THE RIGHT OF SELF-DETERMINATION OF PEOPLES: EXAMINING LEGALITY OF TERRITORIAL SECESSION UNDER INTERNATIONAL LAW

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A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF DOCTOR OF PHILOSOPHY OF THE OPEN UNIVERSITY OF TANZANIA

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CERTIFICATION

The undersigned certify that they have read and hereby recommend and approve for acceptance by The Open University of Tanzania a thesis entitled, "**The Right of Self-Determination of Peoples: Examining Legality of Territorial Secession under International Law",** in fulfilment of the requirements of the Degree of Doctor of Philosophy (Ph.D.) of The Open University of Tanzania.

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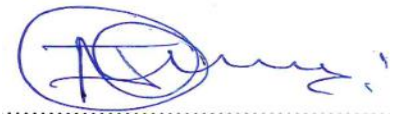
DECLARATION

I, **Joseph Ooko Nyangaga,** declare that this work presented in this thesis is original. It has never been presented to any other university or institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in fulfilment of the requirement for the Degree of Doctor of Philosophy (Ph.D.).



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DEDICATION

To the memory of my late wife Veronica Achieng' Ooko, for your love and care of our children during your lifetime. May Almighty God, shower his blessing on you and grant you peace.

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ABSTRACT

More often the communities have continued to demand territorial secession as a right of self-determination of peoples under international law. In contrast, states continue to maintain that secession is an affront to the international law's principle of territorial integrity and undermines states' sovereignty. The contestation on whether there is right to secede under international law continues to account for most domestic armed conflicts around the world, resulting in human rights violations and civilian deaths. The study employed doctrinal and qualitative research methods to investigate the legality of territorial secession as a right of self-determination of peoples under international law. The study revealed that, even though territorial self-rule is legally attainable through the right of self-determination of peoples in the context of decolonization under Article 73 of the United Nations Charter 1945 and the Declaration on the Granting of Independence to Colonial Countries and Peoples, of the United Nations General Assembly Resolution 1514 (XV) (1960). There is no specific international law rule that either expressly or implicitly supports or prohibits acts of territorial secession in international law. The study further discovered that, in general, the right of self-determination of peoples is primarily concerned with enforcing respect for human rights as its integral aspect. But, where human rights violations are exercised by the state as a policy against the peoples, territorial secession is acceptable as a remedy to human rights violations. The study concludes that territorial secession is neither legally permitted nor prohibited under international law, and therefore it does not violate international law, but rather lacks a legal framework to regulate its character under international law.

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ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
ACJHR	Africa Court of Justice and Human Rights
AFP	Agence France Presse
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
CIL	Customary International Law
EACJ	East Africa Court of Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justices
ICTR	International Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCPOA	Joint Comprehensive Plan of Action
MRC	Mombasa Republican Council
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
SADR	Sahrawi Arab Democratic Republic

SNM	Somali National Movement
UDHR	Universal Declaration for Human Rights
UK	United Kingdom
UN Charter	The Charter of the United Nations
UN GAR	United Nations General Assembly Resolutions
UN	United Nations Organization
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	The United States of America
VCLT	Vienna Convention on the Law of Treaties
WW I	First World War
WW II	Second World War

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

The right of self-determination of peoples refers to legal right for people to establish their own course in the international system, seen as a fundamental tenet of international law, derived from customary international law and is affirmed in numerous international treaties as a basic legal norm. The thorny issue of the right of self-determination of peoples' connection to territorial secession and the subsequent legality of territories to secede has been largely absent from most legal literature and case laws. Even though many legal scholars have written extensively on the right of peoples to self-determination in international law. While this study examines and assesses what constitutes a peoples' right to self-determination under international law, this research's main objective is to determine whether territorial secession as an exercise of a peoples' right to self-determination is a legal undertaking under international law.

In international law, the right of self-determination of peoples is an entitlement that is hotly debated in terms of what it means in practice and who should have access to it. Self-determination is defined by the Oxford Dictionary as "the right of a country or region and its people to be independent and to choose their government and political system."[1] As a result, the external right of peoples to self-determination is perceived to occur when a territory of a given state secedes to form a *de-facto* entity or state. While this right is unquestionably a right of "all peoples," as provided for in both the International Covenant

[1]Hornby A.S, 'Oxford Advanced Learner's Dictionary, International student's edition, 8th Edn.,' (OUP, New York, 2010), p. 1340

on Civil and Political Rights (ICCPR)[2] and International Covenant on Economic, Social and Cultural Rights (ICESCR)[3] in their article 1; in practice, the right to self-determination has remained a source of conflict and human rights violations in many states against those who demand it.

The road that led to the transformation of the traditional political practice of self-determination into a right of peoples and now existing under current international law, was long and arduous. The League of Nations was founded in 1920, its members were primarily drawn from the world's hegemonic states, the league of nations heavily punished Germany on the accusations of it having instigated the first world war, as reflected in the conditions against Germany, in the 1919's Treaty of Versailles. The right of self-determination is omitted in the League of Nations' statute. In 1945, the League of Nations was disbanded and was replaced by the United Nations (UN), whose membership was now open to all states of the world. The key role of the UN as a global body of States is founded mainly on the Charter of the United Nations (the UN Charter),[4] The objective of the UN Charter is found in its preamble that has explicitly provided its main purpose, as.

> *"To save future generations from the scourge of war, which has brought untold sorrow to humanity twice in our lifetimes, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small, and to create conditions in which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress".*

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[2] International Covenant on Civil and Political Rights (ICCPR) Art. 1(2), UNGA Res 2200A (XXI), 999 UNTS 171, adopted on 16 December 1966, entered into force on 23 March 1976,

[3] International Covenant on Economic, Social and Cultural Rights (ICESCR) Art. 1(1), UNGA Res 2200A (XXI) UNTS, Vol. 993, adopted on 16 December 1966, entered into force on 3 January 1976

[4] United Nations, Charter of the United Nations (UN Charter) 26 June 1945, 1 UNTS XVI, Art. 1(2), 55

Articles 1(2), 55, and 73 of the UN Charter guarantee peoples' right to self-determination. Apart from the UN Charter, ICESCR, and ICCPR, other legal instruments that mention this right as an entitlement, includes the UN General Assembly's Resolution of 1960, the "*Declaration on the Granting of Independence to Colonial Countries and Peoples*,[5]" which, instrumentally supported the decolonization and self-rule of territories that were still being colonised or those which are generally referred to as the non-self-governing territories in gaining independence.

However, surprisingly, under international law, there is no agreed-upon legal definition of what constitutes "peoples" right to self-determination. Furthermore, when territorial secession is advanced as a form of right of self-determination, it has always inspired a heated debate, making the right of self-determination to be the most contentious and contested legal provision in international law.[6] Nonetheless, from Western Sahara to Scotland, Eritrea to Nagorno-Karabakh, Somaliland to Kosovo, Biafra to South Sudan, and other cases, demands for the right of peoples to self-determination through territorial secession continue to recur at international law, and most often result in armed conflicts between the State and a section of its citizens.

The territories which managed to secede, in most cases abandoned the legal and peaceful means, and instead chose the use of force. The chaotic nature of those seeking territorial secession demonstrates that secessionists do not trust legal means to achieve their

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[5]Declaration on the Granting of Independence to Colonial Countries and Peoples General Assembly resolution 1514 (XV) of 14 December 1960 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Independence.aspx> Accessed 26 March 2020

[6]Lea Brilmayer., 'Secession and Self-Determination: A Territorial Interpretation' (1991), Yale Journal of International Law, Vol. 16, pp 177-178 https://openyls.law.yale.edu/bitstream/handle/20.500.13051/1750/Secession_and_Self_Determination_A_Territorial_Interpretation.pdf?sequence=2> Accessed 15 September 2019

freedom. This resolve has been exacerbated by the lack of a legal framework to regulate territorial secession at the international level.[7] For these reasons, whenever a territory secedes, it faces a difficult road to be admitted into the ranks of recognised States, because most states are hesitant to offer state recognition to secessionist territories that declares independence without the consent of the parent state, regardless of whether, in the event of such recognition, the new entity would be better off to potentially propel better governance and improve the rights of its people when it becomes a *de facto* entity through recognition as state,[8] or not. Before recognising a territory as a state, other states appear to question whether the territorial secession was consented to or not by the parent state as a yardstick to measure the qualification of those territories to be recognised States.

In general, territorial secession is opposed by most states, because they see it to undermine the parent states' sovereignty.[9] As a result, the right of peoples to self-determination, advanced through territorial secession, remains divisive, and accounting for the majority of domestic armed conflicts commonly associated with human rights violations.[10] On the other hand, states resist secession attempts that they see as *ex injuria jus non oritur* (a legal opinion that rights cannot arise from wrongdoing), and thus use it as an excuse to

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[7] Christian Tomuschat, 'Secession and Self-Determination' in Marcelo G. Kohen (ed), 'Secession International Law Perspectives (CUP, Cambridge, 2006), p. 24

[8]Elizabeth A. Nelson, 'Power and Proximity: The Politics of State Secession' (2016) (Doctorate Thesis, City University of New York (CUNY)), pp. 7-9, <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=2413&context=gc_etds> Accessed 20 April 2019.

[9]Lawrence S. Eastwood, Jr., 'Secession: State Practice and International Law After The Dissolution of the Soviet Union and Yugoslavia' (1993), Duke Journal Of Comparative & International Law, Vol. 3, pp 299-349 <https://core.ac.uk/download/pdf/62547818.pdf> Accessed 17 October 2019

[10] Okechukwu Ibeanu, Kelechi Chijioke Iwuamadi, and Nkwachukwu Orji, 'Biafra Separatism Causes, Consequences and Remedies' Institute for Innovations in Development, (Enugu, 2016), pp. 1-60, <https://www.researchgate.net/publication/312129707_Biafra_Separatism_Causes_Consequences_and_Remedies> Accessed 17 October 2019.

deny secessionists state recognition.[11] Given that the majority of territorial secession cases occur without the consent of the parent state, states have continued to regard secession demands as factually illegal, *ex factis jus oritur* (argument that law arises from facts).[12] Therefore, territorial secession as an external self-determination, remain the most contentious, with no clear legal framework on how it should be achieved.[13]

While a few law scholars have advanced legal opinions dwelling on the legality of peoples' right to self-determination under international law, most of them agree though that the right of self-determination is positive law. However, the interpretation of what this rule entails, and its scope has not yet been settled, in terms of meaning and practise. The lack of unified consensus on what is the right of self-determination has also been noted in the law courts where they continue to hold opposing views on what this rule means in practice and its scope.[14] Nevertheless, the large percentage of law scholars appear to agree that there are two aspects to peoples' right to self-determination, namely the internal and external rights of peoples to self-determination.

The internal right to self-determination is exercised within state borders, whereas the external right is exercised through territorial secession.[15] Territorial secession is viewed

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[11] John Dugard and David Raic, 'The Role of Recognition in the Law and Practice of Secession' in Marcelo G. Kohen (ed), *'Secession International Law Perspectives'* (CUP, Cambridge, 2006), p. 101

[12] Theodore Christakis, 'The State as a 'Primary Fact': Some Thoughts on the Principle of Effectiveness' in Marcelo G. Kohen (ed), *'Secession International Law Perspectives'* (CUP, Cambridge, 2006), pp. 137-138

[13] Sergo Turmanidze, 'Status of the De Facto State in Public International Law: A Legal Appraisal of the Principle of Effectiveness (LL. D Thesis, Universitat Hamburg, 2010), p. 65 <https://d-nb.info/1004783949/34> Accessed 17 October 2019

[14] Chris N. Okeke, 'A Note on The Right of Secession as A Human Right' (1996), Annual Survey of International & Comparative Law, Vol. 3, Issue 1, pp. 27-35

[15] Milena Sterio, 'The Right to Self-Determination under International Law "Selfi stans," secession, and the rule of the great powers' (Routledge, New York, 2013), p. 1

as an external aspect that occurs outside the administrative scope of the parent state; it occurs by carving out a portion of the parent state's land to form a new state through an act of secession, whereas internal self-determination occurs within the State boundaries and does not involve division of the parent's land.[16] For example, the Supreme Court of Canada stated in, *in re Secession of Quebec* that territorial secession as a right of peoples to self-determination is only permissible when peoples are oppressed and continuously denied their rights, or when peoples are subjected to human rights violations.[17] Internally, the main legal instruments used by peoples to advance the claim in exercising their right to self-determination are the ICCPR and ICESCR, both of which provide some legal framework for achieving the right of peoples to self-determination within a State's territorial borders. The internal right of self-determination of peoples requires states to respect peoples' human rights and other related liberties, which includes promoting the self-determination rights of minorities and indigenous peoples and acknowledging that these two groups are vulnerable to marginalisation and human rights violations.[18]

Territorial secession appears to lack a legal framework in international law that addresses the character of its right to territorial split, when viewed as an external aspect of peoples'

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[16] James R Crawford, 'Brownlie's Principles of Public International Law' 8th Edn. (OUP, Oxford, 2012), pp. 141-142

[17] Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (CA)

[18] United Nations Declaration on the Rights of Indigenous Peoples- UNDRIP, adopted by the UN General Assembly Res 61/295, [without reference to a Main Committee (A/61/L.67 and Add.1)] on 13 September 2007; Also see, The United Nations Declaration on the Rights of Indigenous Peoples: 'A Manual for National Human Rights Institutions' (2013), pp. 19-26, United Nations High Commissioner for Human Rights (OHCHR) and the Asia Pacific Forum of National Human Rights Institutions (APF), <https://www.ohchr.org/documents/issues/ipeoples/undripmanualfornhris.pdf> Accessed 8 October 2018

right to self-determination.[19] Abel argues that the gaps in peoples' right to self-determination is seen to be caused by the lack of a comprehensive legal framework that regulates acts of territorial secession and is linked to the debate over who are the peoples and what rights they should be able to self-determine.[20] For these reasons, academic debates about the concept and scope of peoples' right to self-determination through territorial secession, as well as its legitimacy, remain contested in international law.[21]Nonetheless, the existence of the right of self-determination of peoples in international law has reinforced people's belief that territorial secession is part of international legal rights. For instance, in 2016, David Ndii, asserted that, *"Kenya is a cruel marriage; it's time to talk divorce."*[22] Consequently, in a televised interview in 2017, Ndii said, "*If change does not come through the ballot, it will through the bullet someday!".*[23] David Ndii, argued that a segment of Kenyan society was justified to secede and form its own state in accordance with their international legal right to self-determination of peoples, even if it had to do so without the consent of the Kenyan State. It has been observed that states, on the other hand, consider secession to be the worst type of rebellion which a state can ever face, this probably explains why domestic conflicts

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[19] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008), The European Journal of International Law Vol. 19 no. 4, p 667, <http://www.ejil.org/pdfs/19/4/1658.pdf> Accessed 20 April 2019

[20] Mia Abel, Is There a Right to Secession in International Law? <https://www.e-ir.info/pdf/84268> Accessed 20 December 2020

[21] Maya Abdullah, 'The Right to Self-Determination in International Law: Scrutinising the colonial aspect of the right to self-determination' (2006) (Master Thesis, University of Goteborg), pp. 1-5, <https://core.ac.uk/download/pdf/16310405.pdf> Accessed 20 April 2019.

[22] David Ndii, *"Kenya is a cruel marriage, it's time we talk divorce"* (26 March 2016), Daily Nation Newspaper, Kenya; <https://www.nation.co.ke/oped/opinion/Kenya-is-a-cruel-marriage--it-s-time-we-talk-divorce/440808-3134132-154vra2/index.html> Accessed 6 March 2019

[23] David Ndii, "...*If change will not come through the ballot, it will through the bullet."* (2017), Nation Television-NTV, Kenya, <https://www.youtube.com/watch?v=1W_n6-pDVB8> Accessed 6 March 2019

over the right to self-determination have in most cases resulted into civil wars. These civil wars typically provide an environment for the commission of serious international crimes, such as those committed in former Yugoslavia territory in 1991,[24] resulting in international crimes. [25]

Similarly, the Rwandan Genocide of 1994 was a tribal conflict that was not directly fought against the government but was concerned with a rival tribal community fighting to maintain a status quo in Rwanda with an intention to eliminate the minority community's right to live in Rwanda. That armed conflict killed nearly one million people, necessitating the establishment of a criminal tribunal to punish the main perpetrators.[26] In Sri Lanka, the government and the Tamil Tigers have been accused of atrocities and serious human rights violations against the Tamil ethnic community and Sri Lankan civilians, with the alleged crimes ranging from war crimes and the crimes against humanity.[27]

Considering that several armed conflicts around the world have erupted because of contested territorial secession demands, which in many cases tends to result in violations of human rights and threats to international peace and security, there is need to establish what the "*right of self-determination of peoples*" is in international law, and whether *territorial secessions* violate international law.

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[24] Jennifer Trahan, 'Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia' (Human Rights Watch, 2006), pp. 1-15

[25] See, Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), UN GA Resolution 827, adopted 25 May 1993

[26] Statute of the International Criminal Tribunal for Rwanda (ICTR), UN GA Resolution 955, adopted 8 November 1994; see also, 'Jennifer Trahan, (n 25), pp. 1-12'

[27] See UN Report 'Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011), <http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf>Accessed 30 December 2018

This study is guided by the theory that the right of self-determination of peoples under the international law incorporates the right of the territories to territorially secede. This research investigates "what is the right of self-determination of peoples" in international law in general terms, but specifically examines the legality of territorial secession under international law.

1.2 Statement of the Problem

The primary goal of the United Nations and the rules in its Charter is to prevent conflicts and human suffering caused by wars.[28] Thus, the right of self-determination of peoples in international rule of law is observed to revolve around distinct undertakings related to the human right, state sovereignty and its dispensation *omnes* (flowing to all), and the rules on the obligation to the states or *jus cogens* (non-derogate).[29] However, while the UN Charter and other international law rules provide for the right of peoples to self-determination, the legal ambiguity surrounding this right is exacerbated by a lack of legal clarity regarding what it entails. As a result, there have been divergent, as well as contentious conclusions reached by law scholars and different courts in their attempts to provide a legal explanation of what this right represents.[30] Yet, this right as an international rule keeps on being observed as an entitlement of all peoples under the international law.[31] On the other hand, territorial secession is argued to provide the right to form a new state

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[28] 'UN Charter 1945 (n 4), preamble'

[29] Zubeida Mustafa, 'The Principle of Self-Determination in International Law,' (1971), *International Lawyer, Vol. 5, No. 3, pp. 479-487*<https://scholar.smu.edu/til/vol5/iss3/7> Accessed 6 February 2022.

[30] Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011), *Human Rights Law Review, Vol.11, Issue.4,* pp. 610-612, <https://www.corteidh.or.cr/tablas/r27634.pdf> Accessed 21 October 2019.

[31]Cécile Vandewoude, 'The Rise of Self-Determination Versus the Rise of Democracy' (2010), *Goettingen Journal of International Law, Vol. 2, Issue 3, p. 982,* <https://www.gojil.eu/issues/23/23_article_vandewoude.pdf> Accessed 15 March 2021; Also See "ICCPR, (n 2)Art. 1, 1966; and, "ICESCR, (n-3), Art. 1, 1966.

as a remedy for endemic injustices committed by the state against its peoples under the right of self-determination.[32]

Those who oppose secession argue that the territorial integrity of existing states is inviolable, regardless of the justification.[33] However, the Canadian Supreme Court ruled in the Quebec secession case that "only when, "a people" is governed as part of a colonial dominion or when "a people" is subjected to alien subjugation, dominion, or exploitation; and possibly when the state denies "a people" any meaningful exercise of its right to self-determination does this right arise under international law." The court stated that, in other cases "people are expected to achieve self-determination within the boundaries of their State."[34]

The diverging opinions on whether secession is a right within the premise of self-determination keeps on emerging and has led to civil wars in many states.[35] These conflicts continue to persist and have been on the rise since the UN Charter was enacted in 1945.[36] Where there is no agreement between the two, it appears that whenever the peoples demand territorial secession, a conflict between the State and the peoples is unavoidable. States frequently invoke Article 2(4) of the UN Charter, which provides for a state's

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[32] Rob Dickinson, 'The Global Reach and Limitations of Self-Determination' (2012), *Cardozo Journal Of International and Comparative, Vol. 20,pp. 379-380,*https://biblioteca.cejamericas.org/bitstream/handle/2015/3548/cjicl_20.2_dickinson_article.pdf?sequence=1&isAllowed=y> Accessed 14 November 2020

[33]Theodore Christakis, 'Self-Determination, Territorial Integrity and *Fait Accompli* in the Case of Crimea'(2015), *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) Vol.75, p. 76<https://www.zaoerv.de/75_2015/75_2015_1_a_75_100.pdf> Accessed 27 March 2021*

[34] ibid at, para, 3, p. 3

[35] Taylor B. Seybolt, 'Humanitarian Military Intervention the Conditions for Success and Failure' (OUP, Oxford, 2007), pp 8-9

[36]K. J. Holsti, 'War, Peace, and the State of the State'(1995), International Political Science Review, pp. 319-339 <https://www.jstor.org/stable/1601353> Accessed 25 June 2020

territorial integrity, which is commonly interpreted as absolute power over its subjects, or the peoples.[37]

The right to self-determination is recognised as a legal right in international law and is enshrined in the United Nations Charter as well as other international treaties and conventions.[38] Yet, territorial secession, when presented as a people's right to self-determination, is generally regarded as a rebellious act against state authority.[39] In circumstances where a state has been formed as a result of secession, it is commonly observed that other states would likely refuse to grant her own people the same right of self-determination which it claimed during its formation as a right.[40] Brilmayor asserts that, the right to self-determination as an international doctrine does obligate states to allow indefinite subdivision of territories into independent entities.[41] However, the majority of the secessionist' claims have been primarily associated with a long-standing disputed territorial secession demand to seek relief from injustices.[42] The author observes that, many states are concerned that, secessionists are likely to shift the state authority and weaken its rulers power. To this end, the state's power holders' fear revolves around a

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[37] See, 'UN Charter (n 4), Arts. 11(1)(2)(3)(4), 2(4), and 55'.

[38] Milena Sterio 'On the Right to External Self-Determination: "Selfistans," Secession and the Great Powers' Rule' (2010) Research Paper 09-163 , *Minnesota Journal of International Law, Vol.19*, pp. 1-28 <http://ssrn.com/abstract=1337172> Accessed 20 April 2019.

[39] Montserrat Guibernau, 'Nations Without States: Political Communities in the Global Age (2004)', *Michigan Journal of International Law, Vol. 25, Issue 4,* pp. 1254-1258 <https://repository.law.umich.edu/mjil/vol25/iss4/23> Accessed 11 October 2019

[40] Lea Brilmayer, (n 6), p. 182

[41] ibid

[42] David S. Siroky, 'Secession and Survival: Nations, States and Violent Conflict' (2009), (Ph.D., Dissertation, Graduate School of Duke University), pp. 29-36, <https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/3209/DmainD6-29-09.pdf> Accessed 15 February 2021

perception that seceding territory would tarnish the reputation of those in control of power, to the extent that they could be viewed as weak rulers.[43]

Another critical point is that the relationship between secession and the right to self-determination reveals that separatist claims are primarily determined by the extent to which the party in question represents a distinct people, rather than their concerns for long-term peace and justice.[44]

The ambiguity the International Court of Justice (ICJ), added to the ambiguity surrounding self-determination rights, to some extent legitimised it as political principle, in the *Case Concerning the Right of Passage over Indian Territory*.[45] The ICJ opinionated that self-determination right is not purely judicial, while explaining that, the ICJ's judicial obligation does not extend to the declaration whether the right of self-determination is solely a legal undertaking or not.[46]

Another issue with self-determination in international law is that states have been observed to withhold state recognition of territories that have seceded without their parent states' consent.[47] Due to their lack of recognition as state, seceded territories are unable to

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[43] Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea'.(2015), *International Law Studies, Vol. 91, pp. 221-234*<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1262&context=ils> Accessed 23 February 2021

[44] Susanna Mancini, 'Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination' (2008), *International Journal of Constitutional Law (I.CON), Vol.6 Issue, 3-4,* pp. 553-561

[45]Case Concerning the Right of Passage over Indian Territory, 1CJReports 1960, pp. 16-19.

[46] Ibid at, p. 32

[47] Bridget L. Coggins, 'Secession, Recognition & The International Politics of Statehood'(PhD Dissertation, The Ohio State University 2006), pp. 16-71, and 97-127 <https://etd.ohiolink.edu/!etd.send_file?accession=osu1154013298>; Also see, Erika Leonaitė and

access trade markets or purchase weapons to defend their citizens. As a result, these territories are unable to provide the necessary human rights protection to their citizens. South Ossetia, for example, is one of the territories affected by this situation, as are others.[48] It is worth noting that in international law, the international personality revolves around the mandates of States, as well as their rights and duties, and that it is a forum in which States interact on an equal footing.[49] Several revolutions concerning the legal right to self-determination have occurred in recent years. As a result of the Arab spring, many civilians were killed; for example, the civil war in Syria killed tens of thousands of people through armed conflict.[50] Similarly, thousands of civilians have died in Ethiopia's domestic armed conflict, which pits ethnic Tigrayans from the Tigray region state in the country's north against the Ethiopian federal government. Both sides in this conflict have been accused of serious human rights violations, including torture, the use of starvation as a weapon of war, and the willful killing of civilians.[51] These civilian deaths could have

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Dainius Žalimas ‘The Annexation of Crimea and Attempts to Justify It in the Context of International Law’ (2016), *Lithuanian Annual Strategic Review, 2015-2016, Vol. 14*, pp. 11-59 <https://www.researchgate.net/publication/311521729_The_Annexation_of_Crimea_and_Attempts_to_Justify_It_in_the_Context_of_International_Law> Accessed 20 October 2019.

[48] Anthony Cullen and Steven Wheatley, ‘The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights (2013), Human Rights Law Review Vol. 13, Issue, 4, pp 691-728 <https://www.corteidh.or.cr/tablas/r32259.pdf> Accessed 21 October 2019

[49] Roland Portmann, “The Concept of Personality in International Law,” *Legal Personality in International Law* (CUP, Cambridge, 2010), pp. 333-382

[50] Philippe Droz-Vincent, "State of Barbary" (Take Two): From the Arab Spring to the Return of Violence in Syria’ (2014), Middle East Journal, Vol. 68, No. 1, pp. 33-58 <https://www.jstor.org/stable/43698560> Accessed 20 October 2020

[51] See Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia, <https://reliefweb.int/sites/reliefweb.int/files/resources/OHCHR-EHRC-Tigray-Report.pdf> ;

Anne-Eleonore Deleersnyder, ‘Ethiopia’s Tigray conflict: exposing the limits of EU and AU early warning mechanisms’(2020) The Multinational Development Policy Dialogue - MDPD Studies KAS in Brussels, pp. 1-32 <https://www.kas.de/documents/272317/12679622/Ethiopia+Tigray+conflict.pdf> 14 November 2021

been avoided if the right to self-determination in international law was defined and interpreted clearly, including its legal scope.[52]

This research in general investigates what the right of self-determination of peoples under the international law constitutes, and specifically whether territorial secession when exercised as the right of self-determination of peoples is a positive legal undertaking under international law. In doing so, this research analyses and evaluates this right to answer the question of what the right of peoples to self-determination is, who are the peoples in international law, and whether territorial secession is a legal act or not under international law.

1.3 Literature Review

The Westphalia Treaty laid the groundwork for international law by establishing a set of rules, norms, and general legal principles that were widely recognized and accepted in governing state-to-state relations.[53] Several scholars from various academic disciplines, particularly international law, international relations, politics, and philosophy, have written volumes on the concept of peoples' self-determination. Few of them, however, have addressed what constitutes the right of peoples to self-determination under international law, specifically the legality of territorial secession as part of the right of peoples to self-determination as a component in international law. This has left out this

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[52] Claudia Saladin 'Self-Determination, Minority Rights, and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic' (1991), *Michigan Journal of International Law, Volume 13 Issue 1*, pp. 173-176 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1612&context=mjil> Accessed 25 September 2019

[53] Mahmoud Cherif Bassiouni , "A Functional Approach to "General Principles of International Law"(1990), *Michigan Journal of International law, Vol. 11, Issue 3*, pp. 772-775 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1664&context=mjil> Accessed 14 July 2019

legal rule of the right to self-determination to be less understood and thus remains ambiguous, particularly its right of self-determination's relationship with territorial secession. There are many contradictory scholarly arguments on this subject, however, despite these contradictory opinions, it appears difficult to completely ignore or separate claims to the territorial secession from the right to self-determination under international law.

Therefore, research gap is that it is unclear whether territorial secession when exercised as a right of peoples to self-determination, constitutes a violation of international law or not, this is due to a conflicting scholarly legal opinion on this research subject. This section focuses on a review of the literature on what is the right to self-determination in relation to territorial secession as an international law rule, to establish scholarly opinions on what is the right of self-determination of peoples in international law, and the legal y territorial secession. This section seeks to shed light, as a contribution to larger research, on why peoples' demand for self-determination, particularly territorial secession, elicits strong emotions, resulting in numerous armed conflicts between states and peoples over this legal right.

In 2019, the ICJ Judge Robinson issued his separate opinion on the legality of the right to self-determination as a component of customary international law in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Summary of the Advisory Opinion of 25th February 2019,* two important questions came up. The first question is why it was necessary for the judge Robinson to explain in detail to prove that the right to self-determination is a customary international law. And secondly, what is the

importance and binding nature of this rule.[54] The right of self-determination of peoples in international law has been observed to be the subject of debate for a long time by the scholars and courts which consistently continue to query its legality, the scope and binding nature, but fail to unanimously settle on an agreement.

Within the legal international law legal instruments, the right of self-determination of peoples is mainly found in Articles 1(2), 55, and 73, of the UN Charter as well as both the ICCPR and ICESCR in Article 1, and other international as part of human rights and is believed to originate from customary international law.[55] This elevates this right to the level of peremptory norms or *jus cogens* because its rules are *erga omnes* (flowing to all), as was established in the *East Timor (Portugal v Australia) case,*[56] where ICJ observed that the international customary law takes precedence over the treaty law, even though the right of self-determination of peoples continue to be contested when it encompasses territorial secession by the states as undermining territorial integrity of states despite the peoples claim that it is a right.[57]

Historically, President Woodrow Wilson's "fourteen point" address to Congress which was meant to set-forth and promote the balance between the guarantee of political independence of the people and the territorial integrity of the nations, unconsciously

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[54]See Separate opinion of Judge Robinson, paras 4-89, pp. 295-326<https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-09-EN.pdf> in Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Summary of the Advisory Opinion ICJ GL No 169, ICGJ 534 (25th February 2019),<https://www.icj-cij.org/public/files/case-related/169/169-20190225-SUM-01-00-EN.pdf>Accessed 20 November 2021

[55]ibid at paras 4-89, pp. 295-326

[56]*East Timor (Portugal v Australia) (Judgement) [1995] ICJ Reports 90., at p. 29*

[57] Andrew Pullar, Rethinking Self-Determination, (2014), *Canterbury Law Review, Vol. 20*, p. 92 <http://www.nzlii.org/nz/journals/CanterLawRw/2014/5.pdf> Accessed 23 June 2017

conceptualised the idea of creating this right.[58] Some scholars have argued that this right is divided into two aspects, the internal and external.[59] They argue that the internal aspect of this right permits peoples to freely access to political, economic, social, and cultural development without interference, designed to be obtained within the State's boundary.[60]On the other hand, the external aspect has been argued by some scholars and courts as permitting secession to become independence, or self-rule.[61]

The human rights rules have been observed to encompass exploration of the application of the international law rules derived both from treaty laws as well as international customs. The right of self-determination of peoples is an international customary legal norm, then it should have a binding nature that is *erga omnes* (flowing to all), and therefore self-obligatory to all states even those which are not state parties to the irrespective treaties.[62] Ordinarily, the enforcement of the "special law" (*lex specialis*) rules whose sources are derived from customary norms are distinguishable, in comparison to general law (*lex generalis*) whose source arises from treaty law.[63] The rules that emerge from customary norms are observed to be binding at large without the need for ratification; thus, where there is a conflict of law between the treaty and customary law, customary

[58]Juan Francisco Escudero Espinosa, 'Self-Determination and Humanitarian Secession in International Law of a Globalised World- Kosovo V. Crimea' (Springer International Publishing, Gewerbestrasse, 2017), p. 11

[59] ibid

[60] ibid

[61] ibid

[62] Matthew Saul,' (n 31), pp. 612-614

[63]ibid

international law takes precedence.[64] For instance, in the *North Sea Continental Shelf cases*[65]the ICJ stated that, under the customary international law;

> *"Not only must the acts concerned amount to a settled practice, but they must also be observed as 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 (customary) rule of Law requiring it."*

The court went further to state that, 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."

Shaw, on the other hand, contends that the right of peoples to self-determination is a unilateral political act with domestic and international legal ramifications.[66] Shelton opines that, the right of self-determination of peoples provides political independence to territorial entity to enable state to exist without internal interference by other States; and secondly, it provides peoples with freedom to freely exercise their individual liberties such as social, economic, religious, and cultural liberties.[67] Any attempt to interfere with national unity and territorial integrity of any State, would amount to undermining of the political independence of states and therefore is incompatible with the UN Charter principles, [68] as stated in the *1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the*

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[64]Malcom N. Shaw, International Law, 6th Edn. (CUP, Cambridge, 2008), p. 66

[65]*North Sea Continental Shelf Cases, Judgment, I.C.J. Reports 1969, p. 3. Para 44*

[66] 'Malcom Shaw, (n 66), p.445'

[67]Dinah Shelton, The Oxford Handbook of International Human Rights Law' (Oxford University Press, London, 2013), p. 385

[68] Ibid, at p. 389

Charter of the United Nations.[69] This means that the right to self-determination extends beyond human rights exercised within the framework of statehood responsibilities.

However, some scholars have claimed that there is no right to territorial secession, within the right of self-determination of peoples at international law, other scholars argue otherwise, and counterclaim that territorial secession, as a right of self-determination of peoples, indeed does exist in international law, hence the peoples can territorially secede because of this right.

The disputed discourse on whether the right of self-determination incorporates secession or not, does characterise the right of self-determination as an unsettled rule both from legal perspective and in actual practice where opinions on this right appear to be divisive.[70] Christakis contends that a secessionist territory must demonstrate its existence as a matter of fact rather than law; arguing that *"secession is not a question of law, but of fact."*[71] Consequently, Tomuschat argues that if self-determination belongs to all peoples, then all peoples should enjoy it, including the right to secede, without discrimination. He postulates that the drafters of the right to self-determination widened the scope of this rule's *ratione personae* (jurisdiction) to make it more appealing to everyone.[72] Similarly, Li observes that the right to self-determination is a human right that must be protected and exercised by all peoples. Therefore, its promotion cannot be a one-sided undertaking.

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[69]Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625(XXV), (24 October 1970)

[70]Ahmednasir M. Abdullahi, 'Article 39 of the Ethiopian Constitution on Secession and Self-determination: A Panacea to the Nationality Question in Africa? (1998), *Verfassung und Recht in Übersee (VRÜ), Vol. 31, pp. 440-423,* <*https://www.nomos-elibrary.de/10.5771/0506-7286-1998-4-440.pdf?download_full_pdf=1*>Accessed 24 July 2021.

[71] 'Theodore Christakis, (n 15) *p. 5'*

[72]Christian Tomuschat,' (n 7) pp. 23-24

Therefore, if non-secessionists have this right recognized to benefit them, then secessionists should have the same right as well to allow them to break away if they wish to form their own state.[73] It is debatable whether territorial secession should be freely allowed to take course, considering that the uncontrolled right of all peoples to territorially secede in the absence of a regulating legal framework is a risky undertaking; as this could manifest chaos and anarchy if too many states are created, as it could become impossible for states to engage with one another at forums such as the United Nations General Assembly (UNGA).

Malanczuk observes that the ability to secede is contingent on the territory concerned being able to establish factual territorial effectiveness.[74] Crawford postulate that self-determination through secession, is a criterion related to state formation as an international law principle of equal rights in self-determination of peoples, which is found in the UN Charter in Articles 1(2) and 55, was primarily intended to support the decolonization of colonised territories.[75] These two Articles are supplemented by the adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*,[76] as an external aspect of self-determination.[77]

Conceptually, some scholars argue that, under this right, peoples were to gain self-rule, thereafter, the internal aspect of the right to self-determination was to kick-in and be

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[73] Jing Li, 'On State Secession from International Law Perspectives' (Springer, Gewerbestrasse, 2018), pp. 1-2

[74] Peter Malanczuk, 'Akehurst's, Modern Introduction to International Law, 7th Edn. (Routledge, New York,1977), p. 80

[75]'James R Crawford, (n 16), p. 141'

[76]'UN General Assembly Resolution 1514 (XV) of 14 December 1960 (n 5)'

[77]'James R Crawford, (n 16), p. 141'

realised through the two 1966 covenants as per their Article 1 of both the ICESCR[78] and ICCPR.[79] Therefore, the right of self-determination of peoples in an external context does not include the right to secede, but rather a right to form a new state, in a post colonisation context.[80] Kohen contends that the right of peoples to self-determination is a single right with two facets, whereas the internal aspect is practised internally, the external aspect leads to the formation of a new state and are international law's legal undertakings.[81] On the other hand, Cassese observes that there is no right of peoples to self-determination that permits a right to territorially secede. He maintains that UN Charter's Article 73 was only intended to facilitate decolonization, and that Articles 1(2) and 55 were supposed to allow peoples to seek self-determination internally within the State.[82] Hilpold argues that secession as a right of self-determination of peoples, is a neutral principle in which non-State actors, especially the *de facto* territories which are yet to be recognized as States, are held in limbo pending their development into *opinion juris* before becoming an international personality in international law.[83]This mind-set, is supported by Slomanson[84] and Tamanaha[85] who claim that the right to self-determination refers to territorial inhabitants' free willingness to choose how they want to be governed, but dispute that this right includes self-rule through territorial secession. Tamanaha further argues that the right

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[78] ICESCR (n 3) Art. 1(1)

[79] ICCPR (n 2) Art. 1(1)

[80] ibid

[81]Marcelo G. Kohen (ed), *'Secession International Law Perspectives* (CUP, Cambridge, 2006), p. 9

[82] Antonio Cassese, 'International Law, 2nd Edn.', (OUP, New York, 2005), pp. 328-329

[83] Peter Hilpold, 'Self-determination and Autonomy: Between Secession and Internal Self-determination', *(2017), International journal on minority and group rights, Vol. 24,* pp. 302-315, <http://www.peterhilpold.com/wp-content/uploads/2017/04/IJGR-2017-vol.24_03_302-Self-determ-Auton1822.pdf>Accessed on 22 May 2019

[84] William Slomanson, 'Self-Determination: Fundamentals Perspectives on International law 6th Edition' (Thomas Jefferson School of Law, San Diego, 2011), p. 71

[85] Brian Tamanaha. 'On the Rule of Law; History, Politics, Theory (CUP, New York, 2004), p. 36

of peoples to self-determination is realised when an individual has access to political, legal, and personal liberties, which is a necessity for ensuring the minimum degree of autonomy required by a community.[86] Similarly, Hannum and Asatiani contends that the right of peoples to self-determination as a legal right does not include the right to secede because self-determination rule was not intended to disintegrate sovereign States, and therefore "implicitly and explicitly rejects right to secede."[87]

Sterio, on the other hand, advances an opinion that the right to self-determination does indeed include a right to secede. However, secession should strictly be exercised by the oppressed peoples whose fundamental human rights are violated by the state, or continuously subjected to human rights violations.[88] In which case, the oppressed peoples would have the right to external self-determination, including the right to remedial secession and independence.[89] The lack of a legal definition of the right to self-determination in international legal instruments has left this rule open to conflicting interpretation. With states having gained greater influence and control over self-determination practices, this is a game-changer which further limits peoples' access to the benefits of self-determination as an entitlement. Oloka-Onyango, maintain that the right of peoples to self-determination include a right to territorial independence; however, secession is a burden and impactful on the State, as it entails losing part of the State's

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[86] ibid

[87] Hurst Hannum, 'The Right of Self-Determination in the Twenty-First Century', (1998), Washington & Lee Law Review, Vol. 55, p 776, <https://scholarlycommons.law.wlu.edu/wlulr/vol55/iss3/8>; Sopio Asatiani, 'Remedial secession under international law: Analysis of Kosovo, Abkhazia and South Ossetia' (Master Thesis, Central European University, Budapest 2013), p. 5 <https://www.peacepalacelibrary.nl/ebooks/files/335882129> Accessed 8 October 2019.

[88] 'Milena Sterio (n 15), pp. 2-3'

[89] ibid

territory and redrawing of its international borders.[90] Some scholars argue that the right of peoples to self-determination is a weak rule of international law that tries to solve what is essentially a political problem, resulting in a wide range of interpretations and meanings.[91] Borgen further states that because states are never truthful about their actions and interpretations of people's rights to self-determination, this right has been reduced to mere political rhetoric.[92] Anderson argues that territorial secession is a legal right under international law which emanates from the right to self-determination.[93]

Former territories such as Bangladesh seceded from Pakistan, Eritrea seceded from Ethiopia, Bosnia and Herzegovina, Croatia, Montenegro, Slovenia, and Serbia, all seceded from Yugoslavia, and South Sudan seceded from Sudan and were all granted the recognition as states.[94] Therefore, Weller observe that secession is a legal act under the international law; however, because international legal rules are created by states, states have continued to restrict this legal right to be exercised as a right of self-determination, thereby preventing it from being invoked against state.[95] But in contrast to Weller's

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[90] J. Oloka-Onyango 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium.' (1999), *American University International Law Review, Vol. 15, Issue 1,* pp. 151-208

[91] Patricia Carley, *'Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession' (1996), (*Report from A Roundtable held in conjunction with The U.S. Department of State's Policy; United States Institute of Peace) pp. 3-10, <https://www.usip.org/sites/default/files/pwks7.pdf> Accessed 9 September 2018

[92] Christopher Borgen, "States and international law: the problems of self-determination, secession and recognition" in Basak Cali (Ed) *International Law for International Relations*, (OUP, Oxford, 2010), pp. 198

[93] Glen Anderson, 'Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects"(2013), *Denver Journal of International Law & Policy, Vol. 41, Issue 3,* pp. 346-395 <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1129&context=djilp> Accessed 25 January 2019

[94] ibid

[95] Marc Weller, 'Settling Self-determination Conflicts: Recent Developments (2009)' *The European Journal of International Law Vol. 20, No. 1*, p. 112 <http://www.ejil.org/pdfs/20/1/1788.pdf> Accessed 25 January 2019

assertions, the right to self-rule is strictly applicable to the territories which were under colonial administrations, international law has not demonstrated that secession is permissible outside this context.[96] Simon postulates that if a *de facto* territory successfully secedes and is capable of functioning as a state, then it should be offered recognition.[97] Raic, observe that paragraph 7 of Principle V of the Friendly Relations Declaration,[98]the 1993 Vienna Declaration,[99] are identical, implying that the right to (external) self-determination is constrained by the right of states to territorial integrity.[100] The territorial integrity of states, as a right supported by the law, conflicts with self-determination of peoples, this has been observed to limit people's access to their right to self-determination in some circumstances, even though procedurally, it was intended to be exercised in accordance with States' collective obligations to the law to allow their peoples' the right to self-determination, as a human rights. Raic observes that the Principle V of the Friendly Relations Declaration implicitly recognizes the existence of a qualified legal right for peoples to secede and form their own state.[101] Consequently, Principle V of the Friendly Relations Declaration implicitly recognizes the existence of a qualified legal right to unilateral secession for citizens living within the borders of their respective states.[102] The doctrinal debates surrounding the right of peoples to self-determination reviewed in this

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[96] Ibid

[97]Thomas W. Simon, 'Remedial Secession: What the Law Should Have Done, From Katanga to Kosovo (2011), *The Georgia Journal of International and Comparative Law* vol. 40, pp. 107-108 <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=10> Accessed 24 July 2021

[98] See 'Friendly Relations Declaration (n 71), Para 7, Principle V'

[99] Vienna Declaration and Programme of Action, as adopted A/CONF.157/23 by the World Conference on Human Rights on 25 June 1993

[100] David Raic, Statehood and the Law of Self-Determination, Developments in International Law VOLUME 43, Kluwer Law International, The Hague, 2002, p. 323

[101] ibid

[102] Ibid

section demonstrate that there has been disagreement and confusion among scholars as to what is the right of peoples to self-determination as a legal doctrine, from its political or non-legal implications. As a result, this rule has continued to be misinterpreted, contributing to conflicts, and resulting in human rights violations in actual practice.[103] Territorial secession without the state's consent has always been contested, resulting in numerous cases of armed conflicts and confrontations between the State and the secessionist.[104] These feuds are frequently the source of the most human rights violations through armed conflicts. Coggins (2011), p. 35, as quoted by Li, argues that domestic conflicts "kill more people than interstate wars because they are more frequent and tend to last much longer than interstate wars."[105] This standpoint is reflected in many domestic laws that have made secession illegal or unconstitutional. It is not surprising that, the African Union (AU), included the right of self-determination of peoples in its Charter on Human and Peoples' Rights,[106] but imposed the principle of *uti possidetis juris* (non-alienation of the colonial borders), whose objective is to outlaw any kind of territorial secession of an African state frontier.[107] This demonstrates the fact that, the AU as a regional association of African states, does not intend to permit the secession to be

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[103] Matthew Saul,' (n 31), pp. 609-644

104Shpend Kursani, 'Contested States The Struggle for Survival and Recognition in the Post-1945 International Order' (2020) (Ph.D. Thesis, European University Institute), pp. 21-27<https://cadmus.eui.eu/bitstream/handle/1814/67955/Kursani_2020_SPS.pdf?sequence=1&isAllowed=y>Accessed 26 January 2022.

[105] Jing Li, '(n 75), pp. 1

[106]See The African Charter on Human and Peoples Rights', (Nairobi Treaty) 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), ratified by 53 member States of the African Union (AU) Art. 20(1), <https://treaties.un.org/doc/Publication/UNTS/Volume%201520/volume-1520-I-26363-English.pdf> Accessed 8 October 2019.

[107] The Organization of African Unity (OAU) now African Union (AU) in its Resolution AHG/Res. 16 (I) in 1964 at the first session of the Conference of African Heads of State and Government held in Cairo, Egypt (or the "Cairo Resolution"), a prohibited change of African States' frontiers or boundaries from what they were at the independence. This rule was later enshrined as Article 4 (b) in the Constitutive Act of the African Union (AU).

exercised as a component of the right of self-determination of peoples, under any circumstance.

Contrary to the AU's stance on secession, the ICJ opinion, with respect to Kosovo's unilateral secession in 2010 from Serbia,[108] turned-out to be a surprise to many scholars who had believed otherwise, after the ICJ ruled that unilateral territorial secession does not breach the principles of international law. The Kosovo decision transformed and contradicted long-held political and legal beliefs, after the ICJ dismissed the claim that territorial secession without the consent of the parent State is not illegal under international law.

The researcher observes that, self-determination has always gained support from the ruled, particularly during the administrations of monarchs in old days, most monarchs were known to have ruled with an iron fist but lacked the legitimate consent of the peoples they claimed to represent or rule. As a result, self-determination gained currency following the two world wars, when the European territories attempted to promote peace and social cohesion amongst themselves by allowing their peoples who share the common ancestral inclinations to form their own states. This is evident in the current composition of European states, where France is occupied by the French speaking community, Sweden by the Swedish speaking community, the Netherlands by the Dutch people, Italy by the Italians, Spain by the Spaniards, and so on. However, territorial secession based on ethnic

[108] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010 [2010] ICJ Rep 403.

affiliation cannot be replicated everywhere in the world.[109] This is because, at the peak of the scramble for land to colonise, colonial powers drew colonial territorial borders without taking into account the indigenous peoples' tribal inclinations; as a result, even after decolonization, territorial secession based on tribal affiliation was made impossible, because territorial independence was to occur based on existing colonial frontiers, particularly in Africa, but also elsewhere. The division of the land of the indigenous people by the former colonial powers, placed different ethnic communities into different territories, therefore it is impossible to create states based on ethnic alignments, as this is not tenable under current conditions, as it could be a source of conflicts, both at domestic and inter-state, due to cross-border tribal affiliations.[110] The practicality of territorial secession appears to be a double-edged sword, with the potential to create more chaos and anarchy, if the lack of clear legal framework to address secession persists. Dumberry claims, quoting Kohen, noted that secession and territorial integrity rules are at pains to explain each other's positions.[111] Considering that the seceded territories need to be recognized as States to enable them to acquire the *de-jure* status as an international personality as well as its own territorial integrity. Perhaps this is why the International Court of Justice did not consider Kosovo's territorial secession to be a violation of international law, considering the factors and conditions under which the secession

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[109] Cherif Bassiouni (ed), 'Toward a Universal Declaration on the Basic Principles of Democracy: From Principles to Realisation' in *Democracy: Its Principles and Achievement'* (1998), Inter-Parliamentary Union Geneva, pp. 1-19 <http://archive.ipu.org/pdf/publications/democracy_pr_e.pdf> Accessed 18 July 2021

[110] Alexander Keese, 'Ethnicity and the Colonial State', (Koninklijke Brillny, Leiden, 2016) pp. 221-291

[111] Patrick Dumberry, 'Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada' in Marcelo G. Kohen (Eds), 'Secession: International Law Perspectives', (Cambridge University Press, Cambridge, 2006), p. 446

occurred, thus favouring the substantive aspect of that secession over the procedural aspect from an international law perspective.[112]

In conclusion, the researcher observes in this literature, there are two schools of thought. The first holds that, besides independence from colonial rule, there is no legal right to territorial secession as part of the right to self-determination. While the other believes that when a state violates human rights, victims have the right to seek redress, including remedial secession. One thing which scholars unitedly agree upon, is that the right of self-determination of peoples, is undeniably the legal right of peoples that allows them to freely decide as a community about their destiny in terms of political, social, and economic terms; however, if these rights are not respected by the State, the peoples may opt for territorial secession and form their own State. To restore freedom, the researcher advances an opinion that territorial secession should be permitted only in exceptional cases where there is a need to protect fundamental human rights.

Whereas scholars' focus in the preceding discussion, points to the generalisation of the consequences of peoples' right to self-determination, they fail to explain what this right is as an entitlement of the peoples, and who are the peoples in international law. Furthermore, scholars appear to acknowledge that the right of self-determination rules is about observing human rights, but its consequence justifies territorial secession, even though international statutes and conventions largely remain silent, specifically on

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[112]Ioana Cismas, 'Secession in Theory and Practice: the Case of Kosovo and Beyond'(2010), *Goettingen Journal of International Law, Vol. 2 Issue 2,* pp. 531-587 <https://www.gojil.eu/issues/22/22_article_cismas.pdf> Accessed 13 November 2020

whether territorial secession can be exercised as a component of peoples' right to self-determination.

1.4 Objective of the Study

1.4.1 General Objective

The primary goal of this study is to examine the legality of territorial secession in international law as a right of self-determination of peoples.

1.4.2 Specific Objectives

i. To investigate the existing legal gaps in the laws dealing with the right of self-determination of peoples in international law.

ii. To examine the legality of secession of territories as part of the right to self-determination of peoples in international law.

iii. To evaluate the existing rights entitled to peoples under international law's right of self-determination.

1.5 Research Questions

This study sought to clarify, evaluate, and determine the legality and scope of the right of self-determination of peoples, and to determine whether territorial secession is a legal right under self-determination under international law. The specific questions to be addressed are as follows.

1. What are the existing legal gaps in international law that relate to the right of self-determination of peoples?

2. Does international law recognise territorial secession as a legitimate exercise of peoples' right to self-determination?

3. Under the international laws, right of self-determination of peoples, who are the "peoples" and what are the rights to which the peoples are entitled?”

1.6 Significance of the Study

Most armed conflicts can be traced back to calls by peoples to exercise their right to self-determination. These conflicts are typically sparked by calls for territorial secession to exercise a people's right to self-determination, and they are a major source of serious human rights violations such as torture and civilian killings.

This study is significant because it will help to prevent domestic armed conflicts as well as the negative consequences for affected civilian populations. This research contributes to the body of knowledge on territorial secession and the right of peoples to self-determination in international law. This is done by developing, reviewing, and identifying any legal gaps currently present in international law pertaining to the right of peoples to self-determination.

1.7 Research Methodology

The term "research method" refers to the approach or method used to conduct research, including the procedure, tools used to collect data, and other research aids. In contrast, the term "research methodology," does explain or describe the techniques used by a researcher throughout the research process. It is the underlying logic or reasons for selecting a method for a research project. It further entails researching the method used in a specific field,

these could be the collected views, beliefs, values, theories, or principles that underpin their use to develop an approach that corresponds to the research objectives.[113]

This study primarily employed a combination of doctrinal and qualitative research method approaches. Whereas the structured features were analysed using doctrinal research methods, the procedural aspects were evaluated using the qualitative research method to demonstrate the similarities and differences of approaches used by peoples in territorial secession as the right to self-determination in different contexts. The qualitative research method was used to logically evaluate international law rules concerning peoples' right to self-determination in relation to the territorial secession, it entailed analysis of court decisions and scholarly opinions, among others.[114]

Under the doctrinal research method, the researcher assembled relevant facts, identify the legal issues; analysed the arising legal issues with a view to locating appropriate law and legal framework; reading backgrounds and locating primary material including law dictionaries as the black dictionary, case laws, legal encyclopaedias, textbooks, international legal instruments such as international conventions and declarations (both soft and hard laws) and journal articles, and consequently synthesising all the issues contextually; and reaching to a tentative conclusion. The application of the doctrinal research method is usually focused on the study of law itself, rather than study about law, this research method is used for analysing existing laws and related case laws, legal

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[113] Sam Goundar, 'Research Methodology and Research Method' in Sam Goundar and G., Suseendran, *Convergence of Artificial Intelligence with Blockchain Technologies: Challenges and Opportunities* (World Scientific, 2020), Chap. 3

[114] John Creswell, 'Research Design, Qualitative, Quantitative, and Mixed Methods Approaches 3rd Edn.' (SAGE Publications, Inc. California, 2009) p. 97

concepts as well as legal authorities and materials.[115] The doctrinal research method supported the researcher in addressing aspects of law being studied, the international law principles, doctrines, and related theories, including an analysis of the historical development of the right to self-determination. The main sources used while applying the doctrinal method, included law books, journals, and an examination of case laws from International Court of Justice (ICJ) decisions and corresponding advisories, as well as other legal materials such as conventions, international statutes, and scholarly academic journals and theses.

Under the qualitative method, the researcher worked on Thematic Analysis which aided in designing the chapter topics and sub-sections, reviewed, and evaluated jurisprudence and legal theories, for example, assisted in explaining the nature of law in its most general form and provided a deeper understanding of legal reasoning and application. The researcher examined legal prepositions, corresponding laws, and practices in the right of self-determination of peoples and territorial secession.

The researcher also evaluated historical events concerning the right to self-determination and territorial secession, as well as some current events that occurred during the research period and are either directly or indirectly related to this research, these occurrences have been incorporated into this research to further study's progress. To gain a better understanding of the legal prepositions, this research relied on international law legal documents. These aided the researcher in understanding the scope of applicability of

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[115] Amrit Kharel, 'Doctrinal Legal Research (2018), Securities Board of Nepal Silver Jubilee Publication, SEBON, Lalitpur, Nepal, pp. 237-252 <https://www.researchgate.net/publication/323762486_Doctrinal_Legal_Research> Accessed October 2019.

international rules concerning people's right to self-determination in international law. The researcher found the information in the materials acquired to be extremely helpful, particularly in detecting legal voids in the norms of international law.

