

**UNILATERAL NON-COLONIAL SECESSION AND INTERNAL  
SELF-DETERMINATION: A RIGHT OF NEWLY  
SECEDED PEOPLES TO DEMOCRACY?**

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**INTRODUCTION**

Since the political unit known as the “state” first arose in Westphalian Europe,<sup>1</sup> the world’s geopolitical map has undergone a process of steady

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<sup>1</sup> The Peace of Westphalia, concluded in 1648, ended the Thirty Years’ War in Europe, and established the prevailing state based international order. *See generally* Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT’L HIST. REV. 569, 591 (1999); Sasson Sofer, *The Prominence of Historical Demarcations:*

evolution. Indicative of this fact is that in the 20th and early 21st centuries, various states have been directly and indirectly created by unilateral non-colonial (UNC) secession,<sup>2</sup> such as Bangladesh (Pakistan), Eritrea (Ethiopia),<sup>3</sup> Bosnia-Herzegovina, Croatia, Macedonia,<sup>4</sup> Slovenia,<sup>5</sup> Montenegro, Serbia, Kosovo (Yugoslavia), and South Sudan (Sudan).<sup>6</sup> Failed UNC secessions, such as

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*Westphalia and the New World Order Diplomacy*, 20 *DIPL. & STATECRAFT* 1, 6–10 (2009); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 *AM. J. INT'L L.* 20, 20–41 (1948).

<sup>2</sup> The definition of “secession” is discussed in Part 2(A) of the present paper. For immediate purposes, it can be observed that secession is an encompassing method of state creation and can be classified according to whether it is unilateral, consensual, colonial or non-colonial. Unilateral non-colonial (UNC) secession refers to the “unilateral withdrawal of non-colonial territory from part of an existing state to create a new state.” Glen Anderson, *The Definition of Secession in International Law and Relations*, 35 *LOY. L.A. INT'L & COMP. L. REV.* 343, 344, 386–88 (2013) [hereinafter Anderson, *Definition of Secession*]. For an extended discussion of the definition of secession, see *id.* at 343–88.

<sup>3</sup> Although Eritrea’s independence from Ethiopia was the result of a referendum in April 1993, this was preceded by a prolonged period of armed resistance by the Eritrean People’s Liberation Front (EPLF) and can therefore be substantively classified as unilateral in nature. See generally Edmond J. Keller, *Eritrean Self-Determination Revisited*, 38 *AFR. TODAY* 7, 7–13 (1991); Alem Abbay, *The Eritrean Dilemma*, 7 *TRANSFRICA FORUM* 35, 35–50 (1990); Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 *EMORY INT'L L. REV.* 479, 479–537 (1994); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 402–03 (2d ed. 2007) [hereinafter CRAWFORD, *CREATION OF STATES*].

<sup>4</sup> Generally considered to have emerged to independence after the Socialist Federative Republic of Yugoslavia (SFRY) had become extinct (approximately post-1992). Nonetheless the SFRY’s extinction was facilitated by previous UNC secessions. See generally Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 *AM. J. INT'L L.*, 569, 569–607 (1992); STEVE TERRETT, *THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING IN THE POST-COLD WAR WORLD* 32 (2000).

<sup>5</sup> Generally considered to have emerged to independence after the SFRY was extinct (approximately post-1992), thereby ensuring that no existing state remained to challenge Macedonian independence. Nonetheless, the SFRY’s extinction was facilitated by previous UNC secessions. See PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* 193–95 (2002).

<sup>6</sup> Although South Sudan achieved independence as the result of a referendum, this was preceded by “the longest civil conflict on the continent [of Africa.]” Khalid Medani, *Strife and Secession in Sudan*, 22 *J. DEMOCRACY* 135, 135 (2011). As noted by Natsios and Abramowitz, “[t]he civil war . . . lasted 22 years . . . during which an estimated 2.5 million southerners died.” See Andrew S. Natsios & Michael Abramowitz, *Sudan’s Secession Crisis: Can the South Part from the North without War?*, 90 *FOREIGN AFF.* 19, 19 (2011). Silva has similarly observed that “[t]he former unitary state of Sudan had been plagued by bitter internecine conflict for more than half a century, and as a result, an estimated 2.5 million people lost their lives and over five million were internally displaced.” Mario Silva, *After Partition: The Perils of South Sudan*, 3 *U. BALT. J. INT'L L.* 63, 65 (2015). Smith has likewise commented: “Since 1 January 1956, when the former Anglo-Egyptian condominium acceded to international sovereignty, Sudan has been almost continuously ravaged by civil war: between the North and the South of the country from 1955 to 1972, and again from 1983 until 2005, and between the central power structure in Khartoum and

Katanga (Democratic Republic of the Congo), Biafra (Nigeria), the Turkish Republic of Northern Cyprus (Republic of Cyprus), Chechnya (Russian Federation), Abkhazia (Georgia),<sup>7</sup> South Ossetia (Georgia),<sup>8</sup> Transnistria (Moldova), and Nagorno-Karabakh (Azerbaijan), similarly attest to the potential geopolitical impact of this method of state creation.

