Maste r's Thesis in Inter national Law and Human Rights

Okuefuna, Silas Obinna

SECESSION AND THE TERRITORIAL INTEGRITY OF STATES

Master's Thesis in Public International Law

MDP in International Law and Human Rights

Supervisor: Katarina Krause

Åbo Akademi

2020

ÅBO AKADEMI – FACULTY OF SOCIAL SCIENCES, BUSINESS AND ECONOMICS
Abstract for Master´s Thesis

Subject: Public International Law, Master´s Degree Programme in International Law and Human Rights	
Author: Okuefuna, Silas Obinna	
Title of the Thesis: Secession and the Territorial Integrity of States	
Supevisor: Katarina Krause	Supevisor:

Abstract:
Emergence of new States usually is preceded by conflicts. The quest to establish less violent ways of solving territorial and or secessionist disputes led to this research, which examined the concept of secession, whether there is a right to secession under international law in light of the principle of territorial integrity of States. Towards answering the research question, the research explored concepts like self-determination, remedial secession, unilateral secession, and effects of membership or non-membership of the United Nations by an independent nation. The research aimed to establish the scope and extent of the right to self-determination under international law, and the remedies available to an oppressed minority group in a State if they chose to secede from the parent State as a result of the oppression. Topical active secessionist movements, especially in Africa and Europe were used as instances to highlight the different aspects of the right to self-determination and how Parent States react in the face of apparent or imminent assault on the territorial integrity of the respective States, with the Scottish scenario serving as a contemporary comparative model from which other secessionist agitations and States responses were viewed. The research was done using doctrinal research method which was based on the exposition, analysis, and critique of legal prepositions and doctrines as contained in legal texts and judicial decisions.

The research showed that although there is an already established State practice which favours preservation of the territorial integrity of States, (unilateral) secession however, was not prohibited under international law, and new States are emerging as a result of secession. There is a right to external self-determination for all colonised and oppressed people, subject, in Africa, to certain limitations imposed by a case law. Finally, the research underscored the importance of the concept of remedial secession in issues related to oppressed minority population, and the fact that although an oppressed minority population can claim a right to remedial secession, secession itself, is more of a political than legal recourse, and any attempt to unilaterally secede without much international support may be an exercise in futility given the military might and coercive powers of a Parent State.

Key words:
Secession, unilateral secession, remedial secession, self-determination,

Date: 18th May, 2020	Number of pages: 69 Number of words (excl. bibliography and annexes): 28965

The abstract is approved as a maturity test:

Contents

Chapter 1: Introduction

1.1 Background

At the end of the second world war, the United Nations[1] was established to maintain world peace and ensure that events which led to the two previous world wars do not occur again so as not to have a third world war. The Charter establishing the UN in its article 1[2] laid out the aims of the organisation to include among others, "relating with nations based on respect for the principles of equal rights and self-determination of peoples." Prior to the establishment of the UN, there was no legal procedure or laid down rules as to how nations become independent; States were won and lost by conquest, war, colonisation, etc. Since the League of Nations was unable to prevent World War II, the UN in its determination to ensure world peace and safeguard the fundamental rights of persons, recognised the right of peoples to self-determination in articles 1(2) and 55.[3]

Secession is the withdrawal of a group from a larger group. This is usually used to denote situations relating to political withdrawal of a people or group from a sovereign State to form an independent State. In the past, people went to war on the slightest excuse, and a Sovereign can use lethal and disproportionate force to crush any dissident, uprising, or challenge to its territorial integrity through secession. Then, hardly will a State be held to account for its excessive use of force towards a minority or breakaway group. There were no institutions for that nor were there any strong international commitments in favour of broad fundamental human rights of people to choose for themselves their political future or how they were to be governed. However, in recent time, war, which used to be the predominant means of settling political disputes, has receded as new States are emerging without the drumbeats of war. The advent of the United Nations after WW II provided stability at the international scene. It offered less violent ways of solving political conflicts by

[1] Hereinafter referred to as the UN
[2] The Charter of the United Nations
[3] *ibid*

recognising the right to self-determination in the Charter establishing the United Nations and in some human rights Covenants as well as establishing institutions for the effective implementation of its treaties and agreements. The UN also serves as a platform for gauging the independence of States by admitting to its membership only independent States. The UN being the main international body that brings together majority of the world's independent countries, its recognition of States in the form of admission into the membership of the UN is an important element in discussions on State formation, and so will be considered as well in this research.

1.2 Research Question

Self-Determination, as a right, is a peremptory norm of international law which is recognised under the UN Charter and by the two international human rights Covenants.[4] The scope and extent of the concept of self-determination, as enunciated in the UN Charter and the two Covenants, however, has been a source of controversy among jurists and legal scholars on the applicability of that right in specific situations. Understanding of the right to self-determination, in this work, will be narrowed to external self-determination and equated to a right to secede or to form an independent country out of an existing, invading or colonising State. In this research, the researcher will attempt to answer the question; whether there is a right to secession generally, under international law. In answering the above research question, the researcher will seek to answer sub-questions such as whether an oppressed minority population have the right to secede from its parent State; the lawfulness of unilateral declarations of independence under international law; and whether UN membership is a condition precedent for a successful secession or independence of a country. The research question will be considered in light of the territorial integrity principle of Member States of the UN, and international legal pathways for protecting minorities within States.

[4] The International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)

1.3 Methodology and Sources

The researcher will adopt doctrinal research method in answering the above research questions in this thesis. The choice of doctrinal method in this research stems from the fact that the research will mostly be based on the exposition, analysis, and critique of legal prepositions and doctrines as contained in legal texts and judicial decisions. There are two primary law-creating processes under international law; custom and treaty.[5] The Statute of the International Court of Justice listed the sources of international law to include international conventions/ treaties; international customs; general principles of law recognised by civilised nations; and subject to certain conditions,[6] judicial decisions and teachings of the most highly qualified publicists of the various nations.[7] Judicial decisions and teachings of the most highly qualified publicists of the various nations serve as subsidiary sources while the rest are primary sources of international law.

International treaties and customs, being the primary sources of international law will be used extensively in this research as the research is based on international law. In this wise, international law customs, charters, treaties, conventions and declarations including the United Nations Charter; the African Charter on Human and People's Rights; the European Convention on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; Declaration on the Granting of Independence to Colonial Countries and Peoples[8]; and any other international, multinational, or regional bodies' law documents that dealt with or dwelt on secession and right to self-determination will be used.

Reliance will also be placed on judicial pronouncements from international tribunals as they give effect to the provisions of treaties and customs of international law through judicial interpretation. Decisions from select international tribunals like the International Court of Justice;[9] European Court of Human Rights;[10] and African

[5] Cassese A., International Law, 2nd Ed (Oxford University Press, 2004), p. 198
[6] Decisions from the ICJ has no binding force except between the parties and in respect of that particular case. See art. 59 Statute of the International Court of Justice
[7] Art. 38 (1) Statute of the International Court of Justice
[8] Adopted by General Assembly Resolution 1514 (XV) of 14 December 1960
[9] Hereinafter referred to as "the ICJ"

Commission on Human Rights[11] will be used as national discussions on secession in this research revolved mostly around Europe and Africa, and which are affected by decisions of the ECtHR and the ACHR respectively as well as the ICJ. General Comments as well as decisions of treaty bodies[12] that concern the right to self-determination will also be used here as well. Decisions from national courts do not necessarily influence the development of international law, but such are pointers to the attitudes or sentiments with which national governments may implement their foreign policies or international obligations, which may in turn influence the development of international customs. Decisions from national courts are weak sources under international law. Nevertheless, consideration of a select few national courts' decisions will shed more light on secession discussions and the attitude of States towards agitation for secession within their borders. The research will also make use of peer reviewed articles and texts focusing on secession and right to self-determination as part of the subsidiary sources. Finally, a few selected internet-sourced materials will also be used in this research, although internet-sourced materials have the least probative value in academic writings.

1.4 Scope and Limitations

This research is aimed at answering the question whether there is a right to secession under international law; whether an oppressed minority population have the right to secede from its parent State; the lawfulness of unilateral declarations of independence under international law and whether UN membership is a condition precedent for a successful secession or independence of a country. Discussions on secession will revolve around the right to self-determination, which in this case, is limited to external self-determination. External self-determination arises where a people, in the exercise of their right to self-determination, chooses to form a country of their own out of the existing country in which they were formerly subsumed. This research will not go into internal self-determination as it is beyond the scope of this work.

[10] Hereinafter referred to as "the ECtHR"
[11] Hereinafter referred to as "the ACHR"
[12] Charged with monitoring the implementation of the above treaties.

Chapter 2: Attaining Statehood

2.1 State Formation under International Law

There are generally no laid down rules under international law as to how States are formed or become independent. Historically, States are formed through the imposition of a national language and a level of literacy, a common coinage, the fusing of a territory into a single time-space system through innovations in transportation, communication and temporality, and the unification of legal codes and authority.[13] Prior to the First World War[14], a State could come into being when a national movement secures independence, and other States acknowledging the established facts of statehood.[15] This means that independence and recognition were the prerequisites for Statehood prior to World War I. It is unclear, however, the level of recognition required by the international community before a State could be deemed to have been properly formed. As there were no laid down rules for State formation, the practice of States in recognising or withdrawing recognition from States becomes important in determining State formation. The fact that not all sovereign States recognise a new State as sovereign does not in itself erode the sovereignty of that new State. States which recognise the independence of that new State would deal with the State as a sovereign, while States which fail to recognise the new State will either deal with the new State through intermediaries, have limited dealings with the new State, or decide to refrain from doing any business or having any dealings whatsoever with the new State.

A new dawn on State formation emerged after World War I in 1919 with the Paris Peace Conference wherein the victorious allied powers met to form the League of Nations, and remap the boundaries of the defeated Central and Eastern European Countries. At the Peace Conference, boundaries were redrawn along ethnic lines, and

[13] Rose N., and Miller P., "Political Power beyond the State: Problematics of Government", in The British Journal of Sociology, vol. 43, No. 2, 1992, p. 176; Giddens A., The Nation State and Violence: Volume Two of a Contemporary Critique of Historical Materialism, (Cambridge: Polity, 1985)

[14] Hereinafter referred to WW I

[15] Orentlicher D. F., "International Responses to Separatist Claims: are Democratic Principles Relevant?", in Macedo s. and Buchanan A., Secession and Self-Determination (Eds), (New York: New York University Press, NOMOS XLV, 2003), p. 21

disputed territories were resolved through internationally supervised plebiscites.[16] The concept of plebiscite and redrawing of borders along ethnic or national lines were subtle recognition of self-determination principle as a guiding principle in State creation during the conference. Buoyed by this subtle recognition in the redrawing of the Central and Eastern European borders, Woodrow Wilson[17] attempted to rally the other allied powers to incorporate the principles of self-determination into the covenant of the League of Nations.[18] The intended incorporation will allow for such territorial readjustments, as may in the future become necessary by reason of changes in the then racial conditions and aspirations, or social and political relationships.[19] The proposal was unpopular with the other allied powers as there was general apathy towards secession at the time, and so it failed.

With the proposal's failure, self-determination was not considered to be an international legal norm, the principle having been used once prior to World War II in the remapping of the Central and Eastern European Countries, and therefore an isolated case. There were some national movements and countries at the time that sought to take advantage of Wilson's proposal on self-determination without succeeding. In the Aaland Islands Question[20], for instance, representatives of the Aaland Islands[21] at the Paris Peace Conference, sought the annexation of Aaland Islands to Sweden. The application of the Aaland Islands' representatives were premised on the ground that the Aaland Islands were previously part of the Swedish kingdom before the Islands were conquered by Russia in 1809. They based their agitation on the "the right of peoples to self-determination as enunciated by President Wilson".[22] At the time Russia conquered and annexed the Aaland Islands, Finland was part of Russia as an autonomous Grand Duchy. Upon annexation, Aaland Islands became part of the Grand Duchy of Finland within the Russian empire. With the declaration of independence from Russia in 1917 by Finland, Aaland Islands came under Finland's direct rule, hence the national movement by the Aaland Islands to re-

[16] Orentlicher D. F., art. Cit., p. 21
[17] 28th President of the United States
[18] Orentlicher D. F., art. Cit., p. 21
[19] Wilson W., "Covenant (Wilson's First Draft)", in Miller D. H., The Drafting of the Covenant, vol. 2 (New York: G. P. Putnam's Sons, 1928), p. 12
[20] The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7.21/68/106 (1921), 27
[21] Which were part of Finland on Finland's independence from Russia in 1919
[22] Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919, vol. 4 (Washington D.C.: Government Printing Press Office, 1943), p. 172

join the Kingdom of Sweden. Finland argued that Aaland Islands was incorporated[23] as a territory under the Grand Duchy of Finland[24] which gained independence from the Russian empire in 1917. According to Finland, any decision on this issue would amount to an interference with the sovereignty of Finland as it is a matter which, under international law, falls within its domestic jurisdiction. Sweden, on the other hand, espoused the position that the inhabitants of the Islands be allowed to determine their political status through a plebiscite in line with the propositions of President Wilson.

Confronted with these thorny issues of sovereignty over domestic issues and self-determination, the newly established League of Nations appointed a Committee and a Commission to look into the Aaland Islands matter. They were the Committee of Jurists to Determine Whether the League of Nations was Competent to Consider the Petition Filed by the Representatives of Aaland Islands against Finland; and a Commission of Rapporteurs to Assess the Merits of the Petition Filed by Sweden on the Aaland Island Question.[25] The Committee and the Commission came up with identical reports to the effect that the principle of free determination was not, properly speaking, a rule of international law[26], even though it played an important part in modern political philosophy[27]. The Committee of Jurists opined that if there were to be a manifest and continued abuse of a State's sovereignty against a minority population, such scenario will be proper to bring an international dispute arising from the domestic scenario within the competence of the League of Nations.[28] This thus left open the possibility of a remedial secession where a State continually abuses its sovereignty over its minority populations, or as a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees of minority rights[29]. The two reports ended agitations for incorporation of self-determination as a principle of international law under the defunct League of Nations, even though their conclusions established a possibility for remedial self-determination when a Parent State fails in its duties towards its minority populations.

[23] Orentlicher D. F., art. Cit., p. 40
[24] The predecessor to the modern State of Finland
[25] Orentlicher D. F., art. Cit., p. 40
[26] The Aaland Islands Question, p. 28
[27] "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Island Question," League of Nations Official Journal, supp. 3 (1920), p. 9
[28] Report of the International Committee of Jurists, p. 5
[29] The Aaland Islands Question, p. 28

The decolonisation policy of the United Nations resulted in a dramatic increase in the number of independent and Sovereign States right after the Second World War. The decolonisation policy led to several colonies and overseas territories asserting their right to self-determination, gaining independence and acceding to the membership of the United Nations. From original membership of 51 sovereign nations, the United Nations now boasts of membership of 193 independent States.[30] Majority of these newly established States, post-World War II[31], became independent as a result of the right to self-determination clause contained in the UN Charter, and the UN's resolve to pursue decolonisation as one of its major aims.

Apart from the UN's decolonisation drive, some States emerged as a result of the dissolution of a parent State. This is evident in the dissolution of the former Union of Soviet Socialist States[32] into 15 independent States,[33] and the former Socialist Federal Republic of Yugoslavia which dissolved into 7 independent States[34]. Also, new States had been known to emerge through the merging of 2 or more previously independent States. This was evident in the merging of the Federal Republic of Germany and the German Democratic Republic[35] to form the present Federal Republic of Germany.

In other cases, nationalist movements may engage a parent State in warfare which may culminate in the declaration of independence by the nationalists. The Sudanese civil wars which lasted for decades is a good example as the Southern Sudan engaged the Northern Sudan in a civil war demanding for representation in government and regional autonomy.[36] The outcome of the Sudanese civil wars was the independence of South Sudan in 2011 and accession as the 193rd Member State of the United

---

[30] Growth in United Nations Membership, 1945-present, http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html, accessed on 17/03/2018 at 16:21

[31] Hereinafter referred to as "the WW II"

[32] Abbreviated to USSR

[33] Walker E. W., Dissolution: Sovereignty and the breakup of the Soviet Union (Rowman & Littlefield, 2003), p. 2. The States that emerged out of the defunct USSR in 1991 include Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, MOLDOVA, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

[34] Laurent J. C., & Melady T., "The Seven States of the Former Yugoslavia: An Evaluation", https://www.iwp.edu/news_publications/detail/the-seven-states-of-the-former-yugoslavia-an-evaluation, accessed on 17/03/2018 at 18:15. The States that previously belonged to the defunct Socialist Federal Republic of Yugoslavia are Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia.

[35] Which at the time were both independent countries and were admitted into the UN in 1973

[36] Poggo S., The First Sudanese Civil War: Africans, Arabs, and Israelis in the Southern Sudan, 1955-1972 (Palgrave Macmillan, 2009), p. 113

Nations. The Eritreans went to war against Ethiopia which lasted for 30 years when the latter annexed the former in 1962. Eritrea was established by the United Nations as an autonomous region under a federal arrangement within Ethiopia in 1952[37], but the subsequent annexation a decade later abolished its autonomy thereby sparking the 30 year civil war.[38] The Eritreans were able to drive away the Ethiopian forces from their land, and subsequently declared independence from Ethiopia on April 27, 1993 following a referendum conducted and supervised by the United Nations Observer Mission to Verify the Referendum in Ethiopia[39]. East Timor[40] too gained independence from Indonesia after a civil war with the later.[41]

It is pertinent to note, however, that not all wars for secession or self-determination succeed or eventually lead to total independence and recognition by the United Nations. For instance, the then Eastern Region of Nigeria engaged in a 30 months civil war of independence against the Nigerian State wherein it unilaterally proclaimed an independent State known as the Republic of Biafra with Enugu as its capital. The new Biafran State was short-lived as it was subsequently re-annexed by Nigeria in January 1970 after the capitulation of the Biafran forces.

2.2 State Membership of the United Nations

A State is deemed as properly constituted, if the State possesses certain attributes that identifies a State. The attributes include permanent population; defined territory; government; and capacity to enter into legal relations.[42] A State must be composed of a population ruled by a government, and residing within a defined territory over which the State exercises sovereignty to the exclusion of other States or sovereigns. Prior to WW II, the presence of the above four characteristics is all that is needed for a State to be deemed independent and sovereign, in addition to recognition by some other

[37] UN, The United Nations and the Independence of Eritrea (The UN Blue Books Series, Vol XII), p. 4
[38] *Ibid*
[39] Otherwise referred to as UNOVER
[40] Also known as Timor-Leste
[41] Hainsworth P., From Occupation and Civil War to Nation-Statehood: East Timor and the Struggle for Self-Determination and Freedom from Indonesia (IBIS Discussion Paper No. 5, Patterns of Conflict Resolution, University College Dublin)
[42] Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933

States.[43] However, with the advent of the United Nations in 1945 after WW II, a new chapter on State creation, recognition and consular relations emerged. In addition to possessing the four criteria of a State, a modern State must also seek membership of the United Nations[44] by seeking the recognition and support of other Member-States of the organisation. Article 4 (1) of the United Nations Charter stipulates that

> Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations.[45]

The rise in UN's membership over the years is a pointer to the fact that more States have seceded, gained all the attributes of a State, and gotten the recognition of the UN as a Member State of that organisation. The 193rd Member State, South Sudan seceded from the Republic of Sudan in 2011 and was formally admitted into the UN on 14th July 2011 as a sovereign Member State.[46] Admission of new States as Member States of the organisation is usually in two-fold; recognition of a State's independence by the UN Security Council, and recommendation to the General Assembly that the independent State be admitted as a Member State.[47] Both steps are mandatory and must be fulfilled before accession to UN membership. Upon application by a prospective State, the UN Security Council's 5 permanent members together with at least 4 non-permanent members must approve the application and recommend to the General Assembly that the State be admitted into the UN.[48] Where, however, any of the permanent members object or abstain from voting on the application, the application will fail. Upon a successful recommendation by the Security Council, the General Assembly's vote admitting a prospective State as a member of the United Nations must be by two-thirds majority vote.

