory norms of international law, and it applies beyond the colonial context.⁴⁰⁰ In this case, the Court highlighted the extensive debate about whether a right to secession, as part of the law of self-determination, exists "outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation"⁴⁰¹ Similar debate was found to exist regarding whether or not international law provides for a right of "remedial secession" and, if so, in what circumstances.⁴⁰² However, the issue relating to the extent of "remedial secession" was not discussed. The Court stated that it is beyond the scope of the question posed by the General Assembly.⁴⁰³ A review of the concepts "secession" and "remedial secession" is the aim of the fourth chapter.

2.6 The different types of self-determination

After reviewing the most important principles and texts in international law relating to the right to self-determination, it seems appropriate (also for the purpose of drawing up a summary) to set out certain considerations concerning the features of self-determination. According to current interpretation, the right of peoples to self-determination which is recognised today in international law consists essentially of the right to internal and external self-determination.⁴⁰⁴ For the sake of clarity the following part analyses the internal and external aspects of self-determination separately.

399 In his separate opinion, Judge Trindade stated that "the principle of self-determination has survived decolonisation, in order to face nowadays new and violent manifestations of systematic oppression of peoples". Beyond the colonial context, external self-determination does not apply to all peoples as they wish, but it applies to the peoples under systematic oppression, subjugation and tyranny. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Separate Opinion of Judge Cançado Trindade)* 2010 ICJ Reports par 173-176.

400 Saul 2011 *Human Rights Law Review* 615.

401 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 82.

402 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

403 The question posed by the General Assembly concerned only whether or not "the declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in accordance with international law". *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 1.

404 Senese 1989 *Social Justice* 19.

2.6.1 Internal self determination

Cassese⁴⁰⁵ defines internal self-determination as "the right to authentic government, that is, the right for a people really and freely to choose its own political and economic regime – which is much more than choosing among what is on offer perhaps from one political or economic position only". McCorquodale⁴⁰⁶ also states that the "internal aspect of self-determination concerns the right of peoples within a State to choose their political status, the extent of their political participation and the form of their government". Another interpretation of internal self-determination is given by the Supreme Court of Canada⁴⁰⁷ by stating that "internal self-determination means a people's pursuit of its political, economic, social and cultural development within the framework of an existing state". Other authors,⁴⁰⁸ specifically those who focus on democratic governance as a means of realizing peoples' right to self-determination and protecting human rights, claim that the internal aspect of self-determination is democracy.⁴⁰⁹ It follows that other states should not, through appeals or pressure, seek to prevent a people from freely selecting its own political, economic, and social system.

In a more recent instrument of the United Nations, the General Assembly reaffirmed:

The right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognized the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States

405 Cassese *Self-determination of Peoples* 101.

406 McCorquodale 1994 *International and Comparative Law Quarterly* 864.

407 *Reference re Secession of Quebec* 1998 2 (SCR) 217.

408 Hannum *Autonomy* 30; Senese 1989 *Social Justice* 19-25.

409 Vidmar states that the right to self-determination would normally be enjoyed in its internal mode. Vidmar *Democratic Statehood* 140. The internal mode of this right, however, inspired some scholars to argue that the right to self-determination has an effect of the "right to democracy". Franck 1992 *American Journal of International Law* 46-91; Thornberry "The Democratic or Internal Aspect of Self-Determination" 120; Wheatley *Democracy* 135-36. Such arguments stem from the requirement of a representative government, as is very clearly stated in a 21 of the *Universal Declaration of Human Rights*. The exercise of the right to self-determination required the democratic process which, in turn was inseparable from the full exercise of such human rights as the right to freedom of thought, conscience and religion; the right to freedom of expression; the right to peaceful assembly and to association; the right to take part in cultural life; the right to liberty and security of person; the right to move freely in one's country and to leave any country, including one's own, as well as to return to one's country. For more details, see Chapter II par 2.4.4 above.

conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.⁴¹⁰

Having said this, it is necessary to add that internal self-determination is a continuing right which is being exercised continuously, and not a once-for-all right.⁴¹¹ In line with this, Cassese⁴¹² points out that unlike external self-determination, which ceases to exist once it is implemented, the right to internal self-determination is neither destroyed nor diminished by its having already been once invoked and put into effect.

The right to internal self-determination in the modern world exists under treaty law such as the ICCPR and ICESCR. In its general comment on their common article 1, the UN Committee on Human Rights stated that "all states parties should take positive action to facilitate the realisation of and respect of the right of peoples to self-determination". In particular, states must refrain from interfering in and thereby adversely affecting the exercise of the right to self-determination.⁴¹³ In addition to this the 1970 Declaration on Principles of International Law⁴¹⁴ also proposes that the governments of sovereign states ought to be democratic; that is, based on the free choice of the people. There is a consensus regarding the fact that the right to internal self-determination applies beyond the colonial context and extends to racial minorities and religious groups. This is supported not only by the Friendly Relation Declaration and the General Assembly Resolution 2625 (XXV), but also by UN General Assembly resolutions on Southern Rhodesia⁴¹⁵ and South Africa,⁴¹⁶ as well as a number of significant declarations made along the same lines by Western countries.⁴¹⁷

410 GA Res 50/6 (1995).

411 Crawford *The Creation of States* 126.

412 Cassese *Self-determination of Peoples* 101.

413 Human Rights Committee, *General Comment 12, Article 1, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev 1 (1994).

414 GA Res 2625 (XXV) (1970).

415 GA Res 31/154 (A-B) (1976).

416 SC Res 417 (1977) and GA Res 41/101 (1986).

417 Cassese *Self-determination of Peoples* 120-121.

2.6.2 External self-determination

Scholars and commentators frequently hold that self-determination has an internal as well as an external dimension.⁴¹⁸ This means that the people's right to self-determination may be achieved internally or externally. In this connection, the General Assembly Resolution 2625 (XXV) recognises the establishment of a sovereign and independent state, or free association with an independent state or integration with an independent state as the way of realisation of the right to self-determination.⁴¹⁹ In the *Quebec* case, the Supreme Court of Canada defined external self-determination as:

the effort of a group of peoples of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane.⁴²⁰

This is to say that each people has the right to constitute itself into a nation-state or to integrate into, or federate with, an existing state.

According to prevailing opinion, external self-determination was applied most frequently to colonial situations.⁴²¹ Unlike internal self-determination, which is exercised continuously, the right to external self-determination is achieved once and for all. It should be argued that this right has expired once the peoples have achieved statehood or independence.⁴²² Under Resolution 1541(XV), external self-determination may be achieved in three ways, namely "emergence as a sovereign independent State, free association with an independent state, or integration with an independent state".⁴²³ In this connection Resolution 1514 (XV) pointed out the essential standards concerning colonial peoples:

418 Cassese *Self-determination of Peoples* 67-100; Pomerance *Self-determination* 9-24.

419 Par 4 of GA Res 2625 (XXV) (1970).

420 *Reference re Secession of Quebec* 1998 2 (SCR) 217.

421 McCorquodale 1994 *International and Comparative Law Quarterly* 863.

422 Senese 1989 *Social Justice* 19; Cassese *Self-determination of Peoples* 73. This may be inferred from par VI of the principle laid down by GA Res 2625 (XXV), which states: "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles". See GA Res 2625 (XXV) (1970).

423 GA Res 1541(XV) (1960). This Resolution concerned the Principles to be applied to transmit information under a 73(e) of the *UN Charter* and was passed on 15 Dec 1960, the day after the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.

All peoples subjected to colonial rule have a right to self-determination, that is, to 'freely determine their political status and freely pursue their economic, social and cultural development'.⁴²⁴

In the colonial context the right of self-determination is equal to a right to independence. It is apparent from Resolution 1514 (XV) that the declaration of independence by colonial peoples is considered as an exercise of external self-determination.⁴²⁵ Outside of the process of decolonisation, however, the exercise of the right to self-determination does not necessarily result in the creation of a new independent state.⁴²⁶ But again, the scope of the right to self-determination in the post-colonial period manifests differently depending on who is doing the arguing. It is argued that in exceptional circumstances a people's right to self-determination might arguably become a right to external self-determination in manifestation of a right to unilateral secession.⁴²⁷ On this matter Seymour⁴²⁸ argues that the peoples' right to external self-determination is the right to violate the territorial integrity of the encompassing state, and that such a right can be exercised only in the most extreme cases, and even then, under carefully defined circumstances.

In the *Quebec* case, for instance, the Supreme Court of Canada provided for three categories of peoples finding themselves in the special circumstance that would warrant external self-determination: those under colonial domination or foreign occupation; those subject to alien subjugation, domination or exploitation outside a colonial context; and, possibly, a people "blocked from the meaningful exercise of its right to self-determination internally".⁴²⁹ Today there is widespread acceptance among international lawyers of the concept of external self-determination.⁴³⁰ It has been widely discussed by scholars and finally accepted that external self-determination is exercised as a last resort to remedy long-lasting terror and

424 Par 2 of the GA Res 1541(XV) (1960).

425 Cassese *Self-determination of Peoples* 72-73.

426 Theories and practice relating to secession will be discussed later, in the Chapter 4.

427 Van Driest *Remedial Secession* 4.

428 Seymour 2007 *Inquiry: An Interdisciplinary Journal of Philosophy* 396.

429 *Reference re Secession of Quebec* 1998 2 (SCR) 217.

430 Van der Vyver 2000 *Journal of Transnational Law and Policy* 1-38; Seymour 2007 *Inquiry: An Interdisciplinary Journal of Philosophy* 395-423.

oppression perpetrated in flagrant breach of the fundamental principle of equality and non-discrimination.⁴³¹

2.7 Summary

In the first instance this chapter has aimed at reviewing some approaches towards the right to self-determination and its international regulation. It has argued that the right to self-determination of people as a legal right in international law evolved from an essentially political concept. Although its first expression in international law has not been clearly established, some scholars state that "it is an ancient political right, which can be traced as far back as ancient Greece and Rome".⁴³² It has evolved from philosophical affirmation that all exercise of power should be morally legitimate; and the exercise of power is morally legitimate when it is the result of political consent and respects the fundamental rights of individuals subject to that power. As a governing principle, self-determination has originated from the American Declaration of Independence and French Revolution, which suggested that the consent of the governed could make a government legitimate. Both the American and French Revolutions acknowledged the right of peoples to have a government resulting from their own free consent without any external or internal oppression. In addition, these Revolutions proclaimed the principle of popular sovereignty and the right to resist tyranny. It follows that whenever any form of government becomes destructive of these ends (securing life, liberty and the pursuit of happiness); it is the right of the peoples to change or abolish it and to form a new government.⁴³³

Although self-determination presumptively benefits all human beings, it was not until the 20th century that it was developed beyond this embryonic stage by two leading statesmen: Lenin and Wilson. Lenin conceived self-determination primarily as an anti-colonial postulate while Wilson linked self-determination with Western liberal democratic ideals and the aspirations of European nationalists. Wilson used the

431 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Separate Opinion of Judge Cançado Trindade)* 2010 ICJ Reports par 176, Cassese *Self-determination of Peoples* 67-100; Senese 1989 *Socials Justice* 19-25; Sterio 2010 *Minnesota Journal of International Law* 137-176; Vidmar 2010 *St Antony's International Law Review* 37-56; Dugard *International Law* 104; Tancredi "A Normative 'Due Process' in the Creation of States through Secession" 176.

432 Van Walt van Praag 1979 *Wayne Law Review* 280-283.

433 Collins 1980 *Case Western Reserve Journal of International Law* 139.

ideas of self-governance and "democratic entitlement" to formulate the political principle of self-determination. This principle was articulated in the Versailles Settlement and had, as its major thrust, the protection of the oppressed in the aftermath of WWI. However, up to the end of WWI self-determination was largely ignored. Regardless of the effort made by Wilson and Lenin, self-determination remained a political idea, and nothing more than that. Thus, the League of Nations Covenant did not make a clear reference to the right to self-determination.

It is apparent from the above that self-determination entered the sphere of positive international law only after the WWII, when it was asserted in articles 1(2) and 55 of the *UN Charter*. Since then it has become a cornerstone legal norm throughout international law. Notably, in both articles 1(2) and 55, self-determination is mentioned in conjunction with the principle of the "equal rights" of peoples. Under the rubric of human rights, self-determination is provided for in the ICCPR and the ICESCR⁴³⁴ as a "right of all peoples". In the context of article 1 of both the ICCPR and the ICSECR, self-determination is undeniably universal in scope and hence must be assumed to apply to all humanity. Furthermore, at regional level self-determination was embodied in the *African Charter on Human and Peoples' Rights* and in the *Helsinki Final Act*.

Since the decolonisation process is almost over, self-determination is understood to retain its continuity through the right to internal self-determination. This means that the Covenants enshrined the right of the whole people of each contracting state to internal self-determination; that is, the right to freely choose its rulers. However, external self-determination as a right to achieve independent statehood is exercised only in special circumstances.⁴³⁵

It should be added that in 1960 the General Assembly adopted Resolutions 1514(XV) and 154(XV), which provided the foothold for what has become the "new UN law of self-determination".⁴³⁶ By virtue of these Resolutions, self-determination became narrowly associated with the process of decolonisation. However, Resolution 2625(XXV) declared that the right to self-determination was not limited to

434 See the ICCPR and ICESCR.

435 *Reference re Secession of Quebec* 1998 2 (SCR) 217.

436 *Pomerance Self-Determination* 12.

colonial situations and recognised that the exposure of peoples to foreign domination and exploitation amounted to a violation of the peoples' right to self-determination. It appears that this right is not limited to the colonial context, but rather applies to all peoples.

The ICJ has also affirmed the existence of the principle of self-determination in several cases.⁴³⁷ In the *Namibia Advisory Opinion* it was emphasised that "the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter made the principle applicable to all of them".⁴³⁸ In the *Western Sahara* case, the Court accepted that the principle of self-determination is a part of customary international law. The ICJ has also qualified the right to self-determination as an *erga omnes* obligation in the *East Timor* case.⁴³⁹ It is therefore no longer correct to regard the right to self-determination as merely a political aspiration of peoples. In the view of some writers, the principle of self-determination is a *ius cogens*.⁴⁴⁰ In this connection, the following chapter identifies who is entitled to this right. The focus will be placed on rights-holders of self-determination, the definition of the term "a people", and the criteria that a group should meet in order to be considered as a people in the light of contemporary developments.

437 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports par 31-32; *East Timor (Portugal v Australia) Judgment* 1975 ICJ Reports; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* 2004 ICJ Reports.

438 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports.

439 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* 2004 ICJ Reports.

440 Saul 2011 *Human Rights Law Review* 634-642.

Chapter 3: The holders of the right to self-determination

..... it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people.⁴⁴¹

3.1 Introduction

The previous chapter showed that self-determination consists essentially of the right of all peoples to freely determine their political, social and economic development. The right of self-determination is normally exercised in its internal mode. In this context, the people freely choose their own political, economic, and social system within the framework of an existing state.⁴⁴² The right of self-determination can also be exercised in its external mode. In this context, peoples are entitled to secede from the parent state and establish their own independent state or integrate into, or federate with, an existing state.⁴⁴³ Such an exercise, however, is not compatible with the territorial integrity of the state. It is widely accepted that external self-determination can be exercised by colonised or occupied peoples.⁴⁴⁴ Outside the colonial context, the attainment of external self-determination requires the parent state's consent and is exercised in "only the most extreme of cases, and even then, under carefully defined circumstances".⁴⁴⁵ Recently, as will be seen in Chapter Four, international legal scholarship suggests that external self-determination in the form of "unilateral secession" may be valid for peoples whose basic rights are not being respected by the parent state and who are often subject to heinous human rights abuses.⁴⁴⁶

From 1945 to date there has been a progressive acknowledgment in international law of the right of peoples to self-determination. Though the right of self-determination in specific contexts such as colonialism has acquired the status of an international customary norm,⁴⁴⁷ international law does not currently define the

441 Jennings *The Approach of Self-government* 55-56.

442 See Chapter Two par 2.6 above.

443 See GA Res 2625 (XXV) (1970).

444 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 3.

445 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 126.

446 In this respect, it is often referred to as remedial secession. The doctrine of remedial secession will be discussed in Chapter Four of this study.

447 *Western Sahara Advisory Opinion* 1975 ICJ Reports par 56; *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports par 53.

"holders" of the right. The question of who the "right holders" are to whom self-determination applies has been a constant question since the earliest discussion of the right to self-determination.⁴⁴⁸ It should be noted that there is nothing within the confines of the self-determination formula itself that provides guidance on the definition of and concretisation of the "self".

During WWI Presidents Wilson and Lenin referred to "people" and "nations" as the subjects of the right to self-determination, but they did not specify who those "peoples" or "nations" were.⁴⁴⁹ In international instruments, the terms "nations" and "peoples" were first used in the *UN Charter*. It is provided therein that "peoples" are the main holders of equal rights and the right to self-determination.⁴⁵⁰ This language was also used in the vast majority of resolutions,⁴⁵¹ declarations,⁴⁵² decisions and agreements relating to the right to self-determination. However, despite its inclusion in these numerous international instruments the terms have never been defined in any comprehensive or satisfactory manner.⁴⁵³ Attempts to give a definition of the terms "nation" and "people" occurred during the drafting of the *UN Charter* at the San Francisco Conference. It was suggested that the term "nations" "was broad and general enough to include colonies, mandates, protectorates and quasi-states as well as states,"⁴⁵⁴ while the term "peoples" "referred to groups of human beings who might, or might not, comprise states or nations".⁴⁵⁵

In the *UN Charter* drafting process, the participants used the words "nations" and "peoples" interchangeably, but no clear meaning was assigned to them. In a report written for the UN, the Special Rapporteur Cristescu⁴⁵⁶ stated that the *UN Charter* uses the term "peoples" a number of times, particularly in its preamble, as a synonym for "nations" or "states". This caused confusion as to whether self-determination applied to "all nations" and "all peoples" equally. It is recognised that

448 McCorquodale 1994 *International and Comparative Law Quarterly* 866.

449 Cassese *Self-determination of Peoples* 14-19; Whelan 1994 *International and Comparative Law Quarterly* 99-115; Page 1950 *Slavonic and East European Review* 342.

450 A 1(2) of the *Charter of the United Nations* (1945).

451 GA Res 1514 (XV) (1960); GA Res 1541 (XV) (1960); GA Res 2105 (XX) (1965); GA Res 2625 (XXV) (1970); GA Res 2649 (XXV) (1970); GA Res 2787 (XXVI) (1971); GA Res 3103 (XXVIII) (1973).

452 *Algiers Declaration of the Rights of Peoples* (1976); *Helsinki Final Act* (1975).

453 Musgrave *Self-determination* 148.

454 UNCIO DOCS Vol XVIII 657-658.

455 UNCIO DOCS Vol XVIII 657-658.

456 Cristescu *The Right to Self-determination* 39.

these are two different concepts. Nations are political entities while "peoples" are human beings.⁴⁵⁷ The existing interpretations of the term "peoples" are so various as to be all-embracing, for they include a variety of social arrangements including groups of individuals linked by a common language, religion, ethnicity or race.⁴⁵⁸

The opinion has also been expressed that the term "nations" which the *UN Charter* employed at several points refers to states, since international relations are normally conducted between states.⁴⁵⁹ It is clear from a reading of articles 1(2) and 55 that relations between states are to be conducted on the basis of respect for the principle of equal rights and the self-determination of peoples.⁴⁶⁰ The codification of the principle of the self-determination of peoples gave rise to the question of the legal meaning of the term. Was the *UN Charter* intended to refer to states or also to the inhabitants of states? On this matter, Quane⁴⁶¹ suggests that the term "peoples" refers to states. This is because the general view in 1945 was that only states had rights under international law. A cross-examination of the references to "peoples" in the Preamble to the *UN Charter* shows that it starts with the wording "We the Peoples of the United Nations" and ends with the statement that "our respective Governments... have agreed to the present Charter".⁴⁶² The reference to "our respective Governments" shows that the word "peoples" in the Preamble of the *UN Charter* refers to peoples organised as states.

The concept of "peoples" is used in a different sense in Chapters VI and XII of the *UN Charter*. Chapter XI applied to non-self-governing territories while Chapter XII established the trusteeship system. These chapters played an important role in the development of the concept of "peoples". Article 73 provides that member states which have responsibilities for administration of non-self-governing territories will *inter alia* "develop self-government to take due account of the political aspirations of the peoples".⁴⁶³ This article uses the word "peoples" to refer to the inhabitants of territories whose peoples have not yet attained a full measure of self-government.

457 Duursma *Fragmentation* 14.

458 Quane 1998 *International and Comparative Law Quarterly* 539.

459 Quane 1998 *International and Comparative Law Quarterly* 539.

460 Quane 1998 *International and Comparative Law Quarterly* 539.

461 Quane 1998 *International and Comparative Law Quarterly* 539.

462 The Preamble of the *Charter of the United Nations* (1945).

463 A 73 of the *Charter of the United Nations* (1945).

This statement can also be found in Chapter XII of the *UN Charter*. Article 76 provides that one of the main objectives of the international trusteeship system is:

... to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned.⁴⁶⁴

Under article 76 of the *UN Charter*, the concept of "peoples" refers to the inhabitants of territories formerly held under the mandate system of the League of Nations, territories detached from enemy states as a result of WWII and those voluntarily placed under the system by states responsible for their administration.⁴⁶⁵ This interpretation of the term "peoples" is consistent with the object and purpose of the *UN Charter*, because, as United Nations practice has made clear, that the word "peoples" as used in article 1(2) means all peoples.⁴⁶⁶

Following this line of reasoning, Quane suggests that there are three possible interpretations of the concept of "peoples". The first interpretation refers to states, and in this case the principle of self-determination means sovereign equality. The second interpretation refers to the inhabitants of non-self-governing territories. For these peoples, self-determination means only the right to self-government. The third interpretation is that the term "peoples" refers to the inhabitants of trust territories. In this context, self-determination means the right to self-government or independence.⁴⁶⁷

From the foregoing it can be concluded that the term "peoples" as used in the *UN Charter* refers to the populations of states, non-self-governing territories and trust territories. For these peoples, self-determination means the right to freely choose their rulers through regular, democratic and free elections.⁴⁶⁸ It does not imply the right of a minority group or ethnic or national group to secede from a sovereign state. The *UN Charter* was formulated in such a way as to exclude national groups which did not identify themselves with the population of a state, non-self-governing territory,

464 A 76 of the *Charter of the United Nations* (1945).

465 A 77 of the *Charter of the United Nations* (1945).

466 Cristescu *The Right to Self-determination* 39.

467 Quane 1998 *International and Comparative Law Quarterly* 541.

468 Cassese *Self-determination of Peoples* 42.

trust territory or colony from claiming the right to secede and establish an independent state.⁴⁶⁹

The identification of the holder of the right to self-determination was once more dealt with by Sir Ivor Jennings. In his oft-quoted remark, he noted that "at first glance, self-determination seemed pre-eminently simple and reasonable: let peoples decide their own destiny."⁴⁷⁰ The problem, however, was that peoples cannot decide until somebody decides who the "peoples" are.⁴⁷¹ Emerson has argued that the term "peoples" had never attained any generally accepted meaning which could be applied to the diverse world of political and social reality.⁴⁷² This lack of a generally accepted definition of the term "peoples" provides room for "peoples" to be used as political ideas. If a group claims that it is a "people," there are no agreed standards against which that claim can be measured.⁴⁷³ This chapter considers the lack of an authoritative definition of the concept of "peoples" and suggests the most important features of "peoples" as an aid to the identification of the holders of the right to self-determination.

After having discussed the conditions for a group to be qualified as a people entitled to the right to self-determination, the study turns to the question of whether or not the right to self-determination creates a right to overthrow or secede from a government that acts against such a right. Admittedly, it is trite to argue that self-determination, as a legal right, goes hand in hand with the possibility for the right holders to enforce it. Thus, in order to ensure its realisation there should be a "national liberation movement" or another type of body such as a "rebel group" representative of the entire people or a component people.⁴⁷⁴ This chapter considers how "national liberation movements" and "rebel groups" become representatives of peoples and what their legal status in the struggle for self-determination may be. Although the present study often refers to "rebel groups" or "national liberation movements", it is necessary to evaluate the theoretical framework in which they exist before the terms are used in any further analysis, because of their inchoate nature and complex

469 Quane 1998 *International and Comparative Law Quarterly* 537-547.

470 Jennings *The Approach to Self-government* 5-56.

471 Jennings *The Approach to Self-government* 5-56.

472 Emerson 1971 *American Journal of International Law* 462.

473 Summers *Peoples and International Law* 1-10.

474 Cassese *Self-determination of Peoples* 146-147.

history. Post-independence "rebel groups", for instance, are often inspired to imitate earlier "national liberation movements". It will be shown that both kinds of movement share two main core elements, namely the spirit or ideology of revolution and the operational doctrines of guerrilla warfare.⁴⁷⁵ National liberation movements will be considered to the extent that they established the basis for the struggle for self-determination. It is observed that most armed opposition groups would prefer to be called "national liberation movements" rather than "rebel", "insurgent" or "terrorist" groups.⁴⁷⁶

It will be argued that international law at its current stage of development does not provide clear definitions of "national liberation movements" or "rebel groups". Furthermore, doctrinal writings do not provide a clear definition of these two phenomena. Scholarship in the area of international law has also remained too narrowly focused on anti-colonial struggles and "national liberation movements". This chapter will show that the development of international law remains somewhat ambiguous and does not set out a clear distinction between "national liberation movements" and "rebel groups" in the context of the struggle for self-determination. It will be established that the term "national liberation movements" referred to freedom fighters against colonial domination or other governments which masks or represents alien subjugation, while the term "rebel groups" referred to post-independence armed groups, which take up arms to overthrow or secede from dictatorial or oppressive regimes.⁴⁷⁷ Also, the chapter draws a distinction between "rebel groups" fighting for self-determination, and demonstrates how they differ from other dissident armed groups fighting to achieve measurable control over oil or other natural wealth. Rebel groups engaged in conflicts outside the scope of self-determination, such as terrorist or jihadist movements and other movements fighting for the control of natural resources will not be considered within the confines of this chapter due to their dubious legality.

475 Carey 2007 *Journal of Peace Research* 47.

476 For instance the National Liberation Army (ELN) in Colombia, the Revolutionary Armed Forces of Colombia (FARC) and the Sudan People's Liberation Movements fought under the name of national liberation movements. See Schatzman 2005 *Journal of Peace Research* 291; Metelits 2004 *African Today* 65.

477 GA Res 3103 (XXVIII) (1973) par 1-3.

Thus, this chapter is intended to identify and evaluate in depth the nature and definition of the entities that may freely determine their own political status within the context of self-determination. In doing so it will offer a brief overview of what might be considered to be a "people". This discussion will be followed by an examination of indigenous peoples and minority groups to determine if they are eligible to be holders of the right to self-determination. To this end, this chapter will argue that "rebel groups" originated from either aggrieved peoples, minority groups, or ethnic, cultural groups. The chapter also investigates whether these groups have the right to self-determination which may be enforced by "rebel groups" on their behalf. In order to paint a clear picture as regards the legal status of "rebel groups", the chapter will finally consider the recognition of "rebel groups" and their representative capacities in respect of the attainment of self-determination, focusing exclusively on post-colonial "rebel groups" in Africa.

3.2 The meaning of the term "peoples"

Understanding the term "peoples" is vital to the understanding and application of the right of self-determination although there has not been consensus on an acceptable definition.⁴⁷⁸ The historic roots of the term "peoples" include the American Declaration of Independence and the decree of the French Constituent Assembly of May 1790, which referred to both the rights of man and of peoples.⁴⁷⁹ More recently, the term "peoples" has been liberally invoked in a number of international instruments on human rights, more specifically those dealing with self-determination.⁴⁸⁰ For instance, the *UN Charter* was adopted in the name of "We the Peoples" and it features in article 1(2) the principle of equal rights and self-

478 Some scholars are of the opinion that the definition of "peoples" is uncertain and that the notion of peoples' rights could lead to a dangerous proliferation of claims, undermining settled borders, national sovereignty and international peace and security. United Nations Educational, Scientific and Cultural Organisation, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO Paris 27-30 November 1990: Final Report and Recommendations*, UNESCO Doc SHS-89/CONF602/7 (1990); Shaw posits that the concept of a "people" has proved to be one of the controversies of post-World War II period. See Shaw "Definition of Minorities in International Law" 2-3. Brownlie is of the same opinion, that "there has been continuing doubt and difficulty over the definition of what is a "people" for the purpose of applying the principle of self-determination". Brownlie "The Rights of Peoples" 1-16; Musgrave *Self-determination* 148.

479 Brownlie 1985 *Bulletin of the Australian Society of Legal Philosophy* 107.

480 Aa 1(2) and 55 of the *UN Charter*; the common a 1 of the ICCPR and ICESCR; GA Res 1514 (XV) (1960); GA Res 1541 (1960); GA Res 1803 (XVII) (1962); GA Res 2625 (XXV) (1970); etc. See also Kiwanuka 1988 *American Journal of International Law* 80-101.

determination of peoples. Common article 1 of the twin Human Rights Covenants of 1966 deals with the right of peoples to self-determination. Furthermore, and explicitly, in 1976 a group of eminent individuals meeting in Algiers proposed to the world the Universal Declaration on the Rights of Peoples,⁴⁸¹ in which several peoples' rights were elaborated.⁴⁸²

Although the international instruments quoted above grant the right of self-determination to peoples, no precise meaning of the term has been construed. In other words, international law is not clear as to the authoritative definition of a potential candidate who may claim an entitlement of self-determination. Moreover, the term does not convey the same meaning in all these instruments, and each scholarly authority has an entirely different opinion of what the term means. In 1951 Kelsen⁴⁸³ made an early effort to define "peoples" by saying that the term may have two different meanings as it is used in article 1(2) of the *UN Charter*. In connection with self-determination, the term "peoples" may mean one of the elements of state: the population.⁴⁸⁴ If this is so, the population of a territory may be identified with the "people" in the generic sense of the people of a territory. This definition excludes groups of people such as minority groups or indigenous peoples from being holders of the right to self-determination. Of course, despite Kelsen's effort to clarify the term with reasonable precision, it is still suffering from a high degree of ambiguity.

During the period of decolonisation, many scholars interpreted the term "people" in a restricted sense.⁴⁸⁵ The term was thought to mean the population of the colonial and non-self-governing territories.⁴⁸⁶ This is the position adopted by Rigo Sureda.⁴⁸⁷

481 *Algiers Declaration of the Rights of Peoples* (1976).

482 Kiwanuka 1988 *American Journal of International Law* 81.

483 Kelsen *The Law of the United Nations* 51.

484 Kelsen *The Law of the United Nations* 51.

485 For instance, in the *Aaland Islands* question the Commission attempted to deal with the right self-determination by limiting its application to the particular context of decolonisation. *Aaland Islands Question*, Report by the by the Commission of Rapporteurs, League of Nations Council Doc B7 21/68/106 (1921); Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the task of giving an Advisory Opinion upon the legal aspect of the *Aaland Islands Question*, *League of Nations Official Journal Special Supplement No 3* (October 1920); League of Nations 1921 *Official Journal* 64-79. It is quite clear that self-determination, as an international concept, is used in the context of decolonisation. Foster 2001 *European Journal of International Law* 141-157. In the same perspective, Bowett stated that self-determination operates only within the context of decolonization, and that it has no relevance in the relations between free, independent sovereign states. Bowett 1966

At the present stage of the international community it has only been possible to reach a working consensus on colonies as territories deprived of their right to self-determination. This has been so in spite of solemn declarations whereby all peoples are said to be entitled to self-determination. In practice, all peoples are considered to have already exercised self-determination except those falling within the category of colonial peoples.

Those who affirm that the term "people" means only colonial or dependent peoples interpret article 1(2) of the *UN Charter* by reference to Chapters XI, XII, and VIII, so that the word "peoples" is understood to refer only to peoples in non-self-governing or trust territories.⁴⁸⁸ An example of such an interpreter would be of Pomerance,⁴⁸⁹ who has argued that the peoples to whom the right of self-determination was to apply were strictly defined as a population, recognised in non-self-governing territories, within the administrative borders established by a European colonial power.⁴⁹⁰ Many difficulties arise in attempting to confine the meaning of the term to colonial or dependant peoples only. This position may exclude minority groups living inside one or several countries, while they may constitute a whole or a part of a people. An example of an ethnic minority which may constitute a people would be Jewish people, who were dispersed across the borders of many countries before the establishment of the state of Israel in 1948. Another current example would be that of the Tuareg people, who are dispersed in most of the Western African countries.⁴⁹¹ They have been fighting for their peoplehood since 1990.

Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 129.

486 GA Res 2625 (XXV) (1970) states that "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles".

487 Sureda *The Evolution* 215.

488 Bowett 1966 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1960)* 12; Foster 2001 *European Journal of International Law* 141-157; Musgrave *Self-determination* 150.

489 Pomerance *Self-determination* 14-15.

490 Knop is also of the same view: that from its conception self-determination was for colonial peoples and other territories whose peoples had not attained a full measure of self-government. Knop *Diversity and Self-determination* 56.

491 In 1993 the total number of the Tuareg population was estimated at about 1.3 million, including a large number of formerly dependent black slaves (Iklan). The Tuareg are subdivided into many regional confederations such as the Kel Adrar (Kidal-Region in Mali), the Iwelmeden (West Niger), and the Kel Ewey (Air). These confederations are distributed over an enormous territory of five different states. The largest group of about 750 000 individuals (10.4% of the total population) lives in Niger, followed by Mali with 400 000 persons (6.4% of the total population). In Algeria and Libya there live 60 000 persons (not including the large number of

In contrast to the above position, Summers⁴⁹² has stated that a "people" is a sociological entity composed by a large number of individuals associated with national identity, who may or not comprise a state or a nation.⁴⁹³ It should be noted, however, that the colonial "peoples" were simply created in reality, not in the minds of lawyers. The peoples of many perhaps most colonial states have gained their independence, and they are still considered as peoples. Indeed, Resolution 1514 (XV) provides that the term "peoples" is not only limited to colonial populations but is also granted to a given population within pre-existing boundaries. This means that "peoples" are defined by the territory in which they find themselves.⁴⁹⁴ The fact that those found within such territories may comprise of the most diverse and disparate cultural, linguistic or religious groups does not make them any less a people under this definition.⁴⁹⁵ It is finally argued that this resolution has not limited its use of the term "people" to colonial situations, but has also recognised a right to self-determination for many non-colonial peoples, such as "the people of South Africa" and "the Palestinian people".⁴⁹⁶

Further attempts to define the meaning of the term "peoples" were made in the course of the preparatory work on the Covenants on Human Rights,⁴⁹⁷ where self-determination refers to "all peoples". To this end, it was suggested that the term "peoples" includes peoples of all countries and territories, whether independent, trust or non-self-governing, large compact groups, ethnic, religious or linguistic minorities, or racial units inhabiting well-defined territories.⁴⁹⁸ It is obvious from this that the term peoples is understood in its most general sense and includes indigenous peoples⁴⁹⁹ and minority groups.⁵⁰⁰ However, some states such as India vigorously objected to this definition. The representative of the Government of India declared that self-

recent refugees). A minor group of 35 000 persons is spread over the north-eastern parts of Burkina Faso. Krings 1995 *GeoJournal* 57.

492 Summers *The Idea of Peoples* 5.

493 A national identity may be only one of several identities. Other sorts of identity are the social, occupational, religious, political, regional, gender etc., and their value, content and consequences may vary according with the circumstances in which people find themselves. Kohn *The Idea of Nationalism* 11.

494 Musgrave *Self-determination* 150.

495 Musgrave *Self-determination* 150.

496 See GA Res 2396 (XXII) (1968); GA Res 2672 (XXV) (1970).

497 See the ICCPR and ICESCR.

498 Bossuyt Guide to the "Travaux Préparatoires" 32.

499 See Chapter Three par 3.3.1 below.

500 See Chapter Three par 3.3.2 below.

determination applied only to peoples under colonial domination and not to sovereign independent states or to a segment of a people or a nation. National integrity was to be maintained.⁵⁰¹

The question of defining "peoples" for the purposes of self-determination was also addressed by the Canadian Supreme Court in the *Quebec* case.⁵⁰² With regard to the particular issue of the notion of "peoples", the Court declared that:

It is clear that a people may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to people does not necessarily mean the entirety of a state's population.⁵⁰³

Although the Court does not give a definition of the term "people," it confirms that people could refer to groups of individuals other than the entire population of a state. Afterwards, the Court gave reasons for its judgment:

...to restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of the existing states, and would frustrate its remedial purpose.⁵⁰⁴

Apart from the court language, many scholars have tried to introduce a workable definition of the term "peoples". A workable doctrinal definition could be taken from Cassese.⁵⁰⁵ In his book *International Law in a Divided World* he initially defined "peoples" in an ontological sense:

Since in this context the term "a people" refers to a group of human beings united by ethnic, religious, cultural and historic ties, one may legitimately ask oneself which members of such a group can act upon international rules, put forward international claims, and so on.⁵⁰⁶

Dinstein⁵⁰⁷ similarly defines "a people" in term of ethnic criteria:

501 UN Doc ST/HR/R/Rev 4 quoted in Thornberry *International Law* 214.

502 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 124; Kumbaro 2001 <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf>.

503 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 124.

504 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 124.

505 Cassese *International Law in a Divided World* 93.

506 Cassese *International Law in a Divided World* 93.

507 Dinstein 1976 *International and Comparative Law Quarterly* 104.

Peoplehood must be seen as contingent of two separate elements, one objective and the other subjective. The objective element is that there has to exist an ethnic group linked by common history. A random group of persons, lacking any common tradition, cannot be categorised as a people. It is not enough to have an ethnic link in the sense of past genealogy and history. There is also a subjective element, that is, to have a present *ethos* or state of mind. A people is both entitled and required to identify itself as such.

Brownlie⁵⁰⁸ expanded on that definition, but placed more emphasis on identity. He defined "peoples" in the following words:

...the peoples appear to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate. The physical indicia of race and nationality may be evidence of the cultural distinctiveness of a group, but they certainly do not condition it inevitably.

This definition is the most prominent and widely cited in the literature, as it contains the core characteristics of peoples, namely communality of interests, group identity, distinctiveness and a territorial link. Summers⁵⁰⁹ has pointed out that any reliable definition of peoples is unlikely to depart from these elements. These elements were employed by the International Law Commission of Jurists in the East Pakistan study,⁵¹⁰ and later by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in an international meeting of experts on further study of the

508 Brownlie "The Rights of Peoples" 5.

509 These elements are: a common historical tradition; self-identity as a distinctive cultural group; a shared language; a shared religion; and a traditional territorial connection. Summers *The Idea of Peoples* 12-13.

510 The International Commission of Jurists suggested the following criteria for determining a people: "a common history, racial and ethnic ties, cultural and linguistic ties, religious and ideological ties, a common geographic location, a common economic base and a sufficient number of peoples". This list is far from exhaustive. All the elements combined do not necessarily constitute proof. Large numbers of persons may live together within the same territory, have the same economic interests, the same language, the same religion, and belong to the same ethnic group, without necessarily constituting a people. On the other hand, more heterogeneous group of persons, having less in common, may nevertheless constitute a people. To explain the apparent contradiction, we have to realize that our composite portrait lacks on essential and indeed indispensable characteristic - a characteristic which is not physical but rather ideological and historical: a people begin to exist only when it becomes conscious of its own identity and asserts the will to exist... [It must be recognised that] the fact of constituting a people is a political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act. International Commission of Jurists 1972 *International Commission of Jurists Review* 49.

concept of the rights of peoples. During the meeting the experts suggested the following characteristics for use in the identification of peoples. A people could be:

(1) a group of individual human beings who enjoy some or all of the following common features:

- (a) a common historical tradition;
- (b) a racial or ethnic identity;
- (c) cultural homogeneity;
- (d) linguistic unity;
- (e) religious or ideological affinity;
- (f) a territorial connection;
- (g) a common economic life;

(2) the group must be of a certain number which need not be large (e.g. the people of micro states) but which must be more than a mere association of individuals within a state;

(3) the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly

(4) the group must have institutions or other means of expressing its common characteristics and will for identity.⁵¹¹

In supporting these characteristics, state practice as well as opinion expressed through the political organs of the UN suggests that peoples are linked not only by ethnic or religious ties, but also through their connection with their territory.⁵¹² In the *Frontier Dispute* case,⁵¹³ the ICJ reinterpreted the principle of self-determination and defined the holders of the right on the basis of territoriality, and not on the basis of ethnicity.⁵¹⁴ The Court's stance in the *Frontier Dispute* case is indirectly linked to the *Nottebohm* case. In this case, the Court defined nationality as a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.⁵¹⁵

511 United Nations Educational, Scientific and Cultural Organisation, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO Paris 27-30 November 1990: *Final Report and Recommendations* UNESCO Doc SHS-89/CONF602/7 (1990).

512 Wilson *International Law* 80.

513 *Frontier Dispute Case (Burkina Faso v Mali) Judgment* 1986 ICJ Reports par 554.

514 Tsagourias (ed) *Transnational Constitutionalism* 213.

515 *Nottebohm Case (Liechtenstein v Guatemala) Judgment* 1955 ICJ Reports par 23.

This thesis adopts description of the characteristics of peoples outlined in the UNESCO Final Report. Thus, these characteristics first emanate from the most recent international instruments on peoples' rights and they complement the shortfall of the various definitions discussed above. In the context of this thesis, the term "peoples" refers to any national group possessing certain national characteristics.⁵¹⁶ The group must also be one that shares memories of common suffering from historical or political discrimination and stands the chance of losing its cohesion. Furthermore, the characteristics of peoples provided by the UNESCO Final Report lump together indigenous peoples and minority groups as the right-holders of self-determination. If this definition is universally accepted, it would put an end to the challenge of determining whether the right of peoples to self-determination, in international law, should be extended generally to "indigenous peoples" and "minority groups". In view of this, the question of whether international law recognises a right to self-determination merits separate discussion. This will be expounded on in sections 3.3.1 and 3.3.2 of this chapter.

3.3 The scope of a "nation"

A people that holds the international legal right to self-determination is also considered to be a nation.⁵¹⁷ Wise⁵¹⁸ viewed a nation as a political unit and defined it as a community complying with a common system of laws and institutions in a particular territory. Stalin⁵¹⁹ accurately noted that a nation is "a historically constituted community of people". The characteristic features of a nation are, *inter alia*, a common language, territory, economic life, and psychological make-up manifested in a common culture.⁵²⁰ When defining "nation" in this way, neither racial

516 What those national characteristics are is left open. It follows that a people must itself define the purview of its common existence and settle criteria for belonging to the group. There is no place for a Diktat from outside in this respect: one people cannot decree that another group is not entitled to peoplehood. Thus, it is not for the Jews to decide the necessary attributes for the formation of an Arab people, nor for the Arabs to apply arbitrary standards precluding the existence of a Jewish people. Moreover, an individual cannot gate-crash and compel a people to admit him to its fold. The group has to make up its collective mind and resolve whether or not such an individual qualifies. Dinstein 1976 *International and Comparative Law Quarterly* 106; Summers *Peoples and International Law* 2.

517 The term "nation" is defined as a large community of people of mainly common descent, language, history etc., usually inhabiting a particular territory and under one government. Summers *Peoples and International Law* 2.

518 Wise *Nation-Building in Multi-Ethnic Jurisdictions* 44.

519 Stalin "Marxism and the National Question" 307.

520 Stalin "Marxism and the National Question" 307.

considerations nor a tribal context are relevant. This understanding refers to the nation as the aggregate of people bound into a community of character by a community of fate.⁵²¹ In fact, this view is a sound one as it considers the permanent population as being identical to the nation. Support for this argument can be found in internal legal instruments relating to the right to self-determination.

In the romantic theory of self-determination, the nation is briefly defined as a human group conscious of forming a community, sharing a common culture, attached to a clearly demarcated territory, having a common past and a common project for the future and claiming the right to rule itself. As Smith⁵²² has written:

Each nation defines the identity of its members, because its specific culture moulds the individual. The key to that culture is history, the sense of special patterns of events peculiar to successive generations of a particular group. An historical culture is one that binds present and future generations, like links in a chain, to all those who preceded them, and one that therefore has shaped the character and habits of the nation at all times. A man identifies himself, according to the national ideal, through his relationship to his ancestors and forbears, and to events that shaped their character. The national ideal therefore embodies both a vision of a world divided into parallel and distinctive nations, and also a culture of the role of unique events that shape the national character.

On the basis of this definition, nationalism can be viewed as the identification of a considerable number of people with a particular nation. A state based upon a nationalist ideology is thus a nation-state.⁵²³ Such a state will, in most cases, also contain a part of the population who are not members of the nation in question.

In the light of the above description, the meaning of the word "nation" is understood within the romantic theory of self-determination. It is argued that the romantic meaning of the word "nation" was the dominant understanding of the word for nearly all of the nineteenth century and the first half of the twentieth century.⁵²⁴ Furthermore, the American and the French Revolutions saw the nation defined in a manner consistent with the classical theory of self-determination. In this theory, because an individual's identity is tied to the state or a territorial unity, self-determination takes place within the confines of an existing state or territory. This means that it takes place when the population of that state or territorial unit elects a

521 Stalin "Marxism and the National Question" 307.

522 Smith *Nationalism* 2-3.

523 Radan *The Break-up of Yugoslavia* 12.

524 Radan *The Break-up of Yugoslavia* 12.

representative government of its choice.⁵²⁵ It is finally argued that self-determination takes place when the nation obtains its own state.

It follows that in the context of self-determination the concept of a "nation" is similar to that of a "people," and consists of the entire citizen body of a state.⁵²⁶ Legal studies have been unable to draw a clear difference between the two concepts.⁵²⁷ It is clear from the preparatory work of the *UN Charter* and several resolutions that both "peoples" and "nations" are entitled to the right of self-determination as well as other common rights.⁵²⁸ To this end, a people is synonymous with a nation. The most significant difference is that the nation can be broader than a people and/or also refer to a political entity.

3.3.1 *Indigenous peoples*

During recent years, cultural and ethnic identities have been regarded as instruments to justify and legitimise rebel struggles for self-determination.⁵²⁹ In fact, ethnic demands and grievances have played a prominent role in most rebel armed conflicts reported in the post-colonial period. In most cases, the post-independence rebel conflicts result from ethnic exclusion from state power and denial of the opportunity to take part in public affairs, directly or through freely chosen representatives. It should be noted that ethnic mobilisation, be it explicit or implicit, has played a major role in the dramatic outbursts of rebel struggles in the Niger-

525 Musgrave *Self-determination* 96-102.

526 Summers defines a nation as a large community of people of the same race who share the same language, traditions and history, usually inhabiting one area with their own government. Summers *Peoples and International Law* 7.

527 During the consideration of the first a of the *UN Charter* by the Co-ordination Committee, the meanings of the words "peoples," "nations" and "states" were discussed. The members of the Committee stated that "Nations – entities to which the *Charter of the United Nations* refers at several points – are also holders of equal rights and the right of self-determination. Although they are not expressly mentioned in the formulation of this principle in the International Covenants on Human Rights, they are implied, being covered by the term peoples. Cristescu *The Right to Self-determination* 280.

528 The GA Resolution 637 A (VII) states that "the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights". GA Res 637 A (VII) (1952). The GA Res 1803 (XVII) (1962) provides "the right of peoples and nations to permanent sovereignty over their natural wealth and resource". The GA Res 2131 (XX) (1965) states "all States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms". Summers *Peoples and International Law* 2-3.

529 Samset 2002 *Review of African Political Economy* 465.

Delta region in Nigeria,⁵³⁰ in the former Yugoslavia, in Iraq, in South Soudan, in Rwanda⁵³¹ and in the Eastern part of DRC,⁵³² to name just few.

It is generally observed that ethnically divided societies face higher risks of ethnic war because shared ethnicity decreases the collective action costs associated with organising a rebel force.⁵³³ In other words, armed rebellions are more likely when the state excludes large segments of the population from central state power on the basis of their ethnic background. Indeed, the likelihood of infighting increases when a large number of ethnic elites shares government power and engages in competitive rivalry. Furthermore, both rebellion and infighting will be more likely and take on secessionist forms when segments of the population have a short and troubled history of direct rule by the central government.⁵³⁴ Finally, the conflicts between ethnic groups may occur where the existing state has collapsed or failed. For example, this has been the case in Somalia, where several armed ethnic groups have been fighting among themselves in pursuit of political power since 1991.⁵³⁵ As will be shown in Chapter Five, rebel struggles result from high degrees of exclusion, segmentation and incohesion.

530 In October 1990 as many as 80 Agoni inhabitants were reportedly killed as result of indiscriminate shooting by mobile police, and nearly 500 homes were destroyed or badly damaged. Agoni inhabitants then started military action, claiming that the Federal Government of Nigeria was not responding to their demands. See Welch 1995 *Journal of Modern African Studies* 642.

531 From 1959 the clashes between Tutsi and Hutu provoked a huge movement of people fleeing and seeking refuge in neighbouring countries, namely DRC, Burundi, Uganda and Tanzania. Until 1994 Rwanda's political power was in Hutu hands, and Tutsis were forced to flee for their lives. The political ideology was based on ethnic discrimination. Tutsi were killed for any reason. They had no protection in Rwanda, almost no political rights, and their properties (land and herds) were not secure. If ever they fled, their belongings were taken by their Hutu neighbours. Also the Rwandan Government in place denied those who fled the right to return and any right to citizenship. The Tutsi refugees in DRC, in Burundi, and in Uganda had no alternative other than to organise a guerrilla movement (from 1988, in south Uganda) to force the regime in Rwanda to recognise their rights. On 1 October 1990 the Rwandan Patriotic Front (RPF) launched an attack from Uganda. It took power on 4 July 1994 after defeating the Rwanda Army. See Rwanda Civil War <http://www.globalsecurity.org/military/world/war/rwanda.htm>.

532 The area known as the Great Lakes region of Africa has, since the 1960s, been the arena of civil strife of an often protracted nature. The region comprises the DRC (formerly Zaire), Rwanda, Burundi and Uganda. Armed conflict began in 1996 in the DRC and was led by Congolese rebels, the *Alliance des Forces Democratiques pour la Liberation de Congo*, backed by Rwanda and Uganda. According to Daley, seven countries and ten rebel groups were involved in the fighting. For further information, see Daley 2006 *Third World Quarterly* 303-319.

533 Wimmer, Cederman and Min 2009 *American Sociological Review* 317.

534 Wimmer, Cederman and Min 2009 *American Sociological Review* 317.

535 Zegveld *Armed Opposition Groups* 1-2.

This section gives a general overview of indigenous peoples and their right to self-determination. It is not the aim of this section to identify whether or not states characterised by certain ethno-political configurations are more likely to experience rebel conflict. Rather, it will assess the recognition given to indigenous peoples in international law and the characteristics manifested by indigenous peoples. It also examines if they are entitled to the right to self-determination, which can be enforced by rebel groups on their behalf. This is because a country with an ethnic or religious diversity is at a higher risk of rebel conflict.⁵³⁶

In the post-colonial period, the question of indigenous peoples and their right to self-determination remains a subject of international political and legal discourse.⁵³⁷ The issues relating to indigenous peoples include the question of who qualifies as indigenous peoples, and what rights they enjoy in international law. This section provides a brief overview of the conceptual underpinnings of indigenous peoples and specifically evaluates their right to self-determination in terms of international law.

The concept of "indigenous peoples" is notoriously difficult to define.⁵³⁸ Richardson, Imai and McNeil⁵³⁹ state that there is no uncontroversial or authoritative definition, as

536 Fearon and Laitin 2003 *American Political Science Review* 78.

537 Kingsbury argues that "the development of 'indigenous' as a significant concept of international law practice has not been accompanied by any general agreement as to its meaning, nor even by agreement on a process by which its meaning might be established. As the concept becomes increasingly important, international controversy as to its meaning and implications is acquiring greater legal and political significance". Kingsbury 1998 *American Journal of International Law* 414.

538 Summers states that there is no generally accepted definition of an "indigenous people" and the term is subject to considerable debate. Summers *Peoples and International Law* 5; Xanthaki *Indigenous Rights* 9. The definitional issues have been discussed by a number of scholars and experts working with international and regional organisations. Hannum states that there is no "common accepted definition of the concept of indigenous in the contemporary international law discourse". Hannum 1988 *Virginia Journal of International Law* 649-678; See also Anaya *Indigenous Peoples* 3-11.

539 Richardson, Imai and McNeil *Indigenous Peoples and the Law* 12. In this regard, it is fair to report that the UN started working on the issues of indigenous peoples in 1971, but it has never adopted a formal definition of "indigenous peoples", not even in the 2007 *United Nations Declaration* on the rights of indigenous peoples. At the open-ended working group, Daes, Rapporteur of the United Nations Working Group on Indigenous Peoples, pointed out that "the concept of 'indigenous' is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world". See the UN Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People* (Working Paper by the Chair person-Rapporteur, Mrs Erica Irene A Daes on the concept of "indigenous Peoples") UN DOC E/CN4/Sub 2/AC 4/1996/2 (1996). From the same perspective, the African Commission's Working Group of Experts on Indigenous Populations has pointed out that a "strict definition of indigenous peoples is neither necessary

indigenous identity and membership can be defined in several ways.⁵⁴⁰ The UN did not officially define indigenous peoples until it formed a Working Group on Indigenous Populations (hereafter the Working Group) in 1982.⁵⁴¹ In the early years of the drafting process, the Working Group defined indigenous peoples as:

...the descendants of the original inhabitants of conquered territories possessing a minority culture and recognizing themselves as such.⁵⁴²

However, there are some basic problems with this definition. Indigenous peoples are not always a minority of the population in the host state. For example, indigenous peoples constitute a majority of the population in Greenland; 90 per cent of the population is Inuit. In Bolivia, the Quechua and other indigenous peoples account for 60 per cent of the total population.⁵⁴³ Mayan groups in Guatemala comprise around 60 per cent of the population, while the Malays in East Malaysia constitute 50 per cent of the total population.⁵⁴⁴ Moreover, not all territories inhabited by indigenous people were conquered militarily by colonials. Treaty-making, for example, usually took the place of outright conquest in North America between the colonial rulers (Great Britain, Holland, France) and the indigenous populations of Canada and the

nor desirable" They said that a more relevant and constructive endeavour would be to try to outline the major characteristics, which could help them to identify who the indigenous peoples and communities in Africa are. See the African Commission on Human and Peoples' Rights *Report of The African Commission's Working Group of Experts on Indigenous populations/Communities* (2005) 87. Also, the indigenous representatives on several occasions have expressed the view before the Working Group that a definition of the concept of "indigenous people" is not necessary or desirable. See the UN DOC E/CN4/Sub2/AC4/1996/2 (1996) par 35.

540 The "indigenous" attribute has been used with various meanings attached to it throughout history. The historical and etymologically roots of the term suggest that it was initially used to establish a distinction between "persons born in a particular place and those who arrived from elsewhere". UN DOC E/CN4/Sub2/AC4/1996/2 (1996). It was also used with reference to groups perceived as having prior occupancy of a particular location. Ndahinda *Indigeness in Africa* 24-25.

541 The Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish the Working Group on Indigenous Peoples in May 1982. The Working Group was composed of five legal experts, chosen from the membership of the Sub-commission and representing five regions officially recognized by the United Nations, namely Africa, Asia, Eastern Europe, Latin America, and Western Europe. The basic mandate of the group gives special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and the differences in the situations and aspirations of indigenous populations throughout the world. The group meets annually and reviews current developments affecting the rights of indigenous peoples. See ECOSOC Res 1982/34 (1982). Also see Corntassel and Primeau 1995 *Human Rights Quarterly* 347.

542 Charles *World Press Review* 26.

543 Charles *Word Press Review* 26.

544 Corntassel and Primeau 1995 *Human Rights Quarterly* 347.

United States.⁵⁴⁵ A further difficulty with the Working Group definition, as pointed out by Corntassel and Primeau, is that it speaks of the descendants of the "original inhabitants". Yet, because such descendants undergo transformation and may change culturally and even racially, should they be defined based on descent, self-identity, blood quantum or cultural practice?⁵⁴⁶ Clearly, the Working Group did not resolve these definitional problems.

In addition, achieving greater understanding of the concept of "indigenous peoples," the UN Special Rapporteur Martinez Cobo has suggested a valuable definition which was adopted as a Working Group definition.⁵⁴⁷ He described indigenous peoples in the following words:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁵⁴⁸

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- (a) occupation of ancestral lands, or at least of part of them;
- (b) common ancestry with the original occupants of these lands;
- (c) culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);

545 Corntassel and Primeau 1995 *Human Rights Quarterly* 347.

546 Corntassel and Primeau 1995 *Human Rights Quarterly* 347.

547 See the UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities Study of the Problem of Discrimination Against Indigenous Populations, Final Report, Submitted by the Special Rapporteur Mr José R Martínez Cobo UN Doc E/CN4/Sub2/AC4/1986/2/7 and Add 1-4 (1986). It is stated that "the Working Group has used, and should continue to use, the Cobo working definition for 'indigenous peoples.'" The *Cobo formula and the ILO Convention No 169 concerning Indigenous and Tribal Peoples* (1989) both acknowledge self-identification and self-recognition as essential aspects in defining indigenous peoples. Both models are useful, despite the fact that the *ILO Convention No 169*, at a 1(3), has the caveat: the use of the term "peoples" in this Convention shall not be construed as having any implication regarding the rights which may attach to the term under international law. This is severable for a working definition and other purposes.

548 UN Doc E/CN4/Sub2/AC4/1986/2/7 and Add 1-4 (1986).

- (d) language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- (e) residence in certain parts of the country, or in certain regions of the world;
- (f) other relevant factors.⁵⁴⁹

Five core elements of this definition, namely self-definition, non-dominance, historical continuity, having ancestral homelands, and having an ethnic identity, were also provided for in *the International Labour Organization (ILO) Convention*.⁵⁵⁰ However, the UN Declaration on the Rights of Indigenous Peoples⁵⁵¹ provides for the rights of indigenous peoples without defining who they are. According to Anaya,⁵⁵² the concept of indigenous peoples refers broadly to "the living descendants of pre-invasion inhabitants of land now dominated by others". In this context, the term "indigenous peoples" refers to the natives of a particular area who preserve their identity and culture, and differ from other, normally "alien peoples" who have subsequently settled their homeland. In the absence of precise and inclusive definition of indigenous peoples this thesis adopts the Cobo definition, as it includes the four core criteria that may be used to identify indigenous peoples.⁵⁵³ As already argued, Cobo's definition includes peoples in independent states who are considered as indigenous on account of their descent from the populations which inhabited the country or a geographical area at the time of the establishment of the present state

549 UN Doc E/CN4/Sub2/AC4/1986/2/7 and Add 1-4 (1986).

550 A 1(2) reads as follows: peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. *International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries* (1989).

551 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007).

552 Anaya *Indigenous Peoples* 3. Indigenous peoples, nations or communities are culturally distinct groups that find themselves engulfed by settlers born of the forces of empire and conquest. For example, the Aboriginal people of Australia, the Maori of Aotearoa in New Zealand, Native Hawaiians and other Pacific Islanders, the Saami of the European far North, and many minorities or peoples in Africa and Asia are generally regarded, and regard themselves as indigenous peoples.

553 Daes suggested four criteria that can be used to identify indigenous peoples: 1) occupation and the use of a specific territory; 2) voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; 3) self-identification, as well as recognition by other groups as a distinct collectivity; 4) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005) 96.

boundaries.⁵⁵⁴ This definition does not limit indigenous peoples only to those peoples who have suffered from invasion or colonisation, but rather it includes ancestors of indigenous peoples that may have existed in countries that did not experience conquest or colonisation.

Another crucial question is whether indigenous peoples have the right to self-determination. It has been said that indigenous peoples are culturally cohesive groups that suffer inequities within the states in which they live, in connection with historical patterns of conquest and colonialism.⁵⁵⁵ Notwithstanding the absence of colonial structures in the classical forms, indigenous peoples are still oppressed by inhabitants who have become dominant groups in society.⁵⁵⁶ In this regard, an example could be the situation of the Batwa/Pygmies in Central Africa and the Great Lakes Region, who have been marginalised, exploited and subject to extrajudicial killings and cannibalism for several years.⁵⁵⁷ Indigenous peoples consider that the only way to overcome these obstacles is to secure their right to self-determination.⁵⁵⁸

From the first session of the Working Group, the position of the representatives of indigenous peoples has been that a full legal right to self-determination must be

554 Kingsbury 1998 *American Journal of International Law* 414.

555 Anaya *Indigenous Peoples* 110.

556 A typical example would be the Ogoni people of the Niger Delta region in Nigeria. The current marginalisation suffered by the Ogoni people is not solely attributable to the colonial power. Rather it is being perpetrated by the Federal Government of Nigeria with regards to benefit-sharing in natural resources. See Wiessner 1999 *Harvard Human Rights Journal* 57-128; See also Oyefusi 2008 *Journal of Peace Research* 539-555; Afadameh-Adeyemi *Indigenous Peoples* 9.

557 UN Doc E/CN.4/Sub.2/2004/28 (2004) par 26; African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005). Working Group of Experts on Indigenous Populations/Communities of the African Commission Africa states that "the Batwa/Pygmies in the Great Lakes region of Africa can neither eat nor drink with their neighbours and live on the outskirts of other people's settlements". As for the Batwa in Rwanda and Burundi, the report notes that they "suffer from marginalisation, discrimination and extreme poverty and are neglected in all areas of development". Genugten 2010 *American Journal of International Law* 31.

558 Gray *Indigenous Rights* 8. In the fifth session of the Working Group, the participants stated that "the right to self-determination is fundamental to the enjoyment of all human rights. From the right to self-determination flow the right to permanent sovereignty over land, including aboriginal, ancestral and historical lands, and other natural resources, the right to develop and maintain governing institutions, the right to life, health and physical integrity, and the rights to culture, way of life and religion. The right to self-determination includes the absolute right of indigenous peoples to exist as communities, tribes, nations or other entities according to their own wishes and to define their own membership. Center for World Indigenous Studies 2009 <http://www.cwis.org>.

included in any standards that the Working Group devises under its mandate.⁵⁵⁹ The indigenous representatives have consistently argued that a right of indigenous peoples to self-determination is the most important right that any standard could recognise and should thus be included as a fundamental element of any document.⁵⁶⁰ In line with this position, the indigenous representatives have repeatedly pleaded for the inclusion of the right to self-determination in a draft declaration on the rights of indigenous peoples.⁵⁶¹

However, the government representatives did not share the enthusiasm of the indigenous peoples for legal recognition of a right to self-determination. Most government representatives agreed that indigenous peoples should be allowed an increased degree of self-determination within independent states, but not a full right to self-determination, which includes the right to secession.⁵⁶² Also, they have maintained that indigenous peoples are not entitled to self-determination under international law, as the right to self-determination is appropriate only to the process of decolonisation and liberation from foreign occupation and that, under the relevant legal criteria, indigenous peoples are not colonised or under foreign occupation.⁵⁶³

559 See the UN Doc E/CN4/Sub2/1982/R1 (1982) par 5. Indigenous participants at the Working Group sessions have repeatedly asserted that their peoples intend to exercise the right to self-determination in order to effect a free association with surrounding states, rather than independence. See Lâm 1992 *Cornell International Law Journal* 608.

560 The first reason given for this emphasis is that the right of self-determination is essential for their survival and development as peoples, and thus the key to the implementation of solutions for their problems. The second reason is that self-determination is an inherent right of peoples including indigenous peoples. See the UN Doc E/CN4/Sub2/AC4/1988/2 (1988). Legally, indigenous claims for self-determination are based on a 1 of the ICCPR and ICESCR. Par 1 provides that "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".

561 See par 2 of the document submitted by the Working Group on Indigenous Peoples and other indigenous peoples' organizations. It is provided that "all indigenous peoples have the right of self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic, social, religious and cultural development". UN Doc E/CN4/Sub2/AC4/1985/WP4/Add4GE85-12538 (1985). Also, the declaration of principles adopted by the indigenous peoples at Geneva, July 1984, provides that "all indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference". For more comments, see Iorns 1992 *Case Western Reserve Journal of International Law* 210-211.

562 Several states including Canada and Russia stated that they accept a right to self-determination for indigenous peoples which respect the constitutional and territorial integrity of states. See the UN Doc E/CN4/Sub/2004/28 (2004); UN Doc E/CN4/Sub/2000/28 (2000).

563 The issue of self-determination was extensively discussed in 2004, where several states such as Denmark, New Zealand, Finland, Norway, Iceland, Switzerland and Sweden suggested that

Furthermore, government representatives have accordingly rejected the use of the term "peoples" and instead referred to indigenous "populations" so as to avoid any implication that indigenous peoples are entitled to the right of "all peoples" to self-determination.⁵⁶⁴

Notwithstanding the aforesaid divisions, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples on 13 September 2007. The resolution was adopted with 143 states voting in favour, four against⁵⁶⁵ and 11 abstaining, including Russia. The recognition of a right to self-determination for indigenous peoples is certainly one of the most prominent features of the declaration. Article 3 provides that:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁵⁶⁶

This article shows that the right to self-determination is not confined to colonial peoples or peoples organised as states, but also applies to further categories of peoples, that is, indigenous peoples. In this regard the Declaration may be considered as the strongest evidence of the development of the right to self-determination since decolonisation. Some scholars argue that because many states

the right of indigenous peoples to self-determination should always refer to the historical circumstances of colonisation. The representatives of these countries went further to state that self-determination is linked with the "political unity" and "territorial integrity" of states conducting themselves in a democratic way. UN Doc E/CN4/Sub/2004/28 (2004); see also Xanthaki *Indigenous Rights* 110-111.

564 Since the very beginning of the formal process of considering the draft declaration on indigenous rights (1987) the governments of United States of America, Canada, Australia, New Zealand, Norway, Sweden and Denmark have stressed their unwillingness to apply the international meaning of the words "self-determination," "self-government," "territory," and "peoples" to indigenous peoples. Each of these states, joined by others including Japan, Brazil, India, Burma, Peoples' Republic of China and Indonesia has emphasized the view that questions concerning indigenous peoples must remain a domestic issue, not open for consideration at international level. One reason for this is the fear of all governments that some indigenous peoples may not chose to remain under state control, thus creating the possibility that some states will come apart, disassemble, dismember, or collapse. Events associated with the collapse of the USSR into fifteen states and probably many more, (when all is said and done) illustrate how even the apparently most powerful super-state can come apart. Center for World Indigenous Studies 1999 <http://www.cwis.org>. Also, during the discussion and drafting of *International Labour Organization Convention No 69*, governments were vigilant for any terminology that might sanction secession. For some governments, the term "peoples" was unacceptable because it could signify the right-holder of self-determination, which, in turn, could signify the right-holder of secession. See Knop *Diversity and Self-determination* 220-221.

565 New Zealand, Australia, the United States of America and Canada.

566 A 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

voted in favour of the Declaration, it is clear that they were accepting a new rule of a right to self-determination for indigenous peoples.⁵⁶⁷

In addition, article 4 provides that:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.⁵⁶⁸

The idea of "autonomy or self-government" has provoked some serious debates in international law. The language of article 4 seems to give indigenous peoples the right to secede, which impinges upon other fundamental principles, such as state sovereignty and the territorial unity of existing states. The states that rejected the proposal argued that article 4 would be a threat to their territorial integrity and sovereignty.⁵⁶⁹ New Zealand, *inter alia*, stated that article 4 could be misinterpreted as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and indeed the security of existing states.⁵⁷⁰ Indeed, Australia and the United States of America suggested that the right to self-determination of indigenous peoples should be applicable only in its internal mode.⁵⁷¹

It was also stressed that the right to self-determination in article 4 had to be interpreted in the light of the other provisions, especially article 46(1),⁵⁷² which denies any action that may impact the territorial integrity or political unity of sovereign and independent states. In view of this provision, it appears that the right to self-determination for indigenous peoples is restricted to internal dimension of the right and by no means includes a right to unilateral secession. Whether or not indigenous peoples have a right to secession in international law remains unclear.