Since the inception of the United Nations (UN) in 1945, the creation of states by UNC secession has gradually transformed from an extra-legal process grounded in *realpolitik*<sup>9</sup> to one increasingly guided by legal principles. Central to

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the Darfur region, in the West since 2003.” See Stephen W. Smith, *Sudan: In a Procrustean Bed with Crisis*, 16 INT’L NEGOTIATION 169, 169–70 (2011). This means that substantively, South Sudan’s secession could be regarded as unilateral in nature.

<sup>7</sup> Abkhazia *may* eventually become a successful UNC secession, given that at the time of writing, the Russian Federation, Nicaragua, Venezuela, and Nauru, have extended recognition on August 26, 2008, September 5, 2008, September 10, 2009, and December 15, 2009, respectively. *But see* Jelena Radoman, *Future Kosovo Status—Precedent or Universal Solution*, 3 W. BALKANS SECURITY OBSERVER 14, 17 (2006). *See generally* Alexander Murinson, *The Secessions of Abkhazia and Nagorny Karabagh: The Roots and Patterns of Development of Post-Soviet Micro-Secessions in Transcaucasia*, 23 CENTRAL ASIAN SURVEY 5, 5–26 (2004); Alexander Cooley & Lincoln A. Mitchell, *Engagement without Recognition: A New Strategy toward Abkhazia and Eurasia’s Unrecognized States*, 33 WASH. Q. 59, 59–73 (2010); ANTJE HERRBERG, CRISIS MGMT. INITIATIVE, CONFLICT RESOLUTION IN GEORGIA: A SYNTHESIS ANALYSIS WITH A LEGAL PERSPECTIVE (2006), [http://reliefweb.int/sites/reliefweb.int/files/resources/24F8EE652CB48E83C12574A200472BD9-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/24F8EE652CB48E83C12574A200472BD9-Full_Report.pdf) (discussing the Abkhazia conflict in general).

<sup>8</sup> South Ossetia *may* eventually become a successful UNC secession, given that the Russian Federation, Nicaragua, Venezuela, and Nauru have extended recognition on August 26, 2008, September 5, 2008, September 10, 2009, and December 16, 2009, respectively. *See* Charlotte Hille, *Recognition of South Ossetia and Abkhazia Two Years Later: Unicum or Trendsetting?*, 21 SEC. & HUM. RTS. 153, 153 (2010); *see generally* HERRBERG, *supra* note 7; Gerard Toal, *Russia’s Kosovo: A Critical Geopolitics of the August 2008 War Over South Ossetia*, 49 EURASIAN GEOGRAPHY & ECON. 670, 670–705 (2008); Angelika Nußberger, *The War Between Russia and Georgia—Consequences and Unresolved Questions*, 1 GOETTINGEN J. INT’L L. 341, 342–364 (2009); Nicolas Lemay-Hebert, *Zone of Conflict: Clash of Paradigms in South Ossetia*, 2 U.S.A.K. Y.B. INT’L POL. & L. 251, 251–64 (2009); Timothy L. Thomas, *The Bear Went Through the Mountain: Russia Appraises its Five-Day War in South Ossetia*, 22 J. SLAVIC MIL. STUD. 31, 31–67 (2009); Michael Toomey, *August 2008 Battle of South Ossetia: Does Russia Have a Legal Argument for Intervention?*, 23 TEMP INT’L & COMP. L.J. 443, 443–47 (2009); Tracey German, *Russia and South Ossetia: Conferring Statehood or Creeping Annexation?*, 16 SOUTHEAST EUR. & BLACK SEA STUD. 155, 155–67 (2016).

<sup>9</sup> “*Realpolitik*” broadly refers to a philosophy which advocates that states view the acquisition and maintenance of power as their primary objective. Or, as Steinmetz has noted: “Adherents of *realpolitik* assume states to be central actors in an anarchic and ‘essentially competitive’ environment. Rationality, rather than the individual preferences of decision-makers or an assumed universal morality, guides foreign policy decisions. Such decisions are calculated in ‘terms of interest defined as power,’ where power is used as an end in itself, or as a means of achieving other national interest goals.” *See* SARA STEINMETZ,

this transformation has been the development of the law of self-determination, which provides that peoples have the right to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>10</sup> These words, along with other statements in declaratory General Assembly resolutions<sup>11</sup> and relevant state practice more broadly, have been widely held to ground a qualified right to UNC secessionist self-determination for oppressed peoples.<sup>12</sup>

The present article chiefly devotes itself to the under-examined question of whether democracy is an integral aspect of UNC secessionist self-determination, such that any UNC secessionist entity created with a political system *contrary* to this requirement will be devoid of statehood. In essence, the article considers what, if any, ongoing governance requirements might be imposed by the law of self-determination upon states created by UNC secession.