---

[43] Although this recognition, *stricto sensu*, was not a prerequisite for State formation in the past, as States which fail to recognise any particular State as a sovereign either go to war with the said State or refuse to have dealings with that State

[44] Cohen R., "The Concept of Statehood in United Nations Practice", in University of Pennsylvania Law Review, Vol. 109, No. 1961, p. 1129

[45] Article 4 (1) UN Charter

[46] https://news.un.org/en/story/2011/07/381552-un-welcomes-south-sudan-193rd-member-state, accessed on 23/03/2018 at 9:04

[47] Article 4 (2) UN Charter provides that "The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

[48] "About UN Membership", http://www.un.org/en/sections/member-states/about-un-membership/index.html, accessed on 23/03/2018 at 9:57

The status of "Permanent Observer" to the United Nations does not correspond to membership of the organisation. The Permanent Observer status was not provided for in the UN Charter; it is merely a practice, first adopted in 1946 when the then UN Secretary-General accepted the designation of the Swiss Government as a Permanent Observer to the United Nations.[49] Permanent Observer status is available to non-Member States of the United Nations who belong to one or more specialised agencies of the UN, and who apply, or are put forth by a UN member State, to be accepted as a Permanent Observer to the United Nations. Permanent Observers participate in most meetings of the United Nations, and the specialised agencies to which they belong, and are entitled to the necessary documentations. However, Permanent Observer States are not entitled to any voting rights in the General Assembly as they are non-members. The Permanent Observers are merely observers observing the proceedings of the General Assembly. There are currently two Permanent Observer States at the UN; The Holy See and the Palestine.

Permanent Observer State status may be preferred when full membership of the UN is contentious and may not survive the Security Council's recommendation vote. This is the case with the application made by President Mahmoud Abbas of Palestine to the Secretary-General of the United Nations on 23rd September 2011 for the admission of the Palestine State as a full member of the UN.[50] Prior to this application, Palestine enjoyed the status of "Observer Entity" at the UN, which is not so different from the Permanent Observer status that the Holy See enjoys. Palestine was thereafter admitted to the United Nations Education, Scientific, and Cultural Organisation,[51] as a Member-State. The application for membership in the UN was however defeated at the UN Security Council by the "NO" vote of the United States[52] on the issue. All applications for membership of the UN need the support of all the five permanent Members of the Security Council to succeed, even if all the other non-members voted in favour. Following the defeat at the Security Council, the General Assembly, rather

[49] "About Permanent Observers", http://www.un.org/en/sections/member-states/about-permanent-observers/index.html, accessed on 23/03/2018 at 11:23

[50] Cerone J., "Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State", in American Society of International Law, vol. 16, Iss. 37, 2012,

[51] UNESCO

[52] The United States, along with China, France, Russian Federation, and the United Kingdom of Great Britain and Northern Ireland are permanent members of the Security Council.

voted[53] for the recognition of Palestine as a "Non-Member Permanent Observer" to the United Nations. The resolution passed by more than the two-third majority,[54] which was required for full membership, had it been the application was successful at the Security Council.

Palestine's Statehood bid at the United Nations was blocked by the United States exercising its veto against the resolution to recommend Palestine to the General Assembly to be admitted as a UN Member State. Giving the Statehood bid's failure, it presupposes, in a way, that in the face of international law, Palestine is not a State or has not totally achieved statehood. Going by the Montevideo criteria, this could mean that it has not totally fulfilled the four requirements for Statehood. Palestine has permanent population and a government led by President Mahmoud Abbas. To an extent, it could be argued that it also has the power to enter into legal relations.[55] Definite territory requirement, is however, highly contentious in the peace negotiations between the State of Israel and Palestine. While Palestine canvasses the view that the border between Israel and the future Palestine State should be based on the 1967 borders[56] before any peace negotiation between the two sides could be meaningful,[57] Israel maintains that there should not be any precondition[58] to peace talks between the two sides. The outstanding border issue made it improbable to conclude that Palestine fulfilled the four Montevideo criteria for Statehood. The failure to get the recognition of UN by becoming a member of the organisation is a confirmation of the fact that in the eyes of international law, Palestine is not a sovereign State.

---

[53] A/RES/67/19 Resolution Adopted at the 44th Plenary of the United Nations' General Assembly on the Status of Palestine in the United Nations, adopted on 29th November 2012,

[54] Out of the 193 Member States, 138 voted in favour, 9 States voted against, while 41 States abstained, and 5 States did not record any vote at all.

[55] As a Member-State of UNESCO and a permanent observer to the United Nations, Palestine has the legal capacity to enter into legal relations. Without such capacity, it wouldn't have been possible to admit it into UNESCO or as a permanent observer. Capacity is *sine qua non* to the validity of any legal document or contract which creates binding rights and obligations to the parties therein.

[56] The 1967 borders were the borders that existed prior to the 6-day war between Israel and its Arab neighbours of Egypt, Syria, and Jordan. Israel emerged victorious from the war, and as a result, it consolidated territories which hitherto were in control of the Palestinians. Oren M. B., Six Days of War: June 1967 and the Making of Modern Middle East, (Presidio Press, 2017),

[57] SC/13213 Security Council's 8183rd meeting, "Palestinian President Presents Plan to Relaunch Peace Talks with Israel, says New Multilateral Mechanism should Guide Process, in Briefing to Security Council", available on https://www.un.org/press/en/2018/sc13213.doc.htm, accessed on 24/03/2018 at 22:03

[58] Fixing the border between the two sides to the 1967 borders

An alternative proposition to the above Palestinian scenario[59] could be summed up thus: Had it been that the United States allowed the Statehood bid of Palestine at the UN to succeed, and Palestine was admitted as a Member-State of the organisation even though it failed to fulfil the four Montevideo criteria on the characteristics of a State, would its UN's membership be taken to have cured whatever defect Palestine had in its creation? In other words, can UN membership confer independence on an otherwise non-independent territory? It is noteworthy to point out here that the UN does not recognise a State as it lacks the power to do so. The act of recognition under international law rests with States and governments, as recognition implies readiness to assume diplomatic relations. The United Nations is neither a State nor a government that is capable of recognising other States or governments. What it merely does is to admit or refuse to admit to its membership, other independent and peace-loving States,[60] since it is an organisation of independent States.

Since its formation, the UN has mostly operated with respect to the territorial integrity and sovereignty of Member States over domestic issues.[61] In fact, respect for territorial integrity is one of its guiding principles in the pursuit of its purposes. Generally, admitting a non-independent territory as a Member by the UN will be tantamount to interfering with the sovereignty and territorial integrity of the Parent State as that will mean internationalising an issue which falls under the domestic jurisdiction of the Parent Member State. However, where the UN admits such a non-independent territory as a member, such admission will have the effect of conferring independence on the non-independent territory in the eyes of international law. This is because, the UN itself is an organisation of peace-loving independent States[62]. That being the case, UN membership is seen as recognition of the fact of independence of a territory by the Member States of the UN and a willingness to enter into diplomatic relations with the new State. Therefore, UN membership cures any non-compliance with the four Montevideo criteria or whatever defect that there may be in the formation of a new country. Taking the example of the proposed State of Palestine further, full membership of the UN by Palestine will have automatically made

[59] Which did not meet the four Montevideo criteria on the characteristics of a State
[60] Article 4 (1) UN Charter
[61] Article 2(4) of the UN Charter states that "all Member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."
[62] Article 4 (1) UN Charter

Palestine an independent country even if the four Montevideo criteria on Statehood had not been met.

2.3 Significance of Non-membership of the United Nations

As earlier pointed out, an independent State must possess the four attributes enumerated in the Montevideo Convention which includes permanent population, defined territory, government, and capacity to enter into legal relations. A territory may possess the above four criteria and yet may not be independent. This is usually the case where a territory is given limited or regional autonomy by the Parent State on some issues, usually with the exclusion of foreign affairs. For instance, the Aaland Islands in Finland enjoys some degree of autonomy from the Finnish State but lacks the powers to engage in foreign relations. This is also the case with Catalans in Spain. Independence confers legal personality on territories under international law and gives them the capacity to enter into diplomatic and legal relations with other independent States. It also entitles States to seek the membership of the United Nations. All Member States of the United Nations are independent States, but not all independent States are Member States of the United Nations. The UN Charter even recognised the fact that not all independent States may be Member States of the UN as membership is limited to only peace-loving independent States that accepted the Charter obligations and are admitted as a Member State of the UN.[63] There may be independent States who fail to accede to the Charter obligations and who may be unwilling to carry out the obligations under the Charter. There may also be other independent countries that are not peace-loving even though they indicated interest and are desirous of acceding to the UN membership, but due to the Charter provisions on membership, they are not admitted as members. The above countries may be independent and sovereign without acceding to the UN membership. There are some de facto independent States which are yet to become Member States of the UN or permanent observers thereof, but are recognised by at least one Member State of the UN as an independent country. They include Republic of China[64], Sahrawi Arab Democratic Republic, Kosovo, South Ossetia, and Northern Cyprus.

[63] Article 4 (1) UN Charter
[64] ROC otherwise called Taiwan

The above listed de facto independent States had at one time or the other sought membership of the United Nations and recognition by its members without success. The Republic of China and People's Republic of China[65] laid claim to being the sole legitimate government of China[66] and sought recognition from other independent countries and Membership of the United Nations. The People's Republic of China was recognised by the United Nations as the legitimate government of China with about 169 countries having diplomatic relations with PRC compared to 23 countries that recognises the ROC.[67] As a result of diminished diplomatic recognition, the ROC no longer contends representing mainland China, and has since shifted its position to dual recognition of both the ROC and the PRC as legitimate governments representing two independent countries. The PRC, on the other hand continues to maintain one-China policy, treating Taiwan[68] as part and parcel of Chinese territory to which the PRC is the only legitimate government.

In the case of Sahrawi Arab Democratic Republic, otherwise known as Western Sahara, the area was a former Spanish colony bordered to the South of Morocco, North and West of Mauritania, and Southwest of Algeria with an estimated population of about 300,000 inhabitants.[69] The Spaniards pulled out in 1975 without granting independence to the colony neither did it hand over the area to any other country. As a result, Morocco, Algeria, and Mauritania claimed ownership of the area, while the tribal inhabitants of the area assert their right to self-determination and independence.[70] At present, Morocco is in possession of the area, but the African Union treats Western Sahara as an independent country by admitting it as a Member-State of the Union despite Morocco's protests.

In the case of Kosovo, following ethnic tensions between Serbia and Albanian Kosovars and failure of European Union backed negotiations, the Kosovar legislature voted overwhelmingly in favour of seceding from Serbia and declared its independence on 17th February 2008, even though Serbia contests the validity of such

[65] PRC
[66] Rich T. S., "Status for Sale: Taiwan and the Competition for Diplomatic Recognition", in Issues & Studies 45, No. 4, December 2009, pp. 159-188
[67] *Ibid*, p. 160
[68] The ROC controls Taiwan.
[69] Jensen E., Western Sahara: Anatomy of a Stalemate (Lynne Rienner Publishers, 2005), p. 14
[70] *Ibid*,

unilateral declaration of independence. Although Russia and China[71] support Serbia in its claim against Kosovo, a number of countries, led by the West and European Union Member States, continue to recognise Kosovo as an independent State. At present, there are about 116 countries that has recognised Kosovo as an independent State and established relations with it.[72]

In the South Caucasus, both Abkhazia and South Ossetia were former Georgian territories which respectively declared independence from Georgia following ethnic tensions in 1994 and 1992. Initially, Russia was hesitant to recognise both Republics as independent States. However, following the Russo-Georgian war in 2008 and some months after the West recognised the unilateral declaration of independence by Kosovo, Russia formally recognised Abkhazia and South Ossetia as sovereign States and called on the West and other countries to do same. Highlighting the significance of Kosovar's recognition, Russian President, Vladimir Putin, speaking at CIS[73] summit in Moscow declared that

> The Kosovo precedent is a terrible precedent. Essentially it is blowing up the whole system of international relations which has evolved over the past not even decades but centuries. Undoubtedly, it might provoke a whole chain of unpredictable consequences. Those who are doing this, relying exclusively on force and having their satellites submit to their will, are not calculating the results of what they are doing. Ultimately this is a stick with two ends, and one day the other end of this stick will hit them on their heads.[74]

Russia and its allies maintained that Kosovar's unilateral declaration of independence was in breach of international law[75], and its recognition by the West was unprecedented. That being the case, Russia contended that same recognition should be extended to Abkhazia and South Ossetia since they were all in the same boat, stressing that what was good for the goose should also be good for the gander. That notwithstanding, only a few countries recognise Abkhazia and South Ossetia as

[71] Both Russia and China are permanent members of the UN Security Council and may veto any future application for membership of the UN by Kosovo, just like the United States vetoed that of Palestine.
[72] https://www.kosovothanksyou.com/, accessed on 02/04/2020 at 13:30
[73] Commonwealth of Independent States, which is a loose confederation of 9 Member States and 2 associate States members, which were all former Soviet Republics, formed during the dissolution of the Soviet Union.
[74] BBC Worldwide Monitoring, 2008; Toal G., "Russia's Kosovo: A Critical Geopolitics of the August War Over South Ossetia", in Eurasian Geography and Economics, vol. 50 Issue 1, 2009, p. 14
[75] Even though the ICJ ruled afterwards that unilateral declarations of independence, without infringement of any *jus cogens*, were not prohibited under international law.

independent. No Western country recognises the duo, but rather views them as still within the territorial jurisdiction of Georgia.

The same problem of non-recognition which afflicts others[76] also afflicts the Turkish Republic of Northern Cyprus. The Republic declared its independence, unilaterally, from the Republic of Cyprus in 1983 and assumed the name Turkish Republic of Northern Cyprus following ethnic tensions and Turkey's invasion of Northern Cyprus. The rest of Cyprus comprised mainly ethnic Greek Cypriots. The UN Security Council issued several resolutions condemning the unilateral declaration of independence by the Turkish Cypriots and declaring it legally invalid.[77] It called on UN Member States not to recognise the Republic as a Sovereign State. Turkey, however, is the only UN Member State that recognises the Turkish Republic of Northern Cyprus despite the UN Security Council's condemnation. Following the ICJ's Advisory Opinion to the UN General Assembly in Kosovo's unilateral declaration of independence,[78] it is correct to state that unilateral declarations of independence are not generally prohibited under international law. That being the case, it is logical to posit also that there is no general prohibition of secession under international law. Whether there is an enforceable right to secession however is a different issue which will be discussed in the succeeding chapter under self-determination.

[76] Kosovo stands out from the rest as it enjoys significant recognition from a majority of UN Member States, but short of UN membership.

[77] For instance SC/Res/541 reaffirming the invalidity of the purported declaration of the independence of Turkish Republic of Northern Cyprus; and SC/Res/550 condemning the recognition by the Republic of Turkey of the purported secession of the Turkish Republic of Northern Cyprus and the exchange of Ambassadors between them, and called on other UN Member States not to recognise the Republic.

[78] I.C.J., Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, (July 22, 2010). 141, p. 29-48.

Chapter 3: Self-determination leading to State Formation

3.1 The Right to Self-determination

As already stated above, self-determination as a concept came to light immediately after World War I during the remapping of the defeated Central and Eastern Europe and President Wilson's futile bid to elevate it to an international norm at the time. Self-determination, however, transformed from a principle unrecognised under international law in the heydays of the League of Nations to a right protected under the United Nations Charter. With this recognition under the UN Charter also came a transformation in the understanding of what self-determination entails; rights of colonised peoples to determine for themselves their political future, as against the general application to all persons as espoused by President Wilson in 1919.

The principle of self-determination was thus established as an international norm under the purposes and guiding principles of the UN. Article 1 (2) of the UN Charter provides as one of the purposes of the UN "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".[79] The above provision outlines self-determination of peoples, however, nowhere in the Charter was the term "people" defined so as to fully appreciate the category of persons the self-determination principle is applicable to. Different authors proffer different definitions on the concept of "people". Some authors posit that the term "people" refers to the population living within a political unit[80], while others view it from the perspective of ethnicity, nationality, and shared attributes.[81] The United Nations Educational, Scientific and Cultural Organisation[82] in 1989/ 1990 attempted a comprehensive definition of the term "people" to mean

[79] Ch. 1, art. 1(2) Charter of the United Nations

[80] Cassese A., UN Law, Fundamental Rights (Sijthoff & Noordhoff, 1979), p. 150; Higgins R., The Development of International Law through the Political Organs of the United Nations (Oxford University Press 1963), p. 119

[81] Brownlie I., "The Rights of Peoples in Modern International Law", in Crawford J. (ed.), The Rights of Peoples (Clarendon Press, 1988), p. 5; Dinstein Y., "Collective Human Rights of Peoples and Minorities" (1976) 25 International and Comparative Law Quarterly, p. 104

[82] UNESCO with headquarters in Paris, France

> 1. a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life; 2. The group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State; 3. The group as a whole must have the will to be identified as a people or the consciousness of being a people -allowing that groups or some members of such grows, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly, 4. The group must have institutions or other means of expressing its common characteristics and will for identity.[83]

Depending on the context in which the term is used, the term "people" can refer to a whole lot of groups; from people who share common attributes, to people living within the same geographical area, political unit, continent etc.[84] From whatever perspective a person is approaching the definition of the term "people", the concept of self-determination of peoples as provided for under the UN Charter encompasses all. That notwithstanding, for the purposes of this research, the term "people" is taken to mean a group of people who identify themselves as belonging to the same ethnic group or constituting a nation, and who share certain similar attributes of language, culture, geographic location, etc. The above understanding of the meaning of "people" will guide the researcher in the further elucidation of the right to self-determination in this research, and the terms "people", "ethnic group", or "nation" may be used interchangeably in the course of this work.

In Chapter IX of the UN Charter that dealt with International Economic and Social Co-operation, article 55 lists several goals the organisation would pursue "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples…."[85] Going further in article 73 which dealt with non-self-governing territories, there was an implied reference to self-determination wherein it was affirmed in the article that

[83] UNESCO, "International Meeting of Experts on Further Study of the Concept of the Right of the Peoples" (22 February 1990) SHS-89/CONF 602/7, pp. 7-8

[84] For instance "people" can refer to the Roma people based on ethnicity, the Finns based on political unit, and the Europeans based on continent.

[85] Art. 55 Charter of the United Nations

> [m]embers of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories […].[86]

Again, there was a subtle reference to self-determination in the UN Charter as seen in article 76 (b). The article provides for, as one of the basic objectives of the trusteeship system, the promotion of political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence in accordance with the freely expressed wishes of the people concerned.[87]

Even though there was no elaboration of the contents, extent, and beneficiaries of the right to self-determination in the UN Charter, the recognition of the right in the Charter and the subsequent State practice has elevated the right to a *jus cogens*. State practice exemplified by the numerous UN General Assembly's resolutions pertaining to self-determination has developed in this regard in clarifying the status of the right to self-determination under international law. For instance, in 1960, the UN General Assembly adopted Resolution 1514[88] calling on administrative powers to take immediate steps towards transferring without reservations all powers to the trust and non-self-governing territories or all other territories which had not yet attained independence in accordance with their freely expressed will and desire.[89] This declaration represented the political will behind the decolonisation policy of the United Nations,[90] and the overwhelming support the declaration received showed that colonialism was no longer tolerable at the time. Other resolutions like General Assembly Resolution 1541 (XV) defining the three options for self-determination;[91] and General Assembly Resolution 1654 (XVI) establishing the Special Committee on

[86] Ch. XI, art. 73 Charter of the United Nations
[87] Ch. XII, art. 76 (b) Charter of the United Nations
[88] United Nations General Assembly Resolution 1514 (XV): Declaration on the granting of independence to colonial countries and peoples (United Nations General Assembly [UNGA]) UN Doc A/RES/1514(XV), GAOR 15th Session Supp 16, 66
[89] Thúrer D., & Burri T., Self-Determination (Max Planck Encyclopedia of Public International Law [MPEPIL], 2008)
[90] *Ibid*.
[91] General Assembly Resolution 1541 (XV): General Assembly Resolution defining the three options for self-determination

Decolonisation,[92] were historical as well given the role they played in shaping world opinion and attitude towards self-determination and decolonisation.