567 Allen and Xanthaki *Reflections on the UN Declaration* 260.

568 A 4 of the United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007).

569 Davis 2008 *Melbourne Journal of International Law* 458.

570 Kariyawasam 2010 *Asia-Pacific Journal on Human Rights and the Law* 1-17.

571 UN Doc A/61/PV107.

572 A 46(1) reads: "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

3.3.2 *Minority groups*

It is commonly acknowledged that African rebel groups almost always spring from a minority group or a coalition of minority groups.⁵⁷³ Minority groups are defined generally as groups numerically inferior to the rest of the population of a state, whose core members share a distinctive and persistent collective identity based on cultural, religion and ascriptive traits that are important to them.⁵⁷⁴ Such minority groups may collectively suffer from oppression or systematic discriminatory treatment. Certainly, discrimination and oppression along cultural lines can breed resentment, anger, group solidarity, and the formation of activist movements on behalf of the group.⁵⁷⁵

Active discrimination against minority groups may lead to secessionist conflicts. Indeed, some studies find that political exclusion has an impact on the likelihood of armed rebellion and secession.⁵⁷⁶ This is because these groups can be more easily mobilised for a secessionist project with the argument that only independence will avoid the danger or reality of majority rule.⁵⁷⁷ An example would be South Sudan peoples who spent almost thirty years fighting against the Khartoum Government, and currently the Tuareg and Arab pastoralists in Mali that are fighting for the independence of Azaouad.

The previous section demonstrated that a rebel struggle is more likely to occur where ethnic groups are excluded from state power. These groups have no alternative other than to organise rebel groups to force the regime concerned to recognize their rights. In Chapter Five it will be argued that rebel armed conflicts are more likely in countries where minorities are subjected to grievances such as racial discrimination, lack of political influence and economic inequalities.⁵⁷⁸ It will also be established that Africa has a high prevalence of rebel armed conflicts and that this is commonly attributed to ethnic, cultural and religious diversity.⁵⁷⁹ Most African

573 Elbadawi and Sambanis 2000 *Journal of African Economies* 1; Heraclides *The Self-determination of Minorities* 15.

574 Elbadawi and Sambanis 2000 *Journal of African Economies* 3.

575 Fearon 2004 *Security Studies* 402.

576 Cederman, Wimmer and Min 2010 *World Politics* 90.

577 Wimmer, Cederman and Min 2009 *American Sociological Review* 321.

578 Buhaug 2006 *Journal of Peace Research* 694.

579 Elbadawi and Sambanis 2000 *Journal of African Economies* 3.

countries are multi-ethnic societies, many of which do not even have one numerically dominant ethnic group. According to the Minorities at Risk (MAR) project,⁵⁸⁰ of the 230 minorities at risk globally, 72 groups were found to inhabit Africa south of the Sahara, forming about 41 per cent of the region's total population, and 49 groups were in Asia, estimated to constitute nearly 12 per cent of the continent's population.⁵⁸¹

However, it is not the purpose of this section to identify all possibilities for minority groups to use force in pursuit of self-determination.⁵⁸² This will be expounded upon in Chapter Five. Rather, this section gives a general overview of "minority groups" in relation to self-determination and argues that where a minority group suffers severe and systematic discrimination from the central government it may be entitled to unilateral secession as the last resort for ending such oppression.

The concept of a minority in international law dates from the 1919 Versailles Peace Conference, when it was included in the peace⁵⁸³ and minority treaties.⁵⁸⁴ The Polish Minorities Treaty was the first to be signed and constituted a "model" for the other treaties.⁵⁸⁵ Article 8 of Polish Treaty reads:

Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals. In particular, they shall have an equal right to establish, manage and control at their expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.⁵⁸⁶

580 The Minorities at Risk (MAR) project is a "university-based research project that monitors and analyzes the status and conflicts of politically-active communal groups in all countries with a current population of at least 500,000. The project is designed to provide information in a standardized format that aids comparative research and contributes to the understanding of conflicts involving relevant groups". Center for International Development and Conflict Management 2007 http://www.cidcm.umd.edu/mar/data/mar_codebook_Feb09.pdf.

581 Jalali and Lipset 1992 *Political Science Quarterly* 588.

582 The use of force in relation to self-determination will be covered in Chapter Five.

583 *Peace Treaty with Austria* (1919); *Peace Treaty with Bulgaria* (1919); *Peace Treaty with Hungary* (1920) and *Peace Treaty with Turkey* (1923).

584 *Treaty between the Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland* (1919); *Treaty between the Allied and Associated Powers and the United Kingdom of the Serbs, Croats and Slovenes* (1919); *Treaty between the Allied and Associated Powers and Czechoslovakia* (1919); *Treaty between the Allied and Associated Powers and Romania* (1919); *Treaty between the Allied and Associated Powers and Greece* (1920).

585 Åkermark *Justifications of Minority Protection* 105.

586 A 8 of the *Treaty between the Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland* (1919).

This article provided minority rights only for those who were nationals of Poland, while nationals of other countries who were living in Poland were given the choice to opt for either the Polish nationality or that of any other nationality which might be open to them.⁵⁸⁷ In general, the minority treaties granted forms of political or cultural autonomy to specific groups, such as the Szeklers and Saxons of Transylvania under the treaty between the Powers and Romania,⁵⁸⁸ and the Vlachs of the Pindus under the treaty concerning the Protection of Minorities in Greece.⁵⁸⁹ The treaties themselves did not provide any definition of "minority," but rather they referred to persons who belonged to racial, religious, or linguistic minorities.

A reference to "minority" was also made by the Permanent Court of International Justice (Hereafter PCIJ)⁵⁹⁰ in the *Minority Schools* case.⁵⁹¹ In that case the PCIJ dealt *in extenso* with the issue of determining whether or not the attribution of a person to a minority group was a question of fact or will. The PCIJ ruled that the question of whether a person did or did not belong to a racial, linguistic or religious minority had to be left to the objective expression of the intention of the person concerned. In his dissenting opinion Judge Nyholm⁵⁹² expressed the same opinion - that a definition of minorities would have to be based solely on the subjective principle; that is, on the will of the persons concerned. However, the Brazilian representative at the League of Nations argued that minority standing was

587 For more details see aa 3 to 6 of the *Treaty between the Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland* (1919).

588 *Treaty between the Principal Allied and Associated Powers and Romania* (1919). A 11 reads: "Romania agrees to accord to the communities of the Saxons and Czecklers in Transylvania local autonomy in regard to scholastic and religious matters, subject to the control of the Romanian State".

589 See the *Treaty Concerning the Protection of Minorities in Greece* (1920). A 12 reads as follows: "Greece agrees to accord the communities of the Valachs of Pindus local autonomy, under the control of the Greek State, in regard to religious, charitable or scholastic matters".

590 The Permanent Court of International Justice (PCIJ) was established under a XIV of the *Covenant of the League of Nations*, which called on the *League of Nations Council* to formulate plans for an international court designed to contribute to the peaceful settlement of international disputes. In June 1945 the PCIJ was replaced by the ICJ, which was established by the Charter of the United Nations and began work in April 1946. See a 1 of the *Statute of the International Court of Justice* (1945); for more information on the Permanent Court of International Justice, please see <http://www.icj-cij.org/court/index.php?p1=1&p2=1>.

591 *Rights of Minorities in Upper Silesia (German v Poland)* 1928 PCIJ Ser A No 15.

592 *Rights of Minorities in Upper Silesia (German v Poland) (Dissenting Opinion by Judge Nyholm)* 1928 PCIJ Ser A No 15.

dependent upon an objective association within a particular geographic region, and on its history.⁵⁹³

In the *Minority Schools* case however, the PCIJ did not attempt to define the concept of a "minority". A way towards defining this concept was suggested in the *Greco-Bulgarian Communities* case.⁵⁹⁴ In this case the PCIJ considered a minority to be:

....a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.⁵⁹⁵

Although no authoritative definition was envisaged under the League of Nations, this definition sought to resolve the debate over objective and subjective approaches by incorporating both elements. However, the PCIJ concluded with the confusing remark that the existence of a minority is a matter of fact not a question of law. This conclusion abdicated the authority of its decision and in effect also reverted to a purely objective position.⁵⁹⁶

After WWII the UN attempted to reach an acceptable definition of "minority" several times but failed to do so.⁵⁹⁷ Also, a memorandum prepared by the Secretary-General in 1950 stressed that:

593 Preece *National Minorities* 15. Based on an objective approach, the jurist Toscano considered a minority to be "that part of the permanent population of a state, which, linked by historical tradition to a determined portion of the territory and having a culture of its own, cannot be confused with the majority of the other subjects because of the difference of race, language, or religion".

594 *Greco-Bulgarian Communities Advisory Opinion* 1930 PCIJ Ser B No 17.

595 *Greco-Bulgarian Communities Advisory Opinion* 1930 PCIJ Ser B No 17 par 21.

596 Preece *National Minorities* 17.

597 The *UN Charter* makes no specific reference to minorities. Also, the *Universal Declaration of Human Rights* does not contain a provision directly concerning minorities. A proposal to include a provision on minorities in the *Universal Declaration of Human Rights* was rejected. The proposed article was the following: "In all countries inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right, as far as is compatible with public order and security, to establish and maintain schools and cultural or religious institutions and to use their language in the press, in public assembly and before the courts and other authorities of the state". See the Report Submitted to the Commission on Human Rights, UN Doc E/CN4/AC 1/3/Add 1 (1947) referred to in Morsink 1999 *Human Rights Quarterly* 1017-1018; Dinstein *Protection of Minorities* 9; Thornberry *International Law* 118,133-134.

...the term 'minority' cannot, for practical purposes, be defined simply by interpreting the word in its literal sense. If this were the case, nearly all the communities existing within the state would be styled minorities, including families, social classes, cultural groups, speakers of dialects, etc. Such definition would be useless.⁵⁹⁸

During the drafting of the Minority Declaration, the Commission on Human Rights also took the same view, that the question of definition was not a necessary prerequisite for drafting the declaration and that this issue should not hinder the continuation of the work.⁵⁹⁹ The members of the Working Group decided to draft the Declaration on the Rights of the Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities in the belief that the term "minorities" was understood well enough. The Working Group stated that:

...the declaration could function perfectly well without precisely defining the term as it was clear ... to which groups the term referred in concrete cases.⁶⁰⁰

It follows that no definition is contained in the Declaration on the Rights of Minorities,⁶⁰¹ although the use of the terminology "national" or "ethnic, religious and linguistic" provides some sense of how the term is envisioned. A major step to define the concept of "minority" was taken by Special Rapporteur Francesco Capotoriti in a special study on the rights of minorities under article 27 of the ICCPR.⁶⁰² In this study Capotoriti⁶⁰³ defined a minority as:

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

598 UN Secretary-General Memorandum: *Definition and Classification of Minorities* UN Doc E/CN.4/Sub2/85 (1950).

599 *Report of the Working Group on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities* UN Doc E/CN.4/1986/43 (1986).

600 *Report of the Working Group on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities* UN Doc E/CN.4/1991/53 (1991) par 9.

601 GA Res 47/135 (1992).

602 A 27 of the ICCPR reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Human Rights Committee, General Comment 23, Article 27, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev1 (1994).

603 UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. Study prepared by F Capotoriti UN Doc E/CN.4/Sub2/384 (1991).

The Capotoriti definition includes objective characteristics such as the sense of identity of the members of a group, its size and position. The latter criteria meant that the Capotoriti definition could not apply to dominant numerical groups such as white South Africans and Tutsis in Rwanda.⁶⁰⁴ In addition to the objective criteria, the Capotoriti definition also incorporated a subjective feature, that is, the "sense of solidarity" and the will of the members of a group to maintain its difference from the majority population.⁶⁰⁵

Although there is no generally accepted definition of a "minority group" this study adopts the Capotorti definition. This is because it provides the essential defining features of a minority such as numerical inferiority, being in a non-dominant position, having a sense of nationality and having a collective will to maintain their culture, traditions, religion or language.⁶⁰⁶ In other words, the term "minority group" refers to any group that exists in a non-dominant position, and its composition must be based on a shared ethnic, religious or linguistic identity which is distinguishable from the majority in that society. And finally, the group needs to either implicitly or explicitly reveal a sense of solidarity towards the preservation of its identity.⁶⁰⁷ It is worth noting that Capotorti's definition resulted from a detailed analysis of legal issues, with a full explanation of why certain categories were excluded. Arguably, it seems to apply only to long-established groups and excludes aliens or immigrants who have become citizens of the host state.

Besides the definitional problem, another pertinent question is whether or not a minority group can be considered as a people entitled to self-determination. Espiell⁶⁰⁸ stated that contemporary international law does not recognise the right of minorities to self-determination. Mbaya⁶⁰⁹ arrived at the same conclusion when he wrote:

...an ethnic minority living within the borders of a state composed of one or more peoples likewise has no right to self-determination. Such a group can certainly have the right to cultural autonomy; but under the basic principles of international

604 Preece *National Minorities* 19.

605 Skurbaty *As if Peoples Mattered* 44-45; Wheatley *Democracy* 17-19.

606 Pejic 1997 *Human Rights Quarterly* 666-685.

607 Castellino and Gilbert 2003 *Macquarie Law Journal* 165.

608 Espiell *The Right to Self-determination* 56.

609 Mbaya "Human Rights in North-South Relations" 21 quoted in Nirmal *The Right to Self-determination* 247.

law it has not the right to form a separate state of its own, or a separate national identity.

However, this argument is quite illogical because the dimensions of peoplehood are unclear and in any case, peoplehood itself is founded on bases very similar to those of minority groups.⁶¹⁰ Indeed, as in the case of minority groups, international law offers no definition of peoples. In this regard, Ermacora⁶¹¹ stated that both "peoples" and "minorities" possess the same characteristics, and he concluded that "minorities" can also be considered as holders of the right to self-determination. It should be also noted that the description of "a people" on the basis of certain characteristics listed in the UNESCO report⁶¹² can also be used to identify minorities. Whether the term "all peoples" is limited to the total population of a state or can apply to minority groups remains undecided. It is argued that self-determination is "all things for all peoples" – unlimited freedom of choice offered to any "self" to opt in and out, both internally and externally, of any political entity.⁶¹³

It has been observed, however, that international instruments relating to self-determination do not provide the right to external self-determination to minorities. Rather, they provide the right to each national minority to organise and develop its national life in accordance with its free and spontaneous will within a sovereign state. For example, under article 27 of the ICCPR, minority rights exist independently of the right to self-determination. Article 27 does not even grant the minority an unequivocal collective right: it is "persons belonging to such minorities" who are accorded rights.⁶¹⁴ Indeed, article 1 of the ICCPR and ICESCR commences with "all peoples have the right to self-determination". This means that self-determination applies to

610 Dinstein states that it is extremely difficult to define the term "peoples". He goes on to say that peoplehood must be seen as contingent on subjective and objective elements. The objective element is that there has to exist an ethnic group linked by common history. Frequently, it is suggested that the link must express itself, *inter alia*, in a common territory, religion or language. In addition to the objective element, there is also a subjective basis to peoplehood. It is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such. People should have the will to live together and to continue common traditions. See Dinstein 1976 *International and Comparative Law Quarterly* 102-120.

611 Ermacora *The Protection of Minorities* 327.

612 *United Nations Educational, Scientific and Cultural Organisation, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples* UNESCO Paris 27-30 November 1990: Final Report and Recommendations, UNESCO Doc SHS-89/CONF602/7 (1990).

613 Skurbaty *As if Peoples Mattered* 215.

614 Thornberry 1989 *International and Comparative Law Quarterly* 880.

"whole peoples" and not segments thereof.⁶¹⁵ From the preceding line, one can argue that if a group is a minority under article 27 of the ICCPR, then it sounds likely that it is unable to assert a right to self-determination under article 1.

Also, the *Declaration on Minorities*⁶¹⁶ does not provide the right to self-determination. In the words of article 8(4): "nothing in the declaration should interfere with the state's territorial integrity".⁶¹⁷ This attempts to prevent minority groups from the exercise of self-determination in the way of secession. In fact, the only reference to the collective rights is the right of minorities to establish and maintain their own associations, a right that falls considerably short of a right to internal self-determination. In the present day, the thrust of international minority rights law has been towards seeking to provide access to political participation within existing states rather than creating space for the articulation of secessionist ideals.⁶¹⁸

It follows that this categorical denial of secession to minorities is not as clear-cut as it might seem. Although international instruments suggest that minority groups do not have a right to secession, it is important to remember that secession as a concept is based on the ideal of protecting oppressed peoples. In this regard, it is argued that when a minority persistently and egregiously is denied political and social equality and an opportunity to retain its cultural identity, then it has a legal right to dismember an existing state.⁶¹⁹

3.4 Representation by "liberation movements" and "rebel groups"

Cassese⁶²⁰ points out that in the context of self-determination, there must be a liberation movement or another type of body representative of the whole people in their struggle for the realisation of the right to self-determination in case it is flagrantly denied. National liberation movements and other dissident groups are not

615 Thornberry 1989 *International and Comparative Law Quarterly* 867-889.

616 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* GA Res 47/135 (1992).

617 A 8(4) reads: "Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States". *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* GA Res 47/135 (1992).

618 Castellino and Gilbert 2003 *Macquarie Law Journal* 165-167.

619 Pentassuglia *Minorities in International Law* 165. A discussion of secession and related issues is conducted in Chapter Four of this study.

620 Cassese *Self-determination of Peoples* 147.

new phenomena, but have been thrust to the fore as a result of the rise in struggles for national liberation that engulfed the third world in the aftermath of the WWII.⁶²¹ Throughout their history, liberation movements have claimed the right to resort to the use of force on behalf of peoples whose self-determination has been denied.⁶²² In this regard, there was a wide-spread emergence of national liberation movements in a number of colonial entities seeking to achieve independence through violent or non-violent means. The post-independence period also witnessed a number of rebel movements taking action against the government, especially in Africa. The basic legal claim of these movements is that of self-determination. The crucial questions are what the legal status of such liberation movements may be, and how any particular liberation movement becomes the authentic representative of a people. During the decolonisation process the UN General Assembly often used the term "national liberation movement"⁶²³ without providing any definition.

This section touches upon various mechanisms which are used to determine the genuine representative of the people in the struggle for self-determination. First there will be a brief explanation of the terms "national liberation movements" and "rebel groups". This will be followed by an examination of the doctrine of recognition and its impact on the status of liberation movements in international law. Finally, the section will consider the hand-in-glove relationship between the "national liberation movements" and "rebel groups" in relation to self-determination. Together this will provide the reader with both the vocabulary and the underlying philosophy behind the rebels' struggle for the lawful exercise of the right to self-determination.

621 During last few years the term "liberation movements" has been heard a great deal around the world. See Valentine *The Image of African National Liberation Movements* 39; Hettiarachchi *Self-determination* 25.

622 Wilson *International Law* 89.

623 GA Res 3237 (XXIX) (1974); GA Res 3280 (XXIX) (1974); 3210 (XXIX) (1974); 3236 (XXIX) (1974) stated that Palestine Liberation Organisation is "the representative of the Palestine People". GA Res 3237 (XXIX) (1974); GA Res 3111 (XXVIII) (1973) stated that national liberation movement of Namibia, the South West Africa People's Organisation, is the authentic representative of the Namibia people. GA Res 3115 (XXVIII) (1973); GA Res 3116 (XXVIII) (1973); GA Res 3117 (XXVIII) (1973); GA Res 3102 (XXVIII) (1973) provided that the national liberation movements recognised by the various regional intergovernmental organisations concerned be invited to participate in the Diplomatic Conference as observers in accordance with the practice of the United Nations. GA Res 3113 (XXVIII) Reaffirmed that the national liberation movements of Angola and Mozambique were the authentic representatives of their peoples.

3.4.1 National liberation movements

3.4.1.1 History and understanding of the concept "national liberation movements"

Wallerstein⁶²⁴ states that "national liberation movement" as a term is of course recent, but the concept itself is much older. Indeed, Sluka⁶²⁵ points out that:

There have been national liberation movements since the evolution of the first states. States have proven to be the most efficient of social and military organisations ever devised by human beings for the pursuit of conquest or predatory expansion. The history of states is the history of empire, and from their beginning they spread by conquest and subjugation of neighbouring peoples until today all of the formerly independent nations or peoples have been conquered and included within their boundaries.

It follows that the conquest and subjugation of peoples has been a constant theme throughout human civilisation.⁶²⁶ Counter-force resisting this subjugation can be traced back to the Celtic and Jewish resistance of Roman dominion, and it has been used in many historical junctures to justify various rebellions and revolts for self-determination.⁶²⁷ The concept of "national liberation movements" has been historically linked with the right to revolution,⁶²⁸ which has served as a battle cry for people fighting against alien domination as well as for expansionists seeking to extend their territories. The right to revolution has found a place in the most sacrosanct documents – both the American and the French Revolutions recognised this right.⁶²⁹ Also, the American Declaration of the Cause and Necessity of Taking Arms of 1775 and several constitutions of states including the USA consistently

624 Wallerstein 1996 *Economic and Political Weekly* 2695.

625 Sluka "National Liberation Movements in Global Context".

626 Kelly 1999 *Drake Law Review* 211; Valentine *The Image of African National Liberation Movements* 39; Hettiarachchi *Self-determination* 25.

627 Kelly 1999 *Drake Law Review* 211.

628 The right of revolution refers to the right fundamentally to change a governmental structure or process within a particular nation-state, thus including the right to dismember or overthrow" any governmental institution that is unresponsive to the needs and wishes of the people. Olalia 2003 *International Association of People's Lawyers* 4-8.

629 In American legal history, the right of revolution has been solemnized and described variously as "the great and fundamental right of every people to change their government at will". It was further described as "a legal right" of the people; "the reserved right" of a people; "an original right" of the people; a "natural right;" "a most sacred right;" "an indubitable, inalienable, and infeasible right" of the community; and a "revolutionary right". However, one scholar explains that "prior to the American and French Revolutions of the eighteenth century, the right of revolution had been accepted in several human societies, for example, among the early Greeks and Romans; in Germanic folk law; among naturalist theorists such as Thomas Aquinas in medieval Western Europe; and in the writings of early international scholars such as Grotius and De Vattel". For further comments, see Richard *Human Rights in the World Community* 448.

recognise the right of the people "to reform, alter, or abolish government" at their convenience.⁶³⁰

Since that time, national liberation movements have been described as striving to defend the people from foreign domination or to liberate colonies and dependent countries from the yoke of imperialism or, lastly, to liberate the people from national oppression.⁶³¹ In this regard, both De Braganca and Wallerstein⁶³² argued that:

National liberation movements do not emerge one fine day out of the mind of some superman or at the instigation of some foreign power. They are born out of popular discontent. They emerge over long periods to combat oppressive conditions and express aspirations for a different kind of society. They are, in short, the agents of class and national struggle.

In the late eighteenth century, for instance, a conflict between American settlers and their British rulers arose, while in the early nineteenth century, the Latin American countries fought against the rule of Spain and Portugal.⁶³³ There were also numerous nationalist movements which pitted the people of a nation against a foreign invader or against a dominant imperial power, such as the case of the multiple movements in Greece, Italy, Poland, Hungary and an ever-expanding list during the post-Napoleonic era.⁶³⁴ Cassese has argued that the struggle of national liberation movements was evident as far back as the early nineteenth century,⁶³⁵ and indeed, these movements were not limited to Western Europe. In this respect, for instance, 25 million Kurds divided among six states (Iran, Iraq, Turkey, Syria, Armenia, and Azerbaijan) have been fighting for an independent homeland since 1880.⁶³⁶ Another example would be the Indian National Congress, founded in 1885, and the ANC in South Africa, which was founded in 1912.⁶³⁷

Within the context of self-determination, both Soto and Bourgois⁶³⁸ have considered national liberation movements as consisting of freedom fighters who are nationalist

630 Olalia 2003 *International Association of People's Lawyers* 6-7; Claude and Weston (eds) *Human Rights in the World Community* 448.

631 Wallerstein 1996 *Economic and Political Weekly* 2695.

632 De Braganca and Wallerstein (eds) *The African Liberation Reader* 3.

633 Higgins 2004 *Journal of Humanitarian Assistance* 2-3.

634 Wallerstein 1996 *Economic and Political Weekly* 2695-2699.

635 Cassese "Wars of National Liberation" 313-324.

636 Sluka "National Liberation Movements in Global Context".

637 Wallerstein 1996 *Economic and Political Weekly* 2695.

638 Soto and Bourgois 1981 *Latin American Perspectives* 9.

and anti-imperialist, and that the movements arose out of democratic demands supported by many people. From this point of view, it is evident that the concept of "national liberation movements" has developed as a natural corollary of self-determination in the eighteenth and nineteenth centuries.⁶³⁹ There have been occasions in this time before the era of decolonisation when states have accepted the use of force by non-state entities or entities which no longer had all the characteristics of a state.⁶⁴⁰ Poland's emergence after WWI would be a relevant example. After being partitioned for a century and a half, Poland ceased to exist as a state. The armed conflict between Germany and Russia reopened the Polish question and precipitated the nation back into statehood.

In late 1915, Roman Dmowski came from Petrograd to the West to seek recognition of the Polish national committee (KNP) as the exclusive representative of the future government of Poland. On June 4, 1917 the President of the French Republic issued a decree providing for the creation of an autonomous Polish Army, fighting under its own colours. Shortly thereafter, a Polish National Committee was established in Paris, with the approval of the French Government, which was recognised as the Polish official organisation by the Government of France, Great Britain, Italy and the United States.⁶⁴¹ The establishment of the Polish State took place in the late 1918's by way of a definite delimitation of its separate legal identity.⁶⁴² As evidenced by the rebirth of Poland, the idea that national liberation movements representing peoples who have a right to self-determination may resort to force was not entirely new.

No authoritative definition was accorded to the phrase "national liberation movement" at this time. The general theory of national liberation movements remains subject to confusion, doubt and disagreement and even elementary questions of definition, terminology and delimitation of the field to be explained are still not answered.⁶⁴³ In this connection Wilson⁶⁴⁴ argues that defining national liberation movements is a challenging task and that the label, as popularly used, is imprecise.

639 Macartney *National States* 92-156; see also Hannum 1993 *Virginia Journal of International Law* 27.

640 Wilson *International Law* 92.

641 Hackworth *Digest of International Law* 319.

642 Wilson *International Law* 93.

643 Valentine *The Image of African National Liberation Movements* 42-43.

644 Wilson *International Law* 92-95.

He attempts to define them as entities which use force on behalf of peoples whose right to self-determination has been denied.⁶⁴⁵ Ranjeva⁶⁴⁶ adopts this definition but adds that national liberation movements are considered to be "freedom fighters" waging a struggle of national liberation against colonial and alien domination and racist regimes or an established oppressive government to secure the right of their peoples to self-determination.⁶⁴⁷ In this context, national liberation movements have been defined in several ways which reflect the particular orientation of the theorists. It is therefore useful to consider the definition of a "liberation struggle" in order to gain full understanding of how the concept of "national liberation movements" has been employed in relation to self-determination in international law.

The struggle of national liberation movements with the states concerned is a unique form of conflict involving both guerrilla and regular armed warfare and engendering much bitterness, injury and death.⁶⁴⁸ These intrastate struggles also create many difficult legal questions and are difficult to define. Ronzitti⁶⁴⁹ defines the national liberation struggle as an "armed struggle waged by a people through its liberation movement against the established government to reach self-determination". The understanding of such a conflict is also clarified in article 1(4) of the Additional Protocol I to the *Geneva Conventions*, which are concerned with conflicts of an international character.⁶⁵⁰ This article reads as follows:

The situations referred to in the preceding paragraph [which confirms common article 2 of the 1949 Geneva Conventions]⁶⁵¹ include armed conflicts in which

645 Wilson *International Law* 92.

646 Ranjeva "Peoples and National Liberation Movements" 101-112.

647 Regarding the term "national liberation movement" see Sluka's comment: "the use of the term 'national liberation movements' has political implications, particularly when the groups so named are generally referred to by states and the media as 'terrorists.' No one opposed to or critical of these movements calls them 'national liberation movements' because liberation (freedom) has positive value connotations for most people. Nowadays, in the conservative global New Right era we live in, most academics seem to prefer the term 'armed separatist (or secessionist) movements,' which they claim is a more objective or neutral description". Sluka "National Liberation Movements in Global Context".

648 Higgins 2004 *Journal of Humanitarian Assistance* 2.

649 Ronzitti "Resort to Force in Wars of National Liberation" 321.

650 *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protocol of Victims of the International Armed Conflicts* (1977).

651 Common a 2 of the 1949 Geneva Conventions states: "...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". *Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field* (1949); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1949); *Convention (III) relative to the*

peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁶⁵²

A very important aspect of article 1(4) was to consider the armed struggle for self-determination, for freedom from colonial domination, from alien occupation and from racist regime as an international conflict. This is to say that any group that engages in armed conflict against any of the three categories of regimes mentioned in article 1(4) could be seen to be a "national liberation movement" and thus fall within the field of application of the whole corpus of international humanitarian law.⁶⁵³ The legal nature of a liberation struggle has been also discussed in the UN General Assembly, in the two conferences of Governments Experts on the Humanitarian Law.⁶⁵⁴ They make it clear that struggles of national liberation are thought of in two ways: the first is the waging of armed conflicts by "freedom fighters" struggling for liberation and self-determination in the territories under colonial domination. The second is resistance activities conducted against unlawful foreign occupation.⁶⁵⁵

In the light of the debates described above, a "national liberation movement" would appear to be, by definition, the freedom fighters who are organised into a military structure, that fight against an occupying enemy, or a state government that they view as unlawful.⁶⁵⁶ In the more restricted meaning, Nzongola-Ntalaja⁶⁵⁷ defines "national liberation movements" as revolutionary political organisations which mobilise an oppressed people to overthrow colonial or alien domination. He places emphasis on the notion of active liberation from the chains of alien domination and sees the national liberation movements as the vehicle for attaining this. Furthermore, Cabral⁶⁵⁸ shares Nzongola-Ntalaja's view regarding the nature of the oppression which people must be freed from. He views colonialism as being evil and the root cause of this oppression and considers the liberation movement as the mechanism

Treatment of Prisoners of War (1949); *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1949).

652 A 1(4) of the *Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (1977).

653 Higgins 2004 *Journal of Humanitarian Assistance* 20.

654 Quaye *Liberation Struggles* 8.

655 Quaye *Liberation Struggles* 8.

656 Golan *The Soviet Union and National Liberation Movements* 15.

657 Nzongola-Ntalaja *Revolution and Counter-Revolution in Africa* 35-38.

658 Cabral *Unity and Struggle* 165-166.

for attaining freedom for oppressed peoples. However, he also acknowledges that national liberation and social revolution are not commodities which can be exported. The national liberation movement should be the local product, influenced by external factors, but shaped by the historical reality of a people. This position may be supported by suggesting that national liberation involves the regaining of the historical personality of a people and signals its return to history through the eradication of the alien or colonial domination to which it was subjected.

Also, Macfarlane's⁶⁵⁹ opinion is that national liberation movements are engaged in struggles against foreign rulers or colonial regimes. He argues that they are dependent upon and subservient to outsiders and indifferent to the needs of the people they profess to serve. This author does not support the view that national liberation and the movements involved in it are being driven by the needs and aspirations of the oppressed. Instead, he offers a somewhat dubious view of the legitimacy of liberation movements and the struggles which they wage.

It is important to note that in international legal scholarship "national liberation movements" became a specific legal concept during the decolonisation period. Support for national liberation movements was articulated in many UN resolutions and documents providing blanket permission for people struggling for self-determination to use any means at their disposal; encouraging states to give moral and material assistance to liberation movements; forbidding states to give any assistance to the authorities against whom the struggles were directed, and characterising such struggles as international conflicts.⁶⁶⁰ However, regardless of the number of these resolutions there is no unanimity about the precise meaning of the concept of "national liberation movements". For the purpose of this study, the concept of a "national liberation movement" is defined as a non-governmental organisation which represents a people in their struggle against colonial power, alien domination and racist regimes for the attainment of self-determination and independence. The core of this definition consists of the words "represents a people," which means that the legal status of and capacities of a national liberation movement are determined by its representative capacity. In other words, once a

659 MacFarlane *Superpower Rivalry and 3rd World Radicalism* 1.

660 Quayle *Liberation struggles* 3.

"national liberation movement" is endowed with a representative capacity, it can claim to possess international status and therefore come into contact with other international legal subjects.⁶⁶¹

Having determined what may be called the core meaning of the concept of "national liberation movements" during the decolonisation period, a question arises regarding how a particular "national liberation movement" becomes the authentic representative of a people. It is argued that the representative capacity of a "national liberation movement" does not result from the use of the electoral system but rather from the consent of the "people" that it claims to represents. More specifically, when there is no substantial resistance to the authority of a "national liberation movement," or there is public acquiescence in its authority, this implies that it represents the whole people whose self-determination has been denied.

This representative capacity is elaborated upon in article 96 of the Protocol I Additional to the *Geneva Conventions*,⁶⁶² where it refers to a "national liberation movement" as the authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in article 1(4)".⁶⁶³ References to this representative quality can also be found in numerous resolutions⁶⁶⁴ including General Assembly resolution 3111 (XXVIII), which states that

661 Cassese *International Law* 141.

662 *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (1977).

663 A 2(4) refers to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the *Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* in accordance with the *Charter of the United Nations*". See a 1(4) of the *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (1977).

664 GA Res 3210 (XXIX) (1974); GA Res 2878 (XXVI) (1971). Following the GA Res 2878 (XXVI), the General Assembly endorsed a proposal made by the Special Committee to take steps, in consultation with the Organization of African Unity, to enable representatives of national liberation movements in the colonial territories in southern Africa to participate whenever necessary and in an appropriate capacity in the Special Committee's deliberations relating to those territories. In the GA Res 2795 (XXVI), the General Assembly approved the arrangement made by the UN Economic Commission for Africa (UNECA) in consultation with the OUA whereby Angola, Mozambique and Guinea Bissau in their capacity as associate members of the UNECA would be represented by their respective national liberation movements. GA Res 2795 (XXVI) (1971) See generally United Nations *Judicial Year Book* 167-168.

the national liberation movement of Namibia, the South West African People's Organisation, is the authentic representative of the Namibian people.⁶⁶⁵

This representation can also be established through recognition by governments and international organisations. On this matter, Wilson⁶⁶⁶ argues that in the decolonisation period there was a practice of recognising liberation movements as the legitimate representatives of their people and including them as observers, associate members and members of international organisations. The decolonisation period also witnessed the participation of liberation movements as representatives of their people in various subsidiary organs of the United Nations.⁶⁶⁷ In addition to the UN practice, the OAU has also recognised a number of national liberation movements as the sole official and legitimate representatives of peoples not yet constituted as states. These include the MPLA (Angola), the PAIGC (Guinea-Bissau), FRELIMO (Mozambique), the ANC (South Africa), SWAPO (Namibia) and ZAPU (Zimbabwe).⁶⁶⁸ From the UN and OAU practice it may be concluded that participation in the political decision-making process of such organisations plays a key role for a "national liberation movement" in achieving representative capacity. With this capacity, a "national liberation movement," in pursuit of its right to self-determination, is entitled to use "any means" at its disposal and they allowed to seek and receive support from other states. A discussion of the means invoked in this section, which refers to the use of force in pursuit of self-determination, will be developed in Chapter Five of this study.

665 GA Res 3111 (XXVIII) (1973).

666 Wilson *International Law* 117.

667 See UN ECA Res 194 (IX) (1969); GA Res 2795 (XXVI) (1971); GA Res 2878 (XXVI) (1971); GA Res 2908 (XXVII) (1972); and GA Res 3118 (XXVIII) (1973). In General Assembly Resolution 2918 (XVII) (1972), the Assembly in consultation with the Organisation of African Unity championed the participation of liberation movements from Angola, Guinea (Bissau) and Cape Verde and Mozambique "in an observer capacity in its consideration of those Territories". GA Resolution 3247 (XXIX) (1974) effectuated the participation of national liberation movements recognised by the OAU or the Arab League by inviting such liberation movements to participate as observers in the United Nations Conference on the Representation of States in Their Relations with International Organizations. GA Res 3247 (XXIX) (1974); see also United Nations *Judicial Year Book* 154; Hettiarachchi *Self-determination* 25.

668 Wilson *International Law* 143.

3.4.1.2 Decolonisation and "national liberation movements"

In the aftermath of WWII there were approximately 100 territories that were considered as non-self-governing in the sense of Chapter XI of the *UN Charter*.⁶⁶⁹ During this period a number of demands for self-determination were imminent. It was as a result of the demands for self-determination by colonial peoples that, *preater legem*, the national liberation movements were able to develop. Although the *UN Charter litteris verbis* did not declare colonialism illegal, the countries thought that it was an evil and that to use force to eradicate it was legal.⁶⁷⁰ Since the decolonisation process, there were national liberation movements arguing that they have right to use of force for realisation of self-determination.

Between 1945 and 1980, nearly all the parts of Asia, Africa, Oceania (islands in the western Pacific Ocean) and the Caribbean that had been under European, Japanese and American rule were directly or indirectly involved in "national freedom" struggles for independence. This was especially true of Asia, which at that time gave rise to several national liberation movements such as: *Front National de Libération Kanak Socialiste* (FNLKS) in the South Pacific French colony of New Caledonia; the Tamils – minority groups seeking autonomy in Sri Lanka. In Latin America, they were the Brazilian *Acao Libertadora Nacional* (ALN); the *Frente Sandinista de Liberación Nacional* of Nicaragua (FSLN); the El Salvadorean *Frente Farabundo Martí de Liberación Nacional* (FMLN); the *Comandos Armados de Liberación* (CAL) and the *Movimiento Independista Revolucionario Armados* (MIRA) of Puerto Rico. In the Middle East, they were the *Türk Kalk Kurtuluş Ordus* (THKO – Turkish People's Liberation Army) and Palestine Liberation Organisation (PLO)⁶⁷¹ – just to name a few. The western countries were also not excluded. National liberation movements came into existence in the Basque Province of Spain (ETA – Basque Homeland and Freedom), and the Wallons formed a movement in Belgium. Other famous western national liberation movements include the *Front de Liberation du Quebec* (FLQ) in Canada and the Irish Republican Army (IRA) in Northern Ireland.⁶⁷² In most of these struggles, national liberation movements sought to challenge the two component

669 Aa 73-74 of the *Charter of the United Nations* (1945).

670 Nirmal *The Right to Self-determination* 214.

671 Valentine *The Image of African National Liberation Movements* 39.

672 Valentine *The Image of African National Liberation Movements* 39-40.

elements of the situation: the unequal nature of the relationship and the alien nature of such domination.

In Africa, national liberation movements have become of the most prominent and thought-provoking subjects of international relations during the decolonisation process. With the gaining of political power by liberation movements, early independence leaders such as Nnandi Azikiwe, Jomo Kenyata, and Kwame Nkrumah started using the editorial platforms of newspapers and publications, public speeches and campaigns, strikes and trade unions, to disrupt the machinery of colonial economic interests and to undermine their legal authority.⁶⁷³ Although the use of force was not inevitable, some liberation movements, such as the *Mau Mau*, used force to challenge British rule and to enable the Kenyan people to exercise their right to self-determination.⁶⁷⁴

The *Mau Mau* was not the only African liberation movement which resorted to force. The same route was taken by numerous other national liberation movements including the ANC in South Africa, the MPLA and FNLA in Angola, POLISARIO in Western Sahara, FRELIMO in Mozambique, Zimbabwe African People's Union, the National Liberation Front (FLN) in Algeria, and others, which represented their peoples in the struggle for self-determination and independence.⁶⁷⁵ In the comprehensive analysis, the goal of national liberation movements was to achieve political independence in sovereign states under a government representing the majority of the previously colonised people, who were excluded from full participation in society through the colonial rule or the *apartheid* policies imposed on them. In this connection Castro contended that national liberation movements are:

peoples who are moved by ancestral aspirations of justice, for they have suffered injustice and mockery, generation after generation; who long for great and wise changes in all aspects of their life; people, who, to attain their self-determination,

673 Amoakohene *Political Communication* 18-25.

674 Enwezor and Achebe (eds) *The Short Century* 10-12.

675 For the history and details of the African National Congress (ANC), the National Front for the Liberation of Angola (FNLA), the Popular Movement for the Total Independence of Angola (MPLA), the Popular Front for the Liberation of Sanguia el Hamra and Rio de Oro (POLISARIO), the Mozambican National Front (FRELIMO), the South-West Africa People's Organization (SWAPO) and the Front National de Liberation (FNL) See Quayle *Liberation Struggles*; Ranjeva "Peoples and National Liberation Movements" 101-102.

are ready to give even the very last breath of their lives – when they believe in something or in someone, especially when they believe in themselves.⁶⁷⁶

It is clear from this paragraph that Castro considered a "national liberation movement" as an entity possessing public and representative capacities, a body that has the capacity to articulate and act for the relevant people in domestic and international affairs. But to achieve these ends the attribution of legal personality is indispensable.⁶⁷⁷ While this argument was presented in various ways and with differing nuances, some international law specialists agreed that "national liberation movements, *inter alia*, are ... entities which are recognised to have some degree of international legal personality".⁶⁷⁸ When a "national liberation movement" is said to possess international legal personality, this could make it subject to international law and thus capable of enforcing its right to self-determination on the international plane. As stated by the ICJ in the *Reparation* case,⁶⁷⁹ an entity endowed with international legal personality is capable of possessing international rights and duties, and has the capacity to maintain its rights by bringing international claims. Put differently, international legal personality is the capacity to acquire rights and bear obligations, and the capacity to conduct ones' affairs by oneself.⁶⁸⁰

Because national liberation movements are usually interested in pursuing international acceptance and legitimacy based on what they see as a rightful claim to self-determination,⁶⁸¹ international legal personality would help them to communicate and operate with other international actors. In this respect, Brownlie⁶⁸² makes the point that a "liberation movement" endowed with legal personality has a number of legal rights and duties, which are as follows:

676 Castro 1953 "History Will Absolve Me" online by Castro Internet Archive <http://www.marxists.org/history/cuba/archive/castro/1953/10/16.htm>; Soto and Bourgois 1981 *Latin American Perspectives* 7.

677 The nature of international legal personality, which has sometimes given rise to controversy, will here be taken to mean "the capacity to be the bearer of rights and duties under international law". Crawford *The Creation of States* 28. It is a bundle of legal rights and duties an entity has and uses at particular times. *Reparation for injuries suffered in the service of the United Nations Advisory Opinion* 1949 ICJ Reports par 178. See also Smith 1928 *Yale Law Journal* 283.

678 Ferreira-Snyman *The Erosion of State Sovereignty* 60-61; Nijman *The Concept of International Legal Personality* 354-386.

679 *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion* 1949 ICJ Reports par 185.

680 Zahraa 1995 *Arab Law Quarterly* 203.

681 Henderson *Understanding International Law* 45.

682 Brownlie *Principles* 62-63.

.... the capacity to conclude binding international agreements with other international legal persons; the rights and obligations set by the generally recognized principles of humanitarian law; the right to participate in the proceedings of the United Nations as observers.

With this phrasing Brownlie seems to link legal personality to legal subjectivity⁶⁸³ in the sense that to be a legal person is to be the subject of rights and duties.⁶⁸⁴ This means that without legal personality, for instance, a "national liberation movement" cannot be a subject of international law,⁶⁸⁵ and therefore cannot perform the sort of legal acts that would be accepted by the international legal system.

For many scholars, understandably, legal subjectivity and legal personality mean one and the same thing.⁶⁸⁶ For instance, Klabbers⁶⁸⁷ argues that "to be a subject of international law is to be given an academic label," that is, the legitimate subject of international legal research and reflection. He goes on to state that legal subjectivity is a status conferred by the academic community while legal personality is, in principle at any time, a status conferred by the legal system.⁶⁸⁸ Like Klabbers, Davel and Jordaan have elaborated on the issue of legal personality and legal subjectivity, but, they have a slightly different view. For them the term "legal personality" is sometimes preferable to describe the legal subjectivity of juristic persons, while the term "legal personality" is more specifically used to indicate the legal subjectivity of a juristic person. Whatever the controversies about the difference between legal personality and legal subjectivity, the essential nature of both is that they constitute a threshold condition for performing legal acts. Then, the confusion stems from how international law determines its legal subjects, since the international legal

683 Legal subjectivity concerns the characteristic of being a legal subject in legal relations. In this respect, legal subjectivity is regarded as synonymous with legal personality. The attribution of legal personality is a metaphor by which an entity is described as the subject of rights and duties. As such, to confer legal rights or to impose legal duties, therefore, is to confer legal personality. On the international plane, international legal personality means "the capacity to be the bearer of rights and duties" Schwarzenberger and Brown *A Manual of International Law* 53. Also see Sellers 2005 *Ius Gentium* 67; Smith 1928 *Yale Law Journal* 283. Although these discussions are important, particularly the relationship between legal personality and legal subjectivity, they are not the focus of this section. Rather, this section examines how and when a "national liberation movement" can possess international legal personality. For further comments see Jordaan and Davel *Law of Persons* 5; Nijman *The Concept of International Legal Personality* 354-386; Ferreira-Snyman *The Erosion of State Sovereignty* 60-69.

684 Smith 1928 *Yale Law Journal* 283.

685 Jordaan and Davel define a legal subject as "the bear of judicial capacities, subjective rights (including the appropriate entitlements) and legal duties" Jordaan and Davel *Law of Persons* 3.

686 Klabbers 2005 *Ius Gentium* 35-66; Klabbers *An Introduction to International Institutional Law* 39; Smith 1928 *Yale Law Journal* 283-299.

687 Klabbers *An Introduction to International Institutional Law* 39.

688 Klabbers *An Introduction to International Institutional Law* 39.

community does not have a single body endowed with the authority to confer legal personality. As will be seen below, the situation in which a "national liberation movement" gains a legal subject's capacity to act is linked with recognition.⁶⁸⁹ Recognition allows "national liberation movements" to enjoy limited international legal personality, and to ensure that the oppressed or subjected people concerned are internationally represented.

3.4.1.3 Recognition of "national liberation movements"

3.4.1.3.1 Recognition in international law

The problem of recognition in international law has been the subject of much discussion, which generated a huge literature.⁶⁹⁰ It has played a major role in the League of Nations, in the inter-American system, and in the United Nations,⁶⁹¹ yet the problem has not been solved satisfactorily either in theory or in practice. This is because it has two aspects: the constitutive aspect and the declaratory aspect. The constitutive aspect considers recognition as "a necessary act before the recognised entity can enjoy an international legal personality",⁶⁹² whereas the declaratory aspect considers recognition as "merely a political act recognising a pre-existing state of affairs".⁶⁹³

With reference to the constitutive aspect, recognition is the establishment of a fact, not the expression of a will.⁶⁹⁴ Before recognition, the unrecognised entity does not legally exist *vis-à-vis* the recognizing state. It is only by the legal act of recognition that the recognised entity is brought into legal existence in relation to the recognising state, and therefore international law becomes applicable to the relations between these states. In this context, it needs to be noted that in Kelsen's view recognition is strictly constitutive in character.⁶⁹⁵ Kelsen's argument would suggest that it is

689 Ranjeva "People and National Liberation Movements" 107.

690 See Harris *Cases and Materials* 144-153; Brownlie *Principles* 85-88; Dugard *International Law* 89-98; Crawford *The Creation of States* 12-27; Kunz 1950 *American Journal of International Law* 713-719; Kelsen 1941 *American Journal of International Law* 605-617.

691 Kunz 1950 *American Journal of International Law* 713.

692 Dixon, McCorquodale and Williams *Cases and Materials* 158.

693 Dixon, McCorquodale and Williams *Cases and Materials* 158.

694 Kelsen 1941 *American Journal of International Law* 608.

695 According to the constitutive theory, the act of recognition is a precondition for the existence of a legal entity. See Harris *Cases and Materials* 144-153; Brownlie *Principles* 85-88; Dugard *International Law* 89-98. Thus, according to Lauterpacht: "through recognition only and

exclusively through recognition that a state becomes an international person and a subject of international law.

In opposition to the above argument Vidmar⁶⁹⁶ argues that since there is no obligation to recognise, the act of recognition can be characterised as declaratory. In this view, recognition is considered to be a political act which has legal consequences. As Dugard⁶⁹⁷ argues, when states grant recognition politically, they are showing their willingness to enter into diplomatic relations with a recognised entity. Adherents of declaratory theory maintain that recognition presupposes the

exclusively a state becomes an international person and a subject of international law". He went further to state that "the full international personality of rising communities ... cannot be automatic.... As ascertainment requires the prior determination of difficult circumstances of fact and law, there must be someone to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by states already existing. Lauterpacht *International Law* 126; Lauterpacht *Recognition* 2. This means that in each legal system some competent organ must be established to objectively determine the subjects of the system. In the case of an international legal system this can be done only by the states, acting individually or collectively through the recognition of a new entity. However, there are several serious objections to the constitutive theory. For example, when a new entity is recognised by state A but not by B, it becomes an "international person" and a "non-international person" at the same time. After the declaration of independence on 14 May 1948, Israel was recognised as a state by the United States, the Soviet Union, and many others, while it remained unrecognised by Great Britain and many Arab countries with the exception of Egypt. Was it a state? Or was it a state only for those states that recognized it? In the case of the non-recognition of Israel, the British Foreign Office made a statement that "Great Britain would not recognize Israel for the time being because it had not fulfilled the 'basic criteria' of an independent state". Dugard *Recognition* 61; Brown 1948 *American Journal of International Law* 621. There has been much discussion by political theorists as well as legal scholars concerning the essential conditions that entitle a new state to recognition. In this regard, Lauterpacht stated that once an entity complies with the requirements of statehood set out in the *Montevideo Convention* (a permanent population; a defined territory; government; and the capacity to enter into relations with the other states), the existing states are under an obligation to grant recognition. Lauterpacht *Recognition* 6, 75-147; a 1 of the *Montevideo Convention on the Rights and Duties of States* (1933). Unfortunately, Lauterpacht's view is not supported by state practice. The states do not regard themselves as being under a legal obligation to recognise entities that comply with the conditions of statehood. For instance, Somaliland proclaimed its independence in 1991, but it is still unrecognised by other states. This is despite the fact that it was once historically and geographically separated from Somalia. In addition the Transkei (1976), Bophuthatswana (1977) and Venda (1979) were granted independence by the South African Government, which act was rejected and declared invalid by the UN General Assembly, which called upon all governments and organizations not to deal with any institutions or authorities of these entities or to accord any form of recognition to them. See GA Res 3411 (D) (1975); GA Res 31/6 (1976); Richardson 1978 *Columbia Journal of Transnational Law* 185-221; Dugard 1980 *Journal of International Law and Policy* 11-36. Apart from the African continent, there are a number of unrecognised entities in the current international system, including Nagorno Karabakh (Azerbaijan), Abkhazia and South Ossetia (Georgia), Northern Cyprus (Cyprus) and Transnistria in Moldova. See Caspersen *Unrecognised States* 1-2.

696 Vidmar *Democratic Statehood* 43.

697 Dugard *International Law* 89.

legal existence of an entity to be recognised, and therefore it can be characterised as a political act.⁶⁹⁸

However, the declaratory aspect of recognition should not be considered as a principle and defended in all circumstances. The contentions that a state may exist without being recognised and that recognition may create a state are not mutually exclusive.⁶⁹⁹ As will be shown in Chapter Four, where unilateral secession is concerned the effects of recognition may be constitutive.⁷⁰⁰ Likewise, if virtually widespread or collective recognition was granted to a unilaterally emerged entity, it would be difficult to claim that this entity was not a state. For instance, the recognition of Kosovo justifies the view that collective recognition is necessary to avoid controversy concerning the way in which a political entity itself declares to be an independent state.⁷⁰¹

Besides their recognition of states, the recognition of "national liberation movements" and "rebel groups" as representatives of peoples in the struggle for self-determination is also of importance in international law. The following section clarifies the legal consequences of recognition when it is granted to "national liberation movements" and "rebels groups". It will be argued that recognition may indicate the recognising state's willingness to enter into official relations with a new group, or manifest its opinion on the legal status of the group, or both. As will be described in Chapter Five, the recognition of "national liberation movements" or "rebel groups" may also be a way of expressing political support or approval.

3.4.1.3.2 Recognition of "national liberation movements"

Traditionally, only states were recognised as actors of note in international relations. In this respect Grievess⁷⁰² argues that the nation-state and the nation-state system have been the main participants in international relations for over 300 years. This

698 According to the declaratory theory, recognition does not bring into legal existence a legal entity which did not exist before. The main function of recognition is a mere declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of the law. See Harris *Cases and Materials* 144-153; Brownlie *Principles* 85-88; Dugard *International Law* 89-98.

699 Vidmar *Democratic Statehood* 43.

700 See Chapter Four.

701 Jia 2009 *Chinese Journal of International Law* 43.

702 Grievess *Conflict and Order* 355.

argument was supported by the Westphalia Treaty of 1648 and recently by the *Montevideo Convention*, which recognises states as the only persons of international law.⁷⁰³ It is critical that states are the only subjects of international law. Although one could interpret the language of the *Montevideo Convention* to mean that only states can be considered as actors in international law, someone else could argue to the contrary. The proceedings that culminated in the adoption of the *Montevideo Convention* were not to produce an exhaustive definition of the subject of international law.

The viability of the UN and the world-wide character of its membership brought about further changes in the nature of the subjects of international law. Shortly after the establishment of the UN, the Secretary-General called for a re-evaluation of the traditional concept and recognition of the international legal personality of the UN, the specialised agencies established under its control, and the international organisations under its auspices. The status of the UN as a subject of international law was subsequently recognised by the International Court of Justice in the *Reparations* case.⁷⁰⁴

Along with the changing nature of subjects of international law, a pattern of diplomatic activity has followed in the UN with reference to the nature of membership and varieties of accepted participation. It is argued that national liberation movements are bodies established by peoples and recognised by several states and international and regional organisations, including the UN.⁷⁰⁵ In a similar vein, Nassar⁷⁰⁶ argues that states are not the only subjects of international law. Non-state actors, namely national liberation movements, are also significant in global affairs.⁷⁰⁷

Throughout the period of decolonisation some liberation movements (such as the MPLA (Angola), PAIGC (Guinea-Bissau), FRELIMO (Mozambique), the ANC (South Africa), SWAPO (Namibia) and ZAPU (Zimbabwe), and the Pan-Africanist Congress of Azania (PAC)) were recognised by the OAU as the sole official and legitimate

703 *Montevideo Convention on the Rights and Duties of States* (1933).

704 *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion* 1949 ICJ Reports 178-179.

705 Silverburg 1977 *Israel Law Review* 366-368.

706 Nassar *The Palestinian Liberation Organisation* 179-186.

707 Mopp *National Liberation Movement* 6.

representatives of their people.⁷⁰⁸ The UN General Assembly also granted the status of observers to the PLO and the national liberation movements recognised by the OAU.⁷⁰⁹

Theoretically and practically speaking, the act of recognition has legal consequences. Before recognition, it was not possible for "national liberation movements" to appear before a particular organ of the UN or other regional organisations as petitioners to testify and provide information.⁷¹⁰ It is valuable to note that the right of "national liberation movements" to represent peoples comes from recognition. National liberation movements recognised as genuine representative of their people have the ability to possess limited legal personality, and therefore will enjoy certain rights and obligations under international law. For instance, in resolution 3237 (XXIX) the General Assembly invited the PLO "to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly".⁷¹¹ The third paragraph of this resolution stated that the PLO "is entitled to participate in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations".⁷¹² In November 1975 the UN General Assembly invited the PLO to participate in the sessions and the work in the capacity of observers.⁷¹³ It has to be kept in mind that

708 Wilson *International Law* 117; Dugard *International Law* 516-517; Sellström *Sweden and National Liberation in Southern Africa* 30-31.

709 By that time the OAU had recognised the following national liberation movements: for the Portuguese Territories, PAIGC, FRELIMO, MPLA, FNLA, UNITA; for Namibia, SWAPO, for Southern Rhodesia, ZAPU and ZANU; for South Africa, ANC and PAC; for the Seychelles, Seychelles People's United Party (SPUP); for the French Territory of the Afars and Issas, Front de Libération de Cote des Cotes de Somlis (FLCS). See Wilson *International Law* 120. In the GA Res 3210 (XXIX) (1974), the UN General Assembly, considering that the Palestinian people was the principal party to the question of Palestine, would invite the Palestine Liberation Organisation, the representative of the Palestinian people, to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings. Resolution 3280 (XXIX) (1974) provided for participation as observers by national liberation movements in Africa recognised by OAU "in the relevant work of the Main Committees of the General Assembly and its subsidiary organs concerned". The national liberation movements may therefore participate in relevant meetings of Main Committees but not in plenary. Observers had the right to make oral statements, including the right of reply, but they had no right to vote and were not entitled to sponsor or co-sponsor substantive proposals (including amendments) or procedural motions, or to raise points of order or challenge rulings.

710 Wilson *International Law* 117.

711 GA Res 3237 (XXIX) (1974) par 2.

712 GA Res 3237 (XXIX) (1974) par 3.

713 GA/RES/3375 (XXX) (1975) – Par two calls for the invitation of the Palestine Liberation Organization, the representative of the Palestinian people, to participate in all efforts, deliberations and conferences on the Middle East which are held under the auspices of the United Nations, on an equal footing with other parties, on the basis of Resolution 3236 (XXIX)

the PLO is a public body established through the multilateral authority of the Arab League and recognised by several states, and is therefore a subject of international law.

In the same fashion, the General Assembly in Resolution 3280 (XXIX) provided that African liberation movements were invited to participate in conferences, seminars and other meetings held under the auspices of the United Nations which related to their countries.⁷¹⁴ In the twenty-seventh session the General Assembly invited the representatives of national liberation movements concerned⁷¹⁵ to participate as observers in the questions of Southern Rhodesia, Portuguese Territories and Namibia.⁷¹⁶ Based on the OAU documents as well as UN documents, Ginther⁷¹⁷ argued that "liberation movements" constitute new subjects of the international legal system. He went on to state that they have evolved as agents of nation building in the process of decolonisation and in a situation similar to *apartheid* in South Africa.⁷¹⁸ It follows that the legal status of national liberation movement has two pillars: a civil status of political representation, which includes a treaty-making capacity and participatory rights in international conferences, and a military status, which comprises of a right of the national liberation movements to conduct an armed struggle of national liberation.⁷¹⁹

3.4.2 Rebel groups

Apart from "national liberation movements," "rebel groups" are also organised armed groups involved in self-determination struggles. It has been shown in the above section that national liberation movements were directly or indirectly involved in anti-colonial struggles. During the period of decolonisation, "national liberation movements" strived to attain effective national independence. Strictly speaking, at

(1974). The latter requests the General Secretary in par 7 to establish contacts with the Palestine Liberation Organization on all matters concerning the question of Palestine. See GA Res 3376 (XXX) (1975).

714 GA Res 3280 (XXIX) (1974) par 6.

715 The GA invited the representatives of ZANU and ZAPU for Southern Rhodesia; the FNLA for Angola; FRELIMO for Mozambique; SWAPO for Namibia and the PAIGC for Guinea Bissau and Cape Verde. See United Nations *Juridical Yearbook* 150.

716 United Nations *Juridical Yearbook* 150.

717 Ginther "Liberation Movements" 212-213.

718 Ginther "Liberation Movements" 213-214.

719 The issue relating to the legality of an armed struggle of national liberation movement will be discussed in the Chapter Five.

this time there is no classical colonial or alien occupation anywhere in the world. The aftermath of decolonisation, however, had been characterised by military rule that has led to vicious human rights violations, and was often marked by extreme violence and brutality.⁷²⁰ On the other hand, the post-colonial period has also been characterised by the creation of "rebel groups" aiming at the liberation of people from repressive regimes.⁷²¹

As previously stated, this study is concerned with the fight of post-independence "rebel groups" against governments in power, in pursuit of self-determination. It is generally recognised that there are two categories of rebel groups. One category consists of groups that fight against a sovereign state in an effort to overthrow the government in power in order to modify the political system.⁷²² It will be demonstrated that military *coups d'états*, regime change and popular revolution belong to this category. The other category consists of groups that are secessionist or separatist movements aiming at seceding from established states and forming their own independent states.⁷²³ The aims of these groups may also include demands for the autonomy of a specific area within the state concerned.⁷²⁴

The purpose of this section is to examine whether "rebel groups" are genuine representatives of peoples in the struggles for self-determination. In order to do so, it is necessary first to examine the history and evolution of the concept of "rebel groups", focusing exclusively on those aiming at the attainment of self-determination. Though this study does concern itself with "rebel groups" aiming at exploiting natural wealth, it will briefly analyse the correlation between the abundance of a natural

720 Both Rwanda and Burundi, *inter alia*, are good examples of the regimes which have been involved in human rights abuse. In Rwanda there have been massacres of the Tutsi since 1959. In Burundi, too, there have been frequent local massacres of members of each group (Hutu and Tutsi) by members of the other since independence. The conflict in Rwanda and Burundi between two opposed status groups is not unique in Africa. Zanzibar (off the coast of Tanzania) is famed in travel agents' mythology as the Spice Islands, but for many years it was divided between Arab slave-owners and black (negroid) slaves who produced its aromatic cloves. At independence, an Arab party took power, but in 1964 the ethnically negroid Afro-Shirazi party staged a *coup d'état* against the Arab elite, who still controlled land and employment and who occupied the high administrative offices. Thousands of Arabs were killed. Some of the current problems in Liberia can be traced to its origins as a colony in which the population was divided into distinct status groups. See Howard 1996 *International Journal* 36-38.

721 Mkandawire 2002 *Journal of Modern African Studies* 181-215.

722 Buhaug 2006 *Journal of Peace Research* 691; see also Zegveld *Armed Opposition Groups* 1.

723 Zegveld *Armed Opposition Groups* 1.

724 Zegveld *Armed Opposition Groups* 1.

resource and the propensity for conflict involving armed rebel groups. It will be argued that states which depend heavily on natural resources face a higher risk of armed conflict than resource-poor states. The study will also consider the importance of the recognition of "rebel groups" on the international stage and determine whether they have *locus standi* in international law. Finally, the section will establish a clear distinction between "rebel groups" and "national liberation movements" in an attempt to identify the extent to which there are objective distinguishing characteristics, following the present preoccupation with rebel armed conflict and the urgent need to combat the challenges and threats that rebels pose.

3.4.2.1 History and understanding the concept of "rebel groups"

The idea that people are entitled to rebel against oppressive regimes is common and can be found in varying cultural contexts or intellectual traditions throughout history.⁷²⁵ As shown in Chapter Two, people give power to their leaders when they enter into the social contract,⁷²⁶ and if the people are arbitrarily abused by their rulers they have the right to remove them by force.⁷²⁷ The French Revolution would exemplify a situation where people act on their fundamental right to overthrow any government which is unresponsive to their needs. The French Revolution transformed the geoculture of the modern world-system as it launched a general campaign to realise the universal ideals of liberty, equality and fraternity.⁷²⁸ It made widespread the belief that the motive force for political change resides not in a sovereign ruler but in a people as a whole.⁷²⁹ It is apparent that the people of a given country have the right to alter, abolish, or overthrow any form of government that thwarts the desire for self-determination and the right of every inhabitant to take part in the government. Such a government, of course, would also lack authority and, as a government not representing the people it governs, it could be overthrown in an effort to ensure democratic government, political self-determination, and the human rights of all members of the community.⁷³⁰

725 Dunér 2005 *International Journal of Human Rights* 248.

726 See Chapter Two par 2.1 above.

727 Dunér 2005 *International Journal of Human Rights* 248.

728 Wallerstein 1996 *Economic and Political Weekly* 2695.

729 Wallerstein 1996 *Economic and Political Weekly* 2695.

730 Olalia 2003 *International Association of People's Lawyers* 15.

As far as a struggle for self-determination is concerned, arguably people must be represented by a "rebel group" or some other type of body representative of the people concerned.⁷³¹ Bundu⁷³² points out that "rebel groups" have been a constant feature of history. Almost every state has experienced or is currently experiencing a period of domestic turmoil symptomatic of some kind of social or political schizophrenia.⁷³³ For instance, the first quarter of the nineteenth century saw the demise of the Spanish Empire, resulting in the birth of many new states in the Americas, and the second quarter of that century started with the struggle for secession of the confederate states in the United States of America.⁷³⁴ And throughout the history of black Africa, men individually and in groups have refused to accept the ways in which their political, social and economic parameters were defined by their kings.⁷³⁵ In the pre-colonial period, for instance, the groups of Hutu in north Rwanda and south Uganda resisted the royal clans, namely the Tutsi in Rwanda and the Hima in Uganda.⁷³⁶

Since the mid-twentieth century countless "rebel groups" have dominated the armed conflict scene in post-colonial Africa.⁷³⁷ For instance, in 1990 Doe was overthrown in Liberia, in 1986 Museveni toppled the government in Kampala, in 1994 the RFP invaded Rwanda, to list a few. It is more difficult to cite a precise time when other conflicts took place as they emerged slowly and only gradually built up to a crescendo. For instance, the threat to both Sierra Leone and Guinea grew gradually during the 1990s as instability from Liberia spread westward. FRELIMO's war with RENAMO in Mozambique and UNITA's battle with the MPLA government in Angola also gradually intensified throughout the 1980s.⁷³⁸ In all these conflicts, support for a "rebel group" became a general panacea, and it is partly the use of this serious misnomer in the desperate search for pretexts in what amounts to a sheer power struggle between various dissenting groups that obscures the vision of the nature of

731 Cassese *Self-determination of Peoples* 146-147.

732 Bundu 1978 *International and Comparative Law Quarterly* 18-20.

733 Bundu 1978 *International and Comparative Law Quarterly* 18-20.

734 Bundu 1978 *International and Comparative Law Quarterly* 18-20.

735 Rotberg and Mazuri (eds) *Protest and Power* 881-885.

736 Rotberg and Mazuri (eds) *Protest and Power* 881-885.

737 The post-independence period has witnessed a surfeit of rebellions, taking the form of military coups *d'état* in a large number of African countries. Bundu 1978 *International and Comparative Law Quarterly* 20.

738 Herbst 2004 *Journal of Peace Research* 365.

authentic "rebel groups". It is generally observed that existing literature on civil war in general and on rebellion in particular has focused on the strategies and resources rebels use to recruit soldiers and to organise themselves.⁷³⁹ The existing literature on armed rebel conflict does not formulate a clear definition of the term "rebel groups".

In 1963 Lieber⁷⁴⁰ attempted to define "rebel groups" in his "Instructions for the Government of the Armies of the United States in the Field" (commonly referred to as Lieber's Code). Article 149 reads as follows:

...rebellion is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.⁷⁴¹

In article 151 a "rebellion" is defined as being:

.....of large extent, and is usually an armed conflict between the legitimate government of a country and portions or provinces of the same who seek to throw off their allegiance to it and set up a government of their own.⁷⁴²

Clearly, Lieber's definition of "rebel groups" is not all-encompassing. It does not include colonial armed conflicts. In fact, armed struggle aimed at resisting the forcible imposition or maintenance of alien domination is not rebels' concern. Instead, such conflicts would fall under the definition of "national liberation movements," as it has been established earlier in this work.⁷⁴³ Also, Lieber's definition limits the notion of "rebel groups" exclusively to those armed opposition groups that aim at overthrowing governments in power in order to attain internal self-determination. It seems to exclude those groups that fight against a sovereign state in an effort to create a new state on the territory of that state.⁷⁴⁴

In contrast to Lieber's definition, Oppenheim⁷⁴⁵ defines rebel groups as a large portion of the population of a state takes up arms against a legitimate government for

739 Carey 2007 *Journal of Peace Research* 47.

740 *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* of 1863. It was prepared by Francis Lieber, and promulgated as General Orders No 100 by President Lincoln, 24 April 1863.

741 A 149 of the *Lieber Code* (1863).

742 A 151 of the *Lieber Code* (1863).

743 See Chapter Three par 3.4.1 above.

744 Heraclides *The Self-determination of Minority* 33-34.

745 Oppenheim *International Law* 209.

the purpose of obtaining power, or alternately to bring about secession so as to create a new state. In the same vein, the Supreme Court of Israel in *Diab v Attorney-General*⁷⁴⁶ stipulated that "rebel groups" are groups of people who fight against the state for the purpose of obtaining power in the whole state or in part of it. In this broad definition of "rebel groups," the Court would seem to encompass the two types of rebel groups, namely "secessionist rebel groups" and other "rebel groups" which seek to effect a change of government and replace it with their own.

It can be deduced from this context that though the term "rebel groups" has become prevalent in contemporary international law there has not been consensus on a definition of the term. In the Guide to the Analysis of Insurgency published in 2012, a "rebel group" is described as follows:

... a rebel group is a protracted political-military organisation directed toward subverting or displacing the legitimacy of a constituted government or occupying power and completely or partially controlling the resources of a territory through the use of irregular military forces and illegal political organizations. The common denominator for most rebel groups is their objective of gaining control of a government or seceding from a sovereign state.⁷⁴⁷

Two aspects of this definition are particularly important to note. In one situation, the term "rebel group" refers to an organised movement that seeks to overthrow or force a change of an established government. In another situation, the term refers to a group that engages in a range of activities, most notably guerrilla warfare, in order to seize the political control of a region.⁷⁴⁸ It is noteworthy that the definition formulated above does not cover terrorist groups.⁷⁴⁹ It covers only "rebel groups" that seek to overthrow or change the governing authority, such as, revolutionary rebels⁷⁵⁰ and reformist rebels,⁷⁵¹ which seek to force the government to change policies, and

746 *Diab v Attorney-General* 1952 (ILR) 550.