The article is divided into several principal parts. Part I examines the concept of democracy and its essentially contested nature. It argues that although democracy is a nebulous concept, it is still possible to titrate certain features that form the basis of what can be loosely described as “Western electoral democracy.” Part II provides a brief analysis of the law of self-determination and how this might impact the creation of states by way of UNC secession. It successively examines the definition of secession, the right to UNC secession in international law, the preemptory (*jus cogens*) status of self-determination, as well as internal and external self-determination. Part III analyzes the scope of the right of peoples to internal self-determination. In this respect, treaty law, customary law, and judicial decisions relating to internal self-determination are critically examined. State practice pertaining to Southern Rhodesia and the South African

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DEMOCRATIC TRANSITION AND HUMAN RIGHTS 3–4 (1994). The origins of *realpolitik* can be traced to the Greek historian Thucydides and his account of the Peloponnesian Wars between Athens and Sparta. See generally Daniel Garst, *Thucydides and Neorealism*, 33 INT’L STUD. Q. 3, 3 (1989) (“The work of Thucydides has long occupied a privileged position among theorists of *realpolitik*.”); Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1794, 1796 (2002); Alex Khachaturian, *The International Legal Jurists, Morality and the Realist Perspective in International Relations*, 19 SRI LANKA J. INT’L L. 463, 471–72 (2007). The etymology of “*realpolitik*” lays in German, meaning “practical politics.” See *Online Etymological Dictionary*, REALPOLITIK, [http://www.etymonline.com/index.php?allowed\\_in\\_frame=0&search=realpolitik](http://www.etymonline.com/index.php?allowed_in_frame=0&search=realpolitik) (last visited Dec. 27, 2016).

<sup>10</sup> International Covenant on Economic, Social and Cultural Rights, art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171; G.A. Res. 2200 (XXI), (Dec. 16, 1966); G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, art. 2 (Dec. 14, 1960); G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, art. 3 (Sept. 13, 2007).

<sup>11</sup> See G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, principle 5, ¶ 7 (Oct. 24, 1970); G.A. Res. 50/6, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, art. 1 (Nov. 9, 1995).

<sup>12</sup> See *infra* Part II(B) (discussing the exact parameters of this right, including its qualified nature and the fact that it derives from international customary law).

Bantustans is also analyzed. Part IV attempts to precisely delimit *internal* self-determination, considering whether it equates with Western electoral democracy.

The article concludes that, *de lege lata*, there is no obligation for a state created by UNC secession to implement Western electoral democracy. Instead, internal self-determination imposes a more elastic legal obligation on UNC secessionist states, namely: (1) the right of peoples to choose their political system; (2) that within this system peoples must have equal participatory rights; and (3) that there must be an *absence* of sustained and systematic discrimination of any kind against peoples. Looking to the future, however, it is argued that a *de lege ferenda* obligation is emerging for states created by UNC secession to adhere to Western electoral democracy. This will likely form a key aspect of self-determination's 21st century development.

## I. DEMOCRACY AS AN ESSENTIALLY CONTESTED CONCEPT

The origins of democracy are controversial. The concept may have been intrinsic to clan-based hunter-gatherer societies, whereby a committee of respected elders formulated societal policies.<sup>13</sup> Alternatively, democracy might be traced to the ancient Greek city-state, wherein property-owning males were given the right to partake in political affairs.<sup>14</sup> Further still, the Glorious, American, and French Revolutions, which collectively abolished the divine right of kings and paved the way for universal adult suffrage, could be nominated as democracy's genesis.<sup>15</sup>

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<sup>13</sup> Matthew Todd Bradley, "The Other": Precursory African Conceptions of Democracy, 7 INT'L STUD. REV. 407, 410–17 (2005) ("Chieftaincy vividly represents another version of democracy contrary to Western democratic notions."); Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 6 (1994) ("[Democracy] is an idea as old as . . . the gathering of African elders around the village Baobab tree."); For American Indian contributions to democracy, see generally Bruce E. Johansen, *Native American Societies and the Evolution of Democracy in America, 1600-1800*, 37 ETHNOHISTORY 279, 279–90 (1990); Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323, 323–31 (1988); For discussion of indigenous Australians and democracy see Melissa Lucashenko, *The First Australian Democracy*, 74 MEANJIN Q., no. 3, 2015 ("Checks and balances. No master–servant relation. Homeostasis. Far-reaching stability. And a rule of laws and not of men. Sounds a lot like a democracy to me.").

<sup>14</sup> U.O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 4 (1972); BERTRAND RUSSELL, WHAT IS DEMOCRACY? (1953), <https://users.drew.edu/jlenz/br-on-democracy.html>.