The lack of mechanism of implementation of the right to self-determination in the UN Charter was cured by the provisions of the International Covenant on Civil and Political Rights, 1966[93] which has been ratified and domesticated by majority of Member States of the United Nations. Article 1 (1) of the Covenant stipulates that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[94] The Covenant further stipulates that

> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[95]

The exact same provisions contained in the ICCPR on self-determination were replicated in the International Covenant on Economic, Social and Cultural Rights, 1966[96]. By providing for self-determination in the two international covenants[97], self-determination was elevated to the status of a human right and no longer a mere principle. The justiciability of the right to self-determination as contained in both the ICESCR and the ICCPR remains in doubt as an individual complainant may not successfully sustain a complaint against a State party to the Covenants in respect of breaches of the right to self-determination. The Human Rights Committee[98] had emphasized in its General Comment 12[99] on article 1 of the ICCPR that the realisation of the right to self-determination is of particular importance because it is an essential condition for the effective guarantee and observance of individual human rights.[100] However, the HRC had decided in its First Optional Protocol to the ICCPR that article 1 of the ICCPR which provided, amongst other things, the right to self-determination,

---

[92] General Assembly Resolution 1654 (XVI): General Assembly Resolution establishing the Special Committee on Decolonisation
[93] Hereinafter shortened to ICCPR
[94] Art. 1(1) ICCPR, 1966
[95] Art. 1(3) ICCPR, 1966
[96] Hereinafter shortened to ICESCR, 1966
[97] ICCPR and ICESCR
[98] Hereinafter referred to as "the HRC"
[99] General Comment No. 12: Article 1 (The right to self-determination of peoples), HRI/GEN/1/Rev.9 (Vol. 1)
[100] Kaczorowska-Ireland, A., Public International Law, 5th Ed (London: Routledge, 2015)

is non-justiciable when alleging the breach of collective rights as against individual rights. This thus makes it impossible for complainants to successfully rely on the provisions of self-determination under the ICCPR against a State before the HRC.[101] This reiterates the position that the right to self-determination is a collective as against individual rights, and can only be claimed by peoples, not individuals. As the HRC had the right to decide only cases bothering on individual rights as against collective rights under article 1, self-determination which is a collective right falls outside the scope of its adjudicatory powers.[102] In *Kitok v. Sweden*[103], a Swedish citizen of Sami ethnic group, in his Communication, alleged violations of his rights under article 1 and 27 of the ICCPR by the Swedish Government. The Sami ethnic group have the civil right to reindeer breeding as well as the rights to land and water in the villages they occupy. The Complainant had been denied the exercise of these rights because he was alleged to have lost his membership in the Sami village pursuant to a 1971 Swedish statute[104] that prohibits non-members from exercising Sami rights to land and water. Under the law, if a Sami engages in any other profession for a period of 3 years, he loses his status as a Sami and his name is removed from the rolls of the Sami village, which he cannot re-enter unless by special permission.[105] After exhausting local remedies, he complained to the HRC claiming that the Swedish Crown arbitrarily denies the immemorial rights of the Sami minority and that the complainant is the victim of such denial of rights. In relation to article 1 of the ICCPR concerning group rights which the complainant complained of, the HRC held that an individual had no *locus standi* under article 1 of the ICCPR because he could not claim to be a victim of a violation of the right to self-determination which could only be claimed by "peoples".[106]

The Optional Protocol to the ICESCR in its article 1 provided for the competence of the Committee on Economic, Social and Cultural Rights[107] to receive and consider communications pertaining to the rights contained in the ICESCR against State parties which are also parties to the Optional Protocol.[108] The Optional Protocol entered into

[101] First Optional Protocol to the ICCPR
[102] First Optional Protocol to the ICCPR
[103] Communication No. 197/1985; U.N. Doc. CCPR/C/33/D/197/1985
[104] Reindeer Husbandry Act, 1971 (Sweden)
[105] *Kitok v. Sweden, supra,* par. 2.2
[106] Kaczorowska-Ireland, *supra*
[107] Hereinafter referred to as "the Committee"
[108] Article 1 of the Optional Protocol to the ICESCR

force on the 5th of May, 2013 following the ratification by Uruguay making it the 10th State to ratify the Optional Protocol as provided for in article 18.[109] This makes the rights provided for in the ICESCR justiciable against State parties who are also parties to the Optional Protocol. The Optional Protocol to the ICESCR, on the other hand, permits the justiciability of group rights as contained in article 1 of the ICESCR, unlike the first Optional Protocol to the ICCPR. Article 2 of the Optional Protocol to the ICESCR provides that communications may be submitted by or on behalf of individuals or groups of individuals.[110] Groups of individuals, as provided for in article 2 of the Optional Protocol creates a pathway for the competence of the Committee to receive communications pertaining to group rights, like the right to self-determination as provided for under article 1 of the ICESCR. This is an improvement from the ICCPR's First Optional Protocol which explicitly limited communications to individual complaints thereby excluding communications alleging breach of group rights. For the right to self-determination to succeed before the Committee on the ICESCR however, it must be shown that the breach of the right to self-determination affected some other economic, social, and cultural rights provided for under the ICESCR.[111] This means that at the international scene, the right to self-determination is justiciable under the ICESCR to the degree that it is connected to some specific rights protected by the ICESCR against State parties that have ratified the Optional Protocol to the ICESCR.[112] Given the same scenario under the ICCPR, it is inadmissible as only breach of individual rights is admissible in complaints before the Human Rights Committee of the ICCPR.[113] Although the new elevated status self-determination enjoys under the Optional Protocol to the ICESCR is an improvement compared to what obtains under the First Optional Protocol to the ICCPR, it still falls short of being used as an effective tool by separatists hoping to secede from a parent State. This is because, the right cannot stand on its own without being attached to some other specific rights protected by the ICESCR. Again, the Committee lacks coercive measures to force a State to abide by its views or recommendations on a

[109] Article 18 of the Optional Protocol to the ICESCR
[110] Optional Protocol to the ICESCR
[111] Courtis, C., "Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", in Inter-American Institute of Human Rights/International Commission of Jurists, 2008, p. 41
[112] Biglino, I., and Golay, C., Academy In-Brief No.2: The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (Geneva Academy of International Humanitarian Law and Human Rights, 2013), p. 9
[113] *Kitok v. Sweden, supra,*

communication, especially decisions relating to the right to self-determination. Moreover, whatever view or recommendation the Committee may give in relation to the right to self-determination will be in furtherance of the realisation of other specific economic, social and cultural rights, and may not have civil or political connotations which are directly under the purview of the ICCPR.

3.2 Extent of the Right to Self-determination

During the early years of the United Nations, the right to self-determination was majorly associated with the rights of colonised peoples and territories not governing themselves to obtain independence from their erstwhile colonial masters and become self-governing. This explains the State practice developed in this regard through the different resolutions passed by the UN General Assembly on decolonisation. At present, the number of territories still under colonisation or non-self-governing has shrunk[114], and as a result implementation of the right to self-determination by the UN has become redundant. Right to self-determination, however, goes beyond granting independence to colonial and non-self-governing territories. It includes the rights of all peoples to freely determine their political status and freely pursue their economic, social and cultural development.[115] The two international covenants' right to self-determination provisions did not in any way limit the definition or application of that right to only situations that had to do with decolonisation or non-self-governing territories. It proclaimed thus "all peoples […]"[116] meaning that even peoples who cannot be categorised as under colonialism or non-self-governing can also take advantage of, and exercise the right to self-determination. If the draftsman of the two international covenants had wanted to limit the meaning of the right to self-determination, the provisions ought to have read instead, "all colonised and non-self-governing peoples". But by proclaiming "all peoples […]"[117] without qualification, it presupposes to conclude that the right to self-determination is also applicable to peoples other than colonised or non-self-governing peoples.

[114] There are still at least 17 non-self-governing territories that the process of decolonisation has not been completed and which are currently listed in the UN Data base maintained by the UN Statistics Division of the Department of Economics and Social Affairs (United Nations data.un.org.). Available from http://www.un.org/en/decolonization/nonselfgovterritories.shtml, accessed on 02.04.2020 at 11:20

[115] Art. 1(1) ICCPR, 1966; Art. 1(1) ICESCR, 1966

[116] *ibid*

[117] *ibid*

Right to self-determination can be internal or external. Internal self-determination refers to the right of peoples to freely choose their own political, economic, and social system[118] without any foreign interference.[119] According to Salvatore Senese, the right to internal self-determination means that "other states should not, through appeals or pressure, seek to prevent a people from freely selecting its own political, economic, and social system".[120] Internal self-determination is available to a people who have already achieved statehood or belong to another State. For instance, the holdings of elections, division of a State into tiers or the granting of some degrees of autonomy to a region are all instances of internal self-determination. External self-determination, on the other hand, refers to the right of a people to constitute itself as a nation-state or to integrate into, or federate with an existing State.[121] It is the aspect of the self-determination right that concerns the international status of a people,[122] and to some extent, may involve foreign interference. This is the aspect of self-determination right that seeks to break away or tamper with the territorial integrity of an already existing State. The newest Member-State of the UN, South Sudan exercised its right to external self-determination and seceded from the Republic of Sudan in 2011.[123]

3.3 Right to Remedial Self-determination and Territorial Integrity

Generally, there seems to be no internationally guaranteed right to external self-determination beyond decolonisation and non-self-governing territories. This is due, in part, to the already established State practice which abhors assaults on the territorial integrity of States. President Wilson, during the Paris Peace Conference, called for a peaceful post-war Europe to be established through specific covenants that would afford mutual guarantees of political independence and territorial integrity to great and small States alike.[124] Article 2 (4) of the UN Charter provides that

[118] Senese, S., "External and Internal Self-Determination" in Human Rights & Peoples' Rights: Views from North & South (*Social Justice*, vol. 16, no. 1 (35), 1989), pp. 19
[119] Art. 5 Universal Declaration of the Rights of Peoples, Algiers, 1976
[120] Senese, S., *art. Cit.*, p. 19
[121] *ibid*
[122] *ibid*
[123] Johnson, D. H., "New Sudan or South Sudan? The Multiple meaning of self-determination in Sudan's comprehensive peace agreement", in Civil Wars vol. 15 (2), 2013, pp. 141-156
[124] Marxsen C., "Territorial Integrity in International Law-Its concept and Implications for Crimea", in Heidelberg Journal of International Law (ZaöRV 75,2015), p. 8

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[125]

The exercise of the right to self-determination which would lead to the dismemberment of a Member State of the UN no doubt constitutes an assault on the territorial integrity of that State. Consistent State practice developed in this area abhors this, even though the ICJ had declared that unilateral declaration of independence constitutes no breach of international law.[126] What this means is that secession is neither prohibited nor expressly allowed under international law. Secession cannot be claimed as a right, but the fact of a successfully seceded or disintegrated State cannot be denied recognition of that fact under international law as well. However, a right exists for remedial secession which can be asserted against a State that fails in its duties against a section of that State, and which can be used to justify any assault on the territorial integrity of that State.[127] The idea of remedial secession was first broached as a possibility by the Committee of Jurists appointed in the Aaland Islands question[128], and has since come to represent a base view on secession issues. The Committee's opinion was to the effect that if there were to be a manifest and continued abuse of a State's sovereignty against a minority population, that such a scenario will be enough to sidestep the principle of territorial integrity of States and bring the domestic scenario within the competence of an international body.[129] The secession of South Sudan from Sudan evolved into remedial secession following continued abuses of Sudan's sovereignty over its minority South Sudanese population and following a protracted civil war over independence between the two sides. The international community intervened and pressured the Sudanese government into allowing a UN supervised self-determination referendum vote by

[125] Art. 2 (4) Charter of the United Nations

[126] I.C.J., Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, (July 22, 2010). 141, p. 29-48

[127] Art. 6 Universal Declaration of the Rights of People, Algiers, 1976 contains a suggestion that every people has the right to break away from any racist regime.

[128] Report of the International Committee of Jurists, p. 5

[129] League of Nations at the time, which has been succeeded by the United Nations. Report of the International Committee of Jurists, p. 5; The Aaland Islands Question, p. 28

citizens of South Sudan which ensured its secession, as a last resort, from the Republic of Sudan.[130]

Chapter 4: Secession and the Modern State

4.1 Human Rights Concerns and Territorial Integrity

In the desperate quest to maintain and preserve territorial integrity of States, principal actors seem to overlook or relegate respect for human rights to the background. There are particular concern to issues that qualify as genocides, war crimes, and crimes against humanity which are perpetrated by actors on either side of a conflict when fighting for independence or preserving the territorial integrity of a State. The war and armed conflict in Nigeria and Cameroon sheds some light into grave human rights abuses that have occurred in the recent past wherein countries fought to preserve the territorial integrity of their States at the expense of grave human rights abuses. In Nigeria, it was reported that the Nigerian soldiers, upon capture of an Igbo town called Asaba, demanded a roll call of all male population in the town both the old and young. As the men and little boys of the town gathered in the town square at the behest of the Nigerian army, the commander of the Nigerian brigade Division II which captured the town, Murtala Mohammed, ordered his troops to summarily execute them. The troops opened fire killing the unarmed men and boys gathered in the town square and buried them in a mass grave.[131] The London Observer of 21st January 1968 noted that "the greatest single massacre occurred in the Ibo town of Asaba where 700 Ibo males were lined up and shot."[132] Monsignor Georges Rocheau, an emissary of the then Pope, His Holiness Pope Paul VI to both Biafra and Nigeria, after a fact-finding mission in both Nigeria and Biafra stated thus in an interview to French Le Monde Newspaper and as reported in several books including Forsyth and Achebe, that

[130] Johnson, D. H., supra, p. 145
[131] Achebe, C., There was a Country: A professional History of Biafra (Great Britain: Allen Lane, 2012), p. 134
[132] London Observer of 21st January 1968; Forsyth., F. The Biafra Story: The Making of an African Legend (Pen and Sword, 2015)

> There has been genocide, for example on the occasion of the 1966 massacres….Two areas have suffered badly (from the fighting). Firstly the region between the towns of Benin and Asaba where only widows and orphans remain, Federal troops having for unknown reasons massacred all the men.[133]

The Nigerian soldiers committed genocide against the Igbos by assembling, and summarily executing unarmed civilian men and boys in their hundreds in towns they captured from the then Biafran State.[134] During his visit to Asaba on 8th December, 2002, General Yakubu Gowon, who was the then Military Head of State of Nigeria during the Nigeria- Biafra war apologised for the mass killing at Asaba during the war by his soldiers. He stated that

> It came to me as a shock when I came to know about the unfortunate happenings that happened to the sons and daughters […] of (Asaba) domain. I felt very touched and honestly I referred to (the killings) and ask for forgiveness being the one who was in charge at that time. Certainly, it is not something that I would have approved of in whatsoever. I was made ignorant of it, I think until it appeared in the papers. A young man wrote a book at that time.[135]

Testifying at the Nigerian Truth Commission,[136] Major General Ibrahim Haruna, under cross examination from Chief Mogbo, S.A.N[137] representing Ohaneze Ndigbo[138] at the Oputa Panel, stated defiantly that

> As the commanding officer and leader of the troops that massacred 500 men in Asaba, I have no apology for those massacred in Asaba, Owerri, and Ameke-Item. I acted as a soldier maintaining the peace

[133] Forsyth., F. The Biafra Story: The Making of an African Legend (Pen and Sword, 2015); Achebe, C., There was a Country: A professional History of Biafra (Great Britain: Allen Lane, 2012), p. 134

[134] Achebe, C., *supra*, p. 134; Bird E. S., and Ottanelli F., "The Asaba Massacre and the Nigerian Civil War: Reclaiming Hidden History", in Journal of Genocide Research" (Special Double Issue: The Nigeria-Biafra war, 1967–1970: Postcolonial Conflict And The Question Of Genocide), Vol. 16, nos. 2-3, 2014, p. 379.

[135] Achebe, C., *supra*, p. 134; Ogwuda, A., "Gowon Faults setting up of Oputa Panel", Vanguard Newspaper, December 9, 2002.

[136] Popularly referred to as "Oputa Panel" after the chairman of the Truth Commission, Justice Chukwudifu Oputa, J.S.C. The panel was set up in 1999 by the then newly inaugurated government of President Olusegun Obasanjo to look into human rights abuses in Nigeria from the period of military regimes until his civilian government pursuant to Statutory Instrument No. 8 of 1999 which constituted and appointed the Commission.

[137] Senior Advocate of Nigeria

[138] A Pan Igbo umbrella body representing the interests of the Igbo people of Eastern Nigeria who majorly constituted the defunct Biafra Republic

> and unity of Nigeria [...]. If General Yakubu Gowon apologised, he did it in his own capacity. As for me I have no apology.[139]

Article 6 (a) of the Rome Statute of the International Criminal Court defines genocide to mean "[…] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group […]"[140]. Rounding up defenceless male population of a town composed of one ethnic group and massacring them constituted the offence of genocide as set out in the above statute.[141] The mental element of "intent" was present as the perpetrators sought to destroy, in whole or in part, ethnic Igbo population residing in the affected towns. Article 7 (1) (a) of the same Rome Statute defines "crimes against humanity" to mean "[…] any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; […]".[142] The massacres were unprovoked and were committed against civilian populations with full knowledge of the atrociousness of their actions, going from town to town[143] in a widespread or systemic manner rounding up and massacring defenceless civilians in a bid to preserve the territorial integrity of Nigeria.

The Commanding Officer of the troops that committed genocide against the Igbos during the war, in his own words, admitted to the crimes and was unapologetic for his actions and that of his troops. He justified their actions on the premise of preserving the territorial integrity of Nigeria. Although the Rome Statute of the International Criminal Court cannot apply retroactively in Nigeria to events that happened during the Nigeria-Biafra war, murder was and is still a crime in Nigeria.[144] A principal actor of the massacre during the war admitted on live television and before the Oputa Panel

---

[139] Achebe, C., *supra*, p. 135

[140] Article 6 (a) Rome Statute of the International Criminal Court, 1998

[141] Nigeria became a signatory to the Rome Statute on 1st June, 2000, and ratified same on 27th September, 2001, therefore, the International Criminal Court does not have the jurisdiction to entertain matters arising from events that occurred in Nigeria prior to Nigeria's accession and ratification of the statute. See article 11 Rome Statute of the International Criminal Court, 1998 on jurisdiction *ratione temporis*.

[142] Article 7 (1) (a) Rome Statute of the International Criminal Court, 1998

[143] Major General Ibrahim Haruna, in his testimony mentioned about 3 towns that they carried out massacres to include Asaba, Owerri, and Ameke- Item. Achebe, C., *supra*, p. 134; Ogwuda, A., "Gowon Faults setting up of Oputa Panel", Vanguard Newspaper, December 9, 2002.

[144] Sec. 315 of the Nigeria's Criminal Code, The Criminal Code Act, Cap C38 Laws of the Federation of Nigeria, 2004 criminalises unlawful homicide and provides that "Any person who unlawfully kills another is guilty of an offence which is called murder or manslaughter, according to the circumstances of the case." Going by this provision, Major General Ibrahim Haruna, per his admission under cross examination at the Oputa Panel ought to have been charged for murder for the killings of defenceless and unarmed male civilians in Asaba and other towns during the Nigeria- Biafra war.

of giving orders and participating in the mass murder of unarmed civilians during the war. It is doubtful that the perpetrators will be prosecuted for murders committed during the war. The Oputa Panel had limited mandate without prosecuting or punishing powers. It was established to merely investigate and make recommendations to the then government of President Olusegun Obasanjo. The Nigerian Government is yet to implement the recommendations of the Oputa Panel since the Panel submitted its report in 2002.