747 US Government *Guide to the Analysis of Insurgency* 1.

748 Zegveld *Armed Opposition Groups* 1.

749 Terrorist groups often consist of a small number of individuals exercising no direct control of over a territory and operating indiscriminately against civilian and military targets, thereby creating widespread terror among the population. See Aleni 2008 *Journal of International Criminal Justice* 531.

750 Revolutionary rebels seek to replace the existing political order with an entirely different system, often entailing transformation of the economic and social structures. US Government *Guide to the Analysis of Insurgency* 3.

751 Reformist rebels do not aim to change the existing political order but, instead, seek to compel the government to alter its policies or undertake political, economic, or social reforms. US Government *Guide to the Analysis of Insurgency* 3.

possibly secessionist rebels,⁷⁵² which aim to break a part of territory away from an existing state. The definition therefore excludes "rebel groups" that fight for effective control over natural resources within the state concerned. This is because these groups are generally motivated by the desire for the acquisition of wealth or material resources, rather than by a desire for self-determination or other political purposes.

However, recent studies of the causes of contemporary rebel conflicts demonstrate a relationship between the presence of natural resources and the likelihood of rebel armed conflicts.⁷⁵³ Natural resources provide easily lootable assets for rebel groups or convenient sources for sustaining their struggle. Auty⁷⁵⁴ argues that states that depend on their mineral exports are more likely to experience rebel armed conflicts. An abundance of natural resources not only makes rebel conflict more likely, but resource wealth, if it is located on a country's periphery or in an area populated by an ethnic minority, will also give local residents a financial incentive to establish a separate state.⁷⁵⁵ This could be illustrated by the post-colonial African secessionist struggles in resource-rich areas such as, Biafra, Katanga and Cabinda.⁷⁵⁶ It is also observed that separatist rebel conflicts are caused in part by mining firms that are ravaging the environment and driving off the people who have long inhabited the area or depriving them of any benefits from the appropriation of their homelands.⁷⁵⁷

The literature on armed rebel conflict also suggests that the availability of particular types of resources such as gemstones and narcotics, tends to make civil war last longer by enabling rebel groups to keep fighting.⁷⁵⁸ This is because rebel leaders use looted resource wealth to buy arms and hire soldiers.⁷⁵⁹ In other words, the presence of natural wealth helps the rebel leaders to recruit, feed, equip and finance the organisation. In this way the availability of natural resources lengthens a conflict since it enables rebels to fund themselves and hence continue fighting instead of

752 Separatist rebels seek independence for a specific region. In some cases, the region in question spans existing national boundaries. US Government *Guide to the Analysis of Insurgency* 30.

753 Weinstein 2005 *Journal of Conflict Resolution* 598.

754 Auty 2004 *Geopolitics* 29-49.

755 Ross 2004 *International Organisation* 41.

756 Bannon and Collier *Natural Resources and Violent Conflict* 5.

757 Ross 2004 *International Organisation* 41.

758 Weinstein 2005 *Journal of Conflict Resolution* 600.

759 Weinstein 2005 *Journal of Conflict Resolution* 598.

being crushed or forced to the negotiating table.⁷⁶⁰ This can be illustrated by the recent struggles in the mineral-rich states of Central and West Africa, such as Liberia, Sierra Leone, Angola, Sudan, and the DRC, where there have been two successive struggles.⁷⁶¹ The duration of the Angola and Sierra Leone conflicts are in part explained by the fact that both had access to natural resource financing to support their combatants. The civil war in Sudan has been long in duration because rebel groups have been able to benefit directly from the resources around them, such as commodities and non-traded foodstuffs.⁷⁶² Another obvious example would be the Movement for the Emancipation of the Niger Delta. It has been fighting against the government since the 1990s because the region occupied has enough wealth to support a rebel agenda, which is to attain measurable control by local communities over oil wealth and the extraction and production process.⁷⁶³

With this in mind, it is true to say that natural resources, such as oil, gas, non-fuel minerals, gemstones, narcotics, timber, and agricultural products play a conspicuous role in the history of rebel conflicts. Furthermore, natural resources have not only financed but in some cases have motivated rebel conflicts and shaped strategies of power based on the commercialisation of armed conflict and the territorialisation of sovereignty around valuable resource areas and trading networks.⁷⁶⁴ Natural resources may also be an incentive for third states to provide sanctuary for rebel bases within their borders, and those who exploit them can also provide logistical support to those who engage in rebel conflicts. For instance, the Katangese secessionist struggle in Congo was supported if not instigated by the Belgian firm *Union Minière du Haut-Katanga*. And recently the DRC experience showed that the Uganda People's Defence Forces (UPDF) and the Rwandan Defence Forces (RDF), as well as the Burundi National Defence Force were supporting the Rally for Congolese Democracy (RCD) and the Congolese Liberation Front (CLF) in pursuit of the mineral wealth in the territories under their respective control.⁷⁶⁵

760 Ross 2004 *International Organisation* 43.

761 Ross 2004 *International Organisation* 48.

762 Humphreys 2005 *Journal of Conflict Resolution* 514.

763 Oyefusi 2008 *Journal of Peace Research* 541.

764 Le Billon 2001 *Political Geography* 561.

765 Montague 2002 *SAIS Review* 103-104.

In the light of the above contention, it is of importance to note that the relationship between natural resources and rebel conflicts is uncontested. The logic of these arguments also suggests that natural resources could provide a way to finance rebellions that are motivated by a desire for self-determination or other reasons, thereby increasing the prospects of success. As has already been seen in the introduction to this study, the focus here is not on those who fight for natural wealth. This thesis will focus on "post-independence rebel groups" that fight for self-determination on behalf of their people.

3.4.2.2 Post-independence "rebel groups"

In recent years much has been heard of "rebel groups" around the world.⁷⁶⁶ In post-colonial Africa, for instance, there were mass rebel groups fighting against so-called oppressive regimes. Insurgents, secessionists, mutineers, protest movements, and all manner of dissident groups have invoked the title of "rebel group" in defence of the numerous *coups d'états*, civil wars and other acts of dissent that have ravaged the African continent for years.⁷⁶⁷ For example, between 1960 and 1969 there were no less than twenty-six military take-overs in Africa.⁷⁶⁸ In 1984, the New African magazine reported that there had been at least sixty-one successful military overthrows.⁷⁶⁹

The situations outlined above show that the concept of "rebel groups" has two clusters of meanings. In the first cluster of meanings, a "rebel group" refers to an organisation fighting either for internal self-determination or to overthrow a government in power.⁷⁷⁰ In this regard, Okumu and Ikelegbe⁷⁷¹ define "rebel groups" as organisations that essentially engage in armed opposition and resistance, and particularly insurrection or insurgency against governments and ruling regimes. They add that the central target of these "rebel groups" is change in terms of the

766 Civil wars involving separatist movements raged around the globe in the 1990s, in the Balkans, India, Russia, Azerbaijan, Sudan, Indonesia, Britain (Northern Ireland), Turkey, Georgia, the Philippines, and Burma, to name only some of the more prominent examples. Fearon 2004 *Security Studies* 394-415; Higgins and O'Reilly 2009 *International Criminal Law Review* 567-583.

767 Bundu 1978 *International and Comparative Law Quarterly* 18-19.

768 Le Vine "The coups in Upper Volta, Dahomey and Central African Republic" 1035-1136.

769 Eckstein (ed) *Internal War* 3.

770 Oyefusi 2008 *Journal of Peace Research* 541.

771 Okumu and Ikelegbe (eds) *Militias, Rebels and Islamist Militants* 9.

displacement and replacement of existing governments to enable the people, whom they claim to represent, to participate in and possibly control the government.⁷⁷² From the same perspective, Salehyan states that these movements are armed opposition groups fighting against their own governments in order to gain greater political representation and eradicate systematic discrimination.⁷⁷³ This view implies that when a group of people is disadvantaged comparatively to others, its members feel aggrieved and are psychologically predisposed to violence. Such a group may emerge through a variety of mechanisms, including the use of armed force.⁷⁷⁴

It follows that many post-independence rebel movements in Africa were motivated by cultural discrimination and unequal access to economic opportunities and political representation. As a matter of fact, Okumu and Ikelegbe⁷⁷⁵ refer to the existence of post-colonial rebels *inter alia* in Uganda (the National Resistance Army) and Chad (the Armed Forces of the North). In Burundi there were rebel groups such as the National Council for the Defence of Democracy/Forces for the Defence of Democracy (CNDD-FDD); and the National Forces of Liberation (FNL), the armed wing of the Party for the Liberation of the Hutu People – PALIPEHUTU - fought against marginalisation by the Tutsis in the government and military for over a decade. Also, the Revolutionary United Front (RUF) in Sierra Leone, which in many regards seems more like a loose gang of criminals preoccupied with the looting of diamonds for personal profit, released a political slogan stating that "it is our right and duty to change the present political system in the name of national salvation and liberation".⁷⁷⁶

The nomenclature above has proven that these "rebel groups" professedly seek to eradicate corruption, dictatorship or the ineptitude of governments. If this is so, it is crucial to know whether the right to overthrow a government and replace it with the one of the rebels' choice belongs to all peoples. Some scholars such as Paust⁷⁷⁷ contend that self-determination is a "right of people," and therefore to overthrow the

772 Okumu and Ikelegbe (eds) *Militias, Rebels and Islamist Militants* 9.

773 Salehyan *Rebels without Borders* 20-23.

774 Salehyan *Rebels without Borders* 20-23.

775 Okumu and Ikelegbe (eds) *Militias, Rebels and Islamist Militants* 9-10.

776 Buhaug 2006 *Journal of Peace Research* 692.

777 The right to change or overthrow a particular government resorts in the nation as a whole and not in some minority. In Paust's view, to reform, alter or abolish a government is a right of the majority of a community. See Paust "The Human Rights to Revolution" 445-447.

government is permissible when the action is performed in the name of all of the people of the community concerned. It is generally accepted that peoples should be able to decide for themselves who is to rule them. If the system does not allow them to change the order (from tyranny to a democratic regime, for example), then a people may and must avail itself of whatever means it has at its disposal in order to establish the kind of order of government it wishes to have.⁷⁷⁸ This change could be achieved through rebellion or revolution, where a "group of rebels" representing great masses of people acts to seize the state: either to press for changes within the accepted framework or to replace it with new forms of government and a new political system.⁷⁷⁹ In this line of reasoning, First⁷⁸⁰ argues that the overthrow of a government can pre-empt a revolution or lead to it. It can also install a government which maintains or changes social policy.

The issue of justification for the unconstitutional change of government in Africa by "rebel groups" has been a subject of debates and disagreements over time.⁷⁸¹ It was not until the establishment of the AU that coups and all other forms of unconstitutional change⁷⁸² of government were prohibited.⁷⁸³ As this issue will be discussed in Chapter Five, it is difficult at the present stage to determine what cause could justify the overthrow of a government.⁷⁸⁴ In passing, it is possible to observe that Quaye⁷⁸⁵ suggests that in some conditions ethnic or minority groups may be entitled to use force against their state, for example, when they are suffering from systematic oppression or genocide. Such an entitlement would be resorted to "after all [other] means to bring about change in unpopular government have been

778 Wiking *Military Coups* 10-11.

779 First *The Barrel of a Gun* 19.

780 First *The Barrel of a Gun* 19.

781 For instance, Gutteridge contends that "army rule should be the exception and not the rule". Gutteridge *Africa's Military Rulers* 1. See also Ziankahn *The Impact of Military Coups d' État* 31.

782 Other forms of unconstitutional changes of government are defined in a 23 of the African Charter on Democracy, Elections and Governance. Para 1 to 4 condemn: "(1) Any putsch or *coup d'état* against a democratically elected government; (2) any intervention by mercenaries to replace a democratically elected government; (3) any replacement of a democratically elected government by armed dissidents or rebels; (4) any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections". *African Charter on Democracy, Elections and Governance* (2007).

783 See aa 4(p) and 30 of the *Constitutive Act of the African Union* (2000). A 30 provides that "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union". See the *Constitutive Act of the African Union* (2000); Kameldy 2008 <http://www.afriamap.org/english/images/paper/Kameldy-elections-EN.pdf>.

784 The issues relating to the overthrow of governments will be discussed in Chapter Five.

785 Quaye *Liberation Struggles* 11-31.

exhausted".⁷⁸⁶ There are a number of examples of rebel conflicts that might correspond to this model, including the recent struggles in Rwanda, Burundi, Liberia and Uganda.⁷⁸⁷

In the second cluster the rebel movements are secessionist movements fighting for secession or the autonomy of some regional or ethnic homeland.⁷⁸⁸ According to Quaye⁷⁸⁹ there are two categories of secessionist struggles:

...struggles by people who have been incorporated into the political structures of larger states against their will; and struggles by people who, though not seriously opposed to their initial incorporation into the states against which their movements are directed, are later faced with experiences that leave them no other choice than to fight for separation.

In this sense, secessionist movements are commonly founded on ethnic or regional identity. According to Baker,⁷⁹⁰ what constitutes an ethnic or regional group is a consciousness of being a distinct entity, which is based on the belief that the group possesses distinguishable primordial characteristics such as language, beliefs and race, and/or possesses a common history and homeland. If this unique assemblage of characteristics is perceived to be under threat through discrimination or repression, whether by the central authorities or regional antagonists, then political movements may arise whose objective is either to put a much greater distance between the homeland and the central authorities or to completely withdraw the homeland from the authority of the state by creating an independent state. A number of examples illustrate this. One of these is the Kurdish rebellion in Turkey and Iraq, which was motivated by cultural discrimination and unequal access to economic opportunities and political representation.⁷⁹¹

There have been a number of post-independence armed secessionist movements in Africa. For example, the Katangese Peoples' Congress and Biafrans have fought for secession in the Congo and Nigeria although their struggles were not successful.

786 Gutteridge *Africa's Military Rulers* 1.

787 See Lemarchand *Burundi: Ethnic Conflict and Genocide* 1-34.

788 Okumu and Ikelegbe (eds) *Militias, Rebels and Islamist Militants* 9-10.

789 Quaye *Liberation Struggles* 10.

790 Baker 2001 *Terrorism and Political Violence* 67.

791 Salehyan *Rebels without Borders* 20-23.

Similarly, multi-ethnic Eritreans⁷⁹² owe their self-consciousness to Italian colonialism and Ethiopian discrimination against them. They fought a long and bitter war between 1955 and 1995 and were ultimately successful in securing independence in 1993. Also, Somaliland has been discriminated against by the Somalia State and therefore declared its independence in 1991, which independence is not recognised by the international community. In Southern Sudan, the Sudan People's Liberation Movement/Army (SPLM/A) has fought against bad governance based on ethnic and regional hegemonic rule, marginalisation and exclusion. And at this time the Touareg people living on the northern boundaries of Niger and Mali, having long felt abandoned by the central authorities, are fighting to secure greater autonomy of Azawadi or separation from Mali.⁷⁹³

The literature judges that a movement that seeks to obtain recognition of its cultural values but does not seek a territory cannot be regarded as secessionist. The territorial factor is indispensable for a movement to be described as secessionist. Also, a movement that merely seeks a separate territory but does not wish to govern itself and determine its destiny cannot be a *bona fide* separatist movement.⁷⁹⁴ Thus, the main goal of any secessionist movement is for the "distinctly identifiable group" to leave the political arrangement into which they are currently incorporated in order to establish a new politically independent state. This desire has both internal and external aspects. Internally, the secessionist movement seeks all of the prerogatives within the borders of the affected territory that generally accompany political independence, such as control over the economy, political rights, culture, foreign affairs, and a military force.⁷⁹⁵ Externally, a secessionist movement seeks international recognition.⁷⁹⁶ It wants to be treated as a subject of international law by states and by the international community as a whole. It also wants to receive all rights and privileges accorded to independent states and to be a member of the

792 First the Eritrean Liberation Army (ELF) and then the Eritrean Peoples' Liberation Front (EPLF). See Gayim *The Eritrean Question* 469-598.

793 Okumu and Ikelegbe (eds) *Militias, Rebels and Islamist Militants* 9-10.

794 Premdas, Samarasinghe and Anderson *Secessionist movements* 14-15.

795 Brilmayer states that secessionist movements want "an independent state dominated by their own culture, language or religion" and Eide argues that a major purpose of secessionist movements is "a reassertion of national control over language and culture". Brilmayer 1991 *Yale Journal of International Law* 177-187; Eide 1991 *Notre Dame Law Review* 1311-1346.

796 Recognition of rebel movement will be expound in par 3.4.2.3 of the present chapter.

United Nations.⁷⁹⁷ In practice, the internal and external goals of secessionist movements are certainly interconnected. The substantial achievement of one aim will often lead to the realisation of the other.⁷⁹⁸

From this variety of descriptions it can be concluded that there is not only no generally agreed legal definition of the term "rebel groups", but there is also no complete definition. Every scholar emphasises the goal of a "rebel group," that is, to overthrow an established government and to replace it with its own. It is generally accepted that it is not allowed to overthrow or to secede from a democratic government which ensures internal self-determination for all people. In the present study, the term "rebel movement" is used to mean a movement of people, ethnic groups or minority groups whose internal self-determination has been denied, and who are living under conditions of intolerable oppression and injustice, and who are, having exhausted all peaceful means of changing the situation, striving to overthrow forcibly the established government of a sovereign country, or to establish a new state in a portion of the territory of that country or in a territory subject to its jurisdiction and control.

3.4.2.3 Recognition of rebels groups

It has been said that the doctrine of "recognition" has two aspects, namely political and legal aspects.⁷⁹⁹ When this doctrine is used in the context of the recognition of "rebel groups" may have two different implications. First, it may indicate a recognising state's readiness to establish diplomatic relations with a new "rebel group". Secondly, recognition may possibly be a means of expressing an opinion of a recognising state on the legal status of a "rebel group".⁸⁰⁰ The practice of recognising "rebel groups" emerged during the 19th century when a large number of

797 It could be argued that UN membership is now the primary criterion for determining whether an entity is or is not a state. According to par 201 of the Restatement (Third) of Foreign Relations Law, "admission to membership in an international organisation such as the UN is an acknowledgement by the organisation, and by those members who vote for admission, that the entity has satisfied the requirements of statehood". Worster 2010 *American University International Law Review* 1179.

798 Whether or not the international community recognizes the new state will often hinge on how successful a secessionist movement is in asserting real control over its territory. See in general Frankel 1992 *Houston Journal of International Law* 521-524.

799 See Chapter Three par 3.4.1.3.2 above.

800 Talmon "Recognition of the Libyan National Transitional Council" 4.

civil wars broke out, especially in Latin America.⁸⁰¹ It developed out of the necessity to respond to the growing impact, extent and duration that civil wars reached, compelling third states to determine their relations towards "rebel groups" for the period of conflict. The legal technique that states resorted to in establishing temporal and limited relations with "rebel groups" was recognising them as belligerents or the sole legitimate representatives of the people that they claimed to represent.⁸⁰²

Under customary international law states could lawfully recognise "rebel groups" under certain conditions:

First, there must exist an armed conflict of a general nature within the state; secondly, the rebels must occupy and administer a substantial portion of national territory; thirdly, the rebels must conduct the hostilities in accordance with the rules of war and through organised armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for third states to define their attitude by means of the recognition of belligerency.⁸⁰³

This formulation raises several questions, such as whether recognition of "rebel groups" is subject to the discretion of the incumbent government of the nation and third states, or whether there is a duty to recognise "rebel groups" when all of these conditions are fulfilled. The answer largely depends on which legal theory states adopt in relation to recognition. It is generally recognised that there are "no binding rules" in international law to regulate the recognition of a new entity.⁸⁰⁴ In other words, recognition is a unilateral act performed by the recognising state's government. A state is, therefore, free to enter or refuse to enter into political and other relations with a "rebel group". That is, it may grant recognition to or refuse to recognise a new "rebel group". Recognition is a unilateral act in the sense that a state acknowledges, regards, considers, deals with or treats a "rebel group" in its own national interest. In this matter states are naturally guided by different

801 Riedel "Recognition of Belligerency" 47-50.

802 Riedel "Recognition of Belligerency" 47-50.

803 Chen *The International Law of Recognition* 364-368; Lauterpacht *Recognition* 176-178.

804 Generally it has been accepted that there are no binding norms in international law that create an obligation for an existing state to recognize the appearance of a new entity. In this regard Lauterpacht states that "the principal feature of the doctrine of recognition is the assertion that recognition is, in its essential aspect, namely, in relation to the community claiming it, an act of policy as distinguished from the fulfilment of a legal obligation". Lauterpacht *Recognition* 7.

considerations of policy and interests which may be acknowledged by some states but not by others.⁸⁰⁵

Therefore states would be free not only to determine whether or not a given "rebel group" is a representative of a people in the international law sense, but also free to determine what a "rebel group" is and what conditions it has to fulfil in order to become the legitimate representative of a people according to international law. The recognition of a "rebel group" may be done by the government in power against which the rebel group is directed as well as by the governments of third states. The point generally accepted is that recognition may be accorded at the discretion of existing states based upon either the constitutive theory or the declaratory theory.⁸⁰⁶ As was said earlier, the constitutive theory supports the view that the recognition of a "rebel group" is a concession of rights and therefore that the group cannot demand to be recognised upon fulfilling all of the conditions set out above.⁸⁰⁷ The declaratory theory, however, would indicate that the fulfilment of the conditions imposes the duty to recognise the "rebel group", regarding recognition as a declaration to be made after ascertaining the fulfilment of the conditions determined by international law.⁸⁰⁸

Even though there are no internationally accepted standards for when an entity becomes entitled to being recognised as a new subject of international law, several scholars state that when a "rebel group" has achieved a certain degree of governmental and military organisation, it is entitled to recognition.⁸⁰⁹ To the same effect, Cassese⁸¹⁰ suggests that in order to be recognised as members of the world community it is necessary for "rebel groups" to have effective control over some part of a given territory and a population living in that territory. The effective control test has evolved not only in theory but also in practice. For instance, on February 24, 1966, when the Canadian Prime Minister was asked to state the basis upon which the recognition was granted to "rebel groups" that take over governments, he replied that:

805 Bundu 1978 *International and Comparative Law Quarterly* 25.

806 See Chapter Three par 3.4.1.3.2 above.

807 Hackworth *Digest of International Law* 319.

808 Lauterpacht *Recognition* 176-178.

809 Crawford *The Creation of States* 380.

810 Cassese *International Law* 140-141.

A most important consideration is whether the new regime seems to be in control of the country, a control which is at least tacitly admitted by the country's people in so far as this can be ascertained.⁸¹¹

A similar view was expressed by the British Secretary of State for Foreign and Commonwealth Affairs in reply to a Parliamentary question, when he stated:

When there is a change of government by revolutionary action Her Majesty's Government's general practice is to recognise *de jure* the new government when they consider that it enjoys a reasonable prospect of permanence, the obedience of the mass of the population and the effective control of much of the greater part of the territory of the state concerned.⁸¹²

Support for the effective control test may be also found in the American practice. Whiteman⁸¹³ states that the United States, in determining whether or not to extend recognition to a "rebel group," has considered *inter alia* the following criteria: if the "rebel group" is in *de facto* control of the territory, a control which is at least tacitly admitted by a population living in that territory. Thus, according to the practice of these states, effective control is necessary for rebel groups to be recognised.⁸¹⁴ That is to say, therefore, that where this condition is not fulfilled, rebel groups cannot demand to be recognised as the authority representing the people.

Recognition often has a direct impact on whether or not a "rebel group" actually becomes the representative of a people in international relations. It should be noted that some states try to use the tool of recognition in order to treat a rebel movement as representative of a people and thereafter to support the group.⁸¹⁵ It follows that recognition of a "rebel group" as the legitimate representative of a people confers several advantages: it legitimises the struggle of the group against the incumbent

811 Lawford "Canadian Practice in International Law" 331-332.

812 Bundu 1978 *International and Comparative Law Quarterly* 37.

813 Whiteman *Digest of International Law* 72-73 cited in Bundu 1978 *International and Comparative Law Quarterly* 37.

814 Bundu 1978 *International and Comparative Law Quarterly* 37.

815 Galloway *Recognizing of Foreign Governments* 1. The United States has used recognition "to support anti-monarchical governments ... to advance economic imperialism ... to promote constitutional government ... and to halt the spread of communism". See Quayle *Liberation Struggles* 223-224 (giving numerous instances of states adopting self-serving positions on whether to recognize or support a secessionist movement). Particularly amusing are the numerous cases where a state's position on a particular secessionist movement or on secession in general has undergone a complete reversal because of a change in the political landscape (discussing, among other examples, how Soviet and American positions on the right of Eritrea to secede flipped after a pro-Western government in Ethiopia was replaced by a Marxist one, and how Pakistani and Indian positions contrasted on the respective rights of Kashmir and Bangladesh to secede).

government;⁸¹⁶ it provides international acceptance; it allows the group to speak for the people in international organisations and represent it in other states by opening "representative offices"; and it usually results in the receipt of financial aid. This has been the case in the Spanish civil war,⁸¹⁷ the Kosovo civil war,⁸¹⁸ and more recently in Libya⁸¹⁹ and Syria.⁸²⁰

With respect to the recognition of "rebel groups," the Organisation of African Unity (currently the African Union) developed certain standards.⁸²¹ For a "rebel group" to be recognised as a legitimate representative of a people it must have a military organisation, popular support, and possibly effective control over a certain part of the territory in which it is fighting.⁸²² The recognition of a "rebel group" implies that these conditions, determined generally by international law, exist in a given case. This recognition may, therefore, show that when a new entity receives collective or widespread recognition,⁸²³ this is evidence of legitimacy. Also, recognition indicates the recognising state's willingness to enter into official relations with the "rebel group" or manifest its opinion on the legal status of the "rebel group". Briefly, it should be

816 A discussion of the legality of use of force by rebel movements is the aim of Chapter Five of this work.

817 The recognition of belligerency conferred on the recognizing state the right to aid the insurgents. For instance, in the Spanish Civil War, Germany and Italy recognized the belligerents in order to legalize their assistance to the rebels. Garner 1937 *American Journal of International Law* 66-73.

818 The Kosovo Liberation Army (KLA) was recognised by the international community, since no affirmation of Kosovar independence accompanied international institution-based intervention. Özerdem 2003 *International Peacekeeping* 79-101.

819 The Libyan Transitional National Council (NTC) was recognised by thirteen states as the legitimate representative of the Libyan people before the overthrow of Qaddafi's regime. They were Germany, Australia, Britain, France, Gambia, Italy, Jordan, Malta, Qatar, Senegal, Spain, the United Arab Emirates ("UAE") and the United States. This meant that the recognising states might lawfully buy Libyan state-owned oil from the NTC and provide it with assistance. Talmon "Recognition of the Libyan National Transitional Council" 3-4.

820 France has recognised Syrian rebels. Nowadays both France and Britain are pushing the European Union to lift its arms embargo on Syria as soon as possible so that they can send weapons to rebel fighters. Associated Press 2013 <http://www.military.com/daily-news/2013/03/15/france-ready-to-arm-syrian-rebels.html?comp=7000023467983&rank=1>.

821 Talmon "Recognition of the Libyan National Transitional Council" 4.

822 Cassese *International Law* 140-141.

823 Collective recognition occurs when a group of states, such as the African Union or United Nations recognises the existence of a new entity, directly by an act of recognition, or indirectly by the admission of the new entity to the organization. Dugard states that "the collective recognition is not a new phenomenon. The recognition of Greece in 1830, of Belgium in 1831 and of Albania in 1913, was the result of the collective action on the part of major European powers". Dugard *Recognition* 14. "Unilateral recognition is a unilateral declaration of the recognizing state, or by a bilateral transaction, namely, by an exchange of notes between the government of the recognizing state, on the one hand, and the government of the recognized state or the recognized government on the other hand". Dugard *International Law* 89; Kelsen 1941 *American Journal of International Law* 605.

concluded that recognising a "rebel group" as the legitimate representative of a people may provide an indication of the group's capacity to possess limited rights and duties in international law.⁸²⁴

3.5 Summary

This chapter has aimed to describe the historical development of the concepts of "people" and "nation", to whom, by international law, the right of self-determination applies. In painting this historical development the emphasis has been on "national liberation movements" and "rebel groups" as the sole official and legitimate representatives of peoples in their struggle for self-determination. It was explained that though the right of peoples to self-determination is now well established in international law, no clear definition of the term "peoples" is provided. In the *Quebec* case⁸²⁵ the Supreme Court of Canada stated that the precise meaning of the term "people" remains somewhat uncertain. In an *obiter dictum*, the Court described a "people" as any group of persons sharing many characteristics, such as a common language and culture.⁸²⁶ It is clear that the characteristics for identifying a people as described in this definition can also be found among indigenous peoples and minority groups. If this definition were to be universally accepted, it might suggest that ethnic minorities and indigenous peoples are entitled to exercise external self-determination. This matter will be dealt with in Chapter Five.

In the post-WW II period, the issue of what in international legal scholarship constitutes a "people" for the purposes of self-determination has proven to be one of the great controversies.⁸²⁷ In this regard some scholars⁸²⁸ have interpreted the term "a people" to mean the people of a colonial territory and all other peoples in non-self-governing territories. This approach identifies decolonisation as a manifestation of the right to self-determination, and goes further to equate the scope of self-

824 The issue of the extent to which a state that recognises a "rebel group" may support that group in its struggle will be taken into account in Chapter Five.

825 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 123.

826 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 123.

827 Cassese *Self-determination of Peoples* 141-147.

828 India's reservation to the article of the ICCPR was that the "right of self-determination appearing in this article [should] apply only to the peoples under foreign domination and not to sovereign states". See the Statement by the Representative of India to the Human Rights Committee, UN Doc CCPR/C/SR 498 (1984); Higgins "Post-modern Tribalism" 29-32; Brownlie "The Rights of Peoples" 1-5.

determination with the process of decolonisation alone. Others such as Harris⁸²⁹ hold that the "peoples" entitled to self-determination include the aggregate populations of independent states. This concept is based on the argument that self-determination as a human right applies to all human beings. In this connection, Anaya is of the opinion that self-determination reaches beyond the colonial situation and currently applies to all peoples capable of exercising it, unless they are willing to be lumped into the englobing "self" of a whole people of a given territory.⁸³⁰ Also, in its plain meaning article 1 of the ICCPR and ICECSR provides the right of self-determination to "all peoples". This means that colonised peoples or those under oppressive regimes have the right to free themselves from the bonds of domination by resorting to any means recognised by international law.

Having said that international law is not clear as to the definition of "peoples," this chapter aimed at explaining the real holder of the right to self-determination. The definition afforded to the notion of the right holders is principally based on existing definitions of "peoples" but embraces all beneficiaries of self-determination such as "nation" "indigenous peoples" and "minority groups". In the context of the present study a "people" is defined as:

...a group of human beings possessing a clear identify and its characteristics, namely: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life. The group must be relatively large; the group as a whole must have the will to be identified as a people or the consciousness of being a people; possibly the group must be organized or have other means of expressing its common characteristics and will for identity, finally the group must be cemented by shared memories of common suffering, and they must be ready to give even the very last breath of their lives.⁸³¹

The aim of this definition is to establish the range of potential candidates who may claim to be a "people". It determines the most important features of peoplehood as an aid to the identification of holders of self-determination. Based on the theoretical links between what may be understood from the above definition and the right to self-determination, the conclusion can be drawn that indigenous peoples and minority groups enjoy (or should enjoy) the right to self-determination. However, it is observed that since the definition of "peoples" is based on theoretical assumptions

829 Anaya *Indigenous Peoples* 100.

830 Anaya *Indigenous Peoples* 100-103; see also Skurbaty *As if Peoples Mattered* 223.

831 See Chapter Three par 3.2 above.

and objectives, some aspects thereof lack in practice and could accordingly affect the abovesaid exercise of self-determination. Some challenges inherent in the attainment of self-determination are expected to become evident when the definition is applied to people in the process of external self-determination as in the secession claims in Canada, Mali, and Nigeria, for example.

Another important aspect of this chapter is its examination of the role of liberation movements in the attainment of self-determination. It is argued that as far as anti-colonial struggle is concerned, there should be a national liberation movement representative of the peoples in such struggles to free themselves from colonial domination, alien subjugation or racist regimes. In considering the role of national liberation movements in the process of decolonisation, several scholars⁸³² argue that international organisations allowed them access to decision-making by allowing them to participate in their deliberations. It is also argued that the recognition of national liberation movements as the sole official and legitimate representatives at UN level and other regional organisations symbolised the revolution that has taken place at that institution. This may lead to the conclusion that national liberation movements were considered to have *locus standi* in international law in the context of the struggle of peoples against colonialism.

Apart from national liberation movements which fought against colonialism, "rebel groups" have also been involved in struggles for self-determination. It is clear that the concept of "rebel movements" is not defined internationally. Also, academic literature does not provide a cohesive definition, a fact which bears legal consequences for right holders. Issues relating to the definition of rebel groups in international law are theoretically and practically contentious because of the nature of the claims associated with the demands of rebel movement. The current lack of an authoritative definition of "rebel groups" as representative of "peoples" in the struggles for self-determination has led this study to consider them as:

...a movement of people, ethnic groups or minorities who are persistently and egregiously discriminated against and thus denied meaningful access to the government of their country, and who strive to overthrow or secede from such

832 Cassese *Self-determination of Peoples* 197-200; Wilson *International Law* 91-142; Reed 1993 *African Studies Review* 31-59; Sellström *Sweden and National Liberation in Southern Africa* 30.

oppressive forms of government in order to secure their right to self-determination.⁸³³

Although the international community has not agreed on a universally accepted definition of "rebel groups," the abovementioned is a working definition. This definition applies only to authentic representatives of peoples engaged in struggles to regain their right to self-determination usurped by tyrannical governments. It follows that any "rebel group" that does not fulfil this condition and have this aim may not fall under this definition. It was explained that in practice the distinction between "national liberation movements" and "rebel groups" is not always as clear as may be suggested in theory, since both may fight on behalf of peoples for the same purpose.

Before proceeding to the next chapter, it is important to draw a distinction between "rebel groups" and "national liberation movements". Even though it is widely accepted in international legal scholarship that "rebel groups" are not mere "national liberation movements", the distinction is not clear. One way of determining if an armed opposition group is a "rebel group" or "national liberation movement" is to determine against whom the struggle is directed. It was explained that "national liberation movements" are limited to struggles against colonial and racist regimes, whereas "rebel groups" reach beyond colonial and racist situations. Both "rebel groups" and "national liberation movements" are both classified as freedom fighters, in that both strive for self-determination.

Naturally, "national liberation movements" and "rebel groups" share some common features. First, both are dissident movements representing a component of people within either colonial states or independent states. Secondly, both include the element of force, the right to self-determination, and the acceptance of assistance from external states in their struggle for self-determination. The use of force⁸³⁴ is a *sine qua non* for any venture involving decolonisation, change of government or secession. In fact, a number of colonial structures, for example those in Guinea, Algeria, Zimbabwe, Mozambique and Namibia, have been dismantled by armed force by national liberation movements.⁸³⁵ In the same vein, many changes in

833 See Chapter III par 3.4.2 above.

834 The use of force to procure self-determination will be discussed on Chapter Five of this study.

835 Quaye *Liberation Struggles* 11.

governments and dissolutions of federations and confederations states have been realised by rebel groups through the use of armed force.⁸³⁶

Thus, the primary aim of any "national liberation movement" or "rebel group" is the exercise of self-determination. A common link between "national liberation movements" and "rebel groups" is that both of them strive for self-determination. It should be noted that conflicts involving "rebel groups" in pursuit of control over oil and other natural resources are not germane to this study. The desire for self-determination has both an internal and external dimension. Internally, "national liberation movements" and "rebel groups" fight within the borders of a state with the purpose of changing the government and the social order it stands for. Externally, both movements fight for seceding and creating a new state on part of the territory of the existing state. Thus, in their armed struggle for self-determination both of them are entitled to seek and receive aids and support from foreign states.

However, there is a difference between "national liberation movements" and "rebel groups". National liberation movements have fought against colonial power, alien domination and racist regimes, while the rebel groups fight against oppressive dictatorships and non-democratic governments. In other words, national liberation movements aimed to resist not only classical colonial rule, but also other varieties of racist regime. In contrast, rebel groups are committed to resist post-independence oppressive regimes and other governments which do not represent the whole people belonging to the territory without any distinction. Put differently, rebel groups are committed to the nation-state, but seek to overthrow the existing government and replace it with a new political order and to build alternative political authority. Rebel groups grow out of grievances and agitation associated with identity-based exclusion

836 In Africa, between September 1960 and March 1969 more than twenty military coups took place. For instance, in Ghana, military coup overthrew the government of President Kwame Nkrumah in 1966; In Central Africa, Col Jean-Bedel Bokassa overthrew the government of President David Dacko in a military coup in 1966; in 1967, in the eastern part of Nigeria, Col Odumegwu Ojukwu attempted to secede from the federation and declared independence of itself with the Republic of Biafra. Roteberg and Mazrui (eds) *Protest and Power* 1038-1041. More recently, rebel movements with the aim to overthrow the government, have been around all the corners of Africa, for example in Sierra Leone, Guinea, Liberia and Côte d'Ivoire, Chad, Sudan and the Central African Republic (CAR) as well as the Great Lakes region of Rwanda, Burundi, Uganda and the Democratic Republic of Congo (DRC). Okumu and Ikelegbe (eds) *Militias, rebels and Islamist Militants* 1-80.

and alienation by corrupt and autocratic regimes that abused and repressed the marginalised people.

The next chapter will be devoted to examining the circumstances in which peoples denied their right to internal self-determination and access to justice should as a remedy to such gross injustices be endowed with a right to external self-determination by means of unilateral secession.

Chapter 4: The right to secession and territorial integrity

It is for the people to determine the destiny of the territory and not the territory the destiny of the people.⁸³⁷

4.1 Introduction

The previous chapter showed that "peoples" are the main right holders to whom the right to self-determination applies as ascribed in international law.⁸³⁸ It was further shown that, in practice, "national liberation movements" and "rebel groups" are the sole official and legitimate representatives of "peoples" in their struggle for self-determination.⁸³⁹ As already argued in Chapter Two, the right to self-determination is normally exercised in its internal mode within the limits set by the principle of territorial integrity.⁸⁴⁰ It was further demonstrated that the right to external self-determination is exercised only under carefully defined circumstances - that is, when a people is deliberately denied its internal self-determination, and when its fundamental human rights are grossly and systematically violated by the central government.⁸⁴¹ At present, dozens of secessionist and related armed conflicts are taking place in Africa,⁸⁴² ranging from Western African countries such as Mali and Nigeria to Eastern African countries such as Somalia, and to South West African countries such as Cabinda in Angola, to name a but few. These secessionist conflicts remain controversial, as international law does not explicitly acknowledge secession as a legitimate mode of the exercise of self-determination. This chapter will consider the external scope of self-determination, including the right to unilateral secession, which again links self-determination with the doctrine of remedial secession.

As stated in Chapter Two, secession refers to the creation of a new sovereign state through the withdrawal of an integral portion of the territory of an existing sovereign state, carried out by inhabitant of that portion, either with or without the approval of

837 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion (Separate Opinion of Judge Dillard)* 1975 ICJ Reports par 114.

838 See Chapter Three par 3.2 above.

839 See Chapter Three par 3.4 above.

840 See Chapter Two par 2.6.1 above.

841 See Van den Driest *Remedial Secession* 4.

842 Weller 2009 *European Journal of International Law* 111-112.

the parent state or constitutional endorsement.⁸⁴³ In this context, the Supreme Court of Canada stated:

Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one.⁸⁴⁴

This broad definition makes it clear that secession arises wherever a segment of the population of a given territory expresses the will to become a sovereign state in itself or to join with and become part of another sovereign state.⁸⁴⁵ In other words, secession occurs when a segment of the people of an existing state separates from that state to form a new sovereign state or to unite with another. It is further observed that the definition formulated by the Supreme Court of Canada covers both types of secession, with or without the consent of the parent state or constitutional authorisation. The first type is referred to as consensual or constitutional secession, whereas the second type is referred to as unilateral secession. This unilateral mode of secession is defined by Van den Driest⁸⁴⁶ as:

The establishment of a new independent state through the withdrawal of an integral part of the territory of an existing state from that state, carried out by the resident population of that part of the territory, without either the consent of the parent state or domestic constitutional authorisation.

This definition articulates that unilateral secession occurs when a part of the population of an existing state withdraws from that state to form a new independent state or unite with another without the consent of the parent state. In this way, unilateral secession is basically a matter of fact rather than law. In this regard, Chandhoke⁸⁴⁷ suggests that secession should occur in only two cases: first, when historical pacts that govern the accession of a territory to a larger country are broken, and second, when the state has lapsed from justice and when the fundamental rights of a part of the population settled in a particular territory have been violated beyond repair. The right to secession is, however, controversial in theory and practice. In theory, it is questionable that it is universally accepted. In practice, it is not always

843 Van den Driest *Remedial Secession* 6.

844 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 83.

845 Dahlitz (ed) *Secession* 6.

846 Van den Driest *Remedial Secession* 6.

847 Chandhoke 2008 *South Asia Research* 10.

easy to clearly identify who possesses the right to secession, and under which circumstances such a right may be exercised.

It is generally accepted in international legal scholarship that secession applied to the process of decolonisation.⁸⁴⁸ This is because this process does not conflict with the principle of the territorial integrity of states. In this situation, the only territorial relationship to be changed was that with the colonial power.⁸⁴⁹ In other words, achieving independence did not come at the expense of another sovereign state's territory or that of an adjacent colony.⁸⁵⁰ Decolonisation therefore did not present any conflict between self-determination and the principle of territorial integrity. Thus, the traditional claims to self-determination grant a people independence from an existing state to terminate colonial or foreign occupation.⁸⁵¹ In non-colonial situations, the right to external self-determination may be exercised only through the peaceful dissolution of a state, with the consent of the parent state or constitutional authorisation.⁸⁵²

In the light of the above it is questionable that there is a right to external self-determination in the form of unilateral secession in international law. As previously noted, the right to self-determination would normally be consummated in its internal mode.⁸⁵³ It is the internal scope of self-determination, encompassing the requirement for a representative government on a basis of equality, which is in fact reconcilable with the principle of territorial integrity of states.⁸⁵⁴ The principle of territorial integrity entitles a state to exercise sovereignty over the area within its borders, without

848 Crawford *The Creation of States* 383.

849 Fox 1995 *Michigan Journal of International Law* 736.

850 Fox 1995 *Michigan Journal of International Law* 736.

851 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 131. The general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. However, the right to external self-determination, which entails the possibility of choosing (or resorting) independence, has only been bestowed upon two classes of peoples: those under colonial rule and foreign occupation. See also the *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports par 52.

852 Dissolution refers to the establishment of a new sovereign state through the separation of one or more integral parts of the territory of an existing state from that state, resulting in the discontinuation of the legal personality of the previous state. In other words, dissolution occurs in the context of federal-type territorial units. The examples would be the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) in 1990, and the Union of Soviet Socialist Republics (USSR) in 1991. See Van den Driest *Remedial Secession* 85-86.

853 *Reference re Secession of Quebec* 1998 2 (SCR) 2017 par 126.

854 Vidmar *Democratic Statehood* 140.

unwanted incursions by other states.⁸⁵⁵ This principle was vigorously asserted by the Former UN Secretary-General, U Thant, in a statement he made regarding the Biafran conflict. He was asked if there was no contradiction between the people's right to self-determination as recognised by the UN and the attitude of the Nigerian Government towards Biafra. He replied that "the United Nations has never accepted and does not accept ... the principle of secession of a part of its member state".⁸⁵⁶

This statement may be interpreted to indicate that secession is not an entitlement and that the maintenance of the territorial integrity of states takes precedence over the claim of a segment of a population to establish its own state. The room left for self-determination in the form of secession is very narrow, that is, during the process of decolonisation, through the consent of the parent state, and possibly through constitutional authorisation. Outside these circumstances, secession would be seen as unilateral secession which therefore dismembers the territory of the parent state. But it may be possible that states might allow such dismemberment (of other states) in certain situations. There is an emerging doctrine that if a state does not possess a "government representing the whole people belonging to the territory without any distinction"⁸⁵⁷ it cannot invoke the principle of territorial integrity in order to limit the right of self-determination.⁸⁵⁸ It has been explained above that in practice if a people is denied internal self-determination by the parent state, the people could opt for the so-called "remedial secession" as a last resort to remedy flagrant and gross injustices. The doctrine of "remedial secession" suggests that gross and systematic human rights violations against a specific people could lead a state to lose a part of its territory.⁸⁵⁹

855 This principle refers, *inter alia*, to "respect for the inviolability of all frontiers which can only be changed by peaceful means and common agreement". See *Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union"* (1991); Thornberry "The Principle of Self-determination" 189-190; Shaw *Title to Territory in Africa* 180-182.

856 UN Monthly Chronicle 36 (Feb 1970); Nanda 1981 *Case Western Reserve Journal of International Law* 263.

857 Miller 2003 *Colombia Journal of Transnational Law* 623.

858 Vidmar *Democratic Statehood* 158.

859 Cassese argues that in order for the right to secession to be triggered, "there must be gross violation of fundamental human rights, and, what is more, the exclusion of any likelihood for a possible peaceful solution within the existing state structure". See Cassese *Self-determination of Peoples* 119-120; see also par 4.7.3 for further discussions on human rights violations. On the same issue Franck argues that where "a minority within a sovereign state ... is persistently and egregiously denied political and social equality and the opportunity to retain its political identity ... it is conceivable that international law will define such repression ... as coming within

From the point of view of legal doctrine, however, remedial secession is neither legal nor illegal in international law.⁸⁶⁰ This means that remedial cession is not an entitlement under international law, yet there is no explicit prohibition of this mode of state creation.⁸⁶¹ As such, international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their parent state. Yet, it does not also provide an explicit denial of such a right.⁸⁶² With the number of ethnic and cultural conflicts far outnumbering conflicts between nation-states, the international community faces a pressing dilemma which is of particular importance in the African continent, where threats to territorial integrity actually exist in many African countries. The rise in self-determination claims poses a particular danger in Africa because of the arbitrariness of the boundaries drawn by the European colonisers.⁸⁶³

This chapter considers the links between self-determination and territorial integrity and the question of whether or not secession is a lawful mode of exercising the right to self-determination. It will be argued that outside the colonial situation secession is not an entitlement under contemporary international law, not even when the doctrine of "remedial secession" is in question. Then the chapter turns to the *uti possidetis* principle, which applies to the limitation of the borders of the newly emerged states. It clarifies the scope of the *uti possidetis* principle in the framework of the right to self-determination and argues that the application of this principle in a non-colonial situation remains controversial.

4.2 Secession before World War II

Traditionally, the self-determination norm on which secessionists base their claims flows from the French and American Revolutions.⁸⁶⁴ The basic principle is that the

a somewhat stretched definition of colonialism. Such repression, even by an independent state not normally thought to be 'imperial,' would then give rise to a right of 'unilateral secession'". Franck "Postmodern Tribalism and the Right to Secession" 3-27, 13-14; see also Vidmar 2010 *St Antony's International Review* 38.

860 Crawford *The Creation of States* 390; Vidmar 2012 *International and Comparative Law Quarterly* 375; Hilpold 2009 *Chinese Journal of International Law* 55.

861 Vidmar 2012 *International and Comparative Law Quarterly* 375.

862 *Reference re Secession of Quebec* 1998 2 (SCR) par 111; see also Hanna 1999 *Maryland Journal of International Law* 221; Mutharika 1995 *Fordham International Law Journal* 1706-1713.

863 Demissie 1997 *Suffolk Transnational Law Review* 165.

864 See Chapter Two par 2.3.1 above.

lawful authority requires a free and genuine expression of the will of the governed.⁸⁶⁵ This idea, that government must stem from the consent of the governed, seems to allow a disaffected group the right to opt out of an existing state.⁸⁶⁶ Therefore, the phrase "the consent of the governed," which legitimises governmental authority, is linked with a right of secession for dissenters in the case of a state which does not conduct itself in compliance with the principle of equal rights and internal self-determination.⁸⁶⁷

The issue of the desire of a subjugated people to separate from the oppressor drew significant attention from Vladimir Lenin and Woodrow Wilson in the aftermath of the WWI.⁸⁶⁸ As argued in Chapter Two,⁸⁶⁹ Lenin's concept of self-determination implied a right for subjugated peoples to break away from their oppressors and create new and independent states,⁸⁷⁰ but as a last resort only:

.... when national oppression and national friction make joint life absolutely intolerable and hinder any and all economic intercourse. In that case, the interest of capitalist development and of freedom of class struggle will be best served by secession.⁸⁷¹

In this paragraph Lenin claims that in the extreme case of oppression, a people's right to internal self-determination might arguably become a right to external self-determination in the manifestation of a right to secession. Thus, Lenin's conception makes it clear that a right to external self-determination arises as a remedy in the case of total denial to a particular group or a people within the state of any role in their own government. It was in this respect that the right to choose the political

865 *Western Sahara Advisory Opinion* 1975 ICJ Reports par 55.

866 Brilmayer 1991 *Yale Journal of International Law* 184.

867 Haile 1994 *Emory International Law Review* 498; see also Crawford *The Creation of States* 119.

868 Cassese *Self-determination of Peoples* 14-23.

869 See Chapter Three par 2.3.2 above.

870 Lenin contended that "... only the liberation of the oppressed nations and the real eradication of national oppression leads to the fusion of nations, and the political criterion of the feasibility of this lies precisely in the freedom to secede. Freedom to secede is the best and the only political means against the idiotic system of petty states and national isolation which, to mankind's good fortune, is being inexorably destroyed by the whole course of capitalist development". Lenin "Socialist Revolution and the Right of Nations to Self-determination" 332.

871 Lenin "The Right of Nations to Self-determination" 423.

status of any of the constituent republics in the international sphere by means of secession was provided for in the *Soviet Constitution*.⁸⁷²

The external mode of self-determination was also reflected in the Fourteen Points speech, which President Wilson delivered in the US Congress on 8 January 1918.⁸⁷³ In this speech, Wilson expressed the intention to disaggregate the Ottoman and Austro-Hungarian empires and to redraw the map of Europe based on ethnic lines and the will of its peoples.⁸⁷⁴ He advocated that every territorial settlement must be made in the interest and for the benefit of the population concerned, and not as a part of any mere adjustment or compromise of claims amongst rival states.⁸⁷⁵ Therefore, in Wilson's understanding, self-determination also became a right of oppressed peoples to create their own state, under which they would live.

Notwithstanding Lenin's and Wilson's desires, the international community did not seem to accept the right of secession exercisable by any minority group within an independent state as a principle of international law.⁸⁷⁶ During WWI and the League of Nations era, secession applied to certain people in Europe and the Middle East. At this time there was characterisation of national groups, not only minorities, claiming that they should have the opportunity to found their own independent states by

872 At least the 1918 and 1977 Soviet Constitutions included the right of the Union's constituent republics to secede in pursuit of self-determination. Cassese explained that "article 7 provided that each Union Republic shall retain the right freely to secede from the USSR". Cassese *Self-determination of Peoples* 264; See also Miller 2003 *Columbia Journal of Transnational Law* 618.

873 President Woodrow Wilson's Fourteen Points 8 January 1918 http://avalon.law.yale.edu/20th_century/wilson14.asp.

874 See point IX "A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality". Point X "The peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity to autonomous development". Point XI "Rumania, Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkan states to one another determined by friendly counsel along historically established lines of allegiance and nationality; and international guarantees of the political and economic independence and territorial integrity of the several Balkan states should be entered into". Point XII "The Turkish portion of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development, and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees. See President Woodrow Wilson's Fourteen Points 8 January 1918 http://avalon.law.yale.edu/20th_century/wilson14.asp.

875 See para 9-13 of the President Woodrow Wilson's Fourteen Points 8 January 1918 http://avalon.law.yale.edu/20th_century/wilson14.asp.

876 Buchheit *Secession* 63.

seceding from imperial states such as Germany, Russia, and Turkey.⁸⁷⁷ In practice, though, Wilson's idea of secession was to apply only to the defeated powers and not to into the "ancient wrongs" that had given rise to much of the map of Europe.⁸⁷⁸ Outside the defeated European states "national self-determination" was applied together with minority treaties⁸⁷⁹ as a method of ensuring respect for the rights of minority groups. It should be noted that at that time secession was not a rule of international law and the League of Nations had not entered it in its Covenant.

In 1920 the issue of secession was dealt with by the International Commission of Jurists in the *Aaland Island* case.⁸⁸⁰ The Commission of Jurists stated that secession had not yet attained the status of a positive rule of international law.⁸⁸¹ The relevant passage in the Jurists' Report reads:

....Positive international law does not recognize the right of national groups, as such, to separate themselves from the states of which they form part by the simple expression of a wish, any more than it recognizes the right of other states to claim such a separation.⁸⁸²

A similar view was expressed by the Commission of Rapporteurs in a report to the Council of the League of Nations. The Rapporteurs' Report reads in part as follows:

To concede to minorities, either of language, religion or to any fractions of a population, the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within states and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the state as a territorial and political entity.⁸⁸³

In the *Aaland Islands* case, neither the Commission of Jurists nor the Commission of Rapporteurs supported the right of a minority group to secede from the state of

877 Buchheit *Secession* 63.

878 Buchheit *Secession* 63. Wilson did not question the sheer number of ancient wrongs which had been incorporated into the map of Europe. His intention, however, was to avoid the potentially anarchical effect of self-determination universally applied, by limiting the doctrine to those subject to territorial rearrangement following the defeat of the central power.

879 *Treaty between the Allied and Associated Powers and Poland* (1919); *Treaty between the Allied and Associated Powers and the United Kingdom of the Serbs, Croats and Slovenes* (1919); *Treaty between the Allied and Associated Powers and Czechoslovakia* (1919); *Treaty between the Allied and Associated Powers and Romania* (1919); *Treaty between the Allied and Associated Powers and Greece* (1920).

880 League of Nations 1920 *Official Journal* 5. For more details, see par 2.3.5 above.

881 League of Nations 1920 *Official Journal* 5.

882 League of Nations 1920 *Official Journal* 5-6.

883 *Aaland Islands* case, Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, League Doc B 7 21/68/106 (1921); for further discussion, see Nanda 1981 *Case Western Reserve Journal of International Law* 266.

which it formed a part. Hence, at the time of the *Aaland Islands* case the principle of territorial integrity prevailed over the right of secession. Nevertheless, since the end of WWI there has been an evolving, albeit limited, acceptance of the legitimacy of secession within the international arena. After WWII, opinions concerning who was entitled to secession shifted significantly. Secession did not apply generally to ethnic or linguistic groups, but rather to those suffering colonial status. The importance of ethnic or linguistic unity was subordinate to the issue of whether or not a group inhabited a geographically defined colonial unit.⁸⁸⁴ As will be seen in the following section, in the *UN Charter* era secession essentially meant the right of colonial peoples to opt for independence instead of a right of ethnic or linguistic groups to secede.⁸⁸⁵

4.3 Secession in the United Nations era

In the United Nations period, several international instruments⁸⁸⁶ referred to self-determination as a positive right, but did not recognise the right of national groups to separate from the state they belong to by the simple expression of a wish. It is generally accepted that international law neither permits nor interdicts secession.⁸⁸⁷ The cases in which international law prevents secession concern situations where the secessionist action violates its fundamental principles.⁸⁸⁸ Even if the so-called state "constitutive elements" are effectively fulfilled by an entity, the entity will not constitute a state if it was created through the use of force by another state, or by its intervention, or if the forcible secessionist attempt is considered as a threat to international peace and security, leading the Security Council to invoke the principle

884 Haile 1994 *Emory International Law Review* 500.

885 Emerson 1971 *American Journal of International Law* 464.

886 Aa 1(2) and 55 of the *Charter of the United Nations* (1945); a 1 of the ICCPR and ICESCR; *African Charter on Human and Peoples' Rights* (1981); *Helsinki Final Act* (1975); *Algiers Declaration of the Rights of Peoples* (1976).

887 Kohen (ed) *Secession* 19.

888 For example, some secession denounced by the UN as being in violation of peremptory norms of international law. In this respect, the UN General Assembly and Security Council condemned the secession of Rhodesia, Transkei, Bophuthatswana, Venda and Ciskei on the grounds that such secessions were performed in violation of the prohibition of the denial of self-determination and in support of racial discrimination. See SC Res 277 (1970) for Rhodesia; GA Res 31/6A (1976) for Transkei; GA Res 32/105N (1977) for Bophuthatswana; GA Res 34/93G (1979) for Venda; GA Res 37/69A (1981) for Ciskei, SC Res 402 (1976) and SC Res 407(1977).

of territorial integrity.⁸⁸⁹ In such cases, international law prevents the desired outcome of the secessionist forces. As a result, entities created in such a way are unable to become states.⁸⁹⁰

The operation of secession initially resulted in the process of decolonisation. In this period, secession came to be the stock-in-trade of the UN in situations involving independence, association or the integration of colonies and non-self-governing territories.⁸⁹¹ Outside colonialism the success of secession is limited. However, this section is concerned with post-1945 secessions which occurred in the colonial context as well as outside the process of decolonisation. It will clarify how secession is qualified in contemporary international law, and if it is an entitlement occurring outside of the process of decolonisation. In the other words, the essential questions at issue concern whether or not unilateral secession is a lawful mode of exercising the external mode of the right to self-determination.

4.3.1 *Secession under the Charter of the United Nations*

In its current form, the *UN Charter* contains two explicit provisions relating to the right to self-determination.⁸⁹² Both articles 1(2) and 55 refer to equal rights and self-determination as rights pertaining to all peoples. Although the *UN Charter* is considered as the cornerstone of international law, these two articles make no reference to secession. The doctrine of secession had been elaborated upon during the *travaux préparatoires* at Dumbarton Oaks, which disclose two opposite approaches to the issue. During discussions, it was stated that:

.... concerning the principle of self-determination, it was strongly emphasised on the one side that this principle corresponds closely to the will and desires of peoples everywhere and should be clearly enunciated in the Charter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.⁸⁹³

889 Both the secessions of the Turkish Republic of Northern Cyprus and the Republic of Srpska were condemned on the ground of the illegal use of force. See SC Res 541 (1983); SC Res 550 (1984); SC Res 787 (1992); see also Dugard *International Law* 104.

890 Kohen (ed) *Secession* 19.

891 Vidmar *Democratic Statehood* 170; Miller 2003 *Colombia Journal of Transnational Law* 630.

892 Aa 1(2) and 55 of the *Charter of the United Nations* (1945).

893 *UN Conference on International Organisation* UNCIO Doc 343, I/1/16, Vol VI (1945) 296 quoted in Van den Driest *Remedial Secession* 27.

From this, one may deduce that the drafters of the *UN Charter* had no intention of establishing a right to unilateral secession,⁸⁹⁴ while others such as the Belgian delegates supported the amendment of article 1(2) to make the right of self-determination applicable to national groups which do not identify themselves with the population of a state.⁸⁹⁵ The Belgium position, however, did not gain sufficient support in order for it to be included in the *UN Charter*. The argument would be that the *UN Charter* remains neutral as regards the possibility of secession.⁸⁹⁶

It must be borne in mind that during the drafting process of the *UN Charter* there was some ambiguity over the question of whether or not secession is considered to be part of positive international law. This may be explained by the fact that the meaning of the concept of "secession" has evolved over time.⁸⁹⁷ In 1945, secession could refer to colonial peoples demanding independence, since some states regarded colonial claims for independence as secessionist claims. It is difficult to find any references in the drafting history of the *UN Charter* which would support claims by national groups within the independent states to break away from these states.

The approach taken in the *UN Charter* has arguably been supported by Former UN Secretary-General U Thant as well. With regard to the right of a segment of people to separate itself from the state which it belongs, and to create a new state, U Thant stated that:

When a member state is admitted to the United Nations, there is the implied acceptance by the entire membership of the principle of territorial integrity, independence, and sovereignty of that particular state The United Nations spent over \$500 million in the Congo primarily to prevent the secession of Katanga from the Congo. So, as far as the question of secession of a particular section of a member state is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its member state.⁸⁹⁸

This statement clearly indicates that the existing states had shown themselves to be against the legality of secession at all times. Their representatives even carefully avoided the very use of the word "secession" when it involved codifying the rules of

894 Van den Driest *Remedial Secession* 101.

895 UN Doc 343, I/1/16, 6 UNCIO Doc 296 (1945) quoted in Buchheit *Secession* 74.

896 Buchheit *Secession* 73-76.

897 Quane 1998 *International and comparatively Law Quarterly* 547.

898 U Thant Secretary-General's Press Conference *UN Monthly Chronicle* (1970).

state succession, preferring to speak about the "separation of part of a state".⁸⁹⁹ The result is that states are not willing to allow even a potential consideration that secession is a situation governed by international law, even after the success of a secessionist state.⁹⁰⁰

In the UN practice numerous attempts at unilateral secession were considered unlawful or illegal and invalid. The foremost examples would be the cases of Katanga,⁹⁰¹ Biafra,⁹⁰² the Basque region of Spain, and Kashmir in India,⁹⁰³ to name but a few. From these examples it can be concluded that in the age of decolonisation, the right of secession was applied only to the inhabitants of colonial and non-self-governing territories. Outside the process of decolonisation, the *UN Charter* offers little guidance as regards the possible exercise of a right to secession. No clear trace of a right can be found in the *UN Charter*. It is therefore necessary to consider human rights covenants, their attitude towards the concept of secession as a qualified right, and its application outside of colonialism.

4.3.2 Secession under human rights covenants

Article 1 of both the ICCPR⁹⁰⁴ and ICESCR⁹⁰⁵ reaffirm that the right to self-determination belongs to "all peoples". It follows from the first paragraph of the common article that "all peoples," without any distinction, enjoy the right to freely determine their political status.⁹⁰⁶ The wording means that they have the right to the free expression of their popular will. Whether the will is in favour of secession or association, it has to be respected.⁹⁰⁷ The problem lies, however, in defining what constitutes a "people". It is argued in Chapter Three that the definition of "peoples" is problematic.⁹⁰⁸ During the *travaux préparatoires* of the ICCPR there was a consensus that the right to self-determination applies to "all peoples" and not only to

899 The *Vienna Convention on Succession of States in respect of Treaties* did not even distinguish under this heading between true cases of separation, such as devolution and secession, and those of dissolution. See its aa 17, 30 and 40 of the *Vienna Convention on Succession of States in respect of State Property, Archives and Debts* (1983).

900 Kohen (ed) *Secession* 3.

901 SC Res S/5002 (1961).

902 Ijalaye 1971 *American Journal of International Law* 551.

903 Dugard *International Law* 104.

904 *International Covenant on civil and Political Rights* (1966).

905 *International Covenant on Economic, Social and Cultural Rights* (1966).

906 Quane 1998 *International and Comparative Law Quarterly* 560.

907 Buchheit *Secession* 78.

908 See Chapter Three par 3.2.

those under foreign domination.⁹⁰⁹ Although the common Article One of the Covenants does not make a clear reference to secession, the preparatory works of the ICCPR indicate that once a group is recognised as a people, it has the right to freely determine its political status within an established state or to opt for secession. It is argued that the phrase "freely determine their political status" is broad enough to embrace the right to independence or any other international status.⁹¹⁰

At this point the *travaux préparatoires* of the ICCPR provide further clarification. It makes argument that self-determination means the right to "establish an independent state," to "choose its own form of government" or to "secede from or unite with another people".⁹¹¹ In the light of the scope of self-determination, the Egyptian representative stated that the right of peoples to self-determination was the right to "free expression of the popular will; whether that will was in favour of secession or association, it has to be respected".⁹¹² In this regard, Yugoslavia and the United States presented an amendment to the effect that self-determination included the right to secede and to establish a politically and economically independent state.⁹¹³ In response to this proposal, the Commission on Human Rights (hereafter the Commission) spent a great deal of time discussing the inclusion of secession in the proposed covenant on human rights, but at the last, the majority did not vote in favour of secession.⁹¹⁴ It remains unclear if Article One of both Covenants on Human Rights can be interpreted in the context of the more radical views heard during the debates on the legitimacy of secession. It seems clear, on the other hand, that the Commission did not intend the extensive interpretation. On the contrary, the majority of the members of the Commission supported the notion that a right to secession could be only invoked for the liberation of colonial peoples and non-self-governing territories.⁹¹⁵

909 Cristescu *The Right to Self-determination* 8.

910 Quane 1998 *International and Comparative Law Quarterly* 560.

911 Bossuyt *Guide to the "Travaux Préparatoires"* 34.

912 UN Doc A/C3/SR 454 (1952) quoted in Buchheit *Secession* 78-79.

913 Bossuyt *Guide to the "Travaux Préparatoires"* 34.

914 Buchheit *Secession* 76-84.

915 For instance, the New Zealand delegate stated that the "adoption of resolutions might be interpreted as a recognition of unlimited right of secession but he felt that a number of delegations, including his own, had made clear that this interpretation was unacceptable". UN Doc A/C3/SR 454 (1952) quoted in Buchheit *Secession* 78-79.

Furthermore, the concept of secession has been the subject of much discussion in legal literature.⁹¹⁶ According to Cassese,⁹¹⁷ secession applies to colonial peoples, Trust Territories, and possibly to the people of a national component of a multinational state. He derives support for this last category of peoples from the drafting history of the ICCPR, in particular the references by Western States to the right to self-determination of the Soviet republics and by the Soviet Union's statement that the term "peoples" includes nations and ethnic groups.⁹¹⁸ Cassese⁹¹⁹ provides two conditions which must be fulfilled by groups claiming under the third category. The national group must be a member of a state made up of different national groups of comparable dimensions, and this group must be recognised constitutionally.

With this phrasing, Cassese tended to provide an argument for extending the applicability of self-determination to separate groups within a state. This means that in addition to the entire population of the state, distinct groups within the state also have the right to participate in the decision-making process of the government of state, that is, internal self-determination.⁹²⁰ In view of this, Raič⁹²¹ stated that the applicability of self-determination to national groups seems to be "a logical of necessary consequences of the *raison d'être* of self-determination," which involves, *inter alia*, the promotion of and protection of the collective identity of a group.⁹²² Most of states are not ethnically homogeneous territories, but rather contain one or more distinct ethnic groups. Bearing in mind that these groups are often in a non-dominant position within a state, it can be argued that the protection of collective identity of

916 International lawyers differ on whether the right to self-determination of peoples in international law includes a right to secession, and if so, in what circumstances. Knop *Diversity and Self-determination* 1. In this respect, Shaw argues that secession is not contrary to international law. Where the independence-seeking entity succeeds in the light of the principle of effectiveness in establishing a viable state and one that is recognised by other states, international law will recognise this situation. As a corollary to this, international law does not recognise that parts of sovereign states possess the right to secession. International law, therefore, is neutral in this matter. Shaw *Title to Territory in Africa* 215. See also Cassese *Self-determination of Peoples* 90; Crawford *The Creation of States* 375-446; Buchheit *Secession* 85-119; Tomuschat "Secession and Self-determination" 1-45.

917 Self-determination of Peoples 57-59.

918 Quane 1998 *International and Comparative Law Quarterly* 560.

919 Cassese *Self-determination of Peoples* 59-62.

920 Raič *Statehood* 247.

921 Raič *Statehood* 248.

922 Van den Driest *Remedial Secession* 67.

subgroups is more vital than with regard to the nation as a whole, for their position is more vulnerable.⁹²³

However, extending the applicability of self-determination to sub-groups within a state is much more difficult. In the opinion of Van den Driest,⁹²⁴ identifying sub-groups within a state as subjects of the right to self-determination is much more difficult than indicating nations as subjects of this right. In order to justify a claim for self-determination, a sub-group needs to satisfy the criterion of collective identity.⁹²⁵ The question is if any group would be able to satisfy this condition. Also, it is doubtful that a state would constitutionally recognise national groups within its borders, knowing that in doing so it might endorse the dismemberment of its territory. It is unlikely that Article One of the ICCPR, in its external mode, was intended to apply to ethnic, religious or linguistic groups within a sovereign state.

Article 27 of the ICCPR relating to the rights of ethnic minorities in independent states reinforces the validity of this interpretation. It provides that:

...in those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right ... to enjoy their own culture, to profess and practice their own religion, or to use their own language.⁹²⁶

From this paragraph one can deduce that the right conferred on ethnic minorities by article 27 is the right to have their internal human rights observed, rather than a right to secede.⁹²⁷ This article contradicts any notion that Article One of the ICCPR accords ethnic minorities the right to secede. Simply put, the ICCPR does not allow any use of Article One to justify the secession of a national group from an independent state. As such, the Human Rights Covenants remain neutral on the question of whether or not unilateral secession is a possible mode of exercising self-determination.