<sup>15</sup> Under the divine right of kings doctrine, kings were considered to hold their authority from God, rather than the people. To rebel against the king was to rebel against God. See generally Glen Anderson, *A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?*, 49 VAND. J. TRANSNAT'L L. 1183, 1192–96 (2016) [hereinafter Anderson, *A Post-Millennial Inquiry*] (providing a brief historical account of the demise of the divine right of kings doctrine). See generally Rafe Blaufarb, *The French Revolution: The Birth of European Popular*

If the origins of democracy are controversial, so too is its definition. Can democracy only exist in a bicameral,<sup>16</sup> Westminster<sup>17</sup> political system? Is constitutional monarchy<sup>18</sup> undemocratic? Can a centralized socialist political system<sup>19</sup> be classified as democratic? Is a theocracy<sup>20</sup> undemocratic? Can a

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*Democracy?*, 37 COMP. STUD. SOC'Y & HIST, 608, 608–18 (1995) (providing a discussion of the French Revolution and democracy, as well as exploring the idea that the French Revolution faltered in the implementation of democratic ideals due to its substitution of royal absolutism for parliamentary absolutism).

<sup>16</sup> Meaning two houses of parliament. Bicameralism first arose in medieval Europe with one house typically representing commoners and the other representing the aristocracy. Some parliaments are unicameral, meaning that there is only one legislative chamber. See generally James R. Rogers, *The Impact of Bicameralism on Legislative Production*, 28 LEGIS. STUD. Q. 509, 509 (2003); *Bicameralism Around the World: Position and Prospects*, SENAT, <http://www.senat.fr/senatsdumonde/introenglish.html> (last visited Dec. 1, 2016).

<sup>17</sup> Meaning a political system modelled upon the system of government developed in the United Kingdom (UK). The home of the UK Parliament is the Palace of Westminster. The Westminster system has been adopted by numerous countries, many of which were former UK colonies.

<sup>18</sup> Meaning a system of government whereby a hereditary monarch acts within the parameters of a constitution which may be written or unwritten. It can be contrasted with absolute monarchy, whereby the hereditary monarch rules without recourse to constitutional fetters or conventions. Australia, Belgium, Denmark, New Zealand, Sweden and the UK are examples of constitutional monarchies. Brunei and Saudi Arabia are examples of absolute monarchies.

<sup>19</sup> Coburn has suggested that socialism “is at once a critical theory of capitalism and an aspiration for a more socially just and democratic society beyond capitalism.” See Elaine Coburn, *What is Socialism? What are Socialist Studies?*, 5 SOCIALIST STUD. 1, 1 (2009). Importantly, the most commonly cited example of such a system of government, the Union of Soviet Socialist Republics, was, at least in its initial stages, totalitarian. Joseph Stalin, and his collaborators in the upper echelons of the state apparatus, such as Lavrentiy Beria, the Head of the Secret Police, or NKVD, routinely disregarded fundamental human rights and engaged in unlawful killing, mass purges, and other heinous crimes, including in Beria’s case, rape. See generally Marina Stal, *Psychopathology of Joseph Stalin*, 9A PSYCHOLOGY 1 (2013); Henry Kellerman, *Stalin and Genocide*, in PSYCHOANALYSIS OF EVIL 109 (2014); Gary Saul Morson, *The Lingering Stench: Airing Stalin’s Archives*, 27 NEW CRITERION 10, 10–14 (2009); ROBERT THURSTON, LIFE AND TERROR IN STALIN’S RUSSIA, 1934-1941 (1996); Maria M. Tumarkin, *The Long Life of Stalinism: Reflections on the Aftermath of Totalitarianism and Social Memory*, 44 J. SOCIAL HIST. 1047–61 (2011); AMY KNIGHT, BERIA: STALIN’S FIRST LIEUTENANT (1995); Julius Strauss, *Stalin’s Depraved Executioner Still has Grip on Moscow*, TELEGRAPH (Dec. 23, 2003, 12:01 AM GMT), <http://www.telegraph.co.uk/news/worldnews/europe/russia/1450145/Stalins-depraved-executioner-still-has-grip-on-Moscow.html>. Many political systems routinely labelled “capitalist” have “socialist” threads. An example might be a capitalist society in which the government provides universal health care, generous unemployment benefits, and childcare allowances. These subtle socialist threads are often overlooked when considering the intersections between socialism and “democracy.”

<sup>20</sup> Meaning a system of government whereby a deity is viewed as the supreme civic ruler, and the deity’s commandments are interpreted and upheld by specialist ecclesiasts.

democracy only exist with multiple political parties, or will a single party with multiple factions qualify?<sup>21</sup> Is the only true democracy a republic?<sup>22</sup> Should a republican head of state be elected by the parliament or directly by the people?<sup>23</sup> Are constitutions transmitted across successive generations undemocratic?<sup>24</sup> Is representative democracy deficient without participatory democracy?<sup>25</sup>

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Iran is a regularly cited example of a theocracy. *See generally* Francis Fukuyama, *Iran, Islam and the Rule of Law*, WALL STREET J. (July 27, 2009 11:03 PM ET), <http://www.wsj.com/articles/SB10001424052970203946904574300374086282670>.