In the Republic of Cameroon, the people of Southern Cameroon are agitating and engaging in guerrilla-style warfare against the Republic of Cameroon claiming a right to self-determination. They are advocating for the creation of an independent Ambazonia State from the present Southern English-speaking part of Cameroon.[145] It should be noted that the people of Southern Cameroon, had in the past, exercised some form of right to self-determination in a referendum conducted in 1961. In the said 1961 referendum, they had to choose whether to remain with and become a part of Nigeria or to federate with their kinsmen in the newly independent Cameroon Republic. Prior to the referendum, Southern Cameroon constituted part of the Northern and Southern Protectorates of Nigeria which gained independence from Britain in 1960. The Southern Anglophone Cameroon voted to reunite with their brothers in the Republic of Cameroon by forming a federated Cameroon while the Northern Anglophone Cameroon chose to federate with Nigeria.[146] The reunification, then, "was perceived as the greatest achievement and the apotheosis of African nationalist struggles par excellence".[147] However, due to certain political developments in the Cameroon which saw to the abolishment of Cameroon's Federalist Constitution and concentration of more powers in the central government, Southern Cameroonians came to despise the reunification, and called for a return to federation or a total independence from the Republic of Cameroon.[148] In asserting their right to self-determination, the Southern Cameroonians argue that having exercised the right in the past to divorce from Nigeria and federate with the Republic of Cameroon, they have the inherent right to once more choose whether they want to

[145] Ebai, S.E., "The Right to Self-Determination and the Anglophone Cameroon Situation", in The International Journal of Human Rights, vol. 13 No. 5, 2009, pp. 631-653
[146] Awasom, N.F., "The Reunification Question in Cameroon History: was the Bride an Enthusiastic or a Reluctant one?", in Africa Today, vol. 47 No. 2, 2000, pp. 91-119
[147] Awasom, N.F., *supra, p. 92*
[148] Awasom, N.F., *supra, p. 92*

remain with the Republic of Cameroon or secede and form an independent country.[149] The Republic of Cameroon's leadership perceived the latest agitations in the southern part of Cameroon as an attempt to dismember the country in breach of its territorial integrity, and militarily cracked down on the secessionists. The government charged the secessionist Southern Cameroon nationalist leaders with treason.[150] The agitations started off as a civil disobedience by the residents of Anglophone Cameroon who embarked on industrial actions protesting the sending of French Magistrates to preside over courts in Anglophone Cameroon. The government sent its soldiers to quell the civil unrest, and the situation degenerated into armed conflict and outright demand for an independent State of Ambazonia encompassing the current Anglophone areas of Cameroon. Leaders of the Ambazonia separatist movements who had gathered in a hotel in Abuja, Nigeria, were rounded up by the Nigerian Secret Police and extradited to Cameroon where they were charged and convicted of treason by a military court.[151] The trial itself was reported to have been conducted in a grave manner without affording the defendants their basic rights as protected under the Cameroonian Constitution. For instance, the defendants were all civilians but were tried in a military court. Again, the trial was conducted in French language without affording the Anglophone defendants an interpreter to interpret the charges, evidence and court proceedings in the language they understand.[152]

Apart from the above criminal trials, there had been widespread reports of extra-judicial killings and executions of alleged separatists, separatist fighters and their family members by the Cameroonian military. One report paints a graphic scenario of an extra-judicial killing of a perceived separatist by the Cameroonian military that was videotaped on 24th March 2019 thus

> There is a hole dug in dry mud ground, like a grave, with a blindfolded man inside who is clearly alive and does not appear to be injured. As the man in the grave tries to get up, a man in military uniform kicks

[149] Awasom, N.F., *supra, pp.* 91-119

[150] BBC News reported that the secessionist leaders have been convicted by a military court in August, 2019 of treason and rebellion and sentenced to life imprisonment. BBCNews, "Cameroon Crises: Ambazonia separatists get life sentences", available from https://www.bbc.com/news/world-africa-49406649, accessed on 04.12.2019 at 22:21

[151] BBCNews, "Cameroon Crises: Ambazonia separatists get life sentences", available from https://www.bbc.com/news/world-africa-49406649, accessed on 04.12.2019 at 22:21

[152] NA, "Cameroon: Separatist leaders appeal conviction, September 3, 2019" https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction, accessed on 19.12.2019 at 20:21

> him down. There are at least four other men in military uniforms in view at different moments, and at least one of the men in military uniform has gun. There appears to be another man among the military men, wearing shorts and a t-shirt, without shoes on his feet – it is not clear if he is with the men in uniform or a prisoner. The French speaker recording appears to say 'Ça va comme ça'. There is the sound of a gun rifle click. The man blindfolded in the grave tries to get up. A man behind the camera shouts, 'ce la va, ce la va'. The man behind the camera speaks more French which I struggle to understand. He says, 'le téte'. There is the sound of 5 gunshots. The man in the grave is no longer moving.[153]

Assuming the victim was a separatist, and was armed or engaging in warfare against the State before he was finally captured by the Cameroonian military as seen in the video, does the law allow summary execution of a prisoner of war without trial? Article 8 (2) (c) (i) of the Rome Statute of the International Criminal Court, 1998 makes it a war crime to murder a prisoner of war. If there is a contention as to whether there is an armed conflict in Cameroon which is not of an international character to warrant the toga of war crime, the extra judicial killing of the victim above is still murder or capital murder under local laws.[154] There is premeditation in the actions of the soldiers; they dug a hole, threw the victim into the hole, brought out a recording device and recorded the killing. That is capital murder going by local laws, and a war crime should the perpetrators appear before the International Criminal Court.[155] The above case is just one of numerous instances of human rights abuses highlighted in the report[156] mostly committed by government forces in their attempt to quell the uprising and demand for self-determination in Anglophone Cameroon. The report[157] contained gory details of numerous State sponsored executions as well as killings by separatists that for want of decency will not be highlighted here.

[153] Willis, R., McAuley, J., Ndeunyema, N., and Angove, J., "Human Rights Abuses in the Cameroon Anglophone Crises: A Submission of Evidence to UK Parliament", (A report submitted by an independent research team based at the Faculty of Law, University of Oxford on 30 October, 2019).
[154] Sections 275 and 276 of the Penal Code of the Republic of Cameroon, Law No. 2016/007 of 12 July 2016
[155] Although Cameroon signed the Rome Statute of International Criminal Court on 17th July, 1998, it is yet to ratify it, thereby making the Rome Statute inapplicable to Cameroon. See Coalition for the International Criminal Court, http://iccnow.org/?mod=urc0706, accessed on 20.12.2019 at 1050
[156] Willis, R., et. Al., *supra*
[157] Willis, R., et. Al., *supra*

4.2 Criminalising Agitations for the Exercise of the Right to Self-determination

Agitations or demands for the opportunity to exercise the right to self-determination have been criminalised in some countries even though right to self-determination is enshrined in the Charter setting up the United Nations.[158] In Cameroon, for instance, demand for secession was quickly criminalised in the wake of the civil disobedience and unrest that engulfed the Anglophone parts of Cameroon in the recent past. In the new Penal Code of 2016, section 111 criminalises secession and posits that "whoever undertakes in any manner to infringe the territorial integrity of the republic shall be punished with imprisonment for life."[159] The section went ahead in subsection 2 to provide for death penalty for any person found guilty of the offence as provided in section 111 if such offence was committed during the time of war, state of emergency, or a period of siege. What this means is that agitating, demanding or campaigning for secession from the Republic of Cameroon, or the opportunity to exercise the right to self-determination, just as Anglophone Cameroonians did in 1961, would be deemed a contravention of section 111 of the new Penal Code, and therefore, upon conviction subject to life imprisonment or death as the case may be. It was on the basis of this penal provision that the Anglophone separatist leaders, who were arrested in Nigeria and repatriated to Cameroon by the Nigerian Government, were tried by a military tribunal and sentenced to life imprisonment in August 2019 for being in breach of the offence as stated in section 111 of the 2016 Penal Code.[160]

In Nigeria, agitations for the independence of a sovereign State of Biafra still rages even though the then Eastern Nigeria that made up the defunct Biafra was defeated in war and re-annexed back into Nigeria subsequently thereafter. Over the past two decades, some prominent Igbo persons have risen up to campaign and demand for the independence of the Igbos from the Nigerian federation to form the Republic of Biafra. Officially, the preamble to the Nigerian Constitution states that "We the people of the Federal Republic of Nigeria Having firmly and solemnly resolve (sic), to live in

[158] Article 1 (2) of the UN Charter
[159] Sec 111 (1) of the Penal Code of the Republic of Cameroon, Law No. 2016/007 of 12 July 2016
[160] BBCNews, "Cameroon Crises: Ambazonia separatists get life sentences", available from https://www.bbc.com/news/world-africa-49406649, accessed on 04.12.2019 at 22:21

unity and harmony as one **indivisible and indissoluble sovereign nation**[161] under God […]"[162] It should be pointed out here that the Constitution itself was a product of the military regime that handed over power to a civilian government in 1999.[163] The people were neither consulted nor their opinions sought before the Constitution was imposed on the country, and so it is a fallacy to state that the people resolved to live as one indivisible and indissoluble sovereign nation. That notwithstanding, the 1999 Constitution is the *grundnorm* in Nigeria, and supersedes every other legislation in the country.[164] Going by the constitutional preamble and provisions, secession is unconstitutional, and any agitation for the exercise of the right to self-determination which may have the end result of any part of the country seceding to form an independent sovereign State is also unconstitutional.[165] The Nigerian Criminal and Penal Codes did not provide for any offence related to the disintegration or secession of a part of the country to form an independent sovereign State. The Nigerian government, however, has found usefulness in treason offences under the Codes by charging separatists or persons agitating for Nigeria's disintegration of committing treason and treasonable felonies. Treason is the offence of acting to overthrow one's government or to harm or kill its sovereign.[166] Depending on the context in which the proponents may want to apply the offence of treason to, it may also include a violation of allegiance to one's Sovereign or to one's State.[167] The Nigerian Criminal Code stipulates thus

> (1) Any person who levies war against the State, in order to intimidate or overawe the President or the Governor of a State, is guilty of treason, and is liable to the punishment of death.
> (2) Any person conspiring with any person, either within or without Nigeria, to levy war against the State with intent to cause such levying

[161] Emphasis mine
[162] Constitution of the Federal Republic of Nigeria, 1999, as Amended in 2010, hereinafter referred to as "the CFRN 1999, as amended in 2010". Also, see sec. 2 (1) the CFRN 1999, as amended in 2010.
[163] Following the death of the then Head of State, General Abacha in 1998, General Abdulsalami Abubakar took over as the new Head of State, set up a military Constitution Drafting Committee which made a new Constitution for Nigeria that came into effect in 1999 and upon which a civilian government took over power from the military in the same year. See Ogowewo, T. I., "Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy", in Journal of African Law vol. 44, no. 2, 2000, pp. 135-166
[164] The Constitution is supreme and takes precedence should any other law made or which is applicable to Nigeria be found to be inconsistent with it. See sec. 1 (2) the CFRN 1999, as amended in 2010
[165] Sec. 2 (1) the CFRN 1999, as amended in 2010.
[166] Mayben, M., Manifest Secession: A Proposal for Peace and Liberty (1776 Patriot's Press, 2010), p. 17
[167] Mayben, M., *supra*

> of war as would be treason if committed by a citizen of Nigeria, is guilty of treason and is liable to the punishment of death;
> Provided that nothing in this section shall prevent any act from being treason which is so by the law of England as is in force in Nigeria.[168]

The purport of the above provision is that the carrying out of the acts stipulated above as well as conspiring to do same amounts to treason. The punishment for the offence of treason in Nigeria is death. Although harsh, the intent of the draftsman was to totally discourage the commission or conspiring to commit the offence of treason against the Nigerian State or its Sovereign, as the State's major aim lies in deterring the commission of an offence rather than in punishing offenders. The proviso to the above section no longer serves any meaningful purpose as no one in Nigeria today can be charged with, for instance, committing adultery with the Sovereign's consort which is high treason in the United Kingdom[169] but not an offence in Nigeria. The Nigerian Constitution stipulates that no person shall be convicted of a criminal offence unless that offence is defined and its penalty thereof is prescribed in a written law.[170] Nowhere was it written in the Nigerian laws that committing adultery, or doing same with a Sovereign's consort is treason, so the offence of treason in the United Kingdom cannot validly be imported into the Nigerian law of treason without offending the above constitutional provision.

The section providing for treason in Nigeria is exclusive; it enumerated actions that are treasonous and did not give any room for inference. For the offence of treason to be committed in Nigeria, a traitor must have levied war or conspired with any other person to levy war against the Nigerian State in order to intimidate or overawe the President or Governor of a state. In terms of agitations for the exercise of the right to self-determination or secession, the treason section does not include them as acts which are treasonous. However, such acts could become treasonous when they involve levying of war or conspiring to levy war in order to intimidate or overawe the Nigerian President into granting their wishes of holding a self-determination referendum or seceding from Nigeria. This means that individuals can lawfully agitate for the right to self-determination in so far as they do not wage war or conspire to wage such war against the Nigerian State in order to intimidate or overawe the President. Waging war or conspiracy to wage war are principal elements that must be

[168] Sec. 37 Criminal Code cap C38 Laws of the Federation of Nigeria, 2004
[169] Section II UK's Treason Act 1351
[170] Sec 36 (12) CFRN 1999 as amended

proved in order for a treason charge to succeed. According to Okonkwo and Naish[171], "war" as is used in the above section does not bear the restricted meaning which it bears under international law, as it is not necessary that the accused persons should be members of an armed force or even trained in military warfare or in the use of arms.[172] The type of weapon used in levying the war is immaterial, so also the number of persons involved in levying the war.[173] The war must be levied for a general and public purpose, if it is done merely for a private purpose, then the offence may be simply a riot.[174] For instance, In *R. v Boro*,[175] the defendant's counsel argued that to establish the offence of treason as provided under the above section following the waging of war or conspiracy to do same, it must be proved that the Head of State was personally intimidated or overawed as provided in section 37 of the Criminal Code. The Supreme Court however held that there is no difference between intimidating and overawing the State and doing the same to the Head of State as the Head of State is the embodiment of the State, and that to intimidate him is the same as intimidating the State.[176]

The Nigerian government arrested one Ralph Uwazuruike in 2005 and charged him and several others with conspiracy and treason against the Nigerian President and State.[177] Ralph Uwazuruike was the founder and leader of Movement for the Actualisation of the Sovereign State of Biafra (MASSOB) which he formed in Lagos, Nigeria on 13th September 1999 as a secessionist group to advance the interests of the Igbo people of Nigeria and to demand for the independence of the old Eastern Region of Nigeria to form a sovereign Biafran State. At the time Uwazuruike was arrested and charged for treason, MASSOB calls for and engages in civil disobedience across Nigeria, asking Igbo indigenes to observe sit-at-home protests, and holding protests that paralyse economic activities in the respective cities in which they were held. He spent several months in prison whilst awaiting trial, before a Court of Appeal admitted him to bail in 2008. He was subsequently arrested in 2010, and again charged with treason in a Magistrate Court which clearly lacks jurisdiction to entertain such matters

[171] Okonkwo and Naish, *Criminal Law in Nigeria (2nd Ed,* Ibadan: Spectrum Books Limited, 1980) p. 337
[172] Okonkwo and Naish, *supra*, p. 338
[173] Okonkwo and Naish, *supra*, p. 338
[174] Okonkwo and Naish, *supra*, p. 338; *R v Hardie* (1821) 1 St. Tr. 609,
[175] *R. v. Boro* [1966] 1 All N.L.R. 266; [1967] N.M.L.R. 163
[176] *R. v. Boro, supra*
[177] *Uwazuruike & ors. V. The Attorney General of the Federation & ors*. (2013) LCN 4125 (SC)

so as to keep the accused person in prison pending trial.[178] As it is the case in Holding Charge matters, an accused will enter a plea to the charge[179] while the Magistrate remands him or her in prison pending trial by a higher court. Typically, accused persons in Nigeria who had been moved to prison on a holding charge spend several years in prison whilst awaiting trial by a competent court.[180] Without prejudicing the outcome of the criminal matters, it will be difficult to convict the defendants of treason without proving that they actually levied war or conspired to levy war against the Nigerian State or its President, and that in fact, the President or the State was actually intimidated or overawed by such levying of war or conspiracy to so do.[181]

A splinter group[182] later emerged to rival MASSOB and was led by one Nnamdi Kanu,[183] a Nigerian-British citizen. Nnamdi Kanu, the leader of IPOB, too was arrested upon entering Nigeria in 2015, and charged with committing treason against the Nigerian State for calling for the secession of the Old Eastern Nigeria to form Biafra. He was held in prison for several months despite several court orders granting him bail pending trial. President Buhari[184] even admitted in a televised interview on 30th December, 2015 that he was not going to release Nnamdi Kanu, the leader of IPOB, even though the courts had severally ordered for his release on bail pending trial.[185] The admission by the Nigerian President in a televised interview of wanting to keep holding the leader of the secessionist IPOB in detention against court orders confirms the suspicion in many quarters that indiscriminate arrest and purported prosecution of secessionist agitators in Nigeria were more of political rather than genuine belief in the allegations that such persons really committed treason and should

---

[178] Treason and treasonable felonies are offences falling under the jurisdiction of the Federal High Court pursuant to sec. 251 (2) CFRN 1999 as amended. The Nigerian Police has a penchant for bringing charges against accused persons in courts that lack jurisdiction to try the said offence so as to get the courts to make an order for the accused persons to be transferred from the police station to a prison pending when their matters would be decided by a higher court that has jurisdiction to try the said cases. This is what is called, "A Holding Charge" and this has been declared illegal by superior courts, yet the Police in Nigeria still engage in the practice while the magistrate courts still provide them the forum to do so. See *Bola Kace v. The State* (2006) 1 NWLR (pt. 962), p. 765

[179] Enter a plea of "guilty" or "not guilty" when the charge is read out to him in court before the magistrate

[180] See *Uwazuruike & ors. V. The Attorney General of the Federation & ors*. (2013) LCN 4125 (SC)

[181] *R. v. Boro, supra*

[182] Indigenous People of Biafra

[183] Adangor, Z., "Proscription of the Indigenous People of Biafra (IPOBi) and the Politics of Terrorism in Nigeria", in The Journal of Jurisprudence and Contemporary Issues vol. 10 no. 1, 2018, p. 144

[184] The current President of NIgeria

[185] Faloyin, D., "President Buhari calls Pro-Biafra Nnamdi Kanu's acts "Treasonable"", Available from https://www.newsweek.com/president-buhari-angered-biafra-leader-nnamdi-kanus-treasonable-acts-410454, accessed on 08.01.2020

be held accountable in accordance with the law of the land. Nnamdi Kanu was eventually released from prison on 27th April, 2017, 18 months after he was arrested and held in prison awaiting trial.

Chapter 5: Secession and the Courts

5.1 The ICJ and Secession

Since the formation of the International Court of Justice, it has had few opportunities to pronounce on cases that border on secession and self-determination beyond non self-governing peoples and people still under colonial rule.[186] The Kosovo scenario which was before the ICJ for determination presented the court with the best opportunity to finally settle the issue of self-determination in the modern period's international law which does not relate to colonised people or people who have not attained self-governance. Kosovo was previously a part of Serbia which was in federation with Montenegro to form the parent State of Federal Republic of Yugoslavia.[187] Following long running ethnic tensions and sectarian war between the people of Kosovo on the one hand, and the then Federal Republic of Yugoslavia[188] and the attendant interventions by different international players supporting either side to the conflict, the UN Security Council adopted Resolution 1244 (1999) to ensure interim administration of Kosovo, the return of refugees, withdrawal of military forces from the region, and the resolution of the future political status of Kosovo.[189] Resolution 1244 (1999) was pursuant to the UN's Security Council's powers under

[186] For instance, the court had in the past, dealt with the right to self-determination of peoples who have not attained self-rule in cases like *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 1971, pp. 31-32, paras. 52-53; *East Timor (Portugal v. Australia), Judgment,* I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004 (I)

[187] The Federal Republic of Yugoslavia formally dissolved in 2003 with Serbia and Montenegro going their separate ways to become independent of each other.