923 Raič *Statehood* 248; see also Van den Driest *Remedial Secession* 67-68.

924 Van den Driest *Remedial Secession* 68.

925 Collective identity is generally seen to determine the "peoplehood" of a group and is based on the idea that "the members of the group concerned share objectively identifiable common features". See Chapter Three par 3.2 above.

926 A 27 of the ICCPR (1966).

927 Haile 1994 *Emory International Law Review* 503-504.

4.3.3 Secession under the Charter of the OAU/AU and the African Charter on Human and Peoples' Rights

Neither the *Charter of the Organisation of African Unity* (hereinafter the OAU Charter)⁹²⁸ nor the *African Charter on Human and Peoples' Rights* (hereinafter the African Charter)⁹²⁹ confers a right of secession upon ethnic and other groups of people within an independent African state. On the contrary, both Charters contain specific provisions emphasising the need to respect the territorial integrity of states. The Preamble to the *OAU Charter* coupled with article 2 announces the determination of its members "to defend and consolidate the sovereignty and territorial integrity" of African states.⁹³⁰ Article 2 of the *OAU Charter* provides that the defence of the "independence" of African states is one of the OAU's purposes.⁹³¹ The members affirmed the right of self-determination and human dignity in the first paragraph of the Preamble to the *OAU Charter*:

...it is the inalienable right of all people to control their own destiny, conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.⁹³²

The *OAU Charter* affirms that peoples have the right to free themselves from colonial rule, and to determine their political status without external interference. It does not extend to the insistence by one section of the population of an independent state on its own form of self-determination, culminating perhaps in secession.⁹³³ It follows from the *OAU Charter* that self-determination cannot mean the freedom of ethno-cultural groups to secede from established states,⁹³⁴ but rather that secession is limited to peoples under colonial or alien domination.

To the same effect, the *Constitutive Act of the African Union*⁹³⁵ does not make reference to secession, but instead explicitly reaffirms respect for the principle of sovereignty of the member states. More specifically, article 3(b) stipulates support for

928 *Charter of the Organisation of African Unity* (1963).

929 *African Charter on Human and Peoples' Rights* (1981).

930 *Charter of the Organisation of the African Unity* (1963).

931 A 2 of the *Charter of the Organisation of the African Unity* (1963).

932 *Preamble to the Charter of the Organisation of the African Unity* (1963).

933 Kiwanuka 1988 *American Journal of International Law* 89; see also Nanda 1972 *American Journal of International Law* 325-328.

934 Kamanu 1974 *Journal of Modern African Studies* 360.

935 *Constitutive Act of the African Union* (2000).

the defence of the territorial integrity and independence of the member states.⁹³⁶ The AU replaced the OAU,⁹³⁷ meaning that, as its successor, it takes over the rights, power and obligations of the OAU.⁹³⁸ As such, the *Constitutive Act of the AU* enshrines the sanctity of colonial boundaries⁹³⁹ – *uti possidetis juris*.⁹⁴⁰ It has been argued that *uti possidetis* was intended to serve both an external and internal purpose. Externally, it would seek to prevent irredentist tendencies by neighbours from turning into territorial claims and the possible use of force. Internally, it would give clear notice to ethnic national groups that secession or the adjustment of borders was not an option.⁹⁴¹ As Nmehielle⁹⁴² observes, the *Constitutive Act of the AU* is old wine in a new bottle, and the AU is a reincarnation of the OAU. Since its creation, the AU has shown little tendency to apply self-determination to separate groups within a state, based on an interpretation that it includes the right to secede. A clear example in this respect would be Somaliland. No African country has officially recognised Somaliland, despite an active and ongoing campaign by the Somaliland authorities.⁹⁴³ In search for recognition, Somaliland applied for AU membership status in December 2005, but the AU members interpreted Somaliland's claim to independence as unilateral secession from an internationally recognised state, and have retained a solid commitment to the concept that Somalia constitutes a single and sovereign state whose territorial integrity has to be respected.⁹⁴⁴

In addition to the *AU Constitutive Act*, the *African Charter on Human and Peoples' Rights* confers no right of secession upon groups in an independent African state. Rather, it provides that "all peoples have the unquestionable and inalienable right to self-determination, and they shall freely determine their political status and shall

936 A 3(b) of the *Constitutive Act of the African Union* (2000).

937 A 33(1) of the *Constitutive Act of the African Union* (2000).

938 Udombana 2002 *California Western International Law Journal* 76.

939 A 4 spells out the purposes of the African Union, including the respect for the borders that existed at the time of the achievement of independence. See a 4(b) of the *Constitutive Act of the African Union* (2000).

940 *Uti possidetis* is a general principle whose purpose is to prevent the independence and stability of new states from being endangered by fratricidal struggles provoked by the challenging of frontiers. See Chapter Four par 4.6 below.

941 Udombana 2002 *California Western International Law Journal* 73.

942 Nmehielle 2003 *Singapore Journal of International and Comparative Law* 417.

943 Arieff 2008 *Yale Journal of International Affairs* 62; see Somaliland Ministry of Information 2001 http://www.somalilandlaw.com/Government_Recognition_Paper_2001.pdf.

944 Arieff 2008 *Yale Journal of International Affairs* 68.

pursue their economic and social development".⁹⁴⁵ Moreover, paragraph 2 of article 20 singles out colonised and oppressed peoples as holders of self-determination. In the African context, this would legitimise the aspiration for the independence of peoples subject to alien subjugation, domination or exploitation. Outside of colonial situations, peoples are under an obligation to preserve and strengthen the national independence and territorial integrity of their countries.⁹⁴⁶

In practice the OAU/AU rejected the right of groups in independent states to secede. For example, the secessionist activities in Katanga were roundly condemned by the UN and the OAU as threats to sovereign and territorial integrity.⁹⁴⁷ In the *Katangese Peoples' Congress v Zaire*,⁹⁴⁸ the African Commission on Human and Peoples' Rights stated that "the territorial integrity of the existing state takes priority over the exercise of self-determination". Also, the OAU objected to Biafra's attempted secession from Nigeria. In this matter, the OAU Resolution AHG/Res 51(IV) reiterated "their condemnation of secession in any member states, and decided to send a consultative committee of six heads of state ... to the Head of the Federal Government of Nigeria to assure him of the Assembly's desire for the territorial integrity ... of Nigeria".⁹⁴⁹ Emperor Haile Selassie of Ethiopia, Chairman of the OAU Committee on the Nigerian crisis, asserted that the national unity of each state is an "essential ingredient for the realisation of the larger and greater objective of African Unity".⁹⁵⁰ The OAU took the view that if Biafra succeeded the threat would not be confined merely to Nigeria but would also spread to other African states as well.

945 A 20(1) of the *African Charter on Human and Peoples' Rights* (1981).

946 A 27 reads as follows: "every individual shall have duties towards ... state and other legally recognized communities and the international community. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest. A 28 reads: "Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance". See the *African Charter on Human and Peoples' Rights* (1981).

947 Kiwanuka 1988 *American Journal of International Law* 90.

948 *Katangese Peoples' Congress v Zaire* Comm No 75/92 (1995). Par 6 stated that "in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by a 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".

949 OAU Res AHG/Res 51 (IV) (1967).

950 Ijalaye 1971 *American Journal of International Law* 556.

Since Africa has many ethno-cultural groups, if the right of such groups to secede were recognised Africa would be fragmented completely.⁹⁵¹

Thus, both the Katanga and Biafra cases showed the attitude of African states towards the violation of territorial integrity.⁹⁵² In recognition of the diversity of ethnic groups in Africa, the existence of numerous ethnic groups in each independent state, and the arbitrary colonial boundaries which disregarded ethnic affiliation, the OAU sensibly closed access to secession. The question, however, is whether or not territorial integrity is elevated to an absolute principle. Dugard argues that it is not absolute, since it could be waived by the parent state.⁹⁵³ In practice, secession would not create problems where the parent state consents to it. In a case such as this a secessionist claim would not violate the principles of territorial integrity or *uti possidetis*.⁹⁵⁴ This is illustrated by the examples of Eritrea⁹⁵⁵ and South Sudan.⁹⁵⁶

4.4 Secession in judicial decisions

In the *Western Sahara Advisory Opinion*,⁹⁵⁷ the ICJ stated that "application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned". Thus, according to Resolution 1541 (XV), peoples have three options, namely (a) emergence as a sovereign independent state; (b) free association with an independent state; or (c) integration with an independent state.⁹⁵⁸ Whether the will of the peoples is in favour of secession or association, it has to be respected.⁹⁵⁹ In view of this, the critical question is whether or not popular support in favour of secession will *ipso facto* lead to the creation of a new state. As far as

951 Nayar 1975 *Texas International Law Journal* 327.

952 Eastwood 1993 *Duke Journal of Comparative and International Law* 309-310.

953 Dugard *International Law* 103-105.

954 See Chapter Four par 4.6 below.

955 Eritrean people exercised their right to self-determination in a referendum held in April 1993. They had three choices: independence, regional autonomy within Ethiopia, or federation with Ethiopia, and but they opted for independence. It is noted that the absence of opposition to a referendum on independence on the part of the new government of Ethiopia was a key factor in the international community's acceptance of the principle of Eritrean independence. Pool 1993 *African Affairs* 391.

956 In 2011 a referendum was held in South Sudan to determine if the region would secede from Sudan. After South Sudan voted in favour of independence, the central government of Sudan accepted the outcome of the referendum, and now South Sudan is an Independent state. Dugard *International Law* 103.

957 *Western Sahara Advisory Opinion* 1975 ICJ Reports par 55.

958 GA Res 1541 (XV) (1960).

959 Buchheit *Secession* 75.

referenda are concerned, recent practice shows that the expression of the will of the populations concerned is a necessary condition for the establishment of a new state. It is not, however, a sufficient condition to create a new state or to establish a right to the creation of a new state. The cases of Anjouan and Somaliland provide striking examples of this legal situation. In spite of the fact that 99.88⁹⁶⁰ per cent and 97⁹⁶¹ per cent of the populations voted for independence on 26 October 1997 and 31 May 2001 respectively, neither entity constitutes an independent state.⁹⁶² The reason for this, despite the population's choice, lies on the one hand in the absence of a right of entities being part of a state to become independent by their own will, and on the other in the fact that these populations do not constitute "peoples".⁹⁶³

Also, the right of the peoples to secession was dealt with by the Supreme Court of Canada in *Reference re Secession of Quebec*.⁹⁶⁴ The question was whether or not Quebec had a right to unilateral secession under the *Constitution of Canada* or under international law.⁹⁶⁵ In the first instance, the Court stated that the right to self-determination did not authorise the secession of sections of a people from an existing state.⁹⁶⁶ In general, the right to self-determination must be exercised by peoples within the structure of existing independent states and consistently with the preservation of the territorial integrity of those states. The Court did, however, go on to state that in exceptional circumstances a right to secession may arise:

....where a people is governed as part of colonial empire; where a people is subject to alien subjugation, domination or exploitation; and possibly where a people is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.⁹⁶⁷

960 On 26 October 1997 the island of Anjouan had a referendum in which ninety-nine per cent of Anjouans voted for independence. Naldi 1998 *Leiden Journal of International Law* 248.

961 On 31 May 2001 a draft constitution with a Preamble and articles explicitly reaffirming Somaliland's independence was approved by ninety-seven per cent of ballots cast in a national referendum. Arieff 2008 *Yale Journal of International Affairs* 66. According to the Initiative and Referendum Institute, the Somaliland nation indicated its wish to approve the Constitution by a vote of 1,147,949, which equates to 97%; with the number of votes rejecting the Constitution being 34,302, which equates to 3%. See Initiative and Referendum Institute 2001 http://www.somalilandlaw.com/Somaliland_Referendum_Report.pdf.

962 Kohen (ed) *Secession* 16.

963 Kohen (ed) *Secession* 16.

964 *Reference re Secession of Quebec* 1998 2 (SCR) 217.

965 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 2.

966 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 111.

967 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 3.

According to the Court, in other circumstances people are expected to exercise their right to self-determination in its internal mode. The Court thereto added that a state whose government represents the whole people resident within its territory, on a basis of equality and without discrimination in its internal arrangements, is entitled to maintain its territorial integrity under international law.⁹⁶⁸ With regard to the question of whether or not the Quebec population had a unilateral right to secession, the Court concluded that the Québécois did not fit within any of the above exceptional cases.⁹⁶⁹ The Court went on to hold that the Québécois had the dominant positions in the legislative, executive and judicial powers. Since they were in no way in a disadvantaged position, the exceptional circumstances providing a right to unilateral secession were manifestly inapplicable to Quebec.⁹⁷⁰ Therefore the Court was quite clear in its view that the Quebec population at that time had no right to unilateral secession under international law.

More recently, in the *Kosovo Advisory Opinion*,⁹⁷¹ the ICJ declined to address whether or not the Kosovo situation manifested a right to secession or a right to remedial secession.⁹⁷² Instead, the ICJ determined that a declaration of independence in general is not prohibited by international law.⁹⁷³ The Court found issues relating to self-determination and the existence of any right of "remedial secession" to be beyond the scope of the question posed by the General Assembly. The Court did not rule whether the declaration validated a right to secession, created a state, or permitted other nations to legally recognise Kosovo as an independent state.⁹⁷⁴

968 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 3.

969 The Court stated that Quebec did not meet the threshold of colonial or an oppressed people, nor could it be suggested that Québécois had been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the "National Assembly, the legislature or the government of Quebec" did not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally. *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 3.

970 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 137.

971 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

972 For further discussion of "remedial secession" see Chapter Four par 4.7 below.

973 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 122.

974 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 51.

This reluctance did not, however, preclude individual Judges, such as Trindade and Koroma, from addressing the legal aspect of secession. For instance, Judge Trindade⁹⁷⁵ advocated an affirmative rule under international law establishing a right to secede for peoples that have been subjected to systematic violations of human rights. He argued that the right to self-determination at international law had been equated with a right to unilateral secession under certain narrowly defined circumstances,⁹⁷⁶ in particular where peoples suffered humanitarian abuses and were unable to secure their rights within the existing state. Building on the reasoning of Judge Trindade, it may be deduced that remedial secession may be exercised only where a people already possesses the right to self-determination and a state has gravely violated that right.⁹⁷⁷

Against this backdrop, Judge Koroma interpreted the right to self-determination conservatively, illuminating by contrast the magnitude of the leap that Judge Trindade advocated. He argued that international law together with resolution 1244 (1999)⁹⁷⁸ prohibits a unilateral declaration of independence or for the secession of Kosovo from Serbia without the latter's consent. Judge Koroma considered territorial integrity to be precedent to the exercise of a people's rights.⁹⁷⁹ According to him, contemporary international law upholds the territorial integrity of a state as one of its fundamental principles. This principle entails an obligation to respect the definition, delineation and territorial integrity of an existing state. Therefore international law does not grant any group the right to secede from its encompassing state merely because the group wishes to do so.

975 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Dissenting Opinion of Judge Cançado Trindade)* 2010 ICJ Reports.

976 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Dissenting Opinion of Judge Cançado Trindade)* 2010 ICJ Reports.

977 Brewer 2012 *Vanderbilt Journal of Transnational Law* 262.

978 Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the *United Nations Charter*, on 10 June 1999. In this resolution, the Security Council determined "to resolve the grave humanitarian situation" which it had identified (see par 4 of preamble) in order "to put an end to the armed conflict in Kosovo, [and thereto] authorised the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide ... an interim administration for Kosovo ...which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions". See par 10 of SC Res 1244 (1999).

979 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Dissenting Opinion of Judge Koroma)* 2010 ICJ Reports.

It follows from the *Kosovo Advisory Opinion* that international law does clarify the scope of secession in the law of self-determination. The ICJ refused to explore whether or not international law provides for a right to "effect a unilateral secession".⁹⁸⁰ According to the advisory opinion:

.... the Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a state unilaterally to break away from it.⁹⁸¹

At the end of its proceedings the ICJ concluded that a "declaration of independence did not violate any applicable rule of international law".⁹⁸² This is a hypothetical answer because the ICJ did not say that a unilateral declaration of independence is legal; rather it stated that such an outcome is not excluded.⁹⁸³ It is argued from the above that secession is a neutral act in international law. In this regard, as numerous scholars argue,⁹⁸⁴ international law does not in principle prohibit secession unless, of course, there is a violation of a fundamental principle such as the prohibition of

980 Based on a restrictive reading of the question the General Assembly asked the ICJ, the *Kosovo Advisory Opinion* argues that there is no necessary link between self determination or secession on the one hand and a declaration of independence on the other. For further reading see Hilpold 2009 *Chinese Journal of International Law* 47-61; Brewer 2012 *Vanderbilt Journal of Transnational Law* 245-292; Burri 2010 *German Law Journal* 881-890. Further, the ICJ did not pronounce upon whether or not a right to unilateral secession exists. In other words, the Court whittled down the scope of the question it was asked to address to a question of "illegality" and a search for express prohibitions of declarations of independence, and thus it failed to answer the most pressing legal issues raised in the UNGA's question. In the *Kosovo Advisory Opinion* the Court did not say that Kosovo or any other entity outside the colonial context had a right to secession. The ICJ did all it could to circumvent the question of the legal qualification of remedial secession. See Kohen and Del Mar 2011 *Leiden Journal of International Law* 125; Christakis 2011 *Leiden Journal of International Law* 76-80; Cirkovic 2010 *German Law Journal* 895-912; Arp 2010 *German Law Journal* 853.

981 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 56.

982 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 122.

983 The ICJ stated that "during the eighteenth, nineteenth and early twentieth century, there were numerous instances of declarations of independence, often strenuously opposed by the state from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence". *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 79.

984 Seshagiri argues that external self-determination has historically been equated with a right to unilateral secession. Seshagiri 2010 *Harvard International Law Journal* 556. The absence of a right to unilateral secession does not imply that such an act is illegal. See Vidmar *Democratic statehood* 164.

aggression.⁹⁸⁵ Thus, the *Kosovo Advisory Opinion* adds nothing to the existing dilemma over the legality of a unilateral secession.

4.5 The principle of territorial integrity as a limitation on secession

As was addressed in the second chapter, the international community now applies the right to self-determination to any situation, be it internal or external. In the *Quebec* case, it was said that there are three situations in which a right to secession might arise.⁹⁸⁶ For the two cases referencing to colonial situations and alien domination the outcome is easy, as there is broad consensus that secession right in those cases does not violate the principle of territorial integrity. In fact, secession in the colonial situation is regarded as something like the restoration of a rightful sovereignty of which the people have been unlawfully deprived by the colonial power concerned. There is still disagreement on the interpretation of the third category of peoples whose right to internal self-determination has been thoroughly violated by a government that does not represent the whole people.⁹⁸⁷ Whether or not international law grants the right of secession to such people and how this "right" then translates into practical terms is a much larger issue.

It appears to be the usual interpretation of self-determination that it involves accession to independent statehood, but account must also be taken of possible limitations. As a human right, self-determination is subject to the same limitations as other human rights. In this regard McCroquodale⁹⁸⁸ argues:

..... the right of self-determination is not an absolute right without any limitations. Its purpose is not directly to protect the personal or physical integrity of individuals or groups as is the purpose of the absolute rights and, unlike the absolute rights, the exercise of this right can involve major structural and institutional changes to a state and must affect, often significantly, most groups and individuals in that state and beyond that state. Therefore, the nature of the right does require some limitations to be imposed on its exercise.

These limitations are intended to protect the rights of everyone and the general interests of the international community.⁹⁸⁹ As acknowledged in the UN's Agenda for

985 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

986 See Chapter Four par 4.4 above.

987 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 2.

988 McCroquodale 1994 *International and Comparative Law Quarterly* 875-876.

989 McCroquodale 1994 *International and Comparative Law Quarterly* 876.

Peace: "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve".⁹⁹⁰ The reason for this is that, outside colonial situations, the right to self-determination will normally be exercised within the structure of existing independent states and in accordance with the maintenance of the territorial integrity of those states.

The principle of territorial integrity refers to the material elements of a state, namely the physical and demographic resources that lie within its territory (land, sea and airspace) as delimited by the state's frontiers and boundaries.⁹⁹¹ In the *Islands of Palmas Case*, Max Huber stated that territorial integrity involves:

...the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.⁹⁹²

This paragraph demonstrates that the principle of territorial integrity applies generally in interstate relations, and thus it represents a guarantee against any dismemberment of the territory.⁹⁹³ In this context, the question is if secessionist movements, as non-state actors, are equally bound by this principle. In the *Kosovo Advisory Opinion* proceedings some states argued that non-state actors as well as states are bound by the principle of territorial integrity.⁹⁹⁴ Serbia, for instance, stated that "the classical structure of international law has changed and no states or other entity may seek now to cling to it in the face of established evolution," and that "recent practice has shown a number of examples where non-state actors within an existing state are directly addressed in the context of internal conflict and with regard to territorial integrity".⁹⁹⁵ In addition to Serbia, other states made similar contentions

990 UN Secretary-General, *An Agenda for Peace: Preventive Diplomacy and Peace-keeping* (Report of the UN Secretary-General) UN Doc A/47/277-S/24111 (1992) par 17.

991 Haverland "Territorial Integrity and Political Independence" 813; El Quali *Territorial Integrity in a Globalizing World* 6.

992 *Islands of Palmas Case (United Nations v The Netherlands)* 1928 Reports of International Arbitral Awards 839.

993 Kohen (ed) *Secession* 579.

994 Van den Driest *Remedial Secession* 162.

995 International Court of Justice *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-government of Kosovo (Request for Advisory Opinion)* Oral Statement of Serbia CR 2009/24 (1 December 2009) par 10.

in supporting respect for the principle of territorial integrity by non-state entities.⁹⁹⁶ In this regard, reference was made to certain Security Council resolutions reaffirming the importance of the sovereignty of states that were confronted with a situation of secessionist attempts.⁹⁹⁷ Furthermore, the global and regional instruments which deal with the protection of minority groups and indigenous peoples provide internal self-determination for these groups.⁹⁹⁸ These documents seem to imply that these groups are also concerned with the principle of territorial integrity.

The principle of territorial integrity was also touched upon in the Declaration on the Principles of International Law⁹⁹⁹ and the Vienna Declaration.¹⁰⁰⁰ According to these declarations:

Nothing ... shall be construed as authorising or encouraging any action which would dismember the territorial integrity of independent states whose

996 See for example, International Court of Justice *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-government of Kosovo (Request for Advisory Opinion)* Written Statement of Argentina (17 April 2009) par 75. In its statement, Argentina argued that in contemporary international law, respect for the principle of territorial integrity is an obligation that applies not only to states and international organisations, but also to other international actors, particularly those involved in international conflicts threatening international peace and security. International Court of Justice *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-government of Kosovo (Request for Advisory Opinion)* Written Statement of Azerbaijan (17 April 2009) par 20-27; International court of Justice *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-government of Kosovo (Request for Advisory Opinion)* Written Comments of Bolivia (17 July 2009) par 7-12. In the Written Statement of Spain, it was contended that "... the Security Council has repeatedly and constantly maintained a position of unequivocal support and respect for the sovereignty and integrity of a state, even in the framework of serious violations of international law and which have resulted in serious threats to international peace and security". International Court of Justice *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-government of Kosovo (Request for Advisory Opinion)* Written Statement of the Kingdom of Spain (14 July 2009) par 29-34.

997 In this respect, the SC has regularly dealt with a number of armed conflicts of a non-international nature. Such have been the conflicts in Democratic Republic of Congo, Somalia and Sudan, among other. See the following resolutions and statements by the President of the Security Council. For the Democratic Republic of Congo: SC Res 1355 (2001); SC Res 1417 (2002); SC Res 1445 (2002); SC Res 1493 (2003); and SC Res 1565 (2004); Statement of 13 July 1998 (S/PRST/2002/27); Statement of 31 August 1998 (S/PRST/1998/26); Statement of 11 December 1998 (S/PRST/2008/36), to list just a few. For Somalia: SC Res 794 (1992); SC Res 897 (1994); SC Res 923 (1994); SC Res 1814 (2008) and SC Res 1863 (2009); Statement of 29 June 2000 (S/PRST/2000/22); Statement of 30 April 2007 (S/PRST/2007/13); Statement of 14 June 2007 (S/PRST/2007/19); to name a few. For Sudan: SC Res 1556 (2004); SC Res 1564 (2004); SC Res 1590 (2005); SC Res 1663 (2006); SC Res 1714 (2006); Statement of 25 May 2004 (S/PRST/2004/18) Statement of 25 April 2006 (S/PRST/2006/17); Statement of 16 July 2008 (S/PRST/2008/27) to cite a few.

998 See Chapter Three par 3.3.2 above.

999 GA Res 2625 (XXV) (1970).

1000 *Vienna Declaration and Programme of Action* (1993).

government represents the whole peoples on the basis of equality and self-determination of peoples without distinction of any kind.¹⁰⁰¹

This paragraph has been referred to as the "safeguard clause".¹⁰⁰² According to this clause, a sovereign state whose government represents the whole people of its territory without distinction as to race, creed, or colour and complies with the principle of self-determination in respect of all of its people is entitled to the protection of its territorial integrity against secession.¹⁰⁰³ Normally the people of such a state exercise the right to self-determination through representatives in the government on the basis of equality.¹⁰⁰⁴

Among other international legal instruments,¹⁰⁰⁵ the *Helsinki Final Act*¹⁰⁰⁶ reaffirmed the "safeguard clause" in slightly different language:

...states will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states.¹⁰⁰⁷

The logical reading is that to be entitled to the protection of its territorial integrity against secession a state must possess a government representing the whole people belonging to the territory equally and without discrimination. Indeed, the way of governing should respect the principles of self-determination as part of its own

1001 Par I (2) of the *Vienna Declaration and Programme of Action* (1993); GA Res 2625 (XXV) (1970).

1002 Vidmar *Democratic Statehood* 144.

1003 Crawford *The Creation of States* 118-121.

1004 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 130.

1005 A 10 of the League Covenant provides that "the members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. *Covenant of the League of Nations* (1919). A 11 of *Montevideo Convention* provides that "the territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily". *Montevideo Convention on the Rights and Duties of States* (1933). A 2(4) of the UN Charter 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". *Charter of the United Nations* (1945). Such views have also been reflected in other international instruments. A 17 of the *Charter of the Organisation of American States* in 1948 proclaimed that "the territory of a state is inviolable," while a 9 of the *Draft Declaration on Rights and Duties of States* stated that "every state has the duty to refrain from resorting to war as an instrument of national policy and to refrain from the threat or use of force against territorial integrity or political independence of another states. *Charter of the Organisation of American States* (1948); *Draft Declaration on Rights and Duties of States* GA Res 596 (1949).

1006 *Helsinki Final Act* (1975).

1007 Principle VIII of the *Helsinki Final Act* (1975).

internal arrangements.¹⁰⁰⁸ It is arguable that when states are fully in compliance with these factors they would be entitled to the protection of territorial integrity under international law. In this context, the government which does not respect the aforesaid principles may, possibly, not have the right to avail itself of the principle of territorial integrity.¹⁰⁰⁹ In such situations, secession may be legitimised.

The "safeguard clause" has been invoked as the foundation of the doctrine of "remedial secession", which will be considered below.¹⁰¹⁰ At this point the next section turns to the *uti possidetis*, and asks if it is a firmly established principle of international law applicable to all situations involving the creation of new independent states. To put it another way, the section examines whether or not the *uti possidetis* principle applies beyond the decolonisation context.

4.6 The principle of *uti possidetis juris*

It is widely accepted that *uti possidetis* can be defined as "the principle involving the preservation of the demarcations under the colonial regime corresponding to each of the colonial entities that was constituted as a state".¹⁰¹¹ This means that new states will come to independence with the same boundaries they had when they were administrative units within the territory or territories of a colonial power,¹⁰¹² no matter how arbitrarily those boundaries may have been drawn.¹⁰¹³ In effect, the *uti possidetis* principle produced a "photograph of the territory", thus freezing the borders as they were at the moment of independence.¹⁰¹⁴ As aforementioned, it is important to stress that despite its linkages with the principle of territorial integrity, the *uti possidetis* principle should not be equated with it. In the previous section it was seen that the principle of territorial integrity is applicable between independent states in accordance with international law.¹⁰¹⁵ In contrast with this continuing nature,

1008 Kumbaro 2001 <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf>.

1009 Crawford *The Creation of States* 119.

1010 See Chapter Four par 4.7 below.

1011 Moret, de Paredes and Rica *Costa Rica-Panama Arbitration* 164; Brownlie *Principles* 134.

1012 See Ratner 1996 *American Journal of International Law* 590. According to the principle of *uti possidetis*, when a territory gains independence, new international boundaries should be drawn only where there previously existed internal administrative boundaries at the time of independence.

1013 Brownlie *Principles* 133; see also Shaw *International Law* 446-449.

1014 Van den Dreist *Remedial Secession* 169.

1015 See Chapter Four par 4.5 above.

the *uti possidetis* principle is of temporary character, being applicable merely "at the moment when independence is achieved".¹⁰¹⁶

As a legal concept, *uti possidetis* originated from *jus civile* in the Roman law, in which it designated an interdict of the praetor or administrator of justice by which the disturbance of the existing state of possession of immovables, as between two individuals, was prohibited.¹⁰¹⁷ The praetor or administrator of justice employed the Latin formula "*uti possidetis, ita possideatis*", which laterally means "as you possess, so may you possess".¹⁰¹⁸ According to *uti possidetis*, the object of the interdict was to recognise the *status quo* in any given situation involving immovable property, such as land.¹⁰¹⁹ To this extent, it was designed to protect the existing state of possession and a regular title.

In the early nineteenth century the principle *uti possidetis* was associated with the decolonisation of South and Central America.¹⁰²⁰ In contemporary international law, the principle of *uti possidetis* first emerged in the treaty of Bogotá of 1811 between former Spanish colonies, such as The United Provinces of Venezuela and the United Province of New Granada. In this treaty they undertook to recognise and respect as boundaries between them the administrative borders of the Spanish empire.¹⁰²¹ Later the principle was extended over all the former Spanish colonies in Latin America, which agreed to apply the principle both in their frontier disputes with each other and in those with Brazil.¹⁰²² For instance, article 7 of the Treaty of Commerce, Navigation and Boundaries between Brazil and Peru expressly recognised that the

1016 *Frontier Dispute (Burkina Faso v Mali) Judgement* 1986 ICJ Reports par 23.

1017 *Castellino and Allen Title to Territory* 9.

1018 *Moore Costa Rica-Panama Arbitration* 5-6.

1019 *Castellino and Allen Title to Territory* 9.

1020 Brownlie *Principles* 132; Ratner 1996 *American Journal of International Law* 593-595; Shaw *International Law* 356. During the decolonisation process, the former Spanish colonies agreed to apply the principle in their frontier disputes with one another. Each state was to be recognized as possessing all territories that were presumed to be possessed by its colonial predecessor as of 1810 (for South America) or 1821 (for Central America), reflecting the last periods of unchallenged Spanish rule (and thus the last times that borders could be considered to have been under Spanish authority). See Hensel, Allison and Khanani "The Colonial Legacy and Border Stability" 2.

1021 Moret, de Paredes and Rica *Costa Rica-Panama Arbitration* 164.

1022 Brazil generally rejected the application of *uti possidetis de jure* in favour of *uti possidetis de facto*, an alternative doctrine that determines ownership of territory based on physical occupation rather than colonial title. Brazil used this alternative doctrine to argue for the expansion of its territory beyond the 1810 borders with former Spanish colonies such as Bolivia and Peru. Garcia *The Amazon from an International Law Perspective* 52-53.

principle of *uti possidentis* should guide the drawing of their common boundary.¹⁰²³ Also, article 2 of the Treaty of Friendship, Commerce, Navigation, Boundaries and Extradition between Brazil and Bolivia affirmed that the parties agreed "in recognising as basis on which to determine the boundaries between their respective territories the *uti possidetis*" and to define their boundaries between their boundary "in conformity with this principle".¹⁰²⁴ The principle of *uti possidetis* was also reflected in the Treaty of Confederation signed at the Congress of Lima between Colombia, Peru, Chile, Bolivia and Ecuador. Article 7 provided:

The Confederated republics declared that they have a perfect right to the preservation of their territorial boundaries as they existed at the time of the independence from Spain in their respective vice-royalties, *capitmanias generales*, or presidencies in which Spanish America was divided..... Republics which, having been part of the same state when their independence was proclaimed, separated from each other after 1810, shall preserve the boundaries that they had recognized, without prejudice to the treaties that they have concluded or may have concluded to change them or validate them pursuant to the present article.¹⁰²⁵

The principle of *uti possidetis* can also be found in the award by the Swiss Federal Council in the *Colombia-Venezuela Boundary* case.¹⁰²⁶ In the course of its award the Swiss Federal Council stated that the boundaries between the disputant parties should be identical with those laid down by the Spanish authorities in respect of the different territorial units existing prior to the independence of the Latin American states.¹⁰²⁷ Thus, under the *uti possidetis* principle there would be no possibility of new claims based on *terra nullius*, and the boundaries of newly independent states should follow the old colonial boundaries. In other words, each state was to be recognised as possessing all territories that were presumed to be possessed by its colonial predecessor as of 1810 for South America or 1821 for Central America, reflecting the last period of unchallenged Spanish rule.¹⁰²⁸

1023 A 7 of the *Treaty of Commerce, Navigation and Boundaries between Brazil and Peru* (1851).

1024 A 2 of the *Treaty of Friendship, Commerce, Navigation, Boundaries and Extradition between Brazil and Bolivia* (1867).

1025 A 7 of the *Treaty of Confederation between Colombia, Peru, Chile, Bolivia and Ecuador* (1948).

1026 *Swiss Federal Council Arbitral Award (Colombia-Venezuela)* 1922 Reports of International Arbitral Awards 229.

1027 *Swiss Federal Council Arbitral Award (Colombia v Venezuela)* 1922 Reports of International Arbitral Awards 229.

1028 See Hensel, Allison, and Khanani "The Colonial Legacy and Border Stability" 2; Klabbers and Leber "Africa: Lost between Self-determination and *Uti possidetis*" 54.

The *uti possidetis* principle has also evolved significantly from the decolonisation process in Africa, and was affirmed in the Addis Ababa Conference regarding the issue of territorial boundaries. Although the *OAU Charter* itself did not contain explicit affirmation of the principle of *uti possidetis*, implied recognition was given. One of the fundamental themes running through the Charter is adherence to the principles of sovereignty, independence, and territorial integrity of each African state.¹⁰²⁹ This is provided in the Preamble to the *OAU Charter*, which stresses its commitment to the inalienable right of all people to self-determination and freedom, equality, justice and dignity.¹⁰³⁰ In addition to the Preamble, various provisions of the OAU provide the principle of "respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence".¹⁰³¹ In 1964 the Assembly of Heads of State and Government held in Cairo adopted a resolution, which stated that "all member states pledge themselves to respect the boundaries existing on the achievement of national independence".¹⁰³² This resolution is a forthright and explicit crystallisation of a policy against territorial adjustments and abolitions.

The sacrosanct principle of the inviolability of the boundaries inherited at independence was recently reaffirmed in the *Constitutive Act of the African Union*.¹⁰³³ Article 3(b) stipulates the defence of the sovereignty, territorial integrity, and independence of the member states.¹⁰³⁴ This principle is also reaffirmed by states themselves in their mutual relations. For instance, the Lusaka Ceasefire Agreement signed by seven African states on 10 July 1999 strongly emphasises the principles of state sovereignty and the territorial integrity of African States in general and the Democratic Republic of Congo in particular.¹⁰³⁵ It is clear that African state practice over the past thirty years demonstrates the commitment to territorial integrity under the banner of the *uti possidetis* principle. This principle protects the post-

1029 The first par of the preamble to the *Charter of the Organisation of African Unity* (1963).

1030 Naldi 1998 *Leiden Journal of International Law* 251.

1031 Aa 2(1) and 3(3) of the *Charter of the Organisation of African Unity* (1963).

1032 OAU Doc AHG/Res 16(I) (1964).

1033 The AU is the successor of the OAU. See a 3(3) of the *Constitutive Act the African Union* (2000).

1034 A 3(b) of the *Constitutive Act of the African Union* (2000).

1035 Par 3 of the Lusaka Ceasefire Agreement reaffirms the Resolution AHG/16(I) adopted by the OAU Assembly of Heads of State and Government in 1964 in Cairo, Egypt, on territorial integrity and inviolability of national boundaries inherited at independence. See Ceasefire Agreement (Lusaka Agreement) 10 July 1999 http://peacemaker.un.org/sites/peacemaker.un.org/files/CD_990710_LusakaAgreement.pdf.

colonial boundaries of newly independent states by excluding overlapping claims of title based on ethnic kinship and cultural ties.¹⁰³⁶ On the basis of the *uti possidetis* and territorial integrity principles, African states have opposed the secession of Katanga and Biafra. Also, the creation of the Bantustan states, such as Transkei, Bophuthatswana, Venda and Ciskei was opposed not only because this exercise furthered the policy of *apartheid*, but because it resulted in the fragmentation of South Africa, in violation of its territorial integrity.¹⁰³⁷

The modern meaning of the *uti possidetis* principle was stated most directly in the ICJ's 1986 decision in the *Frontier Dispute* case.¹⁰³⁸ In this case, the ICJ had been asked to settle the location of a disputed segment of the border between Mali and Burkina Faso, both of which had been part of French West Africa before independence. In an *obiter dictum*, the ICJ stated that:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.¹⁰³⁹

In this case, the ICJ affirmed the inviolability of frontiers inherited from colonial times. Despite the arbitrariness of colonial frontiers, the ICJ held that *uti possidetis* "is a firmly established principle of international law where colonisation is concerned".¹⁰⁴⁰ The ICJ went on to state that in the context of decolonisation, *uti possidetis* has become a principle of customary international law applicable beyond Latin America, where it initially evolved as such.¹⁰⁴¹ This means that the principle of *uti possidetis* has not been confined to Latin America but has become of universal application. Apart from Latin America and Africa, *uti possidetis* has been invoked in disputes between Asian states,¹⁰⁴² and in some European countries.¹⁰⁴³

1036 Demissie 1996 *Suffolk Transnational Law Review* 176.

1037 Dugard 1993 *Journal of International and Comparative Law* 164.

1038 *Frontier Dispute (Burkina Faso v Mali) Judgement* 1986 ICJ Reports.

1039 *Frontier Dispute (Burkina Faso v Mali) Judgement* 1986 ICJ Reports par 23.

1040 *Frontier Dispute (Burkina Faso v Mali) Judgement* 1986 ICJ Reports par 21.

1041 *Frontier Dispute (Burkina Faso v Mali) Judgement* 1986 ICJ Reports par 21.

1042 See the *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) Merits* 1962 ICJ Reports. In this case, the boundary between Thailand and the French colony of Cambodia attained independence.

This position of the ICJ, that *uti possidetis* forms a principle of international law, remains controversial.¹⁰⁴⁴ In the light of the above, the question is whether or not the *uti possidetis* principle applies outside of the decolonisation process. In the aftermath of the Cold War, the *uti possidetis* principle has been applied in situations of the emergence of a new state not resulting from decolonisation. Following the breakup of the Socialist Federal Republic of Yugoslavia (hereinafter SFRY), the boundaries of the successor states became a critical issue.¹⁰⁴⁵ The European Community (hereafter EC) initially endorsed the *uti possidetis* principle to settle the boundaries issues in the former SFRY.¹⁰⁴⁶ On the 27th of August 1991 the EC created an Arbitration Committee, which was chaired by Robert Badinter, President of the *French Constitutional Council*, and was further consisted of the Presidents of the German and Italian Constitutional Courts, the Belgian Court of Arbitration and the Spanish Constitutional Tribunal.¹⁰⁴⁷

In the Badinter Commission's *Opinion No 3*, the Commission responded to a question, asked by the chairman of the EC Conference on Yugoslavia:

Can the internal boundaries between Croatia and Serbia and between Bosnia and Herzegovina and Serbia be regarded as frontiers in terms of public international law?¹⁰⁴⁸

In answering that question, the Badinter Commission noted that:

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonisation issues

1043 See the *Frontier Land case* 1959 especially the dissenting opinions of judges Moreno Quintana and Armand-Ugon. They stated that the principle of *uti possidetis* was applicable to the frontier dispute between Belgium and the Netherlands. *Case Concerning Sovereignty over Certain Frontier Land Judgement* 1959 Reports; *Case Concerning Sovereignty over Certain Frontier Land Judgement (Dissenting Opinion of Judge Armand-Ugon)* 1959 Reports par 240; *Case Concerning Sovereignty over Certain Frontier Land Judgement (Dissenting Opinion of Judge Moreno Quintana)* 1959 Reports par 255.

1044 Vidmar *Democratic Statehood* 205.

1045 Nanda 2001 *Denver Journal of International Law and Policy* 312.

1046 In the post-colonial era the relevance of *uti possidetis* was evidenced by the practice of states during the dissolution of the former Soviet Union, Yugoslavia and Czechoslovakia, apparently sanctifying the former internal administrative lines as interstate frontiers. See Nanda 2001 *Denver Journal of International Law and Policy* 312; see *Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia* 1992 31 ILM 1499; see also Ratner 1996 *American Journal of International Law* 591.

1047 Pellet 1992 *European Journal of International Law* 178.

1048 *Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia* 1992 31 ILM 1499; see also Pellet 1992 *European Journal of International Law* 184-185.

in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (*Frontier Dispute* case).¹⁰⁴⁹

In accordance with this the Commission stressed that following the secession of four of the Yugoslavian Federation's republics, the former internal federal borders would become international borders for the seceding entities once they received international recognition as states.¹⁰⁵⁰ At this point, the Badinter Commission quoted a fragment of paragraph 20 of the *Frontier Dispute* case:

Nevertheless the principle is not a special rule which pertains to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.¹⁰⁵¹

It must be noted that the position of the Badinter Commission that the *uti possidetis* principle applies beyond the context of decolonisation is highly controversial. Paragraph 20 of the *Frontier Dispute* case stipulated that the principle of *uti possidetis* was not limited to decolonisation in Latin America, but rather is a general principle which is logically connected with the process of decolonisation wherever it occurred.¹⁰⁵² Also, the omitted line *in fine* of the Badinter Commission's quote of the *Frontier Dispute* case refers to "the challenging of frontiers following the withdrawal of the administering power".¹⁰⁵³ The reference to "administering power" is furthermore a clear indication that the *uti possidetis* principle applied in the context of decolonisation.

Therefore, nothing in the reasoning of the ICJ in the *Frontier Dispute* case suggests that the principle of *uti possidetis* applies to cases of secession from independent states.¹⁰⁵⁴ In fact, the whole tenor of the judgment indicates that the principle of *uti possidetis* was unequivocally limited to the situations dealing with decolonisation. It

1049 *Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia* 1992 31 ILM 1499 par 3.

1050 *Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia* 1992 31 ILM 1499 par 1.

1051 *Frontier Dispute (Burkina Faso v Mali) Judgement* 1986 ICJ Reports par 20.

1052 *Frontier Dispute (Burkina Faso v Mali) Judgement* 1986 ICJ Reports par 20.

1053 *Frontier Dispute (Burkina Faso v Mali) Judgement* 1986 ICJ Reports par 20.

1054 Vidmar argues that the reasoning of the ICJ "makes it clear that *uti possidetis* is applicable specifically where a nation has been subjected to colonial rule or racist regime and should not be imposed in other situations". See Vidmar *Democratic Statehood* 207; Radan 2000 *Melbourne University Law Review* 62.

is argued that the application of the *uti possidetis* principle outside the colonial context by the Badinter Commission is underpinned by selective quoting of the *Frontier Dispute* case. With this in mind, it can be argued that the *Opinion No 3* of the Badinter Commission is a rather weak authority to prove a doctrinal acceptance of applicability of the principle of *uti possidetis* outside of the process of decolonisation.¹⁰⁵⁵

Furthermore, the Badinter Commission did not invoke all boundaries in the Former SFRY, but only the contested ones.¹⁰⁵⁶ The entities that did not possess features of a federal republic had to fight hard to present themselves as valid candidates for full independence. In this regard, international decision makers had rejected the sovereignty claims put forward by Serb entities within Croatia (Republica Srpska Krajina) and Bosnia- Herzegovina (Republica Srpska).¹⁰⁵⁷ Also, the international community used the *uti possidetis* principle to reject Kosovo's claim of independence.¹⁰⁵⁸

It follows from the Badinter Commission that outside of the decolonisation process *uti possidetis* may apply only in cases of "dissolution," not simple secession.¹⁰⁵⁹ This is illustrated by *Opinion No 2* of the Badinter Commission, where it was held that:

.... the right to self-determination must not involve changes to existing frontiers at the time of independence except where the states concerned agree otherwise. Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of

1055 Vidmar *Democratic Statehood* 207.

1056 The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at. Clearly, the Badinter Commission took into account the armed conflict which was taking place at that time in Croatia and Bosnia-Herzegovina and applied the *uti possidetis* principle in order to bring these states and their boundaries under the protection of a 2(4) of the Charter of the UN. *Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia* 1992 31 ILM 1499; see also Ratner 1996 *American Journal of International Law* 614.

1057 Hasani 2003 *Fletcher Forum of World Affairs* 92.

1058 European decision makers explained their position in terms of *uti possidetis juris*, according to which the terrain of new sovereign states is defined on the basis of old colonial borders. Since Kosovo was not a federal republic within Yugoslavia, but rather an entity within Serbia, it had no right to claim sovereignty. See Hassani 2003 *Fletcher Forum of World Affairs* 93.

1059 Radan 2000 *Melbourne University Law Review* 54-55; Watson 2008 *Tulane Journal of International and Comparative Law* 286-287.

their identity under international law ... the principle of the right to self-determination serves to safeguard human rights.¹⁰⁶⁰

The wording of this paragraph suggests that the application of the principle of self-determination is limited by the principle of *uti possidetis*. Put differently, the *uti possidetis* principle served as an obstacle to the minorities or other groups of people who had secessionist aspirations. The rights of those groups were limited to so-called internal self-determination, which includes in its conceptual framework the right of all people to take part in the conduct of public affairs, directly or through freely chosen representatives.¹⁰⁶¹ It has been established that the exercise of the right of self-determination should normally not violate the principle of "*uti possidetis*" and the "territorial integrity" of a state which has a government representing the whole people belonging to the territory without distinction of any kind.¹⁰⁶² The question, however, is if the previous paragraph envisages what may be called "remedial secession" where a "people" is actively prevented from participating in their own government through the use of systematic oppression. Some scholars, such as Tomuschat, Dugard, Raič and Ouguergouz argue that in a case of extreme oppression the part of the population being discriminated against could have the right to "remedial secession" as a last resort.¹⁰⁶³ The following section will consider both the doctrine and state practice relevant for this doctrine and will clarify its normative position in contemporary international law.

4.7 The theory of remedial secession

Traditionally, the external right to self-determination at international law has been equated with a right to unilateral secession under certain narrowly defined

1060 *Opinion No 2 of the Arbitration Commission of the Peace Conference on Yugoslavia* 1992 31 ILM 1497 par 1-2.; see also Batistich 1995 *Auckland University Law Review* 1029.

1061 A 21 of the *Universal Declaration of Human Rights* (1948); see also a 25 of the ICCPR.

1062 GA Res 2625 (XXV) (1970).

1063 Tomuschat argues that "remedial secession should be acknowledged as part and parcel of positive international law, notwithstanding the fact that its empirical basis is fairly thin, but not totally lacking... the events leading to the establishment of Bangladesh and the events giving rise to Kosovo as an autonomous entity under international administration can both be classified as coming within the purview of remedial secession". Tomuschat "Secession and Self-determination" 42. Dugard states that the international community might be willing to recognise the secession-seeking entity where "the human rights of the people have been seriously violated and they have been denied proper participation in the government of the state from which they wish to secede". Dugard 1993 *African Journal of International and Comparative Law* 173. Raič argues that unilateral secession is considered to be an *ultimum remedium* for the purpose of ending oppression. Raič *Statehood* 370; Ouguergouz *African Charter of Human and Peoples' Rights* 227-268; Kohen (ed) *Secession* 10.

circumstances.¹⁰⁶⁴ In international legal erudition, remedial secession is considered as a mode of the establishment of a new state through the withdrawal of a portion of an existing state. This is done without the consent of the parent state, as a remedy of last resort to the gross violations of fundamental human rights which the inhabitants of that portion of the territory have suffered at the hands of the authorities of the state concerned.¹⁰⁶⁵ As was previously noted in this chapter,¹⁰⁶⁶ neither an explicit right to remedial secession nor an express prohibition of this right can be found in contemporary international law. In this respect, Crawford argued that "remedial secession is neither legal nor illegal in international law".¹⁰⁶⁷ In this view, the question is whether remedial secession can be considered as a lawful exercise of the right to self-determination, and if so, under what circumstances can it be exercised? This section will critically evaluate the theory and practice of remedial secession and determine whether or not it is an entitlement under international law.

4.7.1 The historical backdrop and status of remedial secession in international law

It is generally accepted that modern international law does not recognise a right to remedial secession for subgroups constituting a people within an independent state. In the context of analysing remedial secession, the former UN Secretary-General Boutros Boutros-Ghali noted that:

... if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.¹⁰⁶⁸

In view of this paragraph, the Report of the UN Secretary-General can be said to be protective of the territorial integrity of states complying with the right to internal self-determination. In other words, a state is entitled to the protection of territorial integrity as long as its government represents the whole people belonging to the territory without distinction of any kind.¹⁰⁶⁹ If a government is unrepresentative and abusive, then is not entitled to invoke the principle of territorial integrity when limiting unilateral secession as way of exercising the right to self-determination. As Vidmar observed, if

1064 Seshagiri 2010 *Harvard International Law Journal* 567.

1065 Van den Driest *Remedial Secession* 7.

1066 See Chapter Four par 4.1 above.

1067 Crawford *The Creation of States* 390.

1068 UN Secretary-General, *An Agenda for Peace: Preventive Diplomacy and Peace-keeping (Report of the UN Secretary-General)* UN Doc A/47/277-S/24111 (1992).

1069 Crawford *The Creation of States* 102.

there is a violation of people's right to internal self-determination, the right to remedial secession may be exercised as a remedy to such gross violations.¹⁰⁷⁰

The theoretical basis for "remedial secession" may be found from as early as 1919, in the *Aaland Island* case, as described in Chapter Two.¹⁰⁷¹ In this case, the Committee of Rapporteurs appointed by the League of Nations to give an opinion on the *Aaland Islands* dispute indicated that the separation of a minority from a state of which it forms a part and its incorporation into other state may be considered only 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 of religious, linguistic, and social freedom.¹⁰⁷² In 1994 the African Commission on Human Rights also indicated some support for remedial secession in the *Katangese People's Congress v Zaire* case.¹⁰⁷³ The Katangese Peoples' Congress was a political organisation claiming to represent the population of Katanga, which had attempted to secede from the Democratic Republic of Congo in 1960. In 1992, the President of the organisation submitted a communication to the ACHPR. The complaint aimed, *inter alia*, at gaining recognition of the Katangese people to separate from Zaire.¹⁰⁷⁴ The African Commission responded to this issue by stating that the external mode of self-determination may arise only under certain circumstances such as grave violations of human rights. In the words of the Commission:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into 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 sovereign and territorial integrity of Zaire.¹⁰⁷⁵

Thus, in the Commission's reasoning, the population of Katanga would be allowed to break away from Zaire under defined circumstances, such as, the grave violations of human rights and the denial of internal self-determination. It may be noted that the content of both cases should be read as outlawing remedial secession except as a

1070 Vidmar 2010 *St Antony's International Review* 38.

1071 See Chapter Two par 2.3.5 above.

1072 *Aaland Islands* case Report of the Committee of Rapporteurs League Council Doc B7/21/68/106 (1921) 27-28.

1073 *Katangese Peoples' Congress v Zaire* Comm No 75/92 (1995).

1074 *Katangese Peoples' Congress v Zaire* Comm No 75/92 (1995 par 1.

1075 *Katangese Peoples' Congress v Zaire* Comm No 75/92 (1995) par 16.

remedy of last resort for persistent and grave injustices which are considered to be violations of fundamental human rights.

In the case of *Loizidou v Turkey*¹⁰⁷⁶ before the European Court of Human Rights, Judges Wildhaber and Ryssdal concurred that:

.... In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively underrepresented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.¹⁰⁷⁷

Although this concurring opinion did not make a reference to secession the content of this paragraph suggests that a right to external self-determination in the manifestation of a right to unilateral secession may be permitted only in exceptional circumstances. In this respect Judges Ryssdal and Wildhaber adopt the remedial secession argument and accept the possibility of secession in circumstances where peoples are oppressed by and/or not adequately represented within the political framework of their parent states.¹⁰⁷⁸

The judicial opinion which supports the theory of remedial secession is that of the Supreme Court of Canada in the *Quebec* case.¹⁰⁷⁹ In its 1998 judgment, the Court stated that a right to unilateral secession arises in only the most extreme of cases and, even then, under carefully defined circumstances.¹⁰⁸⁰ The *Quebec* case neither affirmed nor negated the existence of a remedial right of secession. It merely contemplated that where the right to self-determination internally is somehow being totally frustrated, this may potentially give rise to a right to secession.¹⁰⁸¹ The wording "the most extreme cases," which may justify a unilateral secession, is to be read against the background of the above-cited provision on self-determination and territorial integrity expressed in the Declaration on Principles of International Law. This provision has been referred to as the "safeguard clause". The Supreme Court of Canada seems to have upheld the inverted reading of the "safeguard clause" by

1076 *Loizidou v Turkey* (Application No 1531/89) Judgement (1996).

1077 *Loizidou v Turkey* (Application No 1531/89) Judgement (Concurring Opinion of Judge Wildhaber, joined by Judge Ryssdal) (1996) par 2.

1078 Vidmar 2010 *St Antony's International Review* 39-40.

1079 *Reference re Secession of Quebec* 1998 2 (SCR) 217.

1080 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 126.

1081 Jaber 2011 *International Journal of Human Rights* 926-947.

arguing that "the other clear case where a right to external self-determination accrues (apart from colonial situations) is where a people is subject to alien subjugation, domination or exploitation outside a colonial context".¹⁰⁸² However, the Supreme Court of Canada stated that these circumstances were not met in the case of Quebec,¹⁰⁸³ and the pronouncement remained an *obiter dictum*.

The most recent opinion given by the ICJ - in 2010 - is the *Kosovo Advisory Opinion*,¹⁰⁸⁴ which neither affirmed nor negated the existence of a remedial right of secession. The ICJ did not rule whether the Kosovo situation manifested a right to self-determination or a right to remedial secession.¹⁰⁸⁵ The issue of "remedial secession" was dealt with by Judge Cançado Trindade in his separate opinion. He advocated that the right to self-determination has been equated with a right to unilateral secession where a people suffers humanitarian abuses and is unable to secure its rights within the existing state.¹⁰⁸⁶

The support for remedial secession in judicial decisions is limited to an *obiter dictum*, the concurring and separate opinions of individual judges. There is no judicial body which has accepted unilateral secession as an entitlement in any particular case. The concept nevertheless has substantial support in doctrine. In international legal study the term "remedial secession" was coined by Buchheit¹⁰⁸⁷ in his search for a right to secede. Since then, the theory arguing for the right to remedial secession

1082 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 133.

1083 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 135.

1084 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

1085 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 82-84.

1086 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (Separate Opinion of Judge Cançado Trindade)* 2010 ICJ Reports par 33.

1087 Buchheit contended that: "Remedial secession envisions a scheme by which, corresponding to the various degrees of oppression inflicted upon a particular group by its governing state, international law recognizes a continuum of remedies ranging from protection of individual rights, to minority rights, and ending with secession as the ultimate remedy. At a certain point, the severity of a state's treatment of its minorities becomes a matter of international concern. This concern may finally involve an international demand for guarantees of minority rights (which is as far as the League was willing to go) or suggestions of regional autonomy, economic independence, and so on; or it may finally involve an international legitimacy of a right to secessionist self-determination as a self-help remedy by the aggrieved group (which seems to have been the approach of the General Assembly in its 1970 declaration)". Buchheit *Secession* 222.

has gained significant support in the legal literature. The main argument of the academic proponents is well captured by Buchanan:¹⁰⁸⁸

If the state persists in serious injustices toward a group, and the group's forming its own independent political unit is a remedy of last resort for these injustices, then the group ought to be acknowledged by the international community to have the right to repudiate the authority of the state and to attempt to establish its own independent political unit.

Buchanan's view considers secession as a "qualified right" which is triggered by oppression. At the same time, it is viewed as a remedy of last resort for persistent and grave injustices, understood as gross violations of basic human rights.¹⁰⁸⁹ The same argument for remedial secession is accurately made by Ryngaert and Griffioen:¹⁰⁹⁰

What if a state persistently denies a people the fundamental right of internal self-determination? What if a people does not have free choice but is repressed and suffers from gross violations of basic human rights, and all possible remedies for a peaceful solution to the conflict have been exhausted? Should that people not be allowed a "self-help remedy" in the form of external self-determination? The answer must be in the affirmative.

It is clear from this paragraph that there are at least three cumulative conditions that must be fulfilled before remedial secession may be invoked. First, there should be widespread violations of fundamental human rights and systematic discrimination at the hands of a repressive regime.¹⁰⁹¹ Secondly, violations must be accompanied by exclusion from political participation, and the denial of the right to internal self-determination. And finally, when it is clear that all attempts to secure international self-determination have failed,¹⁰⁹² or when negotiations between the repressive regime and the people lead nowhere, the right to external self-determination may be acknowledged. Within this argument Cassese¹⁰⁹³ suggests what conditions might warrant remedial secession:

... when the central authorities of a sovereign state persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the state structure.

1088 Buchanan *Justice* 335.

1089 Buchanan "Uncoupling Secession from Nationalism" 83.

1090 Ryngaert and Griffioen 2009 *Chinese Journal of International Law* 575.

1091 Ryngaert and Griffioen 2009 *Chinese Journal of International Law* 575.

1092 Dugard *International Law* 104.

1093 Cassese *Self-determination of Peoples* 119.

In addition to Cassese, a great number of other legal scholars have contended that a right to remedial secession does exist under international law and have described the circumstances under which it may be warranted.¹⁰⁹⁴ For instance, Tomuschat¹⁰⁹⁵ argues that the interpretation of the so-called "safeguard clause" embodied in the Friendly Relations Declaration leads to the legal acceptance of a remedial secession, at least as a measure of last resort. Tomuschat¹⁰⁹⁶ goes further to state that:

... If a state is not behaving in the manner prescribed by the Friendly Relations Declaration, then the part of the population being discriminated against could have its right to self-determination recognised, the state acting in contradiction with this right losing the protection of its territorial integrity to this extent.

In this context Summers¹⁰⁹⁷ has argued that most writers express their support for remedial secession rather cautiously by claiming that such a right perhaps exists, or by giving a circular reference to "a number of commentators" without taking a firm stance on whether this right exists or not. In the same vein, Shaw¹⁰⁹⁸ further argues that a theory based on an inverted reading of the safeguard clause is problematic:

Such a major change in legal principle cannot be introduced by way of an ambiguous subordinate clause, especially when the principle of territorial integrity has always been accepted and proclaimed as a core principle of international law, and is indeed placed before the qualifying clause in the provision in question.

In addition to this argument, Shaw states that no mechanism really exists to determine whether or not a particular state may be the subject of unilateral secession on the basis of non-conformity with safeguard clause.¹⁰⁹⁹ With this argument, Shaw seems to point to the issue of determining the human rights situations under which a state may be said to have violated the safeguard clause, hence warranting remedial secession, and the risk of arbitrariness in this regard. In addition to Shaw's, Xanthaki¹¹⁰⁰ has also raised a similar objection, asking "who would be interpreter of the law of self-determination" and determine whether a

1094 Van den Driest *Remedial Secession* 109.

1095 Tomuschat "Secession and Self-determination" 10.

1096 Tomuschat "Secession and Self-determination" 10.

1097 Summers *Peoples and International Law* 347.

1098 Shaw 1997 *European Journal of International Law* 483.

1099 Shaw "The role of Recognition and Non-recognition" 248.

1100 Xanthaki *Indigenous Rights* 144.

segment of people under certain circumstances has a right to external self-determination in the manifestation of remedial secession?

In view of the foregoing, it can be concluded that judicial decisions and doctrine related to remedial secession do not provide sufficient evidence to supporting the contention that in contemporary international law remedial secession is a generally accepted entitlement of oppressed peoples. Nevertheless, the primary idea of remedial secession, that is, that its purpose would be to end the oppression directed against a certain people, could still influence the recognition policies of certain states.¹¹⁰¹ To this extent, the next section considers how the theory of recognition under international law impacts remedial secession.

4.7.2 *The impact of recognition on remedial secession*

There is general consensus that international law contains neither a right to unilateral secession nor the explicit denial of such a right. The absence of this right, however, does not imply that such an act is illegal. In fact, "unilateral secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally".¹¹⁰² In the *UN Charter* period it is very unlikely that an attempt at unilateral secession would result in the creation of a new state, but such an outcome is not excluded.¹¹⁰³ In the *Quebec* case, the Supreme Court of Canada stated that:

... the ultimate success of a unilateral secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.¹¹⁰⁴

1101 Vidmar 2010 *St Antony's International Review* 40.

1102 Crawford *The Creation of States* 390. Also, Cassese argued that "International law does not ban secessionism: the breaking away of a nation or ethnic group is neither authorised nor prohibited by legal rule; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach legal consequences depending on the circumstances of the case". For example, law may impose the withholding of recognition of the new entity if this entity has come about in gross breach of human rights; or may make its recognition contingent upon formal and actual respect for the rights of individuals and minorities. See Cassese *Self-determination of Peoples* 340. Musgrave argues that "secession is simply a political act, although the emergence of the new state through it will necessarily produce consequences in the international legal system". According to Musgrave, secession remains a domestic matter and a legally neutral act under international law. See Musgrave *Self-determination* 119.

1103 Vidmar *Democratic Statehood* 161.

1104 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 155.

In the course of this paragraph, the Supreme Court of Canada suggests that the success of remedial secession depends on international recognition and the conduct of the parent state towards the seceding entity. Equally, Shaw has argued that "recognition may be more forthcoming where the secession has occurred as a consequence of violations of human rights".¹¹⁰⁵

Against this background, the question is whether recognition can be considered as a condition of statehood in international law, while secession is a method of creation of states. The argument suggesting that recognition may possibly lead to the creation of states needs to be taken with attention. It is well established that recognition is a declaratory, not a constitutive act.¹¹⁰⁶ Therefore recognition does not bring into legal existence an entity which did not previously exist.¹¹⁰⁷ In this connection, Brownlie has argued that although recognition is of great importance to statehood, it is not in itself a criterion of statehood and does not impact on whether or not the relevant entity is actually entitled to it.¹¹⁰⁸ However, the argument that recognition is simply declaratory of an existing fact is controversial. Politically recognition is constitutive because the act of recognition is a condition for the establishment of formal diplomatic relations with the new state.¹¹⁰⁹ It thus implies that remedial secession could be given effect through recognition, which observation falls close to Berdahl's¹¹¹⁰ argument that recognition is essential to the emergence of a new state.

It is argued in Chapter Three, however, that acknowledging the constitutive effects of the act of recognition does not mean that non-recognised entities cannot exist as states.¹¹¹¹ The main argument is that the widespread recognition of an attempt at unilateral secession would have the effect of a collective state creation in situations where the emergence of a new state is not in conflict with general international law, in particular laws of a peremptory character, such as *jus cogens* norms.¹¹¹² In

1105 Shaw 1997 *European Journal of International Law* 483.

1106 Shaw 1997 *European Journal of International Law* 483.

1107 Brierly *Law of Nations* 145.

1108 Brownlie *Principles* 72. For the conditions of statehood, see a 1 of the *Montevideo Convention on the Rights and Duties of States* (1933).

1109 Brownlie *Principles* 69.

1110 Berdahl 1920 *American Journal of International Law* 519.

1111 See Chapter Three par 3.4.1.3.1 above.

1112 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports par 81.

supporting this argument Orakhelashvili¹¹¹³ argues that while individual recognition cannot constitute the state, collective recognition can. Arguably, where recognition is granted almost universally to a seceding entity, it can create an ambiguous situation which possibly might be consolidated in the future.

As previously discussed, there is nevertheless a vital limitation on giving effect to remedial secession through recognition. Whereas, in a case of oppression, third states might be more willing to recognise a seceding entity,¹¹¹⁴ this does not imply that states are obliged to recognise the entity in question.¹¹¹⁵ In international law, the current position of remedial secession may be that, as a consequence of severe human rights abuses, the parent state's right to territorial integrity becomes weaker and third states may decide to grant recognition to the seceding entity.

But, as demonstrated above, remedial secession has not yet materialised, even though there is considerable support in academic writing for such a concept, and oppression creates no obligation for third states to grant recognition. It now needs to be considered if remedial secession has been crystallised into a rule of customary international law through state practice. The following analysis considers whether a remedial right of secession has been given effect in state practice.

4.7.3 The meaning of serious and widespread violations of fundamental human rights

It has been argued above that gross and systematic violations of human rights can lead to unilateral secession if oppression is directed against a specific people.¹¹¹⁶ However, the term "human rights violations" is open to broad interpretation. In the consideration of "gross and systematic human rights violations," how severe must they be in order to constitute a threat to a people's existence and therefore to justify unilateral secession? Scholars argue that there have to be grave, widespread,

1113 Orakhelashvili 2008 *Max Planck Yearbook of United Nations* 28.

1114 Buchanan argues that "a state that commits a major injustice toward a part of its people loses legitimate authority over them and the territory that they occupy". In other words, where oppressed peoples try to create their own state, their parent's right to territorial integrity no longer encompasses the area in question, because the injustices the state has perpetrated have violated its claim to a part of the state's territory". Buchanan *Justice* 335; See also Vidmar 2010 *St Antony's International Review* 41-42.

1115 Buchanan *Justice* 335.

1116 See Chapter Four par 4.7 above.

systematic and persistent violations of the fundamental human rights of the members of a certain people.¹¹¹⁷ Although the wording "gross and systematic violations of human rights" is being increasingly used in legal instruments and in the writings of scholars, not much is to be found as far as its meaning is concerned.

The concept of "gross and systematic violations of human rights" has been developed mainly in the practice of the United Nations. The wording "consistent pattern of gross violations of human rights" appeared for the first time in Resolution 8 (XXIII).¹¹¹⁸ In this resolution, the United Nations Commission on Human Rights (UNCHR Commission) requested the ECOSOC to undertake a thorough study and investigation of situations revealing a consistent pattern of violations of human rights.¹¹¹⁹ The UNCHR Commission also invited the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) to bring to the attention of the Commission any situation which it had reasonable cause to believe revealed a consistent pattern of violations of human rights and fundamental freedoms, including policies of racial discrimination, segregation and of *apartheid*, in any country, with particular reference to colonial and other dependent countries and territories.¹¹²⁰

Resolution 8 (XXIII) was followed by Resolution 1235 (XLII),¹¹²¹ which authorised the UNCHR Commission and the Sub-commission "to examine information relevant to gross violations of human rights and fundamental freedoms," and "to make a thorough study of situations which reveal a consistent pattern of violations of human rights".¹¹²² After the adoption of this Resolution, the Sub-commission took a bold step towards the interpretation of the words "gross" and "consistent pattern of human rights violations". Some delegates understood the words "consistent pattern" to imply the repeated occurrence of violations over a considerable period of time as an outcome of deliberate governmental policy.¹¹²³ Others stated that the words "gross"

1117 Cassese *Self-determination of Peoples* 119; Dugard and Raič "The Role of Recognition in the Law and Practice of Secession" 109; Fierstein 2008 *Boston University International Law Journal* 435; Ryngaert and Griffioen 2009 *Chinese Journal of International Law* 575-576.

1118 See UNCHR Res 8 (XXIII) (1967) entitled "Study and investigation of situations which reveal a consistent pattern of violations of human rights".

1119 Par 2 and 3 of the UN CHR Res 8 (XXIII) (1967).

1120 Para 4 and 5 of the UNCHR Res 8 (XXIII) (1967).

1121 ECOSOC Res 1235 (XLII) (1967).

1122 See par 3 of the ECOSOC Res 1235 (XLII) (1967).

1123 44 ESCOR Suppl No 4 (E/4475) 58-79 (64) cited in Quiroga *The Battle of Human Rights* 9.

and "consistent pattern" had nothing to do with time, but should be interpreted in accordance with the *UN Charter*, when such violations were a threat to international peace and security.¹¹²⁴ It was further argued that appropriate action may be considered whenever a government was shown to be guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of humankind.¹¹²⁵ No agreement was reached among the various delegates about which situations would fall under the concept of a "consistent pattern of gross human rights violations".