The analysis of numerous international law principles in scholarly theses, international law textbooks, and academic publications greatly in understanding legal concepts.[116] Academic law books and scholarly journals were essential in advancing and examining certain positions to the arguments regarding the meaning and practice of territorial secession as a right of peoples to self-determination. A thorough account of the historical context, viewpoints, and development of self-determination through practices over the years prior to self-determination practices being accepted as a legal right was provided by the international law materials, such as online law books and complemented by history books, which assisted the researcher in understanding the legal source of right of self-determination as well as international law's strengths and weaknesses.

However, the researcher employed desk research technique, where the application of techniques such as the use questionnaire for the prospective correspondences as the means to collect raw data was never used, because the technique was not appropriate considering the nature of the research of which was more focused to investigate the existence of the applicable law, rather than its tangible effects.

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[116] Patricia Leavy, 'Research Design "Quantitative, Qualitative, Mixed Methods, Arts-Based, and Community-Based Participatory Research Approaches' (The Guilford Publications, New York, 2017) p 91

1.8 The Scope and Limitation of Study

This research focuses on determining whether territorial secession is permissible under international law with respect to the right of peoples to self-determination. The scope of this research encompasses the historical context of self-determination, its associated practices, the development of self-determination practices into a right in international law, and an examination of the legality of territorial secession if advanced as a self-determination right of peoples in international law.

Nonet, postulates that, for a law to be considered a positive law, it must be lawful, before it becomes effective.[117] The scope of this study focused on finding the legality of territorial secession as a right of self-determination of peoples in international law. To do this, the researcher investigated the concept of a people's right to self-determination and how it correlates to territorial secession. This was to determine the connection between this right and the sources of international law and to demonstrate the legality of this rule derived from those sources, the researcher further explored the relationship between the right of peoples to self-determination and international law sources. According to Article 38 (b) and (d) of the International Court of Justice (ICJ) statute., the international law sources are as follows a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilised nations; d) subject to the provisions of Article 59, the judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary

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[117] Philippe Nonet, 'What Is Positive Law?' (1990), *The Yale Law Journal, Vol. 100,* p. 668 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7318&context=ylj> Accessed 20 March 2019

means for the determination of rules of law. [118] The researcher examined the legality of the right of self-determination of peoples along the aspects of the international law sources.

This research examined the concept of the right to self-determination under international law, the legitimacy of territorial secession, whether it belongs within this right for individuals, and how it links to other human rights. Given that norms demand that a rule be established as a right that all peoples are allowed to enjoy for a right to exist. To support researcher, identify the root causes of disputes between territorial integrity and the territorial secession as the right of self-determination of people's international law rules, a study of the relationship between territorial integrity and territorial secession was undertaken. This scope of this study was expanded to include an examination of how territories are recognized and subsequently become sovereign states under international law, as well as the conditions under which a territory might do so after seceding from a parent state as a legal right of self-determination.

The main limitation of this study was the lack of adequate literature from scholars relevant to the study area, but this was overcome by widening the scope of investigations, for which necessitated the use of mixed research methodology where both qualitative and doctrinal methods were used simultaneously. Indeed, the reason for using the qualitative method was to thematize, analyse and evaluate, for example, the jurisprudence and legal theories, of which assisted the researcher in explaining the nature of law in its most general form and provided a deeper understanding of legal reasoning and application.

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[118] See Article 38 (b) and (d) of the Statute of the International Court of Justice (ICJ) <https://www.icj-cij.org/en/statute> Accessed 12 January 2019

1.9 Organization of the Chapters

This research is broken down into seven chapters, which are listed below.

The first chapter introduces the research topic, gives an overview of the research, and provides the contextual and conceptual framework for the study. This includes the background of the study, the research objective, the three research questions, the literature review, and the organisation of the thesis chapters.

The second chapter provides historical context for the concept of self-determination and the subsequent practises, it also demonstrates how self-determination, which was primarily practised as a political process in mediaeval period, evolved over time to become a legal right in contemporary international law. The overview includes the political intrigues that caused people to engage in self-determination practises, all the way up to the point where it became a legal right of the peoples under international law. This chapter also addresses the third research question on "Who are the peoples in the right of self-determination of peoples?"

The third chapter explores the connections between international law sources and the right of self-determination of peoples. This chapter investigated how international law sources contribute to the legality of peoples' right to self-determination, which was legendary practised as a political undertaking before becoming a legal right.

The internal aspect of people's right to self-determination is examined in the fourth chapter. This chapter examines the internal application of the right to self-determination in international law, excluding secession. The first research question, "What is the right of peoples to self-determination in international law?" is addressed in this chapter, along with the accountability mechanisms for states to ensure that each state respects peoples' right to self-determination. The fifth chapter of this study examines the right of self-

determination of peoples from an external perspective, with an in-depth focused review of the legality of territorial secession in international law. As a result, this chapter examines territorial secession practises as well as the challenges that secessionists face. The chapter responds to research question number two, which questions the legality of territorial secession in international law if undertaken as a form of self-determination.

This chapter examines international law and state recognition practises considering peoples' right to self-determination. This sixth chapter examines the need to recognise states for them to exercise their peoples' right to self-determination. The chapter examines the two theories of recognising states, declaratory and constitutive theories, and their applicability, as well as providing an evaluative account of the Somaliland and Taiwan cases to demonstrate the difficulties that secessionist territories face.

Chapter Seven summarises the research findings and concludes with the findings of the investigations conducted as part of this research. It also summarises the findings and provides insights into the emerging challenges to people's right to self-determination. Given the scope of the study, the chapter also makes recommendations for areas that need further investigation.

CHAPTER TWO

CONCEPTS AND THEORIES IN SELF-DETERMINATION

2.1 Introduction

The conceptual context of any legal study is critical because it contributes to an understanding of the law and practice in the past, now, and the evolution expected in the future. Self-determination is an ancient human practice that has been well documented in history books. This chapter two explores the conceptual framework and related theories, throughout the history of self-determination from its inception as a practice up until its adoption as an international legal right. The chapter also examines the concept of self-determination through the general overview of practices relating to this right and reveals" who are the peoples" in international law. As a result, this chapter contributes to a basic understanding of how the global community has conceptually regarded self-determination from mediaeval times to the present as it conceptually evaluates who the self-determination and its beneficiary referred to as the peoples in international law.

2.2 The Review of Concepts and Theories of Self-Determination of Peoples

2.2.1 Francisco de Victoria Concept and Theory on Self-Determination

Conceptually, the right of self-determination of peoples in contemporary international law can be traced back to the days of Francisco de Victoria (1483-1546).[119] Victoria's 1539 teachings, *"De Indis,"* delivered at the University of Salamanca, theorised that, for American Indians' have a right to make their own decisions about social and religious

[119] Francesco de Vitoria, 'On the American Indians,' in Anthony Pagden (ed), *Political Writings*, (CUP. Cambridge,1991), pp. 231-292

practices without being forced or coerced by outsiders.[120] Victoria theorised that there was a need for civil power "*de potestate civili*," or that political power should be exercised responsibly for the benefit of the ruled community in such a way that it advances internal self-determination and collective sovereignty.[121] Victoria's theory was based on the authority and power of divine kings and governments, he claimed that in reality, such authorities are subject to the rule of law in equal measure, just like the community that has been subjected to the government authority by the very divine authority.[122]

Kwame Gyekye, postulates that, the right of peoples to self-determination, is the legal right related to the ancient practice of choosing one's own affairs, particularly political, economic, and social affairs. This practice was long practised as a political undertaking rather than a legal entitlement before the UN Charter was institutionalised. Likewise, the United Nations Educational, Cultural and Scientific Organization (UNESCO) World Report, suggests that the inclusion of self-determination in the UN Charter was intended to meet the need to transform this traditional practice into a legal entitlement as a human right that provides liberty to all people globally as a right.[123] It is observable that cultural practices of people demonstrate that different people naturally belong to different

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[120] Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of

Hospitality from Vitoria to Vattel' (2016), EJIL Vol. 27 no. 4, 901-922 <<https://www.ejiltalk.org/new-issue-of-ejil-vol-27-2016-no-4-out-next-week/> Accessed on 28 February 2019; see also, Charles Fenwick, 'The Spanish Origin of International Law' in James Brown Scott, *Francisco De Vitoria and His Law of Nations*, (Clarendon Press, Oxford, 1934), pp. 691-693

[121]'Francesco de Vitoria (n 122), p. 250'

[122] Luis Valenzuela-Vermehren, 'Empire, Sovereignty, and Justice in Francisco de Vitoria's International Thought: A Re-Interpretation of De Indis (1532)'; (2013), *Revista Chilena de Derecho, Vol. 40 No. 1,* pp. 293 <https://scielo.conicyt.cl/pdf/rchilder/v40n1/art10.pdf> Accessed 1 March 2019

[123] United Nations Educational, Cultural and Scientific Organization (UNESCO) World Report, 'Investing in Cultural Diversity and Intercultural Dialogue' (UNESCO. Paris, 2009), pp. 65-90; Kwame Gyekye, 'African Ethics' (Stanford Encyclopaedia of Philosophy, 2010) <https://plato.stanford.edu/entries/african-ethics/> Accessed 22 February 2019

communities and ethnic groups and that they should be free to practise their own cultures and adapt to particular social activities in their natural habitats. These cultural practices also serve to confirm human behaviour towards claims of the entitlement to self-determination.

2.2.2 The Revolutionary Concepts and Theories in Self-Determination

Historical events such as The Glorious Revolution (1685-1689),[124] The American Revolution (1776),[125] The French Revolution (1789),[126] Karl Marx and Vladimir Lenin's views on self-determination,[127] and Woodrow Wilson's opinions on self-determination,[128] show that self-determination was practised long before it was recognized as a legal right under international law. This chapter section demonstrates how conceptually, revolutions have been viewed as a method of achieving independence or self-determination in resistance to the existing power structure.

2.2.3 Concept of Resistance for Self-Determination and Glorious Revolution of 1688–1689

King James II of England, a Catholic, announced in 1688 that he would govern by divine right; as a result, his subjects rebelled. The king's popularity was already low during his

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[124]Julian Hoppit, 'A Land of Liberty? England 1689–1727 '(OUP, New York, 2000), pp. 15-23

[125] Peter Hilpold 'The Right to Self-determination: Approaching an Elusive Concept through a Historic Iconography' (2006), *Austrian Review of International and European Law, Vol. 11,* p26 <https://www.peterhilpold.com/wp-content/uploads/2017/04/SBR-ARIEL-11-2006-2009.pdf> 15 March 2019.

[126] Peter McPhee, 'The French Revolution 1789-1799', (OUP. New York, 2002); Notes on the French Revolution, 'Diagraming the Main Points and Components of the French Revolution' <https://www.mtholyoke.edu/courses/rschwart/hist255s13/French_Revolution_Lecture/French%20Revolution%20introduction.pdf>; also see, Thomas Zell, 'French Revolution'<https://rfb.bildung-rp.de/fileadmin/_migrated/content_uploads/French_Revolution_02.pdf> Accessed 15 March 2019.

[127] Julius Katzer (ed), 'Vladimir, I. Lenin Collected Works Vol. 20, December 1913- August 1914, 3rd reprint' (Bernard Isaacs and Joe Fineberg 'trs'), (Progress Publishers, Moscow, 1977)', pp. 56-58

[128] 'Patricia Carley (n 93)'

reign, his subjects believed he was violating their rights, which led to the uprising. As a result, he was dethroned, and his protestant daughter eventually took over from him.[129] This led to the enactment of the English Bill of Rights (1689), titled *"An Act Declaring the Rights and Liberties of the Subject and Establishing the Succession of the Crown,"* the statute balanced power between the monarch and Parliament.[130] The English institution of Parliament established a form of government in which the representatives of the people could convene once every three years to discuss governance. The Meeting of Parliament Act of 1694 later formalised this triennial gathering.[131] The Bill of Rights (1689) and the Mutiny Act (1689), both of which prohibited the retention of a standby army during peacetime without parliamentary sanction, were also passed by the English Parliament.[132] Following the Glorious Revolution, the English government underwent a number of reforms, some of which involved the protection of property rights. The British people, through parliament, have the power to make unilateral decisions about matters of government, not the monarchy.[133] The importance of this revolution and its relationship to self-determination, per the concept, stemmed from the fact that it established the sovereignty of parliament in determining how people are governed. This event is observed as a turning point in the English people's exercise of self-determination since it also restrained the monarch's autocratic authority by establishing a system of people-led

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[129] 'Julian Hoppit, (n 127), p. 19'

[130] English Bill of Rights (1689), s. (I)(II) (III

[131] Meeting of Parliament Act, 1694, Ch. 2, 6 and 7

[132] Gary W. Cox, 'Was the Glorious Revolution a Constitutional Watershed?' (2012), *The Journal of Economic History, Vol. 72, No. 3*, pp. 567-598 <https://pdfs.semanticscholar.org/5517/3d6e01aac3a356e907964d9685a310c6355c.pdf> Accessed 1 March 2019

[133] Geoffrey M. Hodgson, '1688 and all that: property rights, the Glorious Revolution and the rise of British capitalism.' (2016), Journal of Institutional Economics, 2 <https://www.eur.nl/media/2017-06-1688allthathodgson> Accessed 2 March 2019

government. Hodgson contends that the Glorious Revolution in 1689 had both positive and negative effects because England witnessed a significant change in foreign alliances that was later attributed to the major wars that occurred between 1755 and 1863, forcing Britain to raise money to fund them at the expense of economic expansion.[134]

2.2.4 Resistance Theory and the American Revolution of 1776

Due to the imposition of a stamp duty levy in 1764, the thirteen American colonies rebelled against the British Empire.[135] The House of Burgesses in Virginia fiercely rejected the proposed stamp tax, arguing that the colonies' current economic distress could not support the new levy. This opposition was the initial cause of the revolution.[136] After a shipment of British tea was dumped into Boston Harbor on 17 December 1773, in protest of British tea income duty, the tension between colonists and colonists grew deeper.[137] The colonies made the *argumentum a fortiori* (strongly arguing), that there could not be a reconciliation between monarchy and freedom. The stand-off culminated in full-fledged war in April 1775. As a result, self-determination was unavoidable, and the American colonies declared independence from Britain in 1776.[138]

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[134] 'Geoffrey M. Hodgson, (n 136), p. 22'

[135] Robert Middlekauff, 'The Glorious Cause: The American Revolution 1763–1789' 2nd ed. (David M. Kennedy 'ed'), (OUP, New York, 2007), Ch. 6

[136] ibid

[137] George Bancroft, 'History of the United States, From the Discovery of the American Continent, Volume X,' (Brown and Company, Boston, 1874), p. 92

[138] Ibid

In his thesis, Beatty notes that, even before the stamp tax was imposed, in 1765, there had been suggestions to rebel against British control in all of the colonies.[139] During the American Revolution, which is comparable to the "Glorious Revolution," people rebelled against government orders that they viewed as oppressive and unjust.[140] Bancroft, argues that *"The American struggle was avowedly a war in defence of the common rights of mankind*."[141] The US President Woodrow Wilson conceptually theorised that, right to self-determination was a necessity and viewed it as an international legal entitlement.[142] Consequently, according to Ginsburg *et al*., he theorised that any power acting against the wishes of the people is illegitimate, and people have the right to resist and demand their right to self-determination, either through democratic or revolutionary means, such as revolution.[143]

2.2.5 Regime Change Theory and the French Revolution of 1789

A power struggle between the King, the aristocracy, and the middle class (the third estate) erupted in Paris in June 1789 and on 26 August 1789, the third estate took charge of the government,[144] which led to a change of regime and governance.[145] The Declaration of the

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[139] Joshua Fogarty Beatty, 'The Fatal Year: Slavery, Violence, and the Stamp Act of 1765' (DPhil. Dissertation, College of William and Mary, 2013), p. 11 <https://digitalarchive.wm.edu/bitstream/handle/10288/20491/2014-09-25_beatty_dissertation_for_swem.pdf;sequence=1>Accessed 2 June 2019

[140] The Glorious Revolution asserted the need for people to gain rights to decide on how they will be governed, by taking away some authority from the monarch and transferring them to the parliament. For the American Revolution, the colonies decided to gain self-rule by way of total independence from monarch authority.

[141] 'George Bancroft, (n 141), p.41'

[142] David Raic, '(n 102), p. 115

[143] Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, 'When to Overthrow your Government: The Right to Resist in the World's Constitutions' (2013), *UCLA Law Review* , *60*, pp. 1207-1212 <http://chicagounbound.uchicago.edu/journal_articles> Accessed 2 June 2019

[144] 'Peter McPhee, (n 129), pp. 50-62'

[145] ibid

Rights of Man and Citizen ("*Declaration des droits de l'homme et citoyen*") was adopted the same day as the date of government takeover. In Article III of this Declaration, it stated that.

> *"The nation is essentially the source of all sovereignty; nor can any individual, or any body of men, be entitled to any authority which is not expressly derived from it."*[146]

Peter McPhee observes that, where the legality to the accessibility and acquisition of land was skewed. There was also equitability to the distribution of agricultural land in favour of the wealthy which led to a food crisis, and a weak economy. Discord in the time led to the French Revolution because of the unfair distribution of land to the upper class and the subsequent shortage of grain reserves.[147]

2.2.6 Socialist theory and the Russian Revolutions

2.2.6.1 Socialist Theory in Karl Marx's Revolution

Socialist beliefs were advocated by Karl Marx and the Social Democratic Party, which in turn fostered self-determination movements in Eastern Europe that resulted in some of the regions becoming independent nations. Later, similar demands were made in other parts of the world, and such demands for self-determination continued long after World War II (WWII).[148] There are numerous states in Eastern Europe that are geographically distinct from one another, and these entities are now said to exist as a result of Marxist ideological influence. Poland, which split away from Luxembourg, and Norway, which emerged from

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[146] Jack Goldstone, 'Ideology, Cultural Frameworks, and the Process of Revolution' (1991), *Theory and Society: Vol. 20, No. 4,* pp. 405-453. <https://www.jstor.org/stable/657686?seq=1> ; Pëtr Kropotkin, 'The Great French Revolution 1789–1793,' (1908), pp. 11-16. <https://libcom.org/files/Petr_Kropotkin__The_Great_French_Revolution_1789-1793_letter.pdf>Accessed 21 April 2019

[147] 'Peter McPhee, (n 129)'

[148] Andrew Heywood, 'Political Theory: An Introduction', 3rd edn. (Palgrave Macmillan, New York, 2004), 361

Sweden, are two examples of these states.[149] Marx believed that the acceptance of nations' right to self-determination was intrinsically intertwined with universal social democracy. An international congress was held in London in 1896 with the aim of opposing military dictatorships and promoting Marxist theories and the right of the people to self-determination.[150] This resulted in the convening of a congress to establish the right of nations to self-determination as provided in the wording below.

> *"The Congress declares, the full right of self-determination [Selbstbestimmungsrecht] of all nations and expressed its sympathy for the workers of every country suffering under the yoke of military, national or other despotism; to join ranks with workers of the whole world to fight for the defeat of international capitalism and the achievement of the aims of international Social-Democracy.[151]"*

Koskenniemi claims that Marx was a liberal who opposed limiting social justice. He was the driving force behind the revolution he had initiated and had no faith in the ability of the law to provide social justice. Marx's beliefs, according to Koskenniemi, are "*an object of progressive political commitment"* for the advancement of the global social system.[152]

Karl Marx's scepticism about the capacity of law to deliver restorative social justice is apparent where it has been observed that conflicts over self-determination are more likely to be resolved through political processes than by the application of the law.

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[149] Vladmir.I. Lenin, 'The Right of Nations to Self-Determination' (Foreign Languages Publishing House, Moscow, 1947), pp.40-47

[150] Ibid

[151] Ibid, at p 47

[152] Martti Koskenniemi, 'What Should International Lawyers Learn from Karl Marx?' (2004), Leiden *Journal of International Law*, pp. 229-246 <https://legalform.files.wordpress.com/2017/11/koskenniemi-international-lawyers.pdf> 29 July 2019

2.2.6.2 Socialist Theory and Vladimir Lenin's Revolution

The editor of the liberal Rech, Mogilyansky, published an official editorial in 1902 that emphasised the value of the right of nations to self-determination.[153] Karl Marx's social justice theories were admired by Vladimir Ilyich Ulyano (Vladimir Lenin, 1870–1924). He saw the advantages of people becoming independent in making their own decisions about their affairs and believed that authorising a declaration of freedom for nationalist groups meant allowing those groups to make their own political decisions for their future, including the right to achieve independence and enjoy self-determination.[154] In the aftermath of an armed conflict, he appears to believe that citizens of defeated territories should be able to choose their rulers, and the colonised people should be able to advance civil liberties and political independence.[155] Hasani asserts that the Soviet attitude toward self-determination, as well as the Soviet-style Socialist Federation, were influenced by the power of politics; this included internal struggles in Soviet Russia under Lenin's self-determination policy, as well as the appeasement of Poles, Funnes, and other nationalities of the Tsarist Empire.[156]

Lenin, like Karl Marx, promoted what can be referred to as social justice politics. His philosophy advocated fairness, a foundational principle of human rights in contemporary

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[153] 'Julius Katzer (ed), (n 130), p. 56'

[154] 'Vladmir.I. Lenin' (n 153), pp. 19-22'

[155] Glen Anderson, 'A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?' (2016), Vanderbilt Journal of Transnational Law Vol.49, No.4, 1197-1199 <http://arizonajournal.org/wp-content/uploads/2017/04/GLEN_ANDERSON_FinalPDF.pdf> Accessed 17 July 2019; Alexander Pantsov, 'The Bolsheviks and the Chinese Revolution 1919-1927' (University of Hawai'i Press, Honolulu, 2000), 9-53

[156] Enver Hasani, 'Self-Determination, Territorial Integrity and International Stability: The Case of Yugoslavia: Lenin and the Soviet Conception of Self-Determination' (National Defence Academy, Vienna, 2013), p. 72

international law. Lenin wanted to promote self-determination as a political strategy for obtaining social freedom. His self-determination concept may have influenced the 1945 adoption of the right of peoples to self-determination as a fundamental principle in the United Nations Charter. According to Przetaczni, Lenin believed that "any suffering nation has a democratic substance and should be supported regardless of its bourgeois character."[157] Karl Marx's socialism ideals, which Marx had advanced through the German Social Democratic Party, had Lenin's full support. Lenin was a revolutionary and a member of the Russian Social Democratic Party. In the 1894 publication of his book "Who Are These 'Friends of the People' and How Do They Fight Against the Social Democrats" he wrote this book when he was 24 years, Lenin demonstrated support for the socialist concept of freedom and self-determination.[158]Lenin and the Bolsheviks' "Russian revolution," which took place in February 1917, overthrew Nicholas II's dictatorial rule over the monarchy. Lenin became the head of Russia shortly after Bolsheviks held over a provisional government between February and October 1917, a government he had held on to behalf of the workers' and peasants' coalition.[159]

2.2.7 Wilsonian Concept of National Self-Determination

While much has been written about self-determination, with Wilson being credited with coming up with the concept, it is clear that if Wilson were alive today, he could have rejected the view that the right to self-determination includes the right to territorial

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[157]Frank Przetacznik, 'The Basic Collective Human Right to Self Determination of Peoples and Nations as a Prerequisite for Peace' (1990), *NYLS Journal of Human Rights: Vol. 8: Iss. 1, Article 3*, pp. 70-71 <https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1175&context=journal_of_human_rights > Accessed 17 April 2019

[158] Lars. T. Lih, 'Lenin Rediscovered: What Is to Be Done? in Context' (Brill Academic Publishers, Leiden, 2005), pp. 109-115

[159] ibid

secession, as scholars such as Sterio have argued.[160] Thomas Woodrow Wilson, the former President of the United States from 1913 to 1921, described democracy in his writings as "national organic oneness and effectual life." Wilson's words, "national organic oneness and effectual life," can be interpreted as a good life for all. He did not, however, stop there; he went on to say that nations must mature into manhood before their peoples are old enough to govern themselves.*[161]*

Wilson believed in civil liberties, which he saw as a means of gaining self-determination; he expressed this belief during the most turbulent period of his presidency, which was marked by World War I (1914–1918), which began a year into his presidency. While both Lenin and Wilson advocated for self-determination, Lenin's self-determination was centred on good governance, in which the peoples could seize power from their oppressive rulers.[162] Wilson's ideas were based on Western democratic principles of national "internal" self-determination, a belief that self-determination should be linked to the concept of self-governance, in which governments must rule with people's consent.[163] As a result, the people should have a direct say in who leads them and how they are represented in government.[164] Wilson believed that nations should be left to determine their own political fate. This is analogous to the internal type of people's right to self-

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[160] 'Milena Sterio (n 15)'

[161] Derek Heater, 'National Self-Determination: Woodrow Wilson and his Legacy' (Macmillan Press Ltd, London, 1994), p. 27

[162]Kathleen Kennedy, 'Civil Liberties' in Ross A. Kennedy (ed), *A Companion to Woodrow Wilson*, 1st Edn. (John Wiley & Sons, Ltd, West Sussex, 2013), pp. 323-324

[163] 'Milena Sterio (n 7), pp. 140-144'

[164] Trygve Throntveit, The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination, (2011), *Diplomatic History*, Volume 35, Issue 3, 445–481, <https://doi.org/10.1111/j.1467-7709.2011.00959.x> Accessed 16 October 2019.

determination.[165] Wilson's theoretical vision of the right to self-determination excluded the concept of nations having independent statehood outside of the parent state. Wilson believed that internal self-determination within state boundaries was desirable, like what the Americans and French pursued in their respective revolutions. He believed that governments should be held accountable to their constituents.[166]

Wilson's post-WWII exposition underwent extensive rethinking of what it meant to have a desirable right to self-determination of peoples. He did, however, remain steadfast in his support for the right of peoples to self-determination at the national level.[167] Critics argue that Wilson's belief in national self-determination was betrayed when the United States recognized Czechoslovakia's independence on 18 October 1918, after Masaryk formally declared Czechoslovakia's independence from the empire of Austria-Hungary while in Washington.[168] Following the United States' recognition of Czechoslovakia, other US allies recognized the territory of Czechoslovakia as an independent state.[169] An event that is thought to have followed the characteristics of peoples' external self-determination in

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165Glen Anderson, 'Secession in International Law and Relations: What Are We Talking About?' (2013), 35 Loy. L.A. Int'l & Comp. L. Rev. p. 359 <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1694&context=ilr> Accessed 11 March 2019.

166 Marija Batistich 'The Right to Self-Determination and International Law' (1995), *Auckland University Law Review*, pp. 1013-1037, <http://www.nzlii.org/nz/journals/AukULRev/1995/7.pdf> Accessed 5 March 2018.

Also see Aaron Kreuter, "Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession" (2010). Minnesota Journal of International Law., pp. 367-369' <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1340&context=mjil> Accessed 20 March 2019

167 Lloyd E. Ambrosius, 'Wilsonianism: Woodrow Wilson and His Legacy in American Foreign Relations' (Palgrave Macmillan, New York, 2002), pp. 118-200

168 Artem Zorin, "American Policy towards Czechoslovakia, 1918–1945" in Aliaksandr Piahanau (ed) *Great Power Policies Towards Central Europe 1914–1945* (E-International Relations Publishing, Bristol, 2019), pp. 107-108

169 Lloyd E. Ambrosius (n 171), pp. 141-148'

the context of contemporary self-determination practices. Wilson's attempt to incorporate self-determination into the League of Nations Covenant to legalise it as an international law applicable to postwar settlements was unsuccessful. According to some authors, this prevented the principle of self-determination from being incorporated as an international law right of the time into the League of Nations statute.[170] In October 1914, the US Ambassador in London, Walter Hines Page, described a conversation he had with Sir John French, Commander-in-Chief of the British Expeditionary Force, about a set of peace proposals devised by Sir John French.

This was based on a combination of punitive treatment by Germany and national self-determination. In his Fourteen Points, Wilson is said to have supported this idea as a good guiding principle, stating that peace in Europe can only be achieved through national self-determination of peoples as the "*principle of justice to all peoples and nationalities, and the right to live on equal terms of liberty and safety with one another, whether strong or weak.*"[171]

Wilson's philosophical beliefs supported national self-determination, which aligned with the goals of the ICESCR and ICCPR rights principles, as well as Article 1(2) of the UN Charter. According to Bessinger, Wilson's influence was responsible for the disintegration

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[170] Burak Cop and Dogan Eymirlioglu, 'The Right of Self-Determination in International Law Towards The 40th Anniversary of the Adoption of ICCPR and ICESCR', (2005), pp. 116-117 <https://dergipark.org.tr/en/download/article-file/816601> Accessed 27 April 2019.

[171] 'Lloyd E. Ambrosius (n 171), p.47'

of the Soviet Union (USSR) and other European territories that split along national self-determination lines many years later, following Wilson's fourteen-point address.[172]

The Glorious Revolution, French Revolution, and Russian Revolution are examples of self-determination historical events that demonstrate the relevance to human right's needs, from which mistreatment or denial of people's rights can legitimately necessitate the need for an external right of peoples to self-determination as a legal right in international law.[173] Summer observes that the goal of including a right of peoples to self-determination in international law instruments was to empower community members to demand their rights, allowing them to make decisions affecting their well-being within their respective States.[174] The right of peoples to self-determination is guaranteed by UN Charter Articles 1(2), 55, and 73. This legal right, however, has limitations because it has yet to define who the peoples are, what rights to self-determination they have, and how those rights should be self-determined.[175]

Although some scholars, such as Weiss, believe that the creation of the United Nations was a brilliant idea to promote global peace and prosperity after WW II.[176] The concept of having a legal right to self-determination was advanced by twentieth-century world

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[172] Mark R. Beissinger, 'Nationalism and the Collapse of Soviet Communism' in *Contemporary European History*, (CUP, Cambridge, 2009), pp. 331–347

[173] Rex A. Wade, 'The Russian Revolution, 1917,' (CUP, Cambridge, 2000), pp. 1-20

[174] James J. Summers, 'The Right of Self-Determination and Nationalism in International Law' (2005), International *Journal on Minority and Group Rights Vol. 12, No. 4*, pp. 325-354, <https://www.jstor.org/stable/24675307> Accessed 20 April 2019.

[175] Redie Bereketeab (ed), Self-Determination and secession in African: The post-colonial state (Routledge, 2015), p. 5

[176] Thomas G. Weiss, 'The United Nations: Before, During and After 1945' (2015), Chatham house publications, pp. 1221-1235,<https://www.chathamhouse.org/sites/files/chathamhouse/publications/ia/INTA91_6_01_Weiss.pdf> Accessed 24 November 2018

leaders such as Thomas Woodrow Wilson, the former President of the United States from 1913 to 1921, who believed that the right of people to self-determination is an entitlement for citizens to be free to decide their own destiny as citizens within their domicile nations. [177]The right to self-determination, according to Batistich, is an old concept that has undergone numerous transformations in many aspects and respects.[178]

2.3 The Concepts and Theories in Self-Determination of Peoples

In the earlier sections of this chapter, 2.2.1, Francisco de Victoria's *("De Indis")* teachings conceptualised and theorised that people have the right to decide for themselves on social issues that affect them without being forced or coerced by outside forces, and that by doing so, they have a civil and political power *("de potestate civili")* collective as a sovereign entity. He asserted that, like the community that had been subjected to governmental authority by the very divine authority, the authority and power of divine monarchs and governments were equally subject to the rule of law. This chapter's latter sections have shown how several theories and concepts linked to self-determination have developed along the principles of Victoria's conceptualization and philosophy on the subject. The socialist theory, the resistance theory for independence, and the resistance theory for regime change are some of these emerging doctrines. The concept of resistance for internal and external self-determination has also emerged from these viewpoints. This section examines the concepts and theories.

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[177] Lloyd E. Ambrosius and Betty Miller Unterberg, 'The United States, Revolutionary Russia, and the Rise of Czechoslovakia' (1990), The *Journal of American History, Vol. 77,* pp. 1070-1071

[178] 'Marija Batistich, (n 170), p. 1013'

2.5.1 Concepts of Resistance and The Wilsonian National to Self-Determination

The Russian and American revolutions demonstrate the similarities between it and the French, Glorious, and Russian revolutions as a situation in which people desired to be involved in administration and decision-making and where failure to do so may lead to regime change or other forms of self-determination.[179]

In accordance with international law, the right of peoples to self-determination can encompass regime change or change of government, such as through democratic or coup means, as an internal aspect of this right, an action that is distinct from the well-established context of decolonization and territorial secession. It is distinguishable from America's 13 colonies, which achieved sovereignty from British colonial rule in 1776, in comparison to French, Glorious, and Russian revolutions because all three of these earlier revolutions resulted in territorial independence within the State or a regime change.[180] The American Revolution, according to some scholars, is an example of an external kind of self-determination in which a territory acquires *de-facto* and *de-jure* status after seceding to become a State.[181] An in-depth examination reveals that decolonization entails refusing such assertion, considering that territorial secession does not include shifting the border between countries. The revolutions under consideration, however, demonstrate that self-determination is a legendary occurrence that has been employed historically to advance

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[179] Vernon Van Dyke, 'Self-Determination and Minority Rights' (1969), *International Studies Quarterly*, Vol. 13, No. 3, pp. 223-253, <https://www.jstor.org/stable/3013530> Accessed 20 April 2019.

[180] Brad Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010), *MJIL, Vol. 11*, pp. 1-48, <https://law.unimelb.edu.au/__data/assets/pdf_file/0011/1686314/Roth.pdf> Accessed 20 April 2019.

[181] Jan Wouters and Linda Hamid, 'We the People: Self-Determination v. Sovereignty in the Case of *De Facto* States' (2016), Inter Gentes Vol. 1 Issue 1, pp. 52-62, <https://intergentes.com/wp-content/uploads/2016/11/We-the-People-Self-Determination-v.-Sovereignty-in-the-Case-of-De-Facto-States_WoutersHamid.pdf> Accessed 21 April 2019.

civil liberties and human values. Moreover, it illustrates that wherever and whenever someone's fundamental human rights are violated, that person has a right to self-determination. No matter whether the community's unilateral activity leads to internal or external self-determination, in such situation. The Wilsonian concept of national self-determination was grounded only on internal self-determination in the absence of territorial secession. The notion focused on people's right to access human rights within state borders. The French Revolution, which happened because of state discrimination where the wealthy had an advantage over the poor, has provided conceptual insights in revolutionary self-determination. For instance, from the time of creation of the United Nations, there has been a need to develop and strengthen the legal framework to prevent *"State v. Peoples"* conflicts, where the State breaches its obligation to safeguard the rights of its citizens, the citizens could seek protection through self-determination whether internally or through territorial secession, as a legal principle found in the UN Charter and other international legal instruments. The right of peoples to self-determination, as a legal principle enshrined in the UN Charter and other international legal doctrines, was ostensibly developed largely to avert wars that, in the majority of situations, would endanger global peace and security.[182] Considering that the aim of international law is to protect peoples regardless of their territorial inhabitation, it was also intended to enhance living conditions for "peoples."[183] The Glorious Revolution fundamentally altered how the British people were governed, deviating from the monarch's exclusive rule to

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[182] Matthew C. Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime' (2013), *EJIL, Vol. 24, Iss. 1*, pp. 151–189, <https://academic.oup.com/ejil/article/24/1/151/438293> Accessed 21 April 2019.

[183] Frits Kalshoven and Liesbeth Zegveld, 'Constraints on the Waging of War: An Introduction to International Humanitarian Law' (ICRC, Geneva, 2001), pp.40-153

parliamentary representation. Wiessner observes that, even though neither territorial secession nor resistance as a means of exercising a people's right to self-determination have been expressly recognised by international legal instruments. Most of the international laws and declarations that the United Nations has established deal with the rights of indigenous peoples and other minorities to self-determination.[184] It is debatable whether the revolutionary concepts played a significant role in the self-determination traditions' growth through time from a political undertaking to a recognised legal right under international law. However, popular resistance can indeed be justified in situations where the state discriminates against or prohibits individuals from exercising their rights.[185] For example, Lenin personally oversaw a revolution to achieve self-determination, which served as the foundation for the Russian revolution.[186] Notably, in the years that followed, the efforts of Karl Marx and Vladimir Lenin impacted the inclusion of the right of peoples to self-determination in modern international law. Bowring contends that the Soviet Union contributed significantly to some of the most crucial doctrines in international law that are still relevant today, such as social justice principles, which are pertinent to the right to self-determination as an international law dogma.[187] Bolshevik and Lenin significantly contributed to the development of modern

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[184] Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011), *EJIL, Vol. 22, Iss. 1,* pp. 121–140, <https://academic.oup.com/ejil/article/22/1/121/436597> Accessed 21 April 2019.

[185] The French Revolution demonstrated the need to seek self-determination in the event that social and civil liberties are denied, it also emphasized the lack of equality, as a justification to self-determination. The current international law has factored, them in several doctrines, including the Universal Declaration of Human Rights (UDHR) 1993; the United Nations Declaration on the Rights of Indigenous Peoples (2007); the International Covenant on Civil and Political Rights (1966)

[186] 'Rex A. Wade, (n 177), p. 1'

[187] Bill Bowring, 'Positivism versus Self-determination: The Contradictions of Soviet international law,' (2007), p. 2, <https://www.researchgate.net/publication/228294082_Positivism_Versus_Self-Determination_The_Contradictions_of_Soviet_International_Law>Accessed 10 March 2019.

international law by establishing the primacy of the doctrine of the right of peoples to self-determination. Furthermore, Russia generously supported national liberation movements throughout Europe in the years that followed, both financially and psychological support. As a result, self-determination rights are now recognized as fundamental principles of public international law.[188]

2.3.1 Resistance Theory in the Right of Self-Determination of Peoples

2.3.1.1 The Resistance Theory of Regime Change

One could consider the Glorious Revolution of 1688–1689 as a case study in the resistance hypothesis of regime transition. The hereditary transfer of power from one monarch to the next served as the foundation of the monarchy's political structure, and it exercised absolute power over its subject.[189] The mediaeval methods of changing monarch administrations were either through rebellion by their subjects to overthrow the monarchy administration from within or militarily powerful monarchs conquering weaker monarchs and imposing their rule over them, or annexing them as part of its territory.[190] There is evidence that dynastic and monarchical governance was incorporated by ancient authorities such as chiefdoms and kingdoms in the majority of the world's cultures. This exemplifies that self-determination was a common practice as an international customary

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[188] 'Lloyd E. Ambrosius and Betty Miller Unterberg (n 181), 141-148'

[189] Gilles Lecuppre, 'Ideal Kingship against Oppressive Monarchy. 65 Discourses and Practices of Royal Imposture at the Close of the Middle Ages' in Jeroen Deploige and Gita Deneckere (eds), *Mystifying the Monarch Studies on Discourse, Power, and History* (Amsterdam University Press, Amsterdam, 2006), pp. 65-76

[190] Jeroen Deploige, 'Political Assassination and Sanctification.: Transforming Discursive Customs after the Murder of the Flemish Count Charles the Good (1127' in Jeroen Deploige and Gita Deneckere (eds), *Mystifying the Monarch Studies on Discourse, Power, and History* (Amsterdam University Press, Amsterdam, 2006), pp. 35-54

norm before it evolved into international law norm.[191] A new age of transnational nation-state authority in Europe began with the Westphalia Treaty of 1648, which created a set of agreed-upon guidelines for nations to adopt.[192] More significantly, the Treaty of Westphalia established the notion of state sovereignty and a code of conduct for territorial authorities.[193] The treaty established a new order opposed to the long-standing practice of using force or a "just" war to rule or conquer other territories. It also carried with it respect for territorial sovereignty and national self-determination.[194] However, the monarchs became more powerful and dictatorial internally within the monarchs' territory, the theory of regime change as right of self-determination demonstrates that the glorious revolution was to seek freedom and regime change of power from monarchy to Parliament.

2.5.2.2 The Territorial Independence Theory

If sovereign occupation and control are allowed to go uncontrolled, the right of peoples to self-determination and territorial sovereignty could become meaningless, which would be problematic and dangerous for global stability and peace. According to historical accounts, nations embraced resistance theory as a form of self-defence against hostile and dominating powers.

There were external conflicts and wars before the contemporary global legal system was established. Article 2(4) of the UN Charter forbids States from using force against the

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[191] Edwina Barvosa-Carter, "Mestiza Autonomy as Relational Autonomy: Ambivalence and the Social Character of Free Will," (2007), *The Journal of Political Philosophy* Vol. 15, No. 1, pp. 1-21 <https://www.scribd.com/document/151367590/Mestiza-Autonomy-as-Relational-Autonomy-Ambivalence-and-the-Social-Character-of-Free-Will> Accessed 22 February 2019.

[192] Marija Batistich (n 170), pp. 1013-1037

[193] Stephane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004), *Australian Journal of Legal History, Vol. 8*, pp. 182-183 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=672241> Accessed 2 April 2019.

[194] 'Taylor B. Seybolt, (n 168) pp 8-9'

territorial integrity of another State unless authorised by the UN Security Council (UNSC) in accordance with Article 42 of the UN Charter or for self-defence in accordance with Article 51 of the UN Charter.[195] However, violent battles between independent nations persisted in the years after the Westphalia Treaty and current international order. For instance, the treaty of Aix-la-Chapelle on 18 October 1748, [196]which ended the Austrian succession war, the treaty of Paris in 1763,[197]between Spain and Portugal, the Peace Treaty of France and Portugal of 1713, and the Peace Treaty of Spain and Portugal of 1715, are some of the examples of peaceful settlements of feuds between territories.[198] The territorial supremacy rivalry and the desire to dominate the weaker nations are widely regarded as the primary root causes of World War One (WWI).[199] Germany signed the Treaty of Versailles of 1919, which was a treaty of peace between victorious nations and Germany.[200] Consequently, the Treaty of Sevres in 1920, which freed Saudi Arabia, Libya, and Sudan from Turkish state control.[201] The signing of peace treaties led to some degree

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[195] UN Special Report, 'Report of the Special Rapporteur, Mr. James Crawford, on State Responsibility (17 March 1 and 30 April 19 July 1999) UN Doc A/CN.4/498 and Add.1–4

[196] See the Treaty of AIX La Chapelle (signed at Aix la Chapelle, 18 October 1748)', <https://www.yourphotocard.com/Ascanius/documents/Considerations%20on%20the%20definitive%20treaty,%20signed%20at%20Aix%20la%20Chapelle,%20October%207(18)th,%201748.pdf> Accessed 3 April 2018

[197] See Treaty of Paris (Adopted 10 February 1763 in Paris) 1763 <https://www.oas.org/sap/peacefund/belizeandguatemala/historicdocs/treaty%20of%20paris%201763.pdf> Accessed on 3 April 2019.

[198] Randall Lesaffer, 'Peace treaties and the formation of international law', in Bardo Fassbender and Anne Peters (eds.), The Oxford Handbook of the History of International Law (Oxford, OUP 2012), pp. 71-94

[199] Richard F. Hamilton and Holger H. Herwig, 'The Origins of World War I' (CUP, Cambridge, 2003), pp. 1-20

[200] The Treaty of Peace between the Allied Powers and Germany, (Signed at Versailles, 28 June 1919). Treaty of Versailles, (1919), was an agreement respecting the military occupation of the territories of the Rhine, and assistance to France in the event of unprovoked Aggression by Germany. <https://www.foundingdocs.gov.au/resources/transcripts/cth10_doc_1919.pdf> Accessed 20 March 2019.

[201] Treaty of Peace between The Allied & Associated Powers and Turkey, signed at Sevres on 10 August 1920 <http://sam.baskent.edu.tr/belge/Sevres_ENG.pdf> Accessed 20 March 2019.

of peaceful coexistence between the states after World War I. But it did not stop the Second World War (WWII) from breaking out in 1939.[202] After World War II, the allied states formed the United Nations (UN) and abandoned the League of Nations because the UN was more inclusive and embraced all states in its membership.[203] Archibugi argues that '*the conceptual self-determination of peoples, is instituted on the principle that peoples themselves are the owners of these rights.*'[204]Indeed, the inclusion of self-determination of peoples into the UN Charter elevated it to the status of a legal right for the first time.[205] The UN is tasked with maintaining world peace and security. According to the UN Charter's preamble, is,

> *..'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom',..*[206]

Therefore, the Glorious Revolution, in which the British people rebelled against the king and claimed the right to self-determination by establishing a parliamentary system and replacing the monarch leadership, served as a national example of the resistance theory of independence. The League of Nations, which had a relatively small membership and did

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[202]David Reynolds, 'From World War to Cold War Churchill, Roosevelt, and the International History of the 1940s' (OUP, Oxford, 2006), pp. 13-22

[203] Leland Goodrich, 'From League of Nations to United Nations, *International Organization'*, (2012), *Vol. 1, No. 1 (Feb. 1947)*, pp. 3-21, <https://www.jstor.org/stable/2703515?origin=JSTOR-pdf&seq=1> Accessed 28 February 2019

[204] Danielle Archibugi, 'A Critical Analysis of the Self-Determination of Peoples: A Cosmopolitan Perspectives' (2003), *Constellations Volume 10, No. 4,* pp. 488-503 <http://www.danielearchibugi.org/downloads/papers/2017/11/Archibugi-A-Critical-Analysis-of-the-Self-determination-of-Peoples.pdf> Accessed 28 February 2019

[205] 'UN Charter 1945 (n 4), Arts. 1(2), 55 and 73'

[206] ibid

not represent the interests of the general populace states, it is comparable to the monarchy rule during the Middle Ages in that it was oriented on collective defence.[207]

However, in practice, the political and legal aspects of the right of peoples to self-determination are viewed as separate doctrines. [208] Where the territorial secession is concerned in the right of self-determination of peoples, it is ambiguous whether conduct of self-determination ought to be regarded as political or legal in light of this manifestation of the dual nature of self-determination, which has given the right of peoples to self-determination a distinct character in international law.[209] There has been scholarly discussion about whether recognizing a territory as a state is a legal or political act that allows such territories to gain legal status as an international personality to become a *de-facto* and *de-jure* state, to date this question has not been settled.*[210]*

International relations scholars have generally argued that acts of territorial secession will remain political acts because they arise from old customary practices of peoples exercising their right to political self-determination.[211] This necessitated a proposal by law scholars to use the terms "internal and external" in the right of peoples to self-determination in order to differentiate between the legal right of this rule practised internally within the

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[207] 'Thomas G. Weiss (n 180) pp. 1221–1235'; 'Leland Goodrich (n 208)'; Also see, Serdar Yurtsever and Fatih Mohamad Hmaidan, 'From League of Nations to the United Nations: What is Next? (2019), *The Journal of International Social Research, Volume: 12 Issue: 62*, pp. 449-466 <https://www.researchgate.net/publication/331320914> Accessed 28 February 2019

[208] 'Peter Hilpold, (n 85) p. 29'

[209] Joel Day, 'The Remedial Right of Secession in International Law' (2012), University of Denver, Potential, pp. 19-30, <https://blogs.elpais.com/files/2.secession_day.pdf> Accessed 27 February 2019

[210] 'Marija Batistich (n 170), p. 1014'

[211] Berg Eiki, Riegl Martin, and Doboš Bohumil, 'Introduction: Secession and Recognition in the Twenty-first Century'. In: Riegl Martin, Doboš Bohumi (eds) Unrecognized States and Secession in the 21st Century. (Springer, Cham., 2017), pp. 1-7

state from the other which incorporates territorial secession.[212] It was determined in the case of Quebec's secession that "internal self-determination" occurs when "a people" within a given sovereign state is given some degree of autonomy to decide how to live their own lives independently, but they must remain subject to and under the parent state's sovereign authority.[213] Contrarily, the external right of peoples to self-determination, as exercised through territorial secession, allows for the relevant territory's inhabitants to secede from the parent state's authorities only when the latter violates or restricts their human rights.[214] The court arrived at the conclusion that when individuals separate from the parent state's territorial control and establish their own sovereign state, such separation is the external self-determination.[215] In order for the secession of the secessionist entity to be acceptable, there must be evidence that territorial secession was triggered by serious human rights breaches by the state in the context of the external right to self-determination.

2.3.1.2 The Socialist Theory of Self-determination

The socialist theory concerned with the right of self-determination can be viewed as a measure intended to enable people to exercise their right as part of a social trajectory of relationships centred on statehood, whether from within or the outside territory. The primary goal is to have access to freedom as a fundamental legal right, including the freedom to determine one's own approach to politics, government, economy, culture, and other relevant rights, both inside and outside the borders of the parent states. Hunnun postulates that the "internal right of self-determination of peoples" is the freedom to

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[212] 'Reference re Secession of Quebec (n 17)'

[213] ibid

[214] 'Marcelo Kohen, (n 83) 43'

[215] 'Reference re Secession of Quebec (n 17)'

exercise one's legal rights within the boundaries of one's state.[216] Without proof of violations of human rights, territorial secession is considered illegitimate in the context of external self-determination and may result in other states refusing to recognise the seceded entity.[217] On the other hand, the internal right of peoples to self-determination is regarded as one of the most important concepts in international law that encompasses the basic human rights of individuals who live in a specific territory. For instance, the UN strongly promoted the right to self-determination of people, especially those from colonised territories, in the 1960s to attain independence and self-governance.[218] Territories that were being colonised were transformed into independent states through UN involvement.[219]

Decolonization did not involve territorial secession; instead, it was a regime change in which power was transferred from foreign rulers to indigenous rulers through independence. Some legal scholars have advanced an opinion that territorial secession in contexts of decolonization represents external self-determination.[220] Kreuter argues that the political intrusion into the legal issue, particularly the external self-determination, has made this legal practice of exercising human rights a difficult and dangerous effort.[221] It

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[216] Hurst Hunnun, 'Legal Aspects of Self-Determination' (Princeton University, 2020), <https://pesd.princeton.edu/node/511> Accessed 20 August 2020

[217] Convention on Rights and Duties of States (Montevideo Convention) 1933, art 1.

[218] Makau wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995), *Michigan Journal of International Law, Volume 16, Issue 4*, pp. 1115-1116, <https://repository.law.umich.edu/mjil/vol16/iss4/3> Accessed 20 March 2020

[219]'UN GA Res 1514 (XV) (14 Dec 1960) (n 5); See also, 'UN Charter 1945 (n 4), Art. 73'

[220] Daud Hassan, 'The Rise of the Territorial State and The Treaty of Westphalia' (2006), *Yearbook of New Zealand Jurisprudence Vol. 9*, pp. 63-70, <https://opus.lib.uts.edu.au/bitstream/10453/3289/1/2006006060.pdf> Accessed 21 April 2019.

[221] 'Aaron Kreuter, "Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession" (2010). Minnesota Journal of International Law., pp. 367-369' <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1340&context=mjil> Accessed 20 March 2019

is observable that, the hegemonic nations at the time when self-determination practices were being incorporated into the UN Charter, had their main focus on installing a remedy that would end wars that had destabilised the world, but they did not intend to allow secession of territories.[222]

Karl Marx and Lenin's socialist theory of the right of peoples to self-determination laid emphasis on the internal socioeconomic welfare of the broader population in Russia and other European states at the time. To-date, the social theory of self-determination is primarily provided by the legal principles found in the 1966 legal documents of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[223]And the International Covenant on Civil and Political Rights of 1966 (ICCPR).[224] The foregoing two legal international rules are complemented with the Universal Declaration of Human Rights (UDHR) of 1948.[225] Araujo observes that, as opposed to states imposing rules on how to live, granting peoples the freedom to exercise their own social, economic, and cultural traditions protects them and allows them the freedom to freely design their own life.[226] The right of peoples to self-determination can be understood to be a body of customs and legal principles that have been combined and formalised the right of peoples to access and attain freedom.[227]

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[222] Yash Ghai, 'Autonomy as a Strategy for Diffusing Conflict,' in Paul C. Stern and Daniel Druckman, (eds), *International Conflict Resolution After the Cold War* (National Academy Press, 2000), 483-524

[223]'ICESCR, 1966, (n 3)'

[224]'ICCPR, 1966, (n 2)'

[225] 'UDHR 1948, (n 105)'

[226] Father Robert Araujo., 'Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law' (2000), Fordham International Law Journal, Volume 24, Issue 5. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1770&context=ilj>. pp. 1477-1479' Accessed 17 October 2018

[227] ibid

2.4 The Concept of Peoples in the Right to Self-Determination

The right of peoples to self-determination constantly causes controversy and debate. Unresolved interpretation of "who are the peoples" in international law rule pertaining to the right to self-determination peoples, has proven to be one of the most contentious issues at international law, and is the central question in scholarly discourse. Legal scholars have not yet reached a consensus on the legal definition of the peoples who are entitled to self-determination under international law.[228] There is no universally accepted definition of what constitutes a peoples, notwithstanding the fact that the ICCPR and ICESCR designate peoples as the direct beneficiaries of the right to access cultural, social, political, linguistic, and religious rights. The "peoples" may pursue their rights to self-determination outside of the territorial jurisdiction if their rights are not protected domestically.[229] States are required to guarantee people's access to the civil and political rights guaranteed by the ICCPR inside their national borders. The ICESCR, likewise obligates states to guarantee fundamental rights to its citizens concerned with economic, social, and cultural rights.[230]

The theories on "who are the peoples" under the right to self-determination under international law are examined in this section.

2.5 The Theory on "Who Are the Peoples" in Right of Self- Determination

Sterio observes that although the UN Charter recognizes "peoples" right to self-determination as a fundamental legal principle, it did not stipulate who constitutes a

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[228] 'Milena Sterio, (n 15) 1-2'

[229] Jérémie Gilbert, 'Indigenous Peoples' Land Rights under International Law: From Victims to Actors', (Transnational Publishers, Inc. New York, 2006), p. 205

[230] *See* CESCR, General Comment No. 3, The Nature of States Parties Obligations, UN Doc. E/1991/23(SUPP), 1 January 1991, para. 9. In pursuant to Art. 2, para. 1 of the ICESCR Covenant. Under these obligations, the States are responsible for the "progressive realisation" of the listed rights and must "move as expeditiously and effectively as possible towards that goal.

"peoples' 'under international law.[231] The UN Charter imposes direct obligations on its member states, to provide human rights protection to peoples, and where the state continually abuses people's rights, they have the legitimacy to seek the right to self-determination internally or externally.[232] Some scholars argue that “peoples” in the right to self-determination lacks definition and appears to have been abandoned by the international law legal definition.[233] The incapacity of peoples to exercise their right to self-determination is observed to have been exacerbated by the failure of international law to define this right and to impose on states the obligation to protect it.[234] This subsection subsequently examines who are the peoples that are recognized by international law instruments.

2.5.1 The Theory of Peoples According to International Legal Instruments

In the elements of crime in genocide, for example, are listed in the Rome Statute as an "intent to destroy, in whole or in part, a national, ethnic, racial, or religious group."[235] The crime of genocide distinguishes and refers to a nation or nationals intended to be harmed by the perpetrator; it includes the peoples who are distinguished, when the element of crime is tested at the "crimes against humanity", by a requirement that the perpetrator's actions must have been "directed against any civilian population, targeted with an

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[231] ‘Milena Sterio, (n 15), pp. 10-11’

[232]Ed Brown, ‘The United Nations, Self-Determination, State Failure and Secession’ (2020), E-International Relations, <https://www.e-ir.info/pdf/81038> Accessed 20 November 2020.