[188] Made up of Serbia and Montenegro

[189] Resolution 1244 (1999) at the time it came into force in Kosovo represented the grundnorm in Kosovo's legal order and hierarchy of laws following the interim suspension of Republic of Yugoslavia's sovereignty over Kosovo by the coming into force of Resolution 1244 (1999). See I.C.J., *Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo,* (July 22, 2010). par. 57, p. 27

chapter VII of the UN Charter. Following the disintegration of the Republic of Yugoslavia in 2006, Kosovo should have fallen within the territorial jurisdiction of the Serbian State save for the interim administration created by the UN's Security Council to administer Kosovo. The interim administration was called "the United Nations Interim Administration Mission in Kosovo",[190] and part of its mandate was to oversee, in a final stage, the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.[191] When negotiations on the future status of Kosovo failed[192], legislative assembly elections were held in Kosovo on 17th November, 2007, which in turn sat, and adopted an independence declaration for the Republic of Kosovo on 17th February, 2008.[193] The independence declaration in its paragraph 1, as quoted in the advisory opinion of the ICJ, stated that

> We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.[194]

The Republic of Serbia contests this unilateral declaration of independence by Kosovo, and sought a ruling on the compliance with international law of such unilateral declaration from the International Court of Justice.[195] Serbia contended that there is an implied prohibition of unilateral declaration of independence under the principle of territorial integrity as provided for under article 2 (4) of the UN Charter. The said article provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

---

[190] Otherwise referred to as the UNMIK

[191] I.C.J., *Advisory Opinion on Kosovo,* p. 29

[192] The then UN Secretary General appointed former Finnish President, Martti Ahtisaari, as his special envoy on Kosovo to oversee negotiations between the two sides. The negotiations failed, and Mr. Ahtisaari included in his recommendations that the only viable option to settle the future status of Kosovo is independence for Kosovo. A troika representing the European Union, United States, and the Russian Federation was also set up for further negotiations. The Troika's negotiation between the opposing sides also failed before the unilateral declaration of independence by Kosovo. See I.C.J., Advisory Opinion on Kosovo, par. 72, p. 34

[193] I.C.J., *Advisory Opinion on Kosovo*, par. 65-74, pp. 31-35

[194] I.C.J., *Advisory Opinion on Kosovo*, par. 75, pp. 35

[195] The ICJ's ruling followed a question posed by the General Assembly pursuant to resolution G.A. Res. 63/3 of October 8, 2008, made following Serbia's request. The question for the ICJ was framed thus: "Is the unilateral; declaration of independence by the provisional institutions of Self-Government of Kosovo in accordance with international law?"

independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[196] The ICJ, in its advisory opinion of 22nd July 2010, held that there was no prohibition of declarations of independence according to State practice, and that state practice, on the contrary, points clearly to the conclusion that international law contained no prohibition to declaration of independence.[197] This means that rather than prohibiting independence declarations, State practice clearly show that such declarations are not prohibited as over time numerous states have emerged through independence declarations. According to the court, the contention that prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity is doubtful as the principle of territorial integrity is confined to the sphere of relations between States.[198] It concluded that

> The adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law.[199]

A cursory look at article 2 (4) of the UN Charter shows that the article was specifically referring to relations between Member States of the UN as the court rightly pointed out. Kosovo, at the time it unilaterally declared its independence, was neither a State per say nor a Member State of the UN, and so could not be covered by article 2 (4) of the UN Charter to warrant the application of the said article in the case before the ICJ in respect of assaulting the territorial integrity of the Serbian State. Article 2 (4) of the UN Charter referred to "all members […] in their international relations […]"[200] while the dispute in question was an internal national dispute between Serbia and its component part, the people of Kosovo. Serbia even contended in its filings before the ICJ that Kosovo was a component part of Serbia thereby nullifying any argument internationalising the dispute, which when stretched further,

---

[196] Art. 2 (4) UN Charter
[197] I.C.J., *Advisory Opinion on Kosovo*, p. 29-48.
[198] *Ibid*,
[199] *Ibid*, par. 122
[200] Art. 2 (4) UN Charter

prohibits assaulting the territorial integrity of a Member State by another Member State.[201]

On the question whether the Security Council's resolution 1244 (1999) prohibited declaration of independence from the Republic of Serbia as was done by the Kosovo's General Assembly on 17th February 2008, the ICJ opined that the said resolution 1244 (1999) contains no express or implied prohibition of same.[202] According to the court, the established practice of the Security Council in making resolutions show that the Security Council usually specify express conditions in situations where it decides to establish restrictive conditions for the permanent status of a territory.[203] In the case of Northern Cyprus, for instance, the Security Council had in resolution 1251 (1999) reaffirmed its earlier position concerning the conflict in Cyprus, and stated that "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded."[204] The stipulations in the resolution concerning the Cypriot conflict were unambiguous as it made clear the intentions of the Security Council. It specifically foreclosed any validation of acts assaulting or attempting to assault the territorial integrity of the Cypriot State. In the case of Kosovo, however, the Security Council Resolution 1244 (1999) alluded to the final status of Kosovo but did not reserve for itself the final determination on how that final status will be resolved. The said Resolution also failed or avoided enumerating any conditions for arriving at the said final status of Kosovo. The court concluded that the Resolution 1244 (1999) does not preclude the issuance of the declaration of independence, and so the declaration of independence of 17th February 2008 did not contravene Resolution 1244 (1999).[205] At the time the independence declaration was made, Republic of Yugoslavia's and by extension the succeeding Republic of Serbia's sovereignty over Kosovo was still temporarily suspended by Resolution 1244 (1999). What this meant was that at the material time of the unilateral independence declaration, the effective legal order applicable in Kosovo derives from the Security Council Resolution 1244 (1999), and not the Serbian legal jurisdiction. Since the court held that resolution 1244 (1999) does not preclude explicitly or implicitly, independence declaration by the people of

[201] I.C.J., *Advisory Opinion on Kosovo*, par. 80, p. 38
[202] I.C.J., *Advisory Opinion on Kosovo*, par. 114, pp. 50
[203] I.C.J., *Advisory Opinion on Kosovo,* par. 114, pp. 50
[204] Security Council Resolution 1251 (1999), par. 11
[205] I.C.J., *Advisory Opinion on Kosovo*, par. 114, pp. 50

Kosovo, the said independence declaration, *prima facie*, was valid as it did not contravene the said Resolution 1244 (1999) which served as a temporary *de jure grundnorm*[206] from which other laws in Kosovo derived their validity.

The ICJ noted that unilateral declarations of independence are not per se, illegal under international law. Illegality, however, may attach to such declarations when there is a breach of certain norms of international law, which rises to the level of *jus cogens*, in the surrounding circumstances existing at the time of the unilateral declaration. According to the court,

> […] the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens).[207]

This reiterates the neutrality of international law towards unilateral declarations of independence in so far as basic norms of international law, which have *jus cogens* character, are not breached during the process or in connection with the said unilateral declarations. For instance the invasion or use of force against a State by another State for the purposes of effecting a secession of a component part of that other State will render illegal under international law whatever independence declaration arising as a result of that invasion. This is because, article 2 (4) of the UN Charter enjoins all Member States, in their international relations, to refrain from the use of force or threats thereof against the territorial integrity of any State.[208] The unilateral declaration of independence by the Turkish Republic of Northern Cyprus from the Republic of Cyprus following an invasion of Cyprus by the Republic of Turkey was declared invalid by the UN Security Council which reiterated the recognition of one Cyprus with sovereignty over the whole island nation.[209] The Republic of Turkey, till date, remains the only Member State of the UN to recognise the independence of the Turkish Republic of Northern Cyprus. In the case of Crimea, which allegedly voted on a referendum pursuant to a Russian invasion of the Crimean region of the Republic of

[206] *Grundnorm* is a pure theory of law, propounded by Hans Kelson, which is taken to mean the basic norm upon which every other norm derives its validity in the society. See Harris, J. W., "When and Why Does the Grundnorm Change?", in The Cambridge Law Journal vol. 29, No. 1, 1971, pp. 103-133
[207] I.C.J., *Advisory Opinion on Kosovo*, par. 81, pp. 38
[208] Article 2 (4) UN Charter
[209] Security Council Resolution 1251 (1999), par. 11

Ukraine, unilaterally declared independence from the Republic of Ukraine, and was annexed by the Russian Federation, the UN Security Council failed to agree on a resolution concerning the issue given the veto power of the Russian Federation in the Security Council. The invasion of Ukraine by Russia in order to effect the annexation of Crimea was a breach of article 2 (4) of the UN Charter, which said breach amounted to a violation of a *jus cogens*. Russia vetoed the Security Council's attempt to censure its misdeeds relating to Crimea. Nevertheless, the UN General Assembly through Resolution GA/11493 of 27 March 2014 condemned the invasion and the subsequent annexation of Crimea by Russia, and called upon Member States not to recognise changes in the status of Crimea region.[210] The United States, European Union, as well as NATO also condemned same and imposed varying degrees of sanctions against Russia for the breach of the territorial integrity of Ukraine.[211] When the Crimean and Northern Cyprus scenario are compared with Kosovo, breach of norms of international law of *jus cogens* character stands out as a distinguishing factor which led to a different outcome under international law for Kosovo unlike Crimea and Northern Cyprus.

It is however, unfortunate that the ICJ adopted a narrow interpretation of the issues before it for consideration in the Kosovo case by declaring self-determination and remedial secession to be beyond the scope of the question posed to it by the General Assembly. The court deliberately avoided pronouncing on "the validity or legal effects of the recognition of Kosovo"[212] by UN Member States. The court also failed to examine the justifications advanced by the States that recognised Kosovo's sovereignty.[213] Implicit in the question of compliance with international law of Kosovo's unilateral declaration of independence lays the reasons for such unilateral declaration and the validity thereof. The reasons are not far-fetched; right to self-determination and remedial secession. Therefore, it appears absurd to look at the legality of such unilateral declaration of independence without taking into account the underlying factors that caused such unilateral declaration.

---

[210] General Assembly Resolution GA/11493 of 27 March 2014

[211] EU restrictive measures in response to the crisis in Ukraine, https://eeas.europa.eu/headquarters/headquarters-homepage_en/8322/EU%20restrictive%20measures%20in%20response%20to%20the%20crisis%20in%20Ukraine, accessed on 19.02.2020

[212] I*bid,* par. 51

[213] Bolton G., & Visoka G., "Recognizing Kosovo's Independence: Remedial secession or earned sovereignty?", in South East European Studies at Oxford, Occasional Paper No. 11/10, 2010, p. 2

5.2 Regional Courts and Secession I (The ECtHR)

In order to highlight the development of the right to self-determination beyond the ICJ, decisions of some regional courts, in this case the European Court of Human Rights[214] and the African Commission on Human Rights,[215] will be examined. The choice of the two regional courts stems from the researcher's background as an African where there are many active secessionist struggles, and Europe which previously colonised several countries prior to the UN's decolonisation drive. The ECtHR had in 2003 made some salient pronouncements in the case of *Refah Partisi*[216] that implicitly touched on the right to self-determination. The *Refah Partisi* was a political party in the Republic of Turkey that was dissolved by the Constitutional Court of Turkey, and its assets forfeited to the State for becoming "a centre of activities against the principle of secularism" in Turkey.[217] In the national courts, the leadership of the party, as well as members of parliament elected on its platform, were accused of professing and supporting objectives that included the introduction of *sharia* law as well as establishment of a theocratic regime in Turkey. The said objectives were contrary to the principles of democracy which the Republic of Turkey accepted upon acceding to the European Convention on Human Rights. Although the party claimed to have expelled those responsible for making the comments or propagating the offensive objectives after being served with the prosecutor's application to dissolve the party, the Constitutional Court found the party liable and subsequently ordered its dissolution. The party and other applicants applied to the ECtHR alleging breach of their articles 9 (freedom of thought), 10 (freedom of expression), 11 (freedom of assembly and association), 14 (prohibition of discrimination), 17 (prohibition of abuse of rights), 18 (limitations on use of restrictions on rights) of the Convention on Human Rights,[218] and articles 1 (protection of property), and 3 (right to free elections) of Protocol No. 1 of the Convention.[219] The court, in dismissing the application, opined in one of the

[214] Hereinafter referred to the ECtHR
[215] Hereinafter referred to as the ACHR
[216] *Refah Partisi (The Welfare Party) & Ors v. Turkey* (Grand Chamber Judgment, of 13.02.2003), hereinafter referred to as "the Refah Partisi case".
[217] *Refah Partisi* case
[218] European Convention on Human Rights, hereinafter referred to as "the Convention" under this chapter
[219] Protocol No. 1 to the European Convention on Human Rights, hereinafter referred to as "Protocol No. 1 to the Convention"

paragraphs that a political party may campaign for a change in the law, legal or constitutional structures of a State only on two conditions. The court stated the conditions to be "firstly, the means used to that end must be legal and democratic in every respect; secondly, the change proposed must itself be compatible with fundamental democratic principles."[220] Although secession and self-determination were not at issue before the court, but implicit in the above conditions set out by the court is recognition by the ECtHR that under the Convention, a people can legitimately seek a change in the constitution of a country or secede from it. This the people can do if they adhere to the conditions listed above in their pursuit of their set out goals even if such goals were to be disallowed under national laws. This means that a region like Catalonia in Spain can legitimately pursue secession or secede from Spain under the Convention even though it is unlawful under national laws. This the Catalan secessionists can do by using democratic means without resort to any violence in pursuing their aims, and the proposed State which they wish to create outside Spain being democratic. In the instant case of *Refah Partisi,* for seeking to enthrone theocracy which is anti-democratic, and for inciting violence, the court held that the *Refah Partisi* and other applicants cannot lay claim to the Convention's protection against penalties imposed on them under national laws for their anti-democratic objectives.

The ECtHR, however in a recent case,[221] had ruled against pro-secessionist Catalan's then President and members of Parliament of the region's Assembly in their application to the court for relief against the suspension of the region's parliamentary session by the Spanish Constitutional Court. In *Forcadell I Lluis and Others v. Spain*, the issues for determination concerned alleged breach of the freedom of peaceful assembly of the applicants under article 11 of the Convention and article 3 of Protocol No. 1 to the Convention. The facts of the show that the Catalan Parliament enacted a law in September 2017[222] mandating the conduct of an independence referendum for Catalonia, and the declaration of independence should the people vote in favour of secession.[223] The minority members of Parliament were dissatisfied and petitioned the

[220] *Refah Partisi* case
[221] *Forcadell I Lluis and Others v. Spain* (dec.), judgment of the European Court of Human Rights delivered on 07.05.2019
[222] Catalan Region's Law No. 19/2017
[223] Sec. 4 of Catalan Region's Law No. 19/2017

constitutional court, which issued a provisional injunction suspending the said law[224] and law no. 20/2017[225] pending the determination on merit of the suit. The Catalan Parliament ignored the constitutional court's provisional injunction and held the referendum on October 1, 2017.[226] The Parliament convened a plenary sitting for October 9, 2017 to declare the results of the referendum and to proclaim Catalonia's independence from Spain.[227] The Plenary sitting for October 9, 2017 was provisionally suspended by the constitutional court on the application of minority members of the Parliament, pending a determination on merit of the suit.[228] The constitutional court subsequently declared the laws unconstitutional for being marred by procedural irregularities, and also held that referendum and secession issues infringed national unity, and therefore fell outside the jurisdiction of the Catalan Parliament.[229] It was on the basis of the above facts that the applicants applied to the ECtHR for the alleged breach of their right to freedom of assembly as guaranteed under article 11 of the Convention. The ECtHR, in its judgment, declared the application inadmissible and held that the constitutional court was within its rights in provisionally suspending the plenary sitting of October 9, 2017 for stemming from an already suspended Law No. 19/2017. In justifying the inadmissibility of the application, the ECtHR posited that "the Organic Law on the Constitutional Court provides for the possibility of adopting any necessary preventive measures and provisional decisions in order to prevent an appeal from becoming nugatory."[230] The Catalan Parliament had acted unlawfully by going ahead with the planning and holding of the referendum without first getting the court to lift the provisional suspension of law No. 19/2017. By going ahead to conduct the referendum despite the court's order to the contrary, they foisted on the court a situation which will render nugatory whatever judgment on the merit the court will render in the main suit. The disobedience of a valid court order renders invalid whatever further actions the Parliament took in disobedience of the existing court order, for according to Lord Denning, "you cannot place something on nothing and expect it to stand."[231] The

[224] Catalan Region's Law No. 19/2017
[225] Catalan Region's Law no. 19/2017
[226] *Forcadell I Lluis and Others v. Spain* (dec.), *supra*
[227] *Forcadell I Lluis and Others v. Spain* (dec.), *supra*
[228] *Forcadell I Lluis and Others v. Spain* (dec.), *supra*
[229] *Forcadell I Lluis and Others v. Spain* (dec.), *supra*
[230] *Forcadell I Lluis and Others v. Spain* (dec.), *supra*
[231] *MacFoy v. United Africa Company Limited (West Africa)* [1961] 3 All ER 1169

ECtHR also reiterated its earlier stated two conditions[232] when seeking to enthrone a new legal order. According to the ECtHR,

> Regard should also be had to the irregularities in the approval procedure for Law no. 19/2017 (which had originated the convening of the impugned sitting) subsequently noted by the Constitutional Court in its decision on the merits. Indeed, while a political party is entitled to campaign for a change in the State's legislation or legal or constitutional structures, the party in question may only do so if the means used are absolutely lawful and democratic.[233]

Manifest irregularities bedevilled Law No. 19/2017. The law was provisionally suspended by the constitutional court. The Catalan Parliament sought to give effect to the law without first getting the court to lift the provisional suspension thereby acting unlawfully. The ECtHR admitted that a democratic process designated as a referendum by a Contracting State may fall within the scope of article 3 of Protocol No. 1 to the Convention, however, that would require the procedure to be conducted "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".[234] When the above established facts are juxtaposed with the two conditions given by the ECtHR when seeking to establish a new order or secede from a State, the activities of the secessionist Catalan members of Parliament failed to pass the basic test of democratic and lawful means in the pursuit of their aims as set out by the ECtHR.[235]

When the two cases of *Forcadell I Lluis and Others v. Spain* and *Refah Partisi* emanating from the ECtHR are contrasted with national policies of most countries which are signatories to the Convention, one finds that secession *stricto sensu*, is not unlawful under the Convention even though it may be unlawful under national laws. However, to lawfully secede under the Convention, the two conditions as listed in the case of *Refah Partisi* and reiterated in *Forcadell I Lluis and Others v. Spain* must be followed and adhered to. To this end, a region in a country that is signatory to the Convention can secede lawfully under the Convention, despite objections from the national government, if it uses democratic and lawful means devoid of any violence in

[232] See *Refah Partisi* case
[233] Forcadell I Lluis and Others v. Spain (dec.), supra
[234] See Forcadell I Lluis and Others v. Spain (dec.), supra; *Moohan and Gillon v. the United Kingdom* (dec.), 22962/15 and 23345/15, 13 June 2017
[235] See Refah Partisi case ; Forcadell I Lluis and Others v. Spain (dec.), supra

pursuing the aim of secession, and the proposed independent State which it seeks to create being a democratic State.[236]

5.3 Regional Courts and Secession II (The ACHR)

In Africa, the African States, having benefited from self-determination rights against their colonialists, were in no hurry to include the right to self-determination in the African regional legal system.[237] It was not until the drafting of the African Charter on Human and People's Rights[238] that the right to self-determination emerged as a concept and a right in the regional legal system beyond the colonial context.[239] According to the Charter,

> 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community
> 3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.[240]

Coming at a time when most African countries had gained independence from their erstwhile colonial masters, the self-determination rights provision under the Charter was given validation beyond the colonial context by the Charter. Self-determination right was divided into two by the Charter by alluding to the right to self-determination of all peoples, and the right to self-determination of peoples still under colonial or imperial rule.[241] The Charter made copious use of the term "people" and projected self-determination rights as a people's rights without providing any definition of the term "people". The African Commission on Human and People's Rights[242] in

[236] See *Refah Partisi case ; Forcadell I Lluis and Others v. Spain* (dec.), supra
[237] Salomon, S., "Self-determination in the case law of the African Commission: Lessons for Europe", in VRÜ Verfassung und Recht in Übersee, (VRÜ, Jahrgang 50 (2017), Heft 3), p. 224
[238] The African Charter was adopted on 27 June 1981 in Nairobi, Kenya, and came into force on 21 October 1986 after the ratification of same by 25 member States
[239] Salomon, S., 2017, *supra*, p. 224
[240] Article 20 African Charter on Human and People's Rights
[241] Salomon, S., 2017, *supra*, p. 230
[242] Hereinafter referred to as "the African Commission"

Endorois' Communication[243] enumerated certain features which "a people" should possess in order to be regarded as such under the African Charter with benefits of the people's or group rights as contained in the Charter. According to the Commission in the *Endorois'* case, a people should have

> …a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights.[244]

In *Kevin Mwaganga Gunme et al v. Cameroon*,[245] the complainants brought the Communication against the Republic of Cameroon, which is a State party to the African Charter, alleging violations of the right to self-determination of the people of Southern Cameroon. The alleged violations were consequent upon the two-option referendum of 1961 which asked whether the people of Southern Cameroon would federate with either Nigeria or the Republic of Cameroon. Majority of the voters in the said referendum chose to federate with the new Republic of Cameroon.The complainants, however, contend that the referendum vote was never ratified by the then Southern Cameroon's House of Assembly, and that the lack of third option of independence in the referendum question negatively impacted the right to self-determination of the people of Southern Cameroon. In their complaint, they contend that the people of southern Cameroon qualify as a people, and therefore are capable of enjoying the group rights under the African Charter, and in particular, the right to self-determination. The complainants also alleged civil, political, and economic marginalisation of the people of Southern Cameroon by the respondent Republic of Cameroon.[246] The African Commission in its decision, however, declined jurisdiction to entertain the issue of "illegal and forced annexation, or colonial occupation of Southern Cameroon by the Respondent State" since the said issue fell outside the Commission's jurisdiction *rationae temporis* given the fact that the facts complained therein occurred before the coming into force of the African Charter in 1986 and were

---

[243] *Centre for Minority Rights Development (Kenya) and Minority Rights Group, Comm. 276/2003 (ACHPR, 25 November 2009), Legal Resources Foundation v. Zambia,* (African Commission on Human and Peoples' Rights), para. 73 (*Endorois' communication* for short.).