In addition to the UN practice, some scholars have attempted to explain the meaning and scope of the formulation "consistent pattern of gross violations of human rights". According to Ermacora,¹¹²⁶ the concept consists of three main elements: "a time element, a quality element, and a quantity element". As regard to the time element, he argued that the violation has to have a certain continuity whose end cannot be foreseen. With respect to the quality element, he submitted that the violations must be similar in magnitude to those of *apartheid* and racial discrimination as provided in the Resolution 1235 (XLII). As to the element of quantity, he stated that the violations must comprise a considerable number of cases. Another significant interpretation of the words "consistent pattern of gross violations of human rights" is that of Tardu. During the debates on what later became Resolution 1503 (XLVIII),¹¹²⁷ he argued that a "consistent pattern of human rights violations" cannot easily involve only a single victim, but rather that a certain number of breaches must have been committed and spread over a minimum period of time.¹¹²⁸ Tardu¹¹²⁹ further stressed that a qualitative test focusing upon the inhuman or degrading character inherent in the violation needed to be applied cumulatively or as an alternative to the preceding quantitative element, in order to ascertain the "gross" character of the violations. A

1124 44 ESCOR Suppl No 4 (E/4475) 58-79 (64) cited in Quiroga *The Battle of Human Rights* 9.

1125 44 ESCOR Suppl No 4 (E/4475) 58-79 (64) cited in Quiroga *The Battle of Human Rights* 9.

1126 Ermacora 1974 *Human Rights Journal* 678-679.

1127 Resolution 1503 (XLVIII) authorised the Sub-Commission to appoint a working group "to consider all communications, including replies of Government thereon, ... with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms ...," and requested the Sub-commission to bring these situations to the attention of the UNHR Commission, which was to examine them. See ECOSOC Res 1503 (XLVIII) (1970); Quiroga *The Battle of Human Rights* 10.

1128 Tardu 1980 *Santa Clara Law Review* 583.

1129 Tardu 1980 *Santa Clara Law Review* 543-584.

useful example in relation to this qualitative aspect would be the policies of *apartheid* and racial discrimination in South Africa, South West Africa (currently Namibia) and Southern Rhodesia.¹¹³⁰

Recently the so-called "widespread" or "systematic" violation of human rights has been reflected in the Rome Statute, albeit phrased quite differently.¹¹³¹ The Rome Statute formulates the scale and organisation criteria of an attack as disjunctive, allowing jurisdiction over attacks of either massive scale or based upon some degree of planning or organisation.¹¹³² While the Rome Statute defines neither "widespread" nor "systematic," negotiators of the Rome Statute understood "widespread" to mean a "multiplicity of persons" or a "massive attack," and "systematic" to include a developed policy or a high degree of organisation and planning of the acts.¹¹³³

In the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), "widespread" has been interpreted to encompass both a large number of acts spread across time or geography, as well as a single or limited number of acts committed on a large scale.¹¹³⁴ For the ICTR "systematic" generally refers to organised or planned acts of violence.¹¹³⁵ This planning, however, can be done by any organisation or group, rather than being limited to the state or military entities.¹¹³⁶ The ICTY has also defined systematicity, and identified the relevant factors in determining this element:

... the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;

the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;

1130 Tardu 1980 *Santa Clara Law Review* 584.

1131 A 7(1) of the Rome Statute reads: "... 'crime against humanity' means any of the following acts when committed as part of a 'widespread' or 'systematic' attack directed against any civilian population, with knowledge of the attack". *Rome Statute of the International Criminal Court* (1998).

1132 Ferllini *Forensic Archaeology and Human Rights Violations* 37.

1133 Ferllini *Forensic Archaeology and Human Rights Violations* 37.

1134 *Prosecutor v Jean-Paul Akayesu (Trial Judgment)* ICTR-96-4-T (1998); *Prosecutor v Duško Tadić (Appeal Judgment)* IT-94-1-A and IT-94-1-A bis 2000 ICTY; *Prosecutor v Duško Tadić aka "Dule" (Trial Judgment)* IT-94-1-T 1997 ICTY par 73; *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)* IT-96-23 & IT-96-23/1-A 2002 ICTY).

1135 *Prosecutor v Jean-Paul Akayesu (Trial Judgment)* ICTR-96-4-T (1998) par 173.

1136 *Prosecutor v Ignace Bagilishema (Trial Judgment)* ICTR-95-1A-T (2001) par 77-78.

the preparation and use of significant public or private resources, whether military or other;

the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.¹¹³⁷

From the foregoing, it appears that to define the concept of "gross human rights violations" is not an easy task. On the basis of the elements given above, widespread and systematic human rights violations may be considered as those violations which form an integral part of a political system, committed in such a quantity and in such a way as to create a situation in which the right to life, to personal integrity or liberty of a section of people or the people as a whole are persistently infringed or threatened.

However, in the context of "remedial secession" some writers have considered some different sorts of injustices than those described above, for which secession is the remedy of last resort. Some recognise unjust annexation, violations of intrastate autonomy arrangements for minorities, or the state's failure to acknowledge valid claims to intrastate autonomy.¹¹³⁸ Others recognise serious and widespread violations of the right to life, such as genocide and ethnic cleansing.¹¹³⁹ The "safeguard clause" sets the requirement for states to have representative government without distinction of any kind. If a government refuses persistently to grant participatory rights to the members of a religious or ethnic group, this refusal may arguably amount to a denial of internal self-determination and therefore may warrant unilateral secession.¹¹⁴⁰

4.7.4 *The emergence of customary international law on remedial secession*

A rule of customary international law can be defined as that which is evidenced by a general practice (*usus*) and accepted as law (*opinio juris*).¹¹⁴¹ In the *Legality of Nuclear Weapons* case,¹¹⁴² the ICJ confirmed that the substance of customary law is to be found primarily in actual practice and *opinio juris*. According to this definition, the question is whether or not the remedial secession doctrine is actually

1137 *Prosecutor v Tihomir Blaskic (Trial Judgment)* IT-95-14-T 2000 ICTY par 203.

1138 Buchanan "Uncoupling Secession from Nationalism" 83.

1139 Hannun 1993 *Virginia Journal of International Law* 46-47.

1140 Cassese *Self-determination of Peoples* 119; Van den Driest *Remedial Secession* 112.

1141 A 38(1) (b) of the *Statute of the International Court of Justice* (1945).

1142 *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* 1996 ICJ Reports.

acknowledged by the international community as a new norm of customary international law. This section will first discuss the elements required for the formation of customary international law (state practice and *opinio juris sive necessitatis*) and elaborate on how these elements have been interpreted by the ICJ and in international legal scholarship. Secondly, this section will map out and assess some relevant cases where groups or territories unilaterally seceded or attempted to secede from independent states. Finally, based on the aforesaid, this section will determine whether or not a customary rule with respect to remedial secession does really exist in international law.

4.7.4.1 State practice

According to article of 38(1)(b) of the ICJ statute, state practice is the key element in the formation of customary international law. State practice is considered as the repetition of a particular act by an increasing number of states.¹¹⁴³ As Malanczuk states, evidence of state practice is to be found in official declarations presented by the delegates of states. These are presented at international conferences or at the meetings of international organisations, as well as in pleadings and submissions to international courts and tribunals.¹¹⁴⁴ Evidence of state practice may also be found in statements made by government spokesmen to parliament, official manuals concerning legal issues, diplomatic correspondence, national laws, and judicial decisions of national courts.¹¹⁴⁵

For state practice to be indicative of a norm of customary international law there must be generality, uniformity, and consistency in such practice.¹¹⁴⁶ In this respect the ICJ stated in the *North Sea Continental Shelf* case¹¹⁴⁷ that a practice must constitute "constant and uniform usage" before it will qualify as customary international law. It is commonly accepted that it is the generality, uniformity and consistency of practice by the states concerned by the norm that would be of the utmost importance to the Court. For instance, if the Court has to determine if the

1143 Cassese *Self-determination of Peoples* 69.

1144 Malanczuk *Akehurst's Modern Introduction* 39.

1145 Malanczuk *Akehurst's Modern Introduction* 39.

1146 Brownlie *Principles* 7-8.

1147 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgement* 1969 ICJ Reports par 74.

right to remedial secession is a rule in customary international law, cognisance will be given to the practice of states with oppressed peoples.

However, it is almost impossible to obtain a constant and uniform practice from all states. In determining whether or not a new customary norm has emerged, it is not necessary that all states must have acted in a particular way. What is important, therefore, is that the generality of the practice is most relevant in terms of the states most closely concerned by the rule.¹¹⁴⁸ This position was also elaborated upon in the *Asylum Case*.¹¹⁴⁹ What is more, a small amount of practice is sufficient to create a customary rule, even though the practice involves only a small number of states.¹¹⁵⁰ In other words, a limited number of states may establish customary rights and duties *inter se*. For instance, in the *Asylum Case*¹¹⁵¹ it was accepted that the right of diplomatic asylum was limited to Latin American states. In the *Right of Passage over Indian Territory* case, it was established that as few as two states could create a local custom.¹¹⁵² It is also possible for a single state to establish a rule of customary law by asserting a particular practice in which other states acquiesce.¹¹⁵³

The ICJ's decisions show that a state which relies on an alleged international custom practised by states must, generally speaking, demonstrate to the Court's satisfaction that this custom has become so established as to be legally binding on the other party. In the *Asylum Case* the Court held that evidence must be produced to support the contention that there was a constant and uniform usage practised by the states

1148 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgement* 1969 ICJ Reports par 43.

1149 "The party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked...is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction ... that it is not possible to discern in all this any constant and uniform usage, accepted as law..." *Colombia-Peruvian Asylum Case* 1950 ICJ Reports 281-283.

1150 Malanczuk Akehurst's *Modern Introduction* 42.

1151 *Colombian-Peruvian Asylum Case* 1950 ICJ Reports par 277.

1152 *Case Concerning Right of Passage over Indian Territory (Merits) Judgment* 1960 ICJ Reports par 6.

1153 In the *Fisheries Case*, for example, the Norwegian government delimited its territorial sea by drawing straight base lines linking the outermost points of land, a method that was contrary to the normal practice. The ICJ found nothing in international law to prevent Norway from determining its base lines in this manner, primarily because there had been no objection by other states. *Fisheries Case* 1951 ICJ Reports.

in question.¹¹⁵⁴ Completely uniform behaviour is not required, and in practice it would be impossible to prove. Hence, in the *Nicaragua* case the ICJ held that a custom does not require:

... absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should in general be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, and not as indications of a new rule.¹¹⁵⁵

Throughout this decision the ICJ clearly stated that the formation process of customary international law is an ongoing process which needs to be supported by a large amount of practice. That is to say that the practice in support of a new customary rule needs to be general, but universality is not required. There is no precise formula to indicate how widespread a practice must be for the purpose of creating customary international law. According to some legal scholars such as Malanczuk,¹¹⁵⁶ a practice should reflect wide acceptance among the states particularly involved in the relevant activity. Since no universal practice is required for the formation of customary rules, it follows that a state can be bound by the general practice of other states even against its will. The only exception to this could be a situation in which a state has explicitly expressed its opposition to the development of the customary norm at issue from the beginning and persistently continues to do so after its formation.¹¹⁵⁷ To put it another way, a state can be bound by the general practice of other states even against its will if it does not make "initial and persistent objection"¹¹⁵⁸ against the emergence of a new rule of customary international law.¹¹⁵⁹ Thus, in order to be bound by customary international law, action by states must not be motivated only by consideration of courtesy, convenience or tradition, but rather

1154 *Colombian-Peruvian Asylum Case* 1950 ICJ Reports par 277.

1155 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 186.

1156 Malanczuk *Akehurst's Modern Introduction* 42.

1157 Van den Driest *Remedial Secession* 199.

1158 This is generally referred to as the "persistent objector" rule. Under this rule, an individual state is not bound by a customary norm, despite the emergence of a widespread practice and relevant general *opinio juris*, if it has persistently objected to an emerging norm from the very beginning. This rule was clearly recognised by the ICJ in the *Fisheries Case*. The Court held that even if the alleged ten-mile rule as regards bays had acquired the authority of a general norm of international customary law, it would in any case "be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast". *Fisheries Case* 1951 ICJ Reports par 131; Danilenko *Law-making* 109; Van den Driest *Remedial Secession* 198-199.

1159 Malanczuk *Akehurst's Modern Introduction* 43.

by a sense of legal duty.¹¹⁶⁰ This is where the psychological element of *opinio juris*, which will be considered below, becomes important.¹¹⁶¹

4.7.4.2 *Opinio juris*

When seeking to determine the existence of a norm of customary international law it is necessary to examine not only what states do but also why they do it. *Opinio juris* is a psychological element associated with the formation of a customary international norm as a characterisation of state practice.¹¹⁶² As Dugard¹¹⁶³ says, state practice alone does not suffice to create a customary norm. In the process of creating a new customary norm, states must believe that the norm already exists and that their practice is, therefore, in accordance with international law. This was first acknowledged by the PCIJ in the *Lotus* case:

..... it would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.¹¹⁶⁴

A similar view in this respect was expressed in the *North Sea Continental Shelf* case, where the ICJ stated that:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.¹¹⁶⁵

These two cases illustrate clearly that it is possible for new customary rules to develop only if states believe that such actions are legally binding under international law. It is this psychological element arising from an internal belief and

1160 *North Continental Shelf Case* 1969 ICJ Reports par 77.

1161 Van den Driest *Remedial Secession* 201.

1162 D'Amato *International Law* 141.

1163 *International Law* 29.

1164 *Case of the SS Lotus (France v Turkey)* 1927 PCIJ Ser A No 10 par 28.

1165 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgement* 1969 ICJ Reports par 77.

usually referred to as *opinio juris* which is necessary and indispensable for the establishment of customary international law. The question now arises as to how this element of customary international law, that is, *opinio juris*, manifests itself.¹¹⁶⁶ Since *opinio juris* concerns a state of mind, apparent difficulties occur in this regard. In this connection Dugard¹¹⁶⁷ notes that "proof of *opinio juris* is difficult to produce".

In identifying *opinio juris*, the ICJ has used two approaches. First, the Court has assumed the existence of *opinio juris* based on evidence of a general practice or consensus among legal scholars or the previous decisions of the Court or other international tribunals. Van den Driest¹¹⁶⁸ refers to this approach as the "conventional approach". According to this approach, *opinio juris* is considered as an expression of state consent to a certain rule, just like the signing and ratification of treaties.¹¹⁶⁹ This position is supported, for example, by Byers. He is of the opinion that *opinio juris* constitutes state will, and the meeting of such wills, as manifested through state practice, is the immediate cause of legal obligations.¹¹⁷⁰ The ICJ adopted this approach in various cases, though it has applied a more rigorous and strict method, requiring isolated evidence of the existence of *opinio juris*.¹¹⁷¹

Besides the conventional approach some more progressive approaches towards the process of the formation of customary international law has been also suggested.¹¹⁷² The progressive approach relies on *opinio juris* in the formation process of customary international law. This is not to say, however, that the progressive approach does not consider both elements to be equally important; rather, it considers *opinio juris* to be the key element of customary international law. The *Nicaragua* case¹¹⁷³ is widely referred to as the basis of the progressive approach. In this particular case the ICJ held, without much attention to practice, that the principles of non-use of force and non-intervention have crystallised as customary

1166 Van den Driest *Remedial Secession* 203.

1167 Dugard *International Law* 30.

1168 Van den Driest *Remedial Secession* 207.

1169 Van den Driest *Remedial Secession* 207.

1170 Byers *Custom, Power and the Power of Rules* 132.

1171 See for example *Fisheries Case 1951 ICJ Reports*; *Barcelona Traction, Light and Power Company Limited (Belgium v Spain) Judgement 1970 ICJ Reports*; *Continental Shelf (Libya Arab Jamahiriya/Malta) Judgment 1985 ICJ Reports*; Van den Driest *Remedial Secession* 205.

1172 Van den Driest *Remedial Secession* 207.

1173 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) Merits 1986 ICJ Reports* par 184.

law. Put differently, the ICJ noted that the existence of a customary rule "in the *opinio juris* of states" is to be confirmed by practice,¹¹⁷⁴ and subsequently did not pay much attention to inconsistencies in state practice.¹¹⁷⁵ The ICJ suggested that there was a strong impression that *opinio juris* is present, defects in the physical practice of states may be overlooked, possibly resulting in the materialisation of a norm of customary international law. The progressive approach seems to be contradictory to the conventional approach, which emphasises physical state practice over *opinio juris*.¹¹⁷⁶

The approach taken by the ICJ in the *Nicaragua* case has arguably been endorsed by the ICTY. For example, in the *Tadić* case¹¹⁷⁷ the Court strongly mitigated the importance of battlefield practice in the process of the formation of customary international law, and being cognisant of the untrustworthiness of the physical evidence, preferred to place emphasis on oral state practice:

..... not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.¹¹⁷⁸

Judging from the reasoning applied in this case, the process of the formation of customary rules of humanitarian law would be easy, since the battlefield would be deemed completely irrelevant due to its untrustworthiness.¹¹⁷⁹ In the *Kupreškić* case¹¹⁸⁰ the ICTY went further to state that scant or inconsistent state practice does not bar the emergence of customary rules of *jus in bellum* when "the demands of humanity or the dictates of public conscience" demand the materialisation of such

1174 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 184.

1175 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 186.

1176 Van den Driest *Remedial Secession* 208.

1177 *Prosecutor v Dusko Tadic aka "Dule" Decision on the Defence Motion Interlocutory Appeal on Jurisdiction* IT-94-1 1995 ICTY.

1178 *Prosecutor v Dusko Tadic aka "Dule" Decision on the Defence Motion Interlocutory Appeal on Jurisdiction* IT-94-1 1995 ICTY par 99.

1179 Van den Driest *Remedial Secession* 208.

1180 *Prosecutor v Kupereškić et al (Trial Judgement)* IT-95-16-T 2000 ICTY par 527.

rules. This view was endorsed by the International Committee of the Red Cross (ICRC) in its study on customary international humanitarian law. In this regard the ICRC identified a huge number of rules of customary international humanitarian law, primarily on the basis of *opinio juris* combined with verbal acts rather than battlefield practice.¹¹⁸¹ This position, which reflects the progressive approach, may be relevant in the formation process of a customary right to unilateral secession, since state practice is generally scant or sometimes even lacking.

In the next section some examples of secession will be evaluated in the light of the doctrine of remedial secession. These are the cases of Bangladesh's secession from Pakistan, Eritrea's secession from Ethiopia, South Sudan's secession from Sudan, and the secession of Kosovo from Serbia. These secessions are about seceding from existing states, possibly due to human rights violations, but not as part of the decolonisation process or the dissolution of states. In fact, the section will investigate whether or not the practice evidences the elements of customary international law on this matter.

4.7.4.3 The doctrine of remedial secession and state practice

4.7.4.3.1 East Pakistan's (Bangladesh's) secession from Pakistan

The secession of Bangladesh from Pakistan in 1971 is usually used as an example of remedial secession,¹¹⁸² and therefore merits close examination. In 1947 the state of Pakistan was created as an independent state "out of two geographically separate provinces: West Pakistan and East Pakistan (East Bengal)".¹¹⁸³ East Pakistan was inhabited by a relatively homogenous group (Bengali people) who spoke their own language, that is, Bengali.¹¹⁸⁴ West Pakistan was inhabited by four major ethnic groups, namely, Punjabis, Pathans, Sindhis and Baluchis, each with its own distinct geographical area and language.¹¹⁸⁵ The only aspect of social life which both regions shared was Islam.¹¹⁸⁶

1181 Van den Driest *Remedial Secession* 209.

1182 Van den Driest *Remedial Secession* 276; see also Buchheit *Secession* 198.

1183 Vidmar *Democratic Statehood* 162.

1184 Buchheit *Secession* 198.

1185 Buchheit *Secession* 201.

1186 Buchheit *Secession* 201.

In the decades following the creation of Pakistan, the East "had relatively suffered severe and systematic discrimination from the central government based in Islamabad".¹¹⁸⁷ In the elections of 1970 the Awami League, an autonomy-seeking East Pakistan party, won 167 out of 169 seats allotted to the East in the Pakistan National Assembly.¹¹⁸⁸ This result meant an absolute majority in the 313-seat Pakistan National Assembly. Due to the fear of that majority, the central government indefinitely suspended the Assembly and introduced a period of martial rule in East Pakistan, "which involved acts of repression and even possibly genocide and caused some ten million Bengalis to seek refuge in India".¹¹⁸⁹ The people of East Pakistan were exposed to serious harm in the form of denial of internal self-determination, and therefore the Awami League proclaimed the independence of East Pakistan on 10 April 1971.¹¹⁹⁰

At that time, Awami League guerrilla forces were already in armed conflict with the military forces of the central government.¹¹⁹¹ As the violence and repression continued in East Pakistan and around ten million of Bengali refugees crossed the border with India, on 3 December 1971 India intervened in support of East Pakistan, fighting Pakistani armed forces on both the eastern and the western fronts. This intervention lasted until 17 December, when the Pakistani forces surrendered and India declared a ceasefire in West Pakistan.¹¹⁹² On 6 December India recognised the independence of the eastern territory of Bangladesh. As soon as it became clear that the Awami League substantially controlled East Pakistan, twenty-eight states *de jure* recognised Bangladesh, and another five extended *de facto* recognition.¹¹⁹³ Several more states recognised Bangladesh after Pakistan itself granted its recognition on 22 February 1974,¹¹⁹⁴ and it was admitted to the UN in September of that same year.¹¹⁹⁵

1187 Crawford *The Creation of States* 140.

1188 Vidmar *Democratic Statehood* 162.

1189 Crawford *The Creation of States* 141.

1190 Crawford *The Creation of States* 141.

1191 Vidmar 2010 *St Antony's International Review* 43.

1192 Vidmar 2010 *St Antony's International Review* 43.

1193 Crawford *The Creation of States* 141.

1194 Van den Driest *Remedial Secession* 276.

1195 GA Res 3203 (XXIX) (1974).

In the light of the above case, it is apparent that the secession of Bangladesh from Pakistan consisted basically of a unilateral secession, as the consent of the parent state was clearly missing. However, notwithstanding the oppression and gross abuses of fundamental human rights that led to the declaration of independence, the question of whether or not the secession of Bangladesh can serve as an argument in support of the legality of remedial secession needs further consideration. In this regard Crawford¹¹⁹⁶ argues that the withdrawal of the Pakistan army after their defeat in battle "merely produced a *fait accompli*, which in the circumstances other states had no alternative but to accept". Other scholars, such as Vidmar,¹¹⁹⁷ argue that though Pakistan withdrew from Bangladesh at the end of 1971, its legal status remained ambiguous for two years.

It was not until Pakistan agreed to recognise its independence in 1974 that Bangladesh was widely recognised by members of the international community and admitted to the United Nations.¹¹⁹⁸ It is relevant to argue that Pakistan eventually consented to the secession of Bangladesh and only after the consent was given was Bangladesh admitted to the UN. It is further argued that the Bangladesh secession seems to be consensual, and that it is therefore not clear evidence in support of remedial secession.¹¹⁹⁹ While Bangladesh's secession may serve as an argument in support of remedial secession,¹²⁰⁰ it was not recognised by the international community as a case of unilateral secession. The UN General Assembly Resolution 2793 (XXVI),¹²⁰¹ which among other things recommended the immediate cessation of hostilities and withdrawal of Indians forces, made no reference to the right to

1196 Crawford *The Creation of States* 393.

1197 Vidmar *Democratic Statehood* 163.

1198 Vidmar *Democratic Statehood* 163; Buchheit *Secession* 211; Pavković and Radan (eds) *Creating New States* 108.

1199 Vidmar *Democratic Statehood* 163.

1200 On the night of March 25, 1971 the (West) Pakistan Army struck Dhaka without warning and, according to eyewitness accounts, killed unalerted civilians and burned homes and offices, using mortars, tanks and machine guns. In this conflict the acts of genocide, selective genocide, reign of terror, brutal atrocities, and flagrant violation of human rights were committed. For further comments see Nanda 1972 *American Journal of International Law* 322-323.

1201 GA Res 2793 (XXVI) (1971).

secession of East Pakistan. This shows, therefore, that the international community did not consider unilateral secession as an entitlement at that time.¹²⁰²

4.7.4.3.2 Eritrea's secession from Ethiopia

Eritrea is located in the northeast of Africa on the Red Sea coast, which is commonly known as the Horn of Africa.¹²⁰³ It has an area of 121,320 square kilometres (48,262 square miles), including the off-shore islands, and its coastline along the Red Sea is about 1,200 kilometres.¹²⁰⁴ To begin with the history of Eritrea, the earliest connections that can be made to Ethiopia were to Axumite kingdoms. The territory of Axum covered most of present-day Eritrea and northern Ethiopia.¹²⁰⁵ The Axumite kingdom was the dominant political entity in the region between the 1st and 6th centuries AD, with its peak in the 4th and 6th centuries.¹²⁰⁶ After the decline of the Axumite Kingdom in about 600 AD, the Five Beja Kingdoms (Bazin, Baqlin, Jarin, Naquis and Qata) reigned in most parts of present-day Eritrea.¹²⁰⁷ Between the 11th and 19th centuries, with the development of Ethiopian Empire, Eritrea became a peripheral part of Ethiopia, to a large extent subject to the *de facto* control of Muslim rulers on the coast and Christian rulers in the highlands.¹²⁰⁸

The Italian presence in Eritrea commenced in 1869 through a shipping corporation known as Rubattino, which purchased the Bay of Assab for strategic trading purposes.¹²⁰⁹ Following the signing of a treaty with Ethiopian Emperor Menelik II at Wichale in May 1889, Eritrea became an Italian colony on 1st January 1890.¹²¹⁰ On that specific date the name Eritrea was given to the nation, denoting for the first time that it was a new political entity.¹²¹¹ After the defeat of Italy in WWII Eritrea was administered by the United Kingdom under trusteeship from 1941 to 1952. The British administration ended in 1952, and at the same time the Federation was

1202 For more comments see Van den Driest *Remedial Secession* 278; Vidmar *Democratic Statehood* 163.

1203 Tesfagiorgis *Eritrea (Africa in Focus)* 1.

1204 Tesfagiorgis *Eritrea (Africa in Focus)* 1.

1205 Mekonnen *Transitional Justice* 23.

1206 Tronvoll *Mai Weini, a Highland Village in Eritrea* 33.

1207 Tronvoll *Mai Weini, a Highland Village in Eritrea* 34.

1208 Cassese *Self-determination of Peoples* 219.

1209 Tronvoll *Mai Weini, a Highland Village in Eritrea* 37.

1210 Cassese *Self-determination of Peoples* 220.

1211 Mekonnen *Transitional Justice* 30.

established.¹²¹² The Federation was, however, dissolved by the Emperor of Ethiopia, Haile Selassie, and therefore Eritrea became a province of Ethiopia.¹²¹³

In response to this act, the people of Eritrea set up an Eritrean Liberation Front (ELF), followed in the 1970s by the Eritrean People's Liberation Front (EPLF).¹²¹⁴ These liberation movements engaged in an armed struggle with Ethiopia for many years to get independence.¹²¹⁵ Following the collapse of the Mengistu government, Eritrea's liberation movements acquired full control over Eritrea. The Ethiopian Transitional Government accepted that the people of Eritrea had a right to self-determination, and consented to the 1993 plebiscite on Eritrea's independence.¹²¹⁶ After Eritrea voted overwhelmingly (99.8 per cent) in favour of independence, the Transitional Government of Ethiopia accepted the results of the referendum. Therefore Eritrea declared its independence without opposition of Ethiopian leaders, and it was admitted to the UN on 28 May 1993.¹²¹⁷

Thus, the secession of Eritrea from Ethiopia cannot be presented as a clear example of unilateral secession, but rather as an example of consensual secession. Like the Bangladesh case, the Eritrean secession had consensual features. As shown above, the Transnational Government of Ethiopia consented to the referendum in which the people of Eritrea voted for independence. Although the circumstances preceding Eritrea's independence involved some acts of oppression and atrocities towards the people of Eritrea, the case does not provide unequivocal support for the doctrine of remedial secession.

4.7.4.3.3 South Sudan's secession from Sudan

Following Eritrea's secession from Ethiopia in 1993, South Sudan is another example where the remedial secession argument was advanced. In order to understand the secession of South Sudan from Sudan in 2011, it is important to

1212 In March 1952 an Eritrean Assembly adopted a constitution providing for federation with Ethiopia. In August the constitution was ratified by the Ethiopian Emperor, who then approved the Ethiopian "Federal Act". The federation was short-lived, however, and on 14 November 1962 the Eritrean Assembly voted for the incorporation of Eritrea into Ethiopia. See Cassese *Self-determination of Peoples* 220.

1213 Kumbaro 2001 <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf>.

1214 Cassese *Self-determination of Peoples* 220.

1215 Crawford *The Creation of States* 402.

1216 Van den Driest *Remedial Secession* 279.

1217 GA Res 47/230 (1993).

have an understanding of Sudanese history. Sudan, the former British colony, is located in northeast Africa, and it was the largest country in Africa with 967,495 square miles.¹²¹⁸ In terms of population, Northern Sudan was predominantly populated by Arabic-speaking people, Sunni Muslims who share a more significant degree of homogeneity while the Southern Sudanese population was largely composed by three major ethnic categories: the Nilotic, the Nilo-Hamitic and the Sudanic groups.¹²¹⁹ Sudan's antique and medieval landscape was defined by the fall and rise of various kingdoms and civilizations.¹²²⁰ Perennial Islamic expeditions into Sudan culminated in the fall of the last Christian bastion at Alwa in 1530. This heralded the demise of Christianity in northern Sudan and the people's eventual conversion to Islam. Under the Mamluks and Ottomans, northern Sudan nominally became an Egyptian dependency, remitting regular tributes to Cairo until Mohammed Ali Pasha's conquest of Sudan in 1821.¹²²¹

In 1874 Egypt, under Khedive Ismail, conquered parts of south Sudan and nominally annexed it to establish a colony. In the south the Turkiyah era (1821–1885) was characterised by slave-hunting and extractive economies, as colonial soldiers and administrators lived off the land while exacting exorbitant taxes on the population. Specifically, the slave trade in the south flourished during this period, while the Khartoum Jalaba merchant class consequently grew prosperous.

In 1885 Khartoum fell to dervishes led by Mohammed Ahmed Al-Mahdi, thereby ending viceregal control of the territory. Like the Turko-Egyptian administration, the dervishes also saw the south only as a hunting ground for slaves and ivory, ostrich feathers and timber. Unsurprisingly, the decades of slave raids aggravated southern fears about the northerners and their allies, shaping future encounters with outsiders. The Mahdist rule ended in 1898, when the British forces invaded and established the Anglo-Egyptian Condominium in order to fully control the Nile. The Condominium rule succeeded mainly in pacifying and establishing firm administrative control over a vast territorial inheritance that Mohammed Ali Pasha crudely formed from diverse peoples and geographies.

1218 Daoud *Factors of Secession* 22.

1219 Lloyd 1994 *Columbia Journal of Transnational Law* 441-442.

1220 D'Agot 2013 *Defense and Security Analysis* 106.

1221 D'Agot 2013 *Defense and Security Analysis* 106.

Realising the vast socio-economic and cultural differences between the North and South, the British decided to administer the northern and southern regions as separate colonies, and provided them with disparate opportunities for development.¹²²² During the Condominium years the British authorities treated the three southern provinces as a separate region to which access by northerners was limited. Into the early 20th century, northerners needed a visa from the British authorities to go to the south.¹²²³ Thus, the British never planned to "create a single nation state" in Sudan. The British intended either to create a separate state of southern Sudan, or to integrate the territory into British East Africa.¹²²⁴

In the North, the British helped create an educated Arab and Muslim Sudanese elite and invested heavily in economic and social development. In contrast, the South and its African peoples were systematically neglected in social, economic and administrative terms. Apart from sealing off the South from the northern influence and preventing social and commercial contact between the two regions, the British did very little to educate the southerners and raise their standards of living, while Christian missionaries provided a small number with opportunities to learn. The policy of separate development was clarified in the "Closed Door" ordinances of that period, which barred virtually all northern Sudanese from entering or working in the south. In the early 20th century the two regions of the Sudan were thus committed to different and distinctive paths.¹²²⁵

During the late 1930s northern Sudanese intellectuals started to negotiate the independence of Sudan with the British authorities. The southerners and the western Sudanese were excluded from the process. Shortly before independence, the British transferred all of their powers, including their political and economic powers, to the Northern Arabs. The southerners, alarmed by the Arab-British negotiations, held a conference in 1947 in Juba to voice their concerns about their future status. In this conference south Sudan publicly rejected unity with Khartoum but found itself with no choice, as the British had already decided on the issue. The southerners followed by holding another conference in 1954 to state a number of requirements about their

1222 Lloyd 1994 *Columbia Journal of Transnational Law* 441.

1223 Daoud *Factors of Secession* 22.

1224 Lloyd 1994 *Columbia Journal of Transnational Law* 440.

1225 Lloyd 1994 *Columbia Journal of Transnational Law* 440.

relations with Khartoum. The southern leaders decided that they should either be given an autonomous status under a federal model, or that they should exercise the right to self-determination for complete independence from the north.¹²²⁶ The southerners were eventually convinced to support independence for a united Sudan, having been persuaded that their demands for greater autonomy or a diversified federal system would be honoured once independence was achieved.¹²²⁷

However, when independence was declared in 1956, British colonial rule was replaced by northern domination in which the Arabs replaced the British as another group of colonisers. The northern elites at the center employed divisive processes of patronage and violence as a tool to control the peripheries. As in colonial times, southerners had no control over their own socio-economic and political affairs in the independent Sudan. The majority of the administrative posts in the south were filled by northerners who had nothing in common with the local people and implemented policies made in Khartoum. For decades after independence the Khartoum elites ruled south Sudan "as an empire," in the same way that the British and the Ottomans had ruled it before them.¹²²⁸

The north's dominion over the south led to the southern soldiers, who were under Arab officers, to mutiny, as they feared that they would be disarmed and moved to the north.¹²²⁹ These soldiers would flee to the bushes and to neighbouring Uganda and form the core of the Anya-Nya League, the first southern guerrilla movement. The government of Sudan has been in continuous conflict with its southern region since 1955, a few months before the country achieved independence in 1956.¹²³⁰ Since then, the southerners have been engaged in a struggle of self-determination for the south, with independence as the ultimate goal.¹²³¹ The two civil wars (1955-1972 and 1982-2005) lasted more than 40 years¹²³² and resulted in a death toll of more than two million southerners¹²³³ and another four and half million displaced.¹²³⁴

1226 Daoud *Factors of Secession* 26.

1227 Lloyd 1994 *Columbia Journal of Transnational Law* 441.

1228 D'Agot 2013 *Defence and Security Analysis* 107.

1229 Daoud *Factors of Secession* 26.

1230 An-na'im and Deng 1996 *Law and Policy* 207.

1231 Lloyd 1994 *Columbia Journal of Transnational Law* 444.

1232 The first civil war persisted, at varying degree of intensity, through the first democratic period (1956-1958), the first military regime of General Aboud (1958-1964) and the second democratic

This conflict would finally end in 2005 with the signing of the Comprehensive Peace Agreement, which provided for a cease-fire, the implementation of measures to monitor the peace, the return of the refugees and the establishment of administrative structures for a Southern Sudanese government. It also provided for a 6-year "interim period" during which the institutions and monitoring mechanisms would work to make "the unity of Sudan" attractive to the people of Southern Sudan. At the end of this period, on 9 January 2011, the people of South Sudan voted against unity and in favour of secession.¹²³⁵ After South Sudan had voted overwhelmingly for independence the central Government of Sudan accepted the outcome of the referendum.¹²³⁶ South Sudan is now an independent state and was admitted to the United Nations and the African Union in July 2011.

Considering South Sudan's struggle and the gross human rights violations that took place on the southern territory, one may argue that the case of South Sudan has the potential of becoming an example of remedial secession. Historically, the Southern Sudanese have faced tremendous suffering since the Ottoman invasion in 1821.¹²³⁷ This period was characterised by hostilities ranging from invasions by slave hunters to incursions by successive governments trying to enlarge their area towards the south.¹²³⁸ As indicated earlier, the Ottoman-Egyptian rule ended in 1898, when the British forces invaded and established the Anglo-Egyptian Condominium. This rule adopted Arabic as the only official state language, and therefore Southerners, English-speaking products of Christian missionary education, were excluded from participation in the government. Thus, when independence came in 1956 the Northern Arabs were the most educated and as such were strongly favoured by the British colonial rulers, who transferred all economic, social and political powers to them.

period (1964-1969). It was settled during the second military regime of General Mohamed Numeiri (1969-1985) through the establishment of regional autonomy for the south under the Addis Ababa Agreement of 1972 and the 1973 constitution. General Numeiri, however, unilaterally repudiated the basic elements of that peace agreement. This led to the second civil war, which lasted till the peace agreement was signed in 2005. See An-na'im and Deng 1996 *Law and Policy* 207.

1233 Natsios and Abramowitz 2011 *Foreign Affairs* 19.

1234 Daoud *Factors of Secession* 14.

1235 D'Agot 2013 *Defence and Security Analysis* 107.

1236 Dugard *International Law* 103.

1237 Lloyd 1994 *Columbia Journal of Transnational Law* 442.

1238 An-na'im and Deng 1996 *Law and Policy* 216; An-na'im and Deng 2006 *Respect, Sudanese Journal for Human Right's Culture and Issues of Cultural Diversity* 18.

In the post-independence period, Southern Sudan has been devastated by a civil war marked by severe human rights violations. Generally, the political history of Northern Arabs was characterised by the exclusionary and discrimination policies adopted by the ruling elite to exclude the southerners from political, social and political life.¹²³⁹ Put differently, the Southerners have been prevented from participating in government, they have been subject to alien laws and customs, and they have been intentionally targeted and persecuted. Arguably Southerners would have the right to remedial secession based on their status as an oppressed people.¹²⁴⁰

However, while the case of South Sudan may serve as evidence in support of remedial secession, other interpretations may also be relevant. As in the case of Eritrea, the secession of South Sudan can be seen as an example of consensual secession rather than unilateral secession. Indeed, if remedial secession is understood as the last resort for ending oppression, it would not be applicable in South Sudan. This is because in 2011 there was no ongoing oppression of the population in the territory. At the time of independence South Sudan had already been granted a considerable degree of self-government.

4.7.4.3.4 Kosovo's secession from Serbia

Kosovo's unilateral secession from Serbia is a prominent and recent example of possible remedial secession. This example therefore merits closer examination. The geographic entity that comprises Kosovo today has a long and varied history, and throughout the ages has formed part of various empires, such as the Roman, the Bulgarian, the Byzantine, the Serbian and the Ottoman. In the aftermath of WWII, Kosovo was given the legal status of an autonomous province of Serbia within the SFRY.¹²⁴¹ At that time Kosovo was predominantly populated by Albanians.¹²⁴² In 1989 its substantial autonomy was unilaterally revoked by the Serbian Government under the nationalist leader Slobodan Milošević. With the abolition of Kosovo's

1239 Natsios and Abramowitz 2011 *Foreign Affairs* 19.

1240 Lloyd 1994 *Columbia Journal of Transnational Law* 442.

1241 Orakhelashvili 2008 *Max Planck Yearbook of United Nations* 2.

1242 Van den Driest *Remedial Secession* 141.

autonomy and the other actions that followed,¹²⁴³ the Kosovo Albanians underwent a continuous process of oppression by the Serbian authorities, and were deprived of and denied any meaningful exercise of their right to internal self-determination.¹²⁴⁴

In response to this action, the leadership of Kosovo declared its independence in October 1991 and adopted the *Constitution of the Republic of Kosovo*.¹²⁴⁵ However, this declaration was recognised only by Albania¹²⁴⁶ and ignored by the Government of Serbia, which dissolved both the Kosovo Assembly and the Government. This period was marked by a parallel political system: on one side there was the official system under the *Constitution of the Federal Republic*, and on the other there was the parallel system of the "shadow" state of Kosovo.¹²⁴⁷

The period after 1990 was characterised by a lack of significant self-government and the gross violation of human rights committed by the Serbian authorities against the Kosovar Albanians. As Noel¹²⁴⁸ observes:

Every aspect of life in Kosovo has been affected. Using a combination of emergency measures, administrative fiats and laws authorizing the dismissal of anyone who had taken part in a one-day protest strike, the Serb authorities have sacked the overwhelming majority of those Albanians who had any form of state employment in 1990. Most Albanian doctors and health workers were also dismissed from the hospitals; deaths from diseases such as measles and polio have increased, with the decline in the number of Albanians receiving vaccinations. Approximately 6,000 school-teachers were sacked in 1990 for having taken part in protests, and the rest were dismissed when they refused to comply with a new Serbian curriculum which largely eliminated teaching of Albanian literature and history.

1243 Jaber 2011 *International Journal of Human Rights* 926-947. The revocation of Kosovo's autonomy spawned an increase in human rights abuses and discriminatory government policies designed to Serbianize the province. These included discriminatory language policies: the closure of Albanian language newspapers, radio, and television; the closure of the Albanian Institute; and the change of street names from Albanian to Serbian. In particular, the introduction of a new Serbian curriculum for universities and schools resulted in the closing down of the Educational Administration of Kosovo and of other institutions and facilities in the field of education. More than 18,000 teachers and other staff of Albanian-language classroom facilities were summarily dismissed when they rejected the textbooks of the uniform curricula. To sum up, thousands of Albanians were dismissed from public employment; according to the independent Kosovar Albanian Association of Trades Unions, 115,000 people out of a total 170,000 lost their jobs. See Independent International Commission on Kosovo 2006 http://sitemaker.umich.edu/drwcasebook/files/the_kosovo_report_and_update.pdf.

1244 Kumbaro 2001 <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf>.

1245 Crawford *The Creation of States* 408.

1246 Crawford *The Creation of States* 408.

1247 Muharremi 2008 *Review of Central and East European Law* 407.

1248 Noel *Kosovo: A Short History* 344.

In response to this discrimination, Ibrahim Rugova, the leader of the Democratic League of Kosovo, established a peaceful resistance movement. After one year of peaceful resistance the character of the resistance became increasingly violent with the establishment of the KLA in 1996.¹²⁴⁹ This developed into an armed conflict between the KLA and Serbian forces in 1997-1999. The successive attacks launched by the Serbian military, paramilitary and police forces included the ever more blatant targeting of civilians and deliberate displacements brought about another large number of displaced people.¹²⁵⁰ In addition, ethnic Albanian people were the victims of extra-judicial executions, "disappearances," the use of excessive force, torture, ill treatment, illegal detention and unfair trials.¹²⁵¹

In response to this crisis, the North Atlantic Treaty Organisation (NATO) unilaterally launched a military operation to stop the humanitarian crisis and the gross violations of human rights being perpetrated by Serbia in Kosovo. Eventually NATO launched an air attack without prior authorisation of the Security Council to force the Serb Government to withdraw its force from Kosovo.¹²⁵² The intervention ended with a *fait accompli* for Milošević, who was compelled to accept a peace agreement that was subsequently adopted in Security Council Resolution 1244.¹²⁵³ Resolution 1244 did not make any reference to Kosovo's final status, but it did establish the UN Mission in Kosovo (UNMIK)¹²⁵⁴ to administer the territory, and the Kosovo Force (KFOR) to provide order and security.¹²⁵⁵

In 2007 the issue of the final status of Kosovo was brought before the UN Security Council on the basis of the plan submitted by the UN Rapporteur Martti Ahtisaari.¹²⁵⁶ The UN Rapporteur envisioned "supervised independence" for Kosovo after a period

1249 SC/RES/1244 (1999).

1250 See Independent International Commission on Kosovo 2006 http://sitemaker.umich.edu/drw/casebook/files/the_kosovo_report_and_update.pdf; see also Amnesty International 1998 <http://www.amnesty.org/en/library/info/EUR70/073/1998/en>.

1251 Amnesty International 1998 <http://www.amnesty.org/en/library/info/EUR70/073/1998/en>.

1252 Van den Driest *Remedial Secession* 141.

1253 SC/RES/1244 (1999).

1254 Par 10 of the *Resolution 1244* authorized the establishment of an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo could enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which would provide a transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo. SC/RES/1244 (1999).

1255 SC/RES/1244 (1999).

1256 Jaber 2011 *International Journal of Human Rights* 928.

of international administration.¹²⁵⁷ This was rejected by the Serbian authorities, who supported autonomy, but accepted by the authorities in Kosovo.¹²⁵⁸ Subsequently the Parliament of Kosovo held a special session in which it declared the independence of Kosovo from Serbia and appealed to the international community for recognition in 17 February 2008.¹²⁵⁹ It was immediately recognised by the United States, and since then 96 other countries including 22 European Union Member States have followed suit.¹²⁶⁰ However, Serbia continues to strongly oppose Kosovo's independence. Moreover, Kosovo has neither been admitted to the European Union nor the United Nations.¹²⁶¹ In this respect, therefore, the legal status of Kosovo remains ambiguous to date.¹²⁶² With respect to this, the question is can the right to remedial secession doctrine be applied to the situation of Kosovo?

As noted above, internal self-determination was denied to ethnic Albanians after Milošević suspended Kosovo's special autonomy in 1989. Arguably, the atrocities committed against the Kosovo Albanians made remedial secession justifiable.¹²⁶³ The proponents of remedial secession theory claim that secession was a remedy to the denial of internal self-determination by the state of Serbia, and Kosovo's people exercised their right externally.¹²⁶⁴ The characterisation of the succession of events as remedial secession was affirmed not only in legal scholarship but also by a

1257 Van den Driest *Remedial Secession* 143.

1258 Jaber 2011 *International Journal of Human Rights* 928.

1259 Van den Driest *Remedial Secession* 143.

1260 Van den Driest *Remedial Secession* 143.

1261 Van den Driest *Remedial Secession* 143.

1262 Van den Driest *Remedial Secession* 143.

1263 During the conflict the Republic of Serbia employed excessive force resulting in widespread violence which was aimed not only at the KLA but also at Kosovo's civilian population. Van den Driest *Remedial Secession* 143. In the *Prosecutor v Dragomir Milošević* case, the Trial Chamber found that during the Indictment period the SRK troops under Milošević's command were responsible for continuously sniping and shelling the area of Sarajevo, resulting in the killing and serious injury of many civilians. It noted that throughout the siege the civilian population was subjected to conditions of extreme fear and insecurity which, combined with their inability to leave the city, resulted in "deep and irremovable mental scars on that population as a whole". The Trial Chamber concluded that in these circumstances, every incident of sniping and shelling for which the SRK was found responsible was deliberately conducted with the intent to terrorise the civilian population of Sarajevo. It found that these acts also qualified as unlawful attacks against civilians and the civilian population under a 3 of the Tribunal's Statute (the "Statute"). Further, the Trial Chamber found that the SRK's military campaign in Sarajevo was a "classical illustration of a large-scale and organised attack, that is, a widespread and systematic attack" constitutive of crimes against humanity. *Prosecutor v Dragomir Milošević (Appeal Judgement)* IT-98-29/1-A 2009 ICTY par 4.

1264 Vezbergaitė *Remedial Secession* 80.

number of states in the *Kosovo Advisory* proceedings,¹²⁶⁵ yet the ICJ did not consider it as such, and contended that the matter was beyond the scope of the question posed to it by the General Assembly.¹²⁶⁶ It is argued that secession was *ultima ratio* mean because there were no other possible effective remedies and the "negotiations to produce any mutual agreeable outcome on Kosovo's status was exhausted".¹²⁶⁷ In a similar vein, Tomuschat¹²⁶⁸ argues that Kosovo's unilateral declaration of independence falls under the purview of remedial secession.

However, while Kosovo may claim to fulfil some of the criteria for a remedial secession, as explained above, such a characterisation is not without its difficulties. It is difficult to perceive Kosovo's secession in 2008 as a last resort for ending the oppression which took place in the period of 1989-1999. In fact, if remedial secession is understood as the last resort for ending oppression, this argument could be accepted only if Kosovo had declared independence in 1999.¹²⁶⁹ Arguably, therefore, in 1999 the conditions for remedial secession were met, but at the time of the declaration of independence of Kosovo the element of last resort seemed to be missing.¹²⁷⁰ In 2008 there were no ongoing human rights violations from the Serbian side,¹²⁷¹ and at that time Serbia had been willing to grant Kosovo widespread autonomy as well as to safeguard minority protection, which could be a remedy in the form of internal self-determination.

1265 Albania stated that under the special circumstances of Kosovo, after the long period of international administration of its territory, the unilateral declaration of independence was not in any way in violation of international law. Albania wished to reaffirm that international law did not contain any rules concerning a unilateral declaration of independence. The position was that secession was neither legal nor illegal in international law, but a legally neutral act the consequences of which were regulated internationally. International Court of Justice *Accordance with International Law of the Unilateral Declaration of Independence by Provisional Institutional of Self-Government of Kosovo (Request for Advisory Opinion)* Written Statement of Albania (14 April 2009) par 73. This argument was supported in Written Comments of Albania submitted on 14 April 2009. See International Court of Justice *Accordance with International Law of the Unilateral Declaration of Independence by Provisional Institutional of Self-Government of Kosovo (Request for Advisory Opinion)* Written Comments of Albania (17 July 2009).

1266 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

1267 International Court of Justice *Accordance with International Law of the Unilateral Declaration of Independence by Provisional Institutional of Self-Government of Kosovo (Request for Advisory Opinion)* Written Statement of the United Kingdom (17 April 2009) par 113.

1268 Tomuschat "Secession and Self-determination" 42.

1269 Vidmar *Democratic Statehood* 166.

1270 Vezbergaitė *Remedial Secession* 80.

1271 Vezbergaitė *Remedial Secession* 80.

For the purposes of this analysis, it is of importance to conclude that although Kosovo's case is not clear evidence to support the existence of a right to remedial secession, Kosovo's independence is recognised by 96 states. In their recognition statements some states invoked the *sui generis* nature of the case of Kosovo determined by the legal regime created by Resolution 1244.¹²⁷² Other states recalled the oppression from before the adoption of Resolution 1244, yet these references were not made in the context of the remedial secession theory.¹²⁷³ This highlights the difficulty in arguing that the case of Kosovo provides strong support for the proposition that remedial secession is a legal entitlement in international law.

4.8 Summary

This chapter has addressed the questions of whether or not contemporary international law recognises a right to secession for peoples, and if so, under what circumstances. The historical development of the right to secession may be traced back to the theories and ideology underlying and arising from the American and French Revolutions. Lenin's concept of self-determination was based on the assertion of the right of subjugated peoples to break away from the oppressor and create a new and independent state. In this regard, Wilson argued that the right to self-determination implies that oppressed peoples have the right to create their own state, in which they would live. These opinions, however, were not fully supported by the committee of Rapporteurs in the *Aland Islands* case. The opinion arising from this case was that the separation of a minority from the state that it forms a part of can be considered only as altogether exceptional and as a last resort. The legal status of secession remained ambiguous. It was not until the period of decolonisation, with the issuing of GA 1514 (XV), that a right to secession could be seen to be applicable to the colonial peoples. This was acceptable to the assembly of nations because the decolonisation process did not conflict with the principle of the territorial integrity of states. In this particular process of secession the only territorial relationship to be changed was that with the metropolitan power, and the achievement of independence did not come at the expense of another independent

1272 Vidmar *Democratic Statehood* 167.

1273 Vidmar *Democratic Statehood* 167.

state's territory or that of an adjacent colony.¹²⁷⁴ The colonial exercise of the right to secession usually resulted in the emergence of former colonial territories as independent states.¹²⁷⁵

Outside of colonialism the right to secession collides with the principle of territorial integrity and may be exercised through the peaceful dissolution of a state, through consensual merger with another state, or as result of a clause in the domestic constitution providing for separation. However, the establishment of a new state by sub-groups of a population within a sovereign state without the consent of the parent state or constitutional approval is controversial. In this situation the right to secession conflicts with the principles of respect for the territorial integrity of states and *uti possidetis*, which are aimed at maintaining the territorial *status quo*.

With regard to the principle of territorial integrity,¹²⁷⁶ this chapter has shown, however, that the principle of territorial integrity is not an absolute norm but rather a principle which can be applied to a greater or lesser extent. The development of international human rights law has limited it in many cases. For the purposes of this study, the so-called remedial secession doctrine suggests that gross and systematic human rights violations can lead a state to lose a part of its territory if oppression is directed against a specific people.¹²⁷⁷ To put this in another way, a state whose government does not represent "the whole people of its territory without distinction of any kind"¹²⁷⁸ is not entitled to invoke the principle of territorial integrity when limiting unilateral secession. Likewise, the principle of *uti possidetis* does not preclude the exercise of external self-determination by means of unilateral secession. The application of the *uti possidetis juris* principle is limited to cases of decolonisation. The argument that the principle of *uti possidetis juris* applies beyond the decolonisation process has very weak doctrinal foundations and reference to it is not mentioned in any international instruments which are relevant for the creation of states and the delimitation of new states.¹²⁷⁹

1274 Fox 1995 *Michigan Journal of International Law* 736.

1275 Vidmar *Democratic Statehood* 144.

1276 See Chapter Four par 4.5 above.

1277 See Chapter Four par 4.7.3 above.

1278 Crawford *The Creation of States* 118.

1279 Vidmar *Democratic Statehood* 223.

Since the principle of territorial integrity is not an absolute norm, it may be limited in the most extreme cases. At least it is arguable that the doctrine of remedial secession suggests that the total denial of internal self-determination accompanied by systematic oppression can lead a state to lose a part of its territory if oppression is directed against a specific people. In this regard, this chapter has addressed the question of whether remedial secession has enough support in legal doctrine to be considered an actual entitlement under international law. Relevant doctrine¹²⁸⁰ shows that a remedial right to unilateral secession arises in only extreme cases as a last resort of subjugated peoples for ending oppression. This caveat has also been reflected in judicial decisions,¹²⁸¹ yet no international judicial body has accepted remedial secession as an entitlement.

The idea of remedial secession nevertheless has some merit, not least if it can be given effect through international recognition. Even though recognition is deemed to be a declaratory act in international law, universal collective recognition can have the effect of collective state creation. It is argued that where subjugated peoples seek secession the international community will be more willing to ignore the territorial integrity of the parent state and grant recognition to the secession-seeking entity.

Although the explanation that remedial secession could be given effect through the act of recognition may be able to clarify the theoretical status of remedial secession in international law, there is a marked absence of state practice. This chapter has shown that no single instance of non-colonial new state creation in the *UN Charter* period serves as a clear example of remedial secession. The international community of states has never accepted either the right of oppressed peoples to secession or the duty to grant recognition when oppressed peoples are trying to create their own state.

The chapter was also devoted to the study of the post-colonial state creations with a view to examining the emergence of a customary right to remedial secession. It has

1280 Crawford *The Creation of States* 118; Cassese *Self-determination of Peoples* 188-120; Buchheit *Secession* 43-127; Tancredi "A Normative 'Due Process' in the Creation of States through Secession" 171-207.

1281 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 126; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

been contended that there has been no clear support for this doctrine in practice. The secession of Bangladesh may well have ended repression, but it is doubtful that the remedial secession argument was really considered. Equally, while some states may have decided to recognise Kosovo because they saw no alternative to Kosovo's independence, this is not sufficient to make a credible argument in favour of remedial secession. Arguably Kosovo's unilateral declaration of independence in 2008 was not the last resort for ending oppression. Indeed, both Eritrea and South Sudan gained independence with the consent of their parent states, though after long-lasting civil wars. At present there is no evidence to suggest that the independence of Eritrea and South Sudan were a result of the exercise of the right to remedial secession. From an analysis of state practice it may be concluded that while there is an emerging rule of a customary right to remedial secession, its theoretical foundations are rather fragile, and there is a long way to go before it can be accepted under contemporary international law.

The next chapter turns to the attainment of self-determination by rebels in African states, and questions if there is at least an emerging customary norm which may authorise rebels to overthrow or secede from an oppressive regime on behalf of the peoples that they claim to represent.

Chapter 5: The use of force by "liberation movements" and "rebel groups" in the attainment of the right to self-determination: the plight of Africa

Every nation people will defend its identity and territory from breakup and eradication. Facing absorption and subjugation, many nations have no other choice than to militarily resist the colonial or oppressive regimes. This is a defensive reaction. To defend their nations from being annihilated, many peoples have taken up arms and engaged in wars of national liberation.¹²⁸²

5.1 Introduction

In the previous chapter it was shown that self-determination, which has both an internal as well as external aspect, is a collective right that vests in peoples.¹²⁸³ By virtue of this right, peoples determine and assure their political, economic and social objectives. The chapter considered the theories and practice of the external aspect of self-determination and pointed out that the right to secede is not an integral part of the right to self-determination, but is limited to peoples under colonial or alien power. Outside colonialism, however, it may be exercised through the dissolution of a state, merger, or (re)union with another state, or through constitutional and consensual secession.¹²⁸⁴ In contrast, the exercise of the right to self-determination by means of unilateral secession is highly contested under international law. This controversy arises from the fact that secession is neither legal nor illegal in international law.¹²⁸⁵ In this respect, it was also argued that the right to self-determination is limited by the principles of territorial integrity.¹²⁸⁶ It is also limited by the *uti possidetis* principle, which stands for the legal validity of post-colonial boundaries.¹²⁸⁷

Notwithstanding the controversy touched upon above, it appears elsewhere in Chapter Four that the possibility of resorting to external self-determination by means of "remedial secession" is not completely excluded. It was said that a right to remedial secession finds its legal basis in the so-called "safeguard clause" provided in the 1970 UN Declaration.¹²⁸⁸ Paragraph 7 stipulates that if a government

1282 Sluka "National Liberation Movements in Global Context".

1283 See Chapter Four par 4.1 above.

1284 See Chapter Four par 4.1 above.

1285 Crawford *The Creation of States* 390.

1286 See Chapter Four par 4.5 above.

1287 See Chapter Four par 4.6 above. It was argued that, whatever the circumstances, the right to self-determination must not involve changes to the boundaries existing at the time of independence.

1288 See Chapter Four par 4.5 above.

systematically oppresses a certain segment of the population living within its territory, the principle of territorial integrity could not be legitimately invoked. Therefore, a group of people concerned would have, as a last resort, a right to create its own state for ending oppression.¹²⁸⁹

However, it has been argued that the drafting history of the "safeguard clause" does not suggest that states intended to grant a right to remedial secession to sub-national groups.¹²⁹⁰ In view of this, it is not clear how and to what extent the right to self-determination will be achieved where people are forcibly denied a choice regarding their affiliations and future by the oppressive power. Does this denial of self-determination accompanied by widespread violations of human rights allow the people concerned to break away from the state or to overthrow the government which deprived them of self-determination? Phrased differently, does the oppression justify the use of force to secure self-determination, such as armed force against alien domination and racist regimes, and armed force against repressive regimes whose existence is not based on the consent of the people? For the purpose of this chapter, it is important to consider whether or not modern international law recognises a right to use force for "notational liberation movements" or "rebel groups" in pursuit of self-determination, and if so, under what circumstances.

In order to achieve clarity about whether or not the use force in relation to self-determination is legitimate internationally, the present chapter examines the basic legal norms on the use force. It makes an argument that as early as the arbitration treaties of the late nineteenth and twentieth centuries, continuing through the Covenant of the League of Nations and the Kellogg-Briand Pact after WWI, and culminating in the *UN Charter*, states have several times formally limited the right to resort to arms in international relations.¹²⁹¹ However, it demonstrates that after WWII opinions about what constitutes armed conflicts and who has authority to use force in the international arena may have altered.¹²⁹² The decolonisation process and the increasing consensus about the right of peoples to self-determination have directed

1289 Barelli 2011 *International Community Law Review* 421.

1290 For more comments see, among others, Jaber 2011 *International Journal of Human Rights* 936-937; Hilopd 2009 *Chinese Journal of International Law* 56; Summers 2005 *International Journal on Minority and Group Rights* 335-336.

1291 Weisburd *Use of Force* 1.

1292 Şahin 1999 *Dış Politika-Foreign Policy* 1.

some to conclude that the struggles of national liberation movements are not outside the concern of international law, although they are seemingly intra-state armed conflicts.¹²⁹³

The post-Charter era has witnessed the establishment of many "national liberation movements" and "rebel groups" which have claimed to have the right to use force on behalf of peoples whose self-determination has been denied.¹²⁹⁴ In this regard, Cassese¹²⁹⁵ points out that "liberation movements" arose first in Africa, then in Asia. They then mushroomed in Latin America and occurred to a lesser extent in Europe. This is because the colonial powers which resisted decolonisation were met by force.¹²⁹⁶ France encountered force in Tunisia and Algeria; similarly the United Kingdom was hurried out of Malaya, Kenya and Cyprus and the Netherlands out of Indonesia,¹²⁹⁷ to list but a few.

As previously said, although this study is specifically aimed at "rebel groups" and their use of force for self-determination, it is of importance first to examine the legality of the authority of "national liberation movements" to use force against alien domination and racist regimes. This is because the post-colonial and the modern day rebel groups have been inspired by earlier examples of national liberation movements. It will be argued that both types of movements are groups of citizens interested in revolution, but more specifically interested in secession or regime change based on what they consider as their rightful claim to self-determination. As will be seen, the right of national liberation movements to use force in pursuit of self-determination was established in the 1960s and 1970s through UN resolutions. There is a growing body of opinion arguing that this rule extends to all self-determination struggles, and rebel groups often use this argument to support the legality of their use of force against oppressive regimes. Although the foregoing explains why some discussion over national liberation movements is important, it is not the focus of this chapter. Rather, the chapter focuses on rebel conflicts aiming at seceding from an established state or overthrowing the government which deprived them of self-determination.

1293 Şahin 1999 *Dış Politika-Foreign Policy* 1.

1294 Wilson *International Law* 91; Arend and Beck *International Law* 40.

1295 Cassese *International Law* 140.

1296 Gray *International Law* 52-53.

1297 Gray *International Law* 52.

In the search for a right to use force for these movements, the present chapter turns to the legitimacy of the use of force by third states to support or to assist national liberation movements" and "rebel groups". It is argued that there have always been states that assisted and assist "national liberation movements" or "rebel groups" in their struggles for self-determination.¹²⁹⁸ These states have supported or support them by arming them, financing them, providing bases on their territories, or fighting on behalf of them.¹²⁹⁹ In this respect the question is whether or not this foreign military support (this intervention) on behalf of "national liberation movements" or "rebel groups" can be recognised internationally. Put differently, does international law allow third states to use force against the territorial integrity of a state which denies political freedoms and democratic rights to its people, and where the government is therefore unrepresentative? The point of analysis is that any military support, such as the provision of arms or military intervention, by one state to a rebel group fighting against another states is, in principle, a breach of the prohibition of the use of force set out in article 2(4) of the *UN Charter*.¹³⁰⁰ It is also against the principle prohibiting intervention by states in the internal affairs of another state. Although this chapter will elaborate on the norms relating to the use of force, it is noted that the use of force between states is not the focus of the present research. Rather, this chapter examines whether or not the right to use force is expanding to include not only states but also "national liberation movements" or "rebel groups" representing peoples struggling to attain independence or regime change. After that discussion, the chapter will consider the lawfulness of the use of force by other states to assert their support of self-determination as one of the purposes of the United Nations.

The chapter presents a general account of the struggles of peoples for self-determination in Africa. But, as Cassese¹³⁰¹ says, "Africa has been the principle home of liberation movements," and it is practically impossible to analyse the hundreds of military coups and secessionist conflicts of this continent. Only the most important cases relevant to the right to self-determination will therefore be discussed in this chapter. Finally, based on the theory and practice related to the use of force in the exercise of self-determination, the chapter will determine whether or not a

1298 Wilson *International Law* 91.

1299 Şahin 1999 *Dış Politika Foreign Policy* 41.

1300 A 2(4) of the *Charter of the United Nations* (1945).

1301 Cassese *International Law* 140.

customary rule with respect to a right to the use of force in relation to self-determination actually does exist today in international law.

5.2 Brief overview of international norms on the use of force

It is almost impossible to write about the right of rebel groups and national liberation movements to use force for the attainment of self-determination without oversimplifying the historical development of the legal norms relating to the recourse to force. The issue of national liberation movements, however, is now of considerably reduced practical importance and is not the focus of this thesis. Rather, the focus will be on rebels' right to use force in pursuit of self-determination and on the right of foreign states to support rebel groups in their forcible action to secure such a right.

5.2.1 The prohibition of the use of force

A brief look at the history of the law relating to the use of force shows that it has changed dramatically over the past centuries.¹³⁰² In reviewing the history of the norms relating to the recourse to force, Arend and Beck¹³⁰³ identify six major historical periods of their development:

1) the just war period, 2) the positivist period, 3) the League of Nations period, 4) the Kellogg-Briand period, 5) the United Nations Charter period, and 6) the post-United Nations Charter period.

As noted previously, this chapter is not deeply concerned with the use of force by states. Instead this section briefly discusses the normative developments that have occurred since the 19th century. During the 19th and early 20th centuries the theory and practice of the use of force was that of *bellum justum*. The *bellum justum* doctrine traces its way back to St. Thomas Aquinas, who wrote in *Summa Theologiae* in the thirteenth century that recourse to force is always unlawful unless three conditions are fulfilled.¹³⁰⁴ First, there had to be "lawful authority".¹³⁰⁵ By this

1302 Brownlie *Principles* 3-49.

1303 Arend and Beck *International Law* 11.

1304 Aquinas *Summa Theologica* 3074.

1305 Hensel (ed) *The Legitimate Use of Military Force* 15-16.

Aquinas meant that a war is just if it is initiated by the legitimate authority.¹³⁰⁶ This meant that a private individual could not declare a war. Secondly, for a war to be just there had to be a just cause. That is, those who are attacked should be attacked because they deserve it on account of some fault. According to Aquinas a just cause was "something that righted a wrong or recaptured stolen property".¹³⁰⁷ For him, a war was just when it avenged some wrong; that is, when a state or a nation was to be punished for having failed to make amends for the wrong committed, or to restore what was taken unlawfully.¹³⁰⁸ Thirdly, for a war to be just, it was necessary for the state or nation waging a war to have a "rightful intention".¹³⁰⁹ This meant that a just war must be waged to attain some good or to avoid evil. Put in another way, a war could be waged not for motives of aggrandisement or cruelty, but rather with the object of securing peace, of punishing evildoers, and of elevating the good.

The doctrine of just war was further developed by sixteenth and seventeenth-century jurists and scholars. The most celebrated writer of this period is Hugo Grotius, who wrote *De jure Belli ac Pacis*.¹³¹⁰ He first submits that for a war to be permissible it needs to be undertaken by a "lawful authority" in defence of persons and property.¹³¹¹ It is to be noted, however, that Grotius allows for anticipatory self-defence to respond to an injury not yet inflicted but which menaces either person or property.¹³¹² He adds that the threat must be immediate and imminent in time.¹³¹³ Also, Grotius discusses several situations in which war would be illegal. These include a desire for fruitful land and a desire to rule people against their will on the pretext that it is for their good.¹³¹⁴ It appears that war could be undertaken in cases

1306 Some scholars attributed the lawful authority to wage war only to an emperor or in some cases to the Pope. Pope Innocent IV also stated that the right to use force belonged to authorities who had no superior. See Russell *The Just War* 298-299.

1307 Arend and Beck *International Law* 14.

1308 Aquinas *Summa Theologica* 3075.

1309 Aquinas *Summa Theologica* 3075.

1310 Grotius *Hogonis Grotii De Jure Belli Ac Pacis* 5-84.

1311 Grotius *Hogonis Grotii De Jure Belli Ac Pacis* 37-54.

1312 Grotius said that if a man was seen actually taking up arms, obviously with the intention to kill another, the latter might anticipate and prevent his intention. See Grotius *Hogonis Grotii De Jure Belli Ac Pacis* 56.