[233] ‘Milena Sterio, (n 15), pp. 10-11’

[234] John Finnis, ‘Evaluation and the Description of Law: The Formation of Concepts for Descriptive Social Science’, in Paul Craig (Ed), ‘*Natural Law and Natural Rights’* 2nd Edn. (OUP, New York, 2011), p.4

[235] ‘Rome Statute of the International Criminal Court (ICC), (adopted 17 July 1998) UNTS Vol. 2187, No. 38544, Arts. 6 and 7

intention to be harmed through knowledgeable attack."[236] This means that the peoples are a nation or specific community, and not a mere general population. As a result, the protection found in international law relating to the "right of peoples to self-determination" can only be accessed within the framework of a majoritarian, not by an individual. Therefore, a state's violation of a person's human rights is not an international crime, in the language of protected peoples under the international criminal law as far as where the term "all peoples" is concerned. Where an individual has been harmed by a state, remedial action would be appropriate within the confines of general principles of international law and international legal norms under Customary International Law (CIL), which is binding on states even if they are not parties to such a specific treaty law prohibiting such an act, provided that the concerned rules in the relevant treaty relate to CIL. In contrast to an approach in which the right of peoples to self-determination is championed as a group protected by international law through their rights to self-determination; rather, it is a case concerned with the State protecting the human rights of an individual person.[237]As a result, the right of peoples to self-determination enshrined in the ICCPR and ICESCR can be interpreted to mean that they are peoples' rights that states and governments are supposed to make available to the population within their territorial borders. Knop argues that the term ‘peoples’ is a colonial trust inherited from the defunct League of Nations, as well as the non-governing territories established by the United Nations Charter.[238]

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[236] Andrew Clapham and Mariano Garcia Rubio,’ ‘The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health(2002), Health and Human Rights Working Paper Series No 3, pp. 3-30, <https://www.who.int/hhr/Series_3%20Non-State_Actors_Clapham_Rubio.pdf> Accessed 20 May 2020; Also see ibid, ‘Rome Statute Arts.. 6 and 7

[237] ibid

[238]Karen Knop, Diversity and Self-Determination in International Law (CUP, 2004, Cambridge), p. 51

2.5.2 The Scholarly Theories of "Who Are the Peoples" in International Law

Knop claims that "peoples" are those who live in one of two types of territories: trust territories or non-governing entities that are still under colonisation. Knop's theory is controversial, but if taken at face value, it would indicate that the term "peoples" would be null and void as a legal concept in international law if all regions under colonial control or attaining self-government were independent.

Kruger, on the other hand, points out to the fact that the UN Charter grants minorities and ethnic groups the right to secede in Articles 1, paragraph 2, and 55, and that customary international law holds that the right of peoples to self-determination is only granted to the "peoples."[239] Furthermore, according to Kruger, the term "peoples" has been abstractly defined, therefore focusing on what the peoples are does not help. This is because the term peoples as defined is somewhat vague.[240] For Kruger, what matters is that people understand that the term 'peoples', as a community of states, have the right to self-determination including the right to secede.[241] This view can be interpreted to mean that peoples are not geographical territories or landmasses occupied by those seeking the right to self-determination, but indeed human beings.

Moltchanova asserts that peoples are indeed the nations, because "the peoples as a group which share a common identification specific in its political and cultural beliefs".[242] Moltchanova postulates that the term "nation" equally refers to peoples who live in a

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[239]Heiko Krüger, The Nagorno-Karabakh Conflict a Legal Analysis, (Springer, Berlin, 2010) p. 59

[240]Ibid, at p. 54

[241] Ibid at p. 55

[242] Anna Moltchanova, National Self-Determination, and Justice in Multinational States (Springer, New York, 2009), pp. 80-81

territory that they have historically identified as their own.[243] She quotes David Miller and Margaret Moore, both of whom agree that peoples are nations, or a group of nations. Miller describes peoples as belonging to a particular or specific community, [244] while Moore observes that, when the peoples identify themselves as belonging to a specific national group, this is because they believe that they have historically shared a unique identity collectively, therefore they can be considered as a nation.[245]

Srebrnik, on the other hand, defines a nation as a group of peoples who believe in ancestral relationships between themselves as binding them together into a unit nation.[246] Srebrnik's postulation examined that peoples are the same as nations, and that people must be ancestrally interconnected to form a nation.

Brownlie contends that national groups or "peoples" have a right to form cohesive political bodies that they can use to foster relationships with other similar groups.[247] Brownlie's argument is like Srebrnik; both scholars appear to agree that peoples form nations when they band together as peoples.

Espinosa observes that peoples have the right to self-determination, which includes the option of secession as a last resort when their human rights are consistently violated.[248] However, it is challenging to reconcile the right to self-determination with the

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[243] 'Ibid

[244] Ibid at p. 78

[245] Ibid at p. 79

[246]Henry Srebrnik, 'Can clans form nations? Somaliland in the making' in Tozun Bahcheli, Barry Bartmann

and Henry Srebrnik (eds), *De FactoStates The quest for sovereignty* (Routledge, London, 2004), p 210

[247] Ian Brownlie, Principles of Public International law, 4th Edn. (OUP, Oxford, 1990), p. 599

[248]Juan Francisco Escudero Espinosa (n 60), p. ix

interpretation of the UN Charter's principle of state territorial integrity.[249] This is due to the question of whether the right of peoples to self-determination is truly a right or merely a recommendation under international law, and whether such a right allows peoples to territorially secede.[250]According to Espinosa, peoples' right to self-determination should be broadly defined to include both internally and externally relevant aspects in order to ensure complete freedom to decide on their own affairs.[251] Vyver, observes that the peoples right include, "*the entitlement of nationality, ethnic, religious, or linguistic societies within a political community to live according to the customs and traditions of their kind.*"[252]

Raic assert that, internal conflicts arose between states and the peoples, because states maintain that the right of peoples to self-governance through territorial secession does not exist, except in determining their political future, and thus the quest for separate statehood based on the universal right of peoples to self-determination is inapplicable.[253] Raic further argues that the right to secede does not imply that the peoples have direct international legal personality without the need for state representation, and therefore the state as a subject to the international law is the only entity which has an international personality.[254] Legal scholars continue to bear divergent views to the definition of the peoples in international law and the right of self-determination of peoples entails.

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[249] Ibid at p.4

[250] Ibid, at p. 20

[251] Ibid, at p. 12

[252] Johan D. van Der Vyver, 'Self-Determination of the Peoples of Quebec Under International Law' (1992) (*Journal of Transnational Law and Policy, Vol, 10, No. 1) p. 1*

[253] David Raic, (n 102), p. 9

[254] Ibid at, p. 18

Under Articles 1(2), 55 and 73 of the UN Charter provides for the right of self-determination of peoples however, these Articles fail to explicitly define "who the peoples" in the international law. However, even though the UN report compiled by Aureliu Cristescu, the Special Rapporteur on the right to self-determination, focused on the protection of minorities from discrimination; in that report, it did define "people" and not "Peoples" as those colonised persons or those in the territories which are still not self-governing and thus seeking independence; and for the reasons of those mentioned conditions.[255]

Therefore, the people, according to the Rapporteur's report should possess the following attributes.

> *(a) The term "people" denotes a social entity possessing a clear identity and its own characteristics.*
>
> *(b) It implies a relationship with a territory, even if the people in question have been wrongfully expelled from it and artificially replaced by another population.*
>
> *(c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights.*[256]

Considering that, the "people" has adequately been identified from the UN"'s rapporteurs report, the "peoples" still remain un-defined.

According to the UN, "nations" are the entities to which the UN Charter refers as equal h olders of the rights alongside peoples. The report further explains that *"the right of*

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[255] Aureliu Cristescu, *(Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities),* The Right to Self-Determination Historical and Current Development on the Basis of United Nations Instruments. (1981) E/CN.4/Sub.2/404/Rev. 1, Para, 267, p. 39 <https://digitallibrary.un.org/record/13664?ln=en>Accessed 13 June 2019

[256] Ibid at, para. 279, p.41

peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights. "[257]And therefore, it states that unequivocally the principle of equal rights and self-determination of peoples is one of; *"the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations".* As discussed in this section, the scholars have examined who are the peoples under the right of peoples to self-determination in international law, but there is no consensus on who they are.

The researcher holds that; the term "peoples" in international law means "nation". To support this theory, the researcher observe that, in The Oxford Dictionary "nation" is defined as a "community of people mainly sharing common descent, history, language, and so forth, forming a state or inhabiting a territory."[258] This means that a "nation" is a unified group of people, which forms peoples, bound together by common affiliations such as language, race, culture, and share other traditions that exist among members of a specific community or nation.[259] Peoples can therefore be considered to be a nation regardless of who governs them or whether they fall under the jurisdiction of any particular jurisdiction. In international law, the term "peoples" does not refer to a person or an individual person's right, but rather to a collective right of a group of specific individuals who belong to a certain community, which forms a larger group who share several, distinctively, and identifiable commonalities. These attributes, matches those of the group

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[257] Ibid at para 280

[258]Delia Thompson (Ed), 'The Oxford Dictionary of Current English 2nd Edn,' (Oxford University Press, New York,1993) p 591

[259] John Stuart Mill 1861, 'Representative Government; under the heading of "Nationality", (Encyclopaedia Batoche Books, 2001, Kitchener), pp. 181-187

for which is also known as peoples under international law's right of self-determination.[260] Communities that share a common ancestry, culture, and customs can be considered a "nation" whose right to self-determination is guaranteed uniquely by the state as the peoples or a unified nation.

The right to self-determination, according to Teson , is "a majoritarian entitlement held by members of a group residing in a territory, whereby they are entitled to determine their political status and organisation to address political or territorial injustice within the framework of respect for individual human rights and the legitimate interests of outsiders."*[261]* Teson contends that individuals or peoples have the right, as members of a particular territory, to reclaim their political rights or to correct territorial injustices within the framework of human rights. As a result, the right to self-determination is reserved for individuals who can only exercise their rights through or within a specific group known as "peoples" or "nations."[262]

In this section, the researcher concludes that peoples are primarily entitled to the right of self-determination. Unlike some scholars' assertions, which advanced the view that peoples only exist in the context of decolonization, the researcher contends that peoples have and continue to have the right to self-determination as a right, even outside the context of decolonization.[263] The researcher concurs with Hillier's assertions that, despite

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[260] Natalie Jones, 'Self-Determination and The Right of Peoples to Participate in International Law Making' (2021), The *British Yearbook of International Law, Vol. 00 No. 0, pp. 1–33,* doi:10.1093/bybil/brab004

[261] Fernando R. Teson, 'A Philosophy of International Law' (Westview Press, Oxford,1998), p. 129

[262] ibid

[263]Karen Knop, (n 245), p. 51

disagreements about what those rights are, all peoples have the right to self-determination outside the colonial context.[264]

The researcher believes that nations are formed or made up of peoples. In other words, nations are peoples who band together as a distinct group to advance a common cause, whether it is economic, social, cultural, political, or otherwise. Peoples or nations, on the other hand, are not required to be territorial. As a result, the peoples can be composed of a tribe or individuals who share common identity based on one common language, ancestry lineage, culture, race, and any other fundamental characteristics that naturally attract and bind them into a close collaborative union as one peoples. Peoples can thus be a minority, a majority, or Indigenous; as a result, peoples can be both the subject and object of international law through their respective nations, propelling them to access international cooperation among nations and the establishment of their rights and duties as peoples in international plane.*[265]*

Consequently, in *East Timor case*[266] The International Court of Justice (ICJ) held that peoples' rights to self-determination are *erga omnes* (universal) and thus cannot be revoked; therefore peoples can be regarded as nations.*[267]* Raic quote Hersch Lauterpacht, in his book, "The Subjects of the Law of Nation,*"* where Lauterpacht held that, *'there is no rule of international law which precludes individuals and bodies other than states from*

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[264]Tim Hillier, Sourcebook on Public International Law**, (**Cavendish Publishing Limited, London, 1998). p194

[265] Solomon E. Salako, 'The Individual in International Law: 'Object' versus 'Subject' (2019) International Law Research; Vol. 8, No. 1; pp. 132-140, <https://www.researchgate.net/publication/334610566_The_Individual_in_International_Law_'Object'_versus_'Subject/link/5d35bbd74585153e5916cd42/download> Accessed 18 August 2021

[266]East Timor, (Portugal *v.* Australia),(n 58), p. 90, at para. 102

[267] Ibid at para. 284, p. 42

acquiring directly rights under customary or conventional international law and, to that extent, becoming subjects of the law of nations'.[268]

Consequently, ICJ, advisory opinion for the *Reparation for Injuries case*,[269]rejected the notion that only States have the international personality in international law. The court explained that the peoples, are also subject of international law in certain circumstances, where they acquire international personality recognized under the international law.[270]

2.6 Conclusion

This chapter reviewed the concepts and theories of the right of self-determination of peoples in international law. It established that the peoples traditionally rebel against authorities and their rulers when they believe that their rights of access to social, political, and economic justice, as well as other relevant societal needs and resources, are restricted. The study also observed that the enshrined right of peoples to self-determination in the UN Charter is a mutation of a long-held traditional practice of political processes, which was later advanced and became a legal right after the establishment of the United Nations (UN) and subsequent institution of the UN Charter in 1945.

The investigation in this chapter further revealed that the term "peoples" refer or mean "nations" that are primarily made up of groups of people who share certain commonalities that bind them together in international law's right to self-determination. Therefore, the

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[268] David Raic, (n 102), p. 15

[269] "Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, pp. 187-188. <https://www.icj-cij.org/public/files/case-related/4/004-19490411-ADV-01-00-EN.pdf> Accessed 24 July 2020

[270] See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 <https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf> Accessed 21 January 2019

"peoples" is a reference to "nation" which also includes individual communities within which “states” also known as “nations” are created. Peoples' entitlements include social, economic, cultural, political, and religious rights, as well as general fundamental human rights. If the entitlements are inaccessible internally, the people or nation in question can succeed in gaining external access to these rights.

The author of this research contends that self-determination has two aspects, which is political and legal, both of which have their own theories depending on the area of interest, hence it will be wrong to argue on a particular theory as the one which guides this study.

Chapter three investigates the international legal framework in the right of self-determination of peoples and the international law sources.

CHAPTER THREE

INTERNATIONAL LEGAL FRAMEWORK GOVERNING RIGHT OF SELF-DETERMINATION OF PEOPLES UNDER INTERNATIONAL LAW

3.1 Introduction

The legal framework is observed as an infrastructure of the legal system that regulates the character of certain *locus standi* to the breach or situation. Besson observes that the origin of any law should be clear and allow understanding of its legal implications through its guiding moral principles, the obligations and rules being imposed.[271] Despite the contentious debate over whether the right to self-determination is a positive law or merely political rhetoric, the right of peoples to self-determination is a fundamental tenet of international law that derives from customary international law. As such, it is regarded as a peremptory norm, which is erga *omnes*, and is thus a hard law which is binding rule of international law.

This chapter investigates the entrenchment of the right to self-determination in international law doctrinally relevant legal doctrines in international law.

3.2 Legislative Processes

The provisions of Article 38 of the ICJ statutes have been observed to be fundamental to the international law legislative process. According to Article 38 of the International Court of Justice (ICJ) statute, the international law sources include (a) international conventions, (b) international customs, if they bear evidence of a general practice accepted as law; (c) general principles of law; and (d) judicial decisions and teachings of the most highly

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[271] Samantha Besson and Jean D'Aspremont, 'The Sources of International Law: An Introduction'(2020), The Oxford Handbook of the Sources of International Law, Oxford University Press, p. 3 <https://hal.archives-ouvertes.fr/hal-02516183/document>Accessed 15 July 2021

qualified publicists, subject to the provisions of Article 59.[272] Article 38 (1) of the ICJ Statute states that "the Court, whose function it is to decide such disputes as are submitted to it in accordance with international law, shall apply." In an illustrated international law rules codification, the focus of the ICJ concerns interpretation rules as characterised in the international law sources, them being, a) international conventions, which bears no difference whether these international conventions or treaties are general or specific, provided they establish rules that are expressly recognized by the contesting states. b) the international customs must be interpreted along the aspects of the norm evidence which are widespread in practice and universally recognized as law, c) the general legal principles should be acceptable by the civilised nations, and d) the binding scope has to subject to the provisions of Article 59 of the ICJ statute, which states that *"the Court's decision has no binding force except between the parties and in relation to that specific case."* [273] However, the judicial decisions and teachings of the most highly qualified publicists from various countries serve as secondary means for determining rules. As per Article 38 of the ICJ statute, the distinctive character to the sources of an international rule is clearly identified and is different from the national legislation system where the parliament legislates the law. The subsections that follow discuss the types of international law sources and the legislative process in relation to the right of self-determination of peoples.

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[272] See, Statute of the International Law Commission –ILC (Adopted by the General Assembly in Res. 174 (II) of 21 November 1947, as amended by Res. 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981)., Art. 38

[273] ibid

3.2.1 Legal Framework

The right to self-determination is a principle of international law that gives people the freedom to choose their own destiny. Although the rule is stated to be an entitlement, it has been difficult to observe because it is directed at the states, who are required to comply with it. However, the states do equally enjoy the right to sovereignty under the territorial sovereignty principles, to which no state is superior to another. Therefore, it is essential to understand the legal framework governing the right to self-determination as an international law principle since it affects the efficiency and viability of any international legislation.

The United Nations General Assembly (UNGA) passed Resolution 174 (ii) of 17 November 1947, which established the International Law Commission (ILC).[274] The primary responsibility of 34 ILC commissioners, whom do not represent their governments before the Commission but are instead appointed based primarily on their area of specific expertise in international law, is to identify norms that, due to their widespread application and qualify as international norms, of which the ILC codifies such norms as customary international rules.[275] The International Law Commission (ILC) commissioners are appointed by the UN General Assembly and serve on the Commission for a five-year term. They are responsible for identifying international law norms, codifying international legal principles, preparing or drafting international agreements or conventions, and performing other tasks that promote international law.[276] The establishment of international criminal law norms that are currently included in the Rome

[274]ibid

[275] ibid

[276] ibid

Statute for the International Criminal Court (1998), was considered one of the previous ILC's greatest achievements.[277] The ILC was involved in the composing of the *"Draft Articles on the Responsibility of States for Internationally Wrongful Acts (1995)*."[278] The International Law Commission's purpose, as stated in its statute, is to *"promote the progressive development of international law and its codification,"*[279] is the identification of the rules that apply "*primarily to public international law, however, the Commission is not prohibited from entering the field of private international law."* [280] The right of self-determination of peoples, as the law of nations, must have an international origin, either derived from an international custom, norms, treaties, general principles of law, and international judicial decisions, it should also demonstrate the widespread application as an international rule [281] The right of self-determination bears evidence of widespread application through state practice, as customary international law and as a treaty law.[282]

Indeed, when establishing obligations, states and non-state actors are more likely to use both soft and hard laws. It has been observed that the soft laws in international law do not

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[277] See, 'the Rome Statute of the International Criminal Court, 17 July 1998, (242)'

[278] Paul G. Lauren, 'From impunity to accountability: Forces of transformation and the changing international human rights context.' in Ramesh Thakur and Peter Malcontent (eds), *From sovereign impunity to international accountability: The search for justice in a world of States* (United Nations University Press, New York, 2004), pp. 28-36

[279] 'ILC Statute 1947 (n 279)'.

[280]ibid

[281] Randall Lesaffer, 'International Law and Its History: The Story of An Unrequited Love' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi, (Eds), *Time, History and International Law, (*Developments in International Law, Vol. 58, Martinus Nijhoff Publishers, Leiden/Boston, 2007), p. 768

[282] David Kennedy, 'The Sources of International Law'(1987), *American University International Law Review, Vol. 2, Issue 1, Article 1*, pp. 1-7 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1632&context=auilr> Accessed 19 January 2020

impose legal obligations, but they are recommendatory and influential.[283] Soft laws are useful in persuading states to adopt certain rules as part of their international law obligations, but their effectiveness differs from that of hard laws, which impose obligations and sanction the violators, whereas soft laws are merely recommendatory in nature.[284] The 1948 Universal Declaration of Human Rights, for example, is soft law, it rules relate to rights which are *erga omnes* (flowing to all), and therefore sustain obligations or *lex specialis derogat legi generali* (applying notwithstanding the circumstances) and can only be repealed by a later rule or *lex posterior derogate legi priori*, that is a more better or improved rule aimed at achieving similar objective. Laws considered to be people's rights or human rights under international law mainly emerge from customary international sources and always play an important role, particularly in obligating states to respect human rights and adhere to related law treaties. For instance, the Convention Against Torture (CAT).[285] CAT is a peremptory norm that cannot be derogated and therefore a*lex specialis derogat legi generali* in nature and is widely practised as international rule norms.[286]

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[283] Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010), Legal Studies Research Paper Series Research Paper No. 09-23, *University of Minnesota Law School, Minnesota Law Review, Vol. 94,* p. 117 <https://www.law.uci.edu/faculty/full-time/shaffer/pdfs/2010%20Hard%20vs%20Soft%20Law.pdf> Accessed 16 August 2020

[284] Dinah L. Shelton, Soft Law in Handbook of International Law (Routledge Press, New York, 2008). pp. 1-22

[285] 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted and opened for signature, ratification, and accession by General Assembly resolution 39/46 of 10 December 1984) entry into force on 26 June 1987, in accordance with Article 27 (1)

[286] Roozbeh (Rudy) B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010), *The European Journal of International Law Vol. 21 no. 1*, pp. 177-179 <https://academic.oup.com/ejil/article/21/1/173/363352> Accessed 15 April 2019

3.2.1.1 International Customary Norm on the Right to Self-Determination

Article 38 of the ICJ statute identifies international customs as a major component of international law sources. Malanczuk asserts that the sources of international law are mostly customs as compared to other sources of international law.[287] Academics in international law have worked for decades to formulate and interpret universal laws. Azaria asserts that the process of identifying norms that eventually become international law rules as an example of "codification-by-convention" in international law.[288] However insofar as it abides by the criteria and guidelines outlined in the International Law Commission (ILC) statute, the right to self-determination of peoples is procedurally and structurally developing. 2018 saw the ILC's publication of a report that named customary international law as one of its main sources for the regular processes of codifying legal rules. As contained in the *"Draft Conclusions on the Identification of Customary International Law, with Commentaries."*[289] The document lays out the criteria that must be satisfied before a rule of customary international law is recognized as a universal rule. The report states that "customary international law is unwritten law developed from state practises recognised as law",[290] consequently the right of self-determination of peoples is observed as a customary international norm. The two requirements for identifying

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[287] 'Peter Malanczuk, '(n 76), pp. 35-41'

[288] Danae Azaria, ''Codification by Interpretation': The International Law Commission as an Interpreter of International Law'(2020), *The European Journal of International Law Vol. 31 no. 1*, pp. 172-175, <https://academic.oup.com/ejil/article-abstract/31/1/171/5882068?redirectedFrom=PDF> Accessed 14 January 2021

[289] See the "Draft Conclusions on Identification of Customary International Law, with Commentaries, 2018". This report was adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10). It also contains commentaries to the draft articles (para. 66), and appear Yearbook of the International Law Commission, 2018, vol. II, Part Two <http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf> Accessed 17 May 2019

[290] Ibid at p2

customary norms are as follows: first, the rule must be recognised as customary international law by a significant number of nations, whether regionally, locally, or elsewhere. Second, there must be proof that a common practise exists among the States involved and that this practise is acceptable and has evolved into law or *opinio juris* among the States to establish their existence and content of a specific customary international rule.[291] This means that multiple states or governments must consistently uphold a customary international rule for it to be regarded as international law. Additionally, it is essential to demonstrate that an international rule can be found in the sources of public international law listed in Article 38, paragraph 1 of the ICJ Statute, particularly sub-paragraph (b), which recognises international custom as evidence of a generally accepted practice that is law. It is noteworthy that most of the regulations found in the United Nations Charter and other related international law treaties stem from customary international law, which encompasses most international law principles, particularly those relating to human rights.[292] The UN Charter is widely recognised as the basic legal instrument of international law; states have frequently referenced it as the guiding legal principles of defence whenever a legal issue arises, to defend specific positions in a dispute.[293] The right of peoples to self-determination, as contained in UN Charter Articles 1(2), 55, and 73, would ordinarily is a binding principle of international law. The UN Charter provisions, regardless of a state's membership status or affiliation with the UN,

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[291] ibid

[292] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/95), *GA. J. INT'L & COMP. L. Vol 25*, p. 319 <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1396&context=gjicl> Accessed 12 May 2019

[293] Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) *Columbia Journal of Transnational Law, Vol.36,* 529; Ronald St. J. Macdonald, 'The Charter of the United Nations as a World Constitution', pp. 264-300, <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1426&context=ils> Accessed 13 July 2019

bind all states, particularly those rules pertaining to international peace and security as well as human rights.[294]

The UN Charter, as the world's supreme law "constitution," differs from domestic laws in three ways. The first is its distinct character in terms of how it is established; unlike national laws, which are enacted by legislatures and other national bodies, international law legislation is enacted at conventions of State delegates. Second, international law's jurisdiction scope binds states as international personalities, whereas national laws bind primarily individual citizens within a given state. Third, international law sanctions states that breach its rules, whereas municipal law convicts' citizens who transgress its laws. Fourth, international law lacks a police force to enforce its provisions as well as a legislature to enact it. Instead, it operates by penalising and forcing breaching states to pay restitution.[295] Dupuy outlined some of the characteristics that a supreme law should have in a constitution. He contends that for the UN Charter to be regarded as a comprehensive constitution of states, there must be evidence of fundamental principles of international law and *jus cogens*.[296] This evidence entails the identification of peremptory norms of

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[294] 'UN Charter, 1945 (n 4)' Arts. 11, 12 and 35'; Under UN Charter, Art.2(6), even non-UN member States are compelled to abide by some core principles which relate to the maintenance of International Peace and security and those that are *jus cogens* oriented such as human rights.

[295] See Responsibility of States for Internationally Wrongful Acts of 2001, adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> Accessed 28 February 2019

[296] Pierre-Marie Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997), in *Max Planck Yearbook of United Nations Law, Volume 1*, p. 3, <www.mpil.de/files/pdf1/mpunyb_dupuy_12.pdf>. Accessed on 18 May 2019

international law, as provided for in Article 53 of the VCLT 1969,[297] which must establish that they are norms derived from general principles of international law. According to Article 53 of the VCLT 1969, "a treaty is void if it conflicts with a peremptory norm of general international law at the time of its conclusion."*[298]*

Chayes and Chayes, argue that most states would comply with their treaty obligations most of the time, and they would do so consensually and in good faith.[299] This is a reciprocal act in which one state expects other states to exhibit a similar level of commitment. However, the laws regulating war characteristics, as well as international criminal law and customary international law, bind not only states but also individuals who violate them. For instance, following the end of WWII in 1945, the United States and its allies established two international criminal courts for the first time in history to trial persons suspected of committing war crimes during the conflict. The International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE) were established to punish individual German Nazi and Japanese generals respectively for atrocities committed during WWII.[300] The International Military Tribunal for the Far East was established with the goal of punishing Japanese military personnel for atrocities

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[297] See 'Vienna Convention on The Law of Treaties (VCLT) (Adopted 23 May 1969, registered or filed and recorded with the Secretariat of the United Nations, Chapter XXIII, United Nations Treaty Series, vol. 1155, p. 331, Art. 53.

[298] ibid

[299] Abram Chayes and Antonia Handler Chayes, 'Compliance Without Enforcement: State Behavior Under Regulatory Treaties' (1991) *Negotiation Journal, Vol.7 Issue 3,* pp. 311-330<https://doi.org/10.1111/j.1571-9979.1991.tb00625.x>Accessed 13 December 2019

[300] See Statute of the International Military Tribnal , 1945 <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf> Accessed 24 February 2019

committed during WWII.[301] Mokhtar argues that the formation of the two tribunals demonstrated the "victors justice," in which war losers would be severely punished. The IMT and IMTFE also violated the general principle of law of *nulla crimen sine lege*, which prohibits punishment without the application of law, because the rules used to punish the offenders were *ex post facto* laws enacted after the crime occurred.[302] However, the creation of these two international criminal tribunals demonstrated the importance of ensuring accountability and enforcement of the right to self-determination through customary international law, of which human rights norm violators are penalised. The two criminal tribunals only laid the groundwork for future tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY),[303] and the International Criminal Tribunal for Rwanda (ICTR),[304] and others, and finally the International Criminal Court (ICC).[305] The individuals who commit crimes bear personal criminal responsibility in which they are deemed individually culpable, and the case is prosecuted at competent international courts when the national court fails to do so.[306]

Self-determination as a norm date back to several centuries, as documented in history books. Russia, for example, imposed the Akkerman Convention on the Ottoman

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[301] See International Military Tribunal for the Far East, 1946 <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf> Accessed 24 February 2019

[302] Aly Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', (2005), *Statute Law Review, Volume 26, Issue 1*, pp.41–55, <https://doi.org/10.1093/slr/hmi005> Accessed 16 March 2019

[303] See Updated Statute of the International Criminal Tribunal for the Former Yugoslav ('ICTY) <https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> Accessed 23 October 2020

[304] See 'ICTR Statute 1994, (n 27)'

[305] 'Rome Statute of the International Criminal Court (n 242)',

[306] Wolfgang Kaleck and Miriam Saage-Maab, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes The Status Quo and its Challenges'(2010), *Journal of International Criminal Justice, vol. 8*, pp. 699-724 <https://www.corteidh.or.cr/tablas/r26652.pdf> Accessed 19 August 2019

administration in October 1826, gaining sovereignty of Serbia and the Danubian principalities.[307] Cakoci asserts that customs and trade are intimately intertwined due to a long-standing link to the history of trade, the objective of which was to provide finance to the state through revenue collections.[308] Prior to the establishment of the United Nations, self-determination was considered to be a political event rather than a legal right. The kingdoms had agreements proclaiming their sovereignty over the lands they held as a way of asserting self-determination and sovereignty over the territories they occupied. Tytler, for example, presented a detailed description of feuds, armed battles, alliances, treaties, and other means taken by kingdoms and kings to self-determine themselves in the areas they occupied in his 1837 history book (MDCCCXXXVII) (posthumously).[309] Historically, only armed revolts could achieve the external aspect of self-determination. When a kingdom was vanquished, the conquered regions were often incorporated or annexed into the victor's authority and administration. On other occasions, a deal was negotiated that spelt out the terms of a vanquished territory's existence on unequal or disadvantaged terms. Indeed, one of the early philosophers, Jean Bodin, argued that the sovereignty of a dictatorial monarchy is justifiable if it has conquered its opponents in fair battle and subsequently ruled them dictatorially.[310] There have also been instances where disputes separated communities, from which they split to form their own sovereignty, an

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[307] Robert Craig Nation, 'War In The Balkans', 1991-2002'(2003), Strategic Studies Institute, Carlisle 22, <https://www.files.ethz.ch/isn/101059/War_Balkans.pdf> Accessed 12 October 2019

[308] Karin Cakoci, 'New Challenges and Perspectives in Customs Law', (2018), p. 617, <https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/6964/1/K_Cakoci_New_Challenges_and_Perspectives_in_Cutoms_Law.pdf> Accessed 13 June 2019

[309] Alexander Fraser Tytler, 'Universal-History from the Creation of the World to the Beginning of the Eighteenth-Century Vol. II' (Hillard Gray, and Company, Boston, MDCCCXXXVII (1837), pp. 1-538

[310] Winston P. Nagan and Aitza M. Haddad, 'Sovereignty in Theory and Practice,' (2012), *San Diego International Law. Journal, Vol.13*, p.440 <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1303&context=facultypub> Accessed 16 January 2019

act that might be understood to correspond to the external aspect of peoples' right to self-determination through secession of a state's territory.[311] Similarly, peoples achieved self-determination through the custom of embracing the king's authority, whereby if the people were displeased with the ruler's treatment and administration, they would rebel and replace the ruler or the regime with other acceptable authorities. Araujo argues that, the ancient Romans granted the emperor sovereignty, but *"they did so in order that they might be governed like men, not sold like cattle,"*[312] Indeed, in his book written in 1651, Thomas Hobbes (1588–1689) stated that *"from this institution of a commonwealth are derived all the rights and faculties of him, or them, on whom Sovereign Power is conferred by the consent of the people assembled. "Similarly*, in his book published in 1690, John Locke (1632–1704) proposed that people have the right to self-determination in terms of how they should be governed: "the determination of the majority for that which acts any community, being only the consent of the individuals of it." Early philosophers and writers, such as Locke and Hobbes, provide evidence that the custom held that people had a right of self-determination over who would rule "the peoples" and how such a ruler was expected to administer his rule, where acceptability was key to continuing to hold *ceteris paribus* power in the community. Treaties have been used to settle self-determination disputes. Hugo Grotius, a Dutch national, published *De jure Belli ac pacis libritres* in 1625, which is the beginning of modern international law.*[313]* The Westphalia Treaty of 1648 was a catalyst for modern international law because it established a norm of conduct

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[311] 'Malcolm N. Shaw, (n 66), p.492,*'*

[312] 'Father Robert Araujo (n 233), pp. 1486-1487'

[313] James Brown Scott, "Grotius' *de jure Belli ac Pacis Libbri Tres'* (1925), *American Journal of International Law, Vol. 18, Issue 3,* 461-468, <http://www.jstor.org/stable/2188875> Accessed 16 March 2018

within international law based on the concept of state sovereignty. Respect for territorial borders is regarded as an essential component in ensuring international peace and security through adhering to international standards.[314] For example, in the Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge sovereignty dispute between Malaysia and Singapore, the International Court of Justice (ICJ) resorted to the 1824 Anglo-Dutch Treaty, which determined that the land was legally Singapore's.[315] To resolve territorial and other disputes, the ICJ courts have issued treaty-based judgments, relying on international law and treaties, including the use of *stare decisis* in previous cases of a similar nature. There is more evidence that the treaties were legal pacts entered into in the years following the Westphalia treaty in 1648 to validate self-determination through peaceful settlements or agreements. Treaties such as the Peace of Aix-la-Chapelle of 18 October 1748, negotiated between Britain and France to end the Austrian succession war, the Peace Treaty of France and Portugal in 1713, and the Peace Treaty of Spain and Portugal in 1715, for example, all aided in fostering peace by recognizing each other's sovereignty.[316] Greenwood argues that if legal sources were listed in order of superiority, customary international law would be at the top because it is the oldest and creates rules that bind all states. He claims that customary law is unwritten but contains customary norms, such as immunity for heads of state, and that its activities are divided into two

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[314] See Excerpts of The Peace of Westphalia Münster, 24 October 1648, <https://pages.uoregon.edu/dluebke/301ModernEurope/Treaty%20of%20Westphalia%20%5BExcerpts%5D.pdf> Accessed 18 May 2019; The Westphalia treaty became a catalyst of many other subsequent treaties, and not only this treaty is considered a foundational source of international peace and security, but legal civilization towards avoidance of cross-border wars.

[315] Martine J. van Ittersum, 'Hugo Grotius: The Making of a Founding Father of International Law', in Anne Orford and Florian Hoffmann., (eds), *The Oxford Handbook of the Theory of International Law*, (OUP, New York, 2016), p. 82

[316] Heinz Duchhardt, 'Peace Treaties from Westphalia to the Revolutionary Era' in Randall Lesaffer (ed), Peace *Treaties and International Law in Europe History: From the Late Middle Ages to World War One*, (CUP, New York, 2004), pp.45-58.

categories. First, it must be widespread and consistent with state practise, which implies immunity for heads of state must have already been provided. Second, such a norm must be supported by legal precedent in the legal responsibility to provide immunity to heads of state.[317]

Customary international law must be identified in accordance with Article 38 (1) of the ICJ, which requires States to ascertain that not only must there be acts involved for a rule to be settled practise, but that such rules must be exercised based on existing evidence of a belief that the practise is obligatory for the concerned state and that the practise conforms to the legal obligation imposed on states, as held by the ICJ in *North Sea Continental Shelf Cases*.[318] Historically, conflicts were used to dominate weaker territories in order to compel them to accept the victor's terms and conditions, with the victor dictating the terms of a peace treaty or settlement over the defeated entity. After WWI, for example, the Treaty of Versailles was utilised to deprive Germany of its territories abroad.[319] Subsequently, it has been observed that, the right of peoples to self-determination disputes before the International Court of Justice, the ICJ judges have been observed to rely mainly on customary international norms and treaties as their primary source of interpreting the legality or existence of self-determination as an international law.

3.2.1.2 General Principles and Case Laws Relating to Right to Self-Determination

The court settlements and the general principle of law are found to relate with the right of self-determination of peoples. For Instance, the general principles of law recognized by

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[317] Christopher Greenwood, 'Sources of International Law: An Introduction (no date), p. 1-5, <http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf> Accessed 13 June 2019

[318] North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44

[319] Treaty of Versailles, (n 205), Art.22'

civilised nations, as appearing in Article 38(1) (c) of the ICJ Statute, were the rules inherited from the Permanent Court of International Justice-PCIJ (1921).[320] Lord Phillimore (an English judge) is credited for proposing the inclusion of fundamental principles of law in the PICJ Statutory provisions as a member of the Advisory Committee of Jurists entrusted with drafting the PICJ Statute.[321] Despite strong opposition from the Belgian delegate, Baron Descamps, who argued that the world court should apply *"the rules of international law as recognized by the legal conscience of civilised nations."* However, Lord Phillimore and Mr. Root, the US delegate, overruled this decision, and the incorporation of general principles of law into the PICJ statute was upheld.[322] The general principles of law has been observed to be maxims or principles of law accepted by all nations in *foro domestic* (national legal system), in most cases it contributes to the development of international law by bridging the legal gap left by deficiencies in international law[323] Bassiouni, observes that the general principles of law are regarded as the logically acceptable criteria of legal application of the law, which is recognised by civilised nations as the third source of international law. Peoples' right to self-determination cannot be argued to have a direct connection with general principles of international law because it is an undertaking of action within international law rather than a standard stand-alone legal application.[324] Greenwood, argues that general principles of

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[320] See Statute of the Permanent Court of International Justice (n 329) Article 38(3), <https://www.legal-tools.org/doc/a0bb78/pdf/> Accessed 12 June 2019; Also see the International Court of Justice (ICJ) statute (n 120), Art. 38(1)(c)

[321] See speech by Lord Lloyd-Jones, Justice of The Supreme Court (16 February 2018) ' General Principles of Law in International Law and Common Law' <https://www.supremecourt.uk/docs/speech-180216.pdf> Accessed 12 June 2019

[322] ibid

[323] Ibid at 1

[324] 'Mahmoud Cherif Bassiouni, (n 55), pp. 770-772'

law are frequently used as legal references in international judgments, but they are rarely adopted entirely. Because they generally refer to a legal concept associated with a specific national legal system or systems and lack evidence of extensive international application.[325] Cassese observes that it is critical that the general principle of law demonstrates evidence of widespread acceptance, particularly if it is to be espoused by the ICJ or an international tribunal as a concept of law originating in a national legal system.[326] In general, the general principles of law continue to be an acceptable legal standard for judges to apply when delivering judgments in courts of law, particularly when no definite applicable rule exists. or where there is no rule that can be found to bridge the gap in the case, then the general principles will step in to fill the void.[327] The International Law Association (ILA) published a study in 2016 that examined the acceptance and application of general principles of domestic law to the development of international law. It did, however, demonstrate that ICJ judgements are primarily based on procedures and evidence.[328] The study's primary goal was to investigate how general principles of law originating in domestic jurisdictions are identified and applied in international court judgements and advisories.[329] The second goal was to provide a framework for general procedures that can be used as a practical reference by those involved in adjudication or

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[325] 'Christopher Greenwood, (n 326), p. 3'

[326] 'Antonio Cassese, (n 84), pp. 188-197'

[327] ibid

[328] The International Law Association draft report "The Use of Domestic Law Principles in the Development of International Law" p. 5, <http://www.ila-hq.org/images/ILA/DraftReports/DraftReportSG_DomesticLawPrinciples.pdf> Accessed 12 June 2019

[329] The International Law Association was founded in Brussels in 1873. Its objectives, as provided in its Constitution, is to study and offer clarification on the development of international law, both public and private international law and to develop international understanding and respect for international law. The ILA has consultative status as an international non-governmental organization, with a number of United Nations specialized agencies.

other related decisions, as well as to have a structured procedure for distinguishing general principle rules of international nature from domestic laws in order to advance international law.[330]The third goal was to improve and facilitate uniformity, predictability, and analysis options for the application of general principles of law in order to reduce the high degree of subjectivity in general principles of law application.[331] This ILA study discovered that international courts and tribunals regularly apply general principles to similar interpretations. General principles of law, for example, were demonstrated to have featured eight times in their judgements. In one of these situations, they only denied their validity. twice, the cases were upheld, while on five occasions, the judges relied primarily on general principles of law to arrive at their verdict.[332] For example, in the *South-West Africa Cases (Second Phase)*,[333] and the *Barcelona Traction (Belgium v. Spain)*,[334] which were territorial dispute-related cases, the ICJ applied general principles of law to reach on their decisions. Similarly, it was observed in *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*,[335] that the Court may have incorrectly referred to equity as a general principle of law. In broad legal perspectives, general principles of law are disputed as to whether their application is mandatory in court decisions. However, contrary to the customs, norms in international law are developed from a specific culture and vary from one society to the

[330] ibid

[331] ibid

[332] 'The International Law Association draft report (n 318)'

[333]*South-West Africa Cases, Second Phase, Judgment, I.C.J. Rep 1966, p. 6*

[334]*Barcelona Traction (Belgium v. Spain), Second Phase, Judgment, I.C.J. Rep. 1970, p. 3.*

[335]*Continental Shelf (Libyan Arab Jamahiriya v. Malta) Judgment, I.C.J. Rep. 1985, p. 13*

next or between groups of societies.[336] The International Court of Justice has considered several cases, some of which address peoples' right to self-determination. Some of these cases were filed with the intention of assisting the Court's determinations in the application of general legal principles. While other court decisions in self-determination cases were based on the *opinio juris sive necessitatis*, which was derived from general legal principles. The international courts' *res judicata* (final court decisions) have applied general legal principles to settle cases involving people's right to self-determination. For instance, in *Southwest Africa (Ethiopia/Liberia v. South Africa),*[337] the ICJ while applying the general principle of law of *actio popularis* norms, held that Namibian residents or any person had the right to take legal action in the public interest. According to the ICJ, *"general principles of law, even if the right of that kind may be known to certain municipal systems of law but not known to international law as it stands at the moment,"* are applicable in litigation requiring a group or locus standi of a given population to sue collectively.[338] Other instances of general principles of law being applied include the *Kosovo case,* in which the International Court of Justice relied on general principles to issue its legal opinion in response to Kosovo's unilateral declaration of independence.[339] In the *Case Concerning East Timor (Portugal v Australia),*[340] The ICJ, observed that the territory of East Timor remains a non-self-governing territory with respect to the right to

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[336] Svensson Måns, 'Norms in Law and Society: Towards a Definition of the Socio-Legal Concept of Norms' (2013), in Matthias Baier (ed.) Social and Legal Norms, (Routledge; New York ,2013) pp.40-43; Also see, Roland Benabou and Jean Tirole, 'Laws and Norms' (2011), NBER, Working Paper Series, Working Paper No. 17579, pp. 1-39 <https://www.nber.org/system/files/working_papers/w17579/w17579.pdf> Accessed 22 February 2019

[337] South West Africa, Second Phase, Judgement (n 342), p. 6, para 5 and 88'

[338] ibid

[339] *See Kosovo, Advisory Opinion, ICJ Rep 403, (n 110), para 95'*

[340] *East Timor (Portugal v. Australia),* (n 58)' *p. 90, para 39*

self-determination under general principles of law. Similarly, in *Western Sahara Advisory Opinion*[341] the ICJ referred to the general principles of law to assert that, *'the indigenous population of the Territory can freely exercise its right to self-determination.'* The decisions of the International Court of Justice (ICJ) on cases involving the territories of East Timor, South West Africa (Namibia), and Western Sahara validate the argument that a general principle of law is important and is consistent with the right of peoples to self-determination enshrined in Article 73 of the UN Charter, champions the rights of indigenous people to access self-rule.[342] Raimondo's thesis puts into question the procedures adopted, as well as how the judges identify and decide to apply a certain general principle of law in order to reach their verdict. His research casts into doubt the legitimacy of court judgements that determine judicial decisions based on general principles of law.[343] Raimondo examined the application of general principles laws that had been transferred from national to international law. The study discovered bias in the application of general legal principles in favour of Western law in many decisions made by international tribunals when delivering verdicts.[344] According to his findings, judges are biassed in their application of general legal principles because they tend to apply general legal principles whose origins they favour. In the study, for example, the general principle of laws originating in France, Germany, England, Wales, the United States, Canada, and Italy was found to be unfairly applied by ICJ judges. The study also revealed that, the general principles of law, as defined in Article 38(1)(c) of the ICJ statute, have

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[341] Western Sahara Advisory Opinion, ICJ Reports, 1975, para 62 (4)

[342] UN Charter, (n 4), Art. 73'

[343] Fabian o. Raimondo, 'General principles of law in the decisions of international criminal courts and tribunals (2007). (PhD Thesis, University of Amsterdam) <https://pure.uva.nl/ws/files/3606050/52732_Raimondo_Uva_digital.pdf> Accessed 19 May 2019,

[344] Ibid

been used sparingly in the Court's decisions, particularly at the ICC and international tribunals, and to a lesser extent in national legal systems.[345] The research noted that, in some cases, judges at international courts had applied general principles of law imported from their own national domestic laws to cases they were presiding over, even when those specific rules did not qualify to be considered as general principles of international law.[346] Judges McDonald and Vohrah, for example, imported laws from the United States and Malaysia during criminal case hearings at the International Tribunal for the Former Yugoslavia (ICTY), which they advanced as general principles of law. The general principles of law they used, were discovered to have been developed in their respective home countries,[347] during the hearing of the criminal case *Erdemović's* Criminal case.*[348]* In another case, while hearing the *Furundzija case,*[349] the judges referred to the general principle laws of Zambia, England, and Italy which were advanced as "general principles of international law" in an international court hearing without providing evidence that they were widely used internationally.[350]

Some legal scholars have criticised international courts for identifying and applying general legal principles, particularly rules that can be traced back to specific national legislation. Cassese observes that general principles of law applied in international courts lack an equitable character; therefore, Article 59 of the ICJ expressly states that court decisions based on general principles have no binding value except to the parties involved

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[345] Ibid at p 200; p 188

[346] ibid

[347] Ibid at p 187

[348] Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, App. Ch., 7 October 1997

[349] Prosecutor v. Furundžija, Judgment, Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998

[350] 'Fabian o. Raimondo, (n 352), p. 187'

in the dispute.[351] General principles of law have always come in handy in complex court decisions, both at international courts and tribunal forums, and their significance to the creation of international law centred on the right of peoples to self-determination cannot be understated. National courts utilise international law in their domestic court decisions when there is a need to bridge a gap left by a deficit in a domestic statute or when judges opt to find credible relevant general principles of law to integrate their court decisions from an *opinio juris* standpoint. Sandholtz conducted research on the application of international law in domestic courts and discovered that, while domestic court judges apply international law less frequently, the most commonly used international rules are those relating to customary international law and treaties, which are typically used in conjunction with national laws.[352] The legal framework applied in self-determination case laws have demonstrated that the application of general principles of law and case laws has significantly contributed to the interpretations at the courts in litigations relating to the right of self-determination in international law. However, the inconsistency in the general principles of law makes them limited in their applicability in the right of self-determination of peoples' court cases.

3.2.1.3 Teachings of Highly Qualified Publicists and the Right of Self-Determination

The teachings of highly qualified publicists are essential for the advancement of international law and the right to self-determination. Writings of prominent legal experts are recognised sources of international law, as stated in ICJ Article 38(1)(d), which

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[351] 'Antonio Cassese, (n 84), p. 194'

[352] Wayne Sandholtz, 'How Domestic Courts Use International Law', (2015), Fordham International Law Journal , Article 5, Volume 38, Issue 2, 596-637 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2384&context=ilj> Accessed 12 June 2019

specifically identifies highly qualified publicists' teachings as a source of international law. Immanuel Kant (1724-1804), for example, was a great philosopher who believed in liberty; Kuehn describes Kant's moral belief as one that believed in people's independence from monarchs and lords and was spurred towards self-determination and identity.[353] Kant believed that self-determination, or the ability to choose one's own destiny, was a natural right. He wrote several books that are still relevant in international law today.[354] Based on his writings and publications, there is no doubt that Immanuel Kant was a staunch supporter of the right of peoples to external self-determination, in which a community would leave the parent state to form their own state. Kant's work was influential in the development of international law. Some of Kant's works include "Kant and the Limits of Autonomy." Kant's work is reflected in the books he wrote about religion in 1792, perpetual peace in 1795, the metaphysics of morals, and the conflict of the faculties in 1797, all of which were written in two parts.[355] Immanuel Kant's viewpoint on how society should live have been intact and has definitely been borrowed by current international law standards. In his 1795 book "Perpetual Peace," Kant philosophised about the distinction between state and individual relationships. Kant contended that broad liberty could exist only in a republic in which government power is divided and shared among the legislative, executive, and judicial institutions.[356] Kant also believed that autonomous states, regardless of size, should not occupy or rule another sovereign, and that no state should

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[353] Manfred Kuehn, 'Kant A Biography' (CUP, Cambridge, 2001), p. 62

[354] ibid

[355] Susan Meld Shell, 'Kant and The Limits of Autonomy', (Harvard University Press, London, 2009), p. 13

[356] ibid

use force to interfere with the constitution or government of another state.[357]His teaching is directly related to the UN Charter Article 2(4) and the right of states to self-determination through territorial integrity. Kant went on to say that understanding why humans have a duty to establish a system of just public laws is important because it contributes to the formation of a juridical community. Kant was clearly attempting to differentiate between international and municipal law, with domestic laws whose scope is limited to the local community.[358] His views on self-determination are related to the justification that if a society cannot agree on its social relations, it has the right to leave or self-determine as an autonomous entity.[359] This viewpoint is consistent with the provisions of Article 1 of the ICESCR of 1966, which states: *"Every people are entitled to self-determination. As a result of this right, they have the freedom to determine their political status and pursue their economic, social, and cultural development."*[360]

Similarly, several philosophers who have made significant contributions to the development of international law have remained interested in the topic of self-determination. Another philosopher whose writings influenced the rules found in modern international law was Thomas Hobbes (1588–1679). Kant's views on self-determination differ from those of Thomas Hobbes. Hobbes postulations advanced public opinion while

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[357]M. Campbell Smith (trs), 'Perpetual Peace' in Immanuel Kant, 'The Collected Works of Immanuel Kant (1724-1804)' (Ian Johnston Liberal Studies Department, Vancouver Island University, Vancouver, 2008)

[358] Amanda Perreau-Saussine, 'Immanuel Kant on International Law', in Samantha Besson and John Sioulas (eds) The Philosophy of International Law, (OUP, New York, 2010), p. 56

[359] Jeremy Waldron, 'Two Conceptions of Self-Determination', in Samantha Besson and John Sioulas (eds) The Philosophy of International Law, (OUP, New York, 2010), p.410

[360] 'ICESCR, 1966 (n 3), Art. 1(1)'

ensuring liberty and the rule of law under sovereign authority.[361] Hobbes advocated for a unitary statehood and the preservation of territorial boundaries, or the principle of *uti possidetis juris* and respect for territorial integrity to preserve the state's sovereignty.[362] Thomas Hobbe advanced a view on the necessity of absolute sovereignty to avoid anarchy or violent conflicts in his 1651 thesis. He claimed that, despite their rational nature, men are incapable of organising and enforcing cooperative agreements.[363] It is worth noting that Immanuel Kent's writings directly relate to several provisions found in the UN Charter and other international law rules, such as the right to self-defence, humanitarian law, and the right to protect, including the welfare of the ruled, as found in the ICCPR and ICESCR, and human rights. In addition to Immanuel Kant and Thomas Hobbes, other early philosophers made significant contributions to contemporary international law and, indeed, to the right to self-determination. For example, John Locke (1632–1704) begins with a more coherent description of the state of nature than Thomas Hobbes' *"war of every man against every man."* He claims that "God created all men equal in their natural state." He went on to explain the theoretical rise of property and civilization by stating that only legitimate governments have the consent of the people.[364] And that, a government that rules without the consent of the people, according to Locke, can be overthrown.'[365] Locke's views are observed to be concerned with the mechanics of what the right of

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[361] Jeremy Waldron, 'Hobbes and The Principle of Publicity (2001), Pacific Philosophical Quarterly 82, University of Southern California and Blackwell Publishers Ltd, pp.447–474, <https://www.law.upenn.edu/institutes/cerl/conferences/ethicsofsecrecy/papers/reading/Waldron.pdf> Accessed 13 June 2019

[362] Ibid

[363] Pärtel Piirimäe, 'The Explanation of Conflict in Hobbes' Leviathan' (St. John's College, Cambridge, (2006), p. 1

[364] John Locke, 'Two Treatises of Government, 1764 Edn. In The Complete Works of John Locke (1632-1704), (Delphi Classics 2017), Version 1, p. 1016

[365] Ibid

peoples to self-determination entails, particularly in the context of colonialism, where Article 73 of the UN Charter and "UN General Assembly Resolution 1514 (XV) (14 Dec 1960) provide peoples with the right to become independent territorially and self-rule.[366]

He claims that rulers can only rule with the consent of the ruled, and that they must allow democracy to exist. Jean Bodin (1529–1596) on the other hand, believed that unless citizens were free, they were ineffective. In places where such sovereignty or freedom is held, citizenship without freedom is meaningless, according to Bodin. "The franc is the only currency subject to the sovereignty of autruy." As a result, "sovereignty" or self-determination would be required for citizenship to be established.[367] Samuel Freiherr von Pufendorf (1632–1644), on the other hand, proposed that peoples of all nations interact with one another. He observed that civil sovereignty and its mechanisms are required for international interactions. Therefore, the lack of such interaction between sovereignty or states would result in differences and a lack of standardisation.[368] In essence, Pufendorf was concerned that peace can only be achieved in a united environment. Therefore, the United Nations was established. The UN Charter's preamble contains references to Pufendorf.[369] The writings of these ancient scholars, both those mentioned in this research and others not mentioned, made significant contributions to the development of international law as we know it today. These opinions confirm that the "Teachings of Highly Qualified Publicists" under ICJ Article 38(1)(d) incorporate self-determination

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[366] 'UN Charter, 1945 (n 4)' and 'UNGA Res 1514 (XV) (14 Dec 1960) (n 5)'

[367] Howell A. Lloyd, 'Jean Bodin 'This Pre-eminent Man of France' An Intellectual Biography' (OUP, Oxford, 2017), p. 134

[368] Craig L. Carr (ed) and Michael J. Seidler (trs), 'The Political Writings of Samuel Pufendorf' (OUP, Oxford, 1994) pp. 140-148

[369] See 'UN Charter, 1945 (n 4), preamble'

from various perspectives, including state sovereignty, the right to self-determination can be demonstrated as part of international law, which emanates from all formal sources of international law.