[244] *Endorois' communication,* par. 73

[245] *Kevin Mwaganga Gunme et al v. Cameroon, Comm. 266/03* (ACHPR, 27 May 2009). Hereinafter referred to *Gunme's* case

[246] *Gunme's* Case, par. 2-22

not alleged to be a continuing violation.[247] In the determination of other alleged issues, the Commission found that the people of Southern Cameroon qualify as a "people" under the Charter because they exhibit several characteristics associated with a "people", including a shared history; tradition; language; territory; and political outlook.[248] It is for the people to identify themselves as such, as identity is an innate characteristic within a people, which external people could recognise but not to deny its existence.[249] Having determined the Southern Cameroonians constituted a people to whom the people's rights under the Charter are applicable to, including the right to self-determination, the Commission surprisingly held that it cannot envisage, condone or encourage secession as a form of self-determination for the people of Southern Cameroons as that will jeopardise the territorial integrity of the Republic of Cameroon, which the Commission is obliged to uphold as a party to the Charter.[250] According to the Commission, "The Commission has however accepted that autonomy within a sovereign State, in the context of self government, confederacy, or federation, while preserving territorial integrity of a State party, can be exercised under the Charter."[251] There is however, no provision under the Charter defining the forms of self-determination a people could exercise, neither does the provisions on self-determination limit the exercise of such right to internal self-determination only, to the exclusion of outright secession. The Commission is of the view that for article 20 of the Charter to be deemed to have been violated, that "it must satisfy the Commission that the two conditions under Article 20(2), namely oppression and domination have been met."[252] Article 20 of the Charter, which provides for right to self-determination, does not contain any indication to the effect that article 20 (1) and (2) must be read conjunctively and the condition of being oppressed or dominated fulfilled before a people can take advantage of either article 20 (1) or 20 (2) in asserting a right to self-determination. The subsections (1) and (2) of article 20 of the Charter ended with full stop marks at the end of each subsection thereby signifying they were disjunctive and can stand separately when alleging or finding a breach to warrant the exercise of self-determination rights as contained therein. The Commission failed to give any indication as to how it arrived at the conjunctive

[247] *Gunme's Case,* par. 155
[248] *Gunme's Case,* par. 179
[249] *Gunme's Case,* par. 179
[250] *Gunme's Case*, par. 190
[251] *Gunme's Case,* par. 191
[252] *Gunme's Case*, par. 197

reading of subsections (1) and (2) of article 20 of the African Charter. It is bewildering therefore where the Commission found the conjunctive meaning it is ascribing to the subsections.

In an earlier case of *Katangese Peoples' Congress v. Zaire*[253], the Commission had held that in order for alleged violations under the Charter to constitute the basis for the exercise of the right to self-determination, the violations must be of such a nature as to show "concrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by Article 13 (1)."[254] In that case, the complainant alleged a violation of the right to self-determination of the Katangese people as provided for under article 20 (1) of the African Charter on Human and People's Rights by the Republic of Zaire. The complainant, who was the President of the Katangese Peoples' Congress, however failed to disclose any instances of the alleged breach of the rights contained in the Charter to warrant the exercise or application of the self-determination rights of the Katangese people to secession.[255] The Commission cited the *Katanga case* in deciding *Gunme's case* on the severity of breaches of the articles of the Charter a State party may be found liable in order to warrant the invocation of external self-determination in favour of the applicants against the State party. The facts of the *Katanga case* can be distinguished from *Gunme's case* given that serious breaches were alleged by the complainants in *Gunme's case* and the Commission found the respondent Republic of Cameroon liable of having breached those rights as contained in articles 2, 4, 5, 6, 6, and 11 of the African Charter. The Commission also determined that the Southern Cameroonians constituted a people capable of taking advantage of the people's rights as contained in articles 19-24 of the Charter. It is however, difficult to fathom why the Commission introduced extraneous requirements for the exercise of the right to self-determination under article 20 outside the clear provisions of the said article.

[253] *Katangese Peoples' Congress v. Zaire,* African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), hereinafter referred to as "the Katanga case".
[254] *The Katanga case*, as quoted in *Gunme's Case,* par. 194
[255] *The Katanga case*

5.4 National Courts and Secession (Quebec Case)

Decisions from national courts have little influence on the development of international law, but one particular decision stands out which cannot be ignored when discussing right to self-determination and secession. In *Reference re Secession of Quebec*[256], a reference was made to the Canadian Supreme Court by the Governor-in-Council concerning certain questions relating to the secession of Quebec from Canada.[257] The questions referred to the court were 3-fold thus; the constitutionality under Canada's Constitution, of a unilateral secession of Quebec from Canada; the legality of such unilateral secession of Quebec from Canada under international law; and in the event of a conflict between domestic and international law on a unilateral secession of Quebec from Canada, which aspect of law would take precedence in Canada.[258] On the question whether there is a right to unilateral session under the Canadian Constitution, the court held that since the Constitution vouchsafes order and stability, that secession of a province under the Constitution could not be unilaterally achieved, and without principled negotiation with other participants in confederation within the existing constitutional framework.[259] According to the court, "a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize."[260] The court is of the opinion that despite the outcome of a referendum vote, the seceding part cannot purport to invoke a right to self-determination in order to dictate the terms of a proposed secession to the other federating units as the vote itself cannot push aside the principles of federalism, rule of law, individual and minority rights, or other principles of democracy in Canada.[261] This does not mean however, that the Canadian constitutional order will be indifferent to a clear expression of majority of Quebecers voting in favour of secession to show that they no longer wished to remain a part of Canada.[262] In negotiations after a successful referendum, the court held that the other parts of the federating units and the Canadian federal government will have no basis to deny the right of the people

[256] (1998) 2 SCR 217
[257] *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217
[258] *Reference re Secession of Quebec, supra*
[259] *Reference re Secession of Quebec, supra*
[260] *Reference re Secession of Quebec, supra*
[261] *Reference re Secession of Quebec, supra*
[262] *Reference re Secession of Quebec, supra*

and government of Quebec to pursue secession should a clear majority of the Quebec people vote in favour of same so long as the rights of others are respected in the process.[263] The court, in answering questions concerning the legality of unilateral secession of Quebec under international opined that it was not purporting to act as an international tribunal sitting in judgment over international laws, but merely giving advisory opinion to the Governor-in-Council on legal issues concerning the future of the Canadian federation from which Quebec seeks to secede.[264] The court declined to provide a definition of who "a people" is, who are capable of enjoying the right to self-determination.[265] However, it admitted there is a right to self-determination under international law, but that the said right was limited to people that are still governed as part of a colonial empire; a people subject to alien subjugation, domination or exploitation; or where a people is denied any meaningful exercise of its right to self-determination within the State they are part of.[266] As Quebec do not meet the threshold of a colonial or oppressed people, or a people who have been denied meaningful access to government to pursue their political, economic, cultural and social development, the court held that the people and government of Quebec "do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally."[267] Having concluded there is no right to unilateral secession under the Constitution and under international law, the court failed to rule out the possibility of unilateral secession by Quebec leading to a *de facto* session. It held that the success of such unilateral secession would depend on the international community according or withholding recognition of same.[268] Where the international community recognises such *de facto* secession, the act of recognising same, according to the court, will not accord any retroactive justification for the act of secession under the Canadian Constitution or under international law.[269] In deciding the last issue referred to the court, the court held that there was no conflict between the Canadian national law and international law on the issue of right to self-determination and secession, and so there was no need to address the issue in the context of the referred questions.[270]

---

[263] *Reference re Secession of Quebec, supra*
[264] *Reference re Secession of Quebec, supra*
[265] *Reference re Secession of Quebec, supra*
[266] *Reference re Secession of Quebec, supra*
[267] *Reference re Secession of Quebec, supra*
[268] *Reference re Secession of Quebec, supra*
[269] *Reference re Secession of Quebec, supra*
[270] *Reference re Secession of Quebec, supra*

The Quebec Advisory Opinion of the Canadian Supreme Court was given in 1998. In the light of the 2010 Advisory Opinion of the ICJ on the accordance of the unilateral declaration of independence by Kosovo to the effect that unilateral declaration of independence is not unlawful under international law, the 1998 Canadian Supreme Court's ruling in *Reference re Secession of Quebec*[271] no longer seems to be good law in Canada's jurisprudence. The Canadian Supreme Court held that unilateral declaration of independence is unlawful under international while the ICJ reached the exact opposite decision in its Advisory Opinion on Kosovo.[272] The Canadian Supreme Court shied away from making a pronouncement on the third referred issue of conflict between international law and Canadian domestic law and which of the two laws takes precedence in situations where there is a conflict.[273] As the ICJ's Advisory Opinion on Kosovo has shown, unilateral declaration of independence is not prohibited under international law, and this is in direct conflict with the latter's prohibition under the Canadian Constitution. How the Canadian Supreme Court will resolve this conflict of laws remains to be seen when next an opportunity presents itself for a decision on the third referred issue. Again, when the second issue of the referred questions is compared with article 20 of the African Charter on Human and People's Rights, the African Charter went beyond colonised and oppressed people to make a broad provision for all peoples to enjoy the right to self-determination as guaranteed under the Charter. When however, same is viewed in the light of the African Commission's decision in *Gunme's case*, this will lead to the same conclusion with Canada's Supreme Court that a people need to be under colonial or alien subjugation in order to enjoy the right of self-determination under international law. However, as Canada is neither a Member State nor a signatory to the African Charter on Human and People's Rights, the African Charter is not applicable to it, and whatever comparison there is to make on the issue of the extent of the right to self-determination, is merely academic.

Following the Supreme Court's ruling in *Reference re Secession of Quebec*, the Canadian Parliament enacted in 2000 the Clarity Act[274] which sets out the modalities to be followed and the clarity of questions to be asked in a referendum when a

[271] *Reference re Secession of Quebec, supra*
[272] I.C.J., *Advisory Opinion on Kosovo*
[273] *Reference re Secession of Quebec, supra*
[274] An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference (S.C. 2000, c. 26), also known as "the Clarity Act" or "Bill C-20"

province tables before the province's Legislative Assembly a proposal for referendum on whether or not to secede from Canada. The enactment of the Clarity Act by the Canadian Parliament elicited a critical response from the Quebec region which in turn enacted its own Bill 99[275] in 2000 reaffirming the fundamental principle that the Quebec people is free to take charge of its own destiny, determine its political status and pursue its economic, social and cultural development, as well as possessing the inalienable right to self-determination.[276] Bill 99 reiterated the fact that it is for the Quebec people, acting through their own political institutions that will determine the modalities for any future referendum vote and not as stated in the federal Clarity Act.[277] When there is a referendum in Quebec, Bill 99 maintains that the winning option is the option that obtains a majority of the valid votes cast[278] unlike the clear majority rule stipulated in the *Reference re Secession of Quebec case* and reiterated by the Clarity Act.[279] Bill 99 essentially affirms Quebec's unilateral right to determine the modalities for future referendum questions and votes in opposition to the Supreme Court's ruling and the Clarity Act. A challenge to the constitutional validity of Bill 99 in a Quebec superior court led the court to hold, 17 years after the suit was instituted, that Bill 99 was not unconstitutional.[280] The applicant alleged that the adoption of Bill 99 was tantamount to the Quebec government giving itself the unilateral right to secede without negotiating with the rest of Canada as stated by the Supreme Court in *Reference re Secession of Quebec case*.[281] The applicant also sought a declaration that Bill 99 was *ultra vires* the powers of the Quebec National Assembly as the law had effects beyond Quebec and will affect the whole of Canada in the event of Quebec's secession from Canada.[282] The court rejected all the applicant's pleadings and held that Bill 99 was valid constitutionally as the Quebec National Assembly had the constitutional jurisdiction to adopt it, and that Bill 99 does not infringe on any provisions of the Canadian Charter of Rights and Freedoms.[283] The judgment of the superior court in this case is currently on appeal to an appellate court, and until the appeal is disposed off, the judgment remains valid and binding. However, the tug of

[275] Act Respecting the exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State, (R.S.Q., c. E-20.2), otherwise known as Bill 99
[276] Bill 99
[277] Chap 1, par. 3 of Bill 99
[278] Meaning 50% plus 1 vote. See Chap 1, par. 4 of Bill 99
[279] *Reference re Secession of Quebec, supra;* Sec 2 (1) Clarity Act
[280] *Henderson v. Procureure générale du Québec*, 2018 QCCS 1586
[281] *Henderson v. Procureure générale du Québec, supra*
[282] *Henderson v. Procureure générale du Québec, supra*
[283] *Henderson v. Procureure générale du Québec, supra*

war between the Canadian Federal Parliament and the National Assembly of Quebec over who calls the shots on referendum issues leading to secession is a potential political crisis if not properly handled.

The codification of referendum requirements by the Federal Parliament of Canada in the Clarity Act represents a tremendous step in giving life to the right to self-determination beyond colonised or oppressed people by a national government. The Clarity Act represents an acknowledgment by a State that it cannot hold a people against their consent and force them to perpetually remain in a political union which is contrary to the principle of self-determination of peoples. It recognises that it is for the people to decide for themselves, through their mandate, how they ought to be governed and whom to pay allegiance to. Internationalisation of the principles contained in the Canadian Clarity Act will eliminate, or drastically reduce incidences of armed conflict usually associated with struggles for self-determination. This could be achieved through an optional protocol to the ICCPR which will be applicable in the countries that ratified the optional protocol. However, getting countries to ratify such an optional protocol will be a herculean task as most countries are made up of multi-ethnic societies who may want to take advantage of the clarity in self-determination issue and attain statehood.

Chapter 6: Scotland as a Contemporary Precedent

6.1 From Biafra to Scotland

The United Kingdom as a permanent member of the UN's Security Council, a multinational State with an active secessionist movement, and a former colonial master, is a good source of contemporary model from which other countries' handling of secessionist and self-determination issues could be adjudged. It presupposes therefore, that the way and manner the British Government handles agitations for secession within its own union will have a reverberating effect all over the world, especially in countries that reverence the United Kingdom as their former colonialist and from whom they derived much of their laws.

In the UK, the 2011 Scottish Parliamentary election handed a major boost to pro-independence campaigners as the Scottish Nationalist Party, which was at the forefront of Scottish independence push, won majority seats in the Parliament.[284] This paved the way for negotiations with the UK government on the future of Scotland. While the UK government agreed that the future of Scotland lies in the hands of Scottish voters, it contested the competency of the Scottish Parliament to solely legislate on Scottish referendum.[285] Both sides reached an agreement after several negotiations and signed the Edinburgh Agreement on 15th October, 2012 thereby allowing the Scottish Parliament to legislate on Scottish referendum that will bear only a single question of Scottish independence or continued union with the United Kingdom.[286] According to the agreement, "the referendum should have a clear legal base; be legislated for by the Scottish Parliament; be conducted so as to command the confidence of parliaments, government and people; and deliver a fair test and decisive expression of the views of people of Scotland and a result that everyone will respect."[287] The Edinburgh Agreement represents a major milestone in recognition of the right to self-determination of a people by a country during peace time without the threats of war or breakdown of law and order.[288] A Scottish Independence Bill of 2014 framed the justification and the inherent right to self-determination succinctly thus

> Self-determination developed during the 20th century and has been codified in the fundamental and universal documents of the international system, such as the Charter of the United Nations in 1945 and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966. The referendum, and becoming an independent country, would be an act of self-determination by the people of Scotland. However self-determination is permanent and that principle would continue to be respected following independence by the on-going democratic nature of Government in Scotland.[289]

---

[284] MacWhirter, I., Disunited Kingdom: How Westminster Won a Referendum but Lost Scotland (Cargo Publishing, 2014), p. 15

[285] Loppez-Basaguren, A., & San-Epifanio, L. E., (ed), Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain (1st Ed., Springer, 2019), p. 189

[286] Adam, E. C., "Self- determination and the Use of Referendums: the Case of Scotland", in International Journal of Politics, Culture, and Society vol. 27, 2013, p. 48

[287] The Edinburgh Agreement, 2012

[288] Turp, D. & Calvet, M. S. I. (ed), The Emergence of a Democratic Right to Self-determination in Europe (Centre Maurits Coppieters, vol. 12, 2016), p. 188

[289] Scottish Government, The Scottish Independence Bill: a Consultation on an Interim Constitution for Scotland, (Edinburgh: Scottish Government, 2014), p. 28; Duclos, N., "The Strange Case of the Scottish Independence Referendum: Some Elements of Comparison between the Scottish and Catalan Cases", in French Journal of British Studies vol. XX no. 2, 2015, par. 9

The Agreement enabled the Scottish Parliament to legislate on referendum, which said referendum was carried out on 18th September, 2014.[290] However, the result was emphatic, as majority of the voters chose to remain part of the United Kingdom of Great Britain and Northern Irelands rather than gaining independence and forming the Republic of Scotland.[291] 55.3% of the voters voted "NO" on independence while 44.7% voted "YES". The 2014 referendum made it the third time Scotland had voted on a self-determination referendum in relation to their continued union with the UK.[292]

Although the Scottish referendum failed in its bid to lead to a new and independent Scotland,[293] nevertheless, separatists in Nigeria, Anglophone Cameroon, other parts of sub-Saharan Africa agitating for independence, and even the Catalonians of Spain point to that as a civilised way of settling self-determination issues.[294] In the midst of disagreements, rising tensions, conflicts and threats of conflicts, that opposing parties could still reach a political solution on issues of session without resort to conflict and allow a people to determine for themselves their political future post decolonisation, was inconceivable until the Edinburgh Agreement.[295] How to achieve this amicable political solution, however without the drumbeats of war, remains an uphill task in most countries, especially in sub-Saharan Africa, where every political calculation is perceived from the prism of ethnicity, religion, and where might still makes right.[296]

In Nigeria, both the leaders of MASSOB and IPOB in Biafra's independence agitation had at different times called for referendums to be conducted in the formerly Eastern

---

[290] , D. & Calvet, M. S. I. (ed), *supra*, p. 187

[291] D. & Calvet, M. S. I. (eds), *supra*, p. 187

[292] Antunes, S. F., "The Scottish Referendum 2014: the Political Process before and after the 'NO' Vote", in E-journal of International Relations vol. 6 no. 2, 2015, p. 45

[293] The 2014 referendum was won by voters who wished to remain a part of the UK union rather than gaining independence and standing on its own as a sovereign nation

[294] Duclos, N., *supra*, par. 11

[295] The UK government and that of Scotland came to the agreement on the understanding and basis of the "doctrine of the mandate", which implies that obtaining a majority in an election by a party gives the party in power the political and moral authority to carry out any policy which formed part of its manifestoes and electioneering campaigns. The Scottish National Party, haven campaigned and won absolute majority in the 2011 parliamentary election on the strength of Scottish nationalism is entitled to implement the promises contained in the party's manifesto and upon which it won the election, albeit, a right to referendum. See Bochel J., Denver, D., & Macartney, A., (eds.), *The Referendum Experience. Scotland 1979*, (Aberdeen: Aberdeen University Press, 1981), p. 171. Also reported in Duclos, N., *supra*, par. 13

[296] Wenar, L., Blake, M., James, A., Kutz, C., Mehdiyeva, N., and Stilz, A., Beyond Oil: Philosophy, Policy, and the Future (New York: Rowman & Littlefield, 2018), p. 14

Region of Nigeria.[297] The referendum demand, if granted, will allow the people decide for themselves what their political future will be and whether they still wanted to be part of Nigeria or secede and become an independent nation. Going by the classical precedent set by the Edinburgh Agreement, the calls for referendum by the different separatist groups, however, lack one vital element: legitimacy.[298] Legitimacy is a conception by a polity that a government is properly constituted, and therefore, is worthy of obedience. The separatist leaders and groups were neither elected nor appointed to speak or act on behalf of the Igbo people, or the peoples that constituted the formerly old Eastern Region of Nigeria. Whereas in the case of Scotland, it was obvious that the Scottish Parliament, dominated by majorities from pro-independence parties had the mandate of the people to negotiate the parameters of referendum and self-determination rights with the UK government based in London.[299] The Scottish Parliament was elected by the people while the MASSOB and IPOB groups and their leaderships lack the people's mandate as they were neither elected nor accountable to the people. This creates a difficulty in opening a proper legal channel for discussions and negotiations with the government at the centre from which Biafra intends to secede. The separatist groups are unknown to the law; at best they amount to pressure groups, and may not successfully pursue negotiations with the government without being hounded by law enforcement agents and prosecutors as criminals.

The independence push by Catalans fit into the same category with that of the Scots on the issue of mandate, as pro-independence parties held majority seats in the Catalan Parliament. However, both agitations had different outcomes; the Scottish push was deemed legal while that of the Catalans were declared illegal by the Spanish constitutional court, thereby leaving open the question whether legitimacy alone or authority from the people to pursue self-determination on their behalf, was enough to arrive at the same legality test of the Scottish push. There is however, a tiny distinguishing factor in both mandates; the independence-seeking parties in Scotland won a super majority in Parliament while those in Catalonia won a simple majority. A decisive electoral victory in the form of a super majority in Parliament or a two third yes-vote in a referendum is a clear indication of the wishes of the electorates on an

[297] Mrabure, K. O., "The Right to Self- determination under International Law: The Current Biafra Struggle", in NAUJILJ, 2015, p. 69
[298] Duclos, N., *supra,* par. 11
[299] MacWhirter, I., *supra*, p. 15

issue that has a huge political impact like secession. This re-echoes the thorny dispute between the federal government of Canada and the Quebec Region on the modalities for a future referendum vote on secession which gave birth to two parallel federal and regional statutes that run counter to each other.[300] While the Clarity Act stipulates a two-third majority vote in favour of secession for any part wishing to secede from the Canadian federation, Bill 99 reiterates that any decision on secession of Quebec will be made by the people of Quebec through their representatives in government and the regional institutions, and that any future referendum vote on secession will succeed by a simple majority vote. The outcome of a legal challenge to Bill 99 is awaited, although a court of first instance had already ruled that the Bill 99 in itself was not *ultra vires* the powers of the Quebec regional Parliament.[301] In the Catalan case, the degree of legitimacy obtained by the independence-seeking parties in Catalonia as represented by the constitution of the Catalan Parliament at the time of the independence push, was a significant derailing factor in the self-determination project. The majority in Catalan Parliament was accused of sidestepping procedural safeguards by the minorities, in their bid to enact Law No. 19/2017 to enable the region conduct the self-determination referendum.[302] On the application of the minority members of the Catalan Parliament, the said law was provisionally suspended. Had the independence-seeking parties won a super majority in the Catalan Parliament, the minority members may have been unable to successfully question their legitimacy or the legitimacy of Law No. 19/2017 that will have legally enabled the holding of a referendum and potentially cured other maladies that afflicted the entire process.