1313 Grotius *Hogonis Grotii De Jure Belli Ac Pacis* 56-57.

1314 Grotius *Hogonis Grotii De Jure Belli Ac Pacis* 60-61; Arend and Beck *International Law* 15.

of extreme necessity in order to enforce rights or to punish wrongdoers and to secure peace.¹³¹⁵

Although the doctrine of just war was accepted throughout the Christian phase, positive international law does not lend support to the use of force in international relations. In the aftermath of WWI, the League of Nations made a concerted attempt to limit the recourse to force in international relations. In this respect the Covenant of the League of Nations placed the resort to war under international supervision, and rendered it unlawful in certain situations.¹³¹⁶ It has been argued that while the League system outlawed the use of force, war remained permissible if certain conditions were exhausted.¹³¹⁷ It was not until the Kellogg-Briand Pact period that the recourse to war to resolve international disputes was outlawed. With the signing of the Kellogg-Briand Pact of 1928¹³¹⁸ the real breakthrough to condemning war in international law was established. This Treaty provided that the High Contracting Parties:

... solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations to one another.¹³¹⁹

Therefore for the first time war as such was to be seen as no proper and lawful instrument of national policy.¹³²⁰ The Pact did not of course prevent WW II. Nevertheless, it had an effect, as it formed the basis for the identification of "crimes

1315 Shaw *International Law* 1121.

1316 Under the League of Nations the use of force was unlawful in four situations: (1) when made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League; (2) when begun before the expiration of three months after the arbitral award or judicial decision or Council Report; (3) when commenced against a member which had complied with such an award or decision or recommendation of a unanimously adopted Council report; (4) under certain circumstances, when initiated by a non-member state against a member state. See a 12 of the *League of Nations Covenant* (1919).

1317 First if, there were no decision of the League Council, there would be no obligation to refrain from the use of force. A 15 of the *League of Nations* reads: "if the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice". See a 15 of the *League of Nations Covenant* (1919). Secondly, if there were a decision by the League Council, states would be obliged to refrain from the use of force against a state complying with the decision of the settlement body. However, if one party was not following the decision, the other party could take recourse to war after three months. A 12 of the *League of Nations Covenant* (1919); see also Arend and Beck *International Law* 20.

1318 *General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact)* (1928).

1319 A 1 of *Kellogg-Briand Pact* (1928).

1320 Remler *The Right of Anticipatory Self-defence* 6.

against peace" which, after WW II, were described in the Charter of the Nuremberg Tribunal as those crimes aimed at the planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.¹³²¹

The more recent development of the law on the use of force is to be found in the *UN Charter*. Article 2(3) provides that all members shall settle their international disputes by peaceful means in such a manner that international peace, security and justice are not endangered. Furthermore, article 2(4) provides the ban on the use of force and the threat of force.¹³²² Since its incorporation in article 2(4), the prohibition on the use of force has been reaffirmed by the Security Council, the General Assembly¹³²³ and the ICJ. In the *Nicaragua* case¹³²⁴ the ICJ reaffirmed that the prohibition on the use force was not only treaty law but also a rule of customary international law, and as such is binding upon all states.¹³²⁵ Some scholars, such as Dugard¹³²⁶ and Christenson,¹³²⁷ argue that this prohibition is not recognised by states only as a basic principle of contemporary international law but also as a norm having the status of *jus cogens*. This opinion was also supported by the ICJ in the *Nicaragua* case. In this case, the ICJ described article 2(4) as a peremptory norm of international law, from which states could derogate.¹³²⁸ Thus, the effect of articles 2(3) and (4) is that the use of force can be justified only as expressly provided for under the *UN Charter*, and only in situations where it is consistent with the UN's purposes.

1321 *Charter of the Nuremberg International Military Tribunal* (1945).

1322 See a 2(4) of the *Charter of the United Nations* (1945) "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".

1323 The General Assembly adopted the Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty (GA Res 2131 (XX) (1965)) and then the Declaration on Principles of International Law Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations. GA Res 2625 (XXV) (1970). The second par of both resolutions contains articles that are virtually identical to a 2 4) of the Charter of the United Nations (1945).

1324 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits ICJ Reports 1986 par 98-100.

1325 Williamson *Terrorism, War and International Law* 223.

1326 Dugard *International Law* 496.

1327 Christenson 1987 *American Journal of International Law* 93.

1328 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports.

Although states and scholars generally agree on the prohibition on the use of force, there is a controversy on the exact scope of article 2(4). This controversy is about whether the term "force" in article 2(4) encompasses not only "armed force" but, for instance, economic force as well. In this respect, Shaw¹³²⁹ and Harris¹³³⁰ argue that the reference to "force" instead of to "war" covers a much broader range of action, such as armed force short of war, as well as war itself. However, article 2(4) does not prohibit political pressure or economic pressure, such as the refusal to ratify a treaty, a trade boycott, or the blocking of a bank account.¹³³¹

Also, Dugard¹³³² argues that article 2(4) does not provide a general prohibition of force, but is instead limited to force used in international relations. Put differently, article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of a state in any manner inconsistent with the purposes of the UN. However, a state can be in breach of article 2(4) even if the territorial integrity of another state is not breached. In the *Nicaragua* case¹³³³ the ICJ held that:

... support given by the United States to the *Contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support constitutes a clear breach of article 2(4).¹³³⁴

It is clear from this paragraph that "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Equally, the words "territorial integrity" has to be read restrictively. The first phrase of article 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity") indicates that the prohibition on the use of force is limited to force used in international relations. This means that international law

1329 Shaw *International Law* 1123.

1330 Harris *Cases and Materials* 888.

1331 Harris *Cases and Materials* 890.

1332 Dugard *International Law* 496.

1333 The United States had provided various forms of support to the Nicaraguan rebels (the *Contras*) with the apparent intent of overthrowing the Nicaraguan government. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* 1986 ICJ Reports.

1334 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) Merits* 1986 ICJ Reports par 242.

"prohibits neither recourse to revolution nor the suppression of an internal revolution".¹³³⁵ This will be expounded upon in paragraph 5.3 of this chapter.

5.2.2 *Exceptions to the prohibition of the use of force*

Under the *UN Charter*, there are basically three exceptions to the article 2(4) prohibition on the use of force. The most significant exceptions are the right to self-defence and the use of force authorised by the United Nations Security Council. Humanitarian intervention is another exception to the prohibition of the use of force, although it is more contested and not clearly regulated in the *UN Charter*.

5.2.2.1 *Exceptions provided by the UN Charter*

The first explicit exception to article 2(4) is found in article 51 of the Charter, which provides the right of individual or collective self-defence if an armed attack occurs against a member of the United Nations.¹³³⁶ The concept of self-defence was first addressed in the *Caroline* case of 1837.¹³³⁷ In this case, British forces attacked a vessel moored on the Niagara River, which was suspected of supporting the Canadian rebellion against the British.¹³³⁸ The force was supplied from the United States shore by an American vessel, the *Caroline*.¹³³⁹ The British forces judged that the demolition of the *Caroline* would serve the double purpose of preventing further reinforcements and supplies from reaching the island and depriving the rebels of their means of access to the mainland of Canada.¹³⁴⁰ On the night of 29th-30th December the British forces seized the *Caroline* at Fort Schlosser on American territory. Immediately after the *Caroline* fell into the hands of the British armed force who boarded her she was set on fire and sent over Niagara Falls. Two United States nationals were killed during the incident.¹³⁴¹

The British forces defended the destruction of the *Caroline* on the ground of self-preservation and self-defence, while the US State Secretary Webster focused on the

¹³³⁵ Dugard *International Law* 496.

¹³³⁶ A 51 of the *Charter of the United Nations* (1945).

¹³³⁷ *Caroline* case 30 BFSP 195-196 (1837) cited in Shaw *International Law* 1131.

¹³³⁸ *Caroline* case 30 BFSP 195-196 (1837); Jennings 1938 *American Journal of International Law* 82.

¹³³⁹ Harris *Cases and Materials* 921.

¹³⁴⁰ Jennings 1938 *American Journal of International Law* 83-84.

¹³⁴¹ *Caroline* case 30 BFSP 195-196 (1837). The facts of the case are taken from Harris *Cases and Materials* 894.

right of a state to territorial integrity. In the diplomatic exchange with the British authorities which followed the incident, Webster laid down the essentials of self-defence:

It will be for ... [Her Majesty's] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.¹³⁴²

These principles expressed by Webster have been recognised as the basic foundation of the right of self-defence in international customary law.¹³⁴³ Webster's statement laid down the essential conditions of self-defence - necessity and proportionality - which are reaffirmed in the *UN Charter*. Article 51 of the *UN Charter* reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹³⁴⁴

There has been extensive controversy as to the precise extent of the right to self-defence in the light of article 51. Some scholars argue that the combined effect of articles 2(4) and 51 of the *UN Charter* excludes any right to recourse to force, rather than the right to self-defence, which arises only if an armed attack occurs.¹³⁴⁵

This right can be exercised either individually or collectively. This means that a victim state may receive the assistance of other states to help fight back against the attacking states. This exception, however, is not without limits. Member states acting in self-defence are required to report their action immediately to the Security Council.¹³⁴⁶ Other scholars support a wide right of self-defence going beyond the

1342 *Caroline case* 30 BFSP 195-196 (1837).

1343 Boas *Public International Law* 327.

1344 A 51 of the *Charter of the United Nations* (1945).

1345 Gray *International Law* 98.

1346 A 51 of the *Charter of the United Nations* (1945).

right to respond to an armed attack on a state's territory. They argue that the use of the language – the "inherent right" of self-defence - preserves the customary international law right to self-defence that existed prior to the *UN Charter*.¹³⁴⁷ This view was supported by the ICJ in the *Nicaragua* case:

.... Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter ... It cannot, therefore, be held that article 51 is a provision which "subsumes and supervenes" customary international law.¹³⁴⁸

This shows that the right to self-defence, which article 51 acknowledges as "inherent", exists also under customary international law. In other words, article 51 supplements the customary international law that existed before the *UN Charter* was framed and which continues to exist today alongside the Charter.¹³⁴⁹

According to article 51, a member state has an inherent right to defend itself against the attacking state if an "armed attack" has taken place. For the purpose of article 51, the ICJ describes an "armed attack" as follows:

.... an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.¹³⁵⁰

In this respect, the ICJ strongly emphasises that this definition contained in article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) may be taken to reflect customary international law.¹³⁵¹ The ICJ has, however, made it clear that not every act constituting the unlawful use of force constitutes an "armed attack". In order to do so its scale and effects must be sufficient. The Court's narrow definition of an "armed attack" excludes assistance to rebels in the form of the provision of weapons or logistical or other support. Such

1347 Gray *International Law* 98; Shaw *International Law* 1132.

1348 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 176.

1349 *Caroline* case 30 BFSP 195-196 (1837).

1350 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 195.

1351 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 195.

assistance may be considered a threat or the use of force, or amount to illegal intervention.¹³⁵²

Besides the use of force in self-defence in response to an armed attack, the use of force is subject to the unique authority of the Security Council. The main provisions of the *UN Charter* dealing with the collective use of force are contained in Chapter VII, which is entitled "Action with Respect to Threat to the Peace, Breaches of the Peace, and Acts of the Peace and Acts of Aggression".¹³⁵³ The basic provision of the *UN Charter* relating to the authority of the Security Council to authorise the use of collective force is article 39. This article reads:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security.¹³⁵⁴

With respect to article 41,¹³⁵⁵ the Security Council may decide all viable diplomatic measures considered to resolve a crisis. If the sanctions under article 41 are deemed ineffective by the Security Council, military action can be ordered in accordance with article 42. This article clearly allows a variety of actions, including demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.¹³⁵⁶ In the light of article 41 and considering the whole chapter VII, it appears that military force authorised by the Security Council is to be used only as the last resort after all other measures have proved to be unsuccessful.

5.2.2.2 Humanitarian intervention

Besides the exceptions to the prohibition on the use of force provided in the *UN Charter*, the doctrine of humanitarian intervention is another exception that has

1352 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 195. This will be expounded in the present chapter par 5.2.2.2.

1353 Arend and Beck *International Law* 47.

1354 A 39 of the *Charter of the United Nations* (1945).

1355 A 41 of the *UN Charter* reads: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

1356 A 42 of the *Charter of the United Nations* (1945).

evolved in international customary law, though it is not universally accepted. The doctrine of humanitarian intervention has been differently defined by various scholars.¹³⁵⁷ On the one hand, it has been defined broadly to encompass even verbal remarks of government actors concerning another state's affairs.¹³⁵⁸ On the other hand, it has been defined narrowly to encompass only dictatorial intervention by a state in the internal affairs of another state or in the relations between other states.¹³⁵⁹ For the purpose of this study it is defined as:

... threat or use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.¹³⁶⁰

On the basis of this definition, humanitarian intervention may be undertaken by one state, a group of states, or an international organisation on the territory of another state to protect persons who are in imminent danger of grave injury when the state in whose territory they are is unwilling or unable to protect them.¹³⁶¹ Thus, the justification for the use of force on the ground of humanitarian intervention depends on the existence of widespread and grave violations of fundamental human rights in the target state.

The doctrine of humanitarian intervention has been in existence and discussed for the past several hundreds of years.¹³⁶² Some scholars argue that it may be traced back to the 16th and 17th century religious wars, and that it is echoed in a large number of cases which occurred in the 19th and early 20th century.¹³⁶³ However, the legality of this type of intervention is one of the most controversial issues in international relations, primarily due to the fact that it is in direct conflict with the most fundamental norms in international relations, that is, the principle of state sovereignty.

1357 Wright 1989 *Florida International Law Journal* 435.

1358 Wright 1989 *Florida International Law Journal* 435.

1359 Wright 1989 *Florida International Law Journal* 435.

1360 Stowell *International Law* 349.

1361 Halberstam 1995 *Cardozo Journal of International and Comparative Law* 1.

1362 Halberstam 1995 *Cardozo Journal of International and Comparative Law* 2.

1363 Examples include the United States' interventions in Cuba at the end of the 19th century, and the protests by the European Major Powers against the cruel treatment of political prisoners in Morocco in the beginning of the 20th century. See Fonteyne 1974 *California Western International Law Journal* 206; see also Halberstam 1995 *Cardozo Journal of International and Comparative Law* 2.

In international legal scholarship, the concept of humanitarian intervention may be found as early as in the writings of Hugo Grotius in 17th century. In the *De Jure Belli ac Pacis* Grotius contended that where "a tyrant practices atrocities towards his subjects which no just man can approve," other states may exercise a right of humanitarian intervention.¹³⁶⁴ Grotius based his argument on the theory of natural law.¹³⁶⁵ According to this theory, the individual possesses some inherent rights.¹³⁶⁶ The nation-states came into existence because individuals wanted to improve their security and as a result ceded part of their inherent rights to the state. The sovereign powers of the state were consequently limited to the extent of the rights ceded by individuals. Hence, the state exceeded its authority when it denied individuals the fundamental rights that they had not ceded to the state. Thus, if the sovereign violated the basic rights of the people, he exceeded his jurisdiction and other states had the right to intervene and re-establish the order of the law of nature.¹³⁶⁷ This view indicates clearly that Grotius and other natural law thinkers¹³⁶⁸ considered humanitarian intervention as legal and an integral part of the *bellum justum* doctrine.

With regard to state practice, it is important to note that in the 19th and early 20th centuries states allegedly intervened in other states' affairs on the ground of humanitarian intervention. This started with the invasion of Greece by France and Russia in 1827-1830 to protect Greek Christians from persecution by the occupying Turks. The Treaty of London, which formally authorised the intervention, provided that the intervention was undertaken on "ground of humanity".¹³⁶⁹ Another example is the French invasion of Syria under the Ottoman Empire in 1860, to rescue severely persecuted Christians. Likewise, Russia intervened in Bosnia, Herzegovina and Bulgaria in 1877, which was also under the rule of the Ottoman Empire.¹³⁷⁰ In all

1364 Halberstam 1995 *Cardozo Journal of International and Comparative Law* 3.

1365 The Law of Nature was the philosophical underpinnings of several basic norms, both legal and moral. It is an essential feature of the Law of Nature that all human beings be treated equally and can therefore be regarded as the foundation of the concept of inherent human rights. Adjei *The Legality of Humanitarian Intervention* 12.

1366 Halberstam 1995 *Cardozo Journal of International and Comparative Law* 2-3.

1367 Adjei *The Legality of Humanitarian Intervention* 14.

1368 In general terms, St Thomas Aquinas held that there is no general prohibition on war and that when certain requirements are met; a war could be waged justly. He gave examples of just wars as wars fought in self-defence; restoration of peace; assistance of neighbours against armed attack and most importantly, "defence of the poor and oppressed people". Aquinas *Summa Theologica* 188.

1369 Adjei *The Legality of Humanitarian Intervention* 20.

1370 Adjei *The Legality of Humanitarian Intervention* 21.

of these cases the language used by the intervening states clearly indicates some sort of acceptance regarding the right to humanitarian intervention in pre-Charter times.

However, with the general prohibition on the use of force under article 2(4) of the *UN Charter*, it becomes doubtful whether humanitarian intervention is still an exception to this prohibition, since the Charter does not clearly provide for it. Rather, article 2(4) enshrines the principle of non-intervention by foreign states and affirms the principle of respect for the territorial integrity of states. Moreover, the principle of non-intervention and the principle of respect for territorial integrity are set out in other regional legal documents, such as General Assembly Resolutions. The 1970 Declaration on Principles of International Law excludes the right to intervene and makes no provision for humanitarian intervention.¹³⁷¹ Resolution 3314 (XXIX) on the definition of aggression also provides that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as justification for a state's interference in another state's affairs". Similar concern was expressed by the ICJ in the *Nicaragua* case. In the opinion of the Court, the United States could not invoke the doctrine of humanitarian intervention to justify its support to the *contras* in the attempt to overthrow the Government of Nicaragua.¹³⁷² The Court went further to state that the assistance to the *contras* not only amounted to the unlawful use of force but also constituted infringements of Nicaraguan territorial sovereignty.¹³⁷³ Thus, according to the Court the principle of respect for territorial sovereignty overlaps with the principles of the prohibition of the use of force and of non-intervention.¹³⁷⁴

The principle of territorial integrity nevertheless is not absolute. There are a number of cases where states intervened in other states to protect non-nationals where their treatment was so outrageous that it "shocked the conscience of mankind".¹³⁷⁵ The most often cited example is that of India's invasion of East Pakistan in 1971, which helped the Bengali people to secure independence from Pakistan and to end

1371 GA Res 2625 (XXV) (1970).

1372 Gray *International Law* 33.

1373 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 251.

1374 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 251.

1375 Dugard *International Law* 508-509.

repression.¹³⁷⁶ The other clear cases in which the humanitarian intervention may be thought to have been justified include the Tanzanian action in Uganda in 1979, which led to the overthrow of Idi Amin, and the Vietnamese invasion of Cambodia in 1978 to overthrow the Pol Pot regime, which had been responsible for acts of genocide.¹³⁷⁷

Another instance in which it has been argued that humanitarian intervention was justified was the use of Western troops to secure a safe haven in northern Iraq after the Gulf War. The action was taken in accordance with the customary international law principle of humanitarian intervention, since there was no express authorisation from the UN. Security Council Resolution 688 (1991) condemned the widespread repression by Iraq of its Kurd and Shia populations, but did not authorise any form of the use of force.¹³⁷⁸ The most recent practice of humanitarian intervention is NATO's recourse to force against the Federal Republic of Yugoslavia in 1991, in order to end a humanitarian crisis caused by Yugoslavia's violation of human rights in Kosovo Province.¹³⁷⁹ In this situation the international community refrained from adopting a condemnatory stand. For instance, the Security Council in ambiguously phrased resolutions tolerated intervention¹³⁸⁰ or at least rejected a resolution condemning the use of force on the ground of humanitarian intervention.¹³⁸¹ This shows that although the claim of humanitarian intervention has often masked an ulterior political purpose, there is a strong argument that in exceptional circumstances and to avoid a human catastrophe, military action can be taken.

The doctrine of humanitarian intervention also has some support among writers. The main argument of academic proponents is well captured by Arend and Beck.¹³⁸² According to them, humanitarian intervention is deemed to be in compliance with article 2(4) if it satisfies four criteria:

1376 Muhire *The African Union's Right of Intervention* 142-143.

1377 Gray *International Law* 31-32.

1378 SC/RES/688 (1991).

1379 Dugard *International Law* 509.

1380 The Security Council adopted Resolution 1244 allowing the presence of NATO forces in Kosovo. In this regard, the Security Council implicitly condoned the NATO intervention in Kosovo on the ground of legitimacy. Muhire *The African Union's Right of Intervention* 161.

1381 The Security Council rejected a draft resolution introduced by Russia condemning NATO Action. Muhire *The African Union's Right of Intervention* 161.

1382 Arend and Beck *International Law* 113.

First, there must be within the target state an 'immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life'. Second, the intervention's specific purpose must essentially be limited to protecting fundamental human rights. Third, the forcible action must not be undertaken pursuant to an invitation by the legitimate government of the target state or done with that government's explicit consent. Fourth, properly speaking, a humanitarian intervention *per se* cannot be undertaken upon the authorisation of the Security Council, whether by a UN Force or by those of Chapter VIII 'regional arrangement'.¹³⁸³

The academic proponents of humanitarian intervention thus tend to see it as a qualified right the performance of which is triggered by extreme humanitarian need.¹³⁸⁴ At the same time, it is an exceptional solution and is the last resort for ending or stopping gross violations of human rights.¹³⁸⁵ It is evident that in such circumstances, humanitarian intervention seems to be subject to the prohibition on the use of force, while justified under customary international law. But it is not the purpose of this chapter to deal with the specific issues of humanitarian intervention. The focus will be on the use of force only in relation to self-determination in international law.

5.3 The use of force in relation to self-determination

The *jus ad bellum* in relation to armed struggles waged by peoples through their national liberation movements or rebels groups to attain self-determination is quite complex and at time vague.¹³⁸⁶ There are number of legal issues to be considered in the present section. One of the major issues that must be addressed is whether or not "rebel groups" and national "liberation movements" have the authority to use force on behalf of peoples whose right to self-determination has been persistently and vehemently denied. In practice, there are two situations in which national liberation movements and rebel groups claim to have the right to exercise this authority on behalf of peoples.¹³⁸⁷

As said earlier, in Chapter Three, national liberation movements are organisations that fight for self-determination and independence on behalf of colonised peoples.¹³⁸⁸

1383 Arend and Beck *International Law* 1113.

1384 Shaw *International Law* 803.

1385 Shaw *International Law* 803.

1386 Higgins and O'Reilly 2009 *International Criminal Law Review* 575.

1387 Wilson *International Law* 91.

1388 See Chapter Three par 3.4.1 above.

In other words, a national liberation movement is an entity possessing public and representative capacities; a group of freedom fighters striving for liberation and self-determination in territories under colonial rule. This led to the classification of national liberation conflicts as international armed conflicts in character. This contention has been confirmed by Additional Protocol I, which clearly provides that wars of national liberation must be considered as international armed conflicts.¹³⁸⁹ In this regard, it seems trite to argue that national liberation movements are readily distinguishable from post-colonial rebels groups. Rebels groups are armed organisations fighting for either internal or external self-determination against the constitutional governments of the states in which they are situated. While the armed conflicts of national liberation movements were to be considered as international armed conflicts, conflicts involving rebel groups are form of civil war rather than international conflict,¹³⁹⁰ unless they become internationalised internal armed conflict.¹³⁹¹ The types of rebel groups that this chapter will focus on include non-secessionist groups as well as armed separatist groups struggling for change of government or the separation of territory from what once was a single unit.

It is possible, however, for a rebel group to develop into a national liberation movement. This was the case of the ANC, which was recognised as a national liberation movement by governments and international organisations like the UN while South Africa was not a colony. The ANC is the only post-colonial liberation movement which has been accorded such status. In reality, rebels groups could be recognised not as national liberation movements but as the legitimate representatives of their peoples or belligerents if they fulfilled the conditions of belligerency.¹³⁹² As such, reference can be made in this context to the Libyan rebel group, which was recognised as the legitimate representative of the Libyan people

1389 A 1(4) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (1977).

1390 For further details on the concept of "civil war" see Chapter Five par 5.3.2.1 below.

1391 A non-international armed conflict may become internationalised if (1) a state victim of an insurrection recognizes the rebels as belligerents; (2) one or more foreign states comes to the aid of one of the parties with its own armed forces (3) two foreign states intervene with their respective armed forces, each having such control over a portion of their territory as to enable them to carry out sustained and concerted military opposition and to implement the laws of wars. See Verri *Dictionary* 35-36.

1392 For the material conditions for the recognition of belligerents, see Chapter Three par 3.4.2.3 above.

while the Qaddafi government continued to be regarded as the sitting government of Libya.¹³⁹³

The recognition of rebels, however, does not depend on their fulfilling all the conditions for such recognition, but rather depends entirely on the discretion of the parent government and foreign states. There is no international duty to recognise belligerency when all the conditions are fulfilled. Therefore, any argument suggesting that the recognition of rebel groups could bestow legal status on them needs to be treated with caution, as it could be problematic in the light of the general view in international law that recognition is a declaratory not a constitutive act.¹³⁹⁴

In fact, the effect of the recognition of rebels as provided by international humanitarian law should not be overestimated. Since international humanitarian law is concerned with the conduct of hostilities, the recognition of rebels brings into effect the *jus in bello* in its entirety between parties to the conflicts. This argument has recently been confirmed by Additional Protocol II, which clearly expands the scope of protection for rebel groups regardless of their being recognised as national liberation movements by the international community.¹³⁹⁵

It is not the aim of this thesis to deal with the application of international humanitarian law to civil wars, a topic which is reserved for future examination. Rather, this chapter looks at the background of the concept of *jus ad bellum* and examines whether this rule has been relaxed and amended to encompass the armed struggles waged by national liberation movements and rebel groups to attain self-determination. Another issue that must be considered when seeking to examine the legality of the use of force to attain self-determination is the circumstances under which this force may be exerted. The issue of state support for rebels or national liberation movements and its legality in international law will also be dealt with.

1393 Talmon "Recognition of the Libyan National Transitional Council" 2.

1394 See Chapter Three par 3.4.1.3.1 above.

1395 *Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts* (1977).

5.3.1 *The use of force by national liberation movements*

Traditionally, national liberation movements did not have the legal authority to take recourse to the use of force in pursuing self-determination. However, with increased recognition that the right to self-determination is an international rule entitling victims to protection in international law, use of force has been captured into the international legal framework. In this regard, Dugard¹³⁹⁶ argues that the norms relating to the use of force have been relaxed, and possibly amended, in struggles of self-determination involving national liberation movements. It is also argued that if the people of a particular territory are regarded by international law as possessing a legal right to self-determination but the state administering that territory refuses to let them exercise that right, they may need to fight a war of liberation in order to achieve this right in practice.¹³⁹⁷

5.3.1.1 The right afforded to national liberation movements to use force, prior to the *UN Charter*

As previously noted, national liberation movements,¹³⁹⁸ call themselves "freedom fighters" and normally wage liberation struggles¹³⁹⁹ on behalf of their people against colonial powers or alien domination to attain self-determination. Cassese argues that liberation struggles were taking place as far back as the early nineteenth century,¹⁴⁰⁰ and indeed, the use of force by peoples under oppressive regimes is certainly not a twentieth century phenomenon. Both the Declaration of the Cause and Necessity of Taking Arms (1775) and the American Declaration of Independence (1776) contain assertions of this right, and several constitutions of states such as of the United

1396 Dugard *International Law* 516.

1397 Ginther "Liberation Movements" 211-215; Malanczuk *Akehurst's Modern Introduction* 336.

1398 Regarding the term "national liberation movements" see Sluka "National Liberation Movements in Global Context". The use of the term "liberation movements" has political implications, particularly when the groups so named are generally referred to by states and the media as terrorists. No one opposed to or critical of these movements calls them liberation movements, because liberation (freedom) has positive connotations for most people. Nowadays, in the era of the conservative new right, most academics seem to prefer the term armed separatist (or secessionist) movements, which they claim is a more objective or neutral description.

1399 A war of liberation has been described as an armed struggle waged by a people through its liberation movement against an established government to reach self-determination. See Ronzitti "Resort to Force in War of National Liberation" cited in Higgins and O'Reilly 2009 *International Criminal Law Review* 575.

1400 Cassese "Wars of National Liberation" 313; Higgins 2004 *Journal of Humanitarian Assistance* 2.

States of America consistently recognise the right of the people "to reform, alter, or abolish government at their convenience".¹⁴⁰¹ In this respect, 25 million Kurds are divided among six states: Iran, Iraq, Turkey, Syria, Armenia, and Azerbaijan, and have been fighting for an independent homeland since 1880, which is for over a century.¹⁴⁰²

Writing in 1988, Heather Wilson¹⁴⁰³ also noted that there have been cases in the twentieth century when states have accepted the use of force by non-state entities. Poland's emergence after WWI is a relevant example. Having been partitioned for a century and a half, Poland ceased to exist as a state. The war between Germany and Russia reopened the Polish question. In late 1915 Roman Dmowski came from Petrograd to the West to seek recognition of the Polish National Committee (KNP) as the exclusive representative of the future government of Poland. On June 4, 1917 the President of the French Republic issued a decree providing for the creation of an autonomous Polish Army, fighting under its own colours. Shortly thereafter a Polish National Committee was established in Paris, with the approval of the French Government, which was recognised as the official Polish organisation by the governments of France, Great Britain, Italy and the United States.¹⁴⁰⁴ The establishment of the Polish State took place in late autumn of 1918 by way of a definite delimitation of its separate legal identity.

The rebirth of Poland was a specific application of a general principle of national self-determination in Eastern Europe at that time. The idea that national liberation movements representing peoples may resort to the use of force as an international right also attracted support. As evidenced by state practice during the two world wars, this idea was not new. An examination of the above conflicts permits one to deduce the existence of certain rules of customary international law. The conclusion may be drawn that the norms for the use of armed force in national liberation conflicts have developed over the last few centuries to a point today where the use of force to settle disputes is virtually inscribed into the UN system.

1401 Cassese "Wars of National Liberation" 313; Higgins 2004 *Journal of Humanitarian Assistance* 2.

1402 Sluka "National Liberation Movements in Global Context".

1403 Wilson *International Law* 92.

1404 Hackworth *Digest of International Law* 319.

5.3.1.2 National liberation movements in the Charter era

5.3.1.2.1 The *UN Charter*

The argument as to the legality of the use of force to attain self-determination was never based on one central argument but rather on a number of assertions.¹⁴⁰⁵ One of the arguments used to justify the use of force by national liberation movements to achieve self-determination and the use of force by third states to assist them in their armed struggles was that this type of use of force was not covered by the prohibition of the use of force provided in article 2(4) of the *UN Charter*.¹⁴⁰⁶ Another argument used to justify the use of force in pursuit of self-determination was that colonialism was in itself an illegal use of force, amounting to aggression and breach of article 2(4); and therefore, people were considered to have a right to use force in self-defence.¹⁴⁰⁷

The argument over whether people who are prevented from exercising their right to self-determination are entitled to engage in self-defence raised bitter divisions between states during the decolonisation period. It was usual that the supporters of liberation movements attempted to use article 51 to legitimise their struggles against colonialism. The war and victory in Algeria, the invasion of Goa, the frustration caused by continued colonial domination and the radical position of an independent Algeria all provided a catalyst for the development of theories regarding national liberation struggles.¹⁴⁰⁸

The supporters of liberation movements were hampered by the reference to "armed attack" as being a precondition for the exercise of the inherent right to self-defence. Many scholars, one of them being Hans Kelsen,¹⁴⁰⁹ favoured a restrictive interpretation of article 51. He argued that self-defence is valid only if, and that implies after, an armed attack occurs.¹⁴¹⁰ Indeed, Brownlie¹⁴¹¹ points out that self-defence is legitimate only following an armed attack. The problem is that although

1405 Higgins and O'Reilly 2009 *International Criminal Law Review* 576.

1406 Gray *International Law* 54.

1407 Gray *International Law* 54.

1408 Gorelick 1979 *Case Western Reserve Journal of International Law* 73.

1409 Kelsen *The Law of the United Nations* 914.

1410 Kelsen *The Law of the United Nations* 914.

1411 Brownlie *Principles* 225.

colonialism is regarded by many states as being morally wrong, it is not in itself an armed attack or an imminent armed attack. Many Third World states thus attempted to change the notion of what constitutes a use of force which would justify the exercise of self-defence.¹⁴¹² The drive to recognise a war of national liberation as an act of self-defence was led by Ghana, India and Yugoslavia during the meeting in Mexico in 1965 of the Special Committee on Friendly Relations.¹⁴¹³ Developing countries, supported by socialist states, argued that the use of armed force by dependent peoples to free themselves from colonial power was authorised by article 51. However, this argument was rejected by Western States. They argued that self-defence could be invoked only in international relations, and that relations between a colonising power and a colonised people were not international.

Arguing against the Western argument, Kenya claimed that if force were used to deprive colonial peoples of the right to self-determination, they would have the right to defend themselves.¹⁴¹⁴ If the colonial power initiates the use of force to prevent the exercise of the right, it would seem to follow, as a matter of logic, that the people were said to have the right to use force in self-defence. Abi-Saab¹⁴¹⁵ places a particular emphasis on the preceding argument. He argues that:

... armed resistance to forcible denial of self-determination by imposing or maintaining by force colonial or alien domination is legitimate. In another words, liberation movements have a *jus ad bellum* under the UN Charter.¹⁴¹⁶

The argument that colonialism is permanent aggression represents another attempt to surpass the restrictive terms of article 51. A number of scholars, one of them being Summers,¹⁴¹⁷ argued that the mere existence of colonialism was inherent aggression to which people were entitled to self-defence by whatever means necessary. These scholars perceived colonialism not as aggression in the present, but as occurring in the past.¹⁴¹⁸ The basis is that at its inception, the colonial regime was installed by "armed force" and that as long as the effects of this armed force continued, so did the initial aggression. This thesis was argued by the National

1412 Gorelick 1979 *Case Western Reserve Journal of International Law* 74.

1413 Gorelick 1979 *Case Western Reserve Journal of International Law* 74.

1414 Gorelick 1979 *Case Western Reserve Journal of International Law* 74.

1415 "Wars of National Liberation" 147.

1416 Abi Saab "Wars of National Liberation" 147.

1417 Summers *Peoples and International Law* 227-232.

1418 Abi Saab "Wars of National Liberation" 147.

Liberation Front of Algeria in 1954. This movement claimed that they were fighting a delayed war of self-defence against the French invasion of 1830.¹⁴¹⁹ Similarly, in justifying India's annexation of Goa before the Security Council in 1961 the Indian delegate argued that it had acted in self-defence against the continued aggression of colonialism against the Goan people, who were one and the same as the Indian people.¹⁴²⁰

The American representative responded that it was true that self-defence would legitimise the use of force, but denied that it was applicable because Goa was "a defenceless territory," and as such posed no threat to India.¹⁴²¹ The Security Council was divided and unable to pronounce on the Goan incident. It must be noted finally that the argument that colonialism presents permanent aggression was not used frequently by the anti-colonial states during the debates on Friendly Relations and on Aggression. Its main fault seems to have been the difficulty of proving that military conquest was a *delictum juris gentium* during a time when this method of territorial acquisition was not only legally respectable but even morally compelling. The debates were marked by a progression towards homogeneity of thought among the Afro-Asia states, which was represented in the school advocating a broad interpretation of article 51.

The ICJ in the *Nicaragua* case also supported the view that the use of force against peoples exercising their right to self-determination is a breach of article 2(4) of the Charter.¹⁴²² It was argued by some states which support the legitimacy of the resort to the use force in the exercise of the right of self-determination that, as the colonial regime itself was installed by force, its maintenance was an act of "permanent aggression" against the original state.¹⁴²³ The right to self-defence under article 51 of the *UN Charter* was therefore available to peoples who are the victims of such aggression. Classical instances include the anti-colonial movements in Angola, Algeria, Mozambique, Zimbabwe, Guinea Bissau, Eritrea, East Timor and Western

1419 Wilson *International Law* 131.

1420 See the statement by the Indian permanent representative to the United Nations UNSCOR 987th mtg UN Doc S/PV/987 (1961) quoted in Raič *Statehood* 103.

1421 Gorelick 1979 *Case Western Reserve Journal of International Law* 78.

1422 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 191.

1423 Gardam *Non-Combatant Immunity* 74.

Sahara. In most of these cases the UN recognised some of the competing groups as legitimate or authentic representative of the peoples' struggles for self-determination.

The last theory stressed that article 2(4) is inapplicable to wars of national liberation, and that such cases of the use of force were legitimate.¹⁴²⁴ It was argued that article 2(4) prohibits the use of force and the threat of force in international relations only. It was possible that wars of liberation were not covered by the prohibition of the use of force set out by article 2(4). This was the predominant interpretation among Africa, Asian and Socialist states,¹⁴²⁵ but did not receive the support of a whole community. The Latin Americans hesitated to support the Afro-Asians beyond the domain of self-defence. They argued that this interpretation was certainly contrary to the spirit of the *UN Charter*, which makes all use of force illegal apart from self-defence. In the writer's view, however, article 2(4) is not so clear in this matter. Its import depends on how states read the *UN Charter*. If the *UN Charter's* purposes and principles were to prohibit the threat or use of force by states against states, it follows from this that the use of force by liberation movements is not contrary to the provision of the Charter.

Thus, while it could be argued that the rules pertaining to armed struggles of liberation movements obviate further inquiry as to their true nature, the underlying lack of state consensus in this matter does little to discourage the occurrence of liberation struggles.¹⁴²⁶ Further, it can be stressed that the international norms regarding the legality of the use of force for self-determination took a step forward in UN resolutions.

5.3.1.2.2 The UN resolutions

During the decolonisation period, the international community gave much theoretical support to those involved in struggles for self-determination. This support took the guise of multifarious resolutions adopted by the UN. Many of these messages of

1424 Gorelick 1979 *Case Western Reserve Journal of International Law* 80-81.

1425 Summers *Peoples and International Law* 227.

1426 Chadwick *Self-determination* 43-63.

support were founded on the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁴²⁷ The first and fourth paragraphs declared that:

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

All armed action or repressive measures of all kinds directed against dependent peoples shall cease to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.¹⁴²⁸

With regard to the above provisions, the use of force to prevent the exercise of self-determination is unlawful. But Resolution 1514(XV) does not provide for the use of force for the purpose of realising the right to self-determination.¹⁴²⁹

In the four years following the adoption of 1514(XV), jurists and statements from Third World Countries accepted that this use of force was legitimate. A resolution adopted in 1964 by the Conference of Jurists of Afro-Asian Countries held in Conakry stated that:

All struggles undertaken by the peoples for the national independence or for the restitution of the territories or occupied parts thereof, including armed struggle, are entirely legal.¹⁴³⁰

Resort to armed force by colonised peoples was also recognised by the Conference of Non-aligned Countries in 1964 in Cairo. At this conference the non-aligned countries declared that:

... [the] process of liberation is irresistible and irreversible. Colonised peoples may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if colonial powers persist in opposing their natural aspirations.¹⁴³¹

The idea that the achievement of liberation was irresistible was echoed in many UN resolutions issued by the General Assembly from 1965 onwards, which reaffirmed the legitimacy of the struggle for self-determination and thus for national liberation

1427 GA Res 1514 (XV) (1960).

1428 GA Res 1514 (XV) (1960).

1429 Pomerance *Self-determination* 48.

1430 Wilson *International Law* 95.

1431 Green "New States, Recognition and International Law" 130; Wilson *International Law* 95.

struggles, e.g. General Assembly Resolution 2105 (XX) of 1965.¹⁴³² Following this trend, Resolution 2625 (XXV) was adopted in 1970.¹⁴³³ This Resolution is significant with regard to the world community's view on self-determination, and indeed on the armed struggles of national liberation movements. Its drafting Committee worked on the basis of consensus, and it was also adopted by the General Assembly by consensus.

The adoption of this Resolution illustrates that by 1970 the international community had recognised the principle of self-determination as a legal right. It was important not only because of its positive contribution to the debate on the status of self-determination but also because of its reference to the use of force regarding self-determination and the legality thereof. It is worth indicating that under the 1970 Declaration, national liberation movements have *locus standi* in international law and that their armed struggles were characterised as armed conflicts of an international nature.

At the same time, the 1970 Declaration itself states that:

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 action 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 receive support in accordance with the purposes and principles of the Charter.¹⁴³⁴

This paragraph explicitly acknowledges that national liberation movements possess the authority to resort to force in international law, especially when forcible action is taken to deprive them of their right to self-determination. Under the 1970 Declaration, national liberation movements are entitled not only to use force in pursuit of self-determination, but they are also entitled to seek and receive support from third states.

1432 GA Res 2107 (XX) (1965); GA Res 2189 (XXI) (1966); GA Res 2326 (XXII) (1967); GA Res 2465 (XXIII) (1968); GA Res 2383 (XXIII) (1968); GA Res 2396 (XXIII) (1968); GA Res 2548 (XXIV) (1969); GA Res 2507 (XXIV) (1969); GA Res 2508 (XXIV) (1969); GA Res 2547 (XXIV) (1969).

1433 GA Res 2625 (XXV) (1970).

1434 GA Res 2625 (XXV) (1970).

Resolution 2649 (XXV)¹⁴³⁵ is another famous resolution on the legitimacy of the struggle for national liberation. It states that peoples under colonial, alien, or racist regimes are themselves entitled to restore the right to self-determination by any means at their disposal. This sentiment was reflected in Resolution 2787 (XXVI),¹⁴³⁶ which confirmed the legality of a people's struggle for self-determination. Resolution 3070 (XXVIII)¹⁴³⁷ categorically affirmed the right to pursue self-determination by all means, including armed struggle.

In the same vein, GA Resolution 3103 (XXVIII) stated in its preamble that:

... the continuation of colonialism in all its forms and manifestations is a crime and that all colonial people have the inherent right to struggle by all necessary means at their disposal against colonial powers and alien dominations in the exercise of their right to self-determination.¹⁴³⁸

Also, the first paragraph stated that:

... the struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law.¹⁴³⁹

The intention of this resolution was not only to grant legitimate combatant status to the members of liberation movements according to *Geneva Conventions*,¹⁴⁴⁰ but also to secure their right to self-determination to allow them to use force in accordance with international law. In addition to this, the General Assembly also adopted Resolution 2787 (XXVI) concerning specific instances of struggles for self-determination, particularly those of the peoples of Zimbabwe, Namibia, Angola, Mozambique, Guinea-Bissau and Palestine.¹⁴⁴¹ In this resolution the General Assembly confirmed the legality of their struggles for self-determination and recommended states to provide political, moral and material support to those struggling for self-determination and independence against colonial and alien domination.¹⁴⁴²

1435 GA Res 2649 (XXV) (1970).

1436 GA Res 2787 (XXVI) (1971).

1437 GA Res 3070 (XXVIII) (1973).

1438 Preamble to the GA Res 3103 (XXVIII) (1973).

1439 Par I of the GA Res 3103 (XXVIII) (1973).

1440 Geneva Convention (III) relative to the Treatment of Prisoners of War (1949); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).

1441 GA Res 2787 (XXVI) (1971).

1442 Para 1-3 of the GA Res 2787 (XXVI) (1971).

This issue was addressed again in 1974 by the Special Committee on the Question of Defining Aggression. Article 3 of the Definition of Aggression enumerates acts of aggression. The acts of national liberation movements were not considered as aggression. Article 7 states that nothing in the definition of aggression 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 as referred to in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of those peoples who struggle to that end to seek and receive support in accordance with the principles of the Charter.¹⁴⁴³

Furthermore, Resolution 2105 (XX) recognises the legitimacy of a national liberation struggle, and invites all states to provide material and moral assistance to the national liberation movements in colonial territories.¹⁴⁴⁴ Resolution 32/147¹⁴⁴⁵ on measures to prevent international terrorism narrowly reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the UN.

5.3.1.2.3 Towards the legality of the national liberation movements' right to use force in the exercise of self-determination

The resolutions described above refer to "all available means" at the disposal of people struggling for self-determination and the "legitimacy of their struggle" in pursuit of such a right. However, the ambiguous word "struggle" was problematic in its interpretation, which varied considerably among states.¹⁴⁴⁶ In late 1960 there was still strong disagreement on exactly what kind of "struggle" was being accepted as

1443 GA Res 3314 (XXIV) (1974).

1444 GA Res 2105 (XX) (1965).

1445 GA Res 32/147 (1977).

1446 Canada considered that "struggle" meant "struggle by peaceful means". Yugoslavia argued that peoples could use "all means at their disposal", including armed force. Yemen also argued that "all necessary means" encompasses "armed force". Summers *Peoples and International Law* 232.

legitimate. The Western States argued that the word "struggle" might not necessarily mean "armed struggle". It might also mean "peaceful struggle". Third World countries, however, interpreted the concept of "struggle" as "armed struggle". The form that this struggle could take had not been precisely delineated. The obvious inference was that resistance to forcible action would likewise involve force. This argument culminated in the number of resolutions, one of these being Resolution 3070 (XXVII), which reaffirms the legitimacy of peoples' struggles for liberation from colonial and foreign domination and alien subjugation, which may be conducted by all available means, including armed struggle.¹⁴⁴⁷

There was also discussion about what legal effects UN resolutions have in sanctioning the use of force in the exercise of self-determination. There was a tendency to consider these resolutions to be only a subsidiary source of international law. It was therefore argued that the use of force by peoples exercising self-determination was illegitimate. Though such resolutions do not generally create legal obligations, they have considerable legal significance. For instance, they may be cogent evidence of state practice and *opinio juris*. It is to be noted that, when voting for these resolutions, the aim of states in the UN General Assembly was to materialise customary international law regarding the use of force by national liberation movements.

As has been said earlier, rules of customary international law consist of two elements: the general practice of states, which is followed out of a sense of legal obligation or *opinio juris*.¹⁴⁴⁸ In this context, the idea of legitimate authority in international law is closely linked with recognition.¹⁴⁴⁹ In the case of liberation movements there have been two tendencies in state practice since WWII in regard to recognition. States either prematurely recognise governments which have been established by national liberation movements who represent the peoples considered to have a right to self-determination, or recognise a national liberation movement itself as distinct from a government formed by it, as the representative of its people.¹⁴⁵⁰

1447 GA Res 3070 (XXVIII) (1973).

1448 See Chapter IV par 4.7.4 above.

1449 Wight *Systems of States* 111-133; Wilson *International Law* 104.

1450 Dixon *Textbook on International Law* 70.

State practice shows that since 1945 the norms relating to the use of force have been amended to include *jus ad bellum* in pursuit of self-determination. The East Indies, which is now Indonesia, was a Dutch Colony until occupied by Japanese forces during WWII. After the collapse of the Japanese administration Indonesian nationalists declared their independence in August 1945. Indonesia was then recognised by Egypt, Syria, Iran, the United States, the United Kingdom, Australia, and China.¹⁴⁵¹ By gaining independence through the use of armed struggle Indonesia constituted the first example of its kind after WWII. Similar cases are Algeria and Guinea Bissau. In each of these conflicts, national liberation movements used force to achieve independence. One may thus draw the conclusion from the foregoing cases that there is an emerging customary international law on the use of force in pursuit of self-determination.

Following the above contention, there is agreement that peoples who have a right to self-determination are entitled to fight an armed struggle of national liberation against a colonial power or alien domination.¹⁴⁵² That is to say that the authority to use force by national liberation movements is triggered by colonialism. Such conflicts are not viewed as internal civil wars but rather as international wars to which the *jus ad bellum* applies. This is evidenced by a number of General Assembly resolutions that called upon states to support national liberation movements in their legitimate struggles against colonial and alien domination.

5.3.1.1 Third states' support for national liberation movements

Despite the prohibition on military aid to armed bands operating from neighbouring territories, there have always been states which were involved in the liberation struggles of other states.¹⁴⁵³ This support sometimes takes the form of "moral, political and material assistance, or military intervention on behalf of a national liberation movement".¹⁴⁵⁴ The first issue that must be tackled here is whether or not

¹⁴⁵¹ Briggs *The Law of Nations* 73.

¹⁴⁵² Malanczuk Akehurst's *Modern Introduction* 336.

¹⁴⁵³ Gardam *Non-Combatant Immunity* 76. "During the period of decolonisation ..., persistent attempts were made to justify in positive international law the use of force by a state in support of 'wars of national liberation' carried out by peoples in exercise of the right of self-determination". See Dinstein *War, Aggression and Self-defence* 68-69.

¹⁴⁵⁴ For example the Palestine Liberation Organisation (PLO), in its armed struggle with Israel, relies on the support of Syria and Iran. See Gray *International Law* 64.

such assistance is legally permitted under international law. It must be noted that third states are duty-bound to refrain from assisting a state denying self-determination to a people or a group entitled to self-determination.¹⁴⁵⁵ In contrast, they can provide economic, political, and logistical support to national liberation movements struggling for self-determination. The issue of third states assisting oppressive state is not analysed here, and it remains reserved for future examination. Instead, this section investigates the legality of state support of or sponsorship of national liberation movements in their struggle for self-determination.

In international law there is a duty not to assist armed bands that operate on the territory of another state. This is provided by article 2(4) of the *UN Charter*, which prohibits the threat or use of force against the territorial integrity of another state. This prohibition was reiterated in the *Nicaragua* case, where it was held that state support to the *contras* constituted the unlawful use of force and the infringement of the territorial integrity of a sovereign state.¹⁴⁵⁶ It is also to be found in a number of General Assembly resolutions that call upon states to refrain from supporting armed groups operating on the territory of another state. For instance, the second paragraph of Resolution 2131(XX) provides that:

No State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.¹⁴⁵⁷

In the same perspective, General Assembly Resolution 2625 (XXV), which interprets article 2(4), states that:

Every state has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.¹⁴⁵⁸

From this paragraph one may deduce that these acts, once committed in another state's territory, involve a threat or unlawful use of force. Such an argument seems to be confirmed by article 3(g) of the Definition of Aggression, which describes acts of aggression as follows:

1455 Cassese *Self-determination of Peoples* 141.

1456 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 251.

1457 GA Res 2131(XX) (1965) par 2.

1458 GA Res 2625 (XXV) (1970) par 1.

The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹⁴⁵⁹

While the above resolutions prohibit the giving of assistance to armed groups, there are some saving clauses in both the 1970 Declaration and the Definition of Aggression which provide that in their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, they are entitled to seek and to receive outside support.¹⁴⁶⁰ It is evident, therefore, that these resolutions contain two seemingly contradictory rules. It follows that the guerrilla manner of operation of national liberation movements is the source of the controversy.

The practice of states intervening in self-determination struggles is widespread.¹⁴⁶¹ This interference sometime takes the form of political, moral and material assistance to national liberation movements.¹⁴⁶² In other words, it may consist of measures of a political or economic nature, or it may constitute armed intervention with the training or provision of troops, arms and materials. Although there are a number of General Assembly resolutions which call upon states to provide assistance to peoples fighting for self-determination, the legality of such action is highly controversial and has been the subject of disagreement between Western and some Third World states.¹⁴⁶³

The GA has expressed its support for national liberation movements in a long series of annual resolutions. Both the 1970 Declaration on Friendly Relations and the Definition of Aggression provide that people in pursuit of the exercise of their right to self-determination are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.¹⁴⁶⁴ This implies that a third state could legally support national liberation movements. The same thought was also expressed in Resolution 3328 (XXIX), which urges all states and specialised agencies of the UN to provide moral and material assistance to all peoples under colonial and alien

1459 GA Res 3314 (XXIX) (1974).

1460 Olalia 2003 *International Association of People's Lawyers* 15-20.

1461 Gardam *Non-combatant Immunity* 76.

1462 Gardam *Non-combatant Immunity* 76.

1463 Chanea and Xanthki *Minorities, Peoples and Self-determination* 60.

1464 GA Res 2625 (XXV) (1970).

domination struggling for their freedom and independence, in particular to national liberation movements in Africa.¹⁴⁶⁵

The UN Security Council, too, has made a number of pronouncements in support of liberation movements in Africa. With respect to Southern Rhodesia, the Security Council reaffirmed the inalienable right of the people of Southern Rhodesia to self-determination and urged all member states of the UN to render moral and material assistance to them in their struggle to achieve freedom and independence.¹⁴⁶⁶ Again, in Resolution S/445 the Security Council commended the People's Republic of Angola, Mozambique and the Republic of Zambia and other front-line states for their support of Zimbabwe in its just and legitimate struggle for the attainment of self-determination and independence.¹⁴⁶⁷

The issue of assistance to national liberation movements was also touched upon in the *Nicaragua* case. Although the ICJ held it was not concerned with the process of decolonisation,¹⁴⁶⁸ Judge Schwebel referred to the problem of giving assistance to national liberation movements in his dissenting opinion. He stated that it was lawful for a foreign state to give to a people struggling for self-determination political, logistical, and humanitarian assistance; but it were not lawful for a foreign state to intervene in that struggle with armed force.¹⁴⁶⁹

The above statement shows that material assistance to a liberation movement by way of the provision of arms, training, funds and logistical support seems to be lawful. It should be added that it is only in the *Nicaragua* case that one can find which kind of support could be afforded to national liberation movements. As noted earlier, the 1970 Declaration as well as article 7 on the Definition of Aggression left undefined the type of the assistance which can be rendered to people who struggle for self-determination. The foregoing resolutions simply provide that such people are entitled to seek and receive support.

1465 GA Res 3328 (XXIV) (1974).

1466 SC Res 253 (1968).

1467 Par 2 of the SC Res 445 (1979).

1468 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Report par 206.

1469 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Report par 206.

Given the vague nature of the resolutions supporting national liberation movements, the question is whether they legally oblige states to support them or simply permit states to infringe the non-intervention rule. It is the writer's view that such support depends on the discretion of the states concerned. As previously noted, GA resolutions are not binding in themselves. But, the strongest argument that the GA resolutions described above have given rise to legal obligations on the part of individual states to support liberation movements is that they are evidence of customary international law requiring such support.¹⁴⁷⁰ It may therefore, be argued that in the process of decolonisation a norm has been developed, which permits states to assist people to implement their right to self-determination.

Since the classical process of decolonisation has largely been accomplished, the following section considers the post-colonial struggles for self-determination. The question of whether or not modern rebel groups have the right to use force to secure the right of their peoples to self-determination will be expounded upon in the following section.

5.3.2 *The use of force by rebel groups*

Apart from national liberation movements which fought for decolonisation, rebel groups are post-independence armed groups which claim to have the authority to use force on behalf of peoples who have been forcibly deprived of their capacity to exercise self-determination. International law clearly states that the denial of self-determination and basic human rights is contrary to the *UN Charter*, and any state that deprives its people of such a right gives them a new right, which is the right to use force against that oppressive regime.¹⁴⁷¹ This section seeks to analyse the legality of the use of force by rebel groups in pursuit of the right to exercise self-determination. It will first look at the history of rebels' right to use force for self-determination and the circumstances surrounding this right, and will then examine whether *jus ad bellum* is expanding to include not only states, but also rebel groups which claim to have the right to exercise this authority on behalf of the people they represent.

1470 Travers 1976 *Harvard International Law Journal* 576.

1471 Morris and Harvey "The Right to Self-determination and the Right to Rebel".

This section will subsequently turn to a consideration of state practice related to the use of armed force for self-determination outside the context of decolonisation, in order to determine if a customary norm has emerged under contemporary international law. In doing so, the focus will be on rebel groups involved in an internal armed conflict or a civil war to attain self-determination, rather than on rebel groups involved in an armed conflict with an international character aimed at achieving self-determination. Put differently, it is to be scrutinised to what extent the development of the concept of self-determination has transformed the norms governing armed conflicts outside the colonial context. Before proceeding to that exercise, this section will commence with a brief introduction to the concept of "non-international armed conflict" or "civil war". The purpose of this section, however, is not to discuss the concepts of "national liberation movements" and "rebel groups". The contemporary meaning of these concepts was discussed in detail in Chapter Three, where the distinction between rebel groups and liberation movements and how a rebel group may become a national liberation movement was discussed.¹⁴⁷² Further, this section shows that the substantive development of several aspects of the concepts of "civil war" is linked primarily to the history of the rebels' right to use force for the attainment of self-determination. This will also be dealt with in the present section.

5.3.2.1 The concept of "civil war"

While international armed conflict is defined as an armed confrontation between two or more states,¹⁴⁷³ non-international armed conflict or "civil war" is not clearly defined. It remains a notion about which several definitions have been proffered; yet it remains mysterious at heart. Selako¹⁴⁷⁴ defines a "civil war" as a violent struggle over the political control of a state occurring entirely within the geographical borders of that country. This position is also taken by Malanczuk. Among others.¹⁴⁷⁵ In his wording, a civil war is defined as an armed conflict between two or more groups of inhabitants of the same state, one of which may be the government.¹⁴⁷⁶ Phrased differently, a "civil war" is characterised by military action that occurs between the armed forces of a state and dissenting armed forces within the territorial boundaries

1472 See Chapter III par 3.4 above.

1473 ICRC "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?"

1474 Salako 2013 *International Law Research* 130.

1475 Malanczuk Akehurst's *Modern Introduction* 318.

1476 Malanczuk Akehurst's *Modern Introduction* 318.

of that state. This definition is clear enough as it includes post-independence civil wars as well as the struggles that national liberation movements pursued in the course of achieving independence. Yet the struggles for independence and liberation from colonial or foreign domination were characterised as international armed conflicts in numerous international documents, predominantly in General Assembly resolutions.¹⁴⁷⁷ The abovementioned definition is consequently not incontestable, and it is difficult to distinguish civil wars from armed conflicts of an international character occurring between national liberation movements and colonial powers.

In addition to Selako and Malanczuk, a vast number of other authors have defined a "civil war" as:

... an armed confrontation occurring within the territory of a single state [and] in which the armed forces of a rebel group or a dissident armed force are engaged against the governmental armed forces.¹⁴⁷⁸

According to this definition, civil wars do not include armed conflicts in which two or more states are involved in support of one or other party. Of course, the intervention of foreign states in a civil war leads to the transformation of it into an internationalised internal armed conflict.¹⁴⁷⁹ What is more, this definition excludes the situations where two or more armed groups fight each other without the involvement of the government's armed forces.¹⁴⁸⁰ A related problem is that the definition is not

1477 For instance, a 1(4) of *Additional Protocol I* classifies the armed conflict involving the struggle of peoples against colonial and alien domination within the realm of international armed conflicts. See *Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (1977); UNGA Res 2625 (XXV) (1970); UNGA Res 3103 (XXVIII) (1973). Both resolutions provide that armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts.

1478 Schmitt, Dinstein and Garraway *The Manual* 2; ICRC "How is the Term 'Armed Conflict' defined in International Humanitarian Law?"; Verri *Dictionary* 35.

1479 *Prosecutor v Duško Tadić (Appeal Judgement)* IT-94-1-A 1999 ICTY par 84. According to the judgment in this case, internal armed conflict may become international if (i) another state intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State. An internationalised internal armed conflict is a civil war characterised by the intervention of the armed forces of a foreign power. See Gasser 1983 *American University Law Review* 1945. In addition, Mitchell argues that a "civil war" becomes an internationalised armed conflict through a process in which one external party (normally the political authorities of another state and their official forces or agents) acts in support of one party in the internal armed conflict. See Mitchell 1970 *International Studies Quarterly* 167; Verri *Dictionary* 35; see also Schmitt, Dinstein and Garraway *The Manual* 2.

1480 In the *Tadić* case, however, the Court extends the definition of civil war to encompass protracted armed violence between rebel groups within a state. See *Prosecutor v Dusko Tadic aka "Dule" Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* 1995 IT-94-1 para 70; see also Sarkees, Wayman and Singer 2003 *International Studies Quarterly* 59.

clear as to whether or not it is applicable to all forms of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

In this respect, article 1(1) of Additional Protocol II provides the three features necessary to the concept of "civil war". First, it requires rebel groups to conduct the hostilities in accordance with the rules of war and through organised armed forces acting under a responsible command. Second, the rebel groups are required to have an effective control of a substantial party of national territory. This territorial control must be sufficient to enable them to carry out sustained and concerted military operations.¹⁴⁸¹ Finally, the rebel groups are required to have the capacity to enforce the laws of war.¹⁴⁸²

Embroidering on these conditions, it now becomes possible to formulate a working definition of the concept of "civil war". For the present study, civil war is defined as follows:

An armed conflict occurring between governmental armed forces and organised rebel groups or between such groups which, under responsible command, exercise such control over a part of a territory as to enable them to carry out sustained and concerted military operations and to implement the laws of war.¹⁴⁸³

This definition is based on three criteria: the organisational character, the level of intensity of the armed confrontation, and the ability to implement minimal humanitarian requirements. Furthermore, implicit in this definition of civil war is that the war is caused by the desire to form a new state (as in the case of the Nigerian civil war 1967-1970, the civil wars in Sudan 1955-1972 and 1983-2005 and the Mali civil war 2012 to date) or fought for the control of a state (Sierra Leone, Liberia and Syria).¹⁴⁸⁴ It should be noted, however, that this definition does not include a war of

1481 Nasu "Status of Rebels" 17.

1482 A 1(1) of the *Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflict* (1977).

1483 The "laws of war" here means the Additional Protocol II and Common Article 3 to the Geneva conventions. The Additional Protocol II is applicable to a situation in which government armed forces confront armed dissident forces, such as a situation in which part of the army rises up against the government. More frequently, it applies when the regular armed forces fight against rebels who have formed organised armed groups. See Junod 1983 *American University Law Review* 36.

1484 Malanczuk Akehurst's *Modern Introduction* 318; Salako 2013 *International Law Research* 131.

national liberation, that is, an armed conflict in which a people lacking statehood but organised within the framework of national liberation struggles for independence in order to attain self-determination. From a legal point of view, a war of national liberation in which peoples are fighting against colonial domination and against racist regimes in order to achieve self-determination is characterised as an international armed conflict.¹⁴⁸⁵ Since the focus here is on civil wars, non-international armed conflicts of international character will not be included in the following analysis.

5.3.2.2 An historical perspective on rebels' right to use force for self-determination

For an understanding of the present day significance of rebels' right to use force for the attainment of self-determination, it is important to consider its history. This right¹⁴⁸⁶ refers:

... to the right fundamentally to change a governmental structure or process within a particular nation-state, thus including the right to replace governmental elites or overthrow a particular government.¹⁴⁸⁷

The origin of the rebels' right to use force for self-determination can be traced back through Chinese legal history to the Confucian concept "Mandate of Heaven," which was formulated as early as in 1122 BC.¹⁴⁸⁸ According to Confucian philosophers such as Mencius (372-289 BC) heaven would bless the authority of the just ruler, but would be displeased and withdraw its mandate from a tyrannical ruler.¹⁴⁸⁹ In the case of an oppressive ruler, Confucians would suggest trying to reform him first, but if this proved to be ineffective he needed to be overthrown and replaced by one who would really benefit the people. In ancient Chinese history the doctrine of the "Mandate of Heaven" repeatedly influenced rebellions by "giving instant legitimacy upon successful rebel leaders".¹⁴⁹⁰ This was because "heaven" loved the people, and the

1485 A 1(4) of the *Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict* (1977); Verri Dictionary 35.

1486 Different terms are used to mean the same right: the right to revolution, the right to resist, the right to resistance, the right to rebellion, the right to rebel. However, for the purpose of this study the "right to rebel" is the working concept. This right is based on the Medieval Latin term *jus resistendi* which permitted peoples to engage in protests or armed rebellions against a king who violated their fundamental rights. See Marsavelski 2013 *Connecticut Journal of International Law* 267.

1487 Olalia 2003 *International Association of People's Lawyers* 4.

1488 Marsavelski 2013 *Connecticut Journal of International Law* 273.

1489 Weldehaimanot "The Right of Rebellion" 5-8.

1490 Marsavelski 2013 *Connecticut Journal of International Law* 273.

sovereign had to obey it. Whenever the ruler ignored the people's needs and ruled harshly, they had the right to revolt against him or even to overthrow him.¹⁴⁹¹ The right to rebellion was also reflected in early Islamic legal theory. Although the Qur'an is clear about the requirement of obedience (in such dicta as "Obey God, obey the Prophet, and obey those who hold authority over you" there is also a duty of disobedience.¹⁴⁹² It was contended that if the ruler orders something contrary to divine law, the subjects have the right to rise up in military rebellion against him.¹⁴⁹³

Separately from its development in the Eastern world, the right of rebellion is also rooted in Western legal history through the theory of "social contract". According to this theory, a people give power to the ruler when it enters into the contract, and if the power is abused by the ruler the people has right to remove him by force.¹⁴⁹⁴ The theory suggests that the legitimacy of a government depends on the consent of the governed and its respect for the rights of citizens.¹⁴⁹⁵ Consequently, if the ruler tyrannise the whole or a considerable part of the people, they have the right to resist and defend themselves from injury.

Various academic writers have provided substantial support for the thesis that a qualified right to rebellion which is triggered by oppression does in fact exist under traditional international law. In the 12th century a scholastic philosopher, John of Salisbury,¹⁴⁹⁶ argued that it is not only permitted, but it is also equitable and just to remove a tyrant from power. In the 13th century, St Thomas Aquinas¹⁴⁹⁷ further argued that one who liberates his country by killing a tyrant is to be praised and awarded. In the same period the *Magna Carta* of 1215 enabled the barons, in the case of violations of some of its provisions, to seize the king's property and use all

1491 Perry Challenging the Mandate ix; Marsavelski 2013 *Connecticut Journal of International Law* 273.

1492 Marsavelski 2013 *Connecticut Journal of International Law* 273.

1493 Black argued that the right to depose a tyrant should be exercised when injustice becomes so widespread that the elite start to gather in groups, talk freely together, and discover that war is their only hope. See Black *The History of Islamic Political Thought* 29.

1494 Paust "The Human Rights to Revolution" 445; see also Marsavelski 2013 *Connecticut Journal of International Law* 266.

1495 Henkin *et al Right v Might* 23.

1496 John of Salisbury *Policraticus* 25 cited in Marsavelski 2013 *Connecticut Journal of International Law* 267.

1497 Aquinas *Political Writings* 249-250; Marsavelski 2013 *Connecticut Journal of International Law* 268.

available means against him, without harming the king, the queen and their children.¹⁴⁹⁸

In this connection De Vattel (1714-1767)¹⁴⁹⁹ argues that when a prince violates fundamental laws, attacks the liberties and privileges of the people, or tends to despoil the nation, the people may resist him and oblige him to descend from the throne. He goes further to state that when public misery is raised to an extreme level, the people may say: *miseram pacem vel bello bene mutari*, that is, "even war is better than a wretched peace".¹⁵⁰⁰ In the same vein as that of these philosophers, Montesquieu elaborates on the question of a right to rebellion as well. In his *Persian Letters*¹⁵⁰¹ he states that if a prince is very far from making his subjects live happily and endeavours to oppress and ruin them, the foundation of obedience ceases; nothing attaches them to him, and they have the natural right to depose him. In addition, Montesquieu contends that the unrestricted power of a ruler cannot be lawful since it could never have been lawfully established.¹⁵⁰² He supports this statement by arguing that the people do not have unrestricted power over themselves, and subsequently they could not have transferred such power to the ruler, "for we cannot ... give to another more power over us, than we have ourselves".¹⁵⁰³

An argument of similar purport is made by John Locke, who notes that the right of rebels to use force on behalf of peoples results from the social contract. Locke's theory of social contract reflects the natural right of people to overthrow their leaders, if those leaders betray their historic rights.¹⁵⁰⁴ According to Locke, this right is exercised when:

1498 A 61 of *Magna Carta* provided that "If we, or our justiciar, our bailiffs, or any one of our servants offend in any way against anyone, or transgress any of the articles of the peace or of the security and the offence be notified to four of twenty-five barons; ... if our justiciar does not correct the transgression within forty days they shall..., among other things, seize our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon". For further comments see Turner *Magna Carta* 235.

1499 De Vattel *The Law of Nations* 105-107.

1500 De Vattel *The Law of Nations* 108.

1501 Montesquieu "Persian Letters" 378.

1502 Montesquieu "Persian Letters" 378.

1503 Montesquieu "Persian Letters" 378.

1504 Marsavelski 2013 *Connecticut Journal of International Law* 269.

... people are made miserable, and ... exposed to the ill usage of arbitrary power ... [and] generally ill-treated ... [through] a long train of abuses, prevarications, and artifices. ... this happens either when: (1) the authority has changed contrary to the people's will, or (2) the authority acts contrary to the end for which it was constituted.¹⁵⁰⁵

It is clear from this paragraph that Locke considers "rebels' right to use force" as a qualified right which is triggered by oppression.¹⁵⁰⁶ To Locke, when oppression prevails and there is no other superior authority to appeal to for assistance, people have the right to resort to armed struggle against the oppressor.¹⁵⁰⁷ According to his argument the action, once begun, continues until the people destroy the oppressor and place the rule in hands which may secure the ends for which the government was first established.¹⁵⁰⁸

In addition to such philosophical doctrine, the right to use force against tyrannical regimes was also incorporated into the documents which form the early foundation of the contemporary revolution in the attitude towards human rights. Of course, the Preamble to the United States Declaration of Independence provides that "all men are created equal, that they are endowed by their God with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."¹⁵⁰⁹ The Declaration goes on to state that a government derives its just powers from the consent of the people and is formed so as to secure the inalienable rights of the citizens. Whenever a government becomes destructive of these ends, it is the right of the governed to alter or to abolish it, and to institute a new government based on the principles which they believe to effect their safety and happiness.¹⁵¹⁰ The American Declaration emphasises that the overthrow of a regime is not to be undertaken for minor and transient causes, but is appropriate when there is a long train of abuses of human rights under "absolute despotism".¹⁵¹¹

This phrasing is identical to that of the French Declaration of the Rights of Man and Citizens.¹⁵¹² This Declaration asserts that "all sovereignty resides in the nation,"¹⁵¹³

1505 Locke *Two Treatises of Government* 203-204.

1506 Locke *Two Treatises of Government* 199-209.

1507 Locke *Two Treatises of Government* 199-209.

1508 Locke *Two Treatises of Government* 199.

1509 *United States Declaration of Independence* (1776).