3.3 Conclusions

Chapter three examined the international legal frameworks of the right of self-determination of peoples in relation to the sources of international law. The right to self-determination was investigated to establish its relationship with the sources of international law, which include treaties, customs or customary international law, general principles of law, court decisions, and the teachings of highly qualified publicists. The study in this chapter observed the link between the right of self-determination of peoples and the sources of international law as provided for in the ICJ statute in Article 38(1)(a) (b) (c) (d).

The study established that peoples' right to self-determination is a legal right germinating from sources of international law that exists across the spectrum of other sources of international law explored in this chapter. The chapter concludes that the legal framework of international law and the right of self-determination of peoples, acquire their key legal rules that can be traced from international law sources. The chapter concludes that, right of self-determination and its corresponding legal framework originates from international sources.

The subsequent chapter examines the right of self-determination of peoples on how it is exercised from an internal perspective.

CHAPTER FOUR

THE APPLICATION OF PEOPLES' INTERNAL RIGHT TO SELF-DETERMINATION IN DOMESTIC JURISDICTION

4.1 Introduction

People's right to self-determination is a legal right enshrined in the UN Charter in Articles 1(2), 55, and 73, as well as the ICCPR and ICESCR of 1966, among other international treaties. Under international law, this right is advanced as one of the human rights rules that allows people to choose or decide their own destiny.[370] Scholarly discourse contends that the application of the right to self-determination from a domestic platform provides a right to access the common interest of peoples through community social well-being, such as political, economic, and cultural benefits.[371] According to Sterio, this right is divided into two parts: external and internal. Internal self-determination occurs when peoples seek greater freedom or autonomy while remaining subject to the parent state's sovereign authority, whereas external self-determination occurs when people seek to form their own state through territorial secession. Even though in a broader picture, the internal right of peoples to self-determination is primarily concerned with human rights protection.[372] Scholars' interpretations of what constitutes a people's right to self-determination continue to be vastly different. However, there is general agreement that the right of peoples to self-determination is a legal right that can be asserted by a community or group.[373] Domestically, peoples' right to self-determination is exercised as a non-territorial entitlement. Externally, however, this right is opined to be realised through territorial

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[370] Guyora Binder, 'The Case for Self-Determination' (1992), Stanford *Journal of International Law, Vol. 29*, pp. 223-270, <https://core.ac.uk/download/pdf/236359803.pdf> Accessed 14 July 2020

[371] Ibid, at pp. 261-266

[372] 'Milena Sterio (n 40), pp. 1-10'

[373] 'Matthew Saul (n 31), pp. 610-612'

secession, which occurs when peoples secede to form their own sovereign territory or state. Even though the right of peoples to self-determination is enshrined in international law, it is unclear what it is, how it should be practised, and what is its practice scope. Therefore, it is necessary to investigate how the right of peoples to self-determination is exercised domestically within states by evaluating how this right is pursued within the framework of international law.

This chapter investigates the application of the right to self-determination from an internal perspective, focusing on discovering what legal instruments exist relating to the right to self-determination, how they support the execution of this right at a domestic level, and what kind of obligations and accountability mechanisms they impose on states, as well as how states comply.

4.2 Legal Instruments Applicable in Exercising the Internal Right of Self-Determination

The term "right of self-determination of peoples" evokes a sense of entitlement to take total control over one's destiny as a member of specific group of peoples under international law over issues affecting them.[374] However, this is one of the most contentious rights in international law, as it is a right that is frequently contested between peoples and states, and it remains undefined to this day. This right is advanced in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR)[375] and the International Covenant Economic, Social and Cultural Rights (ICESCR)[376] as belonging

[374]Joshua Castellino and Jeremie Gilbert, 'Self-Determination, indigenous Peoples and Minorities' (2003), Macquarie *Law Journal, Vol. 3,* pp. 155

[375] 'ICCPR, 1966 (n 2), Art. 1(1)'

[376]'ICESCR, 1966 (n 3), Art. 1(1)'

to everyone without limitations "*all peoples have the right of self-determination.*" The internal right of self-determination is exercised within the state, whereas the external right of self-determination incorporates territorial secession in cases where there is evidence of persistent marginalisation and human rights violations against the peoples.[377] Articles 1(2) and 55 of the United Nations Charter advocate for "equal rights of peoples and access to self-determination," and as a result, Article 73 of the UN Charter advocates for the right of peoples living in non-governing territories to achieve self-rule.[378] As a consequence, a number of treaties, declarations, and other relevant international legal instruments are regarded as aiding in the realisation of the "internal" right to self-determination by ensuring that people's self-determination rights are freely exercised regardless of citizenship or state affiliation. These legal instruments are primarily associated with the broader concept of human rights found in the UN Charter, particularly in the Preamble to the UN Charter. Other relevant legal instruments include the 1948 Universal Declaration of Human Rights, which promotes human rights as people's basic civil rights. According to Puyana, the main goal of the UN Charter was to provide a platform for individuals to exercise their right to self-determination by ensuring that human rights had been included as an important component of international law in its legal instruments.[379] As a direct consequence, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has compiled a list of international legal instruments relating to the right of

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[377] Ernest Duga Titanji, 'The right of indigenous peoples to self-determination versus secession: One coin, two faces?' (2009), African Human Rights Law Journal, Vol. 9, pp. 52-75, <http://www.scielo.org.za/pdf/ahrlj/v9n1/04.pdf> Accessed 14 September 2021

[378] ''UN Charter 1945 (n 4), Arts. 1(2) and 55; 73'

[379] David Fernández Puyana,' "Analysis of the international debate on the right to peace in the context of the human rights and intergovernmental bodies of the United Nations" (Dphil. Thesis, University of Pompeu Fabra, Barcelona, 2014), p. 16 <https://www.tdx.cat/bitstream/handle/10803/145643/tdfp.pdf?sequence=1&isAllowed=y> Accessed 25 August 2019

peoples to self-determination, which includes, but is not limited to, the fourteen core associated human rights treaties listed below.[380] These are, the International Covenant on Economic, Social, and Cultural Rights (1966);[381] International Covenant on Civil and Political Rights (1966),[382] Optional Protocol to the International Covenant on Civil and Political Rights (1966),[383] Second Optional Protocol to the International Covenant on Civil and Political Rights (1989).[384] Others are the International Convention on the Elimination of All Forms of Racial Discrimination (1965),[385] Convention on the Elimination of All Forms of Discrimination Against Women (1979),[386]Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999),[387] Convention on the Rights of the Child (1989),[388] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child

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[380] See, Office of the United Nations High Commissioner for Human Rights, 'The Core International Human Rights Treaties',(2006), (United Nations Publication, Sales No. E.06.XIV.2 ISBN 92-1-154166-2, New York and Geneva), pp. 1-175, <https://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf> Accessed 20 September 2019

[381] 'ICESCR, 1966 (n 3)'

[382] 'ICCPR, 1966 (n 2)'

[383]Optional Protocol to the International Covenant on Civil and Political Rights (Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966)) entry into on 23 March 1976, in accordance with Article 9

[384] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989) entry into force on 11 July 1991, in accordance with Article 8 (1)

[385] International Convention on the Elimination of All Forms of Racial Discrimination (Adopted and opened for signature and ratification by General Assembly resolution 2106 A (XX) of 21 December 1965) entry into force: 4 January 1969, in accordance with Article 19

[386] Convention on the Elimination of All Forms of Discrimination against Women 1981 (Adopted and opened for signature, ratification, and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1))

[387] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Adopted by General Assembly resolution 54/4 of 6 October 1999 and opened for signature, ratification, and accession on 10 December 1999) entry into force: 22 December 2000, in accordance with Article 16

[388] Convention on the Rights of the Child (Adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989) entry into force on 2 September 1990, in accordance with Article 49

pornography (2000).[389] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)[390] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)[391] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002),[392] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).[393]

Among these legal instruments, the two main conventions concerning the internal aspect of the right of self-determination are the ICCPR1966,[394] and the ICESCR 1966;[395] An in-depth examination of the ICCPR and ICESCR reveals that they relate to self-determination rights advanced, as human rights for which states are held accountable for any type of human rights violation committed in their territories, and that these accountability mechanisms are practised and apply domestically.

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[389] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Adopted and opened for signature, ratification, and accession by General Assembly resolution 54/263 of 25 May 2000) entry into force on 18 January 2002, in accordance with Article 14

[390] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Adopted and opened for signature, ratification, and accession by General Assembly resolution 54/263 of 25 May 2000) entry into force on 12 February 2002, in accordance with Article 10

[391] 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 268)'

[392] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted by General Assembly resolution 57/199 of 18 December 2002) entry into force on 22 June 2006, in accordance with Article 28 (1)

[393] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Adopted by General Assembly resolution 45/158 of 18 December 1990) entry into force on 1 July 2003, in accordance with Article 87 (1)

[394] 'ICCPR, 1966 (n 2), Art. 1'

[395] ICESCR, 1966 (n 3), Art. 1'

4.3 Domestic Context in Applicability of ICCPR and ICESCR Rules of Internal Self-Determination

Following the enactment of the United Nations Universal Declaration of Human Rights 1948.[396] The original idea was to create a single legal document that addresses human rights issues because there was a need to establish a single reference rule of human rights law. Consequently, the Human Rights Commission finally presented the approval Covenants to the United Nations General Assembly in 1954 after protracted negotiations that reflected the states' resistance revolving in an opinion on having human rights obligations limit their sovereign powers.[397] These initiatives led to the creation of two related legal documents on human rights, the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (hereinafter ICESCR). After more than a decade of review by the Third Committee, the General Assembly adopted the final versions of these rules in 1966, and ten years later, in 1976, the two Covenants received required ratifications and became legally binding standards for human rights. The ICCPR and ICESCR 1966 both guarantee the right to self-determination, with their respective Article 1 stating that "all peoples have the right to self-determination," [398] Although these two statutes acknowledge that all peoples have the right to self-determination, they do not define it. Instead, they state that all peoples have it and go on to say that it pertains to the freedom of peoples to choose their own style and design of politics as well as their economic, social, and cultural development. The intent of the statutes is to provide an international legal framework

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[396] 'UDHR 1948, (n 121)'

[397] See United Nations General Assembly Resolution 543 (V) of 5 February 1952, where it was decided to draft two separate covenants

[398] See, 'ICCPR, 1966 (n 2), Art. 1' and 'ICESCR, 1966 (n 3), Art. 1'

within which states can guarantee their citizens' rights to exercise their economic, social, cultural, civil, and political rights, as stated in the preambles of the ICCPR and ICESCR.[399] The ICCPR and ICESCR statutes' dispensation obliges states to allow the peoples, in particular indigenous and minority groups, to effectively control and achieve better their protection, with their rights recognised as fundamental human rights in the context of the right to self-determination. The right to self-determination, according to Sylvanus, was incorporated into international law statutes to support indigenous peoples who were perceived as victims of colonial dominance and discrimination, for which their rights had been curtailed or denied, and to aid them in being able to freely determine their own futures as peoples.[400]

4.3.1 The Impact of the ICCPR on Internal Right to Self-Determination

The rights pertaining to the benefits that people should be able to obtain within the state appear to have been ICESCR's focus. However, the ICCPR, which was intended to concentrate on liberties relating to political aspects of peoples' rights, is examined in this section rather than the ICESCR. As a result, this section will examine the ICCPR's 1966 Articles and consider how they relate to the right of individuals to self-determination.

The ICCPR is divided into six sections, which are parts I to II and IV to VI. These sections concern the relationship between states and the UN in terms of enforcing its rules, and they contain the rights that directly relate to and impact on individuals' civil and political

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[399] Ibid at Art.1, Para 1 of both statutes

[400] Barnabas Sylvanus, 'The Role of International Law in Determining Land Rights of Indigenous Peoples: The Case Study of Abuja Nigeria and a Comparative Analysis with Kenya' (Doctoral thesis, Northumbria University, 2017'), p. 184, <http://nrl.northumbria.ac.uk/id/eprint/32544/1/barnabus.sylvanus_phd.pdf> Accessed 23 May 2019

lives.[401] In Article 3, the state parties to the ICCPR undertake to ensure that men and women have equal rights to enjoy all civil and political rights outlined in the Covenant. This article ensures that people's right to participate in civil matters and express their political rights is protected without restrictions or discrimination. According to Seibert-Fobr, as stated in article 2, paragraph 1, which requires states to "respect and ensure," this will largely depend on the state party concerned commitment to implementation.[402] This Article necessitates that the state allows individuals to freely compete for political positions as well as freely vote for their preferred candidates. Indeed, the American Convention on Human Rights (ACHR) is a good example of a regional statute that has incorporated it into its rules.[403] Article 1 of the ACHR appears to supplement the ICCPR, which requires state parties to respect all people's rights, including the right to be free from discrimination based on race, colour, gender, language, religion, political or other opinions, national or social origin, economic status, birth, or any other social condition.[404] This regional rule is related to the ICCPR principle in Article 3; the goal appears to have been to restrain States from inflicting injuries or withholding rights of peoples during wars or turbulent situations, regardless of prevailing conditions on whether it is originating internally internal or externally, the states should not consider the civilians as the legitimate enemy, including for any other reasons be it because of

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[401] Yvonne M. Dutton, 'Commitment to International Human Rights Treaties: The Role of Enforcement Mechanism' (2012), *I U. Pa. J. Int'l L. Vol. 34 Iss.1*, pp. 1-66 <https://www.corteidh.or.cr/tablas/r31682.pdf> Accessed 10 May 2019

[402] Anja Seibert-Fobr, Domestic Implementation of the International Covenant on Civil and Political Rights (ICCPR), Pursuant to its Article 2 para 2' (2001*), Max Planck Yearbook of the United Nations Law, Vol. 5, p. 400,* <https://www.mpil.de/files/pdf1/mpunyb_seibert_fohr_5.pdf> Accessed 16 March 2021

[403] Organization of American States (OAS), American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), 22 January 1969, Art. 1.

[404] ibid

their race, colour, gender, religion, or social origin. Mbondenyi and Ojienda observe that conflicts and civil wars in Africa are frequently founded on the desire to establish constitutional regimes that guarantee peoples' equal participation in their respective nations' economic, social, and political activities.[405] Therefore, the sanctity of human life is emphasised in Articles 5 and 6 of the ICCPR, 1966, and require that no one should be killed without due process of law. For example, the father of Mr. Orif Eshonov, who died in custody on 15 May 2003, claimed that Uzbekistan violated his son's rights under Articles 2 and 7 of the International Covenant on Civil and Political Rights. These claims also appeared to conflict with Article 6, paragraph 1 read in conjunction with Article 2. According to these articles, violations of family rights are protected under Article 6. The court ruled in this case that "families of the deceased and their legal representatives should have access to all information relevant to the investigation and should be entitled to present other evidence."[406] Similarly, in the *Jadhav Case (India v. Pakistan)*,[407] the International Court of Justice (ICJ) ruled that Pakistan should not execute Jadhav pending its decisions; India brought the case against Pakistan under the provisions of Vienna Convention rights, which relate to Article 36, paragraph 1 (b), and Article 14 of the 1966 ICCPR. However, Article 6(2) of the ICCPR allows the death penalty for "the most serious crimes," for states that still have the death penalty in their laws; this rule undermines the sanctity of human life. It would have been preferable if this statute had abolished the death penalty. Indeed,

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[405] Morris Kiwinda Mbondenyi and Tom Ojienda, 'Introduction to and Overview of Constitutionalism and Democratic Governance in Africa' Morris Kiwinda Mbondenyi and Tom Ojienda (eds), in *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (PULP, Pretoria, 2013), p. 3

[406] See Human Rights Committee, Eshonov v. Uzbekistan, Comm. 1225/2003, U.N. No. CCPR/C/99/D/1225/2003, A/65/40, Vol. II (2010), Annex V at 7 (HRC, Jul. 22, 2010), para. 9.6

[407] Jadhav (India v. Pakistan), (Provisional Measures), [2017] ICJ Rep 2017, p. 231

the European Union (EU) has outlawed the death penalty, which its member states are required to follow in their laws.[408] Holmes argues that the insertion of the ambiguous phrase "the most serious crimes" in article 6 of the ICCPR was unfortunate because it allows states to undermine human rights principles and people's dignity, which are critical components of the normative foundation for universal human rights, of which its ramifications is far-reaching.[409]

Under ICCPR principles, states are generally required to subscribe to the commitment that they enact in their national laws that upholds the principles of international treaties with rules which respect human rights, and not to infringe on the peremptory norms or *ius cogem*, which are rules of basic human rights principles that cannot be derogated under the customary international law.[410] When it comes to the implementation of human rights-related international law statutes, not only does the human rights rules rely on the mentioned rules, but the protection offered to the peoples extends broad, incorporating treaties which the concerned state is a party, and whether the state seems to also violate customary international law. For instance, Article 53 of the Vienna Convention on the Law of Treaties (VCLT), adopted on 23 May 1969, states that a treaty is null and void if it contradicts a peremptory norm of customary international law.[411] This means that states cannot simply pass laws that violate or arbitrarily permit the killing of people at will

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[408] William A. Schabas, 'International Law and Abolition of the Death Penalty' (1998), *Washington and Lee Law Review, Vol. 55, Issue 3, pp. 797-846* <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1517&context=wlulr>Accessed 16 June 2020.

[409] Billy Holmes, Non-universal Human Rights? How Article 6 (2) of the International Covenant on Civil and Political Rights Undermines Human Rights (2020), International Human Rights Law Review, Vol. 9, pp 100

[410] 'Peter Malanczuk, (n 76), 57'

[411] 'VCLT 1969, (n 305), Art. 53'.

without first going through the legal process. Article 7 of the ICCPR 1966 prohibits states from inflicting bodily harm through torture, and thus states are prohibited from inflicting acts of inhumane treatment on the people, including the use of torture as a state policy. Following the adoption of the ICCPR in 1966, a separate treaty to address torture was established in 1984, under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT) of 1984 entering into force as international law on 26 June 1987.[412]Armstrong *et al*., argue that torture has continued to be used against those perceived to be part of the anti-State establishment. For example, during the height of the "Arab Spring" in 2011, the Tunisian regime used torture against members of the pro-democracy movement. Tunisia embarked on transitional justice after the overthrow of the president to amend the past legacy relating to human rights violations, provide justice, accountability, and reconcile its people.[413] However, use of torture against civilians by the states is common, and the Tunisian case was not an isolated case concerning the states using torture to intimidate and subdue the voices of those considered to be the regimes' enemies. Torture, in general, has been used to deny peoples' right to self-determination by the states' agents. Article 14 of the ICCPR requires states to compensate torture victims and provide support to them, as well as any other assistance that may be required, including rehabilitation back to normal life.[414] Torture against civilians is punishable as an element of international crime by the International Criminal Court (ICC).[415] The author observes that international crimes have not been well regulated in international law to

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[412] 'Convention Against Torture 1984 (n 292)'

[413] David Armstrong, Theo Farrell and Helene Lambert, 'International Law and International Relations, 2nd Edn.' (CUP, New York, 2012), pp. 173-207.

[414] 'Convention against Torture 1984 (n 292), Art. 14'

[415] 'Rome Statute 1998, (n 242), Art. 7 (1) (f) and (2)(e)'

obligate individual responsibility for crimes such as torture and arbitrary murder committed against individuals under a state 'consent to inflict terror on its civilian population, particularly when these tortures are politically motivated. This is because the Rome Statute's involvement in cases of torture and inhuman treatment is very limited to the elements of crime on how the crimes were committed, to whom, and in what manner, to test whether they result in war crimes, crimes against humanity, and genocide; any crime committed outside of this scope, no matter how rampant or serious, is never prosecuted at the ICC. The Rome Statute considers crimes to be international crimes only if they meet a specific criterion that considers a definition as well as a specific scope and scale, as well as how or the design at which such killings and tortures are designed to be committed.[416] For example, The assassination of Jamal Khashoggi at the Saudi consulate in Istanbul sparked a debate about the capacity of international law to protect peoples where human rights violations are committed by government agents against civilians within and outside state borders, where such crimes and killings do not meet the criterion of international crimes as prescribed by the Rome statute, as well as the limits to international law on diplomatic immunity for diplomats or state agents who commit crimes against their citizens including killings.[417] Articles 8, 9, 10, and 11 of the 1966 ICCPR provide for the right to liberty and fair treatment free of slavery or illegal confinement, as well as other related acts that violate human rights, particularly those committed by state agents against their citizens or acts. Articles 12, 13, and 14 of the ICCPR 1966 address how non-citizens or aliens should be treated, as well as the treatment

[416] Ibid, Art. 5,6,7 and 8

[417] Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) *Human Rights Law Review, Volume 20, Issue 1*, pp. 1–49.

of foreigners found within the territorial frontiers of another state where they are not nationals or a state whose jurisdiction they happen to be at the time. These articles obligate states to provide the same level of protection to their citizens as well to the foreigners found within their borders. Equality of treatment, including freedom of movement and before the courts, must be carried out without discrimination.[418] The Articles 15 and 16 of the ICCPR require states to treat everyone equally before the law, they also prohibit the application of retroactive laws, rather, the principle of *nullum crimen sine lege* should be followed to ensure that no one is subjected to a law that was not in effect at the time the alleged offence was committed. Indeed, no one should have an advantage or disadvantage before the law in the courts by receiving or not receiving harsh punishment for the same offence in comparison to others. According to Article 16 of the ICCPR, everyone must be recognized as a person or human being before the law. OHCHR has emphasised the use of Article 16 of the ICCPR, which states that, a person to be recognized as a person before the law by everyone and everywhere, it emphasises more on the discriminations against women who in most cases are frequently discriminated against because of their gender or marital status. Women have been observed to face discrimination particularly on their rights to own land or property, and inheritance of their parents' property in comparison to their male counterparts.[419] Individuals' privacy must be respected, in accordance with ICCPR in Article 17. This means that states should not enact policies that violate people's privacy or threaten their lives. Articles 18 and 19 of the ICCPR obligate states not to

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[418] Alice Edwards, 'Human Rights, Refugees, and The Right 'To Enjoy' Asylum' (2005), *International Journal of Refugee Law*, Vol. 17, Iss. 2, pp. 293–330.

[419] See United Nations Office of the High Commissioner for Human Rights (UNHCR), 'ICCPR General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)' (First Adopted on 29 March 2000) at the Sixty-eighth session of the Human Rights Committee, CCPR/C/21/Rev.1/Add.10, Para 19.

interfere with the freedom of expression, as well as the right to information, which includes the right to be informed or to inform, the right to choose one's own religion, and the right to teach and practise one's religious beliefs. Article 20 of the ICCPR prohibits the creation of environments or situations that may expose people to incitements that may threaten or endanger their lives through wars based on their national, racial, or religious identity, as well as any other form of discrimination that may ignite violence and attacks against specific individuals or populations. Boyle observes that during the debate on the ICCPR, the states delegated at the conference debated what the limits on freedom of expression should be and how they should be enforced at the convention. Instead, the conference used "Article 19 of the Universal Declaration and imported it to become Article 19 of the ICCPR that refers to "special duties and responsibilities" as the rule on freedom of expression, and in light of The United Nations Genocide Convention of 1948, which made it a punishable crime for the "direct and public incitement to commit genocide."[420] Articles 21 and 22 of the ICCPR guarantee freedom of movement and association, both Articles 23 and 24 of the ICCPR 1966 deal with family law. These statutes demand that people have the freedom to marry and own property, that their births be recorded, and that the naming of their children is done legally.[421] Articles 25 and 26 of the ICCPR 1966 guarantee the right to participate in the governance and politics of the Citizenship State without regard to one's background or social status.[422] Zahara was a

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[420]Kevin Boyle, 'Overview of A Dilemma on Censorship versus Racism 'in Sandra Coliver, Kevin Boyle and Frances D'Souza (Eds), 'Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination' (London and Human Rights Centre, University of Essex, 1992,) p. 5

[421]See OHCHR, 'ICCPR General comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (Adopted on 27 July 1990) the Thirty-ninth session of the Human Rights Committee, para 1-9.

[422] See OHCHR, 'ICCPR General Comment 25 The right to participate in public affairs, voting rights and the right of equal access to public service, Article 25 of ICCPR' (Adopted on 12 July 96) at the Fifty Seventh session. CCPR/C/21/Rev.1/Add.7, 1996) (1) (2)

breast cancer patient who protested the US government's position at the Trans-Pacific Partnership conference to extend drug companies' monopolies on medicines, claiming that it would "deny life-saving medicines to patients who cannot afford high prices,"[423] this protest demonstrates that people have the right to oppose policies that do not consider their best interests. Maisley contends that Article 25 of the 1966 ICCPR allows not only individuals to participate in law-making processes through elections, but also civil society as a non-state actor in the creation of laws that benefit a larger society.[424] Article 27 of the ICCPR requires states to protect minorities' rights, culture, and the right to practise their religion.

It is worth noting that the right of peoples to self-determination found in the ICCPR, 1966, is not based on territorial control, but rather on the obligation of states to guarantee human rights by freely allowing peoples to access social, political, and cultural rights. Araujo observes that the concept of state sovereignty has been used to deprive millions of innocent victims of their human dignity in an unwarranted and unjustifiable manner. It is critical to balance the value placed on state sovereignty in international law in order to protect fundamental human rights such as those found in the ICCPR and the ICESCR.[425] People's liberties must be granted in order for them to participate in a state's internal affairs and determine how it will carry out its governance, particularly by improving the relationship between citizens and their state, including a prohibition on human rights violations in

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[423] DemocracyNow.org, 'Breast Cancer Patient Arrested for Protesting TPP', (6 October 2015), <www.democracynow.org/2015/10/6/breast_cancer_patient_arrested_for_protesting > Accessed 23 September 2019,

[424] Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017), The *European Journal of International Law Vol. 28 no. 1*, pp. 89–113, <https://academic.oup.com/ejil/article/28/1/89/3097818> Accessed 24 September 2019

[425] 'Father Robert Araujo (n 233), p. 1480'

favour of policies that respect human and people's rights. The right of peoples to self-determination, enshrined in the ICCPR, is intended to provide liberties to peoples; it has nothing to do with territorial control. It is arguable that the drafters of the ICCPR intended to have a statute in place that would operationalize and aid in the achievement of the UN Charter's objectives , particularly those enshrined in Articles 1(2) and 3, as well as other related international law legal provisions, such as UN General Assembly Resolutions on the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States per the United Nations Charter 2625 (XXV) of 1970, particularly to the peoples.[426] The goal of these international rules was to extend self-determination beyond territorial independence to include individual liberties within the boundaries of the state's jurisdiction. The ICCPR is therefore intended to regulate the state's approach to its relationship with its citizens and aliens found within its borders to ensure that all nations' liberties required for freedom in the global society are harmonised and to facilitate friendly coexistence among nations.

4.3.2 Relationship of Internal Self-Determination to the ICCPR and ICESCR

The ICESCR addresses the right to self-determination for people from economic, social, and cultural perspectives. In terms of objectives, the preamble to the ICESCR is identical to that of the ICCPR 1966. Taken together, these two statutes address the well-being aspects of the right to self-determination. The goal of the ICESCR regime was to promote economic, social, and cultural development. Even though the wording in Article 1 of the

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[426] Glen Anderson, 'Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects.' (2013), *Denver Journal Of International Law & Policy, Vol. 41,* p. 348, <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1129&context=djilp> Accessed 20 May 2020

ICESCR is similar to Article 1 of the ICCPR, they both focus on different types of human rights. As explained by Langford, the twinning of the ICESCR and ICCPR with their respective optional protocols was intended to bring the ICESCR and ICCPR closer to unifying the human rights objectives found in the Universal Declaration of Human Rights.[427] The Acting President of the General Assembly stated during the plenary session that it "will break down the walls of division that history has built and will unite once more what the Universal Declaration of Human Rights proclaimed as a sole body of human rights sixty years ago."[428]

This demonstrates that the conceptual goal of ICESCR remains the same as that of the ICCPR. It is worth noting that non-discriminatory acts against people are generally regarded as a cardinal legal principle throughout the ICESCR and ICCPR's entire provisions on people's right to self-determination. States must enforce laws that prohibit all forms of discrimination within their borders.[429] Udu contends that if there had been no disagreements between the Western and Eastern blocs, we could have had a single covenant rather than two. The schism between the delegates of the Member States contributed significantly to the division of the covenant's contents into two separate

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[427] Malcolm Langford, 'Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights '(2009*), NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER – Vol. 27, No 1,* p. 2 <https://www.jus.uio.no/ior/english/people/aca/malcolml/1Langford1-28.pdf> Accessed 20 September 2021

[428] Statement by the High Commissioner for Human Rights, Ms. Navanethem Pillay, Official Records, 65th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008

[429] See Limburg Principles, Principles 13, 22 and 35-41; Maastricht Guidelines, Guidelines 11, 12 and 14(a).

documents, resulting in the creation of ICESCR and ICCPR.[430] Cooper observed that, because of the differences among the delegates, it took more than fifteen years to draft the ICCPR and the ICESCR. These differences were primarily based on two opposing viewpoints: first, state parties disagreed on the nature or contents of the single unified covenant. This meant that the covenant had to be divided into two parts so that Member States could choose whether to contact either the treaty or both covenants.[431] Second, the existing political ideologies advanced by the former Soviet Union and its allies, as well as those advanced by the United States and its allied Member States, resulted in a lack of consensus, which hampered the creation of a single harmonised covenant.[432] It is obvious that having a single covenant, possibly merged, was also more practical.

Nonetheless, the ICESCR and the ICCPR both address human rights issues that are broadly relevant to international law legal principles that allow peoples to exercise their right to self-determination as established by the 1948 Universal Declaration of Human Rights (UDHR).[433] Indeed, the General Assembly intended to have a single covenant in

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[430] E.A. Udu,' The Imperatives of Economic, Social and Cultural Rights in the Development of Nascent Democracies: An Inter-Jurisdictional View', (2014), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol 5*, p. 31, <https://www.ajol.info/index.php/naujilj/article/view/136274> Accessed 20 April 2020

[431] Nathan John Cooper, 'Covenants, Constitution & Commons International, constitutional, and community responses to achieve access to sufficient water for everyone (DPhil. Thesis, University of Sheffield, 2016), pp. 43-53, <http://etheses.whiterose.ac.uk/15710/1/Final%20Phd%20Thesis%20July%202016%20NJ%20Cooper%20reg%20080183952.pdf> Accessed 20 October 2020

[432] Kitty Arambulo,''Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?'(1996), *Davis Journal Of International Law & Policy, Vol. 2,* p. 111, <https://www.escr-net.org/resources/drafting-optional-protocol-international-covenant-economic-social-and-cultural-rights-can> Accessed 25 July 2019

[433]'UDHR1948 (n 121)'

order to emphasise the indivisibility and interdependence of the two sets of rights.[434] A single covenant was poised to protect all of the rights found in both covenants through a single implementation and supervisory mechanism. Those in favour of drafting two separate covenants argued during the drafting of these two human rights covenants that civil and political rights fundamentally require abstaining from state action and are thus legally enforceable and justiciable, which could be defined and implemented immediately.[435] Consequently, these rules contained in the two statutes are found not only in the provisions of the ICCPR, particularly in Article 26, where rules against discrimination are found, but also in the ICESCR and other international instruments for human rights as a tool for equal protection of rights. States are thus required, regardless of substantive content, to enact legislation outlawing all forms of discrimination acts as part of their national laws. Article 1(1) of the ICESCR requires states to cooperate internationally in technical matters relating to economic issues. According to Article 55(a)(b) of the 1945 United Nations Charter, the UN member states are obligated to provide high living standards and to ensure employment opportunities, improved economic conditions, social progression, health, and cultural and educational cooperation among them.[436] Article 2 of the ICESCR requires states to enact relevant legislation that

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[434]*Draft Report of the Working Group on Implementation*, U.N. ESCOR Comm. on Hum. Rts., 2d Sess., U.N.

Doc. E/CN.4/53 (1947).

[435]Draft International Covenant on Human Rights and Measures of Implementation, U.N. ESCOR Comm. on

Hum. Rts., 7th Sess., 248th Mtg., at 8, U.N. Doc. E/CN.4/SR.428 (1951).

[436] Olaniyi Felix Olayinka,' 'Implementing the Socio-Economic and Cultural Rights in Nigeria and South Africa: Justifiability of Economic Rights' (2019), *African Journal of International and Comparative Law, Vol.27, Issue.4,* p. 564 <https://www.researchgate.net/publication/336964907_Implementing_the_Socio-economic_and_Cultural_Rights_in_Nigeria_and_South_Africa_Justiciability_of_Economic_Rights> Accessed 20 March 2020

promotes national economic cooperation, including the rights of non-nationals residing in their territories, in order to ensure economic rights.[437] Article 3 of the ICESCR is similar to Article 3 of the ICCPR in that both provide for equality of treatment as well as gender considerations. The difference between ICESCR Article 3 and ICCPR Article 3 is that the latter focuses on gender equality in political and civil issues, whereas ICESCR focuses on gender equality in economic, social, and cultural rights.

According to Ssenyonjo, the ICESCR has aided in the improvement of African living standards through its influence on the governance of the regional human rights system.[438] The African Charter on Human and Peoples' Rights[439] recognizes rights found in the ICESCR, such as the right of individuals to self-determination through equality in securing employment opportunities and work with equitable conditions; the right to good health; the right to education; and it also protects family life and cultural rights. Article 4 of the ICESCR requires states to protect the rights of the peoples while also promoting the general welfare of the peoples in a fair manner. The Article simply encourages states to follow fairness principles when carrying out their governmental obligations in all aspects of government services. Similarly, states are required in Article 4 of the ICCPR to uphold the rule of law and act within the provisions of international law to protect the human rights of everyone found within their territorial jurisdiction, even during times of public

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[437] 'ICESCR, (n 3), Art. 2(1)': "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present" (emphasis added).

[438] Manisuli Ssenyonjo, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa'(2017), *Netherlands International Law Review, Vol. 64*, pp. 259–289 <https://link.springer.com/article/10.1007/s40802-017-0091-4> Accessed 25 May 2019

[439] 'African Charter on Human and Peoples Rights 1981, (n 108)'

emergency when derogation of common liberties may be necessary.[440] The goals of Article 4 of the ICESCR and Article 4 of the ICCPR are similar; the distinction appears to be that the ICESCR appears to address treatment of nationals or citizens through the protection of democratic values, whereas the ICCPR appears to address both nationals and foreign citizens' rights. Article 5 of the ICESCR and Article 5 of the ICCPR are identical in that they both prohibit states from violating human rights they provide under any circumstances. Human rights are regarded as sacredly protected as part of peremptory norms of *ius cogens* that are *erga omnes* in nature, from which no state should deviate for any reason. In armed conflicts, whether civil wars or transnational armed conflicts, the environment, and opportunities for combatants to inflict pain and suffering on their opponents and civilian populations are usually present, with some acts qualifying as international crimes.

For example, the Australian government admitted that its troops committed war crimes while serving in Afghanistan between 2005 and 2013. The conduct of the Australian soldiers included willful killings or "trophy killings" of unarmed Afghan civilians.[441] As a result, the International Criminal Court (ICC) launched an investigation in 2017 into

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[440] See Extracts of Selected General Comments and Recommendations of the United Nations Human Rights Treaty Bodies relating to nationality and statelessness, 'Committee on Economic, Social and Cultural Rights; General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) (2009)', pp. 1-9, <https://www.unhcr.org/4517ab402.pdf> Accessed 20 August 2019

[441] Karen Elphick,' Reports, allegations and inquiries into serious misconduct by Australian troops in Afghanistan 2005–2013' (9 November 2020), Research Paper Series, 2020–21, Parliamentary Library, The Parliament of Australia Department of Parliamentary Services, pp. 1-55, <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/7623329/upload_binary/7623329.pdf>; also see, the Report 'Inspector-General of the Australian Defence Force Report of Inquiry Under Division 4A of Part 4 of the Inspector-General of the Australian Defence Force Regulation 2016 into Questions of Unlawful Conduct Concerning the Special Operations Task Group in Afghanistan: Part 1 – The Inquiry Part 3 – Operational, organization and cultural issues' pp. 1-465, <https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf> Accessed 25 November 2020

suspected international crimes committed in Afghanistan on 1 May 2003 by various warring groups and entities.[442] Customary International Law codifies all forms of human rights violations as well as any form of international crime (CIL). Article 5(2) goes on to say that any restriction or derogation of any of the fundamental human rights is also prohibited. On several occasions, the Elimination of Racial Discrimination Committee heard complaints from people who claimed to have been discriminated against because of their national origin. Article 6 of the ICESCR guarantees the right to work and to receive vocational training to realise economic, social, and cultural rights. This article is distinct from Article 6 of the ICCPR in that it addresses the sanctity of life. While Article 6 of the ICESCR forbids states from assisting or abetting arbitrary killings within their borders, In the case of *Yilmaz Dogman v. the Netherlands*,[443] In this case, for example, the complainant was a Turkish citizen living in the Netherlands. She was fired because of widespread assumptions that foreign workers abuse sick leave. The Committee determined that the Netherlands had not provided Dogman with adequate protection to protect her from discrimination based on her right to work. Article 7 of the ICESCR guarantees the right to good working conditions, including equal pay for equal work, regardless of gender, as well as adequate living conditions, leisure and rest on public holidays, and reasonable working hours. National legislation has empowered workers by enacting relevant legislation that is enforceable in domestic courts; for example, the Argentine Supreme Court stated that the human right to health is guaranteed by the

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[442] see International Criminal Court (ICC),' Situation in the Islamic Republic of Afghanistan' "*Request for authorization of an investigation pursuant to Article 15", 20 November 2017, ICC-02/17-7-Conf-Exp* <*https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF*> *Accessed 25 November 2020*

[443] See UN Committee for the Elimination of Racial Discrimination, Ylimaz Dogman v. the Netherlands, Communication N° 1/1984, September 29, 1988

Argentine constitution and international human rights treaties, requiring statutory regulations for access to medical services.[444] The freedom to work, as well as the freedom to join labour unions and participate in acts that promote workers' well-being, is guaranteed by Article 8 of the ICESCR. Among these rights is the right to participate in labour actions including strikes.[445] Article 8 of the ICESCR, on the other hand, differs slightly from Article 8 of the ICCPR 1966, which prohibited forced labour. Articles 7 and 8 obligate states to the need for freedoms such as the right to join labour trade unions, strike, and work for a specified average of 40 hours per week. It also stipulates that any extra hours worked must be compensated with additional pay. Workers' contracts also should include provisions for access to pension funds.[446]Article 9 of the ICESCR guarantees workers the right to social security and health insurance. This right requires that every individual worker have access to health insurance without discrimination.

As demonstrated in *Etcheverry v. Omint*,[447] the Argentine Court held that health insurance is a right to health. The case involved a private health insurance company that refused to keep a worker who was HIV-positive on his health plan after he lost his job. According to the Supreme Court, a refusal to provide insurance is a violation of the right to health. The Argentine Supreme Court ruled that health insurance companies are required by

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[444] See Argentine Supreme Court, *Reynoso, Nida Noemí c/ INSSJP s/amparo*, 16 May 2006 (majority vote concurring with the Attorney General's brief).

[445] General Comment N° 18, The right to work, (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006).

[446] Luc Demaret, 'International Labour Organization (ILO) Standards and Precarious Work: Strengths, Weaknesses and Potential' in Dan Cunniah (Ed), *Meeting the Challenge of Precarious work: A Workers' Agenda* (2013) *International Journal of Labour Research, Vol. 5 Issue 1,* pp. 19-21 <https://www.oitcinterfor.org/sites/default/files/file_publicacion/wcms_216282.pdf> Accessed 17 August 2019.

[447] See Argentine Supreme Court, *Etcheverry, Roberto E. v. Omint Sociedad Anónima y Servicios*, Attorney General's brief of December 17, 1999, and Judgment of the Court of March 13, 2001.

international human rights treaties to protect the right to health. Article 10 of the ICESCR calls for better treatment and care for children. This includes the well-being of mothers both during and after the birth of their child. It also prohibits the social and economic exploitation of children, as well as child labour.

However, the children's rights go beyond the rights guaranteed by Article 10 of the ICESCR, which are enforceable in domestic courts. The reliefs commonly sought by children in domestic courts in relation to their rights have taken on different dimensions and appear to be all-encompassing litigation encompassing various types of rights, such as determination of their parental custody and well-being.[448] In general, Article 11 of the ICESCR guarantees the right to necessities such as food, shelter, and clothing. It also requires states to ensure adequate food security to alleviate hunger, including food exportation and importation if necessary. Article 12 of the International Covenant on Economic, Social, and Cultural Rights guarantees the right to access and enjoy mental and physical health. This includes disease prevention measures, industrial hygiene environments, and the treatment and control of epidemics, endemics, and occupational diseases. Articles 13 and 14 of the ICESCR require states to ensure that educational facilities, including free and compulsory primary education, are available to their citizens. In *Yated and others v. the Ministry of Education,*[449] the Israeli Supreme Court ruled that the right to education for disabled children includes the right to free education, including special education, as well as all other integral educational sectors. The court ordered the

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[448] Stephen R. Arnott, "Autonomy, Standing, and Children's Rights," (2007), *William Mitchell Law Review: Vol. 33: Iss. 3, Article 11*, pp. 807-825 <http://open.mitchellhamline.edu/wmlr/vol33/iss3/11> Accessed 17 August 2019

[449] See Supreme Court of Israel, Yated and others v. the Ministry of Education, HCJ 2599/00, August 14, 2002

Israeli government to provide a budget that would cover all the services mentioned. Article 15 of the ICESCR guarantees the right to benefit from cultural and scientific progress, as well as the protection of moral and material interests. These include international cooperation of states in the promotion of science and culture.

4.4 Legal Mechanisms and State Accountability under the Rules of ICCPR and ICESCR

According to Articles 27 and 46 of the Vienna Convention on the Law of Treaties (VCLT) 1969, a state's domestic laws cannot be used as an excuse not to honour the international law or treaty obligation because they are acceptable as the supreme rules above any state's national laws.[450] the statement that comes before raises the question of how international law is supposed to enforce its obligations to states given that it lacks its own police force and jail where states can be imprisoned whenever they violate the international law. According to Louis Henkin, states abide by international law because they have a "common interest in orderly friendly relations" and anticipate being treated likewise. He also took into account the fact that states will abide by international law out of concern for the victim's response, which could have an impact on them personally equal to the harm caused by their own violations.[451] States that breach international law have been seen to suffer the consequences of their violations by being imposed by other states with trade and cooperation sanctions, which hurt them economically and socially, given that the entire world has become a unit oneness due to dependence on each other and inter-connectivity on many societal fronts.

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[450] See VCLT 1969, (n 305), p. 331

[451] Louis Henkin, 'How Nations Behave, 2d ed' (1980). *Michigan Law Review, Vol.78, Issue 5, p. 826*<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3768&context=mlr> Accessed 16 August 2021

Therefore, as has been explained, Article 1 of the ICCPR and ICESCR guarantees the right to self-determination to "all peoples." The ICCPR defines this right to self-determination in terms of civil and political rights, whereas the ICESCR defines it in terms of economic, social, and cultural rights. However, both the ICCPR and the ICESCR have regulatory mechanisms in place to ensure that states follow the rules outlined in these two legal principles. Articles 28 to 45 of the ICCPR and Articles 16 and 17 of the ICESCR monitor state behaviour to ensure that the provisions of these two legal rights principles are followed. The Committee on Economic, Social, and Cultural Rights (CESCR), for example, maintains that cultural rights are fundamentally linked to other human rights, and thus culture is viewed as having a universal character that cannot be separated from other human rights.[452] Indigenous peoples and minority groups are given special attention in relation to the ICCPR and ICESCR. This is demonstrated by the CESCR's identification and recognition of the right of these two groups of people to fully enjoy their rights. These rights are primarily guaranteed by the provisions of the United Nations Charter, the Universal Declaration of Human Rights (UDHR), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), both collectively and individually.[453] The ICCPR and ICESCR's applicability focuses on the general treatment of the community under their respective jurisdictions. These two statutes bind states and their respective governments to ensure fairness in human rights matters. ICESCR has gone above and beyond to include culture as a component of food production methods.[454] Articles 28 to

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[452] The Committee on Economic Social and Cultural Rights (CESCR), General Comment No. 21: Right of everyone to take part in cultural life (Art 15 para 1 (a), of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009. E/C.12/GC/21, at para 1.

[453] 'CESCR General Comment No. 21 (n 431), para 7'

[454] 'ICESCR, 1966 (n 3), Art. 15(1)'

45 outline the states' accountability for observing the ICCPR. Article 28 established the Human Rights Committee (HRC), also known as the "Committee." According to Article 39, the committee elects its officers for a two-year term. The committee establishes its procedures and rules, including the requirement that a quorum of twelve members to be present. Article 40 requires state parties to take measures and submit compliance progress reports on a regular basis, or as requested by the Committee. The Committee has a methodology that puts the rating on the recognition of people's rights into action. This is accomplished through an assessment of the state's existing conditions within its borders, as well as the extent to which a state has created an enabling environment for the enjoyment of human rights.

In its 2009 report, Tanzania, for example, informed the Committee that it had enacted the Spinsters and Single Parent-Child Protection Act of 2005 in Zanzibar, which abolished the imprisonment of unmarried women who became pregnant. Tanzania also informed the Committee of the steps it had taken to increase women's representation in public bodies and institutions.[455] Article 41 of the ICCPR authorises a state party to report to the Committee that another state party has failed to meet its obligations under the ICCPR. The report requires that communication be sent to the Committee by the reporting state; the state accused of violating the ICCPR must write back to the state that complained within three months on corrective measures taken. Article 41(c) states that the Committee may only act on a referred matter after determining that all available domestic remedies have

[455] See Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, *HRC, Concluding Observation of the Human Rights Committee – Tanzania, 6 August 2009 CCPR/C/TZA/CO/4*<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/TZA/CO/4&Lang=En> Accessed 20 May 2019

been explored and exhausted in accordance with "generally recognized principles of international law." In 2001, the Human Rights Council (HRC) reported to the United Nations General Assembly (UNGA) that violation cases had been communicated to 10 African, 15 European, 11 American, and 2 Asian states.[456] This demonstrates the accountability structures imposed on States by the ICCPR regime on its accountability mechanism via an infrastructure that supports state enforcement accountability. Indeed, some domestic courts interpret and enforce the ICESCR provisions as a constitutional requirement relating to the implementation of this covenant, even when the States in question are not state parties to the covenant. In the case of *The Government of the Republic of South Africa and others v. Irene Grootboom and others, (2001),*[457] Despite the fact that South Africa was not a state party to the ICESCR, the South African Constitutional Court interpreted the CESCR's provision of Economic and Social Council (ESC) rights as being enshrined in the State's Constitution. Article 45 requires the Committee to submit an annual report on its activities to the UNGA through the ESC. Articles 16 to 25 of the ICESCR, on the other hand, outline the procedure for holding States Parties accountable for the implementation of peoples' right to self-determination in the context of ICESCR provisions.[458]Under Article 16 of the ICESCR, States Parties are required to submit reports on the progress made on the rights recognized in this specific statute. Article 16 of the ICESCR requires states to submit a progress report on their

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[456] See, Report of the Human Rights Committee Volume I, General Assembly Official Records Fifty-sixth Session Supplement No. 40 (A/56/40), 131-141 <https://www.legal-tools.org/doc/2d6b1e/pdf/> Accessed 20 May 2019

[457]Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, (2001) (1) SA 46 (CC), October 4, 2000, paras. 29, 30, 31 and 45.

[458] 'ICESCR, 1966 (n 3), Arts. 16-25'

achievements to the United Nations Secretary-General (UNSG). According to Article 17 of the ICESCR, such a report must be submitted to the ESC in stages. Article 18 of the ICESCR requires States Parties to also submit progress reports to UN specialised agencies whose activities fall within the purview of those agencies. Article 19 of the ICESCR requires the ESC to transmit its reports to the Commission on Human Rights so that it can study them and make general recommendations on human rights progress made by State Parties in accordance with Articles 16 and 17. This procedure complies with the rules for specialised agencies required by Article 18 of the ICESCR.

Similarly, as provided in Article 21 of the ICESCR, the ESC may submit to the UNGA on a regular basis reports containing their recommendations on the general nature or information received from States Parties and specialised agencies on positive measures taken towards the observation of human rights recognized by the statute. In accordance with Article 21, the German Federal Constitutional Court developed a doctrine for "basic survival of peoples" or *"Existenzminimum,"* in which the court stated that the state is obligated to aid those in need so that they can live a dignified life.[459]

According to Article 22, the ESC may inform other organs and specialised agencies, particularly those that provide needed technical assistance to the States, about measures likely to contribute to the effective and progressive implementation of matters arising from the State Party's report. Concerning Article 2(1) of the ICESCR, "the duties of immediate effect and those linked to the progressive realisation of ESC rights," they generally imply that the complete realisation of ESC rights is not independent of budgetary allocations.

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[459] German Federal Constitutional Court (BVerfG) and German Federal Administrative Court (BVerwG), BVerfGE 1, 97 (104f); BVerwGE 1, 159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (134); BVerfGE 45, 187 (229))

However, academic literature, as well as the Committee on ESCR doctrine and case law from various courts, has held that some aspects of ESC rights and duties require immediate implementation by states. Courtis observes that ESC rights are state constitutional requirements.[460] Article 23 of the ICESCR requires state parties to cooperate with international action to achieve progress in the rights guaranteed by the Covenant, as well as by adopting the recommendations it provides, or by participating in consultative and technical meetings organised by the Committee and other governments.

4.5 States' Domestic Application of the Rules of ICCPR and ICESCR in International Law

Under Articles 4 (1) and (2) of the UN Charter, the states are obligated to uphold the principles and obligations derived from their membership in the UN. As a result, state parties choose to be bound by treaties arising from their UN membership in which they have freely expressed an interest in being bound with, they are therefore expected to commit to treaties in good faith under the provisions of the VCLT 1969.[461] Article 26 of the VCLT 1969 states that *"pacta sunt servanda"* requires all contracting State Parties to the treaty to perform them in good faith or with the utmost sincerity. "Every treaty in force is binding on the parties and must be performed in good faith by them."[462] As a result, any state party signing an international treaty is obligated to perform treaties in accordance with the principles outlined in each of those signed treaties. States' compliance with international law is a fundamental requirement of international law. Even though some

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[460] Christian Courtis, 'Standards to Make ESC Rights Justiciable: A summary Exploration'(2009), *Erasmus Law Review, Volume 02, Issue 04,* p. 382 <https://www.researchgate.net/publication/228227587_Standards_to_Make_ESC_Rights_Justiciable_A_Summary_Exploration> Accessed 20 June 2019

[461] 'VCLT 1969 (n 305), '

[462] 'Ibid, at Art. 26 (*pacta sunt servanda)*'

states have been observed to be notorious in violating international law. In the '*Nicaragua Case*'[463] the ICJ judges noted that the International Law Commission (ILC) did express the view that, during the codification of treaty law, they discovered that the UN Charter is a prominent example of a rule in international law that has the character of jus cogens (peremptory norms) and can only be revoked under Article 50 of the VCLT.[464]Human rights rules, including ICESCR and ICCPR provisions, are mainly derived from the Customary International Law (CIL), where they are regarded as peremptory norms that are *erga omnes* in nature, and from which derogation is not permitted, as provided in Article 38 (1) (b) of the ICJ Statute, which recognizes customs as one of the main sources of international law. The ICJ went on to state that the treaty only applies to the parties to it, and that parallel relationships between non-parties or non-parties and parties are governed by the corresponding to the CIL. This means that, where a treaty rule is only binding on treaty parties, the same rule will also bind non-parties to a treaty where those rules are codified as CIL.[465]

Regardless of the structures put in place to ensure that state parties adhere to the principles of the ICESCR and ICCPR, case law and general observations have shown that states frequently fail to comply with international rules and human rights principles, to the point where they have become *sui generis* to the characteristics of states in observing the CIL. For instance, in a 2019 report, the OHCHR stated that it had assisted 35,997 torture victims

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[463] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*) ICJ Decision of 27 June 1986, para 190

[464] The ICJ provided an explanation to the relationship between customary international law and the law of treaties in the 1986 '*Nicaragua Case*' where it affirmed that, the parallel existence of treaty rules and rules of customary international law, had the same or similar obligations. The ICJ further stated, the treaty continues to operate as between the parties to it, while the parallel relations between non-parties, or between non-parties and parties, are governed by the corresponding customary international law.

[465] ibid

from 77 states through the rehabilitation of torture victims; 594 of these victims had been subjected to contemporary slavery and were from 23 states. In addition, the agency received 27,771 complaints about forced disappearances.[466] The Guardian Newspaper reported in 2011 that Egyptian police killed up to 900 protesters extrajudicially during the Arab Spring.[467] Similarly, the New York Times reported in 2013 that 235 supporters of Egypt's deposed former president, Mohamed Morsi, were killed while protesting.[468] The Convention Against Torture and Inhuman treatment (CAT) 1984. goal as stated in its preamble, was to "make more effective the worldwide struggle against torture and other cruel, inhuman, or degrading treatment or punishment."[469] Despite the CAT convention's outlawing of torture in Article 2(2), and the fact that torture is never justifiable for any reason, cases of state-sanctioned torture and extrajudicial killings, on the other hand, continue to be reported around the world. Coomans laments that the most difficult challenge is to enforce international rules on states; this is because of a weak accountability mechanism.[470]

Even though human rights violations are regularly reported by the media, civil society organisations, and United Nations agencies whose work continues to deter many cases of

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[466] See United Nations High Commissioner for Human Rights (OHCHR), United Nations Human Rights Report – 2019, p. 7 <https://www.ohchr.org/Documents/Publications/OHCHRreport2019.pdf> Accessed 20 August 2020

[467] Patrick Kingsley and Leyla Doss, "Egyptian police 'killed almost 900 protesters in 2011 in Cairo'(14 March 2013), <https://www.theguardian.com/world/2013/mar/14/egypt-leaked-report-blames-police-900-deaths-2011> Accessed 25 September 2019.

[468] David D. Kirkpatrick, "Hundreds Die as Egyptian Forces Attack Islamist Protesters" (14 August 2013), <https://www.nytimes.com/2013/08/15/world/middleeast/egypt.html> Accessed 25 September 2019

[469] 'Convention against Torture (n 217), Preamble, Articles 1 and 2'.

[470] Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights'(2011), *Human Rights Law Review Vol. 11 Issue*, pp. 3-4, <https://www.corteidh.or.cr/tablas/r26506.pdf> Accessed 28 May 2019

states violating human rights, the weaker accountability mechanism has resulted in these breaches continuing to be recorded, given that states are sovereign entities that do not receive instructions or orders from outside sources.