Should the Nigerian separatists metamorphose into elected politicians, it remains to be seen whether in actual fact, separatist leaders-turned political leaders will be spared criminal prosecutions by State actors for actively pursuing the disintegration of Nigeria. The events leading up to Catalonia's 2014 referendum which was declared illegal by the Spanish constitutional court is instructive in this wise when contrasted with the Scottish referendum push that bore remarkably close resemblance. Prior to the run-up of the 2014 independence referendum in Catalonia, the Spanish government in Madrid strongly opposed the competence of the Catalan Parliament to legislate or hold such referendum. There was a contention whether Catalonia is a

[300] The Clarity Act of 2000 (Federal Statute) and Bill 99 of 2000 (Quebec Statute)
[301] *Henderson v. Procureure générale du Québec, supra*
[302] *Forcadell I Lluis and Others v. Spain* (dec.), *supra*

nation, just like the Scots, [303] capable of exercising the right to self-determination. A "nation", which is synonymous with "a people" as was used in the self-determination provisions[304], means a group of people having a common origin, language, and tradition, and usually constituting a political unit.[305] The nationhood of Scotland was never in doubt as they constituted a people with a common origin, language, and a distinct culture.[306] In the case of Catalonia, the Catalan Government asserted that Catalonia is a nation in the Government's independence white paper.[307] The Catalan Parliament had in 2012 adopted a Resolution asserting the Catalan "people's right to decide" their political future.[308] The Catalan Government's white paper acknowledged that the Spanish Constitution does not recognise the different constituents as "nations" but rather "national communities", and reserved the exclusive use of the term "nation" for the Spanish State.[309] That notwithstanding, the Catalans saw this as a contentious issue between it and the Spanish Government, and maintained that Catalonia has always felt like a nation.[310] The preamble to the Statute of Autonomy of Catalonia which was ratified through a referendum in 2006 asserts that "In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority".[311] The Spanish Constitutional Court, in 2010, ruled unconstitutional assertions that Catalonia is a nation.[312] The

[303] The nominal argument in Spain revolved around "nationhood" which has almost the same meaning or effect as "a people" and both are used interchangeably in the body of this research. See Catalan Government, *The National Transition of Catalonia* (English version of the White Paper entitled *Transició Nacional de Catalunya*), September 2014.

[304] Under the UN Charter and the two International Covenants

[305] Garner, B. A. (Ed), Black's Law Dictionary (Thomson Reuters, 2014, 10th Ed),

[306] Margaret Thatcher, the former Prime Minister of UK, in her memo stated that *"*[a]s a nation, they [the Scots] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way*"*…see Thatcher, M., The Downing Street Years (London: HarperCollins, 1993), p. 624; Duclos, N., *supra*, par. 6; Great Britain House of Commons," Scotland in the Union. A Partnership for Good*"*, (the Foreword by the Prime Minister), Cm. 2225, London: The Stationery Office, March 1993, p. 5 wherein John Major, who succeeded Margaret Thatcher asserted that "no nation could be held irrevocably in a union against its will".

[307] Catalan Government, "*The National Transition of Catalonia"* (English version of the White Paper entitled *Transició Nacional de Catalunya*), September 2014.

[308] Resolution 742/IX of the Parliament of Catalonia on "*the general political orientation of the Government of Catalonia*", adopted on 27 September 2012. Also, Resolution 5/X of the Parliament of Catalonia "*adopting the Declaration of sovereignty and right to decide of the people of Catalonia"*, voted on 23 January 2013

[309] Resolution 742/IX of the Parliament of Catalonia, supra; Article 2 CE of the 1978 Spanish Constitution

[310] Resolution 742/IX of the Parliament of Catalonia, supra

[311] Preamble to the Statute of Autonomy of Catalonia

[312] Pleno. Sentencia 31/2010, de 28 de junio de 2010 (BOE núm. 172, de 16 de julio de 2010). The English version can be read from

unconstitutionality of Acts, Resolutions, or Laws affirming Catalonia's credentials as a nation paved the way for the voiding of subsequent acts or activities that sought to affirm Catalonia's right to self-determine as a nation. Since the court held that Catalonia is not a nation, it undercuts the 2014 referendum arguments proffered by the pro-independence parties, and justified the criminalisation of subsequent actions carried out in pursuance of the referendum and independence push by the said parties. When political solution to the impasse failed, the Catalan Parliament enacted a law allowing a non-binding consultation to take place.[313] The Spanish Government appealed to the Constitutional Court and the law, as well as the decree allowing referendum, was struck down by the court through an injunction.[314] When the Catalan Government proceeded with the referendum despite the Constitutional Court's order suspending and prohibiting same, the Spanish Government instituted criminal actions against the Catalan President in his personal capacity for "disobedience and dishonesty".[315]

The Catalan's right to self-determination bid was fraught with challenges ranging from the lack of absolute majority in the Parliament to indicate a clear mandate to pursue self-determination, to the non-recognition of Catalonia as a nation under the Spanish Constitution. The non-recognition of the nationhood of Catalonia under the Spanish Constitution as a factor that worked against the independence push is debatable. This is because, it is for the people to identify themselves as a nation, as identity is an innate characteristic within a people, which external people could recognise but not to deny its existence.[316] The people of Catalonia have the right to identify themselves as a nation or a people who could exercise the group right to self-determination. Although the relevance of *Gume's case* is limited to Africa, the ECtHR may not arrive at a different conclusion were it to have the opportunity to determine the nationhood of the Catalans or any other national communities in Spain.

---

http://www.tribunalconstitucional.es/es/jurisprudencia/paginas/Sentencia.aspx?cod=16273, accessed on 28.01.2020

[313] The non- binding consultation in itself was a form of referendum. See Duclos, N., *supra,* par. 19

[314] Duclos, N., *supra,* par. 19

[315] Duclos, N., *supra*, par. 19; Brinded, L., "Catalonia Independence: Spain Sues Catalan President for 'Disobedience and Dishonesty'", (*International Business Times*, 12 November 2014), http://www.ibtimes.co.uk/catalonia-independence-spain-sues-catalan-president-disobedience-dishonesty-1474459, accessed on 28.01.2020

[316] *Gunme's Case*, par. 179

In the case of Biafra, there is no pro-independence political party in the Nigeria's political system. This makes it difficult obtaining the necessary mandate to pursue secessionist policies. On whether the people of old Eastern Region of Nigeria, or the Igbos clamouring for secession constitute a "nation" or "a people" within Nigeria, several scholars, journalists, politicians, and opinion leaders have regarded Nigeria as a country of many nations.[317] The Hausa/ Fulani, Yoruba, and the Igbo people constitute the 3 biggest tribes[318] in Nigeria. It was reported that Professor Sagay,[319] opined that "prior to the British conquest of the different nations making up the present day Nigeria, these nations were independent nation states- and communities independent of each other and of Britain."[320] It is not in doubt that the Igbo people of South Eastern Nigeria[321] posses all the attributes of a nation ranging from defined population, territory, distinct language, and culture, just like every other tribes or people that make up Nigeria. However, the Nigerian Constitution, just like the Spanish Constitution as seen above, recognises only one nation; the Nigerian Nation.[322] The preamble to the Constitution provides that "[…] Having firmly and solemnly resolve(sic) to live in unity and harmony as one indivisible and indissoluble sovereign nation under God…."[323] This implies that the only recognised nation in Nigeria is the Nigeria Nation.[324] The Nigerian nation is a federation of micro-states and not a multi-national State.[325] The Igbo people of Nigeria regard themselves as a nation, and they possess most of the attributes of a people as enunciated in *Ngume's case*. The fact that the Nigerian Constitution does not regard any of the tribes as nations does not in itself deprive them that identity, for according to the African

[317] For instance, see Akinsuyi, T., "Nigeria is a Country of many Nations- Akintoye", in (Nigeria's Independent Newspaper of October 17, 2017); Falola, T., and Njoku, R. C. (eds), Igbos in the Atlantic World: African Origins and Diasporic Destinations, (Indiana University Press, 2016), p. 19

[318] In Nigeria's political discuss, "tribe" and "nation" are most times used interchangeably to mean the same thing.

[319] A professor of Constitutional law and a Senior Advocate of Nigeria (SAN)

[320] Bagu, K. J., Peacebuilding, Constitutionalism and the Global South: The Case for Cognitive Justice Plurinationalism (New York: Rutledge, 2020); Bastida, E., Waelde, T. W., and Warden-Fernandez, J., (eds), International and Comparative Mineral Law and Policy: Trends and Prospects (Kluwer Law International, 2005), p. 285

[321] And some parts of the South- South Geopolitical zone of Nigeria

[322] CFRN 1999, as amended

[323] Preamble to the CFRN 1999, as amended

[324] Preamble to the CFRN 1999, as amended

[325] Nigeria is divided into smaller States with each State being administered by a Governor in conjunction with the State's House of Assembly. See Secs. 2 & 3 CFRN 1999, as amended

Commission in *Ngume's Case*, it is for the people to identify themselves as such, and not for external people to deny such identity.[326]

The only referendum to have been conducted in Nigeria was the 1961 Southern Cameroon's referendum which led to the region's annexation by the Republic of Cameroon.[327] The agitation and campaigns for the said 1961 referendum was spearheaded by elected representatives of the Southern Cameroon at the then old Eastern Nigeria's House of Assembly situated at Enugu, Nigeria. Following a crises that rocked the defunct National Council for Nigeria and the Cameroons[328] in 1953 and the subsequent removal of the only Southern Cameroonian in the Executive Council of the Eastern Region, southern Cameroonian representatives elected on the platform of the NCNC felt marginalised and saw reunification with their counterparts in the French Cameroons as a viable alternative to pursue.[329] The Southern Cameroonian representatives called a conference of notable leaders in Southern Cameroon, and subsequently formed an indigenous political party in the Southern Cameroons called The Kamerun National Congress.[330] The formation of the KNC effectively ended the alliance under the NCNC, as the new KNC won 12 out of 13 seats in the 1953 General Assembly election.[331] The affirmation of the Southern Cameroon's resolve to self-determine as shown in the results of the 1953 parliamentary elections that the then newly established indigenous KNC party won led the British Government to grant quasi-autonomous regional status to the Southern Cameroons, thereby making it distinct and separate from the old Eastern Nigeria Region.[332] Further triumph of indigenous parties with secessionist and reunification ideologies during the 1959 general election in Nigeria led to an eventual agreement on a proposed referendum for the Southern Cameroons. The referendum was made possible due to electoral victories of indigenous political parties with secessionist and reunification ideologies at the polls which clearly showed they had the mandate of their people to pursue the stated ideologies.[333]

---

[326] *Gunme's Case*, par. 179
[327] Awasom, N.F., *supra, pp.* 93
[328] Hereinafter referred to as "the NCNC"; a party that dominated the then Eastern Nigeria House of Assembly
[329] Awasom, N.F., *supra, pp.* 99
[330] Hereinafter referred to as "the KNC". Awasom, N.F., *supra, pp. 100*
[331] Awasom, N.F., *supra, pp. 101*
[332] Awasom, N.F., *supra, pp. 101*
[333] Awasom, N.F., *supra, pp. 106*

6.2 The Option of Remedial Secession

The Federal Military Government of Nigeria led by Lt. Col. Gowon invaded the then Republic of Biafra on the 6th of July 1967 following the latter's declaration of independence and secession from the Nigerian State on the 30th day of May, 1967.[334] The invasion marked the beginning of the Nigeria-Biafra war with the Biafran side fighting to preserve their newly declared independence from the Nigerian State. The Biafrans contended that the Nigerian Military Government, in connivance with the mainly Muslim northern part of Nigeria carried out genocide against the Igbo race following the pogroms that took place in the northern part of the country in 1966. The pogrom left several thousands of Igbo military officers and civilians dead.[335] The Biafrans also contended that in prosecuting the war against the Biafran State, the Nigerian Military Government shelled and inflicted heavy casualties on civilian targets, engaged in summary executions of unarmed civilians, and employed starvation as a weapon of war by blockading all access routes into Biafra.[336]

There is a general belief that a people can assert a claim to remedial secession if there were to be a manifest and continued abuse of a State's sovereignty against a minority population.[337] Such a scenario, according to the Committee of Jurists, would be proper to bring an international dispute arising from the domestic scenario within the competence of the then League of Nations.[338] Precedent for remedial secession beyond the colonial context already exists in Africa in the case of South Sudan. The people of South Sudan, then an integral part of the Republic of Sudan, were allowed to hold a referendum to determine their political future given the established abuse of Sudan's sovereignty over the minority South Sudanese people, which resulted in a long drawn out armed conflict between the Sudanese State and rebels in South Sudan.[339] The people of South Sudan overwhelmingly voted for independence, which

[334] Orobator, S. E., "The Nigerian Civil War and the Invasion of Czechoslovakia", in *African Affairs*, vol. 82, no. 327, 1983, pp. 201–214.
[335] Anthony, D., "'Ours is a war of survival': Biafra, Nigeria and arguments about genocide, 1966-70", in Journal of Genocide Research vol. 16, Nos. 2-3, 2014.
[336] Anthony, D., *ibid*
[337] "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Island Question," League of Nations Official Journal, supp. 3 (1920), p. 5
[338] Report of the International Committee of Jurists, p. 5
[339] Johnson, D. H., "New Sudan or South Sudan? The Multiple meaning of self- determination in Sudan's comprehensive peace agreement", in Civil Wars vol. 15 no. 2, 2013, pp. 141-156

they attained in 2011.[340] In the Biafran context, the Igbo people of Nigeria have continually asserted that they are being marginalised since their defeat and re-annexation after the Nigeria-Biafra war in 1970. Following the surrender of the Biafrans, and to mark the end of the civil war, Col. Gowon,[341] declared that there was "no victor, no vanquished" in the war.[342] He also declared the Federal Military Government's 3Rs policies of "Reconciliation, Reconstruction, and Restitution".[343] However, the policies Gowon's government pursued afterwards were in stark difference to his avowed reconciliation, reconstruction, and restitution policies. The first indication of the government's ill will towards the Igbo people was the declaration by the then Nigeria's Finance Minister, Obafemi Awolowo, that all Igbos, irrespective of their pre-war financial assets deposited in the banks, were entitled to only an equivalent of £20 at the time the war ended to rebuild their lives. The rest of the monies belonging to every Igbo man that were trapped in the banks, after the £20 withdrawals were confiscated by the Nigerian State. Again, the Federal Military Government confiscated and disposed off properties owned by the Igbos in different parts of the country outside the Igbo enclave, which the Igbos abandoned to return to Igboland for their own safety during the war. To legitimise the brazen theft of private properties of the Igbos after the war, the Federal Military Government in 1979 retroactively enacted The Abandoned Properties Act of 1979 to provide cover for the thefts. The Igbos were effectively disenfranchised of the things they owned prior to the war. These few instances clearly show that there was a victor and the vanquished in the war, and the victorious Nigeria never hid this fact from the vanquished Igbos. The marginalisation suffered by the Igbo people of Nigeria is a clear case of manifest and continued abuse of a State's sovereignty against a minority population. The abuses are manifest and they have not been remedied more than 50 years after the war ended. The Igbos are entitled and could legitimately pursue remedial secession should they so desire, even though it is difficult imagining a clear path to success for such without the drumbeats of war or the acquiescence of the Nigerian State.

---

[340] Johnson, D. H., *supra*, p. 145

[341] The then Nigeria Military Head of State

[342] The Federal Ministry of Information Press Release No. 46, January 15, 1970b, titled "Broadcast to the Nation by the Head of the Federal Military Government and Commander-in-Chief of the Armed Forces, Major-General Yakubu Gowon, Thursday, January 15, 1970" (hereinafter referred to as the FMI Press Release No 46 of 1970b); Oluleye, J. J., Military Leadership in Nigeria (Ibadan: Ibadan University Press, 1985), p. 156; Uwalaka, J., The Struggle for an Inclusive Nigeria: Igbos: To Be or Not to Be? A Treatise on Igbo Political Personality and Survival in Nigeria (Enugu: Snaap Press, 2003), p. 5.

[343] The FMI Press Release No 46 of 1970b; Oluleye, J. J., 1985, p. 156; Uwalaka, J., 2003, p. 5

In the case of Anglophone Cameroon, the international community pays little attention to internal cries of marginalisation of a section of a country which usually snowballs into armed conflicts and outright calls for secession. For instance, the English speaking part of Cameroon has been alleging marginalisation since 1972 when the Cameroonian President abolished Cameroon's Federal Constitution and in its place adopted a unitary Constitution.[344] The Anglophone Cameroonians have organised rallies, protests, and civil disobedience aimed towards getting the international community to intervene and stop the Cameroonian President and his government from erasing their Anglophone history and heritage, but to no avail. The situation escalated when in October 2016 French-speaking Magistrates and teachers were sent to go work and teach in English speaking regions which sparked off massive civil unrests that grounded both civil and economic activities in the affected regions. An attempt by the Cameroonian Government to use military force to quash the protests and civil disobedience snowballed into a full-fledged armed conflict between separatists in Anglophone Cameroon and the Government of Cameroon. Previous demands of return to Federal Constitution were quickly replaced by outright demands for secession and the independence of Anglophone Cameroon to be called the Republic of Ambazonia. Foisting French Magistrates on courts in English-speaking areas and administration officials who spoke only French on an English-speaking bureaucracy are overt attempts at eradicating a people's history, culture, and way of life. The Cameroonian Government tried to eviscerate the Englishness of a section of the country and sought to assimilate them into the French way of life, and hence the current impasse with the attendant toll on human rights. However, following fears of Western sanctions due to an increase in negative publicity the armed conflict had generated, the Cameroonian President in December, 2019 announced the granting of Special Regional Status to Anglophone Cameroon Regions. It is left to be seen whether the newly created special status will be able to diffuse the tension and return normalcy to the troubled regions, although the leadership of the separatist fighters rejected such special status and maintained their demands for an outright secession.

Should the newly created special status for Anglophone regions in Cameroon spur a return to normalcy in the troubled regions, it will represent an internal self-determination achieved on the strength of mass civil disobedience, armed conflict, and

[344] Fombad, C. M., "The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression?", in Journal of African Law, vol. 42 No. 2, 1998, p. 173

a people's refusal to abandon their right to self-determination in the face of sheer forceful instrumentality of the State. It remains to be seen, however, whether the Anglophone Regions would be placated by the offer and a full return to normalcy restored. Part of the newly crafted special status for the Anglophone Cameroon is recognition of the distinct way of life of the people, different from the rest of the Cameroon, and a tacit admission of the marginalisation of Anglophone Cameroon by the Cameroonian Government. This begs the question whether the Anglophone Cameroonians are justified in seeking for remedial secession on the strength of perennial marginalisation since the abolishment of the Federal Constitution in 1972. According to the Committee of Jurists in the Aaland Island question, if there were to be a manifest and continued abuse of a State's sovereignty against a minority population, such scenario will be proper to bring an international dispute arising from the domestic scenario within the competence of the League of Nations.[345] It is evident that the Republic of Cameroon has continually abused its sovereignty against the minority Anglophone Cameroon and sought to eviscerate their English heritage by seeking to assimilate them into the French culture. The Anglophone Cameroonians have been protesting since 1972 for an end to the State's abuse of its sovereignty over them by returning to a federal Constitution which will allay their fears of marginalisation in the hands of the majority. In light of the manifest and continuous abuse of State sovereignty over a minority population by the Republic of Cameroon, the minority Anglophone Cameroon is justified in seeking for secession, albeit remedial.