1510 *United States Declaration of Independence* (1776).

1511 *United States Declaration of Independence* (1776).

1512 *French Declaration of the Rights of Man and Citizens* (1789).

and no one "may exercise any authority which does not proceed directly from the nation".¹⁵¹⁴ The French Declaration also spells out the natural and inalienable rights of man, including the right to be free from governmental oppression.¹⁵¹⁵ It may be argued from this that the failure of a government to deliver on the guarantee of civil and political liberties gives rise to the right of people to reform, alter or abolish such a government.

This right to use force against a government which disrespects the will of the people was also included in various early American state constitutions. For instance, article 2 of the *Ohio Constitution* provides that the "Government is instituted for the equal protection and benefit of the people".¹⁵¹⁶ Whenever these ends are perverted and public liberty is manifestly endangered, they have "the right to alter, reform or abolish it,"¹⁵¹⁷ and establish another as they may choose. Similar wording is used in the *New Hampshire Constitution*,¹⁵¹⁸ the *Kentucky Constitution*,¹⁵¹⁹ and in *North Carolina's Constitution* of 21 November 1789.¹⁵²⁰

In the light of the above, the President of the United States, Abraham Lincoln, in his inaugural speech, stated that there is a "revolutionary right to dismember or overthrow any governmental institution that is unresponsive to the needs and wishes of the people".¹⁵²¹ Lincoln's argument in favour of the right to revolution shows that this right has had a crucial historical root in the American culture. The right to

1513 A 3 of the *French Declaration of the Rights of Man and Citizen* (1789).

1514 A 3 of the *French Declaration of the Rights of Man and Citizen* (1789).

1515 A 2 of the *French Declaration of the Rights of Man and Citizen* (1789).

1516 A 2 of the *Ohio Constitution* of 1851.

1517 A 2 of the *Ohio Constitution* of 1851.

1518 A 10 of the Bill of Rights of *New Hampshire's Constitution* states that "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government". The same article further states that the "doctrine of non resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind". *Constitution of New Hampshire* of 1784.

1519 A XIII, section 1(4-5) of the Bill of Rights of the *Kentucky's Constitution* states that "all power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property". For the protection of these ends, "they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper". *Constitution of Kentucky* of 1850.

1520 That Government ought to be instituted for the common benefit, protection and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of humankind. See a 2 of the *Constitution of the State of North Carolina* of 1789.

1521 Lincoln 1861 "Inaugural Address" online by Peters and Woolley *The American Presidency Project* <http://www.presidency.ucsb.edu/ws/?pid=25818>.

revolution has also been admitted in the case law of United States courts. *In re Anastaplo*, the US Supreme Court stated that:

Since the beginning of history, there have been governments that have engaged in practices against the people so bad, so cruel, so unjust, and so destructive of the individual dignity of men and women that the "right of revolution" was all the people had left to free themselves. As simple illustrations, one government almost 2,000 years ago burned Christians upon fiery crosses, and another government, during this very century, burned Jews in crematories. I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join [in asserting a] belief in the right of the people to resist by force tyrannical governments like those.¹⁵²²

In view of this pronouncement and some other relevant instruments cited above, it may be concluded that American legal history offers little guidance as regards the existence of the right to use force by rebel groups in pursuit of self-determination.¹⁵²³ It now needs to be considered whether this right has been given any consideration in contemporary international law.

5.3.2.3 Rebels' right to use force for self-determination under contemporary international law

Given the many different ideological and philosophical foundations of the rebels' right to use force to secure self-determination, it is questionable whether or not this right is recognised by modern international law. For an understanding of the modern-day meaning of a rebels' right to use force in pursuit of self-determination, it is important to address the Universal Declaration of Human Rights, which is considered as the cornerstone in the construction of the global human rights regime.

The third paragraph to the Preamble of the Universal Declaration of Human Rights states that:

... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.¹⁵²⁴

1522 *In re Anastaplo* 366 US 82 (1961) cited in Marsavelski 2013 *Connecticut Journal of International Law* 271.

1523 Marsavelski 2013 *Connecticut Journal of International Law* 271.

1524 Par 3 of the preamble to the *Universal Declaration of Human Rights* (1948).

This provision explicitly acknowledges a right of rebels to use force when pursuing self-determination claims. In addition to this, it considers this right as an exceptional and last resort for ending the oppression. It may be observed that the right to use force against oppressive regimes is a logical consequence of the theory of government provided in article 21 of the Universal Declaration of Human Rights. According to this article, "the will of the people shall be the basis of the government".¹⁵²⁵ The Universal declaration further states that this will of the people shall be expressed in periodic and genuine elections. In addition to this, the first paragraph of article 21 provides that all peoples have the right to participate in the political decision-making process of their country, directly or through freely chosen representatives.¹⁵²⁶ What is more, the second paragraph of article 21 contends that everybody has the right to equal access to public service in his/her country.¹⁵²⁷

The wording of article 21 of the Universal Declaration of Human Rights demonstrates some similarities with common article 1 of the Human Rights Covenants of 1966. This provision grants all peoples the right to self-determination, and by virtue of that right they freely determine their political destiny, and their economic and social development.¹⁵²⁸ Whereas the right to use force to secure the right of people to self-determination is not mentioned in both instruments, it is contended that no state or person has a right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in the Covenants.¹⁵²⁹ Therefore, if a state does not have a government that represents the whole people belonging to its territory without any distinction, and systematically violates its people's fundamental human rights and freedoms, the people should be able to avail themselves of the right to resist oppression as a last resort. In other words, the lack of a representative government and serious and widespread violations of fundamental human rights would by their nature legitimise an armed opposition movement.

Another document which has been essential in the development of rebels' right to use force for self-determination was adopted four years after the ICCPR and

1525 A 21(3) of *Universal Declaration of Human Rights* (1948).

1526 A 21(1) of *Universal Declaration of Human Rights* (1948).

1527 A 21(2) of *Universal Declaration of Human Rights* (1948).

1528 A 1 of the ICCPR and ICESCR (1966).

1529 A 5(1) of the ICCPR (1966).

ICESCR. In 1970 the UN General Assembly adopted Resolution 2625 (XXV), which contends that self-determination could be implemented in varying ways, and peoples are free to choose the political fashion.¹⁵³⁰ In this regard it states the following:

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination 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.¹⁵³¹

An inverted reading of this paragraph would suggest that if a state uses force to deprive peoples of their right to self-determination, not only do those peoples have the right to take action against such a state, but they are also entitled to seek and receive support from third states. Thus, under the 1970 Declaration a movement representing a struggling people is entitled to use any necessary means at their disposal, including armed force.

In addition to the 1970 Declaration, the rebels' right to use force for self-determination provided in the *African Charter on Human and Peoples' Rights*, article 20(2) reads:

... oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.¹⁵³²

In this paragraph the point is made that rebel groups representing oppressed peoples in their action against and resistance to such forcible action used to deny them their right to self-determination are entitled to resort to armed force. On this matter, Wilson¹⁵³³ asserts that the 1970 Declaration authorises a right to use force when forcible action is taken to deprive people of their right to self-determination. To the same effect, the *African Charter* provides that the use of force in pursuit of self-determination is subject to the following conditions: first, existing oppression and

1530 GA Res 2625 (XXV) (1970).

1531 GA Res 2625 (XXV) (1970).

1532 A 20 (2) of the *African Charter on Human and Peoples' Rights* (1981).

1533 Wilson *International Law* 99.

substantial violations of the rule of law; and secondly, the exhaustion of available legal means.¹⁵³⁴

Furthermore, the *Vienna Declaration and Programme of Action*, which was adopted during the 1993 World Conference on Human Rights, in ambiguous terms recognises the legitimacy of a struggle by people in pursuit of their right to self-determination.¹⁵³⁵ This Declaration even considers "the denial of the right of self-determination as a violation of human rights" and asserts the right of peoples to take "any legitimate action," in accordance with the *Charter of the United Nations*, to realise their inalienable right to self-determination.¹⁵³⁶

The phrasing "any legitimate action" is not easy to define, but in the context of self-determination, it is often understood as "political action" or "armed struggle". However, even if some post-colonial instruments assume that "armed struggle" may be one of the means to attain self-determination, it is questionable whether the right of rebel groups to use force against tyranny and oppression is internationally recognised. For instance, no clear validation of such a right can be found in treaty law. As demonstrated previously, it is contained in UN resolutions, albeit still implicitly. What is more, it has been argued that UN declarations and resolutions are not binding laws. The Universal Declaration of Human Rights, nevertheless, is widely solemnised and treated as having changed in nature.¹⁵³⁷ It has attained the status of customary international law, which is binding on all states. As a considerable number of commentators have noted, the Preamble to the Universal Declaration of Human Rights actually supports the right of rebellion, and it reflects the growth of the acceptance of that right, at least from the period of the American Declaration of Independence.¹⁵³⁸

But the scope of the wording "rebellion against tyranny and oppression" remains undefined. In the absence of any qualification, "rebellion" could involve measures not amounting to the use of armed force. It is plain that interpreting the Preamble to the

1534 Marsavelski 2013 *Connecticut Journal of International Law* 275.

1535 *Vienna Declaration and Programme of Action* (1993).

1536 Par 2 of the *Vienna Declaration and Programme of Action* (1993).

1537 Weldehaimanot "The Right of Rebellion" 10.

1538 See, for instance, Bassiouni (ed) *International Terrorism* xii-xiii; Friedlander 1981 *Case Western Reserve Journal of International Law* 284-286; Kittrie 1981 *Case Western Reserve Journal of International Law* 304-305.

Universal Declaration of Human Rights does not allow one to conclude that the right of rebel groups to take recourse to force against tyranny in pursuit of self-determination is now a recognised principle of international law.

5.3.2.4 The right to rebellion and the general prohibition on the use of force

In the previous section it has been demonstrated that people have the right to resist any form of oppression.¹⁵³⁹ Accordingly, in their struggle for self-determination they are entitled to use all necessary means, including armed force. Therefore the question arises as to whether the authority to use force is expanding to include "rebel groups" which represent the struggling people in their forcible action to secure their right to self-determination. The arguments as to the legality of the use of force in pursuit of self-determination have taken different forms. As previously said, the use of force by a people to attain their right to self-determination is not covered by the general ban on the use of force¹⁵⁴⁰ As such, the use of force within the borders of states was traditionally considered a purely internal matter.¹⁵⁴¹ Put differently, the use of force for the attainment of self-determination fits logically into the category of civil war. Contemporary international law neither condemns nor condones civil wars aimed at achieving the right to self-determination within the boundaries of a sovereign state.

An alternative argument would be that where a government seriously or systematically violates the fundamental human rights and freedoms of its citizens, armed revolt is justified as a last resort.¹⁵⁴² It may be suggested that the prior use of force against the people is a prerequisite to their right to take recourse to force in pursuit of self-determination. This is similar to the traditional view of self-defence, which requires that there be an "armed attack" prior to one's exercising the lawful right to use force in self-defence. As Jordan Paust¹⁵⁴³ noted:

In response to governmental oppression of authority, the people of a given community have the right under international law to alter, abolish or overthrow any such form of government. Such a government would lack authority and could be overthrown in an effort to ensure authoritative government, self-determination,

1539 See Chapter V par 5.3.2.1 above; see also *Universal Declaration of Human Rights* (1948).

1540 A 2(4) of the *Charter of the United Nations* (1945); Gray *International Law* 54.

1541 Wilson *International Law* 22.

1542 Kirkpatrick and Gerson "The Reagan Doctrine" 20.

1543 Paust 1986 *Case Western Reserve Journal of International Law* 297-298.

and the human right to relatively free and equal individual participation in the political process. A regime contrary to the authority of the people is actually an illegal regime seeking to exercise power in violation of several interrelated international precepts. Hence, it has no right under international law to assure its survival.

Jordan Paust subjects the use force in pursuit of self-determination to certain conditions. The majority of the citizens must support it, or at least the rebels have to honestly and reasonably believe that the majority of them would agree to it if they knew the relevant circumstances.¹⁵⁴⁴ At the same time, armed insurrection is viewed as exceptional and a last resort for ending widespread violations of primary rights.¹⁵⁴⁵ This means that the right to take recourse to force to secure the right of self-determination cannot be exercised in true democratic political system whose authority is validated by periodic and genuine elections.

Against this backdrop, where the government is maintained by armed force rather than popular will, and where the government seriously or systematically infringes upon the fundamental human rights and freedoms of its citizens, they would have the right to resist by force. It is clear, therefore, that if the people of a particular state are considered by international law as possessing a legal right to self-determination but that state forcibly denies them the exercise of that right, they may need to proceed with armed force in order to attain such a right.

As it appears that international law is neutral to the use of force in pursuit of self-determination,¹⁵⁴⁶ it should be concluded that such a use of armed force is neither lawful nor unlawful (neither legal nor illegal). International law does not prevent rebel groups representing peoples struggling for self-determination from using armed force in pursuit of that right. There is no rule in international law against rebellion, and if a rebellion succeeds, there is nothing in international law that prohibits the acceptance of the outcome,¹⁵⁴⁷ unless it is achieved in violation of *jus cogens* norms.¹⁵⁴⁸ The

1544 Marsavelski 2013 *Connecticut Journal of International Law* 278.

1545 Honoré 1988 *Oxford Journal of Legal Studies* 39.

1546 The use of force to pursue self-determination can be defined as an armed force involving a state and an organised group who wants either to control the government, or to secede and form a new state. Malanczuk *Akehurst's Modern Introduction* 318.

1547 Wilson *International Law* 23.

1548 Vidmar argued that, in case of secession, the entity would not become a state where it merges in breach of certain fundamental norms of international law, in particular those of a *jus cogens* character. Vidmar *Democratic Statehood* 61.

practice shows that states are more willing to grant recognition when oppressed peoples either try to create their own state or to overthrow the government by revolutionary action.¹⁵⁴⁹ It is also suggested that where a repressive government deprives people of their free choice, third states may be willing to assist them in their armed struggles.¹⁵⁵⁰ This will be expounded upon in the following section.

5.3.3 State support for rebel groups

The norms governing foreign assistance to rebel groups are not entirely clear. As a general rule, third states are prohibited from giving aid to rebel groups in their struggle against a sovereign state. For example, General Assembly Resolution 2131 (XX) states that:

.... no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.¹⁵⁵¹

This rule, which is stated in the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, has been repeated in other resolutions,¹⁵⁵² and was reaffirmed by the ICJ in the *Nicaragua* case.¹⁵⁵³ This case dealt with a legal dispute between Nicaragua and the United States of America in 1986.¹⁵⁵⁴ It concerned the question of whether military and paramilitary activities in and against Nicaragua were internationally lawful. In 1981 it was made clear, not only in the United States press, but also in Congress and through an official statement by the President and senior United States officials, that the United States Government had been giving support to the anti-government armed force in Nicaragua, known under the name of the *contras*.¹⁵⁵⁵ In 1983 the United States

1549 Vidmar 2010 *St Antony's International Review* 41-42.

1550 Schachter 1984 *American Journal of International Law* 647.

1551 GA Res 2131 (XX) (1965).

1552 GA Res 375 (1949) on the Rights and Duties of States states that "every state has the duty to refrain from intervention in the internal or external affairs of any other state". The Resolution goes on to state that "every state has the duty to refrain from fomenting civil strife in the territory of another state, and to prevent the organisation within its territories of activities calculated to foment such civil strife". See aa 3 and 4 of the GA Res 375 (IV) (1949).

1553 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports.

1554 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports.

1555 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 20.

Congress enacted a budgetary legislation with a specific provision on funds to be used by United States intelligence agencies to support military or paramilitary operations in Nicaragua.¹⁵⁵⁶ The *contras* had already caused the considerable material damage and widespread loss of life in Nicaragua, and had also committed such acts as killing prisoners, indiscriminately killing civilians, torture, rape and kidnapping.¹⁵⁵⁷ Subsequently, Nicaragua submitted the case to the ICJ.

After a lengthy and formal assessment, the Court found that the United States' activities in relation to the *contras* constituted a breach of the customary international law principle of the non-use of force. The Court further emphasised that the United States had committed a *prima facie* violation of that principle by:

.... organising or encouraging the organisation of irregular forces or armed bands ... for incursion into the territory of another state, and participating in acts of civil strife ... in another State, in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to involve a threat or use of force.¹⁵⁵⁸

The court clearly viewed the arming or training of the *contras* not only as being an act of illegal intervention in the internal affairs of a foreign state, but also as a breach of the principle prohibiting the use of force set out in article 2(4) of the *UN Charter*. The Court further considered that the mere supplying of funds to the armed opposition groups, while undoubtedly constituting a breach of the principle prohibiting intervention in the domestic affairs of other states, did not in itself amount to a use of force.¹⁵⁵⁹ The Court's view that arming rebel movements is a breach of international law finds support in UN General Assembly Resolution 2625 (XXV), which states that each state has the obligation to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in the territory of another state.¹⁵⁶⁰ The question, therefore, is whether or not there is any relevant exception to

1556 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 20.

1557 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 20.

1558 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 228.

1559 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 228.

1560 GA Res 2625 (XXV) (1970).

the prohibition of the use of force that would allow a state to provide assistance to rebel groups representing peoples struggling for their right to self-determination.

There are at least three arguments that third states might deploy in order to be capacitated to provide assistance to rebel groups. First, the support of internal armed opposition may be justified under the doctrine of humanitarian intervention. It is argued that when a government seriously or systematically violates fundamental human rights and the freedoms of citizens, foreign states would be more willing to offer weapons and other support to a "rebel group" aiming at overthrowing tyranny.¹⁵⁶¹ This was the so-called "Reagan doctrine".¹⁵⁶² In 1986, President Reagan justifying aid to the *contras*, said that it is permissible to help the "freedom fighters"¹⁵⁶³ that are fighting to overthrow a repressive regime and install a democratic government in their country.¹⁵⁶⁴

The main problem with this argument is that there is very little state support for the view that international law permits states to help opposition armed groups on the ground of humanitarian intervention.¹⁵⁶⁵ Harris¹⁵⁶⁶ rightly notes that it is not generally accepted by states that unilateral or collective intervention that is not authorised by the UN is lawful. The legality of humanitarian intervention without the consent of the lawful government or UN Security Council authorisation has been rejected by several states. For instance, the 2000 Declaration of the South Summit by the G77 composed of around 130 member states rejected the so-called "right" of humanitarian intervention, which has no legal basis in the *UN Charter* or in the general principles of international law.¹⁵⁶⁷ Also, in the proceedings regarding the legality of the use of force by the NATO in Yugoslavia, the European states failed to rely on the doctrine of humanitarian intervention. Only the United Kingdom expressly

1561 Kirkpatrick and Gerson "The Reagan Doctrine" 30.

1562 Clark, Arend and Beck *International Law* 92.

1563 The distinction between terrorists and liberation or freedom fighters was dealt with in chapter three. See Chapter III par 3.4.

1564 Clark, Arend and Beck *International Law* 92; see also Schachter 1986 *University of Chicago Law Review* 142-144.

1565 Akande 2013 <http://www.ejiltalk.org>.

1566 Harris *Cases and Materials* 956.

1567 Declaration of the South Summit by Group of 77 (2000) http://www.g77.org/summit/Declaration_G77Summit.htm

relied on such a right.¹⁵⁶⁸ In this respect, the argument that international law today permits states to provide assistance to rebel groups on the ground of humanitarian intervention is rather weak, and has no support in state practice.

The second possible argument that may be advanced by states in order to support rebel groups is that the bar on providing aid to rebels does not apply where foreign states are providing aid to a government involved in civil strife.¹⁵⁶⁹ According to Moore, all aid to both the rebel group and the incumbent government should be frozen once a genuine internal war begins.¹⁵⁷⁰ When reading this argument a *contrario*, arguably, Moore took the view that if a state intervenes on behalf of an incumbent government, other states are free to give aid of an equal nature to a rebel group to counter the effect of the initial grant. This theory is based on the doctrine of "counter intervention", which was recognised as an emerging law of intervention in the Cold War period.¹⁵⁷¹

It has been argued that even though international law allows incumbent governments to request foreign military assistance, such assistance is prohibited in a situation where the rebels constitute an organised movement with the political object of achieving self-determination.¹⁵⁷² Furthermore, in the view of Christine Gray,¹⁵⁷³ there is a duty not to intervene in a civil war in the absence of UN or regional authorisation, even at the request of the government. It follows from this contention that where a conflict can be regarded as a civil war, it would be contrary to the principle of self-determination to support a government that is attempting to deprive a people of the exercise of self-determination.¹⁵⁷⁴ Those who hold this view also suggest that assistance in civil war situations is nevertheless allowed in cases where there has been prior intervention in support of the other side of the conflict. In fact, this view is

1568 Akande 2013 <http://www.ejiltalk.org>; Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion) Written Statement of the United Kingdom (17 April 2009). The United Kingdom stated that "We are confronted with an exceptional situation in an exceptional region in an exceptional time, during which a certain group – unfortunately, for cultural and ethnic purposes – has suffered from repercussions of blind violence, ethnic cleansing and deprivation of the most basic of their rights. That has led to intervention in order to put a stop to those inhuman practices, and it led to the developments that have just taken place".

1569 Gray *International Law* 60-94.

1570 Moore 1982 *American University Law Review* 845.

1571 Gomulkiewicz 1988 *Washington Law Review* 44.

1572 Dugard *International Law* 514.

1573 Gray *International Law* 78.

1574 Şahin 1999 *Dış Politika-Foreign Policy* 1-4.

used to justify assistance to rebel groups in cases where a foreign government is providing assistance to the government. For example, after the Soviet intervention in Afghanistan at the end of 1979, Egypt and Saudi Arabia started arming and training the Muslim rebels against the Soviets backed government.¹⁵⁷⁵

However, it is questionable whether the assistance to rebels to counterbalance the help obtained by the established authorities from foreign states has enough support in legal doctrine and state practice to be considered an actual entitlement under international law. As Shaw¹⁵⁷⁶ points out, state practice is far from clear. Any argument suggesting that aid to the rebel groups is acceptable where a prior intervention on the side of government has occurred needs to be taken with caution, as international law does not provide a right to support armed opposition groups. Even though states have regularly provided assistance to rebel groups, they do it secretly and without arguing that their conduct is legal.

Another argument that can be made in order to provide assistance to rebels is that international law permits state support for movements fighting for self-determination. This argument is based on the practice of states during the decolonisation period. In this period many Third World countries supported the right to intervene in liberation struggles to promote decolonisation and to fight against racist regimes.¹⁵⁷⁷ The Soviet Union and its allies also argued that they had the right to intervene in struggles for self-determination.¹⁵⁷⁸ Equally, Western countries, particularly the United States of America, have claimed the right to support armed groups within states seeking to topple allegedly repressive regimes.¹⁵⁷⁹ This argument, prominent during the decolonisation era, has not disappeared with the demise of the colonial empires; instead, it is extended to all self-determination struggles.¹⁵⁸⁰ As Reisman¹⁵⁸¹ points out, one of the basic values undergirding the *UN Charter* is the promotion of and protection of human rights, including self-determination. If a government becomes destructive of these ends, foreign states could permissibly

1575 Malanczuk *Akehurst's Modern Introduction* 320.

1576 Shaw *International Law* 1153.

1577 Arend and Beck *International Law* 86.

1578 Arend and Beck *International Law* 86.

1579 Schachter *International Law* 120.

1580 Schachter *International Law* 120.

1581 Reisman 1984 *American Journal of International Law* 642-645.

support "freedom fighters" in their armed resistance to the repressive regimes.¹⁵⁸² Thus article 2(4) should not be read as an absolute, but should rather be interpreted to allow force in a good cause, such as the attainment of the right to self-determination.¹⁵⁸³

The foregoing argument has received some support in many the UN General Assembly resolutions. For instance, the 1970 Declaration on Principles of International Law recognises that peoples may use force to resist governments which deprive them of self-determination. This resolution emphasised that peoples struggling for self-determination are entitled to seek and receive support from foreign states in accordance with the purpose and principles of the *UN Charter*.¹⁵⁸⁴ Article 7 of Resolution 3314 (XXIX) on the Definition of Aggression further states that peoples forcibly deprived of self-determination are entitled to seek and receive outside support, in accordance with the *UN Charter* and in conformity with the 1970 Declaration.

The difficulty with this argument is, however, that there are many potential definitions as to what constitutes "assistance" to rebel groups. The term "assistance" to rebel groups has been taken by some states to mean "moral and political assistance" and by others to mean "material assistance", such as arming and training the rebels.¹⁵⁸⁵ The issue of lawfulness of the arming and training of the *contras* by third states was dealt with by the ICJ in the *Nicaragua* case. Even though the Court held that it was not concerned with self-determination conflict in its decision, Judge Schwebel addressed this issue in his dissenting opinion. He stated that although it may be legitimate for a third state to provide moral and political support to peoples struggling

1582 Arend and Beck *International Law* 86.

1583 Schachter 1984 *American Journal of International Law* 647.

1584 GA Res 2625 (XXV) (1970).

1585 Under the Truman policy, announced in 1947, the United States of America undertook to give military and economic support to government "freedom fighters" resisting subjugation by armed minorities or outside pressure. In the 1980's the US position which has come to be known as Reagan Doctrine was that a government which denies political freedoms and democratic rights cannot be considered to be based on "the consent of the governed" and therefore lacks legitimacy in a political and legal sense. Subsequently, the use of force against such a regime by a foreign state would not be against the territorial integrity or political independence of the state. Schachter *International Law* 122.

for self-determination, it is not permissible for a third state to intervene militarily in such struggles.¹⁵⁸⁶

Viewed from this perspective, giving humanitarian assistance to rebel groups is lawful in every respect. But the giving of material aid to rebel groups by way of the provision of weapons, training, funds and logistical support seems to be more controversial and problematic.

Finally, another possible approach that may be taken by states in order to support rebel groups is the recognition of belligerency, which is the acknowledgements of a juridical fact that there exists a state of hostilities between two groups competing for power or authority.¹⁵⁸⁷ According to customary international law, the recognition of belligerents presupposes the existence of four conditions:

- (a) an armed conflict of a general nature must exist within the state;
- (b) the rebels must occupy and administer a substantial portion of national territory;
- (c) the rebels must conduct hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; and
- (d) circumstances must exist which make it necessary for third states to define their attitude by means of the recognition of belligerency.¹⁵⁸⁸

It is apparent from this above quotation that when a state of belligerency exists, a third state may formally recognise the belligerent group and may give it military or economic assistance. The use of the belligerency test is the assurance that before the group of rebels can receive international support, it must attain widespread popular support and operate with respect for human rights.¹⁵⁸⁹ It should be emphasised that technically speaking, the belligerency standard is considered as a threshold test for supporting rebel groups.

Although the belligerency standard seems to be a good test of the legitimacy of a rebel group, it is widely criticised in the doctrine for having become a dead letter in

1586 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Report par 180.

1587 Nasu "Status of Rebels" 3; Menon *The Law of Recognition* 110 cited in Higgins 2004 *Journal of Humanitarian Assistance* 6.

1588 Lauterpacht *Recognition* 175-176.

1589 Gomulkiewicz 1988 *Washington Law Review* 44.

modern international law.¹⁵⁹⁰ Another argument is that there is no central international body to judge or declare when a state of belligerency exists. It is also argued that the status of belligerency has nothing to do with the legality of aiding a group of rebels, but rather gives rise to the application of the rules of international humanitarian law including those requiring third states to be legally neutral towards both of the parties involved in a civil war.¹⁵⁹¹ In this regard, the ICJ in the *Nicaragua* case held that no general right to assist an armed opposition group exists in international law.¹⁵⁹²

The demise of the doctrine of belligerency and the prohibition of intervention in civil strife has prompted the international community to consider the rebels as a *de facto* government of "free peoples" resisting subjugation. Once a state has granted recognition to the *de facto* government, it will argue that it is acting in support of a government instead of in support of a rebel group. This would not be a breach of the principle of not providing weapons to rebel groups, as the point of this argument would be that a *de facto* government is not a rebel group but actually a government of free peoples.¹⁵⁹³

This argument was advanced by many European States when they provided early recognition of the Libyan National Transitional Council (NTC) as the government of Libya while Gaddafi's government still controlled much of Western Libya.¹⁵⁹⁴ Recognition of the Libyan NTC as the government of Libya when it did not have effective control of most of Libya was premature and consequently of dubious legality. In addition, early recognition of a rebel group as a *de facto* government would also amount to premature recognition. The legality of the premature recognition of governments coupled with the giving of assistance to that "government" is doubtful. Such recognition could also create a big gap in the prohibition of the use of force, allowing states to circumvent the rule simply by recognising groups that are not in reality governments.

1590 Gomulkiewicz 1988 *Washington Law Review* 47-48.

1591 Nasu "Status of Rebels" 5.

1592 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ Reports par 109-110.

1593 Akande 2013 <http://www.ejiltalk.org>.

1594 Akande 2013 <http://www.ejiltalk.org>.

From the preceding paragraphs it may be argued that while states might be willing to provide assistance to a rebel group in a situation of oppression struggling for self-determination, there is no international duty to grant such aid. There are no relevant court decisions or academic writings providing sufficiently clear evidence to suggest that rebel groups may lawfully use force to overthrow or secede from the governments which deprive them of the right to self-determination. It now needs to be considered whether this right has been given any prominence in state practice.

5.4 African cases of military intervention to secure the right to self-determination

After discussing the current rules of international law regarding state support to rebel groups, it is necessary to look at the position of the African Union's right to intervention in order to find out if intervention to promote self-determination is legitimate. For this purpose, this section first of all looks at the background to the OAU/AU's right of intervention. Furthermore, it looks at different African situations in which the AU has intervened so far in order to secure the right to self-determination. Finally, this section discusses the practice of regional organisations following a *coup d'état*, and asks whether such international or regional organisations are entitled to use force in support of self-determination.

5.4.1 The practice of the Organisation for African Unity / African Union

The OAU on which the AU was built came into operation in 1963 in Addis Ababa, Ethiopia.¹⁵⁹⁵ The main goals of the OAU were, *inter alia*, to promote decolonisation, self-determination and self-rule in African states.¹⁵⁹⁶ However, after independence had been achieved many African States did not practice what they advocated during their engagement against the colonials, but rather engaged in political repression, denial of self-determination, restrictions of freedom of association, and other human rights violations. Constitutional governments were routinely overthrown in several African countries and replaced by military rulers.¹⁵⁹⁷ Since 1952, Africa has experienced no fewer than 85 military coups with 78 taking place from 1961 to

¹⁵⁹⁵ *Charter of the Organisation of African Unity* (1963).

¹⁵⁹⁶ See aa II(c) and III(3) of the *Charter of the Organisation of African Unity* (1963); Omorogbe 2011 *Vanderbilt Journal of Transnational Law* 546.

¹⁵⁹⁷ Udombana 2002 *American University International Law Review* 1177-1211.

1997.¹⁵⁹⁸ As such, to a certain extent, one can agree with the writers who have contended that military *coups d'états* accompanied by political assassinations as well as civil wars frequently backed by OAU Member States characterised the lifetime of the OAU.¹⁵⁹⁹

The OAU consistently granted recognition to governments that came to power through coups, even when those governments were unpopular and had no political support within the state in question.¹⁶⁰⁰ In practice the OAU usually accepted whichever government was in effective control of the territory and allowed that government to represent its state within the OAU.¹⁶⁰¹ This resulted in continuing uncertainties as regards the practice of democracy, constitutionalism, the rule of law and respect for human rights in most African countries.¹⁶⁰² This was the case in Zaire under Mobutu Sese Seko; in Uganda under Idi Amin and Milton Obote; in Nigeria under the various military regimes that overran Nigeria from 1966 shortly after independence; in Central African Republic under Bokassa; in Malawi under Kamuzu Banda; in Equatorial Guinea under Nguema; in Ghana under various military rules culminating in that of Rawlings; in Kenya under Arap Moi; and in Rwanda under Habyarimana, to list but a few.¹⁶⁰³ In such instances, the OAU as a pan-African organisation did not use its power to engender an atmosphere of respect for human rights and the principle of self-determination. It considered the regime changes as solely internal matters to be settled internally by each state. It is obvious that although the OAU condemned violent coups and the assassinations of political leaders,¹⁶⁰⁴ in practice it was completely preoccupied with the respect for the

1598 Van der Linde 2001 *African Human Rights Law Review* 127-128.

1599 Muhire *The African Union's Right of Intervention* 65.

1600 Omorogbe 2011 *Vanderbilt Journal of Transnational Law* 125.

1601 Omorogbe 2011 *Vanderbilt Journal of Transnational Law* 126.

1602 Uzoukwu *Constitutionalism* 2.

1603 Nmeihelle 2003 *Singapore Journal of International and Comparative Law* 412-413.

1604 After the Cold War the OAU adopted a general policy against unconstitutional changes of government. For example, in 1993 the OAU adopted the Cairo Declaration establishing a conflict-resolution mechanism within the organisation that enabled Member States to give practical expression to the consequences of unconstitutional changes of government. In 1997 at its summit meeting in Harare, Zimbabwe, the OAU Assembly called for a return to constitutional government in Sierra Leone and encouraged the Economic Community of West African States (ECOWAS) to achieve that goal. See OAU Council of Ministers, Sierra Leone 66th Sess Doc No CM/2004(LXVI)-C (1997) [http://www.africa-union.org/root/au/Documents/Decisions/com/47 CoM_1997b.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/47%20CoM_1997b.pdf). The Assembly declared that several governments that had come to power through unconstitutional means since the Harare summit should restore constitutional legality by the next annual summit in 2000. These states were Comoros, Congo Brazzaville, Guinea Bissau, and Niger. See OAU Ass *Decision on Unconstitutional Changes of*

sovereign equality, territorial integrity and non-intervention in internal affairs of states.¹⁶⁰⁵

It was not until the establishment of the AU that African leaders decided to condemn military coups and other forms of unconstitutional change of governments. The AU came into existence by replacing the OAU in 2000, in the city of Lomé, Togo.¹⁶⁰⁶ The core purposes of the AU were, *inter alia*, to promote respect for "democratic principles, human rights, the rule of law and good governance",¹⁶⁰⁷ and the "condemnation and rejection of unconstitutional changes of governments"¹⁶⁰⁸ within its member states. Failure to comply with these standards could lead to harsher sanctions, including the loss of the right to participate in the activities of the Union,¹⁶⁰⁹ as well as other political or economic measures as authorised by the Assembly.¹⁶¹⁰

However, while unconstitutional change is outlawed under the *AU Act*, the AU's collective reactions to unfair election or *coups d'état* have not been consistent. For instance, although the AU imposed travel restrictions, diplomatic exclusion, a foreign asset freeze and selective embargoes against Togo (2005), Guinea (2008) and Madagascar (2010) as a result of unconstitutional seizure of political power, the São Tomé and Príncipe (2003) and Côte d'Ivoire (2010) cases, which are similar cases, led only to condemnation and/or a call for peaceful settlement.¹⁶¹¹ Further, it may be noted that, with respect to some cases, the AU called for the return to constitutional order by recommending that free and fair elections be held. But because the coup-makers were able to take part they were able to manipulate the elections in order to

Government 35th Sess Doc No AHG/Dec 142 (XXXV) (1999) par 1. The OAU took a further step by adopting various declarations condemning unconstitutional power takeovers, such as the Algiers Declaration in 1997 and the Lomé Declaration in 2000, on a framework for responses to unconstitutional regime changes. Similarly, in 1997 it endorsed an embargo imposed by the East African countries against Burundi following an unconstitutional change in government there. See Omorogbe 2011 *Vanderbilt Journal of Transnational Law* 127-127.

1605 Nmehielle 2003 *Singapore Journal of International and Comparative Law* 416.

1606 See the *Constitutive Act of the African Union* (2000).

1607 A 4(m) of the *Constitutive Act of the African Union* (2000).

1608 A 4(p) of the *Constitutive Act of the African Union* (2000).

1609 A 30 of the *Constitutive Act* states that: "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union". See the *Constitutive Act of the African Union* (2000).

1610 A 10(2) of the *Constitutive Act of the African Union* (2000).

1611 Yihdego 2011 *European Law Journal* 584.

auto-legitimate themselves, as was done by Ravalomanana in Madagascar in 2002 and Bozizié in the Central Africa Republic in 2005.

With regard to military intervention in support of self-determination, the AU intervened in the Comoros¹⁶¹² in 2007 following the display of a secessionist tendency by Anjouan's out-going leader, Bacar.¹⁶¹³ After a series of negotiations and the failure of diplomatic efforts aimed at convincing Bacar to step down, the AU authorised military action to restore the authority of the Comorian Union Government.¹⁶¹⁴ This military action, which was to be named "Operation Democracy in the Comoros," was approved at the meeting held under the auspices of the AU Peace and Security Council by the Ministers of Foreign Affairs of Tanzania, Libya, Sudan and Senegal in Addis Ababa on 20 February 2008. Despite South Africa's opposition to the use of force, the AU forces and Comorian troops attacked the Anjouan Island on 25 March 2008, and within two days the whole Island was under the control of the intervening forces.¹⁶¹⁵ As a result of this intervention the democratically elected government of the Union of the Comoros was reinstated on October 2008. This shows that the AU is very reluctant to any take action which would dismember or impair, totally or in part, the territorial integrity or political unity of its member states.

The AU's principle on unconstitutional change of government and the implementation thereof has been further challenged by the Arab Spring in Tunisia, Egypt, and later in Libya. With regard to Tunisia and Egypt, the AU expressed concern over the manifestations and supported fair and free elections, but it was incapable of directly interfering with the domestic affairs of these states to support either side. At the same time, the AU explicitly condemned the disproportionate use of force in Libya and called for an end to repression and violence, but neither ruled out nor advocated

1612 The Comoros are an Archipelago of Islands situated in the Indian Ocean, which were reputedly settled by Arab seafarers before becoming a French colony in 1912. The Comoros originally consisted of four main Islands, namely Grand Comore, Mohéli, Anjouan and Mayotte, with an area of some 2,400 square Kilometers. Following the referendum held in 1974, the first three Islands attained their independence from France in 1975. Mayotte voted against independence, choosing to remain a French entity; and following a referendum held on 29 March 2009, it became the 101st overseas department of France. See Muhire *The African Union's Right of Intervention* 223-224.

1613 Ramuhala 2011 *Scientia Militaria: South African Journal of Military Studies* 50.

1614 Ramuhala 2011 *Scientia Militaria: South African Journal of Military Studies* 50.

1615 Svensson *The African Union's Operations in the Comoros* 21.

the notion of Union intervention there. From a practical perspective, it has been observed that the AU's responses to unconstitutional changes of government are rather weak. This weakness may be justified by the AU's response to the brutal repression against the supporters of an Egyptian democratically elected President, Mursi. Thus, not only the AU itself but also its member states refrained from demanding the re-installation of Mursi as the elected President, given the importance of defending democracy and the popular demand.

It is important to note that the *AU Constitutive Act* does not clearly provide for the right of the Union to intervene in a member state for regime change or restoration of a democratically-elected government, but rather it provides for the right of the Union to intervene "in respect of grave circumstances, such as war crimes, genocide, and crimes against humanity".¹⁶¹⁶ Member states also have the right to request for intervention in such circumstances.¹⁶¹⁷ It is worth noting that article 4(h) of the *AU Act* was amended in 2003 to extend the right of the AU to intervene in the case of a "serious threat to legitimate order",¹⁶¹⁸ but the *Protocol on Amendments to the Constitutive Act* still has to enter into force.

In the light of the above it is important to note that while military *coups d'états* and other forms of unconstitutional changes of government have been outlawed under the *OAU/AU Charters*, it may be concluded that the reaction to such practice is limited to condemnation and rejection. At the same time, however, the OAU/AU practice offers only little guidance in the matter of a legal right to intervene in member states to support rebel groups in their struggle for self-determination. It now needs to be ascertain if military intervention to promote self-determination has been given any prominence in the practice of African sub-regional organisations.

5.4.2 *The practice of the sub-regional organisations*

Apart from the OAU/AU practice, intervention for the purpose of enhancing self-determination has had some support in the practice of African sub-regional organisations. It has to be noted that Africa has many sub-regional organisations, known also as Regional Mechanisms or Regional Economic Communities. These

¹⁶¹⁶ A 4(h) of the *Constitutive Act of the African Union* (2000).

¹⁶¹⁷ A 4(j) of the *Constitutive Act of the African Union* (2000).

¹⁶¹⁸ See a 4 of the *Protocol on Amendments to the Constitutive Act of the African Union* (2003).

include the Economic Community of West African States (ECOWAS, 1975), the East African Community (EAC, 1977), the Economic Community of Central African States (ECCAS, 1981), the Intergovernmental Authority on Development (IGAD, 1986), the Arab Maghreb Union (AMU, 1989), and the Southern African Development Community (SADC, 1992).¹⁶¹⁹ Most of these organisations have their own way – though it is not well developed – to promote the rule of law and self-determination among their member states.

In practice, however, these organisations have not been willing to intervene in support of self-determination. Nevertheless, military intervention in support of self-determination has some support in the practice of the ECOWAS. ECOWAS has seen the gross, systematic, and persistent denial of self-determination as a justification of humanitarian intervention. This trend is illustrated by its effort to respond collectively to civil strife. The clear examples in this respect would be the civil war in Liberia (1990) and the Sierra Leone (1998). On August 7, 1990, when ECOWAS and the AU were not able to mediate a peaceful end to the Liberian conflict, the ECOWAS Standing Monitoring Committee decided to establish an ECOWAS Cease-fire Monitoring Group (ECOMOG) for Liberia.¹⁶²⁰ The ECOMOG mandate was *inter alia* "to restore law and order, and to create the necessary conditions for free and fair elections"¹⁶²¹ Upon their arrival in Monrovia, however, the ECOMOG forces were actively involved in fighting with warring factions, and therefore were accused of supporting one faction or the other. The ECOMOG forces were also accused of being dominated by Nigeria and supporting Doe's regime. Olakounlé Yabi correctly notes that the ECOWAS intervention in Liberia aimed at ending "civil wars involving one or several armed rebel groups and protecting the government of a legally recognised Member State".¹⁶²² It is clear from the previous contention that the aim of the intervention was not to defend the political standards adopted by ECOWAS such as the principles of democracy and self-determination,

1619 Muhire *The African Union's Right of Intervention* 211.

1620 The main parties in the Liberian internal armed conflict were: the Armed Forces of Liberia (AFL) led by the incumbent President Samuel Doe, the National Patriotic Front of Liberia (NPFL) led by Charles Taylor, and the United Liberation Movement of Liberia for Democracy (ULIMO) led by Alhaji Kromah. See Muhire *The African Union's Right of Intervention* 155.

1621 ECOWAS Standing Mediation Committee, Decision A/DEC 1/8/90, on the Cease-fire and Establishing of an ECOWAS Cease-fire Monitoring Group for Liberia (1990).

1622 Yabi *The Role of ECOWAS in Managing Political Crisis and Conflict* 6.

but rather to rescue its member facing rebellion.¹⁶²³ The case of Liberia is therefore not a clear example in support of intervention for the purpose of enhancing self-determination.

In addition to its intervention in Liberia, ECOWAS also intervened in Sierra Leone, following the *coup d'état* which expelled President Ahmed Tejan Kabbah from power in May 1997. Kabbah came to power in March 1996, after the first free elections in Sierra Leone in over thirty years. However, the rebels of the Revolutionary United Front (RUF) contested the results and forced President Kabbah into exile in Guinea in 1997. The Armed Forces Revolutionary Council (AFRC), a coalition of government soldiers and member of the RUF led by Major Johnny Paul Koromah, established themselves as Sierra Leone's new government.¹⁶²⁴ The international community strongly condemned the *coup d'état* in Sierra Leone and called for the restoration of the legitimate constitutional order.¹⁶²⁵ For instance, five months after the *coup d'état*, the Security Council passed Resolution 1132, requesting the military junta to "relinquish power" and allow the "restoration of the democratically elected government". Although the Security Council found that the situation in Sierra Leone constituted a threat to international peace and security in the region, it stopped short of authorising military intervention.¹⁶²⁶ From his exile in neighbouring Guinea, Kabbah requested ECOWAS to take military action in order to reinstate the democratically elected government, stating that there was no other option since arms were the only language that AFRC could understand.¹⁶²⁷

In response to Kabbah's call and following the failure of the diplomatic efforts aimed at convincing the military junta to re-establish constitutional order, the ECOMOG forces launched a general military offensive which led to the overthrow of the military

1623 It has to be noted that when Nigeria decided that ECOMOG should intervene in Liberia a few months after Charles Taylor's rebel movement attacked the Doe's regime, neither the victim of the attack nor the Nigerian government could be described as models of democracy and respect for self-determination and human rights. See Yabi *The Role of ECOWAS in Managing Political Crisis and Conflict* 6.

1624 Muhire *The African Union's Right of Intervention* 156; see also Nowrot and Schabacker 1998 *American University International Law Review* 325.

1625 Nowrot and Schabacker 1998 *American University International Law Review* 328.

1626 Nowrot and Schabacker 1998 *American University International Law Review* 328.

1627 Muhire *The African Union's Right of Intervention* 156; Nowrot and Schabacker 1998 *American University International Law Review* 32.

regime.¹⁶²⁸ The democratically elected President Kabbah was reinstated on 10 March 1998, and became the first democratically elected African leader to be returned to power through military intervention.¹⁶²⁹ ECOWAS intervention in Sierra Leone was therefore accepted by the international community at large. As noted by Nowrot and Schabacker,¹⁶³⁰ the OAU welcomed ECOMOG's action almost immediately.¹⁶³¹ Further, in the statements and resolutions that followed the ECOWAS intervention, the Security Council never objected to the ECOMOG's offensive. Rather, the Security Council commended the important role that ECOWAS had played to put an end to the military junta.¹⁶³² Apparently, the international community preferred to turn a blind eye to the illegality of the ECOWAS intervention.¹⁶³³ Although there was no legal basis for the ECOWAS intervention under the *UN Charter*,¹⁶³⁴ it was at least accepted by the international community as legitimate. Put differently, the ECOWAS intervention, though illegal, was acknowledged to be morally permissible, and received support and applause from several quarters, including the United States, the European Union, the United Nations and other non-ECOWAS African countries.¹⁶³⁵

While the ECOWAS intervention in Sierra Leone may serve as an argument in support of intervention to promote self-determination, it was not in support of rebel

1628 Omorogbe 2011 *Vanderbilt Journal of Transnational Law* 127; Muhire *The African Union's Right of Intervention* 156.

1629 Nowrot and Schabacker 1998 *American University International Law Review* 312-412.

1630 Nowrot and Schabacker 1998 *American University International Law Review* 330.

1631 Nowrot and Schabacker 1998 *American University International Law Review* 330.

1632 Nowrot and Schabacker 1998 *American University International Law Review* 330.

1633 Nowrot and Schabacker 1998 *American University International Law Review* 330.

1634 The *UN Charter* does not provide that a regional organisation may forcibly intervene in an internal conflict if the UN does not. According to Chapter VIII Article 53 of the Charter of the UN, "no enforcement action shall be taken under regional arrangements or by regional agencies without [prior] authorisation of the Security Council...". *Charter of the United Nations* (1945). Clearly ECOWAS intervened in Sierra Leone without prior authorisation of the Security Council. Hence, unless ECOWAS could justify intervention on some other legal basis, the intervention would seem to have been unlawful. In addition, for a regional agency to take military enforcement action, it must be empowered to do so by its constitutive act or subsequent protocol or treaty. In this respect, the ECOWAS treaty of 1975 did not provide for a regional security mechanism to deal with internal conflicts. Furthermore, neither the ECOWAS Protocol on Non-Aggression, nor the ECOWAS Protocol relating to Mutual Assistance on Defence empowers ECOWAS to take enforcement action in a purely internal conflict. From a legal point of view, the ECOWAS action would appear to have been unlawful, unless ECOWAS invoked a customary right to humanitarian intervention, which would also be controversial. See *Treaty Establishing the Economic Community of West African States* (1975); *ECOWAS Protocol on Non-Aggression* (1978); *ECOWAS Protocol Relating to Mutual Assistance on Defence* (1981); see also Levitt 1998 *Temple International and Comparative Law Journal* 346-347.

1635 Sesay 1996 *Review of African Political Economy* 42.

groups. Also, it should be noted that the main argument advanced by ECOWAS member states for the armed attack against the military junta in Sierra Leone was not the violation of self-determination but rather the gross violation of human rights. With regard to the legality of the use force, ECOWAS resorted to a number of mixed legal and political justifications. These included the atrocities committed by the military junta against Sierra Leone and the threat to regional peace and security. The case of Sierra Leone would therefore not be a clear precedent in support of military intervention to help rebel groups struggling for the right of peoples to self-determination.

5.5 The use of force in relation to secession and state practice

As was observed previously, state practice is one of the two elements of customary international law, and is often considered to be the key element in the process of the formation of customary international law.¹⁶³⁶ In search of traces of a customary right of rebels to use force in pursuance of self-determination, it needs to be asked if there is enough state practice to contribute to the crystallisation of such right. For the purpose of this study, this section will identify and discuss the post-independence secessionist movements in Eritrea, South Sudan, Katanga, Biafara and Somaliland, focusing on the patterns of state behaviour that may be crystallising into customary international law. The section will also seek to group these cases into successful cases (Eritrea and South Sudan), and unsuccessful cases (Katanga, Biafara, and Somaliland). Finally, the ongoing Tuareg conflict in northern part of Mali aimed at gaining independence of the Azawad province will be expounded upon in the present section.

The cases examined below are of importance to the present study in different ways. They have been selected to illustrate the post-colonial state practice related to the use of force for the attainment of self-determination. Among other things, these instances serve to examine whether or not the denial of self-determination accompanied by widespread violations of human rights gives rise to the right to use force. As will be contended below, these cases are about seceding from an existing

1636 See Chapter Four par 4.7.4.1 above.

state, possibly due to human rights violations or the denial of self-determination, and are not connected to the decolonisation process.

5.5.1 *African cases of successful secession*

5.5.1.1 Eritrea

As previously said, Eritrea was very different from Ethiopia. As early as during the existence of the Axumite Kingdoms, Eritrea was part of Abyssinia. Between the eleventh and nineteenth centuries, Eritrea became a part of Ethiopia.¹⁶³⁷ It was occupied by Italy from 1885 to 1889. Following the treaty of Ucciale of 1889 (between Ethiopia and Italy), Eritrea became an Italian colony in 1890.¹⁶³⁸ When Italy's colonial rule over Eritrea came to an end in 1941, Eritrea was administered by the United Kingdom under a trusteeship until 1952. After a period of trusteeship the UN General Assembly, in complete disregard of the Eritreans's demand for independence,¹⁶³⁹ decided that Eritrea should be federated with Ethiopia under the sovereignty of the imperial crown.¹⁶⁴⁰ Under this federal arrangement, Eritrea was given autonomous status with legislative, executive and judicial powers over internal Eritrean affairs.¹⁶⁴¹ The two territories federated in 1952, but that federation was short-lived. On 14 November 1962, in violation of the UN General Assembly Resolution, Ethiopia's Emperor Haile Selassie unilaterally dissolved the federal arrangement¹⁶⁴² and annexed Eritrea.¹⁶⁴³ Thus, Eritrea was reduced to the status of the 14th province of Ethiopia.¹⁶⁴⁴

The unilateral dissolution of the federal structure had been contested by radical elements within Eritrea, who argued that the incorporation of Eritrea into Ethiopia

¹⁶³⁷ Cassese *Self-determination of Peoples* 219.

¹⁶³⁸ Cassese *Self-determination of Peoples* 219.

¹⁶³⁹ It is submitted that by the end of 1945 there were two political parties which favoured independence after a period of trusteeship: the Eritrean Independence Party and the Islamic League Party. According to the British colonial ruler in Eritrea, 75% of the Eritrean people supported the demand for independence, while the remaining 25% supported either union with Ethiopia or other forms of association with outside forces. See Tesfagiorgis 1987 *Wisconsin International Law Journal* 10.

¹⁶⁴⁰ Par 1 of the GA Res 390 A (V) (1950); Cassese *Self-determination of Peoples* 219.

¹⁶⁴¹ Par 2 of the GA Res 390 A (V) (1950).

¹⁶⁴² Kumbaro 2001 <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf>; Tesfagiorgis 1987 *Wisconsin International Law Journal* 106; Mekonnen *Transitional Justice* 34.

¹⁶⁴³ Tesfagiorgis 1987 *Wisconsin International Law Journal* 106.

¹⁶⁴⁴ Makinda 1982 *Third World Quarterly* 94.

constituted another form of colonialism and the denial of their right to self-determination.¹⁶⁴⁵ It was then that the newly-formed Eritrean Liberation Front (ELF) resorted to armed force to fight what they called illegal Ethiopian occupation, and to promote the idea of establishing an independent Eritrean state.¹⁶⁴⁶ This movement launched an armed struggle for independence which was widely known in the 1980s as the longest armed struggle in Africa.¹⁶⁴⁷ In its struggle the ELF received outside support from the People's Republic of China, Cuba, and some Arab states, notably Syria¹⁶⁴⁸ and Iraq.¹⁶⁴⁹ It also had representatives in most Arab countries, with Bagdad as its headquarters, and Damascus and Tripoli housing the main offices. In Western Europe, furthermore, it had offices in Rome and Stockholm. The ELF also had headquarters in Kuwait and offices in Aden, Beirut, Rome and Paris.¹⁶⁵⁰ Notwithstanding the many years of struggle, the ELF did not win the sympathy of African states. The only ELF office in Sub-Saharan African Countries was at Kampala. This was because most African leaders tended to limit self-determination to internal processes for fear of undermining the artificially created African boundaries.¹⁶⁵¹ It was argued that the success of the Eritrean secessionist movement would not only adversely affect Ethiopia's territorial integrity, but also would have far-reaching implications for the rest of the African countries by inspiring other secessionist movements.¹⁶⁵²

In 1970 the ELF split into two groups. One continued to be named the ELF Revolutionary Council and the other was called the Eritrean People's Liberation Front (EPLF). Both movements kept fighting for independence with support from

1645 Makinda 1982 *Third World Quarterly* 94.

1646 Mekonnen *Transitional Justice* 36.

1647 Mekonnen *Transitional Justice* 37.

1648 From 1964 Syria was the staunchest supporter of the Eritreans and, furthermore, of all liberation movements in Middle East countries. The Syrian position was taken in the defence of the "oppressed Moslem people" as and was opposed to the position of Egypt, which was limited by internal considerations, and to that of a very conservative Saudi Arabia. Syria became the champion of the ELF. The secretary general of the ELF, Mr Osman Saleh Sabbi, found a permanent refuge there. Syria furnished almost all the Czech- or Russian-made arms used by the combatants. The ELF has been equipped with relatively modern arms since 1966, and about 2000 guerrillas were trained primarily in Syrian camps. See Červeník 1977 *Africa Spectrum* 42.

1649 Gayim *The Eritrean Question* 469-598.

1650 Červeník 1977 *Africa Spectrum* 44.

1651 Selassie 1997 *Colombia Human Rights Law Review* 117.

1652 Selassie 1997 *Colombia Human Rights Law Review* 117.

Moscow, Cuba and some Arab states.¹⁶⁵³ In 1974 Emperor Haile Selassie was ousted in a military coup and replaced by Menghistu Haile Mariam. As Menghistu's regime was unable to control these liberation movements they went on the offensive and expanded to control most of the territory of Eritrea. From 1974 - 1991 both liberation movements did their best to liberate the countryside and cities. In February 1990 the ELF's and EPLF's forces captured the port of Massawa, and one year later they entered the capital city, Asmara. In 1991, in coalition with the Ethiopian People's Revolutionary Democratic Front (EPRDF), they entered Addis Ababa, the capital of Ethiopia. Menghistu Haile Mariam fled to Zimbabwe and Eritrea's thirty-year armed struggle was over.¹⁶⁵⁴

Following the collapse of Mengistu's regime, the Ethiopian transitional government acknowledged that the people of Eritrea had the right to self-determination and consented to the organisation of a referendum on Eritrea's independence. The internationally observed referendum held in April 1993 resulted in an overwhelming majority of 99.8 % of Eritrean voters opting for independence. Eritrea proclaimed its independence on 24 May 1993,¹⁶⁵⁵ and thus won its rightful place among the family of nations after a long and horrible armed conflict.

At first glance it appears as if the secession of Eritrea from Ethiopia initially constituted a case of the use of force in relation to self-determination. However, while the circumstances leading to the declaration of independence involved the use of armed force, it remains open to question whether it can actually be classified as a case in which a rebel's right to use force for self-determination was accepted. A number of arguments may be adduced in this regard. First, it has been argued that contemporary international law does not recognise the authority to use force for rebel groups to secure their right to self-determination. Secondly, during the period of the armed struggle the states of the world were divided in their attitude towards granting recognition to the Eritrean liberation movements. The international community refused to see the "Eritrea struggle" as anything other than an internal Ethiopian

1653 It is submitted that Saudi Arabia, Syria, Libya, Egypt, Sudan and a number of other Arab countries supported Eritrea's independence during the armed struggle years with varying degrees of support. Sahini 1999 *Diş Politika-Foreign Policy* 31.

1654 Selassie 1997 *Colombia Human Rights Law Review* 119.

1655 Selassie 1997 *Colombia Human Rights Law Review* 119.

problem. Most states, especially African states, argued that if Eritrea's claim for secession received a hearing, it would undermine the entire post-colonial African state system as legitimised by the Cairo Resolution of the OAU in 1969.¹⁶⁵⁶ Eritreans, nevertheless, argued that Eritrea's case was not the secessionist struggle of an ethnic or minority group, as in Katanga in the Congo and Biafra in Nigeria during the 1960s.¹⁶⁵⁷ Rather, they considered their armed struggle as a continuation of an unfinished quest for decolonisation.¹⁶⁵⁸

In this context and considering the silence of the protagonists and their supporters regarding the existence in this case of any legal norm relating to the use of force to attain self-determination, it appears that the Eritrea case cannot be seen as a clear example in support of rebels' right to use force in relation to self-determination. Indeed, it is obvious that Eritrean independence was not a direct outcome of the military victory. At the end of the armed struggle, the Provisional Government of Eritrea postponed a declaration of independence and insisted on a referendum.¹⁶⁵⁹ Eritrea proclaimed its independence only after the referendum held in April 1993. In sum, it is clear that although Eritrea's claim of independence was preceded by a long and tragic war, the secession took place without opposition of the Eritrean authorities.

5.5.1.2 South Sudan

Apart from Eritrea, South Sudan is another country where independence was preceded by a long and horrible civil war. The civil war between North and South Sudan broke out in 1955, one year prior to the country's attainment of independence from Britain.¹⁶⁶⁰ The main cause of this armed conflict was the tensions over religion, the control of resources, power and ethnicity.¹⁶⁶¹ As previously said, Southern Sudan was not only physically separated from the North, but it was also culturally, ethnically and linguistically different as well. During the colonial period Southern Sudan had never been governed as a part of Northern Sudan, but rather had always been

1656 OAU AGH/Res 16 (I) (1964). This Resolution reaffirmed the immutability of the national boundaries achieved after independence.

1657 Selassie 1997 *Colombia Human Rights Law Review* 119.

1658 Selassie 1997 *Colombia Human Rights Law Review* 118-119.

1659 Selassie 1997 *Colombia Human Rights Law Review* 119.

1660 Metelits 2004 *Africa Today* 69.

1661 Schafer "Negotiating the North/South Conflict" 1.

administered as a separate entity.¹⁶⁶² However, when the colonial rule came to an end the wishes of the South to be seen as a nation were dismissed. The South eventually felt compelled to support independence for a united Sudan, convinced that its demands to greater autonomy or a diversified federal system would be respected once independence had been attained. But the government which assumed control of a united Sudan after independence proved to be ineffectual at redressing local grievances and fulfilling national aspirations for unity. Having inherited a politically, economically and ethnically divided country, the government attempted to rule only by oppression. Arabisation programmes were expanded and all development aimed at achieving equality between the regions was abandoned.¹⁶⁶³

In response to this, the Southern Sudanese people decided to organise a rebel movement, which was known as the Sudan African Nationalist Union or Anya-Nya. The Sudan's first civil war, which was also the first in post-colonial Africa, began in August 1955, a few months before independence was achieved in January 1956.¹⁶⁶⁴ From that time on, the Anya-Nya intensified the fight for self-determination for the south, with independence as the ultimate goal.¹⁶⁶⁵ During the conflict the Anya-Nya received some support, especially from among neighbouring countries. For instance, Chad, Ethiopia, Kenya, Uganda, and Zaire (now the Democratic Republic of the Congo) allowed Israel to establish military bases in their territories to train the Anya-Nya. These countries not only provided military bases to the Anya-Nya movement, but also gave the movement military and logistical aid in its drive for self-determination. With this aid, the Anya-Nya continued to defend the southern Sudanese people and to foil the Arabisation policy in its region. It was not until the signing of the Addis Ababa Agreement that the first civil war was ended, in 1972. The most important result of this agreement was the establishment of Southern

1662 Lloyd 1994 *Columbia Journal Transnational Law* 441.

1663 Southerners had gained only three seats in the Constituent Assembly. Also, the Northern leadership had discretionary powers to fill all the vacant administrative posts in the South with Northerners and initiated a policy of rigorous Arabisation. See Lloyd 1994 *Columbia Journal Transnational Law* 440.

1664 Johnson *The Root Causes of Sudan's Civil Wars* 21.

1665 Lloyd 1994 *Columbia Journal Transnational Law* 440.

Sudan as an autonomous entity, with its own Parliament and High Executive Council.¹⁶⁶⁶

However, the President of Sudan, Nimeiri kept systematically undermining the autonomy given to the south under the Addis Ababa Agreement.¹⁶⁶⁷ It is worth noting that southerners were subject to government policies which not only undermined southern autonomy but which also consistently directed resources away from southern development. The situation deteriorated in September 1983, when Nimeiri declared a revision of the penal code so that it would be linked "spiritually and organically" to Islam.¹⁶⁶⁸ The newly enacted law established a set of Islamic principles that implemented Islamic punishments for non-Muslim activities such as the consumption of alcohol.¹⁶⁶⁹ This decree brought about renewed oppression and caused further uprising in the south, which led to renewed fighting and the second civil war.

In December 1983 the southern militia, calling themselves Anya-Nya II or the Southern People's Liberation Army (SPLA), fled to the bush again in response to Islamic oppression. The SPLA, commanded by John Garang, fought from that time on to overthrow Khartoum's repressive rule. As was the case in the first phase, neighbouring countries were still involved in the Sudan's second civil war. It is worth mentioning that Eritrea, Ethiopia, Kenya and Uganda remained the main military and logistical sponsors of the SPLA.¹⁶⁷⁰ Even Egypt, the former backer of Khartoum's regime, guardedly changed sides in favour of the SPLA.¹⁶⁷¹ The rebels also received logistical support from the United States and Israel. The major concern of these countries in giving military and economic aid to the SPLA was their policy of preventing the spread of Islamic fundamentalism.¹⁶⁷² In 1996 Eritrea, Ethiopia and Uganda received over \$20 million worth of arms from the US on behalf of the rebel movements in Sudan.¹⁶⁷³

1666 Metelits 2004 *Africa Today* 69.

1667 Metelits 2004 *Africa Today* 69-70.

1668 Metelits 2004 *Africa Today* 69.

1669 Schafer "Negotiating the North/South conflict" 4.

1670 Ali, Elbadawi and El-Batahani "Sudan's Civil War" 200-210.

1671 Korwa 1988 *African Security Review* 44-53.

1672 Korwa 1998 *African Security Review* 50.

1673 Sudan: Arms against a Sea of Troubles, *Africa Confidential*, 37(23), 15 November 1996 1.

The external support helped the SPLA to fight a twenty-two year civil war that internally displaced over four million people, resulted in the creation of 600 000 refugees, and caused over two million deaths from fighting, famine and disease.¹⁶⁷⁴ This civil war officially ended when the Comprehensive Peace Agreement (the CPA) was concluded between the Government of Sudan and the SPLA in 2005. The CPA provided for an interim period of six years, after which the Southern Sudanese were to vote in a referendum on independence.¹⁶⁷⁵ In a January 2011 referendum, the people living in southern Sudan overwhelmingly voted in favour of independence.¹⁶⁷⁶ South Sudan officially declared independence on 9 July 2011, and five days later became the 193rd United Nations member.¹⁶⁷⁷

While South Sudan's independence is widely considered as the final outcome of the longest civil war ever, the question was whether the Southern Sudanese rebel groups had the legal authority to use armed force in this respect. It is argued that peoples who have a legal right to self-determination are entitled to fight a liberation war if the state administering that territory refuses to let them exercise that right.¹⁶⁷⁸ As previously said the Southerners were being subjected to oppression and prevented from participating in government. This subjugation would give rise to the right of the southern Sudanese to use force to secure their right to self-determination.

With regard to the above argument, the remaining question is whether this right, which has a certain amount of doctrinal support, has also enough support in state practice in order to be an actual entitlement in international law. It is submitted that during their conflict, the southern Sudanese rebel groups gained a fair degree of third state support, but it follows from practice that when states gave support to the Sudanese rebel groups they were motivated by their own security interests, not by any sense of legal duty. Consequently, the case of South Sudan would not be a relevant precedent in support of rebels' right to use force in relation to self-determination.

1674 Lango and Patterson 2010 *International Journal of Applied Philosophy* 3-5.

1675 Lango and Patterson 2010 *International Journal of Applied Philosophy* 3-5.

1676 Belloni 2011 *Ethnopolitics* 411.

1677 Huliaras 2012 *Commonwealth and Comparative Politics* 257.

1678 Morris and Harvey "The Right to Self-determination and the Right to Rebel".

5.5.2 African cases of unsuccessful attempts at secession

In addition to the successful struggles of Eritrea and South Sudan, some other African post-independence conflicts might be seen to be relevant with respect to the question of the emergence of a customary right to use force for self-determination. In this respect, a few cases will be discussed in support of state practice on this matter, in particular the unsuccessful secession of Katanga in DRC, Biafra in Nigeria, Somaliland in Somalia, and the Tuareg case in the Northern part of Mali.

5.5.2.1 Katanga

Katanga is one the provinces of DRC and the most mineral-rich region in the country. The Katangan secessionist movement dates from the colonial period. Under the Congo Free State, Katanga was administered by the privately owned *Comité Spécial du Katanga* until 1910, when its administration was transferred to the colonial administration.¹⁶⁷⁹ In 1960 Katanga was one of the most sparsely populated of the Congolese provinces, with a population of 1,709,659. In spite of the smallness of the population, approximately 13 per cent of the total population of the DRC, Katanga was the most resource-rich of the Congolese provinces.¹⁶⁸⁰ The overwhelming concentration of mineral wealth within the boundaries of Katanga had obvious political implications. It wanted to secede from the rest of the Congo with the end aim of not sharing its wealth with the rest of the country.

Consequently, Katanga proclaimed its independence in July 1960, one month after the Congo itself became independent. The declaration of Katanga's independence resulted from the Congolese army's mutiny, which occurred five days after independence. This secessionist regime, under the leadership of Moïse Tshombe, gained a little support, particularly from the Belgian Government.¹⁶⁸¹ It is observed that, though the Belgian Government refused to extend official recognition to the newly born Katangese Republic, it nevertheless acknowledged the independence of the province and the King paid public homage to the tribes which have preserved

1679 Ndikumana and Kisangani "The Economics of Civil War" 3.

1680 During colonial rule the Belgian administration derived 60 per cent of its revenue from the province, and foreign mining interests reportedly earned \$47 million in net profit from Katanga in 1960. Lemarchand 1962 *American Political Science Review* 405; Buchheit *Secession* 142.