4.6 Obligations Imposed on States to Comply with the Rules of ICESCR and ICCPR

States have the right to freely self-determine domestic issues without interference from the outside world, as stated in UN Charter Article 2(4). For this reason, States have been observed to frequently invoke the supremacy of their sovereignty as a justification when they break international law to avoid being held accountable, particularly when a human rights rule is involved to prevent meddling in their internal affairs. Hathaway *et al*. contend that violations of the ICCPR rules must be dealt with by the concerned states because international law does not intend that a state's accountability extends beyond its territorial sovereign territory.[471]In contrast, the view of human rights violations, Cassese believes that the state's immunity becomes subordinate to *jus cogens* obligations.[472]Case laws have also demonstrated that courts of law have routinely issued decisions against various states for violations of human rights. Article 14 (1) and (2) of the CAT Convention provide a right to compensation in cases where death occurs because of torture, including for the dependants of torture victims. Torture has been used as a form of human rights violation by some autocratic regimes to suppress calls for internal self-determination. Torture victims have the right under the convention to seek restitution from courts in jurisdictions other than the one in which the torture occurred, provided that the person who committed

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[471] Oana A. Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu and Sarah Weiner, 'Consent is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict'(2016), *University of Pennsylvania Law Review Vol. 165, Issue No. 1, p.* 21 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6202&context=fss_papers>Accessed 29 March 2019

[472] 'Antonio Cassese (n 84), p. 208'

the crime of torture against the victim visited or was found in the state where the victim has sued them. International law has evolved to allow violations of human rights to be addressed outside of the jurisdiction of the state where the crime of torture was committed. In *Tachiona v. Mugabe*,[473]the widow of a torture victim filed a case in a US court against the former President Robert and others for torture crimes committed in Zimbabwe. The Committee Against Torture, or "the Committee," confirmed this when it interpreted Article 14 of the Convention Against Torture (CAT) as requiring state parties to the convention to provide a procedure that allows victims and their families to obtain compensation from those responsible for their torture, regardless of the state in which the crime of torture was committed.[474]The Committee's *opinio juris* demonstrates that the hierarchy placed on the importance of *jus cogen* to characterise the nature of the CIL, which obligates non-derogation of its rules, is correct. In *Ahmadou Sadio Diallo's* case, the International Court of Justice (ICJ) (*Republic of Guinea v Democratic Republic of Congo*),[475]The ICJ determined that the Democratic Republic of the Congo violated Articles 9 (1) (2) and 13 of the ICCPR, as well as Articles 6 and 12 (4) of the African Charter on Human and Peoples' Rights (ACHPR).[476]States have been found to have routinely violated the CIL, the ICCPR, and the ICESCR, all of which include core human rights rules related to the peremptory norms. These violations constitute a serious violation of human rights, which consequently contravenes the people's right to internal self-

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[473] '[2001] 169 F. Supp. 2d 259 (S.D.N.Y.)

[474] Christopher Keith Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad'(2008), *The European Journal of International Law Vol. 18 no. 5*, p. 922 <http://www.ejil.org/pdfs/18/5/246.pdf> Accessed 12 July 2019

[475] Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Compensation, Judgment, I.C.J. Reports 2012, p. 324

[476] See 'African Charter on Human and Peoples Rights'(ACHPR)1981, (n 108)'Article 6 and 12(4)'

determination. Culture is defined as "a complex whole consisting of people's beliefs, knowledge, rituals, morals, customs, and other habits and abilities." A custom, on the other hand, is defined as "a traditional way of behaving or doing something unique to a specific place, time, or society."[477]

Cassese contends that after WWII, existing customary rules were eroded at the expense of new emerging practices, causing customs to lose ground. This was due to socialist countries' growing assertiveness and the large number of Third World countries entering the international arena. Both socialist and Third World countries demanded a review of customary international rules that they saw as overwhelmingly pro-Western.[478] This appears to have been remedied by the establishment of the International Law Commission (ILC),[479]whose primary function has been to promote the development and codification of international law, including the drafting of conventions in areas where international law has not yet been fully developed. The ILC is made up of thirty-four members. This is the team in charge of incorporating the new customary norms into international law.[480]

Customs, on the other hand, have been observed to conflict in their performance, which varies from place to place and culture to culture. This was demonstrated in the *Colombia v Peru* case-law,[481] the ICJ stated that "the party relying on a custom of this kind must prove that this custom is established in such a way that it has become binding on the other

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[477] "Difference between Culture and Custom" (2016) available at <https://pediaa.com/difference-between-culture-and-custom/> Accessed on 25 September 2019.

[478] 'Antonio Cassese (n 84), pp. 165-166'

[479] 'ILC Statute 1947, (n 279)'.

[480] Ibid at Articles 1(1)(2), 2, and 15

[481] See Colombian-Peruvian asylum case, (*Colombia v Peru)* Judgment of 20 November 1950: I.C. J. Reports 1950, p276.

party." The *Colombia v. Peru case* questioned whether customs that had never been codified by the ILC qualified as binding prior to their codification as international rules. The International Court of Justice's (ICJ) decision, *Opinio juris sive necessitatis*, arising from the *Colombia v. Peru case*, created more confusion than clarity in how customs should be accommodated in international law. Articles 19 to 23 of VCLT provide that when becoming a party to a particular treaty, states may choose to reserve treaty articles that they deem unacceptable to them, and only those rules concerning the principle of *pacta sunt servanda*.[482] It should be noted that while states may subscribe to certain international principles or statutes, this does not imply that they fully agree and wish to be bound by every other rule in the statute or customs, particularly where those customs have yet to be recognized as an international law rule. Indeed, when state representatives debate the nature of certain rules of international law, not all states always agree to every proposal in a particular draft statute, and the stand of some states may be overruled by most states, resulting in a particular article of legal bearing being excluded or included against their wishes. During the drafting of the ICCPR, Alston and Goodman noted that there were differing opinions on the obligations that state parties to the ICCPR would acquire. They point out that some delegates argued that the ICCPR's obligations were absolute and immediate, and that states should carry them out even before enacting corresponding national laws.[483] Article 4 of the ICCPR allows for the suspension of people's liberties in times of emergency; exceptions are only made for the rules in Articles 6, 7, 8 (1) (2), 11, 15, 16, and 18. This appears to be a "blank cheque" because there are no provisions in the

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[482]'VCLT 1969 (n 284), Article 26 '*pacta sunt servanda''*

[483] Phillip Alston and Ryan Goodman, International Human Rights: The Successor to International Human Rights in Context (OUP, Oxford, 2013), p. 162

entire covenant that declare what could be considered public emergencies or necessities that would justify the derogation of individuals' liberties. The legal challenge to Article 4 of the ICCPR is that the covenant allows the state to derogation of people's liberties *"in the time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,...,"* by doing so, the ICCPR appears to ignore peoples' protection, for the state to decide at a time when they are mostly needed.[484]

Article 61(1) of the VCLT allows state parties to invoke impossibilities in carrying out a treaty. States may terminate or withdraw from a treaty after such an invocation has been declared. This means that Article 61(1) of the VCLT contradicts the ostensibly binding nature of treaty-making by allowing states to abandon treaties without being held accountable. Article 26 of the VCLT expects states to perform treaties in good faith or with honesty; dishonesty complicates and undermines the nature of the desired accountability, which would have been expected from states to increase treaty compliance.

When confronted with political challenges, some states have typically imposed rules that suspend citizens' liberties, thereby denying peoples their human rights and self-determination rights. The application of the 1945 UN Charter is the other challenge. Article 2(4) states that "all Members shall refrain in their international relations from threatening or using force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the goals of the United Nations." The principle of territorial integrity has only served to support state claims to sovereignty. This enables some states to invoke the principle of territorial sovereignty to circumvent the

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[484] ibid at 394

accountability to the violations of human rights, citing non-interference principle with their internal matter.

Carswell observes that the misuse of the veto power at the United Nations Security Council (UNSC) has aided violations of human rights by impeding the UN's central competence and thus undermining the UN's very *raison d'être.*[485] When states violate human rights against their citizens, the veto rule can be seen as contributing to a lack of intervention. Article 2(4) of the UN Charter simply prohibits states from intervening to stop atrocities committed by the authorities of another state, unless those human rights violations escalate to the point of qualifying as international crimes.[486] As listed in the Rome Statute of the International Criminal Court, the following crimes are considered international crimes: (a) genocide; (b) crimes against humanity; (c) war crimes; and (d) aggression (ICC).[487]The Rome Statute also has limitations on the scope of its application to the listed international crimes. The first three international crimes listed in Article 5 of the Rome Statute are directly related to harm done to peoples or individuals. The fourth international crime is territorial aggression by one state against another.

An in-depth examination of the first three international crimes reveals that genocide, for example, obligates the criminality aspect of the defendant following the test that relies on establishing the "*mens rea* "to destroy, in whole or in part, a national, ethnic, racial, or

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[485] Andrew J. Carswell,' Unblocking the UN Security Council: The Uniting for Peace Resolution (2013), *Journal of Conflict and Security Law*, *Volume 18*, *Issue 3*, p.463 <https://doi.org/10.1093/jcsl/krt016> Accessed 23 July 2020

[486] Jennifer Trahan, 'The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices' (2013), *Criminal Law Forum, Vol.24*, pp.417–473 <https://link.springer.com/article/10.1007/s10609-013-9213-9> Accessed 27 February 2020

[487] See 'Rome Statute of the International Criminal Court (n 242), Article 5'

religious group."[488] The crimes against humanity test are based on determining how and in what manner the criminal acts "*actus reus*" were carried out. As a result, crimes against humanity necessitate that the perpetrator is aware of such criminal acts in advance and intend to carry them out. This includes the attack's design, which must be a "widespread or systematic attack, directed against any civilian population."[489] The criminality of the "war crimes" is established by demonstrating that there was a plan or policy in place to carry out the acts on a large scale.[490] The second test for war crimes requires the court to establish that the violations fell within the prohibited categories of war behaviour and character, as defined by the provisions of the "Grave Breaches of the Geneva Conventions of 12 August 1949."[491] It is clear that the first three international crimes listed in Article 5 of the Rome Statute directly relate to the rules listed in Articles 6 and 7 of the ICCPR, and thus the Rome Statute supports the preservation of peoples' internal right to self-determination by punishing human rights abusers and offences. Kaleck and Maab, argue that the element of the crime specified for these crimes, however, has a high criminality threshold, allowing them to qualify as international crimes, leaving a legal gap in the scope required to obligate criminal liability for torture and murder, which are usually committed against individual citizens.[492] The criminality scope was advanced under the elements of international crimes in terms of the threshold required to obligate criminality. As a result,

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[488] Ibid at art. 6

[489] Ibid at art. 7

[490] Ibid at art. 8

[491] Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009), *Journal of International Criminal Justice, Volume 7, Issue 4,* pp. 723-741, <doi:10.1093/jicj/mqp053> Accessed 26 September 2019

[492] Wolfgang Kaleck and Miriam Saage-MaaB, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010), *Journal of International Criminal Justice, Volume 8, Issue 4,* pp. 700-701, <doi:10. l093/jicj/mqq043> Accessed 26 September 2019

the ICCPR has become "a dog without teeth to bite" because the state lacks effective policing against the crimes it commits against its citizens. It lacks the necessary enforcement capabilities to protect its citizens. The failure to access the freedom and independence from an internal self-determination provided under the ICCPR legal provisions, has been observed to result in some cases into the affected peoples' demanding for territorial secession or an external right of self-determination.[493]

The trend in human rights violations demonstrates that the most common violations of human rights committed by state agents are crimes such as torture, arbitrarily killings, and deprivation of liberties, which are typically committed in the context of civil armed conflicts, such as in the former Yugoslavia and Rwanda.[494] The dynamics of domestic armed conflicts have revealed that serious human rights violations occur more frequently in times of domestic armed conflict than in times of peace. The situation could be exacerbated by the fact that Article 4 of the ICCPR allows for the suspension of liberties during state emergencies.[495]

Grave breaches, according to Eboe-Osuji, do not hold domestic fighters accountable; rather, they are only applicable in extra-territorial wars.[496] 400,000 civilians were estimated to have been killed in Syria's civil war between 2011 and 2016, according to a

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[493] Karolina Kremens, 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2011), *Wroclaw Review of Law, Administration & Economics, Vol.1 Iss. 2,* pp. 26-48.

[494] Ibid at 25-28

[495] Dominic McGoldrick, 'The interface between public emergency powers and international law' (2004), *Canadian Yearbook of International Law, Vol. 16,* pp. 92-110.

[496] Chile Eboe-Osuji, ''Grave Breaches' As War Crimes: Much Ado about 'Serious Violations'?'' (no date), <https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf> Accessed 26 September 2019

UN official report.[497] The Syrian government has been accused of intentionally targeting civilian residential areas and hospitals with aerial bombardments and the use of unconventional chemical weapons, both of which are prohibited under the 1949 Geneva Conventions.[498]

Despite the fact that Syria became a state party to the ICCPR on 21 April, 1969, through "accession into the treaty," it has not refrained states and other non-state actors from committing human rights violations.[499] China has also been accused of arbitrarily detaining approximately one million people in the Western region of Xinjiang and using surveillance technology to track their movements, where they have been subjected to forced labour, these are the ethnic Uyghurs and China's predominantly Muslim religious community and denying this group of peoples their rights to self-determination.[500] Similarly, the Rohingya ethnic group has faced persecution, including denial of citizenship by the Myanmar government. Bangladesh is hosting hundreds of thousands of Rohingya refugees, because of domestic conflict, resulting in an international humanitarian crisis.[501]

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[497] Megan Specia, 'How Syria's Death Toll Is Lost in the Fog of War', (2018), <https://www.nytimes.com/2018/04/13/world/middleeast/syria-death-toll.html> Accessed 26 September 2019

[498] See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 12 August 1949, 75 U.N.T.S. 287, entry into force 21 October 1950

[499] 'ICCPR, 1966 (n 2)'

[500] Olivia Enos, 'Forbes news Online "Why the Crisis in Xinjiang Is about More Than Human Rights' (18 June 2019), <https://www.forbes.com/sites/oliviaenos/2019/06/18/why-the- crisis-in-xinjiang-is-about-more-than-human-rights/#228bda8f6c77>; BBC News night, 'Are Muslim Uyghurs being brainwashed by the Chinese state?' (31 August 2018), <https://www.youtube.com/watch?v=3DazSCxfUdE> Accessed 27 September 2019.

[501] Humans Rights Watch, 'Myanmar/Bangladesh: Halt Rohingya Returns: Ensure Refugees' Security, Basic Rights, Equal Access to Citizenship', (20 August 2019), <https://www.hrw.org/news/2019/08/20/myanmar/bangladesh-halt-rohingya-returns> Accessed 27 September 2019

According to Alston and Goodman, there is little difference between the ICCPR and the ICESCR in terms of the purpose that both treaties serve. These two international law statutes, however, can be seen as complementary to one another.[502] In general, the ICCPR's enshrined right of peoples to self-determination was intended to provide basic human rights concerning how states are expected to treat individuals found within their territorial jurisdictions, considering the power imbalance between an individual and the state, as well as the authority that states have over an individual. While there are international rules requiring states to respect human rights and the right of peoples to self-determination, these rules have not been strictly enforced. Dennis and Stewart argue that the accountability mechanisms in the ICESCR and ICCPR lack better enforcement mechanisms for remedying marginalised economic, social, and cultural rights, and that as a result, full implementation of these two statutes is jeopardised.[503] It has also been observed that the UN employs different levels of accountability mechanisms, raising the question of whether, if human rights are, in fact, ″universal, indivisible, interdependent, and interrelated, ″as proclaimed in UN international law instruments, then why do we have disparities in human rights' enforcement mechanisms.[504] A harmonised accountability mechanism could have influenced a standard level of state compliance in providing equitable rights to the economic, social, political, civil, and cultural rights.

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[502] 'Phillip Alston and Ryan Goodman (n 492), pp. 284-286'

[503] Michael J. Dennis and David P. Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004), *American Journal of International Law, Vol. 98*, pp. 462-463, <https://www.law.du.edu/documents/sutton-colloquium/materials/2013/Stewart-David-Justiciability-of-Economic-Social-and-Cultural-Rights-Should-There-be-an-Int-l-Complaints-Mechanism-to-Adjudicate-the-Rights-to-Food-Water.pdf> Accessed 25 November 2020

[504] ibid

4.7 The Effectiveness of the ICESCR and ICCPR Rules Applicability on States

After approximately 20 years of discussion, the UN General Assembly adopted the ICESCR in resolution 2200 A (XXI) on 16 December 1966, and it came into effect on 3 January 1976, after a ten-year delay. The Covenant contains legal provisions that uphold peoples' rights to exercise their own self-determination in relation to their enjoyment of economic, social, and cultural freedoms domestically. It also includes the right to a livable wage, a decent standard of living, health care, education, and unrestricted access to cultural freedom and scientific advancement.[505] The terms of the ICESCR, just like the ICCPR are expected to voluntarily be observed by the state parties in line with the rules of VCLT 1969, at Article 26 "*Pacta sunt servanda*" which states that, *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith"*.[506] The ICESCR and the ICCPR are similar in many ways; however, the terminologies used in these two Covenants differ. Whereas the ICCPR used phrases such as "everyone has the right to" or "no one shall be," the ICESCR used the phrase "State Parties recognize everyone's right to self-determination of peoples."

Arambulo argues that the rights outlined in the ICCPR and those outlined in the ICESCR were interconnected but interdependent; thus, "when someone is deprived of economic, social, and cultural rights," they lose a human life worth living.[507] In terms of general obligations, the main difference between these two statutes is found in Article 2(1) of each of these two statutes; at ICESCR, the legal tone used is less commanding and bears the markings of recommendations to the State parties to take steps toward improving their

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[505] 'ICESCR, 1966 (n 3)",

[506] 'VCLT 1969 (n 305), Article 26 '*pacta sunt servanda''*

[507] 'Kitty Arambulo, (n 441)'

economy and related technical empowerment in order to maximise their available resources.[508]This means that, under ICESCR, the allocation of resources to economic and technical assistance needed for economic progress is conditional on the availability of necessary resources and infrastructure. State parties do not appear to be forced to have what their country requires, but rather make progressive efforts to improve their economy, which is a prerequisite for improving people's living standards, which is a human right. Article 2(1) of the ICCPR, on the other hand, requires States to take steps to respect and ensure the rights recognized in the treaty, such as not discriminating based on race, colour, gender, language, religion, political affiliation, or any other factor.[509]

The approach in the ICCPR is observed throughout most of the Articles of the ICCPR, whereas in the ICESCR, its obligations are subject to the state's availability and ability to look for and avail resources needed for trade and the improvement of living conditions.[510] The obligations imposed by these two statutes are necessary for the improvement of peoples' human rights in economic, social, and cultural factors that support peoples through access to freedom and better living standards as an internal right of self-determination.[511] The ICCPR provisions, on the other hand, are focused on those types of human rights over which the state has control, and which are not influenced or determined by external factors.

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[508] 'Fons Coomans, (n 479) pp. 1-35'

[509] Ibid

[510] Tara Van Ho, 'General Comment No. 24, E/C.12/GC/24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)' (2019), *International Legal Materials , Volume 58 , Issue 4* , pp. 872 – 889.

[511] 'Kitty Arambulo, (n 441)'

The obligations to the rights found in the ICESCR that States must observe, on the other hand, are mostly independent and remote to the extent that their achievability varies from one state to the next in terms of uniqueness to that particular state's infrastructure development and international policy, which would influence what to trade in and with whom, among other factors.[512] Articles 11(1), 23(1), and 2(1) of the ICESCR, for example, require states to recognize the importance of international cooperation and support in facilitating both joint and separate actions to fully realise the resources they require. Ethiopia and Egypt are at odds over who gets what share of the Nile River's waters, which are vital to both countries' economies. Egypt is concerned that Ethiopian action will reduce Nile water flow, when the mega dam, the Grand Ethiopian Renaissance dam become fully operational, putting Egyptian livelihoods in jeopardy.[513] This means that, according to the ICESCR, international cooperation is required to obtain certain resources that the population of the state requires but cannot find within its borders. Therefore, as a condition for ICESCR implementation, states should seek international cooperation with other states. Certainly, this is a point of divergence between the ICESCR and the ICCPR, which would contradict the scope of the two covenants' implementations, given that access to the ICCPR's provisions of rights is not dependent on institutions, but flows directly to individual citizens as human rights. For this reason, The ICCPR is more concerned with the relationship between a state and the peoples who live within its borders, whereas the ICESCR is more concerned with international relations with other states to fully

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[512] Michael J. Dennis and David P. Stewart, (n 512), pp.462 – 515.

[513] France 24 News "Egypt calls on 'active' US role mediating Nile dam impasse with Ethiopia" (7 October 2019), <https://www.france24.com/en/20191007-egypt-ethiopia-nile-river-dam-mediating#targetText=26%2C%202019.&targetText=Egypt%20has%20urged%20international%20mediation,sparking%20fresh%20tensions%20with%20Ethiopia> Accessed 8 October 2019

implement people's self-determination rights. Unlike some ICESCR provisions, states have complete control over their ICCPR responses and responsibilities.[514] This means that the inequity of each state's economic standing in terms of resources poses a challenge to the implementation of both the ICESCR and the ICCPR. Due to financial constraints, this has had a negative impact on the implementation of ICESCR rights in some poor states.[515] To adequately meet the needs of the people, the implementation of these rights enshrined in the statutes of both the ICESCR and the ICCPR covenants necessitates financial resources. Accountability is also an issue in the equitable use of state resources. These are concerned with the economic resources' affordability and availability. These are exacerbated by misappropriation of sources and corruption on the part of some state agents.[516] This raises the question of whether international law is compellable law in the sense that states can be forced to follow its rules, similar to how citizens of states are held accountable for violations of municipal law.

Posner observes that international law requires states to keep their promises. Considering that it is impossible to "commit State to jail" for treaty violations or non-performance in the same way that national jurisdictions can for their citizens, the extent, and limits of international law's capacity to enforce its obligations on states must be assessed to ensure accountability through the imposition of sanctions.

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[514] See Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights, Vienna Declaration and Programme of Action (Part 1, para. 5), adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF. 157/24 (Part 1), chap. III.

[515] 'Phillip Alston and Ryan Goodman (n 492), pp. 315-317'

[516] 'Michael J. Dennis and David P. Stewart, (n 512),'

4.8 Right to Protect (R2P) as Internal Self-Determination and the Enforceability Mechanisms on States

Under international law, states have a fundamental obligation to safeguard civilian populations that are located within their borders. This obligation is both explicit and implicit. Under the Right to Protect, the international community typically intervenes to protect civilians when a state fails to offer them the necessary protection (R2P).[517] In accordance with its core global mandate, the United Nations, as the principal representative of the international community, is specifically obligated to enforce international peace and security and to offer the necessary protection to the affected civilian population.[518] Consequently, the UN Security Council has a mandate under the UN Charter to prevent civilian deaths and is authorised to intervene and protect civilians where there is a risk of a breach of international peace and security.[519]

Under the UN Charter in Article 24, the UN has the primary objective to safeguard the human rights of all persons. On the other hand, states have a responsibility to protect their subjects against the violations of their human rights, but where a state fails to offer such a protection as part of its responsibility, it is upon the UN to take necessary action to prevent violation of human rights. These obligations stem from the principle of universal

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[517] Peter Stockburger, 'The Responsibility to Protect Doctrine: Customary International Law, An Emerging Legal Norm, or Just Wishful Thinking?' (2008*), Intercultural Human Rights Law Review, Vol. 5, Issue. 2010* pp. 365-405, <https://www.stu.edu/Portals/law/docs/human-rights/ihrlr/volumes/5/365-406-PeterStockberger-TheResponsibilitytoProtectDoctrine-CustomaryInternationalLawanEmergingLegalNormorJustWishfulThinking.pdf> Accessed 5 March 2018

[518] Ibid

[519] Judy A. Gallant, 'Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order' (1992), *American University International Law Review, Vol. 7, Issue 4, Article 42*, pp. 881-895 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1532&context=auilr> Accessed 20 November 2019

jurisdiction, *aut dedere aut judicare*, which requires states to act against perpetrators of international crimes committed in violation of human rights, regardless of their social standing. This may include prosecuting individuals who commit international crimes, which are punishable both in national courts and by the International Criminal Court (ICC) under the Rome Statute.[520]

The protection against the violations of human rights is observed to stem from international legal instruments such as covenants, treaties, declarations, and general principles of international law found in Customary International Law (CIL). It obligates, states as an international community responsibility, act where serious violations of human rights occur, to prevent the perpetrators from continuing with such breaches, such prevention may include use of force as a form of intervention to protect civilians in accordance with international humanitarian law. Indeed, the use of force is permissible under Chapter VII of the UN Charter, specifically Article 42, but only as a last resort where other forms of peaceful intervention have failed to protect civilians from imminent or ongoing serious violations of human rights. Even though a case like that of Palestinians, has continued to pose a challenge in international law, as it has failed in its numerous attempts to resolve violations of Palestinian people's human rights, which have frequently been breached because of Israel's occupation of Palestine.[521]

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[520] See 'Rome Statute 1998(n 233), Arts. 5, 6, 7 and 8';' also see case No. ICC-01/09-02/11-1037 19-09-2016 1/18 EK, The Prosecutor v. Uhuru Kenyatta (The Kenyan President) at ICC. <https://www.icc-cpi.int/CourtRecords/CR2016_06654.PDF> Accessed 5 March 2019.

[521] International Court of Justice (ICJ), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, para. 95

Peoples usually suffer the consequences of violations of their rights by the State, which in some cases has long-term consequences on their lives; for this reason, the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in the year 1985.[522] The primary goal of this declaration was to provide justice and reparation to victims of atrocities.

Melzer contends that the collective requirement of compliance with International Humanitarian Law (IHL) is no longer a distinguishing feature of the armed forces; rather, that role has been reduced to a legal obligation and is now in the hands of the parties to the conflict, who must comply with the rules of IHL through their internal disciplinary system.[523] There is considerable evidence that the majority of serious abuses of human rights and mass killings by conflict parties constitute international crimes. However, the international legal strategy for intervening has been criticised for failing to respond quickly and, as a consequence, being unable to use force to prevent atrocities committed by perpetrators, as was the case observed in the in the *Tadic case* at the International Criminal Tribunal for the former Yugoslavia (ICTY).[524] Similarly, the UN report on human rights violations in Uganda revealed that crimes committed during Idi Amin Dada's dictatorship administration, such as torture, extrajudicial killings, and other human rights violations against Ugandan civilians, violated the principles of the ICCPR and resulted in

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[522] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985 UN doc. E/CN.15/1997/16,

[523] Nils Melzer, 'Targeted Killings in International Law', (OUP, Oxford, 2008), p. 252

[524] ICTY, *Prosecutor v. Tadic´, Case No. IT-91-1-AR72*, also see the indictments of 13 February 1995 Initial indictment, 1 September 1995 First Amended Indictment and 14 December 1995 Second Amended Indictment.

over 300,000 civilian deaths.[525] These examples of human rights violations raise questions about international law enforcement's ability to intervene to prevent serious violations of human rights at the time they occur, rather than only seeking justice for victims of atrocities later.[526] Following the events of the human rights violations, Niv observed that, the chances of the perpetrators being convicted of human rights violations are very slim, and that the most viable solution in responding to human rights violations is to prosecute them.[527] Even though international crime in some cases has been committed, the international justice system has been observed to move slowly within the international criminal system, resulting in witness elimination and apathy, resulting in key evidence getting destroyed by the perpetrators, making convicting the perpetrators impossible.

To limit armed conflicts over territorial secession demands, as a right of self-determination of peoples-, the internal right to self-determination, which is not territorial based, is a viable option. In Tanzania, for example, the state's acceptance of the Island of Zanzibar having a semi-autonomous administration is an example of internal self-determination instances where the right to self-determination can be accomplished peacefully and territorially without the need to secede.[528]

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[525] See Report by the International Commission of Jurists, on 'Violations of Human Rights and The Rule of Law in Uganda (1974)' pp. 1-62, <https://www.icj.org/wp-content/uploads/2013/06/Uganda-violations-of-human-rights-thematic-report-1974-eng.pdf> Accessed 14 October 2019.

[526] Steven R. Ratner, 'The schizophrenias of international criminal law' (1998), *Texas International Law Journal, Vol. 33*, pp. 237, 239, 240 and 249. <https://search.proquest.com/openview/f1e6963352a5ca0943c9e166b6c58cf4/1?pq-origsite=gscholar&cbl=7237> Accessed 20 April 2020

[527] Ady Niv, ''The Schizophrenia of the 'No Case to Answer' Test in International Criminal Tribunals'' (2016), *Journal of International Criminal Justice, Volume 14, Issue 5*, pp. 1121–1138.

[528] Tanganyika Act of Union 1964 available at <https://www.wipo.int/edocs/lexdocs/laws/en/tz/tz027en.pdf> Accessed 3 March 2019

The regime change, either through coups or democratic elections, is seen as another means of gaining access to internal self-determination. This was traditionally accomplished through popular revolutions as was observed in chapter two of this research, but in modern processes, it can be accomplished peacefully through democratic political elections.[529] Another option is non-territorial control, as the third aspect of peoples' internal self-determination, where the state exercises grants peoples' rights to freely pursue their cultural, political, social, and economic interests.[530]

Therefore, the right of self-determination of peoples found in ICCPR and ICESCR statutes is linked to human rights obligations, which include civil, political, economic, social, and cultural rights.[531]

The researcher observes that, the right of self-determination exercised domestically within the state, was intended to obligate states to provide basic needs to their citizens as a form of protection from negative consequences related to the protection of its citizens. The key obligations of the state as per the existing international legal instruments as outlined in this chapter is to ensure safety, security, and a decent standard of living of the peoples.

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[529] Christian Walter, 'Introduction', in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), *Self-Determination and Secession in International Law*, (OUP, Oxford, 2014), p. 1

[530] Kalana Senaratne, 'Internal Self-Determination in International Law: A Critical Third-World Perspective' (2013), *AJIL, Vol. 3. Iss. 2*, pp. 305-339<https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/internal-selfdetermination-in-international-law-a-critical-thirdworld-perspective/D50802D44C5C534376496283B78D220B/core-reader> Accessed 23 February 2019

[531] 'Anja Seibert Fuhr, (n 411)'pp. 399-472'

4.9 Conclusion

This chapter has established that, as entrenched in the ICCPR and ICESCR, the right of peoples to self-determination is a fundamental human right guaranteed by international law, encompassing liberties in the form of social, political, economic, civil, and cultural rights. The two statutes, along with other legal instruments on human rights, constitute the collective rights of the peoples, which are determined within a state's territorial borders and should be respected by states.

The goal of these two covenants was to forge a link between international law and its relationships with peoples on the one hand, and the state on the other as the custodian of these rights. In doing so, the United Nations, supports the states to provide these rights to their citizens within the framework of international law under the human rights principles, where states are the subject of international law, but peoples are the object of the UN's protection mandate.[532] Consequently, ICESCR and ICCPR were designed to obligate states to compliance through progressive and accountable structures within the UN, through support to states towards states' delivery of these rights. Human Rights Committees (HRCs) is the UN tool and a key UN structure that monitors state compliance and has a reporting mechanism requiring states to be accountable.

Furthermore, the UN regards, the violations of human rights as an abuse of peremptory norms that violate customary international law, and thus constitute a breach that invokes the remedy of universal jurisdiction; consequently, violations of human rights can be prosecuted in any domestic court, including a national court of another state outside the

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[532] Mark Weston Janis, "Individuals as Subjects of International Law'', (1984), *Cornell International Law Journal: Vol. 17: Issue. 1, Article 2*, p. 61, <http://scholarship.law.cornell.edu/cilj/vol17/iss1/2> Accessed 14 October 2019

state where the breach was committed, or at international courts, as was observed in the case of Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012, p. 324, and in Tachiona v. Mugabe [2001] 169 F. Supp. 2d 259 (S.D.N.Y.). In Tachiona v. Mugabe [2001], the widow of a torture victim in Zimbabwe successfully obtained an arrest warrant for the prosecution of former Zimbabwean President Robert Mugabe in a US Court, even though the alleged torture was committed in Zimbabwe. In cases where international crimes have occurred, a framework for direct intervention has been established under the right to protect (R2P), and as a result, international criminal responsibility can be initiated against those responsible for human rights violations through international courts and tribunals as well as domestic courts.

Chapter five investigates the right of self-determination of peoples in the context of territorial secession. It examines the legality of territorial secession when advanced as peoples' right to self-determination.

CHAPTER FIVE

THE LEGALITY OF TERRITORIAL SECESSION AS A RIGHT OF SELF-DETERMINATION OF PEOPLES IN INTERNATIONAL LAW

5.1 Introduction

Most states oppose territorial secession as peoples' right to self-determination. The lack of international law statutes defining how peoples' rights to self-determination should be exercised externally or defining whether territorial secession is legal only serves to intensify the conflict between peoples and states.[533] Despite states' opposition, peoples maintain that territorial secession is a part of their right to self-determination, which includes the right to secede as an external right to self-determination.[534] It has been observed that, most states generally recognise territorial secessions where parent state consents, but where the territory in question secedes against state's will, other states usually refuse to recognised such territories.[535] The impact of territorial secession is that it obligates redrawing of the state's border, or external *"ab extra"* self-determination and is different from internal self-determination.[536] This chapter examines whether territorial secession is lawful under international law and concludes that it is neither illegal nor prohibited. However, there is no international legal framework that outlines the conditions under which territories may lawfully secede, and international law does not specify the

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[533]Hurst Hannum, (n 223)'

[534]Allen Buchanan, 'Theories of Secession' (1997), Philosophy and Public Affairs, Vol. 26, No. 1., pp. 34-41. <http://fs2.american.edu/dfagel/www/Philosophers/TOPICS/SelfDetermination/Theories%20of%20Secession_Buchanan.pdf> Accessed 3 November 2020

[535] Michele Capeleto, 'Does Self-Determination Entail an Automatic Right to Secession?' (2014), pp. 1-8 <https://www.e-ir.info/2014/05/02/does-self-determination-entail-an-automatic-right-to-secession/> Accessed 20 February 2019

[536]Milena Sterio, 'Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia' (2018), *American Society of International Law, Vol. 22 Issue 1*, <https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan> Accessed 20 June 2020

legality of territorial secession. Chapter five investigates the right of self-determination of peoples in the context of territorial secession, for which it examines the legality of territorial secession when advanced as the right of self-determination of peoples.

5.2 Decolonization as a Self-Determination Right in International Law

There has been an endless debate among legal scholars about what constitutes a people's right to self-determination, and particularly whether territorial secession can be exercised as a people's right to self-determination, or whether the right to secede ever exists. John Locke (1632–1704), wrote that.

> *"All men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."*[537]

The right of self-determination of peoples in international law ignites a sense of entitlement to freedom for all peoples. Under international law, Article 73 of the UN Charter and UN General Assembly Resolution 1514 of 14 December 1960 provides for the aspect of the right to self-determination that permits self-rule, in particular the colonised or indigenous peoples.[538] The main goal of UN Charter Article 73 was to help enforce the decolonization of territories that were still under colonial control in order for them to gain independence.[539] The majority of these colonised territories were primarily in Africa and Asia continents. On 24 April 1955, representatives of Asian and African states held a conference aimed at hastening the independence of their respective territories, the (Asian-African Conference) in Bandung, West Java province in Indonesia, and was

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[537] John Locke, 'Of the State of Nature' in Crawford Brough Macpherson(ed), *Second Treatise of Government -1690* (Hackett Publishing Company, Indianapolis, 1980), p. 8

[538] See 'UN Charter 1945 (n 4), Art. 73', and UNGA Res 1514 (XV) (14 Dec 1960), (n 5)'

[539] 'Karen Knop, (n 245), p. 329'

attended by twenty-four states, six from the African and eighteen from the Asian continents. These states issued a communiqué emphasising the significance of independence for colonised territories as part of the demand for human rights and self-determination in accordance with the UN's primary goal and the principles of the 1945 UN Charter.[540] Following the Bandung conference, the UN General Assembly convened the 947th Session on 14 December 1960, which resulted in the adoption of UN General Assembly Resolution 1514. (XV), this resolution obligated the states that were still holding colonies to expedite the granting of independence to their colonies.[541]

However, some states with colonies were observed to be resisting UN General Assembly Resolution 1514 (XV) and were unwilling to give up their colonies; for example, Spain, a member of the UN since 1955, incorrectly denied that it was harbouring non-self-governing territory, as defined in Article 73 of the UN Charter, 1945.[542] Consequently, during the enactment of UN General Assembly Resolution 1541 in 1960,[543] the objective and meaning of UN General Assembly Resolution 1514(XV), as well as its scope, were clarified,[544] in its relationship to Article 73 of the UN Charter. The UN General Assembly Resolution 1541 outlined twelve principles that distinguished what are the non-self-governing territories from those managed under and regarded as the territories which were

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[540] See Final Communiqué of the Asian-African conference of Bandung (24 April 1955), Section C (1) <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf>, Accessed 4 August 2019

[541] 'UNGA Res 1514 (XV) (14 Dec 1960), (n 5)'

[542] 'David Raic, (n 102), 204'

[543] "Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter" UN General Assembly Resolution 1541 (XV), 948th Plenary meeting, of 15th December 1960.

[544] 'UNGA Res 1514 (XV) (14 Dec 1960), (n 5)'

under Trusteeship, as referred to in Article 77(1)(c) and the territories which fall under Article 73 of the UN Charter 1945.

UN Charter Article 73 and UN General Assembly Resolution 1514 (XV), it is paradoxical to argue that territorial secession is directly linked to these two international law instruments. Especially considering that territorial secession is concerned with the geographical curving out of a land mass to create a separate entity outside the jurisdiction of the mother state, therefore, Sterio's argument that decolonization and territorial secession are aspects of external right of self-determination is questionable.[545]

The preceding arguments show that decolonization involved a regime change in which indigenous rulers took over management or administration of colonised territories from foreign rulers who had colonised them. Regime change, whether democratic or coup d'état, is similar with decolonization in that both involve replacing unwilling rulers with new management; however, secession of a state's territory to establish another state is a completely different scenario because it involves regime change as well as the establishment of new territory or state. Furthermore, an overview of events, as well as a review of decolonization statutes and relevant UN General Assembly Resolutions, clearly refutes the argument that decolonization is an external right of self-determination, because decolonization does not include the redrawing of territorial borders. In fact, international law statutes only address substantive law issues and lack a procedural law framework for determining which legal approach to consider taking in accommodating territorial secession as an aspect of the right to self-determination.

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[545] 'Milena Sterio, (n 15),

As a consequence, the right to self-determination, which is found in international law under UN General Assembly Resolutions 1514 (XV) and UN Charter, 1945; does refer to the territorial secession as the peoples' right; thus is distinct in its goals, which is only limited to decolonization, therefore scholars who argues that secession is part of external right of self-determination do seeks to achieve an alien objective to this right.[546] Similarly, the right of self-determination enshrined in UN General Assembly Resolution 1541 (XV) differs from 1514 (XV) in that, the Resolution 1541 (XV); categorises the territories that would satisfy the requirements of Article 73 of the UN Charter, 1945; through a progressive manner advanced as principles or rules which are highly specific to decolonization. The UN General Assembly Resolution 1541 (XV) of 1960 categorised territories in phases determinable by those territories' readiness to achieve self-rule through a progression matrix established by different principles within this resolution.[547] Principle I, for example, applied to colonial territories that had not yet achieved full self-government. Under the provisions of the UN Charter in Article 73 e, states controlling territories deemed to be on the path to self-government were required to submit regular information to the UN Secretary-General (UNSG) on security and constitutional issues for the UN's considerations for technical assistance towards their self-government.[548] The evaluation for these territories to be considered ready for independence and self-rule was under Principle VII, given that under this principle, the concerned territories were expected to design their own constitution without interference from outside sources.[549]

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[546] ibid

[547] UN General Assembly Resolution 1541 (XV) of 1960, 948th plenary meeting <https://www.ilsa.org/Jessup/Jessup10/basicmats/ga1541.pdf> Accessed on 15 April 2021

[548] ibid

[549] ibid

Indeed, UN General Assembly Resolution 1541 was only meant to establish a progressive mechanism for achieving independence in stages; actual independence was to be governed by UN General Assembly Resolution 1514 (XV) of 1960. As previously stated, the right of peoples to self-determination, as enshrined in UN Charter Article 73 and UN General Assembly Resolutions 1514 (XV) of 1960, could only be exercised once in the history of the state for any colonised territory seeking independence from colonial powers. The right of self-determination of peoples through decolonization was not intended to include the redrawing of territorial boundaries under these specific international law provisions.

The researcher observes that, the intention of the delegates at the time when the UN Charter was being formulated, leading into the inclusion of the right to self-determination of peoples, in Article 73 of the UN Charter, was primarily to eradicate colonisation and effect self-rule of indigenous people. However, it appears that violations of human rights by the government in the post-colonization or outside the colonisation context necessitated a need to accept territorial secession as a remedy for human rights violations.[550] Many colonised territories gained independence after the adoption of UN General Assembly Resolutions 1514 (XV) 1960 and 2625 (XXV) 1970, which advocated for states that were still practising colonialism to allow the affected territories to gain independence; however, the indigenous peoples' leadership imposed a dictatorship. In Africa, for example, several *coup d'états* were observed to be common in many states shortly after independence, as a result of dictatorship which resulted in human rights abuses, thus contradicting the goal of

[550]See UN Report by Mr. Hector Gros Espiell, Special Rapporteur, On Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination (20 June 1978), E/CN.4/Sub.2/405 Vol. I). There seems to have been disagreements by the State parties to the UN, on what the right to self-determination of peoples would entail under international law and whether those rights would be considered *jus cogens* or peremptory norms.

decolonization. This was due to the fact that many African states' first governments after independence were never elected or subjected to populous democracy.[551] This could have been avoided if there had been an enforceable treaty in the form of a covenant to support the uniform and coordinated implementation of peoples' right to self-determination within emerging states in order to ensure that the rules of human rights are implemented, and the rights of the citizens are protected in a post-colonial context.

Cop and Eymirlioglu observe that, following UN General Assembly Resolutions 1514 (XV) 1960 and 2625 (XXV) 1970, there was no clear roadmap on how the "peoples" would freely determine their political status and pursue their economic, social, and cultural development, after attaining independence.[552]

As a consequence, territorial secession, in which a territory splits from the parent territory or create new state, is not related to UN Charter Article 73, as well as UN General Assembly Resolutions 1514 and 1541 (XV) of 1960, as it has been demonstrated that these legal instruments were primarily concerned with assisting peoples who had yet to achieve self-rule within their territories.

5.3 UN Charter Article 73(e) and UN General Assembly Resolution 1514(XV) of 1960 in Legal Advisory Opinions and Case Laws in the Right to Self-Determination

The International Court of Justice (ICJ) is the world's apex court, whose decisions and legal opinions serve as *stare decisis*(precedent) for national courts around the world to

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[551] Tor Sellstrom and Lennart Wohlgemuth, The International Response to Conflict and Genocide: Lessons from the Rwanda Experience, Historical Perspective: Some Explanatory Factors, The Nordic Africa Institute Uppsala, Sweden, pp. 25-41, <https://www.oecd.org/derec/unitedstates/50189653.pdf> Accessed 13 January 2021

[552] Burak Cop and Dogan Eymirlioglu, (n 174), p. 118'; 'UNGA Res 1514 (XV) (14 Dec 1960) (n 5)'

follow, and these rules are binding on all states; as a result, the ICJ has been asked on several occasions to provide advisory opinions or make decisions as part of case law in matters relating to peoples' right to self-determination. This subsection examines the ICJ's legal opinions and the case laws relating to the right of self-determination of peoples.

The previous chapters, have presented and demonstrated the United Nations' (UN) critical role in ensuring that territories that had not yet achieved independence and self-rule did so as a right of self-determination of their inhabitants, particularly in the 1960s.The primary legal framework for decolonization was provided by the application of UN Charter Article 73 and UN General Assembly Resolution 1514 (XV) 1960.The territorial right to self-determination through decolonization was strongly supported at the UN; the UN took progressive steps by passing resolutions aimed at abolition of colonialism at the UN General Assembly. Indeed, the United Nations General Assembly's Fourth Committee declared in 2009 that the UN's efforts toward decolonization were among the organisation's greatest successes, despite the fact that more could have been done to improve those efforts.[553] The international law has gone even further in not only abolishing colonialism, but also criminalising it, as well as other acts associated with discrimination and degrading acts against indigenous people, such as apartheid, which is now prosecutable as crimes against humanity under the Rome Statute.[554] As a direct consequence, the International Court of Justice (ICJ) has presided over a number of cases

[553] See UN General Assembly, Decolonization Was United Nations 'Success Story,' but Renewed Momentum Was Needed on Behalf of 16 Remaining Non-Self-Governing Territories, Fourth Committee Told, Sixty-fourth General Assembly (9 October 2009) Fourth Committee 6th Meeting (PM)GA/SPD/426 <https://www.un.org/press/en/2009/gaspd426.doc.htm> Accessed 19 July 2019

[554]See 'Rome Statute 1998, (n 242), Art. 7'

involving the right of peoples to self-determination, the majority of which are territorial disputes.

In this subsection, the study explores some case laws and advisories arising from Article 73 of the UN Charter and UN General Assembly Resolution 1514 (XV) 1960, to understand the legal interpretation of these two international law rules from the ICJ points of view on what role these two statutes were intended to play in territorial self-rule relating to the right of peoples to self-determination.

5.4 Brief Summary of the East Timor's Case Dispute

The case of *East Timor (Portugal v. Australia) 1995*[555] was unique, but also complex. In the 1700s, Portugal colonised East Timor, but as a weak coloniser, it was unable to manage its colonies directly and effectively.[556] As a result, Indonesia forcibly invaded and occupied East Timor in 1975, intending to permanently annex it as part of its territory, despite the fact that East Timor had been designated as a non-governing territory and was designated for self-rule upon its decolonization.[557] Australia and Indonesia signed an agreement in 1989 to exploit the East Timor territory's resources. That move, prompted Portugal to sue Australia in the International Court of Justice for entering into an agreement with an occupying power (Indonesia), to exploit East Timor's resources while Portugal was the UN-recognized legitimate caretaker administrator of East Timor. Portugal was of the opinion that Australia violated "East Timor's right to self-

[555]East Timor (Portugal v. Australia), (n 58), p. 90

[556] A brief history of East Timor (2002) <https://mypages.valdosta.edu/mgnoll/brief%20history%20of%20east%20Timor.pdf> Accessed 11 August 2019

[557] Trevor Findlay, 'The Use of Force in UN Peace Operations' (OUP, Oxford,2002) pp. 287-296; '

determination of its peoples, territorial integrity and unity, as well as East Timor's territorial sovereignty over its natural wealth and resources" by negotiating the Zone of Cooperation Treaty in exclusion of Portugal.[558] It should be noted that, following the adoption of UN General Assembly Resolution 1514 (XV) 1960, East Timor was designated as a non-self-governing territory administered by the Portuguese designated for self-rule, but Indonesia unlawfully invaded East Timor on 7 December 1975, and annexed it as part of its territory.[559] According to Chomsky and Herman, the Indonesian takeover of East Timor was a bloody event that resulted in the deaths of approximately 60,000 East Timorese during the annexation period. Chomsky and Herman have called the Indonesian military's murders of East Timorese "absolute terror," arguing that the Indonesians' actions were criminal.[560]They went on to explain in their journal that the Indonesian army's killing of East Timorese was a re-enactment of a similar scenario in 1912, when East and West Timor were divided between the Portuguese and Dutch, and approximately 3000 Timorese were similarly killed.[561] It is estimated that 200,000 East Timorese were killed by Indonesian forces during the territory's independence from

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[558] Brandi J. Pummell, 'The Timor Gap: Who Decides Who Is in Control'(2020), *Denver Journal of International Law and Policy, Vol. 26, Issue 4*, p. 657 <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1591&context=djilp> Accessed 23 October 2020

[559] See UN General Assembly Resolution 3485 (XXX) 12 December 1975, this Resolution did condemn the takeover of East Timor by Indonesia "Strongly deplores the military intervention of the armed forces of Indonesia in Portuguese Timor" and called upon Indonesia to stop the violations territorial integrity of East Timor.

[560] Noam Chomsky and Edward Herman, 'Benign Terror: East Timor' (1979), *Bulletin of Concerned Asian Scholars, Vol.11 Issue. 2,* pp.40-68 <https://www.tandfonline.com/doi/pdf/10.1080/14672715.1979.10424041> Accessed 19 November 2019

[561] ibid

Indonesia.[562] Between 1975 and 1982, the UN General Assembly passed eight resolutions in response to Indonesia's forcible annexation of East Timor. These UN General Assembly Resolutions are 3485 (XXX) passed on 12 December 1975,[563] 31/53 of 1 December 1976,[564] 32/34 of 28 November 1977,[565] 33/39 of 13 December 1978,[566] 34/40 of 21 November 1979,[567] 35/27 of 11 November 1980,[568] 36/50 of 24 November 1981[569], and 37/30 of 23 November 1982. [570]

Indonesia's occupation of East Timor, which lasted from 7 December 1975 to 25 October 1999, was deemed illegal and illegitimate by the UN. When it established the United Nations Transitional Administration in East Timor (UNTAET) in 1999, the UN Security Council (UNSC) was seen to have played an important direct role, pending the territory's independence. In general, all United Nations General Assembly Resolutions adopted condemned the illegitimate takeover of East Timor territory and the Indonesian government's violations of the human rights of East Timorese peoples and was concerned with the need to provide humanitarian assistance to the peoples of East Timor.[571] There were two UN Security Council Resolutions (UNSCR)as well. The first was

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[562] A brief history of East Timor (n 506), p72, <https://mypages.valdosta.edu/mgnoll/brief%20history%20of%20east%20Timor.pdf> Accessed 11 August 2019

[563] UN Security Council, Security Council resolution 384 (1975) [East Timor], S/RES/384 (1975), 22 December 1975,

[564] UN General Assembly, Question of Timor. A/RES/31/53, 1 December 1976

[565] UN General Assembly, Question of Timor. A/RES/32/34, 28 November 1977

[566] UN General Assembly, Question of Timor. A/RES/33/39, 13 December 1978,

[567] UN General Assembly, Question of Timor. A/RES/34/40, 21 November 1979,

[568] UN General Assembly, Question of East Timor. A/RES/35/27, 11 November 1980

[569] UN General Assembly, Question of East Timor. A/RES/36/50, 24 November 1981

[570] UN General Assembly, Question of East Timor. A/RES/37/30, 23 November 1982

[571] See United Nations General Assembly Resolutions (1975-1982), <https://etan.org/etun/genasRes.htm> Accessed 11 August 2019

UNSC Resolution 384 (1975), which was issued on 22 December 1975 and urged "States to respect East Timor's territorial integrity as well as the inalienable right of its people to self-determination," as well as Indonesia to withdraw all of its forces from East Timor as soon as possible.[572] On 12 April 1976, the UN Security Council passed Resolution 389 (1976), in response to which the Indonesian government invited the UN Security Council to visit East Timor, but the UNSC declined the offer.[573] Despite Indonesia's illegal occupation of East Timor under international law, Australia agreed in 1989 with Indonesia to exploit petroleum resources in three major areas in the occupied territory of East Timor.[574] Australia and Indonesia agreed on three points in their agreement: the first was to exploit petroleum resources for commercial purposes and to share the benefits equally between themselves. Second, Australia was to make certain notifications and share them with Indonesia Resource Rent Tax collections resulting from petroleum production; third, Indonesia was to make similar notifications and share them with Australia Contractors' Income Tax collections resulting from petroleum production.

5.4.1 Arguments of the Parties to the Dispute

Portugal, through its ambassador in the Netherlands, filed a case against Australia at the International Court of Justice registry on 22 February 1991, titled "certain activities of Australia concerning East Timor."[575] The dispute was founded on two grounds. The first was Australia's failure to respect Portugal's duties and powers as East Timor's

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[572] See UN Security Council Resolution 384, 22 December 1975

[573] See UN Security Council Resolution 389, 12 April 1976.

[574] See Article 2(a)(b)(c) of the Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, 1989 <https://cil.nus.edu.sg/wp-content/uploads/formidable/14/1989-Australia-Indonesia-Timor-Gap-Treaty.pdf> Accessed 11 August 2019.

[575] 'East Timor (*Portugal v. Australia*), Judgment (n 58)'

administering power. Second, Australia was accused of violating "the right of the people of East Timor to self-determination and related rights."[576] Portugal claimed that it had asked the court to declare that Australia had ignored the rights of East Timorese people to self-determination and its own rights as the legitimate administration of East Timor, despite the fact that Australia was aware of Portugal's status that Portugal was the legitimate caretaker of East Timor and thus had an obligation to respect those rights.[577] Portugal further claimed that on 11 December 1989, Australia agreed with another state party to explore and exploit petroleum resources at Timor Gap without involving it. As a result, the ICJ was to find, first, that the people of East Timor's right to self-determination and sovereignty over their natural wealth and resources had been violated; second, that Portugal's powers as East Timor's administering authority, as well as its duties to its people and the international community, had been violated. Third, Australia has violated the binding nature of UN Security Council Resolutions 384 and 389 concerning East Timor, as established by the UN Charter organs. Fourth, Australia has excluded and continues to exclude any negotiations with Portugal, even though Portugal had administrative powers over East Timor regarding the exploration and exploitation of the continental shelf in the Timor Gap area.[578] Fifth, Australia bears international responsibility for damage caused for which it owes restitution to the people of East Timor and Portugal. Sixth, the people of East Timor, Portugal, and the international community obligate Australia to refrain from all violations of human rights and international norms referred to in its submissions until the people of East Timor exercise their right to self-determination under the

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[576] Ibid at para, 10, p. 93

[577] Ibid

[578] Ibid para. 10 p, 94-95

conditions outlined by the UN. As a result, Australia should halt any further negotiations, signing, ratifications, exploration, and exploitation agreements with any state party over the shelf of Timor Gap.[579]

In a rebuttal, Australia argued that the Portuguese claims were inadmissible and that the ICJ lacked jurisdiction to hear its claims because they did not violate Portugal's international law rights, and that East Timor became a Portuguese colony in 1975 and remained so until 1975. Australia contended that the Western part of East Timor was colonised by the Dutch and later became part of independent Indonesia. It also stated that the UN General Assembly Resolution 1542 (XV) of 15 December 1960, recalled the status of certain territories administered by Portugal and Spain and described them as "overseas provinces" by the metropolitan state concerned. As a result, it considers the territories under Portuguese administration, including "Timor and dependencies," to be non-self-governing territories under Chapter XI of the UN Charter, and that Portugal had accepted that position in 1974.[580] As a result, on 27 August 1975, Portugal withdrew from the East Timor mainland to the island of Atauro; on 7 December 1975.Afterwards, the Indonesian armed forces 'intervened' in East Timor; and on 8 December 1975, Portugal departed from the island of Atauro and thus left East Timor entirely, paving the way for Indonesia to occupy the territory, which effectively became under its control.[581] Australia also claimed that on 31 May 1976, the people of East Timor "requested" that Indonesia accept them as part of Indonesia, and that on 17 July 1976, East Timor became part of Indonesia. As a

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[579] Ibid para. 10 p, 95

[580] Ibid

[581] Ibid para. 11 p, 95

result, the intervention of Indonesian armed forces in East Timor coincided with the withdrawal of the Portuguese authorities.