<sup>21</sup> An argument could be made that in many democracies such as Australia, there is really one substantive party (Liberal-Labor Party) with two dominant factions (Liberal and Labor). Similar arguments could be made in the context of the United States with respect to Democrats and Republicans. Factional division in a single party state could therefore take on a unique significance.

<sup>22</sup> Meaning a system of government whereby political power is vested in the people. It can be contrasted with monarchy (constitutional or absolute) in which (certain or all elements of) political power rests with an unelected hereditary ruler.

<sup>23</sup> In Botswana, China, Greece, Guyana, Italy, South Africa, and Switzerland, for example, the President is elected by their Parliament. In Austria, Brazil, Finland, France, Indonesia, Kenya, Korea, Mexico, The Russian Federation, and Tanzania, for example, the President is directly elected by the people. *See generally* *List of Countries by System of Government*, WIKIPEDIA, [http://cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/L/List\\_of\\_countries\\_by\\_system\\_of\\_government.htm](http://cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/L/List_of_countries_by_system_of_government.htm) (last visited Jan. 16, 2017). Incidentally, the President of the United States (POTUS) is often mistakenly assumed to be directly elected. In fact, the POTUS is indirectly elected by the Electoral College, which is a body established under Article 2 of the US Constitution. *See* Michael Vincent, *US Election: The Electoral College System Explained*, ABC (AU), <http://www.abc.net.au/news/2016-09-27/us-electoral-college-explainer/7787472> (last updated Dec. 15, 2016); *What is the US Electoral College?*, BBC NEWS (Aug. 26, 2016), <http://www.bbc.com/news/world-us-canada-15764542>; *What is the Electoral College?*, NAT'L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/federal-register/electoral-college/about.html> (last visited Oct. 1, 2016).

<sup>24</sup> Thomas Jefferson, for example, did not believe that the political compacts of older generations should irrevocably bind the living. *See* DANIEL BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* 207, 211 (1948); Robert W. McGee, *Secession Reconsidered*, 11 J. LIBERTARIAN STUD. 11, 17 (1994).

<sup>25</sup> In a representative democracy, citizens elect representatives to make decisions on their behalf. In a participatory democracy, citizens directly participate (for example via a plebiscite, referendum, initiative, or recall) on particular issues of public importance. Participatory democracy can complement representative democracy, as is the case in Switzerland. *See* Bruno Kaufmann, *How Direct Democracy Makes Switzerland a Better Place*, TELEGRAPH (May 18, 2007, 12:01 AM BST), <http://www.telegraph.co.uk/news/1435383/How-direct-democracy-makes-Switzerland-a-better-place.html> (“While it embraces direct democracy, Switzerland is nevertheless still a representative democracy. Most laws are made and decided by parliament.”); Dag Anckar, *Direct Democracy in Microstates and Small Island States* 32 WORLD DEVELOPMENT 379, 387–88 (“With a few exceptions, Switzerland being the most prominent one, the countries of the world do not resort frequently to direct democracy, and the small countries do not constitute an exception to this rule. [The small countries] do house a special inclination to introduce in their constitutions prescriptions for the constitutional referendum, but are otherwise equally

The point that emerges from these questions is that the definition of democracy is essentially contested.<sup>26</sup> Perhaps the loose thread that ties all conceptions of democracy together is that it is based upon majority rule meaningfully exercised by citizens.<sup>27</sup> This is reflected in the etymology of the

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or even more disinterested than large countries in more differentiated instruments of direct democracy.”)

<sup>26</sup> Gallie has asserted that democracy is “the appraisive political concept par excellence.” Walter Bryce Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 184 (1956). See also generally Walter Bryce Gallie, *Art as an Essentially Contested Concept*, 6 PHIL. Q. 97, 97–114 (1956); E. Garver, *Rhetoric and Essentially Contested Arguments*, 11 PHIL. & RHETORIC 156, (1978); A. Mason, *On Explaining Political Disagreement: The Notion of an Essentially Contested Concept*, 33 INQUIRY 81 (1990); C. Swanton, *On the “Essential Contestedness” of Political Concepts*, 95 ETHICS 811 (1985); David Collier & Steven Levitsky, *Democracy with Adjectives: Conceptual Innovation in Comparative Research*, 49 WORLD POL. 430, 433 (1997).