1681 Crawford *The Creation of States* 404.

their amity with Belgium.¹⁶⁸² Katanga's secessionist movement was not officially condemned by the Belgian Government, but instead was strongly supported militarily, financially and diplomatically.¹⁶⁸³ In addition to supplying armaments, Belgium, the Federation of Rhodesia and Nyasaland, and the Congo-Brazzaville facilitated Katanga in the recruitment of mercenaries, and provided advisors.¹⁶⁸⁴

Although the Katanga secession was backed by Belgian troops almost from the beginning, it was neither recognised by individual states nor by the UN. Rather, the UN Security Council adopted Resolution 143 (1960), which called upon the Government of Belgium to withdraw its troops and also authorised the UN Secretary-General to "take the necessary steps" to provide the Congolese Government with military and technical support.¹⁶⁸⁵ It was on the basis of this resolution that the Security Council authorised the deployment of a United Nations peacekeeping force in the Congo, known as the ONUC. In the beginning the ONUC operated under the peacekeeping principles which mean that force could be only used in self-defence and as a last resort, but as the crisis dragged on the ONUC's mandate was progressively expanded in further resolutions,¹⁶⁸⁶ to include the use of force to end the secession.

The UN forces eventually conducted four major operations in order to implement the new mandate. These operations were known as Operation "Rum Punch," Operation "Morthor," Operation "Unokat" and Operation "Grand Slam".¹⁶⁸⁷ The first operation was an enforcement of the Security Council Resolution 161/1961, and was conducted in order to arrest and expel all mercenaries and political advisors believed to be preventing Tshombe from engaging in negotiations for the peaceful settlement of the secession.¹⁶⁸⁸ The second operation was intended not only to arrest and expel uninvited foreign troops, but also to arrest secessionist leaders, with the exception of Tshombe.¹⁶⁸⁹ The failure of the Morthor operation and consecutive negotiations led

1682 Lemarchand 1962 *American Political Science Review*.415.

1683 Dorn and Bell 1995 *International Peacekeeping* 13.

1684 Katangese secession relied on approximately 500 well-trained and disciplined foreign mercenaries for leadership of its army. See Dorn and Bell 1995 *International Peacekeeping* 13.

1685 Buchheit *Succession* 144.

1686 SC Res 146 (1960); SC Res 161 (1961); and SC Res 169 (1961).

1687 Tshiband 2009 <http://ssrn.com/abstract=1417417>.

1688 Tshiband 2009 <http://ssrn.com/abstract=1417417>.

1689 Tshiband 2009 <http://ssrn.com/abstract=1417417>.

the UN to do everything it could in the third and fourth operations. The ONUC's forces eventually defeated Tshombe's rebels in January 1963.¹⁶⁹⁰

With regard to the legality of the use of force for self-determination, it is questionable if the Katanga secessionist struggle serves as an argument in support of rebels' right to resort to the use of force to attain self-determination. From the legal point of view, the UN argued that Katangan secession was illegal,¹⁶⁹¹ and therefore any action conducted in that context was *ipso facto* illegal.¹⁶⁹² Also, with regard to state practice during the civil war, although some states provided arms, equipment, and other forms of support to the Katanga rebels, they refused to grant diplomatic recognition. The majority of the UN members considered the Katanga secession conflict as intrinsically illegal. There is therefore no clear evidence in this case to support rebels' right to use force for the attainment of self-determination.

5.5.2.2 Biafra

Another example where the authority to use force to secure self-determination was advanced is Biafra. On May 30, 1967, the eastern region of Nigeria, known as Biafra, seceded from the Republic of Nigeria and proclaimed itself the independent "Republic of Biafra". The Biafra secession had its most obvious roots in events that occurred in May, 1966, when there was a series of attacks against people of the eastern region residing in north. These attacks were followed by a coup on July 29, 1966, during which northern troops systematically killed about 240 southern officers and at least 10,000 civilians, of whom at least three-quarters were easterners.¹⁶⁹³ The Biafrans viewed these massacres as deliberately planned by northern civilians and military leaders to eliminate Easterners permanently from the North, from any role in the army, and from equal status in political life with other Nigerian peoples.¹⁶⁹⁴ Against this background, the Biafrans therefore decided that the creation of a new independent state which they themselves controlled could ensure their protection, as the state had failed to protect the life of its citizens.

1690 Ndikumana and Kisangani "The Economics of Civil War" 5.

1691 SC Res 161 (1961).

1692 Tshiband 2009 <http://ssrn.com/abstract=1417417>.

1693 Nayar 1975 *Texas International Law Journal* 323; see also Nixon 1972 *World Politics* 475.

1694 Nixon 1972 *World Politics* 476.

The declaration of Independence was followed by two and half years of a bloody and devastating civil war, from July 1967, to January 1970. For the Biafrans, the civil war was led by a military general who employed skilled and experienced indigenous armed forces. Unlike Katanga, Biafra's secession enjoyed a great deal of diplomatic and military support.¹⁶⁹⁵ Also, there was no substantial involvement of the UN, even though the OAU was a major supporter of the Government of Nigeria.¹⁶⁹⁶ Five states recognised Biafra as an independent sovereign entity, even though none of the recognising countries established formal diplomatic relations with it.¹⁶⁹⁷ The first to recognise Biafra was Tanzania on April 13, 1968, followed by the Ivory Coast, Zambia and Haiti.¹⁶⁹⁸ Most of the statements declaring the granting of recognition referred to the atrocities endured by the people of Biafra and their claim to self-determination.¹⁶⁹⁹ However, besides these five states, the vast majority of states judged that Biafra did not qualify for recognition neither as a state nor as belligerents. Thus, the Biafra secession failed, and the thirty-month civil war ended on January 12, 1970, with the statement by the Biafran army's chief that "the Republic of Biafra has ceased to exist".¹⁷⁰⁰

From the above context, the question now arises as to whether the Biafrans constituted a "people" able to exercise a right of self-determination, and if such a right gave them the authority to use force in pursuit of such a right. An examination of peoplehood is beyond the scope of this discussion. That was dealt with in Chapter

1695 France was reported to have indirectly supplied the secessionists with weapons via the Ivory Coast and Gabon. Portugal permitted the Biafrans to use Lisbon as a base for propaganda activities and arranging the purchase of arms. See Buchheit *Secession* 170.

1696 Crawford *The Creation of States* 406.

1697 Crawford *The Creation of States* 406.

1698 Buchheit *Secession* 170.

1699 In his statement, Tanzania's Minister of State for Foreign Affairs announced that Tanzania had decided to recognise Biafra as an independent state, and a member of the community of Nations. He went further to state that with 30,000 of their number murdered in two major pogroms, the fears of the Biafrans were genuine and deep-seated and that these fears were at the root of the fanaticism with which they had set up their own state and fought for it. In a statement issued after a meeting in Libreville, the Gabon Cabinet also stated that "when one thinks that hundreds of thousands of innocent civilians (women, old men and children) are condemned in an absolutely illegal struggle to pay with their lives for the right of existence recognised to every human being, the Gabon people and Government could not without hypocrisy take refuge behind the principle of so called non-interference in the internal affairs of another states". Further, in a statement in Lusaka, the Government of Zambia declared that "the indiscriminate massacre of the innocent civilian population has filled us with horror ...; the heritage of bitterness stemming from this horrifying war would make it impossible to create any basis for the political unity of Biafra and Nigeria". See Ijalaye 1971 *American Journal of International Law* 553-554.

1700 Buchheit *Secession* 168.

Three of this study.¹⁷⁰¹ With regard to the use of force, there is a growing body of opinion arguing that this norm extends to rebel groups whose right to self-determination has been forcibly denied by a central government. To put it even more strongly, international legal scholarship tends to see rebels' right to use force as a qualified right triggered by oppression. This might be the case for the Biafran people as they suffered from bloodshed and massacres at the hands of the government. The bloodshed endured by Biafrans was also acknowledged in most of the recognition statements. Recognition by four states, however, is not adequate to be taken as proof of the formation of a new rule of customary international law. Therefore, the case of Biafra cannot be seen to represent a convincing example in support of the rebels' right to use force in the exercise of self-determination. Indeed, although some states supplied the Biafran forces with arms, they did not do so with the belief that there was a norm requiring it.

5.5.2.3 Somaliland

Somaliland is located in the eastern Horn of Africa, just in the Northwest corner of Somalia. It is bordered by Ethiopia in the south and west, Djibouti in the northwest, Somalia in the east, and the Gulf of Aden in the north. Ethnically the population of Somaliland is undisputedly Somali, a Hamitic people.¹⁷⁰² Its official language is Somali, even though English is often spoken among its educated population. During the European colonial expansion, Somaliland came under British colonial rule in 1886.¹⁷⁰³ In June, 1960, Somaliland gained its independence from Britain. Thirty-five states recognised Somaliland's independence, including all five permanent members of the UN Security Council.¹⁷⁰⁴ Five days later Somaliland united with Italian Somalia, under European encouragement, to form the united Republic of Somalia.¹⁷⁰⁵ However, this union was established against the wishes of the

1701 See Chapter Three par 3.2 above.

1702 Somaliland's population is divided into five large clans, including the Isaaq, the largest in Somaliland, and the Gadabuursi, Ciise, Dhulbahante and Warsangeli clans. See Roethke 2011 *Journal of International Service* 35-36.

1703 Roethke 2011 *Journal of International Service* 36.

1704 Bryden 2003 *Annales d'Ethiopie* 342.

1705 Crawford *The Creation of States* 412.

Somalilanders. In a subsequent referendum on the proposed unification, the people of Somaliland voted against a union.¹⁷⁰⁶

Post-colonial Somalia was marked largely by political unrest, chiefly over what occurred during the Siad Barre dictatorship.¹⁷⁰⁷ In 1981, following a decade of attacks led by the Siad Barre regime, *Isaaq* militants formed a rebel group, the Somali National Movement (SNM), to oppose the regime.¹⁷⁰⁸ In response, the Barre regime sent regular army troops to suppress the SNM rebels. As fighting escalated the government increasingly targeted civilians of the *Isaaq* tribe.¹⁷⁰⁹ For example, between June 1988 and March 1989 the government forces "deliberately killed at least 5,000 unarmed civilians" because of their *Isaaq* tribe kinship. In the same period the Mogadishu government also bombed the Somaliland cities of Burao and Hargeisa and destroyed both of them.¹⁷¹⁰ As a result, an estimated 50,000 *Isaaq* were killed, 350,000 fled the country, and half a million were displaced in different parts of Somalia.¹⁷¹¹ The Barre regime fell in January 1991 to a coalition of tribe-based rebel groups. After achieving victory, the SNM rebels unilaterally declared the independence of "Somaliland" on May 18, 1991. Somaliland tribe elders endorsed this declaration in 1993 and 1997, and a "national referendum" overwhelmingly approved independence in 2001.¹⁷¹² However, notwithstanding these internal signs of support for secession, no state has yet recognised Somaliland as a state.¹⁷¹³

Currently Somaliland is not a state for the purpose of international law, and the causes of non-recognition remain uncertain. Some writers say that it is because Somaliland has earned its sovereignty by the unlawful use of force. But international law neither prohibits nor authorises the use of force by a secessionist movement in

1706 Eggers 2007 *Boston College International and Comparative Law Review* 212.

1707 Polhill 2001 <http://www.dennis.polhill.info/archives/80>.

1708 After a 1969 coup President Siad Barre ruled Somalia with the strong support of the military. Those viewed as opponents of the regime were subject to arrest and imprisonment and on several occasions to torture and execution. In mid-1980 the State Department and various human rights groups reported increased human rights abuses by the Somali government against civilians, particularly the civilian population in the north. See Roethke 2006 *Journal of Modern African Studies* 37. Also see Observation Regarding the Northern Conflict and Resulting Conditions NSIAD-89-159 (1989) <http://www.gao.gov/products/NSIAD-89-159>.

1709 Perlez *New York Times* 24.

1710 Observation Regarding the Northern Conflict and Resulting Conditions NSIAD-89-159 (1989) <http://www.gao.gov/products/NSIAD-89-159>.

1711 Observation Regarding the Northern Conflict and Resulting Conditions NSIAD-89-159 (1989) <http://www.gao.gov/products/NSIAD-89-159>.

1712 Polhill 2001 <http://www.dennis.polhill.info/archives/80>.

1713 Dugard *International Law* 105.

the exercise of a right to self-determination. The use of force in relation to self-determination lies in an international law-free zone. Nevertheless, it should be noted that although a secession struggle is a legally neutral act the consequence of it, that is, the personality of the seceding entity, is regulated internationally. In this particular case, state practice reveals that states are not willing to recognise a secessionist entity when it is successfully attained by the use of armed force.

5.5.2.4 Tuareg separatism in Northern Mali

Following the achievement of Mali's national independence in 1960, the Tuareg people who mainly inhabit northern areas of Mali expressed and demonstrated a persistent desire to form their own sovereign state.¹⁷¹⁴ This desire arose from their political deprivation and marginalisation. Since 1960 the political power in Mali has been held by Sudanese ethnic groups (Bambara) which constitute the majority, and the Tuareg have been denied the right to participate in the government. They were never able to obtain a hearing for their own political interests, and even the existence of their ethnic community was denied.¹⁷¹⁵

In 1962 the Tuareg initiated a rebel movement characterised by small hit-and-run operations. Because of the rebels' lack of coordination and sophisticated weapons, the new Malian army chased the Tuareg rebels far into Algeria, and put the Tuareg people under a repressive military rule.¹⁷¹⁶ In 1990 the Tuareg exiles and emigrants established the Popular Movement of Liberation of Azawad (MPLA), an organisation dedicated to the liberation of the northern areas of Mali. Some of the MPLA members received military training from Qaddafi's regime and others were exposed to military experience in Chad, Lebanon, and even in Sri Lanka with the Tamil Tigers.¹⁷¹⁷

In June 1990 the Tuareg rebels launched their second rebellion with a series of attacks on Malian military bases, police stations, development projects and administrative centers in northern Mali. The Malian army responded with tactics similar to those used in 1963-1964, but the rebels turned out to be strong. For

1714 Krings 1995 *GeoJournal* 58.

1715 Krings 1995 *GeoJournal* 58.

1716 Keita 1998 *Small War and Insurgencies* 102-128.

1717 Krings 1995 *GeoJournal* 58.

instance, in one battle at the wells of Tuxemene in September 1990, the rebels defeated the Malian army with up to 200 troops lost on the side of government.¹⁷¹⁸ Because civilians were the main victims of army reprisals, many civilians sided with the rebels, and many young Tuareg joined the MPLA rebels.¹⁷¹⁹ By the end of 1990, heavy military losses forced Traoré's government to seek a solution by means of negotiations.¹⁷²⁰ A cease-fire agreement was signed in January 1991 through the mediation of Algeria.¹⁷²¹ Under this agreement, Northern Mali gained a "special status" that was practically equivalent to autonomy for the Tuareg.

Although this was a preliminary agreement designed to lead towards a durable peace, it provoked immediate discord among the rebels. From January 1991 onwards the rebel movement splintered under violent internal conflicts that were to persist until October 1994.¹⁷²² In the meantime, President Moussa Traoré was overthrown on March 26, 1991, following several days of riots and violence in Bamako.¹⁷²³ The fall of Traoré gave rise to the installation of a democratic government in Mali under president Alpha Oumar Konaré, who signed a new peace agreement in April 1992, known as the National Pact.¹⁷²⁴

The Pact, like the cease-fire agreement, stipulated, *inter alia*, for a special administrative status for Northern Mali and the integration of the rebels into Mali's security forces. In practice, however, the National Pact suffered from problems similar to those of the cease-fire agreement. Although the period following the signing of the pact was one of relatively low conflict intensity, fighting was not over.¹⁷²⁵ Between 2009 and 2011, Al-Qa'ida in the Islamic Maghreb (AQIM), the Malian Touareg insurgency, joined forces with the Algerian GSPC, known as the Salafist Group for Preaching and Combat. Also, a significant number of the Malian

1718 Humphreys and ag Mohamed "Senegal and Mali" 255-257.

1719 Lecocq and Klute 2013 *International Journal: Canada's Journal of Global Policy Analysis* 426.

1720 Krings 1995 *GeoJournal* 60-61.

1721 Lecocq and Klute 2013 *International Journal: Canada's Journal of Global Policy Analysis* 426.

1722 The MPA split into two factions, one containing Ifoghas Tuareg (which remained the MPA) and one composed of non-Ifoghas Kel Adagh (including Idnan Tuareg as well as the previously subservient Imghad groups), which called itself the Armée Révolutionnaire de la Libération de l'Azawad (ARLA). This split reflected persistent divisions within Tuareg and Ishumar over issues of tribe and ideology, including disputes over the role of traditional social structures and hierarchies. Thurston and Lebovich "A Handbook on Mali's 2012-2013 Crisis" 23.

1723 Lecocq and Klute 2013 *International Journal: Canada's Journal of Global Policy Analysis* 426.

1724 Thurston and Lebovich "A Handbook on Mali's 2012-2013 Crisis" 23.

1725 Lecocq and Klute 2013 *International Journal: Canada's Journal of Global Policy Analysis* 426.

army's integrated rebels deserted and joined the rebels once again.¹⁷²⁶ In November 2011 the newly founded National Movement of Azawad (MNLA) organised a number of protests in northern Mali, demanding self-determination or independence for Azawad. The MNLA is the first Tuareg separatist movement to declare openly that its objective is an independent state of Azawad, and it has adopted explicitly nationalist symbols, such as a national flag.¹⁷²⁷

In response to this the Mali government reinforced its military forces in the northern regions. On 17 January, 2012, the Tuareg insurgency aligned itself with Al-Qaida and other Islamist-oriented armed groups of the Islamic Maghreb and started attacks in northern Mali. Within ten weeks they had conquered all towns and villages in the north, completely defeating the Malian army. On 6 April the MNLA rebels declared the independence of northern Mali and announced the creation of a new state called Azawad. Despite the fact that the Tuareg have expressed ideals of national independence, no third state has recognised the independence of Azawad. Rather, the ECOWAS countries and France sent armed forces to help the Malian army in the reconquest of northern Mali. In October 2012 the UN Security Council approved a resolution proposed by the French government to support an ECOWAS force.¹⁷²⁸ With the deployment of troops drawn from various ECOWAS countries and France and the hunting down of Islamist and Jihadist groups, there seems no room left for an independent Tuareg state. Currently the Tuareg secessionist rebels are organised in diverse groups dispersed in the northern regions of the desert and in neighbouring countries, where they continue to employ mobile forces.

In view of the events outlined above it may be argued that the case of the Touareg rebellion has the potential to become a precedent in support of the authority to use force for self-determination, although no state has recognised Azawad independence. It is to be noted that the main argument advanced to justify the military intervention in Mali was that this was a war against terrorists rather than against MNLA rebels fighting for the rights of the Tuareg people and seeking independence for their homeland, Azawad. At the outset of the intervention France made a clear distinction between the MNLA rebels and the terrorists, and declared

1726 Cissoko *A Third-World Country* 18.

1727 Lecocq and Klute 2013 *International Journal: Canada's Journal of Global Policy Analysis* 426.

1728 SC Res 2085 (2012).

that there would be no action against the Tuareg.¹⁷²⁹ What is more, the UN Security Council did not condemn the MNLA rebels, but instead recommended that they separate from terrorist organisations, notably Al-Qaida in Islamic Maghreb (AQIM) and associated groups, including the Movement of Unity and Jihad in Western Africa (MUJWA).¹⁷³⁰

5.5.3 A new drive towards establishing a customary right of rebels to use force for the attainment of self-determination

It has been demonstrated above that the development of the norms relating to the use of force for the purpose of attaining the right to self-determination is to a large extent determined by the realities of practice.¹⁷³¹ In line with this, it should be determined if the theoretical concept and its specific interpretation are being reflected in practice. Put differently, the extent to which a customary right to use force for the attainment of self-determination has emerged under contemporary international law needs to be established. In order to assess the formation of a new customary norm in the light of the use of force by rebel groups in pursuit of the right to self-determination, a distinction between customary international law and regional customary law needs to be established.

As D'Amato argues, customary international law contains rules, norms and principles that seem applicable to any state and not to particular states or an exclusive grouping of states.¹⁷³² For instance, rules relating to the high seas, to airspace and outer space, to diplomatic immunities, to the rules of warfare and so forth apply equally to all states having occasion to be concerned with these areas.¹⁷³³ By contrast, regional customary law deals with non-generalisable issues¹⁷³⁴ or with rules expressly limited to a group of states, such as those in Latin America, Africa, or

1729 Christakis and Bannelier 2013 <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/>.

1730 Christakis and Bannelier 2013 <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/>.

1731 See Chapter Five par 5.5 above.

1732 D'Amato 1969 *American Journal of International Law* 211.

1733 D'Amato 1969 *American Journal of International Law* 211.

1734 D'Amato 1969 *American Journal of International Law* 212.

indeed as small a constituency as just two states.¹⁷³⁵ In the *Asylum* case the ICJ discussed the Colombian claim of a regional or local custom and held that:

The party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State ...¹⁷³⁶

In determining the existence of regional customary law it is not necessarily the case that all states must have acted in the same way. Rather, the states most affected by such a custom must have acted in such a way as to suggest that they believe that they are bound by it. Additional support for the preceding argument may be found in the *North Sea Continental Shelf* case.¹⁷³⁷ In this case the ICJ stated that the practice of states whose interests are more concerned should be extensive and virtually uniform in order to show a general recognition that a new rule of customary international law had emerged.¹⁷³⁸ Put differently, it is the generality and consistency of practice by states affected by the regional custom that will be of greatest importance to the acknowledgment of the existence of such a norm. In summary, it may be said that if a court has to determine whether or not rebel groups have a customary right to use force for the attainment of self-determination in African states, cognisance will be given to the practice of African states and African organisations.

Having established the difference between customary international law and regional customary law, it now becomes possible to assess whether or not a customary right to use force for the attainment of self-determination has emerged under contemporary international law. This investigation will be conducted on the basis of a contemporary interpretation of the conventional approach towards international customary law.¹⁷³⁹ As was previously said, the conventional approach requires the presence of both state practice and *opinio juris* for the creation of customary

1735 In the *El Salvador/Honduras* case it is said that a "trilateral local custom of the nature of a convention" could establish a condominium arrangement. *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)* 1992 ICJ Reports par 351-399; Espiell 2001 *Journal of the History of International Law* 1-17.

1736 *Colombian-Peruvian Asylum Case* 1950 ICJ Reports par 276-277.

1737 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment* 1969 ICJ Reports.

1738 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment* 1969 ICJ Reports par 74.

1739 See Chapter Four par 4.7.4.1 above.

international law.¹⁷⁴⁰ However, this traditional model does not consider both elements to be equally important; rather, it considers state practice to be the core element for the establishment of customary rules.¹⁷⁴¹ For the purpose of this section, the main question is whether or not state practice is sufficiently dense to contribute to the creation of a customary right of rebel groups to use force in relation to self-determination.

As was seen above, the use of force by a number of rebel groups has sometimes been adduced as providing support for the thesis that there is a right to use force for self-determination: Eritrea, South Sudan, Katanga, Biafra, Somaliland, and most recently, the Tuareg case involved such a use of force. It is observed, however, that in only two of these cases was the use force for self-determination successful. These were the cases of Eritrea and South Sudan. In addition, the lawfulness and genuineness of their use of force, arguably due to their backgrounds of oppression and gross human rights violations that occurred on their territories morally justified the use of force. Bearing in mind that the independence of Eritrea and South Sudan was preceded by the use of force, this may lead one to the conclusion that these instances constitute relevant physical state practice in support of the existence of a customary right of rebels to use force for self-determination.

Against this background, the success of the Eritrea and South Sudan secessions was not actually the result of the use of force, but arose out of agreements between the seceding entities and the parent states, and was concluded through referenda. In this respect, and considering the number of unsuccessful attempts at secession, it is evident that post-colonial state practice cannot be said to constitute settled state practice in support of a right to use force for self-determination. Thus, outside of the process of decolonisation there is no adequate and persuasive state practice in this matter to meet the threshold of a modern interpretation of the conventional approach towards customary international law.

Besides the conventional model of customary international law, which is the approach based on state practice, another approach, which is the *opinio juris*-based approach, was advanced in the *Nicaragua* case. In this case the Court stressed

1740 See Chapter Four par 4.7.4.2 above.

1741 Van den Driest *Remedial Secession* 207.

opinio juris to the detriment of state practice when considering international customary norms on the use of force.¹⁷⁴² The approach taken in the *Nicaragua* case has arguably been endorsed by several international legal scholars. For example, Bin Cheng¹⁷⁴³ argues that only the *opinio juris* is necessary for the creation of a new international customary rule. He goes further to state that "in reality customary law has only one element," that is, "*opinio juris*".¹⁷⁴⁴ Inasmuch as states are their own law-makers, where there is a general *opinio juris* among them, there is a norm of general international law.¹⁷⁴⁵ This argument, however, does not mean that practice is a normal element of international customary law, but simply provides evidence of the existence and contents of the underlying rule and of the necessary *opinio juris*.¹⁷⁴⁶

According to Bin Cheng, as long as a particular *opinio juris* about the existence of a new rule of customary international law is not rejected by members of international community of states, such a norm might be created instantly overnight.¹⁷⁴⁷ In addition to this, Meron¹⁷⁴⁸ stresses that the methodology employed to discover new customary international law has shifted from a state practice-based approach to an *opinio juris*-based approach. As *opinio juris* is interpreted as the belief of states, Lepard¹⁷⁴⁹ argues that an international customary norm arises when states generally believe that it is desirable now or in the future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct. According to him, state practice is no longer perceived as a mandatory element, but rather as simply evidence of the existence of *opinio juris*.¹⁷⁵⁰

The problem again is whether there is substantial *opinio juris* in support of a rebels' right to use force for the attainment of self-determination. As was previously said, *opinio juris* is generally an expression of state consent to a certain norm.¹⁷⁵¹ In this respect, it was observed that the practice of the international community of states in

1742 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits 1986 ICJ reports par 184.

1743 Cheng 1965 *Indian Journal of International Law* 36-48.

1744 Cheng 1965 *Indian Journal of International Law* 36-48.

1745 Cheng 1965 *Indian Journal of International Law* 36-48.

1746 Cheng 1965 *Indian Journal of International Law* 46.

1747 Cheng 1965 *Indian Journal of International Law* 36-48.

1748 Meron *Human Rights and Humanitarian Norms* 45-75.

1749 Lepard *Customary International Law* 97-98.

1750 Lepard *Customary International Law* 98.

1751 See Chapter Four par 4.7.4.2 above.

reaction to the attempts at unilateral secession and military coups has reflected the belief of a number of states that the modern international law covers a right to use force for self-determination as a last-resort remedy to persistent oppression and the denial of self-determination. Particularly, this was observed in the statements announcing the recognition of Biafra during its short life. Most of the recognising states made reference to the indiscriminate massacre suffered by people of Biafra, and Tanzania seemed to accept the existence of a right to use force for the attainment of self-determination.

The question remains, however, as to whether the views of these states actually constitute sufficiently strong and unequivocal *opinio juris* for the purpose of the establishment of an international customary norm on the legality of the use of force for the attainment of self-determination. Due to the fact that the *opinio juris* required for the establishment of a customary norm may be presumed to exist if a uniform practice is proven,¹⁷⁵² a high degree of proof is required for determining such an *opinio juris*. In this respect, it is important to note that notwithstanding the body of support for the existence of a legal right to use force for self-determination, the majority of states expressed the contrary view. For instance, only five states explicitly supported the right of the Biafran people to use force to create a state. In a similar vein, reference may also be made to various statements made by the OAU/AU and UN during the aforementioned secessionist struggles. The statements of these organisations indisputably expressed *opinio juris* opposing the existence of a rebels' right to use force for self-determination. Instead, they are evidence of the prevalence of belief in the principle of the territorial integrity of the member states of the two organisations. With this in mind, it is to be concluded that, outside of the process of decolonisation, there is no unequivocal *opinio juris* on the existence of a right to use force for self-determination in contemporary international law. In other words, due to the lack of both state practice and *opinio juris* on the rebels' right to use force for the attainment of self-determination, no such right has crystallised yet either in international customary law or regional customary law.

1752 Harris *Cases and Materials* 38.

5.6 Summary

This chapter has addressed the question of whether international law recognises a right to "national liberation movements" and "rebel groups" to use force in pursuit of the right to self-determination. For the purpose of addressing the existence of such a right, the sources of contemporary international law have been examined one by one. First, international instruments such as treaties and UN resolutions were scrutinised in search of traces of a right to use force for the attainment of self-determination. Second, two constituents of customary international law, namely state practice and *opinio juris*, have been examined in search of the existence of a customary right to use force to reach self-determination.

To begin with, the chapter has briefly outlined the historical development of the notion of use of force, the origins of which may be traced back to the theory and doctrine of *bellum justum* in the Middle Ages. The *bellum justum* doctrine legitimised the use of armed force in international law as a self-help measure only if certain criteria were met relating to a belligerent's authority to make war, its objectives and intent. A hundred years later, the use of force as a last resort was reflected in the *UN Charter*. Under the *UN Charter*, the resort to force was outlawed, unless it was either authorised by the UN Security Council under Chapter VII, or in the case of individual or collective self-defence under article 51. It was also seen that besides the use of force under the exceptions mentioned in the *UN Charter*, the use of force may also be used under the doctrine of humanitarian intervention, although such a use remains controversial.

With regard to the use of force in pursuit of a peoples' right to self-determination, it was contended that there have been always "national liberation movements" and "rebel groups" which claimed to have authority to resort to the use of force on behalf of a people whose right had been denied. The first part of this chapter was devoted to assessing the legality of an armed struggle waged by a people through its national liberation movement. It was seen that since the beginning of history there have been regimes that have engaged in practices against peoples that are so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that they are intolerable. Prior to the *UN Charter* era, especially, by the mid-nineteenth century, the rights of man, especially those envisaged by the American Declaration of

Independence and the French Revolution, began to be meaningful in the comity of nations. National liberation movements in Europe, such as those in Poland, Ireland, Norway and Czechoslovakia, claimed self-determination, and threatened the stability of the Austro-Hungarian and Russian Empires.

As one commentator has noted, it is essential, to prevent a situation where the rights of peoples are not recognised by a tyrannical regime, that they should be protected by the rule of law.¹⁷⁵³ Otherwise by way of exception,¹⁷⁵⁴ there is no clear rule against rebellion in international law. The right of peoples to revolt against tyranny and oppressive regimes is an internationally recognised right. Those whose struggle is acknowledged to be for self-determination and against tyrannical regimes are deemed to be waging a "legitimate" struggle: a *just war*.

In so far as the use of force is concerned, the *UN Charter* has been adopted with Article 2(4), which prohibits the threat or use of force between states. The only exceptions to this article are that it is legitimate to resort to the use force either in case of self-defence or in case of collective action under Chapter VII. In some cases national liberation movements and their supporters attempted to use article 51 to justify the use of force. The more common argument to support the plea of self-defence is that colonialism, by its very nature, is regarded by many states as being morally wrong, and is permanent aggression.

However, such a wide interpretation of article 51 was not in line with the views of Western States. They were of the opinion that this article applied to the right of self-defence of states. Nevertheless, it is asked whether liberation movements have a right to use force in international law against colonial, alien, or racist regimes, realising that international law is still a matter of consent, not consensus. From a legal perspective, the GA has expressed its support for liberation movements in a long series of annual resolutions.¹⁷⁵⁵ The first resolution claiming to assert a right to

1753 Olalia 2003 *International Association of People's Lawyers* 6-7.

1754 Some scholars argue that classical international law and the definition of aggression were inapplicable to wars of liberation, and that in such cases the use of force was legitimate. The basis for this legitimacy was what is called the rule of exception. See Gorelick 1979 *Case Western Reserve Journal of International Law* 81.

1755 GA Res 2646 (XXV) (1970) affirms the legitimacy of the struggle of peoples under colonial, alien, or racist domination, recognises them as being entitled to the right to self-determination and to restore to themselves that right by any means at their disposal. Under the 1970

the use force was passed in 1965 in response to denials of self-determination by Portugal, South Africa and Rhodesia. Resolution 2105 recognises the legitimacy of the struggle in those states, and invites all states to provide material and moral assistance. It is important to note that the phrase "legitimacy of the struggle" was repeated in almost all resolutions supporting liberation struggles. Those resolutions, whether general or passed in response to a specific conflict, expressly spelled out the right to use force to attain self-determination, and encouraged states to provide the assistance to the people struggling for their right to self-determination.

What is more, it was seen that national liberation movements enjoyed a fair degree of state support in their struggles against colonial, alien, or racist regimes. In addition to this, states providing aid to national liberation movements have never been condemned for doing so. Further, as a matter of state practice, national liberation movements were recognised by some states and international organisations, including the UN and the OAU, as observers. With regard to the *opinio juris*, Resolution 3328 (XX) was adopted with 118 votes in favour, zero against and ten abstentions. Resolution 3295 on Namibia received 112 in favour, zero against, and 15 abstentions. Resolution 3297 on Rhodesia received 111 in favour, zero against, and 18 abstentions. And finally, Resolution 3300 on implementing the 1970 Declaration by the specialised agency was adopted by consensus. The great majority of those voting for those resolutions in support of liberation movements probably believed that in doing so they were either helping to create new norms or else changing old ones. As such, these resolutions may be seen as a reflection of *opinio juris*. It can thus be concluded that there is emerging customary international law regarding the use of force by national liberation movements on behalf of peoples under racist or colonial regimes, or other forms of alien domination.

From the above reasoning, the question of whether the authority to use force for self-determination is expanding to include not only "national liberation movements" but

Declaration, peoples in their action against such regimes are entitled to seek and to receive outside support. In this respect the GA urges all states and specialised agencies and other organisations within the UN system to provide moral and material assistance to all peoples under colonial and alien domination struggling for their freedom and independence. See GA Res 3328 (XXIX) (1974). In Resolution 2787 (XXVI) (1971), the GA calls upon all states dedicated to the ideals of freedom and peace to give all their political, moral and material assistance to the peoples struggling for liberation, self-determination and independence.

also post-colonial "rebel groups" representing peoples under modern-day repressive regimes was also covered. The second part of this chapter was devoted to assessing the existence of rebels' right to use force for the attainment of self-determination on the basis of various sources of contemporary international law. For this purpose, the *UN Charter*, the 1966 *International Covenants*, the 1948 *Universal Declaration of Human rights*, *UN General Assembly Resolution 2625 (XXV)*, and the 1993 *Vienna Declaration and Programme of Action* adopted by the World Conference on Human Rights were considered, but no clear provision of such a right was found in the aforementioned instruments. Furthermore, a close look was taken at international legal doctrine. From the writings of Montesquieu, St Thomas Aquinas and John Locke it seems that the rebels' right to use force for self-determination has some support among writers. As was demonstrated, however, while the scholarship of the rebels' right to use force for self-determination might be attractive, it may be concluded that its theoretical foundations are rather weak, and it remains problematic whether such a right has emerged under contemporary international law.

In line with the above, this chapter analysed the post-colonial practice of states and international organisations such as the UN and the OAU/AU. It was found that state practice beyond decolonisation does not reveal unequivocal support for rebels' right to use force for the attainment of self-determination. Numerous contentions were made in this respect. First, a number of examples of the creation of states have been rejected as being the outcome of the illegal use of force. This includes Katanga, Biafra, and Somaliland, to list just a few. Although some states supported these entities politically, financially and militarily during their armed struggles, there was no consensus on the norm requiring such action. Therefore these cases cannot be seen as providing support for the existence of a rebels' right to use force in pursuit of self-determination. Secondly, the creation of Eritrea and South Sudan could also not support the existence of such right, because the attainment of independence was by consensus rather the outcome of armed of force.

In sum, considering the relevant state practice and *opinio juris* with respect to the rebels' right to use force for the attainment of self-determination, it is to be concluded that no such right presently exists under customary international law. As was demonstrated, neither enough state practice nor a body of strong and clear *opinio*

juris in support of such a right was found. It may be that there is still a long way to go before a developed customary right to use force for rebel groups to attain self-determination will be crystallised in international customary law.

Chapter 6: Conclusions and recommendations

One is bound to recognise that the right of peoples to self-determination, before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of the peoples, in the finally awakened conscience of humanity.¹⁷⁵⁶

6.1 Introduction

This study has sought to analyse the contemporary meaning of the right of peoples to self-determination and, more particularly, the question of how the denial of this right may give rise to some remedies, including the use of armed force. The aim of this thesis was to investigate whether or not a people accorded the right to self-determination has also a *jus ad bellum* to secure such a right. For this purpose, the thesis considered the following research question:

How and to what extent should a group of rebels be recognised as having a right to use force on behalf of peoples to overthrow or secede from an oppressive regime in the exercise of their right to self-determination?

While each chapter provides a summary at the end and specific answers to the questions posed, the concluding chapter offers a recapitulation of the main findings from all previous chapters. It states briefly the final reflections on the concept of self-determination and the *jus ad bellum* for the attainment of it. In sum, it offers conclusions on the colonial and post-colonial armed struggles for self-determination, and explores how these conflicts have affected the contemporary international norms on the use of armed force.

6.2 Conclusions

6.2.1 The right to self-determination

In contemporary international law, self-determination is defined as the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development.¹⁷⁵⁷ This study has shown that the right to self-determination is a collective right, that is, a right of a group of individuals as a group.

1756 *Legal Consequences for States of the Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion (Separate opinion of Judge Ammoun)* 1971 ICJ Reports par 74-75.

1757 Common a 1 of both the ICCPR & ICESCR.

As a right of all people, self-determination is applied not only in a colonial situation, but also in non-colonial situations. Beyond the process of decolonisation, however, it clashes with the principle of the territorial integrity of states. It was also seen that the right to self-determination has two classes or aspects: internal and external aspects.

6.2.1.1 The development of the right to self-determination

In order to determine the contemporary meaning of the right of peoples to self-determination and whether it is generally accepted as a legal right in international law, a historical background of this right has been presented. In the second chapter it was seen that the right of peoples to self-determination as an international legal right evolved from an essentially political concept, and its first expression in international law is not clearly known. It was argued that its roots may be found in ancient political theories, which can be traced as far back as ancient Greece and Rome.¹⁷⁵⁸ It has evolved from such philosophical theories that the exercise of power will be morally legitimate when it is the result of the political will of the governed. As a governing principle, however, self-determination can be traced back to the American and French Revolutions. Both the American and French Revolutions acknowledged the right of peoples to have a government resulting from their own free will without any external or internal oppression. In this respect, peoples were to have a say in the conduct of public affairs. Equally, people were entitled to be free from internal and external subjugation, mostly in the form of colonial rule or any form of suppression outside the colonial context.¹⁷⁵⁹

It was illustrated that, despite these early traces, there was little practice regarding self-determination in international law before WWI. The right of self-determination was developed beyond this embryonic stage by two leading statesmen, namely Lenin and Woodrow Wilson, after WWI. Lenin conceived of self-determination as an anti-colonial postulate while Wilson linked self-determination with Western liberal democratic ideals of representative government.¹⁷⁶⁰ Wilson used the idea of representative government to formulate the political principle of self-

1758 See Chapter Two par 2.2 above.

1759 See Chapter Two par 2.3.1 above.

1760 See Chapter Two par 2.2.2 above.

determination.¹⁷⁶¹ This principle was inscribed into the Versailles Settlement and had, as its major thrust, the protection of oppressed peoples in the aftermath of the WWI. However, regardless of the effort made by Wilson and Lenin, self-determination remained a political principle on the international plane until the adoption of the Covenant of the League of Nations. Although this Covenant was considered as the legal basis of the right to self-determination, the principle was applied only to the colonies of the defeated powers, and it was not clearly mentioned in the Covenant. The right to self-determination first gained legal prominence in the *Ålands Islands* case in 1920.¹⁷⁶² In this case, the Commission of Jurists and the Committee of Rapporteurs stated that the right to self-determination was a right under positive international law. At the same time, they envisaged the possible resort to self-determination in the form of external self-determination as a last resort for ending oppression.

Chapter Two further showed that self-determination entered the sphere of positive international law only after WWII, when it was codified in articles 1(2) and 55 of the *UN Charter*. Under the *UN Charter*, self-determination was associated with the principle of the "equal rights" of peoples. As a human right, self-determination was also clearly provided for in the second paragraph of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁷⁶³ This resolution is generally considered as one of the most important contributions in the process of decolonisation, as it proclaimed the right of colonial peoples to self-determination. The necessity to end colonialism was also reflected in GA Resolution 1541(XV), which called for a full measure of self-government for colonial peoples and defined three possible ways in which self-government could be achieved: emergence as an independent state, free association, or integration with an independent state.¹⁷⁶⁴ In the colonial context, the right of peoples to self-determination was thought to be consummated mainly in its external mode, and was seen to be achieved once peoples attained independence.

1761 See Chapter Two par 2.2.3 above.

1762 See Chapter Two par 2.2.4 above.

1763 See GA Res 1514 (XV) (1960).

1764 See GA Res 1541 (XV) (1960).

Chapter Two turned to the post-colonial development of the right to self-determination. In this respect, the 1966 Human Rights Covenants and Resolution 2625(XXV) were examined. According to both instruments, self-determination is not limited to the colonial context, but indeed applies to all peoples. While it was seen that in the context of decolonisation, self-determination was generally considered to be achieved externally, in non-colonial situations it is primarily consummated in its internal mode. The internal aspect of self-determination refers to the right for a people freely to choose its own political, economic and social system. This internal aspect of self-determination is also reflected in various international and regional instruments, such as the *African Charter on Human and Peoples' Rights* of 1981, and the *Helsinki Final Act* of 1970.

Chapter Two further showed that the right to self-determination was highlighted by the ICJ in several cases.¹⁷⁶⁵ In the *Namibia Advisory Opinion* it was held that the subsequent development of international law in regard to non-self-governing territories as enshrined in the *UN Charter* made the right to self-determination applicable to all of them.¹⁷⁶⁶ In the *Western Sahara* case the ICJ accepted that the right to self-determination is a part of customary international law. The ICJ also qualified this right as an *erga omnes* obligation in the *East Timor* case.¹⁷⁶⁷ It is therefore no longer correct to regard the right to self-determination as merely a political aspiration of peoples. Thus, with respect to the colonial situation, some scholars and jurists considered the right of peoples to self-determination as a part and parcel of a *jus cogens* norm; meaning that no derogation from this norm is allowed.¹⁷⁶⁸

1765 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports par 31-32; *East Timor (Portugal v Australia) Judgment* 1975 ICJ Reports; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* 2004 ICJ Reports.

1766 *Legal Consequences for States of Continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* 1971 ICJ Reports.

1767 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* 2004 ICJ Reports.

1768 See Chapter Two par 2.5 above.

6.2.1.2 The right-holder of self-determination

Having analysed the content and the meaning of the right to self-determination, Chapter Three turned to the question of who the "self" may be to whom this right is granted. As was demonstrated in Chapter Three, there is no clear legal definition of the "self" or "people" in international law. The argument that peoples possess a legal right to determine their own political status seems to be ridiculous, since the people cannot decide until someone decides who the people are.¹⁷⁶⁹ Chapter Three aimed at describing the historical development of the concepts of "people" to whom, by international law, the right to self-determination applies. In painting this historical development, the emphasis was on "national liberation movements" and "rebel groups" as the sole authentic official and legitimate representatives of peoples in their armed struggle for the attainment of self-determination.

6.2.1.2.1 The people

The aim of Chapter Three, among other things, was to find a definition of a people. The chapter started with the argument that the absence of a precise legal definition of the concept of "a people" does not mean that the entire concept is in limbo. In the *Quebec* case,¹⁷⁷⁰ the Supreme Court of Canada, in an *obiter dictum*, described a "people" as any group of individuals that shares many characteristics such as a common language and culture.¹⁷⁷¹ From this definition it is clear that the characteristics for identifying a people can also be found among indigenous peoples and minority groups. The chapter argued that if this definition were to be universally accepted, it would pose a challenge in defining whether indigenous peoples or ethnic minorities are entitled to exercise the right to self-determination, especially in its external mode.

In the aftermath of the WWII, the issue of what in international law constitutes a "people" for self-determination purposes has proven to be one of the great controversies.¹⁷⁷² Some scholars¹⁷⁷³ interpreted the concept of "people" to mean the

¹⁷⁶⁹ Jennings *The Approach to Self-government* 55-56.

¹⁷⁷⁰ *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 123.

¹⁷⁷¹ *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 123.

¹⁷⁷² Cassese *Self-determination of Peoples* 141-147.

¹⁷⁷³ See Chapter Three par 3.7 above; Brownlie "The Rights of Peoples" 1-5.

colonial people and all other peoples in non-self-governing territories. This approach identifies decolonisation as a manifestation of the right to self-determination, and goes further to equate the scope of self-determination with only the process of decolonisation. Other scholars, one being Harris,¹⁷⁷⁴ hold the view that "peoples" entitled to self-determination include not only those under colonial rule, but also the aggregate populations of independent states. This view is based on the argument that self-determination as a human right definitely applies to all human beings. In this respect, it was contended that self-determination reaches beyond the colonial situation and that it currently applies to all peoples capable of exercising it, unless they are willing to be lumped together in the global "self" of a whole people of a given territory.¹⁷⁷⁵ This argument was also provided in the common article 1 of the ICCPR and ICECSR, which states that "all peoples" have the right to self-determination.

Having said that international law is not clear as to the definition of the concept of "peoples", relevant sources suggest that the concept is defined on the basis of shared identities, a common belief, a language, a territory, and a cultural and historical heritage, among other factors. For the purpose of this study a people was defined as:

...a group of human beings possessing a clear identify and its characteristics, namely: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; a territorial connection; a common economic life. The group must be relatively large; the group as a whole must have the will to be identified as a people or the consciousness of being a people; possibly the group must be organised or have other means of expressing its common characteristics and will for identity, finally the group must be cemented by shared memories of common suffering, and they must be ready to give even the very last breath of their lives.¹⁷⁷⁶

This definition was chosen as a working definition because it embraces all of the beneficiaries of self-determination, such as "indigenous peoples" and "minority groups". In addition to this, it determines the most vital features of peoplehood as an aid to the identification of holders of the right to self-determination. It was seen that not only the entire population of a territory, but also sub-groups within a territory, such as indigenous peoples or minority groups, may be considered as the right-holders of

1774 *Anaya Indigenous Peoples* 100.

1775 *Anaya Indigenous Peoples* 100-103; see also Skurbaty *As if Peoples Mattered* 223.

1776 See Chapter Three par 3.3 above.

internal self-determination in general, and external self-determination in special circumstances. It was shown that a people is entitled to self-determination in the form of secession in exceptional circumstances; that is, where a people is oppressed or where a definable group is denied meaningful access to government to pursue their political destiny.¹⁷⁷⁷ In such a case, Chapter Three argued that national liberation movements or rebel groups may claim to have the authority to use force on behalf of peoples to secure their right to self-determination.

6.2.1.2.2 National liberation movements

After defining the holders of the right to self-determination, Chapter Three turned to the meaning and role of nation liberation movements in the attainment of such a right. It was argued that as far as anti-colonial struggles are concerned, there are always national liberation movements which have claimed to have the right to use force on behalf of peoples whose right to self-determination has been denied. As a legal concept, national liberation movements have been stipulated in many GA resolutions and documents providing blanket permission for people struggling for self-determination. Nevertheless, despite the number of these resolutions and documents there is no precise legal definition of a "national liberation movement" in international law. In international legal doctrine, however, national liberation movements were considered to be freedom fighters against colonial or alien dominion for the attainment of self-determination and independence.¹⁷⁷⁸

For the purpose of this study, national a liberation movement was defined as an organisation which represents a people in its struggle against colonial power, alien domination and racist regimes for the attainment of self-determination. This definition include not only armed groups against classical colonial domination, but also armed groups against colonies of settlement which are established at the detriment of the local populations, who deny the local populations their right to self-determination either by displacing them or imposing on them a racial minority government which denies them basic rights and equal treatment.¹⁷⁷⁹ Given that to date the process of decolonisation is virtually over, the question may be asked if the concept of a

1777 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 138.

1778 See the Chapter III par 3.4.1 above.

1779 Abi-Saab "Wars of National Liberation" 150.

"national liberation movement" covers the post-independence rebel groups fighting for self-determination. Over recent decades the position of the UN and the OAU/AU shows that a liberation movement can be the legitimate representative of the people of a territory only if the established government is a colonial power or is a racist regime which denies equal treatment to the great majority of the country.¹⁷⁸⁰ It is to be noted that, outside of the process of decolonisation, only the ANC was the only rebel movement recognised as a national liberation movement, representing the South African black people in their struggle against the *apartheid* regime.

The core of this definition consists of the representative character of national liberation movements, which means that the legal status of and capacities of such groups are determined by their control of the loyalty of the population. In the process of decolonisation, this representative capacity of national liberation movements was acknowledged at the UN level and by other international or regional organisations. It was contended that once a "national liberation movement" is endowed with a representative capacity, it can claim to possess international legal status and therefore come into contact with other international legal subjects. In sum, it was concluded that the recognition of national liberation movements as the sole authentic and legitimate representatives of their peoples at UN level and by other regional organisations symbolised that they were considered to have a *locus standi* in international law in the context of the struggle for the attainment of self-determination.

6.2.1.2.3 Rebel movements

Apart from national liberation movements which have fought against colonial and racist regimes, "rebel movements" are other armed groups claiming to have a legal right to use force to secure the right of their peoples to self-determination. Like national liberation movements, "rebel movements" are not clearly defined in international law. Furthermore, the academic literature does not provide a cohesive definition, a fact which bears legal consequences for right holders. It was shown that issues relating to the definition of rebel movements in international law are theoretically and practically controversial because of the nature of the claims

¹⁷⁸⁰ Wilson *International Law* 144.

associated with the demands of rebel movement. For the purpose of the present study, a rebel movement was defined as:

... a movement of peoples, ethnic or minority groups who persistently oppressed and denied any meaningful exercised of its right to self-determination within the independent state of which it forms a part, strive to overthrow or secede from such oppressive forms of government in order to the secure their right to self-determination.

As with national liberation movements, rebels also act as authentic representatives of peoples in their struggles to attain the right to self-determination. But it was seen that they are different in the fact that "national liberation movements" are limited to struggles against colonial and racist regimes, whereas "rebel groups" reach beyond colonial and *apartheid* situations. The struggles of national liberation movements were mostly aimed at attaining independence, while the post-colonial rebel groups fight against an independent state for regime change. Put differently, rebel groups are committed to the nation-state but seek to overthrow the so-called "oppressive dictatorship" and replace it with a new political order; or to build alternative political authority in order to create a minimal working order guaranteeing their freedom; or seek a separate existence from an existing state; or have secessionist objectives.

Regarding the question as to whether rebel groups can be granted the status of national liberation movements, this study argues that no clear-cut answer can be given. As was observed previously, states and international organisations are not willing to grant such a status to a rebel group acting beyond colonial and *apartheid* situations.

6.2.2 *Secession in international law*

The fourth chapter of this study was concerned with the question of whether or not, under contemporary international law, a people is entitled to separate itself from the state to which it belongs, and to create a new state. It was found that this is quite permissible in international law. As pronounced in the *Quebec* case, the right to external self-determination in the manifestation of a right to secession may be exercised where a people is governed as part of a colonial empire, or where it is subject to alien subjugation, domination or exploitation.¹⁷⁸¹ This was also stipulated

1781 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 111.

in several resolutions, among others, GA 1514 (XV), which states that the right to secession can be seen to be applicable to colonial peoples. It was shown that beyond the context of decolonisation, the right to secession collides with the principle of territorial integrity and can be exercised only through the peaceful dissolution of a state, consensual merger with another state, or as result of a clause in the constitution providing secession.

As to the principle of respect for territorial integrity,¹⁷⁸² Chapter Four submitted that it is not an absolute rule but rather a principle which can be applied to a greater or lesser extent. The development of international human rights law has limited this principle in many cases. In this study it was contended that the so-called remedial secession doctrine suggests that gross and widespread human rights violations can lead a state to lose a part of its territory if oppression is directed against a specific people.¹⁷⁸³ It was argued that a state whose government does not represent "the whole people of its territory without distinction as to race, creed and colour"¹⁷⁸⁴ is not entitled to invoke the principle of territorial integrity when limiting unilateral secession. In addition to the principle of respect for territorial integrity, Chapter Four addressed the principle of *uti possidetis juris*, and found that it does not preclude the exercise of external self-determination by means of unilateral secession.¹⁷⁸⁵ This is because the *uti possidetis juris* principle is most often applied in colonial situations. The argument that it applies beyond the process of decolonisation has very weak legal and doctrinal foundations and reference to it is not made in any international instruments which are relevant for the creation of states or the delimitation of post-colonial states.¹⁷⁸⁶

Having concluded that the right to external self-determination in the form of secession may be exercised in colonial situations, Chapter Four turned to the question of whether an ethnic group or a minority group within an independent state is entitled to unilaterally secede and form an independent state. For this purpose the chapter looked at the historical background of the right to unilateral secession, and found that it may be traced back to the *Åland Islands* case. In this case, the

1782 See Chapter Four par 4.5 above.

1783 See Chapter Four par 4.7.3 above.

1784 Crawford *The Creation of States* 118.

1785 See Chapter Four par 4.6 above.

1786 Vidmar *Democratic Statehood* 223.

Commission of Jurists and the Committee of Rapporteurs held that the separation of a minority or an ethnic group from a state to which it belongs can be only considered as altogether exceptional and as a last resort for ending oppression.¹⁷⁸⁷ In this respect, the argument in favour of the right to unilateral secession in the form of remedial secession was primarily based on the denial of internal self-determination and extreme oppression towards a particular segment of people within a state.

In order to determine whether a remedial right to unilateral secession has emerged in contemporary international law, various sources of international law were examined. First, international legal instruments were examined. It was found that remedial secession is neither specifically prohibited nor authorised in positive international law. International legal doctrine was also addressed in order to see whether remedial secession has enough support in such doctrine to be considered an actual entitlement under international law. From relevant doctrine, it was shown¹⁷⁸⁸ that a remedial right to unilateral secession arises only in extreme circumstance as a last resort for subjugated peoples to end oppression. This was also reflected in judicial decisions,¹⁷⁸⁹ yet no international judicial body has accepted remedial secession as a legal entitlement.

The chapter nevertheless argued that the idea of remedial secession has some merit, not least if it can be given effect through international recognition. Although recognition is deemed to be a declaratory act in international law, universal collective recognition can have the effect of collective state creation. It was contended that, where subjugated peoples seek secession as a remedy to gross injustices, the international community will be more willing to ignore the territorial integrity of the parent state and grant recognition to the secession-seeking entity. This argument, however, needs to be taken with caution, as the international community of states has never accepted either the right of oppressed peoples to remedial secession or the duty to grant recognition to them when trying to create their own state.

1787 See Chapter Four par 4.7.1 above.

1788 Crawford *The Creation of States* 118; Cassese *Self-determination of Peoples* 188-120; Buchheit *Secession* 43-127; Tancredi "A Normative 'Due Process' in the Creation of States through Secession" 171-207.

1789 *Reference re Secession of Quebec* 1998 2 (SCR) 217 par 126; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion* 2010 ICJ Reports.

In conclusion, Chapter Four showed that even though there is an argument that remedial secession can be given effect through the act of recognition, there is a lack of clear support in state practice. Post-independence state creations, such as Bangladesh, Kosovo, Eritrea and South Sudan, were examined in order to assess the extent to which a customary right to remedial secession has emerged under contemporary international law.¹⁷⁹⁰ On the basis on the abovementioned cases, it was demonstrated that the support for remedial secession was slight, and none of those cases served as a clear example of remedial secession. In sum, it is to be concluded that while there is an emerging rule of a customary right to remedial secession, its theoretical foundations are rather fragile and there is a long way to go before it can be accepted under contemporary international law.

6.2.3 The right to use force by national liberation movements and rebel groups for the attainment of the right to self-determination

Having concluded that peoples have the right to self-determination, Chapter Five turned to the question of whether or not international law recognises a right to use force for the attainment of it. In this respect the development of the idea that "national liberation movements" and "rebel groups" fighting to secure the right of their peoples to self-determination may legitimately use force as a matter of international law was scrutinised. The chapter examined various international instruments, such as treaties and UN resolutions in search of traces of a positive right to use force in the context of self-determination. In the same context, the two elements of customary international law, namely state practice and *opinio juris*, were also expounded in search of the existence of a customary right to use force for the attainment of self-determination.

6.2.3.1 The right to use force by national liberation movements

It was contented that in the decolonisation process there have always been "national liberation movements" which have claimed to have a right to use force on behalf of a people whose right to self-determination has been denied. The first part of Chapter Five was devoted to assessing the legality of an armed struggle waged by a people

1790 See Chapter Four par 4.7.4.3 above.

through its national liberation movement against colonial oppression. It was seen that the first argument used to justify the use of force by national liberation movements to attain their right to self-determination and the use of force by states in support of wars of national liberation movements was that this type of use of force was not covered by the general prohibition on the use of force provided in article 2(4) of the *UN Charter*. Secondly, national liberation movements argued that colonialism was in itself an illegal use of force, amounting to aggression and breach of article 2(4); and therefore, peoples under colonial rule were considered to have the right to use force in self-defence.¹⁷⁹¹ Such a wide interpretation of article 51 of the *UN Charter*, however, was not in line with the views of Western States. They were of the opinion that this article applied only to the right to self-defence of states, and any so-called right of peoples to self defence against colonial rule had no basis under the *UN Charter*.

In addition to the *UN Charter*, Chapter Five critically considered the GA resolutions on colonialism, although they did not clearly sanction the use of force in the exercise of self-determination. It was demonstrated that the first resolution claiming to assert a right to use force was passed in 1965 in response to denials of self-determination by Portugal, South Africa and Southern Rhodesia. Resolution 2105 recognised the legitimacy of all struggles undertaken by peoples for their national independence. This resolution also invited all states to provide material and moral assistance to the national liberation movements in colonial territories. It was also demonstrated that the phrase "legitimacy of the struggle" was repeated in almost all resolutions supporting liberation struggles.

In practice, it was seen that national liberation movements enjoyed a fair degree of state support in their struggles against colonial domination. In addition to this, it was observed that such a practice of states in support of national liberation movements has never been condemned, but instead commended by the international community of states at large. As a matter of state practice, national liberation movements were also recognised by some states and international organisations as legitimate representatives of their peoples. With respect to *opinio juris*, it was shown that a large majority of states regularly voted in favour of resolutions accepting the legality

¹⁷⁹¹ Gray *International Law* 54.

of the use of force by national liberation movements. In this respect, state members of the UN voted overwhelmingly "yes" at the General Assembly to several resolutions in support of the legitimacy of liberation struggles.¹⁷⁹²

As this evidence indicates, during the decolonisation period the great majority of states were of the opinion that national liberation movements had the authority to use force in pursuit of self-determination. This is to say that the acceptance of national liberation movements by a number of states as entities capable of legitimately resorting to the use of armed force in colonial context proved that the norms relating to the use of force in international law had been possibly amended to include the use of armed force for self-determination. In view of this, it can be concluded that in the decolonisation context, the right has emerged not only of the use of force by national liberation movements but of states to help them in their struggles to attain the right to self-determination.

6.2.3.2 The right of rebel movements to use force

Having said that the use of force by a national liberation movement in exercise of a right to self-determination has legally emerged in international law, Chapter Five turned to the question of whether this right is expanding to include post-independence rebel movements. As previously said, if the right of peoples to self-determination is not recognised by a tyrannical regime, peoples should have recourse, as a last resort, to rebellion against tyranny and oppression.¹⁷⁹³ It was also argued that the resort to armed force by rebel groups striving for self-determination was lawful because there was no clear rule against rebellion in international law.¹⁷⁹⁴ Generally speaking, the use of force against tyranny and oppressive regimes by rebels is not in violation of international law. In other words, rebellion is neither legal nor illegal in international law. Those whose struggle is acknowledged to be for self-

1792 See, for instance, GA Res 3328 (XXIX) (1974), which was adopted with 118 votes in favour, zero against and ten abstentions. Resolution 3295 (XXIX) of 13 December 1974 on Namibia was adopted with 112 in favour, zero against, and 15 abstentions. Resolution A/RES/3297 (1974) on Rhodesia was adopted with 111 in favour, zero against, and 18 abstentions. At the same time, Resolution 3300 (XXIX) (1974) was adopted by consensus.

1793 See Chapter Five par 5.3.2.2 above.

1794 Some scholars argue that classical international law and the definition of aggression were inapplicable to wars of liberation, and that in such cases the use of force was legitimate. The basis for this legitimacy was what is called the rule of exception. See Gorelick 1979 *Case Western Reserve Journal of International Law* 81.

determination and against tyrannical regimes are deemed to be waging a "legitimate" struggle: a *just war*.

In this analysis, a key role was granted to the various sources of contemporary international law. In this respect, it was seen that the *UN Charter*, the 1966 International Covenants, the Universal Declaration of Human Rights, GA 2625 (XXV), and the 1993 *Vienna Declaration and Programme of Action* offer no clear provision in respect of the right of rebel movements to use force for the attainment of self-determination. At the same time, international legal doctrine was explored. It was shown that following the early writings of St Thomas Aquinas and John Locke, a considerable number of legal scholars supported the thesis that rebels' right to use force for self-determination does exist under certain circumstances. This argument was primarily based on two instruments: the 1970 *Declaration on Principles of International Law* and the *African Charter on Human and Peoples' Rights*. For instance, the 1970 Declaration contains a so-called safeguard clause which reads:

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

Reading this clause *a contrario*, it might suggest that if a state uses force to prevent a people from exercising its right to self-determination, not only does such a people have a right to use force against such a state, but it is also entitled to seek and receive aid from foreign states. Put differently, the denial of a people's right to self-determination and serious injustices toward a group of people by the state to which it belongs would warrant a right to use force to secure such a right. As was demonstrated, however, there are major objections to this interpretation. First, it was argued that peoples are entitled to use force when force is used against them, and not simply when self-determination is denied.¹⁷⁹⁵ Second, as previously said, GA Resolution GA 2625 (XXV) does not specifically mention "armed resistance".¹⁷⁹⁶ The absence of the term "armed" leaves the idea of resistance ambiguous. It was argued that resistance could refer to civil riots, strikes or political opposition, which may not

¹⁷⁹⁵ Wilson *International Law* 99.

¹⁷⁹⁶ See Chapter Five par 5.3.2.2 above.

be regarded as a threat or amount to the use of armed force. While the legal doctrine on rebels' right to use force for self-determination might be attractive, its theoretical foundations are rather fragile. It is to be concluded that rebels' right to use force to secure the right to self-determination is never an entitlement, not even in a situation of severe oppression.

Having concluded that a right to use force has not enough foundation in legal doctrine to be an entitlement, Chapter Five turned on the assessment of the post-colonial practice of both states and international organisations. It was found that beyond the context of decolonisation, state practice does not reveal unequivocal support of rebels' right to use force to secure the right to self-determination. In this respect, the creation of numerous states has been rejected as being not only the outcome of unlawful unilateral secession, but also the illegal use of force. This includes the cases of Katanga, Biafra and Somaliland, to name just a few. Even if some states supported these entities politically, financially and militarily during their struggles for independence, there was no consensus on the norm requiring such action. Consequently, these cases cannot be seen as providing support for the existence of rebels' right to use force in the exercise of the right to self-determination. It was also seen that the creation of the states of Eritrea and South Sudan could not support the existence of such a right, because the achievement of independence was by consensus rather than the outcome of armed force.

On the basis of the practice and *opinio juris* with respect to the rebels' right to use force in pursuit of the right to self-determination, it is almost impossible to conclude that such a right currently exists under contemporary international law. As was demonstrated, neither enough state practice nor a body of strong and clear *opinio juris* in support of a customary right to use force for rebel groups to attain the right to self-determination was found. Nevertheless, this does not mean that, someday, such a right will not be part of contemporary international law. As D'Amato¹⁷⁹⁷ said, customary international law grows and changes over time as a result of the practice and *opinio juris* of states in their international relations.

1797 D'Amato *International Law* 231.

6.3 Recommendations

In the light of the foregoing, the study advocates that the following possible recommendations should be made in order to ensure the promotion and realisation of the right of peoples to self-determination.

6.3.1 Regarding the right to self-determination

With respect to the right to self-determination, this study calls upon the African law-making authorities to:

- (1) Take all necessary measures to ensure the promotion and protection of the right of peoples to self-determination as embodied in the *African [Banjul] Charter*.
- (2) Recognise in law and in practice that the rights of peoples to freely determine their own political, economic, social and cultural systems play a decisive role in the emergence and maintenance of effective democratic systems as they are a channel allowing for dialogue, pluralism, tolerance and liberalism, where minority or indigenous groups are represented.
- (3) Ensure a conducive and safe environment for every group of people exercising or seeking to exercise its right to self-determination.
- (4) Ensure that all political opponents are free to participate in the political process, and are not labelled as enemies of the state.
- (5) Ensure that no one is criminalised for exercising the right to self-determination, nor is subject to threats or the use of violence, harassment, persecution, intimidation or reprisals.
- (6) Ensure that any limitations on the right to self-determination are prescribed by law, necessary in a democratic society, and proportionate to the aim pursued, and do not harm the principles of pluralism, fair and periodic elections, and respect for the fundamental human rights.
- (7) Ensure that administrative and political leaders are adequately trained in relation to international human rights norms and standards governing the right to self-determination.

- (8) Ensure that political leaders who violate the right to self-determination are held personally and fully accountable for such violations by an independent and impartial oversight body, and by the courts of law.
- (9) Ensure that victims of violations of the right to self-determination have the right to an effective remedy, including the use of force.

6.3.2 Regarding the use of force for the attainment of self-determination

With respect to the norms relating to the use of force in order to attain self-determination, the following recommendations are addressed to the African Union authorities:

- (1) The Union's principle of recognition of national liberation movements and rebel groups needs serious revision and reconsideration. There is a crucial need to ensure consistency in the practices of the Union, although special circumstances must also be taken into account on a case-by-case basis.
- (2) Every state must have a duty to refrain from the use of force to deprive peoples of the right to self-determination. In case an oppressive regime uses force to deny its people the right to self-determination, such a people, represented by a rebel group, must have a right to use force for the attainment of it.
- (3) In order to speed up the development of a customary norm relating to the use of force in pursuit of self-determination, it is recommended to the AU authorities to:
 - a) adopt a declaration pertaining to the right to use force for the attainment of self-determination;
 - b) adopt a legal regime for all rebel groups struggling for self-determination with a view to protecting and facilitating the attainment of self-determination;
 - c) recognise all rebel groups struggling for self-determination as representatives of their peoples, and assist them in accordance with the principles of the *UN Charter*;

- d) amend article 4 of the *AU Constitutive Act* to ensure that the definition of the use of force by rebel groups for the attainment of self-determination complies with the basic principles on the use of force in international law.
- (4) Concerning the legal framework pertaining to the right of rebel groups to have recourse to force in attaining self-determination, the study calls on the relevant authorities to consider the following draft declaration.

Suggested draft declaration on the use of force by rebel groups for the attainment of self-determination

We, Heads of State and Government of the Member States of the African Union (AU):

Inspired by the noble ideals which guided the founding fathers of our Continental Organisation and the generation of Pan-Africanists in their determination to promote the right of African peoples to self-determination;

Considering the principle of self-determination stated in the *AU Constitutive Act* and the *African [Banjul] Charter on Human and Peoples' Rights*;

Recalling the heroic struggles waged by our peoples and national liberation movements for self-determination and independence;

Aware of the increasing rebel conflicts resulting from the denial of self-determination, which constitute a serious threat to the world peace in general and to the African peace in particular;

Recognising that the African peoples ardently desire the end of "oppressive dictatorship" in all its forms and manifestations;

Convinced that the continued existence of "oppressive dictatorship" and non-democratic governments in Africa constitutes a major obstacle to the socio-economic development of the continent and of the need to promote peace, security and stability as an indispensable precondition for the enjoyment of human rights;

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to "oppressive dictatorship" and all practices of segregation and discrimination associated therewith;

Determined to take all necessary measures to promote the exercise of the inalienable right of peoples to take part in government, directly or through freely chosen representatives;

Solemnly declares that:

1. All peoples shall have the inalienable right to self-determination. They shall freely determine their political destiny and shall pursue their economic and social development; and every state has the duty to refrain from any forcible action which deprives peoples referred to above of their right to self-determination.
2. The subjection of peoples to oppressive dictatorship and non-democratic governments constitutes a denial of their right to self-determination.
3. People who are forcibly deprived of their legitimate right to self-determination and fundamental human rights are entitled to use all available means, including the use of armed force, to recover their entitlements.
4. The use of force by rebels on behalf of peoples whose right of self-determination has been forcibly denied should be a remedy of last resort for ending oppression; that is to say, when there is no alternative remedy to redress that situation.
5. In their struggles to secure the right of their peoples to self-determination, rebels are entitled to receive assistance and support from governments and organisations in accordance with the purposes and principles of the Charter.

Considering the character and the importance of the right of peoples to self-determination (*erga omnes* and *jus cogens*), it is hoped that the AU member states will act upon the above recommendations swiftly and in a timely fashion.

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