Portugal rejected those arguments, and countered claimed that UNSC Resolution 389 of 1976, UN General Assembly Resolution 3485 (XXX) of 1975, and subsequent UN General Assembly Resolutions 31/53 of 1976 all recognized Portugal as the "administrating power." The claim that East Timor had been legally incorporated into Indonesia was rejected by the United Nations General Assembly in Resolution 32/36 in 1977.[582] Portugal also argued that all UN General Assembly's Resolutions continued to maintain that East Timor was a non-self-governing territory under Chapter XI of the Charter, and that it remained one of the candidates for implementing the Declaration on the Granting of Independence to Colonial Countries and Peoples under the UN general Assembly 1514 (XV) 1960.[583]Australia further stated that it recognizes East Timor as Indonesia's *"de facto"* territory since 20 January 1978. However, it has consistently expressed public opposition to Indonesia's intervention in East Timor. For this reason, it is undeniable that Indonesia effectively controls East Timor. Therefore, continuing to refuse to recognize East Timor as part of Indonesia would be unrealistic. Because of this, the negotiations between Australia and Indonesia over the delimitation of the continental shelf between Australia and East Timor confirmed Australia's *de-jure* recognition of Indonesia's incorporation of East Timor, despite Australia's continued opposition to the way East Timor was incorporated into Indonesia.[584] For these reasons, on 11 December 1989, Australia and Indonesia signed a treaty covering the Indonesian

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[582] Ibid

[583] Ibid para. 11 p, 97

[584] Ibid para. 11 p, 98

province of East Timor and Northern Australia. Because of that agreement, Australia enacted legislation in 1990 to implement the treaty, which went into effect in 1991.[585] Crawford notes that Australia has been found to have violated international law on several occasions in previous ICJ decisions, and that the East Timor case appeared to have harmed Australia's reputation for breaking the law even more.[586]

5.5 International Court Justice (ICJ) Decisions

In East *Timor's* case, the ICJ had to determine; first whether there was a dispute between the two states, it came to the conclusion that, because the disagreement concerned a disagreement on a point of law, the dispute existed between the two states.[587] To enable the ICJ to reach its decision, the Court observed that Australia's behaviour could not be assessed solely without the participation of Indonesia, because the dispute at hand concerned the 1989 treaty between Australia and Indonesia, and thus it cannot be decided in the absence of Indonesia's consent.[588] Second, in the case of East Timor's status, the court contended that Portugal and Australia were obligated to recognize the ICJ's jurisdiction; and third, that East Timor was a non-self-governing territory with the right to petition for recognition. For that reason, the ICJ observed that Portugal and Australia were obligated to recognize East Timor as a non-self-governing territory with the a right to self-determination; and that the UN General Assembly had the authority to determine non-self-governing territories under Chapter XI of the UN Charter, as a result, the UN General

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[585] Ibid

[586] James Crawford, ''Dreamers of the Day': Australia and the International Court of Justice" (2013), *Melbourne Journal of International Law, Vol. 14*, <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1687489/06Crawford-Depaginated.pdf> 12 May 2019

[587] Ibid at para. 22, p. 99

[588] Ibid at para. 28, p. 102 and para. 34, p. 104

Assembly treated East Timor as a non-self-governing territory.[589] East Timor was also declared to be a non-governing territory with the right to self-determination by the court.[590]The East Timor case points to the fact that, under Article 73 of the UN Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the UN General Assembly 1514 (XV) 1960, was meant to support the independence of the non-self-governing territories.

5.6 ICJ's Opinion on "Legal Consequences for South Africa's Continued Presence in Namibia

Subsequent to Germany's defeat in WWI, the state of Germany and other states were conditionally forced to surrender rights to their colonies on an agreement reached between them and the victorious states under the Treaties of Sevres in 1920 and Treaty of Versailles in 1919.[591] Article 22, paragraph 1, of Treaty of Versailles of 1919, stated that.

> *"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 civilization and that securities for the performance of this trust should be embodied in this Covenant"*[592]

The same wordings as indicated above, appears in Article 22 of the Treaty of Sevres, signed on 10 August 1920, also known as the Treaty of Peace Between the Allies and Turkey.[593] Similarly, the same wording was included in the League of Nations Covenant

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[589] Ibid at para. 31, p. 103

[590] Ibid at para. 37, p. 105-106

[591] See 'Treaty of Versailles 1919 (n 205), Art. 22, para. 1'

[592] Ibid

[593] 'Treaty of Peace between the Allied & Associated Powers and Turkey 1920, (n 36), Art. 22 para.1'

in 1920.[594] The mandatory administrations were established for territories such as South-West Africa under Article 22 of the League of Nations Covenant. The Article stated that, "*There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization… can be best administered under the laws of the Mandatory as integral portions of its territory…"*[595] Following the South African army's invasion of Namibia on 9 July 1915, the territory was renamed South West Africa by South Africa, which continued to occupy it.[596]And later South Africa annexed it as its own integral territories through a constitutional amendment in 1949.[597]

South Africa's action against Southwest Africa (Namibia) prompted the UN General Assembly to pass Resolution 338 (IV), which requested an advisory opinion from the International Court of Justice, to clarify the international status of Southwest Africa.[598] Moloye stated in his 1974 thesis that if Namibia remained under Pretoria's administration, the chances of Southwest Africa (Namibia) gaining independence were slim.[599] This

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[594] See The Covenant of the League of Nations (1920) as (Including Amendments adopted to December 1924), Article 22, para. 1, <https://avalon.law.yale.edu/20th_century/leagcov.asp> Accessed 15 September 2019.

[595] ibid

[596] Evert Kleynhans, 'A critical analysis of the impact of water on the South African Campaign in German South West Africa, 1914-1915'(2016), Historia Journal, issue 61 , 41. <http://www.scielo.org.za/pdf/hist/v61n2/02.pdf> Accessed 17 September 2019

[597] Henry J. Richardson, 'Self-Determination, International Law and the South African Bantustan Policy' (1978), Columbia Journal of Transnational law, Vol. 17, 185-219 <https://core.ac.uk/download/pdf/232670356.pdf> Accessed 16 June 2019

[598] Index to Proceedings of the General Assembly, 4th session, (South West Africa, A/1180, Resolutions 337-338 (iv) 1949, 35, <https://library.un.org/sites/library.un.org/files/itp/a4_0.pdf> Accessed 17 September 2019

[599] Olugbemi Moloye, 'Namibia : the trust territory'(1974), (Masters Theses 1911 - February 2014. 2510), 1, <https://scholarworks.umass.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3646&context=theses> Accessed 19 October 2019

territory's status was also unique in that it was the only territory in Africa, and the world, that had not been placed under the United Nations trusteeship system to allow it to progress toward independence. South Africa's continued occupation of Namibia, despite UNSC and UNGA Resolutions, prompted the UN Security Council to seek an advisory opinion from the ICJ through a request for an advisory opinion made to the ICJ between 5 August and 29 December 1970.[600] And therefore, on 29 July 1970, the United Nations Secretary-General (UNSG) requested an advisory opinion from the President of the International Court of Justice (ICJ).[601]

In its opinion, the International Court of Justice determined that "South-West Africa was still considered a territory held under the Mandate, under the rules of Article 22 of the League of Nations Covenant of 17 December 1920."[602] The ICJ also maintained that the UN General Assembly Resolution 2145 (XX1) of 27 October 1966, terminated South Africa's mandate and chose to manage Southwest Africa directly. The UN General Assembly Resolution 2145 (XX1) was followed by another UN General Assembly Resolutions 2248 (S-V) of 19 May 1967, 2324 (XXII), and 2325 (XXII) of 16 December 1967, which demanded the withdrawal of the South African government from the South-West African territory.[603] As a result, South Africa's continued presence in South West Africa (Namibia) was declared illegal by the UN Security Council in 1970, and South

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[600] See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, p. 5, para 7

[601] Ibid, at p. 16

[602] International Status of Southwest Africa, Advisory Opinion, ICJ Reports (1950), <https://www.icj-cij.org/en/case/10> Accessed 17 September 2019,

[603] See UN General Assembly Resolutions Adopted Without Reference to A Main Committee, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNMembers%20ARES2371%20XXI.pdf> Accessed 17 September 2019,

Africa's defiant attitude in maintaining its presence in Namibia undermined the authority of the United Nations.[604]

Jordan-Walker, explains that, at the time, the newly elected UN Secretary-General (UNSG), Javier Prez de Cue'llar, stated that resolving the Namibian conflict was a top priority for the UN.[605] Indeed, South Africa's attitude was viewed as damaging to the UN's image, and the failure to allow Namibia to gain sovereignty was critical to the UN's credibility. The court had been asked whether territories placed under trusteeship under Article 77 of the UN Charter could be annexed by mandatory powers under Article 79 of the UN Charter, or form an integral part of its caretaker State, rather than achieving self-determination under Article 73 of the UN Charter, the response was that this is not possible.

In its defence, the South African government rejected the advisory opinion, including the legality of the Court's capacity to issue an advisory opinion, and thus rejected the court's advisory opinion.[606] The South African government claimed that there was a proclivity to annex former enemy colonial territories. The council, however, rejected the idea of annexing the territory under trusteeship.[607] The court dismissed all the government of South Africa's challenges, citing the ICJ's statutory powers and the legal grounds of the case at hand. It is noted that, on 27 January 1971, the South African government attempted

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[604] Security Council Resolution 276 (1970), <http://unscr.com/en/resolutions/doc/276> Accessed 17 September 2019

[605] Deneice C. Jordan-Walker, 'Settlement of the Namibian Dispute: The United States Role in Lieu of U.N. Sanctions'(1982), *Case Western Reserve Journal of International Law, Vol. 14, Issue 3,* p. 1, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1846&context=jil> Accessed 6 November 2018

[606] 'Advisory Opinion, I.C.J. Reports, 1971 (n 610), paras. 27-41'

[607] 'ibid, at para 50'

and proposed for Namibia to hold a plebiscite (referendum) "to determine the wish of its people" on whether the Territory to continue being administered by the South African government or the United Nations. The court further noted that the government of South Africa had committed to the principle of being a mandated state by observing the relevant rules of the League of Nations concerning its mandate, which had partly been stated in the agreement that; "... agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations".[608]Therefore, "the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned."[609]" As a result, the International Court of Justice ruled that states that use the international trusteeship system to administer and supervise territories through agreements, as outlined in Chapter XII of the United Nations Charter, cannot be annexed to form an integral part of such a state.[610]

The Court went on to explain that where such trusteeship is granted through an agreement with a caretaker state, "the principle of non-annexation, as well as the principle that the well-being and development of such peoples form a sacred trust of civilization," exist.[611] The International Court of Justice also ruled that states that provide tutelage to territories as mandates on behalf of the League of Nations, as prescribed in paragraph 2 of Article 22, are barred from laying claims to the territories under their tutelage.[612] Therefore, the mandate of the designated caretaker states was to be exercised for the benefit and in the

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[608] Ibid, p. 19, para 51

[609] ibid, para 53

[610] 'UN Charter 1945 (n 4), Chapter XII, Articles 76-85'

[611] 'Advisory Opinion, I. C. J. Reports 1971 (n 610), p. 16, para 45'

[612] 'The Covenant of the League of Nations (1920) (n 604), Article 22, para 2'.

interest of the inhabitants living in the territories under the trusteeship of the designated caretaker States. In exchange, the caretaker States were to uphold and demonstrate the duty of care by providing humanity treatments to the peoples of the territories they were managing under trusteeship, because those territories had become an international object of civilization's sacred trust, and the League of Nations, in this sense, "had only assumed an international function of supervision and control."[613]The court noted that the mandate for German South West Africa was drafted and defined in accordance with the League of Nations Covenant's seven articles, of which Article 6 made it an explicit obligation to the Mandatory State. Articles 2, 3, 4, and 5 imposed obligations on mandatories or caretaker states, and "the Council of the League was to supervise the administration and ensure that these obligations were met."*[614]* The court reasoned those non-self-governing territories, as defined by the UN Charter, require that the principle of self-determination be compellingly applicable to all "territories whose peoples have not yet attained a full measure of self-government," as required by the UN Charter, Art. 73.[615]The court recalled that the International Court of Justice (ICJ) decision in 1956 had confirmed that the effect of Article 80 (1) of the UN Charter was to preserve the rights of states and peoples, as stated in I.C.J. Reports 1956, p. 27.[616]And therefore, the trusteeship rules as provided for in Article 80, paragraph 1 of the UN Charter, is the same as it was in the League of Nations.[617]The court also stated that "the general supervisory functions over mandates, previously exercised by the League of Nations, were to be exercised by the United

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[613] 'Advisory Opinion, I. C. J. Reports 1971 (n 610), p. 17, para 46 and 'Advisory Opinion, I.C.J. Reports 1950, (n 433) p. 132

[614] 'Ibid at p. 18, para 49'

[615] Ibid, p. 19, para 52

[616] Ibid, p. 22, para 59

[617] Ibid, p. 22, para 60

Nations."[618]As a result, Article 10 of Chapter IV of the UN Charter transferred supervisory powers of trusteeship and mandates from the League Council to the United Nations General Assembly.[619] Therefore, the United Nations General Assembly is legally empowered to perform the supervisory functions previously performed by the League of Nations in relation to the administration of trusteeship territories.[620] The UN Charter establishes the General Assembly's supervisory functions over the administration of the Government of South Africa over the territory of Southwest Africa in order to protect peoples' rights to self-determination as "the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory."[621] The International Court of Justice stated unequivocally that, following the General Assembly's declaration of the termination of South Africa's mandate under UN General Assembly Resolution 2145 (XXI), paragraph 4, South Africa lost the right to continue administering the Territory of South West Africa.[622] In addition, the court stated that UN Security Council Resolutions 264 (1969) and 276 (1970) had cumulative effect. In this regard, paragraph 3 of Resolution 264 (1969) demanded that South Africa withdraw its administration of Namibia immediately. As a result, the declaration in paragraph 2 of UN Security Council Resolution 276 (1970) that "the continued presence of South African authorities in Namibia is illegal" was confirmatory. Following the termination of the mandate, all actions taken by the South African government on behalf of or concerning Namibia became illegal and invalid as a result of UN Security Council Resolution 276

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[618] Ibid, p. 24, para 69

[619] Ibid, p. 25, para 71

[620] Ibid, p. 25, para 72

[621] Ibid, p. 25-26, para 72

[622] Ibid, p. 38, para 105

(1970).[623] The court concluded that "*the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), relating to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its articles 24 and 25."*

The court ruled that South Africa bears international responsibilities for continuing to violate an international obligation by maintaining an illegal situation and occupying the territory without title, and that "physical control of a territory, rather than sovereignty or legitimacy of title, is the basis of state liability for acts affecting other states."[624] The legal effect of the preceding Resolutions was binding on all United Nations Member States, and those States were obligated to follow the provisions of those Resolutions.[625]

The two preceding case laws concern the right of peoples to self-determination under the UN Charter, as stated in Article 73 and UNGA Resolution 1514 (XV) of 1960.They were intended to facilitate decolonization and self-rule for indigenous peoples in both colonial and trusteeship-controlled territories. The United Nations, through its competent organs such as the General Assembly, Security Council, and International Court of Justice, emphatically rejected such an attempt.

Territories designated for self-rule or administered by caretaker states were not supposed to be annexed or dominated by other states, instead they were to gain self-rule because of their peoples' right to self-determination. In other words, once decolonization and territorial independence were achieved, the goal of international law, as outlined in UN

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[623] Ibid, p. 39, para 107-108

[624] Ibid, p. 42, para 118

[625] Ibid, p. 41 para 115

Charter Article 73, was also established. The preceding two case laws show that the right of peoples to self-determination under UN Charter Article 73 (e) and UNGA Resolution 1514 (XV) of 1960 was only intended to achieve decolonization.

5.7 Common Legal Principles for Territorial Secession and Right of Self-Determination

Territorially, the right of self-determination of peoples was bolstered by the UN Charter in Article 73, including the two legal doctrines, namely the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960),[626] and Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970),[627]which guaranteed an indiscriminate right to self-determination. The international law statutes, particularly those containing provisions on the right to self-determination, such as the ICESCR and ICCPR appear authoritative in providing undiscriminating legal remedy to all peoples on all forms of self-determination. In contrast, the implied intention of granting peoples the right to self-determination under international law in line with the UN Charter Article 73, and the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960),[628] and Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970),[629]suggests that the drafters' *consensus ad idem* was intended to specifically support territorial decolonization.[630]

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[626] 'UN GA Res. 1514 (XV) of 14 December 1960 (n 5)'

[627] 'UN GA Res. 2625 (XXV) of 24 October 1970 (n 71)'

[628] 'UN GA Res. 1514 (XV) of 14 December 1960 (n 5)'

[629] 'UN GA Res. 2625 (XXV) of 24 October 1970 (n 71)'

[630] Christian Tomuschat, '(n 7), pp,22-23

Most states have been observed to reject the idea of territorial secession or dividing of their landmass because of such demands, an attempt to effect territorial secession without the parent state's consent have frequently resulted in the use of force or rebellion against the state.[631]

The use of force is impactful and has negative consequences for the civilian population; as a result, it violates the core objectives for which the United Nations was established; these two main objectives are the maintenance of international peace and security, and the promotion of the economic and social welfare of all peoples while respecting human rights, thus undermining the organisation's core reasons for existence.[632] The UN Charter Articles: 1(2), 55, and 73, the relevant concerned with the right of self-determination of peoples, these rules contain principles that all UN Member States are bound to follow.[633] Despite the fact that international law recognizes the right of self-determination of peoples, the "territorial" claims as the right of self-determination, particularly secession, remains the most contentious aspect of self-determination.[634] According to Siroky, secessionist demands usually spark an armed conflict between them and the state, resulting in deaths and violations of human rights.[635] Most states would respond to the secessionists' demand by claiming that they are "enemies of the state," with the intent of destroying the

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[631] Malcolm N. Shaw, 'Peoples, Territorialism and Boundaries'(1997), *European Journal of International Law, Vol.3*, pp.478-507, <http://ejil.org/pdfs/8/3/1457.pdf> Accessed 18 August 2019

[632] ''UN Charter 1945 (n 4), , preamble'

[633] Ronald St. J. Macdonald, 'Charter of the United Nations as a World Constitution' International Law Studies, Vol. 75, pp. 264-300, <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1426&context=ils> Accessed 18 August 2018

[634] 'Glen Anderson, (n 95), pp. 346-394'

[635] David S. Siroky, 'Secession and Survival: Nations, States and Violent Conflict'(2009), (PhD Thesis, Department of Political Science, Duke University, p 1; <https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/3209/DmainD6-29-09.pdf?sequence=1> Accessed 3 August 2019

very fabric of state unity, and thus should be despised by all citizens. Similarly, Okoronkwo observes that, in most cases, secession has been the source of domestic armed conflicts and persistent warfare, resulting in devastating serious violations of human rights for civilians.[636]

Despite the fact that there is only one right of peoples to self-determination, the UN Charter approach to achieving this right is clearly stated in Article 73 of the UN Charter and reinforced by UNGA Resolution 1514 (XV) 1960, which specifically supported decolonization.[637] The other approach to peoples' right to self-determination is encapsulated in the two other UN Charter Articles dealing with the right to self-determination, found in Articles 1(2) and 55, and is observed to relate to the principles of equal rights and liberties, these being liberties to pursue economic, political, cultural, civil, and social rights, they are connected to the ICCPR, and ICESCR, with direct source to the UN Charter's objectives, spelled out at Article 55.[638]

Territorial secession is not explicitly provided for in international legal doctrines relating to self-determination, but in practise, it is implicitly acceptable where it is used as a remedial measure against a state that routinely violates its citizens' human rights, as the affected peoples' right to self-determination. Nanda describes territorial secession as an "external right of peoples to self-determination."[639] Nanda, like Sterio *et al.*, observes that,

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[636] Pius L. Okoronkwo, 'Self-Determination and the Legality of Biafra's Secession under International Law' (2002), *Los Angeles International and Comparative Law Review, Vol. 25*, pp. 62-115 <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1537&context=ilr> Accessed 3 August 2019

[637] 'UN Charter 1945 (n 4), Art. 73'; 'UNGA Res 1514 (XV) (14 Dec 1960) (n 5)'

[638] 'UN Charter 1945 (n 4), Arts. 1(2) and 55'

[639] Ved P. Nanda, 'Self-Determination under International Law: Validity of Claims to Secede' (1981), *Case Western Reserve Journal of International law, Volume 13, Issue 2*, pp. 257-280 <https://core.ac.uk/download/pdf/214080749.pdf> Accessed 12 March 2019.

outside of the non-colonization scenario, other forms of people's right to self-determination did not acquire the express right to allow secession from the parent state.[640] As a result, territorial secession appears to be in conflict with the principle of territorial integrity enshrined in UN Charter Article 2(4). Even though territorial secession or the formation of new states is not expressly forbidden by international law, as was held in Kosovo Case.[641]

The territorial secession, undertaken as the right of self-determination by the peoples, invokes two main aspirations of the peoples in international law: first, the right to freedom, including self-rule, and second, where human rights abuses have been persistent against the peoples, the formation of own state and government through territorial secession as an independent state is impliedly permissible.[642] Scholarly discourses on the relevance and relationship between the right of peoples to self-determination and territorial secession have always emerged, but mostly as a rebutting discourse. These arguments concern what the term "peoples" means, given that it has never been defined in international law, as well as how to deal with the right of peoples to self-determination found in legal doctrines, where all "peoples" have the right to self-determine themselves.[643] These disagreements have only added to the confusion surrounding this legal right, which has been extensively researched by scholars but remains unresolved. Schwed rightly pointed out that, *'it is*

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[640] 'Milena Sterio, (n 7), 11'

[641] *See Kosovo, Advisory Opinion, ICJ Rep 403, (n 110), para 95';* David Raic, (n 94), 2'.

[642] 'Christine Griffioen 'Self-Determination as a Human Right: The Emergency Exit of Remedial Secession' (PhD Thesis, Utrecht University, 2010). <https://www.peacepalacelibrary.nl/ebooks/files/335882129> Accessed 8 October 2019.

[643] Onyeonoro S. Kamanu, 'Secession and the Right of Self-Determination: An O.A.U. Dilemma.' (1974), *The Journal of Modern African Studies, Vol. 12, No. 3,* pp. 355–376 <www.jstor.org/stable/159938> Accessed 19 December 2020

certain that a peaceful resolution will not be possible without a careful analysis of the United Nations' position regarding the scope of the right to self-determination'.[644]

In a post-colonization scenario, the UN's primary concern is territorial integrity as a state right and governance by the territory's own native peoples, rather than a people's right to self-determination through secession, as stated in UN Charter Article 73. As a result, many governments have become intolerant of secessionist demands, where self-rule exists outside of the context of decolonization.[645] Decolonization is not a perfect example of a peoples' external right to self-determination because independence from colonisation only involved a regime change from a non-native ruler who had imposed themselves on the local people and occupied their territory forcefully and were now to hand over administration to the native ruler. If decolonization is viewed as an external right of self-determination, regime change of a state's oppressive regime that violates its citizens' human rights should also be considered in equal measures, be considered as such, because the right of self-determination concerning territorial control should be evaluated not only through secession, but also through regime change, particularly *coup d'état*.[646] Weller argues that the doctrine of right to self-determination suffers from "simplicity and mono-dimensional application," in that it specifically does not admit emerging cases that

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[644] Alejandro Schwed, 'Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute' (1982), *Fordham International Law Journal, Volume 6, Issue 3, Article 3*, p.445 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1073&context=ilj> Accessed 20 May 2020

[645] James Crawford, '*The Right of Self-Determination in International Law: Its Developments and Future*, in Philip Alston (ed.), *Peoples' Rights*, Collected courses of the Academy of European Law, European University Institute, Oxford University Press, *2001*, IX/2, pp. 7-68, <http://hdl.handle.net/1814/2904> Accessed 3 January 2019

[646] If the apartheid regime in South Africa was considered illegitimate and harmful to the indigenous peoples, can an overthrow of a retrogressive government or a dictatorship regime through *coup d'etat* be acceptable under the provisions of the UN Charter in Article 73 and UN General Assembly Resolutions 1514 (XV) of the 1960?

are relevant to this rule in the contemporary world, and thus is to blame for contributing to the conflict rather than helping to resolve this confusion.[647] This study observes that colonial administrators partitioned the African continent into colonial territories without considering the natives' distinct tribal affiliations, which had existed for centuries prior to colonisation, and for which had demarcated the national tribal administrative boundaries. During the colonisers' partitioning of Africa, different tribal communities were forcibly grouped together under one unit territory against their will to form a unitary colonial administration. Internal conflicts have resulted, many of which have persisted, some of which have resulted in armed ethnic tensions, which in some cases have led to genocide, like that witnessed in Rwanda in 1994.[648] Decolonization was intended to provide relief to territories by achieving desired self-determination of nations and peoples, through preservation of human rights, particularly in Africa, but this has been rarely achieved. In general, the right of the people to self-determination may appear to have been realised, through economic, cultural, and social developments, but in terms of individual rights, which the right to self-determination was supposed to cure, through upholding of the human rights standards, deteriorated further in most African states after the independence of the colonised territories.

Most states emerging from colonial administration, particularly those in Africa, practised autocratic rule, this resulted in numerous civil wars and *coup d'état* which had to replace some autocratic regimes, unfortunately some of these power transfers were primarily

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[647] Marc Weller, 'Settling Self-determination Conflicts: Recent Developments (2009), The European Journal of International Law Vol. 20, No. 1, p. 112

[648] Makau wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) *Michigan Journal of International Law, Vol.16, Issue 4, pp. 1113-1175* <*https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1522&context=mjil*>Accessed 13 July 2019

motivated by tribal allegiances.[649] Svolik examined data and discovered that, between 1946 and 2008, coups accounted for 68 percent of government changes, with authoritarian regimes dominating. Only 11% of regime changes were the result of popular uprisings, 7% were the result of ruler assassination, 5% were the result of foreign intervention, and 10% were the result of democratic transition, with the majority being former colonial territories.[650] The foregoing analysis supports the claim that there have been issues with governance styles following decolonization as achieved under the UN Charter, Article 73, which has been a key legal principle advanced by some legal scholars advocating for decolonization as an external aspect of peoples' right to self-determination.

Another challenge is that the right to self-determination in international law has never been clearly defined in terms of whether it supports or prohibits territorial secession. For this reason, there is still a gap in international law in cases where a territory has seceded as part of this right. Ordinarily, legal principles on the right of peoples to self-determination expressly demonstrate that the doctrine is concerned with providing rights to peoples' well-being by ensuring a high standard of living and protecting human rights. However, secessionists continue to use the term "right to self-determination" to refer to their demand for an external right to self-determination through territorial secession, because they believe that this right includes the right to secede.[651] As the saying goes, "where there is a right, there is a remedy," secession is arguably a desired remedy to the

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[649] Jimmy Carter, 'Ethnicity, Human Rights and Constitutionalism in Africa', "We have become not a melting pot but a beautiful mosaic. Different people, different beliefs, different yearnings, different hopes, different dreams" (The Kenyan Section of the International Commission of Jurists, Nairobi, 2008), pp. 5-243

[650] Milan W. Svolik, 'The Politics of Authoritarian Rule (CUP, New York, 2012), p. 5

[651] Sara Zaric, 'The Principle of Self-Determination and the Case of Kosovo'(2013), (Master Thesis in Public international law, Stockholm University) pp. 45-52, <http://www.diva-portal.org/smash/get/diva2:694349/FULLTEXT01> Accessed 14 January 2019

endless injustices against the peoples. Another difficulty is that the debate over the right of peoples to self-determination is complicated by the fact that the term "all peoples" has never been defined in international law; the quandary persists because of a lack of legal definition on who are the peoples and what are their explicit rights in international law.[652]

Hunnun argues that, under international law, there is no right of people to secede from territories unless the practice has a political ramification.[653] Hanna concurs with Hunnum, by claiming that secession is a constitutional violation under international law because international law only promotes the principle of state sovereignty.[654] Buchanan, on the other hand, believes that the right to territorial self-determination arises, but where it is protected by the international law in a narrow window, particularly where violations of human rights are evident, and that as a result, the secession of a territory could be undertaken as a last resort.[655]

Territorial secession in right of self-determination has an ambiguous definition of who are the "peoples" this has judicially continued to evoke undertones of law and practice contradictions. It is clear that the lack of an agreeable definition of "whom" the peoples are and what rights they should self-determine has made it structurally difficult in interrogating the legal entitlement to the scope of the peoples' right to self-determination by the researchers.[656] Territorial secession could legally occur as a legal remedy to

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[652] Ahsan I. Butt, 'Secession and Security: *Explaining State Strategy against Separatists'* (Cornell University Press, London, 2017), p. 29

[653] 'Hurst Hannum, (n 223) '

[654] Roya M. Hanna, "Right to Self-Determination in Re Secession of Quebec" (1999), *Maryland Journal of International Law, Vol. 23, No. 1,* p. 217.

[655] 'Allen Buchanan, (n 544), p. 35'.

[656] 'James Crawford (n 16), 434'

violations of human rights against the peoples, *ubi jus ibi remedium*, in international law, but the peoples can only decide to pursue territorial secession as a last resort, particularly where a state commits human rights violations against them.[657]

The arguments that secession is permissible as a last resort where human rights violations against peoples have been rampant are not provided for in international law and can only be based on morality and legitimacy to view for the right to secede, or as a *de lege ferenda*, so to speak; however, in contemporary law, secession is thus an act without supporting law. Territorial secession has been observed in some cases to occur in exceptional circumstances, even when there are no claims of violations of human rights or denial of people's rights.[658] The former Soviet Union's disintegration resulted in the secession of some of its territories, and the disfranchised former Soviet Union territories became new sovereign states.[659] This demonstrates that territorial secession is not always happening as the result of a violation of human rights in a remedial circumstance but can also happen without the claims of human rights abuses. Because there has never been an explicit legal framework or structure outlining how self-determination can be legally achieved, secession as a territorial right of peoples to self-determination continues to face monumental legal and practical challenges regarding whether this act is legally permissible under international law.[660] The lack of clarity on the right to secede has created

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[657] Juan Francisco Escudero Espinosa, (n 60) p. 158

[658] Mia Abel, 'Is There a Right to Secession in International Law?' (May 2020) <https://www.e-ir.info/2020/05/18/is-there-a-right-to-secession-in-international-law/> Accessed 12 December 2020

[659] Jure Vidmar,'Remedial Secession in International Law' (2010), *St Antony's International Review, Vol. 6, No. 1*, pp. 37–56 <www.jstor.org/stable/26227069> Accessed 19 December. 2020

[660] Ilya Berlin, 'Unilateral Non-Colonial Secessions: An Affirmation of the Right to Self-Determination and a Legal Exception to the Use of Force in International Law (Master thesis, The University of Western Ontario 2017), pp. 72-74 <https://ir.lib.uwo.ca/etd> Accessed 20 May 2019

a vacuum, resulting in a bloody conflict between states and those who demand secession as a right of self-determination. The ensuing standoffs have resulted in breaches of international peace and security in some cases, particularly where they result in violations of human rights. It is arguable that the inclusion of the right of peoples to self-determination was a historical accident resulting from Wilson's speech on self-determination to the US Congress, which influenced the inclusion and importation of political principle to become legal rule in the UN Charter in 1945.[661] Borgen appears to agree that there is a gap in international law due to a lack of clarity on whether peoples have the legal right to secede.[662] Crawford claims that secession as a right to self-determination was intended to be realised through annexation of territory to form a federated state with some autonomy but full control of the parent state, or assimilation of territory into a unitary state, rather than formation of a new sovereign state.[663] Kohen observes that this right, however, has remained devoid of a universal legal framework and infrastructure that can be identified as a legal path that supports people's self-determination.[664] Cassese, on the other hand, contends that the significance of UN Charter Article 73, relating to the right of peoples to self-determination, appears to have been intended by the drafters of the UN Charter to apply only to territories under colonisation, and that once these territories gained independence, this right was to be regarded as spent.[665] This section has established that secession, if advanced as a right of peoples to

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[661] 'Christopher Borgen (n 45), p. 198'; See, also Woodrow Wilson's "Fourteen Points"<http://web.ics.purdue.edu/wggray/Teaching/His300/Handouts/Fourteen_Points.pdf> Accessed 16 October 2019.

[662] 'Christopher Borgen (n 45), p. 198'

[663] 'James Crawford (n 16), p. 141'

[664] Marcello Kohen, (n 83), p. 3

[665] 'Antonio Cassese, (n 84), pp. 328-329'

self-determination, is not supported by these rules, particularly considering that UN Charter Article 73 and UN General Assembly Resolution 1514 (XV) of 1960, given that the two legal instruments' function was to assist colonised territories and those that were not yet self-governing in becoming independent states.

5.8 Territorial Secession as a Method of Achieving Right of Self-Determination

The academic discourse surrounding territorial secession suggests that secession is one of the means of exercising peoples' right to self-determination which entails the territorial split of the parent state, with the breakaway territory gaining *de-facto* entity status or statehood.[666]

The secession of territories, as a right to self-determination of peoples, is a contentious issue in both international law and politics, because, on the one hand, it is regarded as a fundamental human right, providing the freedom to choose one's own destiny. But in practice however, the peoples frequently face challenges from states that have not accepted the concept of secession to be a right,[667] Sterio argues that self-determination rights, particularly the rights of the minority groups, if consistently violated can justify the remedial secession of a territory they occupy, for them to form their own independent state.[668] Territorial secession, exercised as a people's right, is the most difficult type of self-determination to achieve because it obligates the state to shrink in size, as well as cause the state to give away all investments and development made to the seceding territory, and thus politically dents the image of the government and state leadership

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[666] Ieva Vezbergaite, 'Remedial Secession as the Right to Self-Determination of Peoples' (2011), (Master Thesis, Central European University, Budapest,) pp. 15-18 and 31-34.

[667] 'Michele Capeleto, (n 545)'

[668] 'Milena Sterio (n 15), p. 9'

whose watch the secession occurs. In practice, territorial secession in self-determination is linked to other legal theories and political implications relating to statehood, recognition as a state for the separating entities, and territorial sovereignty, whose attainment is dependent with other states. Godorozha observes in his thesis that the legal theories in the right of self-determination are the result of competing doctrines of international law, which he criticises to as states' foreign policies for allowing their individual foreign policies to play a larger role in influencing the direction in which international law acquires its dimensions.[669]The UN Charter, legal provisions in Articles 1(2), 55, and 73, as well as UN General Assembly Resolutions 1514 (XV), only support self-rule of colonially freed territories and were "a magical device" that contributed enormously to the decolonization of territories and allowed indigenous peoples to access self-rule.[670] However, outside of the scope of independence from colonialism, the right of peoples to self-determination has not been successful and continues to stimulate discussion about its practicality both from political and legal standpoint.[671] More often than not, territorial secession is accomplished against the backdrop of armed conflicts that involve violations of human rights.

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[669] Vadim Anatolyevich Godorozha, "On the Development of the Law of Self-Determination from External to Internal Aspects" (2016). (Doctorate Thesis), Golden Gate University School of Law GGU Law Digital Commons, Theses and Dissertations. Paper 68, p. 36 <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1068&context=theses> Accessed 15 July 2020

[670] 'UNGA Res. 2625 (XXV) 1970 (n 71)'; 'UNGA Res. 1514 (XV) 1960 (n 5), and 'UNGA Res. 1541 (XV) 1960 (n 553)'

[671] Amy Maguire, 'Contemporary Anti-Colonial Self-Determination Claims and the Decolonisation of International Law' (2013), *Griffith Law Review Vol. 22 Issue 1*, pp. 238-240. <https://www.tandfonline.com/doi/abs/10.1080/10383441.2013.10854774>Accessed 12 May 2019

This section examines the practises used by peoples to exercise their right to self-determination through secession.

5.9 An Overview of Some Territorial Secession Cases

5.9.1 The South Sudan Case

Sudan's armed conflict was one of the longest and most protracted in Africa, and it ended in 2005 with the separation of South Sudan from Sudan, this followed a peace negotiation and the signing of the Comprehensive Peace Agreement (CPA) between the territory of South Sudan and the State of Sudan, which resulted in the holding of a plebiscite of Southerners to secede.[672] The Nilotic native Southerners, who were primarily Christian and some of them traditionalist secular believers from the South, held a secession referendum in 2011. The outcome of the referendum favoured separation from the Cushitic Northerners, predominantly Muslims, from the Nilotic Christians and traditionalist southerners.[673]

Historical, and prior to the separation of South Sudan from Sudan, the Nilotic and Cushitic Sudanese had developed hatred and enmity between their two communities, the origin of feuds could be traced to concern religious, political, economic, cultural and social discriminations against the Nilotic southerners, who had been neglected and viewed as second-class citizens.[674] The separation had occurred as a result of the never-ending war

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[672] Einas Ahmed, 'The Comprehensive Peace Agreement and the Dynamics of Post-Conflict Political Partnership in Sudan.' (2009), *Africa Spectrum* Vol. *44, Issue No. 3*, pp. 133-47 <http://www.jstor.org/stable/40607827> Accessed 20 May 2019

[673] Bronwen Manby, '*The Right to a Nationality and the Secession of South Sudan: A commentary on the impact of the new laws*.'(2012), Nairobi: Open Society Initiative for Eastern Africa, pp. 1-39, <https://www.opensocietyfoundations.org/uploads/22a26ffd-bb6b-40a9-ad33-e202b48b76c3/right-nationality-and-secession-south-sudan-commentary-20120618.pdf> Accessed on 20 February 2020

[674]Hilde F. Johnson, 'South Sudan: The Untold Story from Independence to Civil War' (I. B. Tauris & Co. Ltd, New York, 2016), pp. 1-15

between South Sudan and Sudan before being brought into negotiation at a negotiating table by regional leaders in Naivasha, Kenya, where a deal to "divorce" Sudan and its people from the South was agreed upon. However, the domestic war had already resulted in the deaths of an estimated two million people who had been killed in a 25-year-long armed conflict in the South.[675]

5.9.2 The Eritrean Case

In 1889, Italy took advantage of the uncertainty caused by Emperor Yohannes IV's death to occupy the Highlands with the assistance of Eritrean auxiliaries. Menelik II, the new Ethiopian monarch, approved the occupation. On 1 January 1890, the Italian king announced the establishment of the colony of Eritrea, which took its name from the ancient Greek name for the Red Sea, Erythreus. Massawa was the capital of the new colony until 1897, when it was replaced by Asmara.[676] Eritrea was initially administered by Italy before becoming a part of Ethiopia in 1952. Eritrea was federated with Ethiopia in 1952 under a United Nations mandate as a largely autonomous, self-governing territory with legislative, executive, and legal powers over its own domestic affairs, following chronic partisan wranglings, surges of violent extremism, and foreign canvassing.[677]

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[675] Ian Fisher, *"Oil Flowing in Sudan, Raising the Stakes in Its Civil War" (The New York Times,* 17 October 1999). <http://www.nytimes.com/1999/10/17/world/oil-flowing-in-sudan-raising-the-stakes-in-its-civil-war.html?mcubz=3> Accessed 20 September 2019.

[676] See Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, Human Rights Council, Twenty-ninth session, (A/HRC/29/CRP. 1) of 5 June 2015. Agenda item 4, Human rights situations that require the Council's attention Italian colonization (1890-1941), pp. 67-70 <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoIEritrea/A_HRC_29_CRP-1.pdf> Accessed 20 July 2020.

[677] Gebru Tareke, 'The Ethiopian Revolution: War in the Horn of Africa'(Yale University Press, New Haven & London,). pp. 57

The elected assembly was suspended in 1956, and all political parties were outlawed, with their key leaders imprisoned, eliminated, forced into exile, or bought off with honours. Labour and other civic organisations were also prohibited, as was open dissent and the press. Tigryan language was abandoned, and Amharic was proclaimed the sole official language, and it is the only one taught in public schools. After two years, the Eritrean state's symbols, the flag and seal, were abandoned. The infiltrating annexation of territory and systematic dismantling of civic and political establishments in Eritrea. The ten-year-old federation was dissolved on 14 November 1962, after an obedient chamber obediently gave consent to its dissolution. Eritrea would become a common province in the domain of Ethiopian imperial authoritarian rule.[678] Eritreans would later engage Ethiopia in a prolonged armed civil war for self-determination, Eritrea's separation from Ethiopia in 1993 following a thirty-year civil armed conflict in which hundreds of thousands of civilians were killed.[679]

5.9.3 The Biafra Case

The Republic of Biafra was a secessionist state in former Eastern Nigeria that existed from 30 May 1967 to 30 January 1970. This was due to the former Eastern region's infighting, which was dominated by the Igbos, who led the secession, following power struggles that led to a stream of coups, primarily pitting the Muslim northerners and Christian southerner's coup leaderships.[680] After the July 1966 revenge coup, the North turned

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[678] Ibid, at p. 58

[679] Alexandra Magnolia Dias, 'An Inter-state War in the Post-Cold War Era: Eritrea-Ethiopia (1998-2000)' (PhD Thesis, London School of Economic and Political Science, London, 2008, UMI Number: U501303) <https://core.ac.uk/download/pdf/46518773.pdf> Accessed 29 June 2019.

[680] Jideofor Adibe, 'Biafran Separatist Agitations in Nigeria: Causes, Trajectories, Scenarios and the Way Forward' in Secessionist Movements (2017) Centre for Democracy and Development, Vol 5. No.1. pp. 4-5

against the Igbo, and the refusal of Col. Emeka Ojukwu, the military Governor of Eastern Nigeria, to recognize Col Gowon, a Christian from the Middle Belt, as the new Head of State, set in motion a chain of events that culminated in Ojukwu's declaration of the Republic of Biafra and the resulting 30-month civil war. During the two-and-a-half years of war, an estimated 100,000 military casualties occurred, while between 500,000 and two million Biafran civilians died of starvation. Only when Biafran troops agreed to surrender, the federal government, led by General Gowon, announced that there was no victor or loser and started the painful process of re-integrating the Igbos into Nigerian society.[681] The case of Biafra in Nigeria was the first to advocate for secession in Africa.

The UN disassociated itself from the concept of territorial splits of its Member States' territories through acts of secession at the time. In 1970, shortly after the end of the Biafra war, former UN Secretary-General U Thant stated, "The United Nations has never accepted, does not accept, and I do not believe it will ever accept the principle of secession of a part of its Member State." U Thant rejected any demand for the right to self-determination centred on secession, alluding to Biafra's attempted secession from Nigeria as unacceptable.[682] According to Nanda, the principle of territorial integrity has been working against the modern international system in terms of secession. As a result, any opinion that encourages territorial separation is viewed as disruptive by states and is rejected because it contradicts the state-centric system.[683]

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[681] ibid

[682] UN Secretary-General U Thant notably stated in 1970., That the United Nations, as an international body, never had approved, and he does not think that will ever recognize, the concept of secession of a section of a (UN) member state territory ('Press Conference in Dakar, Senegal,' 4 January 1970, 36)

[683] 'Ved P. Nanda (n 649),'

Secession cases, however, have continued to be witnessed, with or without the consent of the parent state. Abkhazia is one such territory,[684] South Ossetia,[685] Lugansk and Donetsk[686]These are some of the *de-facto* territories that have seceded without the consent of their parent states, even though they have been largely denied state recognition.

Territorial secession appears to contradict two irreconcilable principles of international law: the principle of territorial integrity, known as *"ius territorii,"* and the right of peoples' self-determination.[687] The right of peoples to self-determination, as guaranteed by the UN Charter and related legal rules, does not provide a legal framework for the practical process of secession. In contrast, the doctrine of *ius territorii* does not consider situations in which the peoples' right to self-determination would require that a portion of a state's territory secede to form its own state. Conflicting norms in international law. Pauwylen argues that this has contributed to challenges to not only the right to self-determination, but also to other legal principles of public international law.[688] When confronted with demands for secession as a right to self-determination by a segment of their population, states have frequently invoked their rights to territorial integrity and frontier preservation; however, the principle of territorial integrity appears to contradict the right of peoples to self-determination. For example, Kenya has demonstrated intolerance toward any demand for secession of its territory, as seen in 2014, with the use of excessive force to silence the

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[684] Susanna Baghdasaryan and Svetlana Petrova, "The Republic of Abkhazia as An Unrecognized State" (2017), *Russian Law Journal Volume 5, Issue 1*, pp. 98-118.

[685] 'Marcello Kohen (n 83), p. 114'

[686] 'Christopher Borgen (n 45), pp. 216-218'

[687]UN Charter 1945 (n 4), Art 2(4)', 1(2), 55'

[688] Joost Pauwelyn, 'Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of

International Law' (CUP, Cambridge, 2003), p. 6

Mombasa Republican Council (MRC) in 2014. Similarly, the Wallaga massacre in Kenya 30 years ago of northerners demanding secession calls into question the legality of secession as a means of realising the right of peoples to self-determination under international law.[689]

Walter and Ungern-Sternberg postulated that international law recognizes a right to remedial secession in response to gross human rights violations where the state fails to provide protection to the people, because of the ever-increasing importance of human rights, as a failure of the state's responsibility to protect. As a result, whenever a state fails to protect its citizens from human rights violations, it loses legitimacy. [690] The notion that international law recognizes secession as a remedial right to self-determination, on the other hand, is a contentious proposition; there is no tangible evidence in international legal doctrines that directly supports such an argument. Except for scholars' implied interpretations found in various human rights international declarations on the rights of self-determination of peoples, and international law legal doctrines. Some scholars, including Martinenko, argue that Article 76 (b) of the UN Charter, which states that territories under trusteeship must be allowed to self-govern or gain independence, directly allows secession of territories where the secessionist cause is justified, particularly based

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[689] Abdi Latif Dahir, "Kenya's Wagalla massacre 30 years later: *Survivors of the mass killing are upset the government has not brought the killers to justice."(27 Feb 2014),* <*https://www.aljazeera.com/indepth/features/2014/02/kenya-wagalla-massacre-30-years-later-201422682831165619.html*>Accessed 6 March 2019*;* Roopa Gogineni, *"MRC Chairman Released from Kenya Prison" (2012),* Voice of America (VOA) Africa, News, 15 November 2012. <https://www.voanews.com/a/mrc_chairman_released_from_prison_in_kenya/1546671.html> Accessed 6 March 2019.

[690] Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), 'Self-Determination and Secession in

International Law' (OUP, New York, 2014), p. 6

on human rights violations.[691] Some legal scholars, including Eastwood, disagree, claiming that under international law, there is no such thing as a right to secede. Eastwood and others argue that for territorial secession to be recognized as a principle of customary international law, several criteria related to state practice must be met. For example, secession must be widely recognized by the states over a long period of time through continuous or repetitive practice. Second, there should be legal authority supporting the secession proposal, and third, a new rule of customary international law must be discovered to have established that there is widespread and uniform state practice establishing general acceptance of such a rule. Fourth, the customary behaviour of states must reveal the existence of an international legal principle relating to the asserted right.[692]

Territories that secede from their parent states without consent are never tolerated in the post-colonial independence scenario, both internationally and internally within the concerned state.[693] In Iraq, intolerance has been observed in relation to the denial of Kurdistan's right to hold a referendum on secession,[694] and also in Spain with respect to Catalonia's referendum vote.[695] The United Kingdom, on the other hand, allowed Falkland and Scotland to hold secession referendums. The United Kingdom's consensual approach

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[691] Alexander Martinenko, 'The Right of Secession as a Human Right' (1996), *Annual Survey of International & Comparative Law, Volume 3, Issue 1 Article 3*, p. 22

[692] Lawrence S. Eastwood, Jr., (n 8), p. 301 <https://core.ac.uk/download/pdf/62547818.pdf> Accessed 17 August 2019

[693] Matthew Craven, 'Statehood, Self-Determination and Recognition.' In: Evans, Malcolm D., (ed.), International Law 3rd ed. (OUP, Oxford, 2010), pp. 203-251.

[694] Mina Aldroubi, "Iraqi parliament rejects Kurdistan independence referendum: The decision will give authority to Iraq's prime minister Haidar Al Abadi to take all necessary measures to preserve Iraq's unity, said parliamentary speaker Salim Al Juburi" (12 September 2017) <https://www.thenational.ae/world/mena/iraqi-parliament-rejects-kurdistan-independence-referendum-1.627743> Accessed 19 June 2019

[695] BBC News, "Spanish parliament rejects Catalan independence vote" (9 April 2014), <https://www.bbc.com/news/world-europe-26949794> Accessed 16 September 2019

to secession is viewed as abnormal in which the state agreed to secessionist referendums without opposition.[696] Indeed, in his speech following the Scottish referendum, former UK Prime Minister David Cameron stated that "the UK government could have blocked the Scottish referendum, but the UK government decided not to interfere."[697]Ethiopia's constitution allows for territorial secession as a form of peoples' right to external self-determination.[698]Article 39 (4) (1) of the Ethiopian constitution of 1995 provides for the right to secede; any of its regions wishing to secede can hold a referendum, which must be organised by the federal government within three years of notice to secede, but the public approval rate to secede must attract a two-thirds majority of Ethiopians. The lack of timelines for separation is one of the bottlenecks in the Ethiopian constitution. Even if the plebiscite receives a three-thirds majority, the entire process and consent to secede are at the discretion and in the hands of the state, which must decide on the secessionists' desire to exit. Another potential challenge may arise when the division of assets between the secessionist territory and the State of Ethiopia is required by law under Article 39(4). (e). Referendums in Spain can be called with the king's approval, according to Article 92

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[696] BBC News, "Falklands referendum: Voters choose to remain UK territory" (12 March 2013) <http://www.bbc.com/news/uk-21750909> ; BBC News, "Scottish referendum: Scotland votes 'No' to independence" (19 September 2014), <https://www.bbc.com/news/uk-scotland-29270441> Accessed 16 September 2019

[697]United Kingdom (UK) Government Website; Scotland Independence Referendum. Press release, a statement by the Prime Minister. David Cameron. (2014).<https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister> Accessed17 August 2019

[698] See The Federal Democratic Republic of Ethiopia Constitution (1995), Art. 39(1) allowing for secession, and the conditions in Art.39(4) (a),(b), (c),(d)(,e) which needs to be satisfied to enable secession, <http://www.icla.up.ac.za/images/constitutions/ethiopia_constitution.pdf> Accessed 29 April 2019

(2) of the Spanish Constitution, on the proposal of the president of the government and with the approval of the Congress of Deputies.[699]

However, given the failure of Catalan secession, it is unclear if secession can ever be approved. Ethiopia has a provision that allows any of the ethno-regions that make up the federated State of Ethiopia to secede. However, the conditions mentioned may be technically impossible to meet unless Ethiopia willingly allows secession.

In general, international law seems to be neutral, it neither supports nor prohibits territories from seceding to form their own states. However, international law has remained silent on whether a territory has the right to secede because of a state's mistreatment of its peoples, including for the reasons of violations of human rights. Some scholars argue that remedial secession of a territory is permissible when there is a genuine reason to do so, particularly when the state subjected a portion of its population to human rights violations.[700] Outside of the context of decolonization, where territories such as South and North Rhodesia (Zimbabwe and Zambia) were separated and attained independence as sovereign states, secession is extremely rare.[701] Article 73 of the UN Charter supports international law with regard to the right to self-determination in cases of self-governance or independence of a territory, and only directly involves cases of decolonization of territories to gain independence.

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[699] See Article 92 (2) of the Spain Constitution <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> Accessed 20 October 2020

[700] 'Milena Sterio (n 15), p. 19'

[701] 'Marcello Kohen (n 83), pp.472-473'

As another peaceful approach to secession, some secessionists are following the legal procedure in the courts of law and demanding secession. The East African Community court, did receive a petition from Zanzibar citizens who sued Tanzania, claiming that the union between Tanganyika and Zanzibar was not legally binding and that, as a result, the people of Zanzibar had the right to secede through their inherent right to self-determination of peoples through territorial secession.[702] Tanganyika and Zanzibar were two separate states that gained independence from the colonial power separately and were recognized as individual states until the two states formed a union in 1964 that gave birth to the United Republic of Tanzania.[703] The Tanganyika parliament passed the Act of Union during the unification period, but the Zanzibar State, for its part, did not use parliament to legitimise its unification with Tanganyika prior to being assimilated into Tanzania.[704] The people of Zanzibar, a Tanzanian semi-autonomous territory, signed a petition in 2018 demanding Zanzibar's unification,[705] Zanzibar's union with Tanganyika to form the United Republic of Tanzania violated Zanzibar's national law at the time, so the union had to be dissolved to allow Zanzibar to have its own self-rule. The cases of Zanzibar and Tanganyika are similar to Somalia and the Somaliland union, in which the

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[702] See Press Release of East African Court of Justice, Arusha, 19th September 2018, "Court disallows Application seeking to hear a case challenging the Union of Tanzania, in Zanzibar" <https://www.eac.int/press-releases/1219-court-disallows-application-seeking-to-hear-a-case-challenging-the-union-of-tanzania,-in-zanzibar>Accessed 13 July 2020

[703] See Tanganyika Act of Union 1964 (n 538)'

[704] Romuald Haule, 'Torturing the Union? An Examination of the Union of Tanzania and Its Constitutionality' (2006), Max-Planck-Institute, ZaöRV 66, pp. 215-233 <https://www.zaoerv.de/66_2006/66_2006_1_b_215_234.pdf> Accessed 3 March 2019

[705] East African Court of Justice, press release "Court disallows Application seeking to hear a case challenging the Union of Tanzania, in Zanzibar" (19 September 2018) <https://www.eac.int/press-releases/1219-court-disallows-application-seeking-to-hear-a-case-challenging-the-union-of-tanzania,-in-zanzibar> Accessed on 3 March 2019.