6.3 Conclusion

Through a lengthy research process, it is established that secession is not prohibited under international law, although there is no enforceable right to secession. There is a right to self-determination, which may lead to secession under international law for oppressed people and people who are still subject to colonialism or alien subjugation. This does not however, mean that secession for all other cases generally, is outlawed under international law as international law is silent on the issue, and a people, whether colonised or not, can successfully secede unilaterally from a parent State

[345] The League of Nations had been replaced by the United Nations; Report of the International Committee of Jurists, p. 5

without breaching international law.[346] In Africa, the African Charter granted the right to self-determination to all peoples, including oppressed people and people who are still subject to colonial rule,[347] although the African Commission adopted a restrictive interpretation of the right to self-determination of peoples as enunciated in the African Charter to include only internal self-determination for non-colonised people,[348] whilst preserving the rights of all colonised or oppressed people to secede through the exercise of the right to self-determination.[349] There is a right to remedial secession for oppressed people, as set out in the Report of the International Committee of Jurists.[350] In the case of the Igbo people of Nigeria for instance, the Igbos suffered grave violations of human rights in the hands of the Nigerian State to warrant remedial secession in their favour. Secession, however, is more of a political than legal recourse, and any attempt by the Igbos to unilaterally secede without much international support may be an exercise in futility. Finally, membership of the United Nations, as seen from the research, is a conclusive proof of the evidence of independence and or secession of a country. However, lack of membership, does not *ipso facto*, lead to the conclusion that a country lacks independence, or that secession was unsuccessful. This is exemplified by the Kosovo scenario which successfully seceded from Serbia and is recognised by majority of members of the UN, although it lacks official recognition and membership of the UN.

[346] I.C.J., *Advisory Opinion on Kosovo,*
[347] Article 20 African Charter on Human and People's Rights
[348] *Gunme's Case,* par. 191
[349] *The Katanga Case*
[350] "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Island Question," League of Nations Official Journal, supp. 3 (1920), p. 5

BIBLIOGRAPHY

Books

Achebe, C., There was a Country: A professional History of Biafra (Great Britain: Allen Lane, 2012)

Bagu, K. J., Peacebuilding, Constitutionalism and the Global South: The Case for Cognitive Justice Plurinationalism (New York: Rutledge, 2020);

Bastida, E., Waelde, T. W., and Warden-Fernandez, J., (eds), International and Comparative Mineral Law and Policy: Trends and Prospects (Kluwer Law International, 2005),

Biglino, I., and Golay, C., Academy In-Brief No.2: The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (Geneva Academy of International Humanitarian Law and Human Rights, 2013),

Bochel J., Denver, D., & Macartney, A., (eds.), The Referendum Experience. Scotland 1979, (Aberdeen: Aberdeen University Press, 1981)

Brownlie I., "The Rights of Peoples in Modern International Law", in Crawford J. (ed.), The Rights of Peoples (Clarendon Press, 1988),

Cassese A., International Law, 2nd Ed (Oxford University Press, 2004)

Cassese A., UN Law, Fundamental Rights (Sijthoff & Noordhoff, 1979),

Coulon J., Soldiers of Diplomacy: The United Nations, Peacekeeping, and the New World Order (Toronto: University of Toronto Press, 1998)

Crawford, J., "State Practice and International Law in Relation to Secession," in British Yearbook of International Law 1998 (Oxford: Clarendon Press, 1999)

Falola, T., and Njoku, R. C. (eds), Igbos in the Atlantic World: African Origins and Diasporic Destinations, (Indiana University Press, 2016),

Garner, B. A. (Ed), Black's Law Dictionary (Thomson Reuters, 2014, 10th Ed),

Giddens A., The Nation State and Violence: Volume Two of a Contemporary Critique of Historical Materialism, (Cambridge: Polity, 1985)

Higgins R., The Development of International Law through the Political Organs of the United Nations (Oxford University Press 1963),

Jensen E., Western Sahara: Anatomy of a Stalemate (Lynne Rienner Publishers, 2005),

Kaczorowska-Ireland, A., Public International Law, 5th Ed (London: Routledge, 2015)

Loppez- Basaguren, A., & San- Epifanio, L. E., (ed), Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain (1st Ed., Springer, 2019)

Mayben, M., Manifest Secession: A Proposal for Peace and Liberty (1776 Patriot's Press, 2010)

MacWhirter, I., Disunited Kingdom: How Westminster Won a Referendum but Lost Scotland (Cargo Publishing, 2014)

Okonkwo and Naish, *Criminal Law in Nigeria* (Ibadan: Spectrum Books Limited, 1980, *2nd Ed*)

Oluleye, J. J., Military Leadership in Nigeria (Ibadan: Ibadan University Press, 1985)

Onuoha, G., Challenging the State in Africa: MASSOB and the Crises of Self-determination in Nigeria (Zurich: LIT Verlag GmbH & Co., 2011)

Oren M. B., Six Days of War: June 1967 and the Making of Modern Middle East, (Presidio Press, 2017)

Orentlicher D. F., "International Responses to Separatist Claims: are Democratic Principles Relevant?", in Macedo S. and Buchanan A., Secession and Self-Determination (Eds), (New York: New York University Press, NOMOS XLV, 2003).

Poggo S., The First Sudanese Civil War: Africans, Arabs, and Israelis in the Southern Sudan, 1955-1972 (Palgrave Macmillan, 2009),

Rouvez, A., Coco, M., and Paddack, J.P., Disconsolate Empires: French, British, and Belgium Military Involvement in Post- Colonial Sub- Saharan Africa (University Press of America, 1994)

Thatcher, M., The Downing Street Years (London: HarperCollins, 1993),

Thúrer D., & Burri T., Self-Determination (Max Planck Encyclopedia of Public International Law [MPEPIL], 2008)

Turp, D. & Calvet, M. S. I. (ed), The Emergence of a Democratic Right to Self-determination in Europe (Centre Maurits Coppieters, vol. 12, 2016),

UN, The United Nations and the Independence of Eritrea (The UN Blue Books Series, Vol. XII)

Uwalaka, J., The Struggle for an Inclusive Nigeria: Igbos: To Be or Not to Be? A Treatise on Igbo Political Personality and Survival in Nigeria (Enugu: Snaap Press, 2003),

Walker E. W., Dissolution: Sovereignty and the Breakup of the Soviet Union (Rowman & Littlefield, 2003),

Wenar, L., Blake, M., James, A., Kutz, C., Mehdiyeva, N., and Stilz, A., Beyond Oil: Philosophy, Policy, and the Future (New York: Rowman & Littlefield, 2018),

Wilson W., "Covenant (Wilson's First Draft)", in Miller D. H., The Drafting of the Covenant, vol. 2 (New York: G. P. Putnam's Sons, 1928)

Articles

Adam, E. C., "Self- determination and the Use of Referendums: the Case of Scotland", in International Journal of Politics, Culture, and Society vol. 27, 2013.

Anthony, D., "Ours is a war of survival: Biafra, Nigeria and Arguments about Genocide, 1966-70", in Journal of Genocide Research vol. 16, nos. 2-3, 2014.

Antunes, S. F., "The Scottish Referendum 2014: the Political Process before and after the 'NO' Vote", in E-journal of International Relations vol. 6 nos. 2, 2015.

Awasom, N.F., “The Reunification Question in Cameroon History: was the Bride an Enthusiastic or a Reluctant one?” in Africa Today, vol. 47 no. 2, 2000.

Barnett, M.N., “The UN Security Council, Indifference and Genocide in Rwanda”, in Cultural Anthropology vol. 12 no. 4.

Bird E. S., and Ottanelli F., “The Asaba Massacre And The Nigerian Civil War: Reclaiming Hidden History” in Journal of Genocide Research (Special Double Issue: The Nigeria-Biafra war, 1967–1970: Postcolonial Conflict And The Question Of Genocide) Vol. 16 nos. 2-3, 2014.

Bolton G., & Visoka G., “Recognizing Kosovo’s Independence: Remedial secession or earned sovereignty?”, in South East European Studies at Oxford, Occasional Paper No. 11/10, 2010.

Cerone J., “Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State”, in American Society of International Law, vol. 16, Iss. 37, 2012.

Cohen R., “The Concept of Statehood in United Nations Practice”, in University of Pennsylvania Law Review, Vol. 109, 1961.

Dinstein Y., “Collective Human Rights of Peoples and Minorities”, in International and Comparative Law Quarterly, vol. 25, 1976.

Duclos, N., “The Strange Case of the Scottish Independence Referendum. Some Elements of Comparison between the Scottish and Catalan Cases”, French Journal of British Studies vol. XX no. 2, 2015.

Ebai, S.E., “The Right to Self-Determination and the Anglophone Cameroon Situation”, in The International Journal of Human Rights, vol. 13, no. 5, 2009.

Ebeku, K. S. A., “Fulani Herdsmen Attacks in Nigeria: A Case of Genocide in the Making”, in International Journal of Law, Humanities & Social Science vol. 3 no.6, 2019.

Ekpo, C. E., and Agorye, C. A., “The Indigenous People of Biafra (IPOB) and the Setting of “Jubril Al- Sudani” Agenda: A Qualitative Review of a Failed

Securitization Move", in International Journal of Quantitative and Qualitative Research Methods, vol. 7 no. 2, 2019.

Einsiedel, S. V., Malone, D. M., and Ugarte, B. S., "The UN Security Council in an Age of Great Power Rivalry", in United Nations University Paper Working Series No. 4, 2015.

Fombad, C. M., "The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression?", in Journal of African Law, vol. 42 no. 2, 1998.

Harris, J. W., "When and Why Does the Grundnorm Change?", in The Cambridge Law Journal vol. 29, No. 1, 1971.

Horowitz, D. L., "The Cracked Foundations of the Right to Secede", in Journal of Democracy vol. 14 no. 2, 2003.

Hossain, M., "Bangladesh War of Independence: A Moral Issue", in Economic and Political Weekly, vol. 44 no. 5, 2009.

Johnson, D. H., "New Sudan or South Sudan? The Multiple meaning of self-determination in Sudan's comprehensive peace agreement", in Civil Wars vol. 15 no. 2, 2013.

Kerwin, G. J., "The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts", in Duke Law Journal vol. 1983 no. 876.

Kuzio, T., "Russia-Ukraine Crises: The Blame Game, Geopolitics, and National Identity", in Europe Asia Studies vol. 70 no. 3, 2018.

Ma Shu Yun, "Ethnonationalism, Ethnic Nationalism, and Mini-nationalism: A comparison of Connor, Smith and Snyder", in Ethnic and Racial Studies, vol. 13 no. 4, 1990.

Marxsen C., "Territorial Integrity in International Law-Its concept and Implications for Crimea", in Heidelberg Journal of International Law, ZaöRV 75, 2015.

Mrabure, K. O., "The Right to Self- determination under International Law: The Current Biafra Struggle", in NAUJILJ, 2015.

Ogowewo, T. I., "Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy", in Journal of African Law vol. 44 no. 2, 2000.

Orobator, S. E., "The Nigerian Civil War and the Invasion of Czechoslovakia", in African Affairs, vol. 82, no. 327, 1983.

Pederson, D., "Political violence, ethnic conflict and contemporary wars: broad implications for health and social well-being", in Social and Science Medicine vol. 55 no. 2, 2002.

Rich T. S., "Status for Sale: Taiwan and the Competition for Diplomatic Recognition", in Issues & Studies 45, No. 4, 2009.

Rose N., and Miller P., "Political Power beyond the State: Problematics of Government", in The British Journal of Sociology, vol. 43, No. 2, 1992.

Salomon, S., "Self-determination in the Case Law of the African Commission: Lessons for Europe", in VRÜ Verfassung und Recht in Übersee, (VRÜ, Jahrgang 50, 2017).

Senese, S., "External and Internal Self-Determination" in Human Rights & Peoples' Rights: Views from North & South (*Social Justice*, vol. 16, no. 1 (35), 1989),

Toal G., "Russia's Kosovo: A Critical Geopolitics of the August War over South Ossetia" in Eurasian Geography and Economics, vol. 50 Issue 1, 2009.

Wolf, K., "Ethnic Nationalism: an Analysis and a Defence", in Canadian Review of Studies in Nationalism vol. 13 No. 1, 1986.

Treaties and Statutes,

African Charter on Human and People's Rights

European Convention on Human Rights

First Optional Protocol to the ICCPR

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Montevideo Convention on the Rights and Duties of States, 1933

The Charter of the United Nations

The Statute of the International Court of Justice

Declarations, Resolutions and Recommendations

A/RES/67/19 Resolution Adopted at the 44th Plenary of the United Nations' General Assembly on the Status of Palestine in the United Nations, adopted on 29th November 2012,

Catalan Government, *The National Transition of Catalonia* (English version of the White Paper entitled *Transició Nacional de Catalunya*), September 2014.

General Assembly Resolution 1541 (XV): General Assembly Resolution defining the three options for self-determination

General Assembly Resolution 1654 (XVI): General Assembly Resolution establishing the Special Committee on Decolonisation

General Assembly Resolution G.A. Res. 63/3 of October 8, 2008

General Assembly Resolution GA/11493 of 27 March, 2014

Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919, vol. 4 (Washington D.C.: Government Printing Press Office, 1943),

Resolution 742/IX of the Parliament of Catalonia on "*the general political orientation of the Government of Catalonia*", adopted on 27 September 2012.

Resolution 5/X of the Parliament of Catalonia "*adopting the Declaration of sovereignty and right to decide of the people of Catalonia*", voted on 23 January 2013

Rome Statute of the International Criminal Court, 1998

Security Council Resolution SC/Res/541 reaffirming the invalidity of the purported declaration of the independence of Turkish Republic of Northern Cyprus

Security Council Resolution SC/Res/550 condemning the recognition by the Republic of Turkey of the purported secession of the Turkish Republic of Northern Cyprus and the exchange of Ambassadors between them.

Security Council Resolution SC/Res/1244 (1999)

Security Council Resolution SC/Res/1251 (1999),

Scottish Government, *The Scottish Independence Bill: a Consultation on an Interim Constitution for Scotland*, Edinburgh: Scottish Government, 2014, p. 28

Terrorism (Prevention) (Proscription Order) Notice 2017. This notice was gazetted in vol. 104 Official Gazette of the Federal Republic of Nigeria

The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7.21/68/106 (1921),

The Edinburgh Agreement, 2012

UNESCO, "International Meeting of Experts on Further Study of the Concept of the Right of the Peoples" (22 February 1990) SHS-89/CONF 602/7,

Universal Declaration of the Rights of Peoples, Algiers, 1976

United Nations General Assembly Resolution 1514 (XV): Declaration on the granting of independence to colonial countries and peoples (United Nations General Assembly [UNGA]) UN Doc A/RES/1514(XV), GAOR 15th Session Supp 16, 66

UN Security Council's Draft Resolution 2/2014/189

UN GA's Resolution 68/262entitled "Territorial Integrity of Ukraine" and adopted on 27th March, 2014 by the 68th session of the United Nations General Assembly, which was in response to the Russian Annexation of Crimea.

Domestic Law

An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference (S.C. 2000, c. 26), also known as "the Clarity Act"

Constitution of the Federal Republic of Nigeria, 1999, as Amended in 2010

Criminal Code cap C38 Laws of the Federation of Nigeria, 2004

Law No. 19/2017 (Catalan Region)

Nigeria's Statutory Instrument No. 8 of 1999

Nigeria's Terrorism (Prevention) Act, 2011

Penal Code of the Republic of Cameroon, Law No. 2016/007 of 12 July, 2016

Protocol No. 1 to the European Convention on Human Rights

Reindeer Husbandry Act, 1971 (Sweden)

Statute of Autonomy of Catalonia

The Criminal Code Act, Cap C38 Laws of the Federation of Nigeria, 2004

The (Nigerian) Abandoned Properties Act of 1979

The 1978 Spanish Constitution

UK's Treason Act 1351

International Case Law

Centre for Minority Rights Development (Kenya) and Minority Rights Group, Comm. 276/2003 (ACHPR, 25 November 2009), Legal Resources Foundation v. Zambia, (African Commission on Human and Peoples' Rights),

East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995,

Forcadell I Lluis and Others v. Spain (dec.), judgment of the European Court of Human Rights delivered on 07.05.2019

I.C.J., *Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo,* (July 22, 2010). 141, p. 29-48.

Katangese Peoples' Congress v. Zaire, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995)

Kevin Mwaganga Gunme et al v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009),

Kitok v. Sweden, Communication No. 197/1985; U.N. Doc. CCPR/C/33/D/197/1985

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 1971,

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)

Moohan and Gillon v. the United Kingdom (dec.), 22962/15 and 23345/15, 13 June 2017

Pleno. Sentencia 31/2010, de 28 de junio de 2010 (BOE núm. 172, de 16 de julio de 2010)

Refah Partisi (The Welfare Party) & Ors v. Turkey (Grand Chamber Judgment, of 13.02.2003)

Domestic Case Law

Bola Kace v. The State (2006) 1 NWLR (pt. 962), 507

Henderson v. Procureure générale du Québec, 2018 QCCS 1586

MacFoy v. United Africa Company Limited (West Africa) [1961] 3 All ER 1169

R. v. Boro [1966] 1 All N.L.R. 266; [1967] N.M.L.R. 163

R v Hardie (1821) 1 St. Tr. 609

Reference re Secession of Quebec, (1998) 2 SCR 217

Other Documents

Akinsuyi, T., "Nigeria is a Country of many Nations- Akintoye", Nigeria's Independent Newspaper of October 17, 2017;

Courtis, C., "Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", in Inter-American Institute of Human Rights/International Commission of Jurists, 2008,

Fountain, R., "Secret Papers Reveal Biafra Intrigue", BBC News, 3rd January, 2000

General Comment No. 12: Article 1 (The right to self-determination of peoples), HRI/GEN/1/Rev.9 (Vol. 1)

Global Terrorism Index 2015: Measuring and Understanding the Impact of Terrorism (Report)

Glynn S., The Spirit of '71: How the Bangladeshi War of Independence has Haunted Tower Hamlets, (online papers archived by the Institute of Geography, School of Geosciences, University of Edinburgh, 2006)

Great Britain House of Commons, "*Scotland in the Union. A Partnership for Good"*, (the Foreword by the Prime Minister), Cm. 2225, London: The Stationery Office, March 1993

Hainsworth P., "From Occupation and Civil War to Nation-Statehood: East Timor and the Struggle for Self-Determination and Freedom from Indonesia", in IBIS Discussion Paper No. 5, Patterns of Conflict Resolution, University College Dublin.

Janna, C. "Biafra: Why I asked for guns from US- based Nigerians." Nigerian Daily Post Newspaper of June 27, 2017

NA., The Buea Declaration: All Anglophone Conference, 2nd and 3rd April, 1993 (Limbe: Nooremac Press, 1993)

Ogwuda, A., "Gowon Faults setting up of Oputa Panel", Vanguard Newspaper, December 9, 2002.

The Federal Ministry of Information Press Release No. 46, January 15, 1970b, titled "Broadcast to the Nation by the Head of the Federal Military Government and Commander-in-Chief of the Armed Forces, Major-General Yakubu Gowon, Thursday, January 15, 1970"

Willis, R., McAuley, J., Ndeunyema, N., and Angove, J. Human Rights Abuses in the Cameroon Anglophone Crises: A Submission of Evidence to UK Parliament. A report submitted by an independent research team based at the Faculty of Law, University of Oxford on 30 October, 2019.

Internet Materials

http://www.un.org/en/sections/member-states/about-permanent-observers/index.html,
https://www.bbc.com/news/world-africa-49406649,
http://www.ibtimes.co.uk/catalonia-independence-spain-sues-catalan-president-disobedience-dishonesty-1474459
Coalition for the International Criminal Court, http://iccnow.org/?mod=urc0706

http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html

https://www.un.org/press/en/2018/sc13213.doc.htm

https://www.kosovothanksyou.com/

http://www.un.org/en/decolonization/nonselfgovterritories.shtml

https://news.un.org/en/story/2011/07/381552-un-welcomes-south-sudan-193rd-member-state,

https://www.iwp.edu/news_publications/detail/the-seven-states-of-the-former-yugoslavia-an-evaluation,
https://www.hrw.org/news/2019/09/03/cameroon-separatist-leaders-appeal-conviction
https://www.newsweek.com/president-buhari-angered-biafra-leader-nnamdi-kanus-treasonable-acts-410454

https://www.reuters.com/article/us-nigeria-security-biafra/tension-grips-nigerian-city-as-separatist-leader-goes-missing-idUSKCN1C81IT

http://www.tribunalconstitucional.es/es/jurisprudencia/paginas/Sentencia.aspx?cod=16273

https://eeas.europa.eu/headquarters/headquarters-homepage_en/8322/EU%20restrictive%20measures%20in%20response%20to%20the%20crisis%20in%20Ukraine