<sup>27</sup> For representative definitions of democracy, see Jack Donnelly, *Human Rights, Democracy and Development*, 21 HUM. RTS Q. 608, 615–18 (1999); Christoph Hanisch, *A Human Right to Democracy: For and Against*, 35 ST. LOUIS U. PUB. L. REV. 233, 236–38 (2015); DAVID HELD, *MODELS OF DEMOCRACY* 1 (3rd ed. 2006) (defining democracy as “a form of government in which, in contradistinction to monarchies and aristocracies, the people rule”); Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, 2 J. DEMOCRACY 75, 76 (1991) (defining democracy as “a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives”); Joseph Schumpeter, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (1943) (defining democracy as “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”); FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 43 (1992) (defining a state as democratic if it “grants its people the right to choose their own government through periodic, secret-ballot, multi-party elections, on the basis of universal and equal adult suffrage”); Joel I. Colón-Ríos, *De-Constitutionalizing Democracy*, 47 CALIF. W. L. REV. 41, 58 (2010) (“[A] democratic society is an open society, that is, one in which even the most fundamental principles are always susceptible to being reformulated or replaced through democratic procedures. Democratic openness welcomes conflict and dissent, and is incompatible with untouchable abstract principles[.]”); Stanley Fish, *Why Democracy?* N.Y. TIMES (Oct. 7, 2007), [http://opinionator.blogs.nytimes.com/2007/10/07/why-democracy/?\\_r=0](http://opinionator.blogs.nytimes.com/2007/10/07/why-democracy/?_r=0) (“[D]emocracy is a form of government that is not attached to any pre-given political or ideological ends, but allows ends to be chosen by the majority vote of free citizens[.]”). Democracy Watch has suggested that “[a] democracy is a society in which all adults have easily accessible, meaningful, and effective ways: (1) to participate in the decision-making processes of every organization that makes decisions or takes actions that affect them, and; (2) to hold other individuals, and those in these organizations who are responsible for making decisions and taking actions, fully accountable if their decisions or actions violate fundamental human rights, or are dishonest, unethical, unfair, secretive, inefficient, unrepresentative, unresponsive or irresponsible; so that all organizations in the society are citizen-owned, citizen-controlled, and citizen-driven, and all individuals and organizations are held accountable for wrongdoing.” *Democracy Watch’s Definition of a Democratic Society*, DEMOCRACY WATCH, <http://dwatch.ca/democracy.html> (last visited Jan. 16, 2017). The Vienna Declaration and Programme of Action in Article 8 states that



word “democracy,” which is grounded in the Greek terms “*dēmos*” (δῆμος) meaning “people” (especially those in a political district) and “*krátos*” (κράτος) meaning “power, to rule.”<sup>28</sup>

From a Western perspective, democracy takes on a more pointed definition, connoting electoral representation, the separation of powers, respect for the rule of law, and protection of human rights.<sup>29</sup> The first of these elements suggests that citizens should be given meaningful participation within the political system. Most commonly, this occurs via elected representatives who make decisions on behalf of their constituents. However, it is also possible that citizens can directly participate by way of plebiscites on individual issues, thereby ensuring more precise input.<sup>30</sup> The second element, the separation of powers

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“[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.” Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (June 25, 1993) [hereinafter Vienna Declaration]. The Vienna Declaration was adopted unanimously by the UN World Conference on Human Rights in June 1993. The conference was attended by 171 states, and in total attracted 7000 participants, including states representatives, international human rights experts, academics, and representatives of more than 800 non-governmental organizations. See *World Conference on Human Rights*, OFF. HIGH COMMISSIONER HUM. RTS., <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx> (last visited Jan. 1, 2017); The Polity IV Project has posited that “Democracy is conceived as three essential, interdependent elements. One is the presence of institutions and procedures through which citizens can express effective preferences about alternative policies and leaders. Second is the existence of institutionalized constraints on the exercise of power by the executive. Third is the guarantee of civil liberties to all citizens in their daily lives and in acts of political participation. Other aspects of plural democracy, such as the rule of law, systems of checks and balances, freedom of the press, and so on are means to, or specific manifestations of, these general principles.” MONTY G. MARSHALL & KEITH JAGGERS, POLITY IV PROJECT: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800–2010 14 (2011), [http://home.bi.no/a0110709/PolityIV\\_manual.pdf](http://home.bi.no/a0110709/PolityIV_manual.pdf).

<sup>28</sup> For more information on the history of *demos kratos*, see generally D.F.M. Strauss, *The Cultural and Philosophical Underpinnings of the Ancient Greek Idea of the State*, 32 *POLITEIA* 45, 45–57 (2005); Paul Veyne, *Did the Greeks Know Democracy?*, 34 *ECON. & SOC’Y.* 322, 322–45 (2005); Dolf Sternberger, *Ancient Features of the Modern State*, 5 *HIST. OF EUROPEAN IDEAS* 225, 225–35 (1984); H. Clay Jent, *Demos Kratos: Democracy, Old and New*, 58 *SOC. STUD.* 242, 242 (1967); For a detailed etymological consideration of *demos kratos*, see Josiah Ober, *The Original Meaning of “Democracy”: Capacity to Do Things, Not Majority Rule*, 15 *CONSTELLATIONS* 3, 3–9 (2008).