Somaliland parliament passed an Act of Union in 1961, but Somalia did not follow a similar process and never ratified the Act of Union.[706]

5.10 Common Reactions of States towards Territorial Secession

Whenever there is an armed conflict involving secession as a right of peoples to self-determination, the international community has demonstrated a lack of interest in interfering, resulting in weak intervention strategies incapable of preventing human rights violations. As a result, many people have died because of previous armed conflicts. For example, the Syrian civil war killed hundreds of thousands of people, with chemical weapons and other unconventional weapons used against the civilian population.[707] The failure of the United Nations and its member states to intervene directly to stop human rights violations in Syria exacerbated the suffering of the civilian population, and the targeted population was forced to take up arms for self-defence, even though they were no match for the powerful state machineries and military prowess.[708]

The lessons from these two secession cases demonstrate that states would reject any assertions from any segment of their citizens demanding territorial sovereign independence, regardless of the legitimacy of the separatist demands. This emphasises the fact that secession must be earned rather than given to those who demand it.[709] According

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[706] See Somaliland Act of Union 1961 <http://www.somalilandlaw.com/Act_of_Union_Law_No._5_of_31__January_1961.pdf> Accessed 3 March 2019

[707] Oluwaseyi Emmanuel Ogunnowo and Felix Chidozie, 'International Law and Humanitarian Intervention in the Syrian Civil War: The Role of the United States' (2020), pp. 1-11 <https://journals.sagepub.com/doi/pdf/10.1177/2158244020919533> Accessed on 20 November 2020

[708] Roland Paris, The 'Responsibility to Protect and the Structural Problems of Preventive Humanitarian Intervention (2014)', *International Peacekeeping, Vol. 21, No. 5,* pp. 569–603 <https://www.tandfonline.com/doi/pdf/10.1080/13533312.2014.963322?needAccess=true> Accessed 16 October 2019

[709] 'Brad Roth (n 184)'

to the researcher, territorial self-rule in the colonial context was not a proper way of exercising and evaluating the success of international law in terms of the right to self-determination. This is because people's ethnicity, social, cultural, or economic fundamental differences, if are pursued within ethnicity and tribal paths, can be viewed as major contributors to post-colonial States' experiences with internal conflicts and civil wars. This situation has been exacerbated by the state's right to territorial integrity, which directly contradicts the right to self-determination in cases where secession is necessary to address human rights violations. South Sudan's independence from Sudan and Eritrea's independence from Ethiopia are two of the few examples of when the right to external self-determination was achieved and territories admitted as UN member states, but this was against the backdrop of bloody wars, because of many years of armed conflict, which fatigued the concerned states into submission to consent to these secessions. Similarly, the separation of Pakistan and India from British India supports the reasons for religious and ethnic diversity in post-colonial British India.[710]

The African Union (AU) categorically rejects any form of external right to self-determination of peoples that results in secession. The AU's *uti possidetis juris* principle prohibits any African State from changing its borders.[711] Secession, on the other hand, remains extremely unpopular among the states. States' common approaches are to either

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[710] Roy Kaushik, 'Partition of British India: Causes and Consequences Revisited', (2014), *India Review, Vol.13 Issue 1*, pp. 78-86, <https://www.tandfonline.com/doi/abs/10.1080/14736489.2014.873681> Accessed 12 February 2019

[711] Constitutive Act of the African Union, Art. 4. <https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf>Accessed 25 November 2019

reject the idea entirely or, if necessary, to use force to subdue those who demand secession. Kurdistan, an Iraqi territory, and Catalonia, a Spanish territory, are two examples.[712]

Some states accept secession in their national laws, but the stringent conditions that must be met as legal requirements to secede make it impossible for succession to occur in a real sense. Ethiopia, for example, has enshrined in its constitution the external right of peoples to self-determination and secession.[713] When confronted with demands for secession, some states may reject the idea of total secession but may be willing to negotiate an alternative solution or counteroffer for internal self-determination. The case of Biafra, a Nigerian territory threatened with secession, is one example.[714] While other states would not hear any of it until unavoidable circumstances forced the actual secession to take place; examples include South Sudan, a former Sudanese territory, and East Timor, which was previously occupied by Indonesia.[715] As well as Abkhazia and South Ossetia, territories of Georgia,[716] and Kosovo[717] territory of Serbia. The United Kingdom's Falkland and

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[712] BBC News, 'Online news Catalonia Referendum: Does the Region want to leave Spain?' (28 October 2017),.<http://www.bbc.com/news/world-europe-29478415> Accessed 25 November 2019

Galip Dalay, 'After Kurdish Independence Referendum: How to prevent Crisis in Iraq'. (2 October 2017), <https://www.foreignaffairs.com/articles/middle-east/2017-10-02/after-kurdish-independence-referendum> Accessed 25 November 2019

[713] See 'Ethiopian Constitution (n 708) Art. 39(1), (4) (a) (b) (c) (d) (e)

[714] Brad Simpson, 'The Biafran secession and the limits of self-determination'(2014), *Journal of Genocide Research, Vol. 16, Nos. 2–3,* pp. 337–354, <https://www.researchgate.net/publication/265341466_The_Biafran_secession_and_the_limits_of_self-determination> Accessed 17 August 2019

[715] Markus Benzing, 'Midwifing a New State: The United Nations in East Timor, in Mark Planck, Yearbook of the United Nations Law', (2005), Vol. 9, pp. 295-372,<http://www.mpil.de/files/pdf2/mpunyb_benzing_9_295_372.pdf, > Accessed 14 June 2019

[716] Tracey German, 'Abkhazia and South Ossetia: Collision of Georgia and Russian Interests'. (2006), p. 13 <https://www.ifri.org/sites/default/files/atoms/files/germananglais.pdf> Accessed 24 November 2019

[717] Gary Wilson, '*Self-Determination, Recognition and the Problem of Kosovo'*, (2009), Netherland International Law review, Volume 56, Issue 3, pp.455-481 <https://doi.org/10.1017/S0165070X09004550> Accessed 24 November 2019

Scottish territories were granted permission to hold referendums for secession on what can be described as a very rare occasion, where secessionists were allowed to make their own choice on whether to divorce mother state or stay through a government funded referendum.[718] In ordinary circumstances, such an approach has been observed in many instances around the world, where exercising of the peoples' right to self-determination is restricted, especially those that resulted in territorial secession, has always been highly restricted and contested.[719]

In its advisory opinion on Kosovo's secession, the International Court of Justice (ICJ) held that the general international law contains no applicable prohibition on declarations of independence, and thus the unconfirmed declaration of independence which took place on 17 February 2008 did not violate the general principles of international law.[720] When the United States declared independence on 4 July, 1776, and was thus recognized by France, Britain objected to France's recognition of the United States as a state, claiming that a title to a territory or its recognition as a state cannot be recognized when that independence is

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[718] James Crawford and Alan Boyle, 'Annex an Opinion: Referendum on the Independence of Scotland – International Law Aspects'. (2012), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf> Accessed 17 August 2017; BBC News, "Falklands referendum: Voters choose to remain UK territory" (BBC news on 12 March 2013). <http://www.bbc.com/news/uk-21750909>; United Kingdom (UK) Government Website 'Scotland Independence Referendum. Press release, a statement by the Prime Minister. David Cameron. (2014). <https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister> Accessed 17 August 2019

[719] Francisco Gutiérrez Sanín. Tatiana Acevedo and Juan Manuel Viatela, 'Violent Liberalism? State, Conflict and Political Regime in Colombia (1930-2006)' *An Analytical Narrative on State-Making*, (2007), (Instituto de Estudios Políticos Relaciones Internacionales Universidad Nacional de Colombia, Crisis States Working Papers 19 Series No.2) pp. 2-73, <https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-two/WP19.2-state-conflict-and-political-regime-in-colombia.pdf> Accessed 20 January 2019; Sterio, Milena, 'Self-Determination and Secession Under International Law: The New Framework' (2015), Law Faculty Articles and Essays.pp. 294-299 <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1858&context=fac_articles> Accessed 20 November 2019

[720] See, Kosovo, Advisory Opinion, I. C. J. Reports 2010, (n 110) p. 403, para 84

obtained through a revolution, because secession is only legal if the parent state consents.[721] In response to Britain's accusation that it had recognized the independence of the United States in 1776, France maintained that the doctrine of effectiveness did not require the parent state's consent for a seceding territory.[722] In the nineteenth century, unilateral secession without the approval of the parent state was observed to have become a normal phenomenon and an acceptable principle, which was later confirmed by the ICJ in 2008 in Kosovo's unilateral declaration of independence.[723]

The researcher argues that territorial secession is not a breach on the part of the seceding territories under general principles (or rules) of international law, in despite that states generally refuse to accept secession as a right of self-determination. Even though the international law is silent on the legality, it can be concluded that territorial secession is neither legal nor illegal.

Indeed, Aureliu Cristescu, *(Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities)* stated that,

> *…." The right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories and entities subjugated in violation of international law. In such cases, the peoples concerned have the right to regain their freedom and constitute themselves independent sovereign States".*[724]

The researcher proposes that the International Law Commission (ILC), as the body that codifies new norms of customary international law, engage states in developing an

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[721] 'Peter Malanczuk, (n 76), p. 83'

[722] Ibid

[723] *Kosovo, Advisory Opinion, I.C.J. Reports 2010, (n 110) p. 403, para 74'*

[724] See Aureliu Cristescu, (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) (n 262), p. 26, para. 173

acceptable legal framework that would identify circumstances under which territorial secession can be achieved, considering the lack of an adequate legal framework.

Indeed, there is evidence that territorial secession has long been practised prior to, and after the Treaty of Westphalia in 1648, and that it continues to be practised even in the current international law dispensation, though in most cases it is realised under the infrastructure of armed conflicts through the use of force to achieve territorial secession, even though use of force is an act prohibited by international law.[725] The territorial secession practices events demonstrate that territorial secession is an old practised norm.[726]

Binder claims that self-determination is less widely accepted because it exemplifies the inherent tension between majority rule and minority separatism, given that the allied victors of WWI initially embraced separatism as a pragmatism rather than self-determination as a principle. They changed their minds following WWII, when they condemned separatism as reckless and illogical.[727] Furthermore, while decolonization established self-determination as a legal doctrine, it left nationalist secession without legal authority, exposing territorial secession's vulnerability and making it indefensible for the people as a component of the right to leave the mother state.[728]

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[725] Claus Kreß, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use Of Force' (2014), *Journal on the Use of Force and International Law, Vol.1 No.1*, p. 17, <https://www.iipsl.jura.uni-koeln.de/fileadmin/sites/iipsl/Forschung/Anlagen/14_Maerz_2015/zu15.pdf> Accessed 10 July 2019

[726] Li-Ann Thio, 'International law and secession in the Asia and Pacific regions' in Marcelo G. Kohen (Ed), *Secession: International Law Perspectives* (CUP, New York, 2006), p. 299

[727] Guyora Binder, 'The Case for Self-Determination', (1992), *Standard Journal of International Law. Vol. 29*, pp. 225-226 <https://digitalcommons.law.buffalo.edu/journal_articles/295> Accessed 15 January 2020

[728] ibid

5.11 Referendums' Role in Achieving Peoples' Self-Determination Rights

The plebiscite is one method of gathering the opinions of a large group of people to influence a decision. Referendums have become well-known in democratic states and are regarded as an acceptable method of making policy or political decisions. Referendums held by secessionists can be traced back to the 1860s, when several confederate states seceded from the Union in the United States, resulting in the American Civil War.[729] Norway held secessionist referendums in 1905,[730] and the Western Australia held an unsuccessful secession referendum in 1933.[731] Setala explains that, between 1940 and 2005, a combined total of 152 referendums took place in Europe alone.[732] The vast majority of recent referendums have been held for constitutional amendments, which legitimise changes or amendments to national laws.[733]

Secessionist referendums are uncommon under contemporary international law, considering that a referendum to secede would necessitate parental state consent as well as financial and logistical support.[734] Eritrea, which held an independence referendum in

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[729] Michael Dudley Robinson, 'Fulcrum of the Union: The Border South and the Secession Crisis 1859-1861' (2013), (Doctoral Dissertation, Louisiana State University and Agricultural and Mechanical College), pp.46-339 <https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=1893&context=gradschool_dissertations> Accessed 14 July 2019

[730] Michael Hechter, "The Dynamics of Secession." (1992), *Acta Sociologica, Vol. 35, No. 4*, pp. 267–283. <www.jstor.org/stable/4194789> Accessed 19 Feb. 2020

[731] See, Secession Referendum Act, 1932 (No. Preamble. 41 of 1932); Secession: The History of Secession Movement in Western Australia <https://www.wa.gov.au/sites/default/files/2019-10/Secession_0.pdf> Accessed 16 June 2020

[732] Maija Talvikki Setala, 'National Referendums in European Democracies: Recent Developments' (2006). *Representation, Vol. 42, No. 1,* pp. 16-20 <https://www.researchgate.net/publication/233032850_National_referendums_in_european_democracies_Recent_developments> Accessed 29 April 2019

[733] ibid

[734] 'Marcello Kohen (n 83), p. 7'

1993, was one of the successful cases in recent years,[735] Bosnia-Herzegovina in 1992,[736] Timor-Leste in 1999,[737] South Sudan in 2011[738] and Montenegro in 1992,[739] all of these territories are now recognized as States and members of the United Nations.[740] The referendums held by secessionists have introduced a new discourse into international law, legitimising the political process into achieving a legal right of peoples to self-determination.[741]

Secession referendums have grown in popularity and acceptance in recent years as a peaceful way for people to engage with the state and demand the right to self-determination. This approach contrasts with the use of force. In many cases, the use of force has resulted in confrontation and disruption of state management, and in most cases has resulted in many civilian deaths through civil wars, as seen in recent cases where regime change was pursued, such as in Syria, Yemen, and Libya.[742] There is no evidence that referendums have evolved into a legal rule of international law that can be considered a principle of international law, despite the fact that referendums are not codified as a customary international rule, they have been seen as a peaceful means of achieving

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[735] ibid

[736] Martti Koskenniemi, 'The Gentle Civilizer of Nations:The Rise and Fall of International Law 1870–1960' (CUP, Cambridge, 2004), p. 151

[737] 'Malcom Shaw, (n 66), pp. 232-234'

[738] 'Marcello Kohen (n 83), pp.4-5'

[739] ibid

[740] Yves Beigbeder, 'Referendum' (2011)', *Max Planck Encyclopaedia of Public International Law*'<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1088> Accessed 20 December 2020

[741] 'Marcello Kohen (n 83), p. 2'

[742] Louise Arimatsu and Mohbuba Choudhury, 'The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya Chatham House International Law, pp. 1-43 <https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf> Accessed 20 April 2019

peoples' opinion on their plans towards right to self-determination.[743] Sen observes that referendums legitimise sovereignty decisions and provide a moral perspective by demonstrating the consent of the governed in direct intervention of the people on issues that affect their lives.[744]

The impact of referendums can be seen as authenticating and transforming political opinion into a legal obligation. For example, when a referendum is used as a legitimate means of soliciting citizens' opinions on specific state law, the outcome has always influenced the legality of decisions such as the endorsement or rejection of a state's constitution.[745] The use of referendums in decision-making for political and legal opinions demonstrates that referendums cross the legal and political divides but belong to neither, and thus referendums serve as an authenticable legitimate expression by citizens to influence opinion or positively sensitise legal legitimacy.[746] The use of referendums as a process of legitimising peoples' right to self-determination remains an evaluative tool of public opinion that influences a political decision on a legal matter but has no legal bearing in itself.

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[743] Charles G. Thomas and Toyin Falola, 'Secession and Separatist Conflicts in Post-Colonial Africa' (University of Calgary Press, Calgary, 2020), pp. 23-67

[744] Ilker Gokhan Sen, 'Sovereignty Referendums in International and Constitutional Law' (Springer International Publishing Switzerland, 2015), pp. 33-34

[745] Stephen Tierney,' Reflections on referendums'(2018)', International IDEA Discussion Paper 5/2018, <https://www.idea.int/sites/default/files/publications/reflections-on-referendums.pdf> Accessed 22 January 2020

[746] 'Ilker Gokhan Sen, (n 754),14-26'

5.12 Conclusion

This chapter examined the right of self-determination of peoples, specifically the legality of territorial secession under international law's right to self-determination. The examination outcome established that territorial secession is neither prohibited nor approved by international law; however, under the international law, the act of territorial secession remains silent on its legality. This investigation also revealed that UN Charter Article 73, as well as UN General Assembly Resolutions 1514 (XV) and 1541 (XV), only address the decolonization of colonised territories. It has been observed that the UN has directly advocated for the right of peoples to self-rule in cases where the peoples were either colonised or subjected to mandatory trusts to gain independence, as stated clearly in the ICJ decisions on the right to self-determination of *East Timor, Western Sahara,* and *Namibia* case laws. The preceding laws mentioned above do not apply when it comes to regulating territorial secession in post-colonial situations.

This chapter also revealed that referendums can be used to demonstrate peaceful interest in seceding, but the challenge remains that referendums are not recognised by international law as a legal framework for achieving external self-determination, including secession, despite being widely regarded as a legitimate means for people to express their desire to make a specific decision in resolving issues that affect their lives. This chapter concludes that, while international law does not explicitly prohibit territorial secession as an aspect of the international law principle of peoples' right to self-determination, it also does not support territorial secession. For instance, in the advisory opinion on Kosovo's unilateral secession, the International Court of Justice (ICJ) stated that the general principles of international law do not prohibit unilateral declarations of territorial independence, and

thus there was no violation of international law.[747] The ICJ's decision confirmed that there is no international legal framework that governs how territories declare independence. The ICJ appears to have squandered an opportunity to address the weighty legal challenges concerning peoples' right to self-determination, where secession occurs, and how such entities ought to acquire international personality status through state recognition for future jurisprudence, critics may say that, indeed, this was an opportunity for the ICJ to lay out a legal framework for territories in Kosovo's situation to legally declare independence. As Cassese rightfully stated, the ICJ has never directly addressed the legality of territorial secession advanced as the right of self-determination outside of the colonial context.[748] The law on the right of self-determination of peoples, particularly Article 73 of the United Nations Charter and UN General Assembly Resolution 1514 (XV), which supported territorial self-rule, is too rigid to support other forms of human rights abuses that would justify secession. Nonetheless, the case law, on Kosovo's secession case, established that territorial secession without the consent of a parent state does not violate general international law principles.

Chapter six examines the law and practises relating to territorial recognitions of the seceded territories on the grounds of the peoples' right to self-determination in international law.

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[747]Kosovo, Advisory Opinion, I.C.J. Reports 2010, (n 110) p. 403, para 74'

[748] Antonio Cassese, 'Self-Determination of Peoples: A Legal Reappraisal' (CUP, New York, 1995), p. 120

CHAPTER SIX

THE LAW AND PRACTICE ON STATE RECOGNITION IN PEOPLES' RIGHT OF SELF-DETERMINATION

6.1 Introduction

The right of peoples to self-determination was incorporated into the UN Charter after its founding in 1945.[749] In terms of case law and practises relating to territorial recognitions of seceded entities and their ensuing status as a *de-facto* and *de-jure* state, there have been enormous advancements in international law since 1945, especially where the fundamental rights of indigenous and minority peoples allow them to assert their right to self-determination, including through secession, when their rights are restricted by the states in which they are domiciled.[750] While legal scholars continue to hold contrasting opinions on whether or not secessionist territories are actually permitted to create new states outside of the context of decolonization under the principle of peoples' rights to self-determination. Despite these opposing views, statehood created because of independence through secession continues to give rise to new states. Chapter five examined the right of peoples to self-determination in the context of territorial secession, specifically the legality of territorial secession. It was established that secession does not breach international law, even if the international law instruments are silent on the explicit legality of territorial secession in international law. Chapter six, which complements chapter five in addressing the legality of territorial secession from the states' recognition of seceded territories into statehood under the right to self-determination in law and practise, examines and analyses the recognition of states in international law as an aspect of the right of self-determination

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[749] UN Charter, 1945 (n 4), Art. 73'

[750] 'Milena Sterio, (n 15), p. 12'

of peoples. The post-secession state recognition practises and the law as a crucial element of peoples' access to the right to self-determination are examined in this chapter. To accomplish this, the study examined the theories of state recognition, the relevant legal framework, as well as case law pertaining to the possible effects of state recognition in international law.

6.2 The Background of Recognizing States

State recognition is one of the oldest practices in international relations; however, its consequences have legal consequences in international law for both non-recognized de facto entities and recognising states. In general, all territories should be recognised as states in order to be considered legal entities or *de-jure* sovereign entities capable of acquiring international personality status, as *de facto* and *de-jure* entities.[751] State recognition, as practised in contemporary international law, has its origins in the *Treaty of Westphalia (1648),*[752] This treaty is credited with establishing an organised set of rules that several sovereign jurisdictions agreed to respect and obey as the law that governs their interactions. The *Westphalia Treaty* was a peace treaty signed by the Holy Roman Emperor and King of France, as well as their respective allies, on 24 October 1648.[753]

This Treaty emphasised the significance of territorial kingdoms and sovereigns coexisting peacefully, as well as respect for each other's territorial borders. Hugo Grotius organised the rules of this treaty in 1625, making the *Westphalia treaty* known as the peace treaty or

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[751] Hersch Lauterpacht, 'Recognition of States in International law' (1944), *The Yale Law Journal, Vol. 53, No.3,* pp. 385-387 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4335&context=ylj> Accessed 25 July 2019

[752] 'David Raic, (n 102), p. 21'

[753] Leo Gross, 'The Peace of Westphalia, 1648-1948.' (1948), *The American Journal of International Law, vol. 42, no. 1,* pp. 20–41. <www.jstor.org/stable/2193560> Accessed 6 March 2019

"Belli ac pacis libritres de jure," or "Belli ac pacis libritres de jure," following a 30 years' war between the concerned parties to this treaty[754]

The *Westphalia Treaty* was not the first treaty into which sovereign entities in Europe signed and agreed to its terms; however, it was unique in that it was a written law that brought together a greater number of sovereigns than previous agreements. It was also agreed upon as a precursor to the end of a thirty-year war that had destroyed living conditions, exhausted European residents, and killed several people. Another significance is that it laid the groundwork for modern international law.[755]

Other treaties were agreed upon between various kingdoms prior to Hugo Grotius' *Westphalia Treaty of 1648*, demonstrating that recognition of territorial integrity and sovereignty was practised long before the *Westphalia Treaty*. For example, on 7 May 1495, the Catholic Sovereigns of Spain and Portugal signed the Madrid Compact. it involved, the Serene, King of Portugal and the Algarves, and it concerned the territorial integrity agreement involving both sides of the African sea, and *Senhor da Guiné*, also known as the Lord of Guinea[756] It was agreed and covenanted that caravels would be accompanied by astrologers, pilots, sailors, and others, within ten months of the treaty's signing. The agreement required the two kingdoms on either side of the Grand Canary

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[754]James Brown Scott. 'Grotius' De Jure Belli Ac Pacis Libri Tres: The Work of a Lawyer, Statesman and Theologian' (1925), *The American Journal of International law; vol. 19, No. 3,* pp.461-468.

[755]Steven Patton, 'The Peace of Westphalia and its Effects on International Relations, Diplomacy and Foreign Policy' (2019), *The Histories, Volume 10, No. 1, The Histories, Volume 10, No. 1, pp. 91-99,* <*https://digitalcommons.lasalle.edu/cgi/viewcontent.cgi?article=1146&context=the_histories*>23 November 2021

[756] See Compact between Spain and Portugal, signed by the Catholic Sovereigns at Madrid, May 7, 1495, <http://avalon.law.yale.edu/15th_century/mod002.asp> Accessed 14 June 2020

Island to determine and draw the divisional line of the sea.[757] Indeed, such treaties demonstrate the existence of nations' recognition and sovereignty rights within their respective territories as a means of self-determination for those nations' peoples. Several other treaties recognised sovereignty and how territories of different sovereigns should interact with one another in times of war and peace. For example, *Francisco de' Victoria* believed that (territorial) conquest is justified because it demonstrates liberality and equality in and of itself. According to Shaw, in international law, state recognition entails some responsibility, which includes unilateral political acts with both domestic and international legal consequences, in particularly when a state recognises an act or status of another state or government in control of a territory.[758] Even though the rules of the Westphalia Treaty established a foundation for territorial sovereignty and a set of rules for peacefully resolving conflicts without resorting to war. In the years that followed, conflicts, particularly domestic conflicts, became more common. Internal conflicts, such as the French Revolution of 1789–1799, heralded the beginning of many domestic revolts against monarchs in Europe, in which monarchy authoritarian rule was abandoned and a populous government was installed as the legitimate representative government of the people in France.[759] After defying the Spanish National Assembly, the Cortes (Parliament), militarily, General El o, Captain-General of Valencia in the Spanish army, briefly attempted to re-establish the monarch's absolute rule in 1814, but this did not last long. Six years later, in 1820, Major Rafael del Riego led a counter-revolution against the

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[757]Lyle N. McAlister, 'Spain and Portugal in the New World, 1492-1700' (. Library of Congress Cataloging in Publication Data, Minneapolis, 1987), pp.41-88

[758] 'Malcom Shaw, (n 66), p.445'

[759]Bruno Aguilera-Barchet, 'A History of Western Public Law Between Nation and State' (Springer International Publishing, New York, 2015), p. 394

monarch, compelling King Fernando VII to restore the suspended constitution of 1812.[760] The Greeks, on the other hand, revolted against the Ottoman Empire in 1822, with the help of Russia. In 1827, the Turks regained control of Greece, but Russia grew in power as its influence in the Mediterranean expanded because of its expansion. Russia declared war on the Ottomans, or as they are now known, Turkey. The dispute was eventually settled through an agreement requiring a portion of the truce to be the peace treaty contained in the Treaty of Andrinopolis of 1829, which forced the Ottoman Empire to recognise Greece's independence.[761]

Similarly, at the Congress of Vienna in 1815, the allied powers agreed to combine the united provinces of the North (Protestant) and the lands to the South (Catholic) into a single territory. The Catholics of the southern provinces were at odds with King William I of England (1815–1840) at the start of 1815. Taking inspiration from France's parliamentary victories over the monarch, the southern provinces rebelled in 1830, establishing the Kingdom of Belgium as a new state.[762] Following revolution against the Austrian emperor in Vienna, King Frederick William IV of Prussia (1840–1861) deposed the emperor and united all German speakers to form a single German state in 1848.[763] Whaley recounts events following the *Westphalia treaty and* observes that wars and conflicts did not end even after having treaties in place; instead, conflicts kept on reoccurring, sometimes resulting in lengthy armed conflicts.[764] Even after the institution

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[760] Ibid, p. 505

[761] Ibid, pp. 508-509

[762] Ibid, p. 509

[763] Ibid, p. 516

[764] Joachim Whaley, 'Germany and the Holy Roman Empire, Volume.2: From the Peace of Westphalia to Dissolution of the Reich 1648-1806' (OUP, New York, 2012), pp. 554-661

of the Westphalian treaty, the differences that sparked the Thirty Years War remained. But the only difference was that the majority of those conflicts were either resolved through negotiations or, to a lesser extent, escalated into internal or external wars, depending on the reason for the conflict and who was involved. However, history has shown us that most territorial sovereigns of the 1800s were primarily domestic conflicts in which people sought to assert their rights to self-determination from monarchs' absolutist rule.

6.3 The Legal Justification for Recognizing States

Before the existence of states, monarchs were very common all over the world in mediaeval times. Monarchs have historically been observed to act like states; they had absolute authority over their subjects and, in some cases, continued to rule as sovereigns even while in exile; these rulers could return when the situation permitted them to do so.[765] The transition of territories to statehood was historically observed to be rapid in the 1800s. For example, in 1815, the European powers convened a convention known as the "Concert of Europe" in order to reach an agreement among Europe's most powerful elite states on how to relate to each other regionally.[766] The outcome of this meeting was a treaty known as the Final Act of the Congress of Vienna (1815), which recognised a large number of jurisdictions at the time as sovereign entities and established a European diplomatic system, establishing precedent that states would have to be recognised by other states in

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[765]Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999), *Columbia Journal of Transnational Law. vol. 37*, p.419.<https://www.scribd.com/document/384427102/Defining-Statehood-The-Montevideo-Convention-and-its-Discontents-pdf> Accessed 13 October 2020

[766]Kyle Lascurettes, 'The Concert of Europe and Great-Power Governance Today What Can the Order of 19th-Century Europe Teach Policymakers About International Order in the 21st Century?'(2017), pp. 3-4,<https://www.rand.org/content/dam/rand/pubs/perspectives/PE200/PE226/RAND_PE226.pdf> Accessed 20 July 2020

the future.[767] According to Halden, the Final Act of the Congress of Vienna (1815) shaped the nature of the States and heralded a new dawn in which state-nation-like territorial integrity entities began to emerge.[768]

However, it took 113 years for the United States to propose the Kellogg-Briand Pact in 1928.[769]This inter-state recognition policy pact is observed to relate to respecting other states' territorial integrity where "acquisition of territory by illegal threat or use of force against another sovereign" was prohibited and could not allow acquisition of a title recognizable by other states over the annexed territory. However, the Japanese invasion of Manchuria in 1931 violated the Kellogg-Briand Pact principle. The US Secretary of State, Stimson, declared it an illegal invasion, and as a result, the US refused to recognise the Manchuria takeover because it violated the Kellogg-Briand Pact, which prohibited the use of war as a tool of national policy.[770] The Stimson doctrine came to refer to the refusal to recognise territorial claims or state occupation using force. As a result, Stimson refusal to recognise any situation of territory takeover resulting from non-legal means, whether through a treaty or an agreement.[771] However, the Stimson Doctrine did not appear to be strictly followed because prior to WWII, state practice did not support the view that the Stimson Doctrine contained a binding rule of international law. Indeed, after

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[767]See Statute for Final Act of the Congress of Vienna/General Treaty (1815) <http://www.hlrn.org/img/documents/final_congress_viennageneral_treaty1815.pdf> Accessed 20 July 2020

[768]Peter Haldén, 'Republican continuities in the Vienna Order and the German Confederation (1815–66)' (2011)' *European Journal of International Relations*, *Vol. 19, Issue 2*, pp. 284–285 <https://journals.sagepub.com/doi/pdf/10.1177/1354066111421037> Accessed 20 July 2020

[769] See General Treaty for the Renunciation of War (Kellogg-Briand Pact) Paris, 27 August 1928 <https://www.uni-marburg.de/icwc/dateien/briandkelloggpact.pdf> Accessed 20 July 2020

[770]See Japanese Conquest of Manchuria 1931-1932. Attack of September 18, 1931 <https://www.mtholyoke.edu/acad/intrel/interwar/manchuria31.htm> Accessed 16 June 2020

[771] ibid

joining the League of Nations in 1923, Italy invaded Abyssinia, now known as Ethiopia. As a result of strong Ethiopian resistance, the Italian conquest of Ethiopia came to an end, and both parties signed the Treaty of Wilwal in 1934.[772] Similarly, after the Munich agreement in October 1938, the Germans seized control of Czechoslovakia,[773] contrary to the Kellogg-Briand Pact, the forceful invasion was never interfered with by the League of Nations.

Following their convention on 26 December 1933, when government representatives from twenty-five American states gathered in Montevideo, Uruguay, for the Seventh International Conference of American States, the America's states developed the legal framework for recognising a state. The Montevideo Convention on the Rights and Duties of States (Montevideo Convention) agreed that a person of international law, or state, must meet the following criteria in Article 1 of the Montevideo Convention: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter relations with other States.*[774]*

The rules found in the Final Act of the Congress of Vienna (1815), as well as the Montevideo Convention of 1933, formed the basis of legality applicable in contemporary international law where a territory's status must be evaluated as legal or *de-jure* regarding its recognition as a state, in consideration of peoples' right to self-determination. The

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[772]Nate Overton, 'Resolving the Dispute Between Italy and Ethiopia'(2020), ODUMUNC 2020 Issue Brief League of Nations, pp. 1-7, <https://www.odu.edu/content/dam/odu/offices/mun/docs/ib-league-ethiopia-updated.pdf> 20 October 2020

[773] Chad Bryant, 'The Thick Line at 1945: Czech and German Histories of the Nazi War Occupation and the Post-war Expulsion/Transfer' (2006), The National Council for Eurasian and East European Research 910 300 Washington, pp. 1-24, <https://www.ucis.pitt.edu/nceeer/2006_819_01f_Bryant.pdf>20 October 2020

[774]See 'Montevideo Convention 1933 (n 224)'

republic democracy developed and advanced primarily in the twentieth century, when populists' movements, and subsequent regimes became common in many states, with monarchs' administrations greatly reduced in favour of states, the retained monarchs in Europe such as the Netherlands, Spain, England (United Kingdom), and others, their powers and authority are observed to have been severely diminished. Most monarchs have been abolished or reduced to ceremonial status around the world, with the surviving monarchs in Europe including the Netherlands, Spain, and England (United Kingdom) having their powers severely limited.

6.4 The Legal Theories Supporting State Recognition of Seceded Territories under International Law

In the fourth chapter of this study, it was established that neither Article 73 of the UN Charter nor UN General Assembly Resolution 1514 (XV) (1960) prohibits or permits territorial secession in international law; these two self-rule-related legal instruments are silent on this subject, demonstrating their neutrality to the legality of secession, as a right of self-determination. Separation of territories to form new entities and subsequently having own sovereign jurisdiction outside the parent state is a long-standing practice that predates the 1648 *Treaty of Westphalia*. However, the approach advanced by the Canadian Supreme Court ruling with respect to the demands by Quebec state desire to secede from Canada, determined that, under international law, a territory may only secede if the parent state fails to uphold human rights standards for its citizens.[775] Consequently, Aureliu Cristescu, *(Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities),* opined that the entities that secede because its parent state

[775]'Reference re Secession of Quebec (n 17)'

violates its occupants' human rights are justified to do so.[776] As a result, when a state separates, the requirement for the secessionists' territories to be recognised as states comes into play as a means of obtaining the *de facto* status that allows such an entity to become an international personality as a state. Customary international law has shown that international personality has been practised for many years before current international law. Unrecognised territories are usually *de facto* in nature but lack the legal personality, or *de-jure* status. The challenge arises when *de-facto* territory desire to interact with other states at an international forum but is ignored because other states view them as illegitimate before the law or *ex injuria jus non oritur (*law or right do not arise from injustice), because it lacks *de jure* (legal) status.[777]

There is no specific international law statute enacted within the current international law dispensation that deals with the recognition of territories into statehood; however, there are two theories relating to state recognition: declaratory and constitutive. According to the constitutive theory of state recognition, a territory's status is legalised through recognition once a specific state considers the territory to have evolved into statehood; however, such legislation is only applicable to the specific recognizing state of the territory as state.[778] This means that the constitutive theory is based on arbitrary or spontaneous declarations of statehood in which an entity is considered to have been

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[776]Aureliu Cristescu, (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) (n 262)

[777]William Thomas Worster, 'Relative International Legal Personality of Non-State Actors,' pp. 1-18, <https://www.peacepalacelibrary.nl/ebooks/files/397878052.pdf> Accessed 24 November 2020

[778]Ali Zounuzy Zadeh, 'International Law and the Criteria for Statehood: The Sustainability of the Declaratory and Constitutive Theories as the Method for Assessing the Creation and Continued Existence of States' (Master of Law Thesis, Tilburg University) p. 2 <https://arno.uvt.nl/show.cgi?fid=121942> Accessed 16 August 2020

recognised as a state on its own. Since such recognitions create disparity and deficiency in state recognition, particularly when some states recognise the entity as a state while others refuse to recognise the same territory due to a lack of a unified approach, such recognitions are seen as politically motivated rather than legally supported. Constitutive theory proponents regard it as the most pragmatic method of recognising states; it is the most constructive and practical method in recognizing states into statehood because it lacks a restricted structure. The second methodical theory is the Declaratory Theory; this theory adheres to the requirements of the Montevideo Convention (1933).[779] The Declaratory Theory contrasts the constitutive theory in that it is evidentiary and advances the viewpoint that state recognition should be automatic based on certain specific criteria, recognising that statehood is a practical fact that cannot be determined solely by an individual state's discretion.[780]Crawford echoes Eban's sentiments, the Israel's former Foreign Minister, who argued that *"the existence of a state is a question of fact rather than law."* Eban observed that state recognition as a right of self-determination of peoples in the context of territorial secession, follows a political rather than a legal path. Eban observed that state recognition as a right of self-determination of peoples in the context of territorial secession, follows a political rather than a legal path. This means that recognition of a territory into statehood will be applicable only when a new state is formed or when a *de- facto* entity exists with no external control over its jurisdictions. For instance, the International Court of Justice (ICJ) issued advisory opinions in 1975 in

[779]See 'Montevideo Convention 1933 (n 224), Art. 1'.

[780] William Thomas Worster, 'Law, Politics and the Conception of the State in State Recognition Theory.' (2009), *Boston University International Law Journal Vol. 27,* p. 116 <https://www.bu.edu/law/central/jd/organizations/journals/international/volume27n1/documents/Worster.pdf> Accessed 17 July 2019

support of the Sahrawi peoples' right to self-determination and statehood; but Morocco has continued to dominate Western Sahara's territory without allowing it to achieve independence.[781]The Western Saharan case demonstrates that territorial recognition in general is a political rather than a strictly legal requirement. This section investigates the declaratory and constitutive theories as legal tools for state recognition, as well as how these two theories have been applied in recognising territories into states.

6.5 Elements of Declaratory Theory in International Law for State Recognition

The declaratory theory of state recognition in contemporary international law complies to a criterion outlined in Article 1 of the Montevideo Convention of 1933, which states that a *"state, as a person of international law, must have: a) a permanent population, b) a defined territory, c) government, and d) the capacity to engage in relations with other states.*"[782]

6.5.1 The Declaratory Model on Interpretation of What is "Permanent Population"

The requirement for a permanent population makes no mention of its size. There is no minimum number of people required to constitute a state, nor is there a requirement that the population be of the nationality of the candidate territory for it to be recognized as a state, nor is there a requirement that the territory be of a certain size.

6.5.1.1 Overview of the State of Vatican

The Vatican as a State is only 108.7 acres in size and has a permanent population of 1100 people. As the seat of the Roman Catholic Church, the Vatican has historically been

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[781]'Western Sahara, Advisory Opinion, I. C. J. Reports 1975, (n 329), para 62 (4)'

[782] 'Montevideo Convention, (n 224), Art.1'

referred to as the Holy See.[783] Prior to the conquest of Rome on 8 September 1870, the Roman King recognized the Holy See's sovereignty; however, after the conquest, King Victor Emmanuel II wrote to Pope Pius IX, stating that the Holy See cannot be considered a sovereign state.[784] The Holy See lost its sovereignty in 1870 because it lacked a territory; however, on 7 June 1929, a portion of the Holy See, now known as the Vatican, was returned to the Roman Catholic Church,[785] in accordance with the Lateran Treaty,[786] entered between the Holy See and Italy, which acknowledged Vatican's sovereignty. The Vatican City government, according to Ryngaert, is governed by the Fundamental Law of Vatican City State, which is equivalent to a constitution. It was issued by Pope John Paul II on 26 November 2000 and went into effect on 22 February 2001.[787] Cumbo contends that the Vatican City State does not qualify as a state because any state, as an international personality, must be independent under the territoriality principle. In contrast to the Vatican City State, it is located on land inside Italian territory.[788] If Combo is correct, states like Swaziland and Lesotho, which are surrounded by South African territory, should not be considered states as well. Alasina contends that a state's size and population are irrelevant when determining whether an entity is a state; thus, in his 2003 lecture, he

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[783]Teacher Activity Guide Vatican Splendors A Journey through Faith and Art", 2 <http://www.evergreenexhibitions.com/images/pdf/Vatican_New_Educators_Guide.pdf> Accessed 29 October 2020

[784] Horace F. Cumbo, 'The Holy See and International Law' (1948), *International Law Quarterly, Vol. 2,* p. 606, <http://uniset.ca/microstates2/va_2IntLQ603.pdf> Accessed 29 October 2020

[785] Cedric Ryngaert, 'The Legal Status of the Holy See(2011), *Goettingen Journal of International Law, Vol.3 issue 3*, p. 833, <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> Accessed 29 October 2020

[786] See 'Treaty Between The Holy See and Italy in the Name of the Most Trinity' (1929), Articles, 3 and 26, <https://www.rightofassembly.info/assets/downloads/1929_Lateran_Treaty.pdf> Accessed 29 October 2020

[787] 'Cedric Ryngaert, (n 796), p. 834'

[788] 'Horace F. Cumbo, (n 795), p. 603'

noted that China had a population of 1.2 billion people, while Tuvalu had a population of 11,000 people.[789]

6.5.2 What the "Defined Territory" is in Declaratory Model of International Law

The state is required to have a defined territory, but this poses a problem because the state's territorial border may be contested. This is because a state can be formed as a result of conflict and continue to exist even after its border disputes are resolved. For example, after Eritrea's secession from Ethiopia in 1993, the boundary dispute remained unresolved, and an all-out war erupted between the two states over the border dispute in 1998-2000.[790]After international mediation resulted in an agreement signed in Algiers, Algeria on 12 December 2000, the two states' hostility subsided, but mistrust persisted, with small-scale border flare-ups continuing.[791] Unresolved border disputes during secession may pose a problem, because border conflicts can be extremely violent, resulting in a breach of international peace and security.

6.5.3 What the "Effective Government" is in Declaratory Model of International Law

The third requirement under the is that the state has an effective government capable of governing the territory it claims. This is important because the entity must demonstrate its ability to provide governmental services and protect its citizens, as well as its

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[789]Alberto Alesina, 'The Size of Countries: Does it Matter?'(2003), *Journal of European Economic Association, Vol. 1, No. 2-3, p. 301*<https://dash.harvard.edu/bitstream/handle/1/4551794/alesina_size.pdf> Accessed 7 September 2021

[790] Kidanu Atinafu and Endalcachew Bayeh, 'The Ethio-Eritrean Post-War Stalemate: An Assessment on the Causes and Prospects'. (2015), *Humanities and Social Sciences. Vol. 3, No. 2*, pp. 96-101. <doi: 10.11648/j.hss.20150302.15> Accessed 29 October 2020

[791] Redie Bereketeab, 'The Ethiopia-Eritrea Rapprochement: Peace and Stability in the Horn of Africa'(2019), *The Nordic Africa Institute, Policy Dialogue No. 13*, p. 9, <https://www.diva-portal.org/smash/get/diva2:1313153/FULLTEXT02.pdf> Accessed 29 October 2020

independence from any other external authority or jurisdiction. Kosovo, for example, declared independence in 2008 despite the fact that it lacked an effective government and was immediately recognized by the majority of European countries.[792] The Constitutive theory of state recognition was observed to have been used by states in recognizing Kosovo's independence. The requirement for a government with the ability to exercise power over the territory and its people is critical, but it may be more difficult, especially in the context of a disputed border, especially where the territory is *de facto,* but its secession is dispute by the parent state or another state. Shortly after, Eritrea seceded from Ethiopia, it found itself unable to control some of its villages along the border with Ethiopia because the border area concerned was disputed between Eritrea and Ethiopia.[793] Lesson learnt In the Eritrean secession context, demonstrates that an effective government is heavily reliant on other internal and external factors that could not be achieved prior to or immediately after it attains legal title to statehood.

6.5.4 What "Capacity to enter into External Relations with Other States" is in Declaratory Model of International Law

The ability to enter relations with other states is both a prerequisite and a result of statehood because an entity will be denied entry into diplomatic relations with other states until other states accept the new state's existence, even if it is capable and willing to do so. Crawford contends that, in reality, the ability to engage in relations with other states is a result of demonstrating statehood, which is largely determined by the interest of

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[792]Frank Dietrich, 'The status of Kosovo – reflections on the legitimacy of secession, (2010), *Ethics & Global Politics, Vol. 3, No. 2*, pp. 123-142 <https://www.tandfonline.com/doi/pdf/10.3402/egp.v3i2.1983?needAccess=true> Accessed 29 October 2020

[793]'Kidanu Atinafu and Endalcachew Bayeh, (n 801)'

an individual recognizing state.[794] Kosovo's territory was easily recognized by Western Europe's hegemonic states, but was largely denied recognition by many other states, particularly those from Eastern Europe, which is why the territory has not been admitted as a UN member State.[795] The author's observations are that the ability to engage in relations with other states is heavily reliant on externality, which is beyond the control of the territory seeking recognition.

6.6 The International Law's Legal and Political Aspects in State Recognition

The law and politics of state recognition cannot be overlooked, as both are critical considering the legal nature that surrounds statehood and the rights of state citizens, who rely on both the political aspect of the given state and the relevant laws that regulate the character of a specific territory.

In state recognition, explored in previous sections of this chapter, it was noted that few recognised states strictly apply the declaratory theory; nearly all the states recognised under contemporary international law use the constitutive theory. Despite their support for declaratory theory as a legal means of state recognition, states use constitutive theory more when recognizing states, according to Koskenniemi, who is cited by Worster.[796] Similarly, to Kosovo, several states have recognized Palestine based on a constitutive theory rather than a declaratory one. However, it is undeniable that states typically apply both declaratory and constitutive theories concurrently, albeit at different stages of the state recognition process. When a State recognizes a territory as a state unilaterally, that

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[794]'James Crawford, (n 16), p. 116'

[795]Frank Dietrich, (n 803),'

[796] 'William Thomas Worster, (n 791), p. 127'

recognition would have followed a constructivist theory, but where the same territory is now formally recognised by all other states and admitted becoming a UN member state, then such a recognition can be viewed as the declaratory theory.[797] Changing trends in the mode of recognizing states have emerged in recent years subsequent to break-up of Union of Soviet Socialist Republics (USSR),[798] which point to the spontaneous preference of recognizing states, especially those falling outside of the context of decolonization. During the dissolution of the USSR, for example, a new trend of state recognition was observed. The European Community (now the European Union-EU) stipulated additional human rights and democracy requirements for the recognition of former Soviet Union territories.[799] These conditions were contained in the *"Declaration on the Guidelines for the Recognition of New States in Eastern Europe and the Soviet Union,"* the EU insisted that these new states commit to 1) respecting the UN Charter, the Helsinki Final Act, and the Paris Charter in terms of the rule of law, democracy, and human rights; 2) respect the UN Charter, in order to protect the rights of ethnic and national groups, as well as the minorities 3) to adhere to the existing boundaries 4) to accept relevant arms control commitments, and 5) to commit to resolving all questions concerning State succession and regional disputes through negotiation and agreement.[800] The widely accepted theory of

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[797]Bridget L. Coggins, (n 49), pp. 38-39<https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=osu1154013298> Accessed 06 April 2021

[798]Olexiy Haran, 'Disintegration of the Soviet Union and the US Position on the Independence of Ukraine Discussion Paper 95-09, Centre for Science and International Affairs, John F. Kennedy School of Government, Harvard University. <http://belfercenter.ksg.harvard.edu/publication/2933/disintegration_of_the_soviet_union_and_the_us_position_on_the_independence_of_ukraine.html> Accessed 23 July 2019

[799]See Declaration of the European Council on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, issued on 16 December 1991. <http://www.icj-cij.org/docket/files/141/15048.pdf> Accessed 23 July 2020

[800] Ibid

state recognition that follows some structured framework is arguably the *declaratory* found in the Montevideo convention. However, the Montevideo Convention appears to have limitations in that it does not adequately address state conditions for recognition, because there was no obligation for new states to observe human rights. This is a gap because most states that seceded had historically gone through a turbulent period of domestic wars, as in the case of South Sudan and Eritrea. As a result, it was prudent to enact a rule requiring such territories, as they evolved into states, to respect human rights.

Territories such as Kosovo seceded from Serbia in the aftermath of a war and human rights violations; the right of Kosovar peoples to self-determination would include the preservation of human rights, which Serbia had violated; this could be the main reason why it received immediate recognition from hegemonic states, despite the fact that Kosovo seceded without the consent of the parent state.[801] It is common practise for states to withhold recognition from territories that secede without the consent of their parent states. Despite this fact that, in the case of Kosovo, the ICJ held in its advisory opinion regarding Kosovo's unilateral secession that there is no rule in international law that prohibits unilateral secession of territories, even if it occurs without the consent of the parent state.[802]

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[801] Bruno Coppieters, "The Recognition of Kosovo: Exceptional but not Unique" (2008), in What is 'Just' Secession? (Is Kosovo Unique?) ESF Working Paper No. 28, European Security Forum a Joint Initiative of CEPS, IISS, DCAF and GCSP, pp. 3-7, <https://www.files.ethz.ch/isn/54290/28_Full%20version.pdf> Accessed 26 October 2019

[802] 'Kosovo, Advisory Opinion, I.C.J. Reports 2010, (n 110) p. 403'

The ICJ in its *obiter dictum*, the Court noted that.

> *…'a great many new States have come into existence because of the exercise of this (unilateral declaration of independence) right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases'*[803]*….*

Recognition theories in international law have added to the confusion and conflict between the principles of territorial integrity and the right of self-determination of peoples; these conflicts appear to extend to the actual recognition of seceded entities. Some of the territories that successfully seceded but remained as *de facto* entities after failing to be recognized as States include Abkhazia, South Ossetia, Cyprus, Taiwan, Somaliland, and other unrecognised *de-facto* territories.[804] In general, recognition of territories at international law has kept on following an uncoordinated and discordant manner, whereby some states would recognize a territory while others refuse to recognize that recognition. The Western Sahara territory is a case at hand, of which it has been recognized by some African states and was admitted as an African Union (AU) member since February 1982, but it remains under Moroccan occupation.[805] Despite the fact that both the ICJ and the AU recognise and have stated that Western Sahara is not part of Morocco and that its Sahrawi peoples have the right to self-determination, the territory has not yet achieved self-rule. Labella claims that the UN has worked tirelessly for more than three decades to

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[803] Ibid at para 79.

[804] Thomas De' Waal, 'Uncertain Ground: Engaging with Europe's De Facto States and Breakaway Territories' (Carnegie Endowment for International Peace Publications Department, Washington, 2018) pp 1-87

[805] See African Union's Legal Opinion on Status of Western Sahara. https://www.au.int/web/sites/default/files/newsevents/workingdocuments/13174-wd-legal_opinionof-the-auc-legal-counsel-on-the-legality-of-the-exploitation-and-exploration-by-foreign-entities-of-the-natural-resources-of-western-sahara.pdf Accessed 27 September 2019

ensure that the Sahrawis' right to self-determination is respected by Morocco, but has failed, and thus the Sahrawi Arab Democratic Republic (Western Sahara) remains an important test case for the UN's effectiveness.[806] Another issue is that, regardless of whether a territory meets the four key rules outlined in Article 1 of the Montevideo Convention, the same convention went above and beyond its own Article 1 provisions. Whereas Article 3 clearly states that "the state's political existence is independent of recognition by other States," and thus "the state has the right to defend its integrity and independence even before recognition."[807] But, according to Article 3 of the Montevideo Convention, whether or not a territory is recognised as a state has no bearing on defending its existence and integrity, and thus territories have no restrictions on exercising their rights other than those imposed by other states under international law.[808] This implies, however, that state recognition undertaken under the regime of constitutive theory is only relevant to the recognizing state in its relations with the unrecognised territories it recognizes. It is observable that states appear to prefer the constitutive theory of state recognition over the declaratory theory of state recognition in actual practice. States are observed to have their own interests in mind when it recognizes a territory, and those interests differ from one state to the next, as they lean more on political preferences. Furthermore, the constitution does not require any of the four rules in Article 1 of the Montevideo Convention to be in place, and neither a recognising state would require proof of those rules before it can recognize an entity as a state.

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[806] Jennifer Labella, 'The Western Sahara Conflict: A Case Study of U.N. Peacekeeping in the Post-Cold War World' (2003), *Journal of African Studies Vol. 29*, p. 97, <https://escholarship.org/uc/item/84c6h73d> Accessed 20 June 2020

[807] 'Montevideo Convention, (n 224), Art.3'

[808] ibid

In *the Lighthouses Case (France v. Greece),*[809] at the Permanent Court of International Justice (PCIJ), the effective control of territorial borders by the concerned territory or state was dismissed as a fiction, in reference to the Turkish Sultan's continued sovereignty. The main issue with state recognition is that, except for the Montevideo Convention of 1933, there are no international law statutes or conventions enacted under the auspices of the UN that address state recognition. The Montevideo Convention was not intended to be applied globally because it was only applicable to the American Continent States. This has made it difficult to establish a specific rule of international law that considers the dynamics of the legal framework as well as the needs of how states should be recognised, and therefore, the international law seems to be a less guiding principle in the recognition of states, but the international politics take precedence.

6.3.1 Evaluation of Declaratory Theory in State Recognition

The Convention on the Rights and Duties of States (Montevideo Convention) (1933), provides that, for the state to be recognised as such, it must possess, (a) a permanent population; (b) a defined territory; (c) a government; and have (d) the capacity to enter into relations with other States.[810] This statute is thought to follow the declaratory theory of recognizing states, in which an aspiring territory must demonstrate that it meets the aforementioned prescribed requirements to be considered a state.

One of the key requirements of declaratory theory is that the entity be *de-facto* and capable of asserting its sovereignty and effectiveness, have a government, and be able to engage

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[809]See Light House (France. v. Greece), 1934 P.C.I.J. (ser. A/B) No. 62, at 4 (Mar. 17)

[810]See 'Montevideo Convention 1933 (n 224)' at Article 1.

in equal footing with other states on behalf of the territory it occupies and controls. In many cases, most territories that secede in "a noisy manner" because the parent state refused to consent to a territorial divorce with the parent state will be unable to meet all four requirements of Article 1 of the Montevideo Convention. This is because, even if the territory can assert its sovereignty, there is still a deficit in being able to engage or have state-to-state like relationships with other states, as this requirement is independent and cannot be met by the territory without the good will of other states.

Worster contends that within the international legal system, the act of state recognition is increasingly attributed to the constitutive effect rather than the declaratory theory.[811]Lauterpacht observed that, while recognitions are declarations of existing facts, they are only made in the impartial fulfilment of a legal duty, therefore, state recognition, in a real sense, is constitutive in nature.[812]

The constitutive theory appears to be more practical because an individual state agrees that an entity is, in fact, a state and treats it as such. Indeed, most territories that have been recognized as states adhere to the constitutive theory of recognition rather than the declarative theory. Following WWII, several new states were formed because of unilateral declarations of independence. Following their unconsented secessions, secessionist states such as Pakistan which seceded from India, and later Bangladesh which seceded from Pakistan, gained their independence, and were recognized in accordance with the constitutive theory.[813] The constitutive theory, on the other hand, has a divisive

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[811]'William Thomas Worster, (n 791), p. 127'

[812] 'Hersch Lauterpacht, (n 761), p. 385'

[813]'Glen Anderson, (n 95)'

recognition element, in which some states offer recognition while others refuse. For instance, Swedish Prime Minister Stefan Loefven announced Sweden's recognition of Palestine as a state on 3 October 2014. However, Jen Psaki, a spokesperson for the US State Department, criticised Sweden's decision, saying, "The US supports Palestinian statehood, but it can only come through a negotiated outcome, and mutual recognition by both parties (Israel and Palestine)."[814] State recognition today is a jumble of disparate practices, making it difficult to determine whether it adheres to constitutive or declaratory theory. It is observable that a new trend is emerging in which state recognition is relative to the political and economic interests in the territory being recognised by the state concerned. Rich contends that, recent recognition practices manifest that there is no legal duty to recognize territories because the exercise has become an optional and discretionary political act, as was previously thought.[815] An investigation into Kosovo's unilateral declaration of independence from Serbia on 17 February 2008, reveals a one-of-a-kind case.[816] Considering that, the entity was quickly recognized as a state by several other states from Western Europe, and the United States, in disregard of concerns surrounding the legality of its unilateral declaration of independence.[817] Critics argue that recognizing Kosovo violated the Montevideo Convention because the entity did not have its own

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[814] "US: Sweden 'premature' to recognize Palestine". (AFP (Agence France Presse), 3rd October 2014 <http://www.afp.com/en/node/2906632> Accessed 26 July 2020

[815] Roland Rich, 'Symposium: Recent Developments in the Practice of State Recognition "Recognition of States: The Collapse of Yugoslavia and the Soviet Union" (1993*), European Journal of International Law, Vol.4*. pp. 36-65. <http://www.ejil.org/pdfs/4/1/1207.pdf> Accessed 25 November 2019> Accessed 25 November 2019

[816] Jure Vidmar "International Legal Responses to Kosovo's Declaration of Independence" (2009), *Vanderbilt Journal of Transnational Law, Vol. 42, Issue 3*, p. 781 <https://hdl.handle.net/11245/1.326987> Accessed 25 November 2019

[817] Daniel Fierstein, "Kosovo's declaration of independence an incident analysis of legality, policy and future implications"(2008), *Boston University International Law Journal, Vol. 26*, p.418 <http://www-syst.bu.edu/law/central/jd/organizations/journals/international/volume26n2/documents/Fierstein.pdf> Accessed 25 November 2019

effective government when it declared independence. Considering that the UN had established a caretaker government for the entity under UN General Assembly Resolution 1244 at the time of its independence declaration, the territory was forcibly separated from Serbia while negotiations with its parent state, Serbia, were still ongoing.

The secession of Kosovo from Serbia, followed by recognition, represents a new trend that departs from existing theories of state recognition, which forbid the use of force to acquire another state's territory. Kosovo lacked a defined territory because it was carved out of Serbia's control through force.

6.7 The International Law's Ambiguity on Legality of States Recognition of Governments

International politics and law play important roles in state recognition. However, international law appears to play a limited role in government recognition. While there are theories on how to recognize a state, at least to the extent of the provision of the Montevideo Convention of 1933, no legal theory exists on how governments should be recognized when the state regime changes. Without legal intervention, the legitimacy of governments appears to be entirely in the hands of international political actors.[818] However, typically, the State is recognized alongside its government; state agents are usually its government officials who represent the state, advances its governmental policy, and carry out the State's duties and responsibilities under the international law.[819]

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[818] M. J. Peterson, 'Recognition of Governments Legal Doctrine and State Practice, 1815-1995' (Macmillan Press Ltd, London, 1997), p. 52.

[819] Ibid at, pp. 1-4

The third criterion for recognizing a state under the Montevideo Convention is whether the entity has an effective government. The government of the state is recognized and identified as a single unit with its government. In international law, there is no separate recognition of a state's government, except for the state itself.[820] Non-interference in a state's domestic affairs, as provided for in Articles 2(4) and (7) of the UN Charter, includes non-interference in the formation or dissolution of a state's government, because the formation or dissolution of a state's government is considered a state's domestic affair. As a result, under international law, the scope of state recognition as an international personality is limited to the recognition of states.[821] *Coup d'etat*, for example, were common in Africa between the 1960s and the 1990s. Governments that arose from illegitimate takeovers have always been allowed to rule, regardless of how they came to power. Mohammed Morsi was Egypt's first civilian and Islamist president, but he was deposed by the military on 3 July 2013. The military action followed four days of anti-government protests and Mr. Morsi's rejection of the generals' ultimatum to end Egypt's worst political crisis since the former president Hosni Mubarak's ouster in 2011.[822]The state's recognition cannot be revoked or recalled, even if its government fails to govern or is unable to conduct its affairs effectively, as was the case in Somalia in the 1990s and early 2000s.[823]

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[820] 'Malcolm Shaw, (n 66), p.454'

[821] Pietro Pastorino, 'The principle of non-intervention in recent non-international armed conflicts', pp. 1-15, <http://www.qil-qdi.org/wp-content/uploads/2018/09/03_Intervention_PUSTORINO_FIN.pdf> Accessed 26 July 2019

[822] See BBC News 'Egypt's Mohammed Morsi: A turbulent presidency cut short'17 June 2019 <https://www.bbc.com/news/world-middle-east-18371427> Accessed 26 July 2019

[823] 'Hersch Lauterpacht, (n 761), pp. 386-390'

Indeed, in 1930, Mexico's Foreign Minister, Seor Estrada, rejected the entire doctrine of granting recognition to state governments, claiming that it "allows foreign governments to pass upon the legitimacy or illegitimacy of the regime existing in another country, with the result that situations arise in which the legal qualifications or national status of governments or authorities appear to be made subject to the opinion of foreigners." Since then, the Mexican government refused to issue declarations of government recognition. The Estrada Doctrine, as it came to be known, holds that explicit acts of government recognition are unnecessary.[824] The *Tobar Doctrine*, on the other hand, is of the view that politically anticipated the possibility of government recognition. The *Tobar Doctrine* was incorporated into two agreements signed in December 1907 and November 1923 by Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. According to these agreements, the parties agreed not to recognize any government formed as a result of a coup or revolution in any of the five republics. The United States was not a party to this agreement, but it has been observed to continue its policy of not recognizing governments whose existence is the result of a coup.[825] The issue of government recognition usually arises when a new regime seizes power unconstitutionally from a legitimate government; as a result, other states may exercise caution not to appear to be endorsing or approving the illegitimate government takeovers, but there appears to be nothing like formal recognition of state government legally from the perspective of international law.

The first government recognition hurdle in Africa occurred in 1965, when Prime Minister Ian Smith unilaterally declared Rhodesia's (now Zimbabwe) independence from Britain

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[824] 'Tim Hillier, (n 271), p. 204'

[825] 'M. J. Peterson, (n 829), pp. 58-59'

on 11 November 1965; his government lasted until 27 April 1966.[826] Smith's declaration of forming a government was found to be in violation of UN Charter Article 73 and UN General Assembly Resolution 1514 (XV) of 1960, which addressed the independence of colonised territories. Smith's action was seen as the establishment of an illegitimate government, and it was condemned by the United Nations General Assembly and several states around the world. This case was unique in that it involved a unilateral declaration of independence and the establishment of a government by an individual who was a coloniser, declaring the establishment of a government by himself as the ruler of a colonial territory.

6.8 The Legal Relevance of International Treaties in State Recognition Practices

It is common to observe that states are keen on taking positions on how they approach the issue of recognising states, this behaviour poses a challenge. Whether individually or collectively as regional blocs, there are no known international law statutes or conventions that have been instituted under the dispensation of the United Nations since 1945 that specifically address state recognition in international law. However, the Montevideo Convention (1933), an agreement signed by America Continental, is regarded as the only international standard that has been established as the guiding principles recognising other states as *de jure* and *de facto.*[827] It has been observed that the lack of an international law regulation governing the criteria for state recognition by states has led willing states to adopt regional regulations governing the criteria for state recognition. For instance, the

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[826] Jacob Chikuhwa, 'A Crisis of Governance: Zimbabwe' (Algora Publishing, New York, 2004), pp. 19-21; See the UN General Assembly, 21st Session, A/6316, 4th Committee, 1613th Meeting of 20th October 1966.

[827] See 'Montevideo Convention 1933 (n 224)'

Helsinki Final Act of 1975,[828] was an agreement, where a regional treaty was instituted to address state recognition. Its intention was to invent a legally binding framework in this agreement signed by the thirty-five states at the 1975 Helsinki Summit for recognition of states. The Helsinki Final Act was divided into three areas of activities; the first was to bring predictability to the behaviour of the state's parties in terms of how they will relate to and recognize one another's territorial integrity. Secondly, state parties were required to refrain from any action that is inconsistent with the purposes and principles of the UN Charter, particularly any action that constituted a threat or use of force, against the territorial integrity, political independence, or unity of other states. Specifically, the State parties were expected to refrain from militarily occupying or using force against each other's territory in violation of international law, as well as from acquiring or threatening other states; state occupation or acquisition was never to be recognized as lawful.[829]

However, in 2014, Russia used force to annex Crimea, infringing on Ukraine's sovereignty and territorial integrity, and contravening both the Helsinki Final Act and Article 2(4) of the UN Charter.[830] Other treaties that have been signed include the General Treaty for the Renunciation of War (Kellogg-Briand Pact), which was signed in Paris in 1928. [831] The Kellogg-Briand Pact had fifteen state parties; It's worth noting that the treaty only had two

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[828] See, Conference on Security and Co-operation in Europe Final Act (Helsinki Final Act), 1975, Declaration on Principles Guiding Relations between Participating States, <https://www.osce.org/files/f/documents/5/c/39501.pdf> Accessed 20 October 2020

[829] Ibid

[830] Veronika Bílková, 'The Use of Force by the Russian Federation in Crimea' (2015), *Heidelberg Journal of International Law (HJIL) / Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), Vol. 75*, pp. 27-50<https://www.zaoerv.de/75_2015/75_2015_1_a_27_50.pdf> Accessed 20 September 2020

[831] General Treaty for the Renunciation of War (Kellogg-Briand Pact) Paris, 27 August 1928 <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0732.pdf> Accessed 20 July 2020

clauses: "do not resort to war" and "resolve disputes amicably, " its goal was to foster peaceful coexistence among the states parties by avoiding military conflict and resolving disputes through peaceful negotiations.

Another agreement concerned the disintegration of the former Yugoslavia, where the European states met on 27 August, 1991, in Brussels, Belgium, for the Conference of the Yugoslavia Arbitration Commission: Opinions Arising from the Dissolution of Yugoslavia[832] The intention was to bring together the presidency of the Federal Republic of Yugoslavia and the six breakaway republics in order to participate in the European Arbitration Commission (court) established specifically to peacefully resolve the issues arising from Yugoslavia's disintegration. There were no specific laws or rules to be applied in the arbitration, except for public international law derived from norms and general principles of law.[833]The Badinter Arbitration Committee was established to provide an opinion on the Serbian question, including the right of its populations in Croatia and Bosnia and Herzegovina to self-determination, the delimitation of internal borders, and the identification of borders between these republics.[834]

6.9 Case Laws and Legal Opinions on State Recognition

The courts have played a key role in interpreting laws and rules both domestically and internationally; they provide an infrastructure through which a disputed interpretation and

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[832] See 31, International Law Materials (ILM), 1488 (1992), the introductory notes by Maurizio Ragazzi, on Conference of Yugoslavia Arbitration Commission: Opinions Arising from the Dissolution of Yugoslavia, 11 January to 4 July 1992. in Brussels, Belgium on 27 August 1991 <https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf> Accessed 26 July 2020

[833] ibid

[834] Alain Pellet, 'The Opinions of the Badinter Arbitration Committee a Second Breath for the Self-Determination of Peoples' (1992), *European Journal of International Law, Vol. 3*, pp. 178-179 <http://ejil.org/pdfs/3/1/1175.pdf> Accessed 27 July 2020

meaning of a rule can be settled. Conflicting legal norms and state practices have all been the subject of un-uniform legal norms and state practices at international and domestic courts when it comes to observing the Peoples' "right" to secede, as the right to self-determination and the acquisition of legal or international personality status through state recognition. The *Aaland Islands case*[835] exemplifies this challenge, as it was the first "test" case on the capability and capacity of the international dispute relating to state recognition under international law today, despite being decided prior to the current international law dispensation. Previously, they were under Swedish administration and control until 1809, when the territory was lost to Russia during the war of 1808-1809.In this case, it was explained that the inhabitants of Aaland Island were entirely Swedish-speaking and practised the same culture, despite belonging to Finland's archipelago province. However, following the peace treaty of 30 March 1856, the island was demilitarised, and the Grand Duchy of Finland was established, with autonomy within the Russian Empire. This allowed residents of *Aaland Island* to continue to follow Swedish laws and the legal system, as well as speak in their native language.[836] Following the Russian revolutions in February and March 1917, Finland declared independence. As a result, *Aalanders* who preferred to be part of Sweden rather than Finland gathered 7,000 signatures in support of reunification with Sweden. In January 1918, representatives from Aaland paid a visit to the Swedish King and government, during which Sweden expressed its support for Aaland's unification.[837] Finland objected to the entire concept of Aaland uniting with

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[835] Ida Jansson, 'The implementation of an international Decision at the Local Level: The League of Nations and the Åland Islands 1920–1951' (2020), Journal of Autonomy and Security Studies, Vol. 4 Issue 1, p. 35 <https://jass.ax/wp-content/uploads/2020/09/JASS_Jansson.pdf> Accessed 10 January 2021

[836] Ibid

[837] Ibid at p. 37

Sweden, and thus the reason for the dispute, which was observed to have centred on state rights in relation to territorial integrity on the one hand, and secession and annexation on the other, in light of the Aaland peoples' right to self-determination, this dispute was between Finland and Sweden. The case was arbitrated by the League of Nations' Aaland Commission of Jurists, which reached a decision in June 1921. Finland's sovereignty over the land islands was agreed to be recognized and respected. And that Aaland Island should maintain its autonomy for the territory's inhabitants to maintain their Swedish language, culture, and traditions.[838] The dispute was handled by the League of Nations at a time when the Permanent Court of International Justice (PCIJ) had not yet been established. Diggelmann suggests that the Aaland issue was approached in a balanced manner, with both domestic jurisdiction and the state's territorial sovereignty rights considered in the peaceful resolution of the dispute.[839]

In mediaeval times, an empty land that was not occupied could be claimed by the first person to lay hands on to it; this principle was known as *terra nullius*.[840] In *Cooper v. Stuart*,[841]where the territorial acquisition had been affected through settlement, Lord Watson observed that:

> *"There is a great difference between the cases of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically*

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[838] See the speech of Ms. Patricia O'Brien, The Legal Counsel and the Under-Secretary-General for Legal Affairs, on 17 January 2012 at United Nations Headquarters, titled '*The Åland Islands Solution a precedent for successful international disputes settlement*

<https://legal.un.org/ola/media/info_from_lc/POB%20Aalands%20Islands%20Exhibition%20opening.pdf > Accessed 10 January 2019

[839] Oliver Daggerman, 'The Aaland Case and the Sociological Approach to International Law'(2007), *The European Journal of International Law Vol. 18, No. 1*, p. 138, <http://www.ejil.org/pdfs/18/1/213.pdf> Accessed 20 June 2019

[840]'Francesco de Vitoria (n 122), p. 250'

[841]*[1889] 14 App Cas 286, at p 291*

> *unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions."*[842]

Indeed, as discussed in chapter two of this study, there was less acrimony to the recognition of territorial sovereignty and the right to self-determination of peoples who inhabited such land in the circumstances of *terra nullius* acquisition of territories where the land was completely unoccupied. However, colonial land that had previously been inhabited did not qualify as *terra nullius but* was viewed as a conquest or cession of a territory.[843] The *terra nullius* principle, as taught by *Francisco de' Victoria*, is somewhat problematic because there was no developed technology and records for the claimant of the empty land title to ensure that the land was indeed empty, nevertheless, it is fair enough to consider that *terra nullius* was recognised.[844]

The courts have dealt with array of issues concerning state recognition, for instance, in *Customs Regime between Germany and Austria, Advisory Opinion,* [845]the Court was to determine whether.

> *"a regime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of 19 March 1931, would be compatible with Article 88 of the Treaty of Saint-Germain and with Protocol No. I signed at Geneva on October 4th, 1922".*[846]

According to Article 88 of the Treaty of Saint-Germain, Austria's independence was inalienable unless the League of Nations agreed to ally with it. While the Union did violate Austria's independence, the PCIJ ruled that the consequences of the judgement were

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[842] ibid

[843] *Mabo v Queensland (No. 2) ("Mabo case") [1992] 175 CLR 1 (Australia)*

[844] 'Francesco de Vitoria (n 122), p. 250'

[845] *[1931] P.C.I.J. (ser. A/B) No. 41 (5 Sept.)*

[846] Ibid at para 72

incompatible with both the Protocol of 1922 and the Treaty of St. Germaine. Judge M. Anzilotti in his *obiter dictum*, stated that:

> *"The existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (suprema potestas), or external sovereignty, by which it is meant that the State has over it no other authority than that of international law."*[847]

The PCIJ was confirming that the term "independence" refers to a state's *de-facto* and *de-jure* ability to function as sovereign. Austria's ability to engage in relations with other states would be jeopardised if Article 88 were invoked. The message passed in with this decision is that, once a state is acknowledged as an international personality, its integrity and sovereignty is irreversible.

The recognition of Saharawi's people's territory of Western Sahara attracts an interesting discourse of 'a state, but not a state'. The Sahrawi Arab Democratic Republic (SADR)[848] also known as Western Sahara, has been recognised as a state by the Organization of African Unity- OAU, (now African Union- AU) since 1981.[849] This recognition by the AU had followed the *Western Sahara advisory opinion*, by the ICJ in 1975 [850] where the International Court of Justice (ICJ) determined that there were no international law provisions on which Morocco could rely to assert the existence of an internationally recognized legal relationship on its claim to Western Sahara territory as its own constituent territory. In the absence of such evidence of the Moroccan State's specific attachment to

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[847] Ibid at para. 81

[848] SADR was proclaimed by the Polisario Front on 27 February 1976

[849] The admission was based on a decision by a simple majority of African Union, Member States, pursuant to the OAU Charter in Article XXVIII (2)

[850] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, (n 329), para 62 (4)*

and effective control over Western Sahara, Morocco was barred from making any claims over Western Sahara territory.[851] Despite the ICJ ruling and the OAU's admission of the entity as a member state of the AU in 1981, the Moroccan government continues to occupy Western Sahara. Indeed, the AU stated in its 2015 legal opinion that the Sahrawi Arab Democratic Republic (SADR), also known as Western Sahara, is a recognized state.[852]

6.10 An Analysis of Judicial decisions of States' Territorial Integrity in the High Seas

While there are clearly identified borders on the land that are managed and patrolled by the police and controlled by the immigration officials of a given state, the sea does not have a demarcated frontier of any state, and neither are their people living at the perceived boundaries who can precisely identify the territorial borders between one state from another. As a result, crimes committed on the high seas lack a clear territorial authority over which state should prosecute the offenders.

The case of the *S.S. Lotus (France v. Turkey)*[853] before the now defunct Permanent Court of International Justice (PCIJ)There was an intriguing litigation before the PCIJ that brought to the surface the limitations with the rules on state recognition and responsibilities for crimes committed on the high seas. In this case, decided in 1927, a French vessel collided with a Turkish vessel in 1926, killing eight Turkish nationals. When

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[851] ibid

[852] See the Office Of The Legal Counsel and Directorate for Legal Affairs of the African Union Commission "Legal opinion on the legality in the context of international law, including the relevant united nations resolutions and OAU/AU decisions, of actions allegedly taken by the Moroccan authorities or any other state, group of states, foreign companies or any other entity in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activity in Western Sahara" p. 15, para. 71, <https://au.int/sites/default/files/newsevents/workingdocuments/13174-wd-legal_opinionof-the-auc-legal-counsel-on-the-legality-of-the-exploitation-and-exploration-by-foreign-entities-of-the-natural-resources-of-western-sahara.pdf>

[853][1927] P.C.I.J. (ser. A) Nos. 9 and 10,

the ship arrived in Turkey after the accident, Turkish authorities arrested the French naval lieutenant crew and charged them with criminal negligence. France filed a complaint with the PCIJ against Turkey, disputing Turkish jurisdiction over crimes committed outside of its territorial jurisdiction. The PICJ ruled that states have territorial jurisdiction over wrongs committed when crimes committed on the high seas involve their citizens as perpetrators or victims.[854] This case demonstrated that state recognition extends beyond territorial land mass boundaries to include recognition of the jurisdiction of cases of crime or disputes arising outside the actual territorial frontier limitations in which the state's citizen is either the perpetrator or the victim.

Considering the PCIJ decision in S.S. Lotus (France v. Turkey), which determined that states have jurisdiction over the prosecution of crimes committed on the high seas in which their citizens are either victims or perpetrators, The case of *Romania (State) v. Cheng*,[855] proved to be even more complex to decide. The ship involved in this crime was a Taiwanese-registered vessel, even though Taiwan is not an UN-recognized state. On 24 May 1996, Canadian police apprehended its captain (Cheng), a Taiwanese national, for throwing three Romanian stowaways overboard while sailing from Spain to Canada.[856] When Romania learned of the incident, it requested that the accused persons be extradited to Romania in accordance with the existing extradition treaty between Romania and Canada. Taiwan requested permission to intervene in the case from the Nova Scotia Supreme Court, arguing that the case fell under Taiwan's jurisdiction under international law because the alleged crimes were committed on the high seas and Taiwan owns the

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[854] ibid

[855] *[1997] CanLII 9867 (CA)*

[856] Ibid

ship's flag state, giving it exclusive jurisdiction over the subject matter.[857] China (People's Republic of China) also intervened in the case, claiming that Taiwan was a Chinese territory and that the suspects should thus be extradited to China mainland rather than Taiwan. Wilde argues that the process of recognition is governed by an aspect of international law in which a state is or is not legally (*de jure*) a state simply because other states have decided to ignore or deny it recognition.[858] Indeed, Wilde's proposition relates to the Montevideo Convention at article 3 which states that,

> *"The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law."*[859]

The Canadian court was perplexed as to whose jurisdiction this case could legitimately be heard; the court ruled out sending the crew to Romania, because the crimes were committed outside of Romania's jurisdiction or territory. But was now perplexed as to whose jurisdiction the suspect's trial should be heard, between China and Taiwan. Even though Canada and Taiwan do not have diplomatic relations, it granted Taiwan jurisdiction over the case. The argument was that Taiwan had not lost its statehood at the time the vessel was registered and that the ship had been operating under the flag of Taiwan.

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[857] ibid

[858] Ralph Wilde, 'Meeting Summary Recognition of States: the Consequences of Recognition or Non Recognition in UK and International Law' (2010), Chatham House, publication, p. 2 <https://www.chathamhouse.org/sites/default/files/field/field_document/Meeting%20Summary%20Recognition%20of%20States.pdf> Accessed 16 July 2021

[859] 'Montevideo Convention 1933 (n 224), Article 3'

The preceding two case laws; *France v Turkey* and *Romania (State) v Cheng'*, reveal that, under universal jurisdiction, the state owning the flag ship has first the priority in prosecuting suspects for the crimes committed at the high seas. The Canadian court's decision to transfer the prosecution of the *Romania (State) v. Cheng* case to Taiwan, as well as Article 3 of the Montevideo Convention, show that non-state recognition of a territory by states does not discount political *de-facto* control of a territory's frontier and existence, but only ignores it when it comes to legal recognition. Consequently, States' failure to recognize a *de facto* territory does not deprive it of its statehood status.

While some scholars, such as Hsieh, argue that non-recognized territories participate in international law and have similar obligations as the recognized states, such as state immunity. Therefore, the international law does not preclude unrecognised de-facto territories or states from participating in legally binding covenants; because they can sue or be sued at the ICJ or any other international court.[860] This is based on the provisions of Article 35(3) of the ICJ statute, which state that,

> *"When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court".*[861]

And, the UN Security Council Resolution 9 (1946), which in paragraph 1 states that,

> *"The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the following condition, namely, that such State shall previously have*

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[860]Pasha L. Hsieh, 'An Unrecognised State in Foreign and International Courts: The Case of the Republic of China on Taiwan' (2007), *Michigan Journal of International Law Vol. 28, Issue. 4*, pp. 789-91,<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1163&context=mjil> Accessed 20 April 2019

[861] 'Statute of the International Court of Justice, (n 120) Art.35(3)'

> *deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court…"*[862]

as well as Article 3 of the Montevideo Convention of 1933.Graefrath, argue that territorial sovereignty and international crime prosecutions are inextricably linked and embedded in a state's responsibilities. As a result, that responsibility extends to respecting the territories of other states to avoid encroachment or threat to other states' territorial integrity.[863] Graefrath, however, does not specify whether these responsibilities extend to non-recognized territories.

6.11 The Impact of State Practice on Rules of State Recognition

The state's recognition evolves around territorial integrity, that follows state practices protected under the customary international law, and is derived from states' general but consistent practice, of which states would follow as a legal obligation. For instance, in *North Sea Continental Shelf (Federal Republic of Germany vs. Denmark; Federal Republic of Germany vs. Netherlands),*[864] where the ICJ observed that state practice is treated as any other rule of "customary international law," and thus has the binding direct or indirect effects of a positive law. And therefore, regardless of its origins, state practice as an international law norm, require that any State asserting the existence of a customary rule bears the burden of proving the existence of the concerned rule as consistently

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[862] See United Nations Security Council Resolution 9 (1946) of 15 October 1946, Admission of States Not Parties
to the Statute of the Court of Justice. Paragraph 1 <https://www.icj-cij.org/en/other-texts/resolution-9> Accessed 16 July 2021

[863] Bemhard Graefrath, 'Universal Criminal Jurisdiction and an International Criminal Court', (1990), European Journal of International Law, Vol. 1, p. 73<http://ejil.org/pdfs/1/1/1146.pdf>Accessed 29 June 2019

864 North Sea Continental Shelf, (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), Judgement, *I.C.J. Reports, 1969, p. 3, para 37.*

practised by other States in a uniform manner.[865] It is necessary to distinguish between what conduct qualifies as state practice and the value it has in state practice, because it typically defines a state's foreign policy, culture in relation to other States, national legislation, and treaties to which it consents to be bound, including recognition of other States. Legal scholars recognize the importance of state practices in the process of state formation, but the significance of state recognition appears to have been underappreciated, particularly in post-cold war state practices.[866] In an international law vacuum where there are no enforcers of the law, state practice is astute. This has made it less consistent for states to follow state practice uniformly, and the inconsistency is also visible when states grant recognition to other states. The lack of universal legal framework or state practice for recognizing states has severely impacted the recognition of new states, such as Taiwan and Somaliland, whose de-facto status and historical backgrounds make them unique entities within international law but are yet to be recognized.

This section examines the difficulties encountered by Taiwan and Somaliland in demonstrating the impact of a lack of structured and agreeable legal methodology in state practice concerning state recognition.

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[865] Robert Beckman and Dagmar Butte, 'Introduction to International Law' p. 1-12 <https://drive.google.com/file/d/1yuLqmWhO9HXPlvDHX4KMM1-S1hoduIzd/view?showad=true> 26 June 2019

[866] Amy E. Eckert, 'Constructing States: The Role of the International Community in the Creation of New States' pp. 19-34. <https://www.princeton.edu/jpia/past-issues-1/2002/2.pdf> Accessed 26 June 2019

6.11.1 Taiwan's Recognition Challenges and The Different States' Approaches on Its Recognition as a State

Taiwan became a part of China during the Ching Dynasty in 1684, but it was not assimilated into China until 1885 as territory of the Chinese Empire.[867] The Treaty of Shimonoseki, signed in 1895, facilitated Japan's annexation of Taiwan.[868] Following WWII, Japan returned Taiwan to China under the terms of the Cairo Declaration of 1943, which required it to be handed over to the Republic of China (ROC), which was governed by the Chinese Nationalist Party, which had dethroned the Ching Dynasty in 1912. Prior to the civil war, the ROC ruled China for more than 20 years.[869] The Chinese domestic war between the Nationalist Party, or Republic of China, and the Communist Party ended in 1949 with the Communist Party, or People's Republic of China (PRC), winning. The ROC withdrew to Taiwan, where it has remained and continues to operate as *a de facto* territory under the Nationalist Party government.[870] The ROC regards itself as a retreated power and the legitimate government of China, whereas the PRC, which controls mainland China, regards it as an autonomous territory under its control; both the ROC and the PRC individually claim the legitimacy of the Chinese government.[871] Indeed, the Republic of China was a founding member of the United Nations, with diplomatic status

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[867] Andrew D. Morris, 'Taiwan's History An Introduction' pp. 1-31, <https://core.ac.uk/download/pdf/19135781.pdf> Accessed 26 June 2019

[868] Gunnar Abramson, 'Comparative Colonialisms: Variations in Japanese Colonial Policy in Taiwan and Korea, 1895 - 1945' (2004), *Portland State University McNair Research Journal, Vol. 1: Iss. 1, Article 5.*<https://core.ac.uk/download/pdf/37768121.pdf> Accessed 26 June 2019

[869]Clifton W. Sherrill, 'Deterrence and Clarity: U.S. Security Policy in the Asian-Pacific, 1950-1970' (2003), (PhD, Dissertation, The Florida State University), pp. 52-124, <https://fsu.digital.flvc.org/islandora/object/fsu:168448/datastream/PDF/view> Accessed 26 June 2019

[870]San-shiun Tseng, 'The Republic of China's Foreign Policy towards Africa: The Case of ROC-RSA Relations'(2008), (PhD Thesis, University of the Witwatersrand, Johannesburg), pp. 70-104, <https://core.ac.uk/download/pdf/39666111.pdf> Accessed 26 June 2019

[871] Hungda Chiu, 'The International Legal Status of the Republic of China'(1988-89), *Chinese Yearbook of International Law and Affairs, Vol. 8*, pp. 1-19, <https://core.ac.uk/download/pdf/56353997.pdf> Accessed 26 June 2019

that it enjoyed while representing China until the 1970s when its status as a UN member state began to wane. Most UN member states at the time were allied with the People's Republic of China, which controlled the majority of Chinese landmass, the UN General Assembly Resolution 2758 in 1971[872], expelled the Republic of China and transferred China's state representation to the People's Republic of China.[873] Most UN member states severed ties with the ROC or Taiwan, however, the territory remained *de facto* and prosperous. Hsieh points out that Taiwan, as of 2007, had the 17th largest economy and the third-largest foreign exchange reserves in the world.[874] Taiwan has remained a *de-facto* territory out of China's control, but domestically its inhabitants recognize their territory as a "sovereign state," with all the hallmarks of state power, governance, and relationship with other states just like any other state. Chiang claims that, contrary to the PRC claims that Taiwan is its constituent territory, many states including the US government recognize Taiwan as a state.[875] Despite the fact that Taiwan or ROC was expelled from the UN membership as a state, the entity was recognized as a sovereign state by 33 of the 123 UN member states as of 1995.[876] Taiwan also has one of Asia's most powerful military forces and equipment. In fact, the United States and other states supply the military hardware to Taiwan's army. In 2001, for instance, Taiwan spent $20 billion

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[872] 'Restoration of the lawful rights of the People's Republic of China in the United Nations'. General Assembly (26th sess.: UN GA, Res 2758 (XXVI) 1971 <https://digitallibrary.un.org/record/192054?ln=en>

[873] Frank Chiang, 'One-China Policy and Taiwan' (2004), *Fordham International Law Journal, Vol. 28, Issue 1 Article 1,* pp. 26-65, <*https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1950&context=ilj*> Accessed 26 June 2019

[874] 'Pasha L. Hsieh, (n 871), p. 766'

[875] 'Frank Chiang, (n 884), p. 65'

[876] Lung-chu Chen, 'Taiwan's Current International Legal Status'(1998), *New England Law Review, Vol. 32,* p. 678, <https://core.ac.uk/download/pdf/230500565.pdf> Accessed 20 July 2019

on military equipment from the United States. This military hardware included eight diesel submarines worth $12.3 billion, six batteries of PAC-3 surface-to-air missiles worth $4.3 billion, and twelve P-3C maritime patrol and anti-submarine aircraft worth $1.6 billion.[877]

Taiwan's legal status is complicated by the fact that it meets all the requirements of Article 1(a) (b) (c) (d) of the Montevideo Convention 1933, which could allow any entity to be recognized as a state under the Declaratory Theory of State recognition, but it is not formally recognised as state by the UN. The States that have formally recognized Taiwan appear to have done so under the Constitutive Theory of State recognition.

Chiang contends that, for the territory to successfully secede from China, Taiwan's sovereignty requires it to request the states that recognize it, including the United States, to advance the diplomacy campaign of its recognition in which the PRC (China mainland) and Taiwan reach an agreement about its independence. Taiwan would then be required to hold a referendum with international guarantees that the outcome would be recognized.[878] Considering that. Taiwan's continued antagonistic relationship with mainland China and the fact that the UN formally recognizes China's sovereignty over Taiwan, it is unlikely that Taiwan will be recognized as a state by UN member states soon. This complicates matters by making it extremely difficult for Taiwan to be recognized as a state without China's consent. The challenge affecting Taiwan's state recognition can be attributed to a lack of structure and uniform state practice that relates to the state

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[877] William S. Murray, 'Revisiting Taiwan's Defence Strategy' (2008), *Naval War College Review: Vol. 61: No. 3,* Article 3, p. 16 <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1814&context=nwc-review> Accessed 21 July 2019

[878] Frank Chiang', 'State, Sovereignty, and Taiwan' (1999)', *Fordham International Law Journal Vol.23, Issue 4 Article 1,* p. 1004<https://core.ac.uk/download/pdf/144230297.pdf> Accessed 30 July 2019

recognition, which has resulted in some states recognizing Taiwan while others withholding their recognition.

6.11.2 The Impacts of Law and Politics in Somaliland's Recognition

Despite several attempts to persuade the international community to recognize Somaliland as a state, its recognition has remained a mirage. Even-though the larger Somalia has always claimed that Somaliland is part of its territory, the facts show that Somaliland gained independence from Britain before the larger Somalia did from the Italians.[879] Its refusal to be recognized as a state is observed as a direct consequence primarily motivated by political expediency because of unstructured state practice and the lack of strict rules and a legal framework for recognizing states under international law.

Historically, Somaliland declared independence from the British on 26 June 1960. On the same day, 35 UN member states recognized it as a new sovereign state, including the United States, the United Kingdom, and Egypt.[880] On 27 June, 1960, just a day after its independence, Somaliland's Legislative Assembly immediately drafted and passed the *Act of Union* ,[881] and sent it to Somalia pending Somalia's independence, expecting Somalia to later reciprocate by passing similar legislation in its Parliament to enable the formation of a union of unitary states comprising Somaliland and Somalia. Somalia gained independence from the Italians on 1 July 1960, four days later after Somaliland gained

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[879] Joshua Keating, 'When is a nation not a nation? Somaliland's dream of independence' *The Guardian (News), 20 July 2018*, <https://www.theguardian.com/news/2018/jul/20/when-is-a-nation-not-a-nation-somalilands-dream-of-independence> Accessed 19 October 2020.

[880] Ioan M. Lewis, 'Understanding Somalia and Somaliland: *Culture, History, Society'* (Columbia University Press

New York, 2008). pp. 71-74

[881] See Somaliland & Somalia: The 1960 ACT OF UNION – An early lesson for Somaliland Law of Union Between Somaliland and Somalia: Law No. 1 of 1960 -27 June 1960 <http://www.somalilandlaw.com/Somaliland_Act_of_Union.htm> Accessed 28 October 2020

independence.[882] Somalia's representatives did not sign the treaty on 30 June 1960. Instead, Somalia drafted their own *Atto di Unione* treaty, which differed greatly from Somaliland's. Neither Somaliland's *Act of Union* nor Somalia's *Atto di Unione* was ever signed to formalise the union, but both states acted as if they were part of a single unitary Somali State.[883]

An *Act of Union* is a legal document that binds the states that form or merge into a union. This is analogous to a "marriage certificate," which outlines the terms and conditions of any union. Senegal and Gambia, for example, merged to form *Senegambia* before splitting up and returning to their original colonial borders as separate states.[884] If separation is required later, an Act of Union establishes the structures and infrastructure to be followed in the dissolution of the union, as well as how to relate within the union. In contrast, the failure of Somaliland and Somalia to enact a legally binding Act of Union rendered the union legally unsustainable. For instance, during the merger of Zanzibar and Tanganyika, an *Act of Union* formalised the union and created a new state called United Republic of Tanzania on 24 April 1964.[885]

Somaliland's efforts to be recognized as a sovereign state were influenced by the fall of Mohamed Siad Barre's regime in January 1991, which made Somalia a failed state. According to Rotberg, failed states are tense, deeply conflicted, dangerous, and bitterly

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[882] 'Ioan M. Lewis, (n 891), p. 33'

[883] ibid

[884] Arnold Hughes, 'The collapse of the Senegambian confederation', (1992), *The Journal of Commonwealth & Comparative Politics, Vol. 30, Issue. 2,* pp. 200-222, <https://www.tandfonline.com/doi/abs/10.1080/14662049208447632> Accessed 23 October 2020

[885] See 'Tanganyika Act of Union 1964 (n 538)

contested by warring factions.[886] The state of Somalia disintegrated into clanship administrative systems as a result of the absence of an effective government immediately following the fall of Mohamed Said Barre, with warlords controlling and asserting their authority over the territories they had occupied.[887] Because the clan that administered the territories was divided into small administrative units that were unrelated to one another, these clans were *de facto* administrators of the areas they controlled, Somalia as a state was unable to engage in international relations with other states at the time. Following Somalia's division into small factions of clan-cum-warlord rulers, the Somali National Movement (SNM), formed in 1981, was the only stable faction that assisted in the formation of a government in Somaliland, primarily of the Isaq clan. Somaliland's SNM officials declared the North-Western territory free of their southern counterpart on 18 May 1991, and began consolidating power along the old British Protectorate territory of Somaliland. The clan militias disarmed over time, and the people established an unusual Parliament that combined the democratic system of governance with the traditional leadership of elders and clans.[888] With the establishment of a *de facto* government in Somaliland, the territory remained relatively peaceful during a period of major conflict and turmoil in other parts of Somalia.

Following the formation of the Somaliland government, and especially during the peak of clan conflicts in larger Somalia, Somaliland made several attempts to be recognized as an

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[886] Robert I. Rutberg "Failed States, Collapsed States, Weak States: Causes and Indicators" in Robert I. Rotberg, (ed) *State Failure and State Weakness in a Time of Terror* (Brookings Institution Press, Massachusetts, 2003). p. 5

[887]'Ioan M. Lewis, (n 891), pp. 71-74'

[888]Nikola Pijovic, "To be or not to be": 'Rethinking the Possible Repercussions of Somaliland's International Statehood Recognition' (2014), *African Studies Quarterly Vol.14, Issue 4*, pp. 17-36<http://www.africa.ufl.edu/asq/v14/v14i4a2.pdf> Accessed 14 September 2020

independent entity worthy of its own state. It is arguable that, first, Somaliland was a separate state at the time of its independence from Britain on 26 June 1960, and thus never legally united with Somalia to form a binding union; and hence, the territory's union with Somalia was "illegitimate," and has no legal basis to this day. Second, the Somaliland border with Somalia satisfies African Union Charter conditions found in Resolution AHG/Res 16(I), which advances the principle of *uti possedetis* found in African Union Constitutive Act Article 4(b).[889] The AU's Constitutive Act forbids tampering with African States' borders from what they were at the time of independence, so preserving African States' borders is critical. Somaliland has been denied recognition as a state on several occasions because it is considered a territory of Somalia, but if its case is evaluated in accordance with the principle of uti possedetis, it will be discovered that Somaliland is not a component of Somalia. As a result, if Somaliland becomes a state, Somalia will not be fragmented. Third, Somaliland satisfies the requirements of the Declaratory Theory of State Recognition outlined in Article 1(a) (b) (c) (d) of the 1933 Montevideo Convention. According to Article 1 (a), a state must have a permanent population. Somaliland has its own permanent population, which is primarily made up of the Isaaq clan and other clans.[890] Somaliland nationals have been involved in political processes, including national elections. As of 2001, Somaliland had a population of more than 3.6 million people, with 97.1 percent voting in favour of Somaliland's independence in a referendum held on 31 May 2001. According to Lalos, a national referendum held on 31 May 2001, also approved Somaliland's Constitution and independence, with 1.18 million people

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[889] 'Constitutive Act of The African Union (n 721), Art. 4(b)'

[890] Berouk Mesfin, 'The political development of Somaliland and its conflict with Puntland' (2009), Issue Paper No. 200, pp. 1-11, <https://www.files.ethz.ch/isn/111689/p200.pdf> Accessed 26 October 2019

voting.[891] Somaliland held peaceful elections for national and presidential positions in 2003. The incumbent president was defeated in the election and stepped down peacefully. Somaliland can interact with other states, as required by the Montevideo Convention in Article 1 (d).[892] For example, the European Union (EU) funded these elections, which were observed by international and local observers and deemed free and fair by the observers.[893] International humanitarian organisations and consulates from other countries, including Ethiopia, are accredited to Somaliland. In accordance with Article 1 (b), which requires a state to have a defined territory, Somaliland maintains its colonial boundary and a well-defined border known internationally, as defined at the time of its independence from Britain in 1960.[894] According to Article 1(c) of the Montevideo Treaty, each state must have its own government. Somaliland has its own Constitution and government, which includes a judiciary, executive, parliament, with own police, and army.[895] Somaliland has its own government and conducts trade with other countries. Somaliland's main export is livestock, which is shipped to the Arabian Peninsula. This accounts for eighty-five percent of its foreign income and thirty percent of its GDP (GDP).[896] Jacques, *et al*, comment that Somaliland also has its own police force, military,

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[891] 'Dimitrios Lalos, 'Between Statehood and Somalia: Reflections of Somaliland Statehood' (2011), *Washington University Global Studies Law Review, Vol. 10, Issue, 4*, .p. 795,'<https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1032&context=law_globalstudies > Accessed 28 October 2020

[892] 'Ioan M. Lewis, (n 891), pp. 71-74'

[893] Anne Moltes (ed), 'Pillars of Peace, Somali Programme Democracy in Somaliland: Challenges and Opportunities (The Academy for Peace and Development Hargeysa, 2010) pp. 1-83

[894] ibid

[895] ibid

[896] Ahmed M. Musa, Oliver Vivian Wasonga and Nadhem Mtimet, 'Factors influencing livestock export in Somaliland's terminal markets' (2020), *Pastoralism: Research, Policy and Practice, Vol. 10 Issue. 1,* p. 1 <https://pastoralismjournal.springeropen.com/articles/10.1186/s13570-019-0155-7> Accessed 23 January 2021

and does its own revenue collection, complete with its own currency, passport, and national flag.[897]

Several African countries, including South Africa, are supportive to Somaliland becoming its own state, but the African Union maintains that Somaliland is part of Somalia's territory and does not want Somalia to be split in accordance with the African Union's Constitutive Act. As a result, some African countries have found a way to deal with Somaliland; they do not want to appear to be opposing the AU's regional stand on Somaliland by declaring full recognition of the entity, but instead want to maintain direct international relations with it without fear of retaliation from Somalia or the AU. Ethiopia and Somaliland signed bilateral trade treaties, and both countries established liaison offices in their respective capitals, Hargeisa, and Addis Ababa. Both states trade directly with each other, with no intervention or involvement from Somalia.[898] Somaliland meets all of the prerequisite requirements for state recognition Montevideo Convention, and AU law, but it has been denied state recognition despite the entity having a solid historical background that does not relate to it as being part of Somalia, as well as meeting all of the prerequisite requirements under international law that qualify it as a state. The continued refusal to

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[897] Demi Jacques, Dayna Jones, Neda Shahram, A. Lee Stone and Julie Sugano (eds), 'A Shadow on Tomorrow's Dreams: Somaliland's Struggle for Statehood' (Unrepresented Nations and Peoples Workshop Lewis & Clark Law School, Portland Oregon, 2016), pp, 1-31

[898] Nikola Pijovic, 'Seceding but not Succeeding: African International Relations and Somaliland's lacking international recognition (2013), *Croatian International Relations Review· Vol. 19*, p. 7 <https://sciendo.com/article/10.2478/cirr-2013-0004> Accessed 23 January 2019

recognize Somaliland as a state has nothing to do with the entity failing to meet the international law requirements for state recognition, but rather can be attributed to state practice that is more aligned with political views than achieving legal objectives.

6.12 Conclusion

Chapter six examined the law and practices of state recognition in relation to the people's right to self-determination. The objective of this chapter is to examine how state recognition relates and impacts on the external right of self-determination of peoples, particularly territorial secession. The chapter commenced with reviewing the historical context of state recognition as well as the two major state recognition theories, the Constitutive and Declaratory theories. The *Constitutive theory* was found to be arbitrary and political; it lacks any legal framework and serves the interests of the recognizing state over the territory it recognizes. *Declaratory theory*, on the other hand, was discovered to be compatible with Article 1 of the Montevideo Convention of 1933. It is, however, criticised because states do not strictly follow it when recognizing other states. Indeed, state recognition is said to begin with Constitutive theory and end with *Declaratory theory*. The study also investigated whether international law contains legal provisions for recognizing state governments as separate and recognition outside of state recognition itself. The study discovered that, governments of states cannot be recognized in isolation of state, thus, once a state is a recognized state, its government is automatically also recognized, failed states are term as such because they do not have functional governments, however, the recognition of their statehood stands.

The chapter went on to examine some of the judicial decisions and opinions that implied state recognition of judicial responsibilities for crimes committed on the high seas. According to the study, states are recognized as having extended their territorial integrity

to the high seas when the ship or vessels involved in the crime are their own flagships and either the perpetrator or victim of the crime is their nationals.

The chapter concluded by examining state practices impacts relating to state recognition of the aspiring territories seeking to be recognized as state. In relation to state practice, two candidate territories for state recognition cases were reviewed, the Taiwan's case and Somaliland's case. According to the findings of the study, there is no uniform and coordinated state practice in recognizing states. Indeed, it was discovered that the recognition of states was premised on the political interests of states rather than the legal requirements advanced by international law.

Finally, the study discovered that there is no strict international law governing how states should be recognized, because of lack of strict legal framework to be used in for state recognition at international law.

Chapter Seven presents a summary of the study's results, a conclusion, and suggestions for future research on the topics not covered in the study, bringing this study to a close.

CHAPTER SEVEN

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

In any research, the study should conclude by presenting the findings and the conclusion of the area being researched. In chapter seven, the study concludes by presenting the findings and making recommendations to address the challenges identified in this research relating to territorial secession as the right of self-determination of peoples. It also makes recommendations for future research on issues that are outside the scope of this study.

7.2 Research Summary and Findings

Legal scholars have written extensively on the right of self-determination of peoples in international law; however, this right's affiliation with territorial secession and the legality of territories to secede has been largely under researched comparably as observed from most legal literatures and case laws. This study examined what is the right of self-determination of peoples in international law, its nexus the territorial secession as well as the legality. The focus was to establish the root cause of the conflicts and to prevent the domestic wars associated with the disputes arising from the vague clarification in international law on whether territorial secession is legal or not under if exercised as the international law's rule of right of self-determination of peoples.

The main reason for conducting this research was to examine the legality of territorial secession under international law as a peoples' right to self-determination. To achieve the foregoing objective, first, the research sought to determine whether there are any existing legal gaps in the laws relating to peoples' rights to self-determination in international law regarding territorial secession. Secondly, the study was to examine whether territorial secession was legal under international law in relation to the peoples' rights to self-

determination. Third, the study was designed to assess the specific claims to the rights of peoples under the international law right to self-determination. The study concluded that territorial secession is neither prohibited by international law nor permitted by it, and that its legality is left unresolved on whether the territorial secession is practised in accordance with international rule on peoples right to self-determination. Additionally, this study discovered that there is no unambiguous rule in international law defining territorial secession as a peoples' right to self-determination. The lack of a clear legal framework and the application of the rule of international law, which should regulate territorial secession, was observed to be a contributing factor to the domestic strife and war observed in most civil wars.

7.2.1 The Research Outcome on Question One

Question sought to answer, ***"What are the existing legal gaps in international law dealing with the right of self-determination of peoples?"***

The research observed and concluded that the right of self-determination of peoples in international law, as found in international legal instruments and the UN Charter, involves the maintenance of peoples' well-being. These includes peoples' liberties in the form of social, political, economic, civil, and cultural rights, right of self-determination includes the prohibition of violations of human rights, and any other forms of peoples' rights abuses including international crimes. Such as freedom from torture, arbitrary killings or unlawful deprivation of life, property damage, social discrimination, and all other practises that harm people physically and mentally.

The study also examined the authenticity of the right of self-determination as an international law, by investigating the legal basis of this rule derived from international law sources. This was necessary to determine whether this right is derivable from

international law sources, as provided for in the ICJ statute in Article 38 (1) (a) (b) (c) (d). The study established that the right to self-determination has an indirect relationship across the spectrum of the sources of international law mentioned, such as the general principle of law, as demonstrated by ICJ case laws, and the teachings of highly qualified publicists whose philosophies are based on the right to human liberties. The study also discovered that the right of peoples to self-determination is directly found in treaties such as those provided in the ICCPR and ICESCR, as well as the UN Charter, as well as legal instruments bearing soft laws such as the declaration on the grant of independence. As a result of the evolution of contemporary international law and the need to supplement customary international law with statutory law that can obligate compliance with human rights, the right of peoples to self-determination was found to be an international law norm that was incorporated into the UN Charter and is a non derogable right under international law.

For instance, in Rasul v. Bush,[899] the former US President George Bush, was sued for human rights violations committed against detainees at Guantanamo Bay, Cuba. While, Augusto Pinochet Duarte, the former Chilean head of state, was also arrested and detained for one year in the United Kingdom for violations of human rights relating to the Convention Against Torture (1984) for crimes committed in Chile.[900] The study concluded that violations of human rights attract the invocation of universal jurisdiction, which is an international law principle that allows any state acting on behalf of the entire global

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[899][2004]542 U.S. 466

[900]Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case' (1999), European Journal of International Law, Vol. 10, pp. 237-277 <http://www.ejil.org/pdfs/10/2/581.pdf> Accessed 26 February 2020

community to prosecute or extradite persons who violate the human rights of others, including state agents of another state, even if those agents have diplomatic immunity. Indeed, under international law, as well as Article 27 of the Rome Statute, the violator's official capacity, whether as Head of State or Government, is irrelevant and would not absolve the perpetrator of criminal responsibility and prosecution. Consequently, states could also sue het state in the International Court of Justice for compensation for human rights violations committed in their territories, as was in the case of Ahmadou Sadio Diallo.

Consequently, the territorial secession was observed to be a protest or a last-resort decision, where the human rights of the concerned population had been violated for a long time and there was no hope of ending the abuses against the peoples, to allow peoples enjoy their human rights, hence they opt to secede to gain the territorial independently outside the parent state's territory as self-rule access freedom to observe the right to self-determination, as corrective action taken by peoples to allow them to continue exercising their rights.

However, the research affirmatively answered the subject question, where it found that, there are legal gaps under the international law relating to territorial secession as a right of self-determination of peoples as follows.

i. The research noted that there are no existing international rules, nor a legal framework which regulates the character of territorial secession in international law.

ii. The study also revealed that, since the creation of the United Nations in 1945, the successor of the League of Nations which was formed in 1919 and disbanded in 1945. There has never been any rule enacted

under international law under the regime of the contemporary United Nations.

iii. The research also noted that, even in the cases where territorial cession takes place, there are no rules which regulate those territories' recognition into statehood. Instead, there exist two theories, namely declaratory and constitutive theories. The Constitutive theory was found to be arbitrary and political; it lacks any legal framework and serves the interests of the recognizing state over the territory it recognizes. Declaratory theory, on the other hand, was discovered to be compatible with Article 1 of the Montevideo Convention of 1933.

7.2.2 Research Outcome on Question Two

Question sought to answer, if ***"international law recognises territorial secession as a legitimate exercise of peoples' right to self-determination?"***

This research observed that territorial secession is a method of accessing the right of self-determination of peoples through self-rule by seeking a split of the domiciled state's territory, as was analysed in chapter five of this research. The legitimacy of territorial secession was examined from the legal platform of evaluation in terms of the approach in position which the peoples and the states take to advance their diverging positions, in relation to existing legal provisions on self-determination in international law. As provided in section 7.3.2; the UN Charter Article 73, as well as UN General Assembly Resolutions 1514 (XV) and 1541 (XV), only address the decolonization of colonised territories. This research determined that territorial secession is neither prohibited nor approved by the international law; however, under the international law, the act of territorial secession remains silent on its legality, this was because of case law, such as the

Kosovo secession advisory opinion,[901] which established that seceding without the consent of a parent state does not violate general principles of international law.

Considering the paucity of international law rules governing territorial secession, it is reasonable to conclude that secession is neither prohibited nor permitted under international law but is a legitimate act in cases where peoples have been subjected to human rights violations. According to the study, the International Court of Justice has never definitively addressed the legality of territorial secession as a method of right to self-determination outside of the colonial context. As stated in the ICJ decisions on the right to self-determination of *East Timor, Western Sahara,* and *Namibia* case laws, the UN has directly advocated for the right of peoples to self-rule in cases where the peoples were either colonised or subjected to mandatory trusts to gain independence. When it comes to regulating territorial secession in post-colonial situations, the preceding laws mentioned above do not apply.

This study also revealed that referendums can be used to demonstrate peaceful interest in seceding, but the challenge remains that referendums are not recognised by international law as a legal framework for achieving self-determination, including secession, despite being widely regarded as a legitimate means for people to express their desire to make a specific decision in issues that affect their lives. The study also showed that, while international law does not explicitly prohibit territorial secession as an aspect of the international law principle of peoples' right to self-determination, it also does not support territorial secession.

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[901] Kosovo, Advisory Opinion, I.C.J. Reports 2010, (n 110) p. 403, para 74’

Kosovo's *opinio juris* of the International Court of Justice confirmed that there is no international legal framework that governs how territories should declare independence. Even though ICJ appeared to have squandered an opportunity to address the weighty legal challenges concerning peoples' right to "external" self-determination, where secession occurs, and how such entities should acquire international personality status through state recognition for future jurisprudence. Cassese observes that the International Court of Justice has never directly addressed the legality of external self-determination outside of the colonial context, particularly territorial secession.[902]

The research concluded that international law has remained neutral on its recognition towards territorial secession considering that it has no rule for regulating this undertaking.

7.2.2 Research Outcome on Question Three

Question sought to answer whether "***under the international law's the right to self-determination, who are the "peoples" and what are the rights to which the peoples are entitled?***"

One of the key questions in the right of peoples to self-determination is the definition of who the peoples are in international law. Because there is no definition of who are the "peoples" in international law doctrine on the right of self-determination of peoples, the term "right to self-determination" has been interpreted differently by scholars and courts. The researcher analysed the term 'peoples' from both express and implied perspectives to answer this question. According to the research, the term "peoples" refers to a unit "nation." For instance, the United Nations means a united community or nations, a non-

[902]Antonio Cassese, 'Self-Determination of Peoples: A Legal Reappraisal' (CUP, New York, 1995), p. 120

territorially oriented unit, which is distinguishable from the meaning of states. Accordingly, the study considers the term "state" primarily refers to territorial jurisdiction, which is made up of various communities bound together in a specific state citizenry. A nation shares common characteristics such as language, culture, social and economic heritage. For instance, a nomadic community or nation can be distinct, in cultures and languages descended from a common biological ancestor. The right of self-determination of peoples entails the right of nations to self-determination.

According to the research, the liberties to be determined by the peoples, are the liberties such as social, cultural, economic, civil, and political rights, as well as basic human rights, under do not harm principles against the inhuman treatment, like torture, cruel and degrading treatment. The research found that the liberties to be determined by the peoples, are those liberties such as social, cultural, economic, civil, and political rights, as well as basic human rights, “do not harm” principles which is against the inhuman treatment, like torture, cruel and degrading treatment.

7.3 Conclusion

The study draws the conclusion that, considering the research's findings, there are no international laws governing the status of territorial secession as a peoples' right to self-determination. The legal framework is only in place when a parent state's territory allows for internal exercise of a people's right to self-determination. The right of self-determination of peoples, exercised internally primarily addresses the rights of individuals and the upholding of inherent human rights.

Based on this, the research concluded that territorial secession cannot be viewed as a component of the right of peoples to self-determination, but rather as a means of corrective self-determination in circumstances where the state is unable to guarantee human rights

to the affected peoples who are subjected to rights violations by the respective state. The study also found that there aren't any clear laws or regulations governing state recognition and secession. Finally, the legal analysis derived from this study concludes that unilateral territorial secession is not illegal or in contravention of international law.

7.4 Recommendations

This study makes the following four recommendations:

First, a legal framework should be established to regulate the practise, as well as an international legal framework that can serve as a point of legal reference regarding territorial secession, that is exercised as a right of self-determination of peoples.

Second, the scope and bounds of both state practices and secessionist practical approaches should be defined in accordance with the legal principles of existing international law relating to the right of peoples to self-determination. This will assist in averting civil wars brought on by acrimonious conflicts over the right to self-determination between the state and its citizens. By averting wars and armed conflicts, it will also support international peace and security on a global scale.

Third, the plebiscite, also known as a referendum, should be recognised by international law and relevant legal rules instituted which will regulate the character of referendums as one of the peaceful ways to get the public's opinion on crucial legal matters that could have a significant impact on their lives and rights.

Fourth, to interpret what peoples mean in international law about the right of self-determination of peoples, the International Court of Justice (ICJ) should define the term "peoples" under international law.

7.5 Future Research

Future research should investigate the extent of the conflict between states' territorial sovereignty under Article 2(4) and the preamble of the UN Charter on the one hand. On the other hand, Articles 1(2), 55, and 73 of the UN Charter, as well as the right of self-determination of peoples need to be examined, and therefore recommend corrective amendments to international law. This will allow for the creation of new international statutes that will allow for the peaceful and conflict-free harmonisation of the two mentioned international rules and the advancement of the two rights enshrined in the UN Charter at international law.

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