<sup>29</sup> See generally Larry Diamond & Leonardo Morlino, *The Quality of Democracy*, 15 *J. DEMOCRACY* 20, 22 (2004) (providing a similar yet different scholarly definition of democracy).

<sup>30</sup> Catherine Bosley, *Switzerland’s People Power: Direct Democracy Targets Immigration, Taxes and Gold*, BLOOMBERG, <https://www.bloomberg.com/quicktake/switzerlands-people-power> (last updated June 6, 2016) (explaining that, as occurs in Switzerland, a plebiscite can be triggered on a particular matter if 100,000 petitioners are obtained).

doctrine, ensures that no level of government is capable of aggregating sufficient authority to short-circuit democracy itself. In the Westminster parliamentary tradition, for instance, the government is separate from the executive, be it a monarch or president. Final appellate courts also stand as an important protective barrier holding elected legislatures within constitutional confines. The third element, respect for the rule of law, necessitates that the organs of the state act and transact with legal accountability and oversight. It also ensures that disputes at all levels of society are decided with recourse to legal principles rather than executive fiat. The fourth element, the protection of human rights, ensures that citizens are endowed with fundamental protections, such as the right to life, liberty, assembly, association, free speech, hold property, be free of detention without charge, and so on. These fundamental protections are often constitutionally anchored (be it in writing or by convention). They are also developed by legislatures, and enforced by the courts. Finally, the second, third, and fourth elements in combination provide an additional layer of defense against the tyranny of majority rule by safeguarding minority viewpoints. Very often constitutional and legislative measures can be developed to ensure that minority viewpoints are further protected from permanent political marginalization.<sup>31</sup> Together, this patchwork of protections can be short-handedly referred to as Western electoral democracy.

Before moving to consideration of whether Western electoral democracy is a *sine qua non* for any new state created by UNC secession, it is first necessary to address the precursory issue of the right to UNC secession in international law.

## II. THE RIGHT TO UNC SECESSION IN INTERNATIONAL LAW

In order to discuss the right to UNC secession in international law, four sub-points require examination: (1) the meaning of secession; (2) the right to UNC secession in international law; (3) the designation of self-determination as a peremptory norm; and (4) the interrelationship between internal and external self-determination. Each of these sub-points is important for understanding how a right to UNC secessionist self-determination arises in international law, as well as associated legal consequences, such as the acquisition or denial of statehood by virtue of the operation of peremptory norms.

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<sup>31</sup> A prominent example is the *Maori Representation Act 1867* (NZ), which sets up a system of Māori electorates throughout New Zealand. See generally *The Origins of the Māori Seats*, N.Z. PARLIAMENT, [https://www.parliament.nz/en/pb/research-papers/document/00PLLawRP03141/origins-of-the-m%C4%81ori-seats#footnote\\_2\\_ref](https://www.parliament.nz/en/pb/research-papers/document/00PLLawRP03141/origins-of-the-m%C4%81ori-seats#footnote_2_ref) (last visited Jan. 1, 2017) (“Separate electorate seats in Parliament to represent those New Zealand electors choosing to register on the Māori roll are a distinctive feature of New Zealand’s democracy. Dedicated electoral seats have also been created for ethnic or indigenous groups in Lebanon, Fiji, Zimbabwe, Singapore, the United States dependencies of Guam and Puerto Rico, and India, while the Saami (Scandinavian Lapps) have a separate parliament.”).

### A. Secession

In the context of international law and relations, “secession” can be defined as “the withdrawal of territory (colonial or non-colonial) from part of an existing state to create a new state.”<sup>32</sup> Secession is thus an encompassing method of state creation. Contrary to popularly held perceptions, it is not synonymous only with unilateralism,<sup>33</sup> or situations where the existing state<sup>34</sup> does not grant independence. Nor is secession restricted to the non-colonial context, as it is the withdrawal of sovereignty over territory which is crucial, this being equally applicable in the colonial setting.<sup>35</sup> Further, secession is not predicated on the threat or use of force as asserted by Crawford,<sup>36</sup> because the way in which

<sup>32</sup> Anderson, *Definition of Secession*, *supra* note 2, at 344.

<sup>33</sup> See ALEXIS HERACLIDES, *THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS I* (1991) (“Secession is a special kind of territorial separation involving states. It is an abrupt unilateral move to independence on the part of a region that is a metropolitan territory of a sovereign independent state.”).

<sup>34</sup> Throughout this article the term “existing state” is used to denote a parent state, or otherwise existing member of the international community of states.

<sup>35</sup> For authors who assert that secession can occur in a colonial context, see Anderson, *Definition of Secession*, *supra* note 2, at 373–79; CRAWFORD, *CREATION OF STATES*, *supra* note 3, at 330, 375; Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace*, 8 N.Y. L. SCH. J. HUM. RTS. 49, 103 (1990); HANNA BOKOR-SZEGÓ, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* 53 (1978) (stating that self-determination “comprise[s] the right to secede from the administering power”); INGRID DETTER DE LUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 15 n.14 (2d ed. 1987) (“[S]elf-determination is not merely concerned with the rights of the citizens in one country to organize their government as they wish. It also implies the right of secession from colonial rule.”); FATAH OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA* 235 (2003) (noting that “as a rule, States and international organizations continue to be hostile to the exercise of a right of secession other than in situations of decolonization or foreign domination or occupation”); THOMAS MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* 181 (1997) (defining “secession” as “the antithesis of territorial integrity. It occurs when part of an independent state or non-self-governing territory separates itself from the whole to become an independent state”); Ronald Thomas, Note, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of Independence on the Merits of International Law*, 32 *FORDHAM J. INT’L L.* 1990, 1994–95 (2009) (“[The UN] has not ruled out secession in colonial contexts.”); Iñigo Urrutia Libarona, *Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo* 16 *REVISTA D’ESTUDIS AUTONÒMICS I FEDERALS* 107, 124 (2012); Peter Radan, *Secessionist Referenda in International Law and Domestic Law*, 18 *NATIONALISM & ETHNIC POL.* 8, 9 (2012); Christine Haverland, *Secession*, in *IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 354–55 (Rudolf Bernhardt ed., 2000) (stating that “both the separation of a former dependent territory . . . and the separation of an integral part of a unitary state are secessions”).

<sup>36</sup> CRAWFORD, *CREATION OF STATES*, *supra* note 3, at 375.

secession occurs is unrelated to the outcome: the establishment of a new state.<sup>37</sup> Secession can occur entirely amicably (such as a constitutional or politically-negotiated secession), or it can involve the use or threat of force (such as a civil war). The key element that ties all variants of secession together is an endogenously motivated withdrawal.<sup>38</sup> Secession, whatever its precise complexion, arises organically from within a defined territory which seeks to establish its own sovereignty independent of the existing state.

## **B. UNC Secession in International Law**

A great deal has been written over whether there is a right to UNC secession in international law.<sup>39</sup> The agreed legal basis for such a right is the law of self-determination, as expressed in international treaties and customary instruments. Stated succinctly, the law of self-determination provides that peoples are entitled to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>40</sup> This is not merely a rhetorical postulate: under appropriate conditions, the contemporary law of self-determination provides a right to UNC secession for peoples subject to consistent and egregious human rights violations by the existing state.

Self-determination thus attaches to “peoples.” But how are such groups to be defined? Although there is no universally agreed upon definition, a survey of legal instruments reveals a reasonably certain core meaning. Firstly, peoples are not confined to the colonial context.<sup>41</sup> The law of self-determination can therefore take effect within a colonial and non-colonial setting. Second, there can

<sup>37</sup> Anderson, *Definition of Secession*, *supra* note 2, at 345–70.

<sup>38</sup> *Id.* at 345–46.

<sup>39</sup> See Anderson, *A Post-Millennial Inquiry*, *supra* note 15, at 1221 n.172, 1227 n.182 (providing a general bibliography of important sources).

<sup>40</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 10, art 1(1); International Covenant on Civil and Political Rights, *supra* note 10, art 1(1); G.A. Res. 2200(XXI), *supra* note 10; G.A. Res. 61/295, *supra* note 10, art. 3.

<sup>41</sup> This can be deduced from various international instruments. The UN Charter’s preamble begins with the phrase, “[w]e the peoples of the United Nations” and concludes by pledging the organization to the “economic and social advancement of all peoples.” Article 1(2) continues that one of the UN’s purposes is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” International Covenant on Economic, Social and Cultural Rights, *supra* note 10, art. 1(1); International Covenant on Civil and Political Rights, *supra* note 10 (providing that “[a]ll peoples have the right to self-determination”). This is repeated, *mutatis mutandis*, in Principle 5 paragraph 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. See G.A. Res. 2625 (XXV), *supra* note 11. See also G.A. Res. 61/295, *supra* note 10, art. 3 (providing that “[i]ndigenous peoples have the right to self-determination”). All of these instruments refer to peoples within sovereign states. Arguments suggesting that “peoples” are somehow restricted to the colonial context are therefore untenable.

be more than one people within a non-self-governing territory<sup>42</sup> or sovereign state.<sup>43</sup> Peoples are thus typically units which coalesce at a sub-state level. Third, peoples are units which possess nationalist overtones, although care should be taken not to construe this requirement too restrictively. As Nanda has rightly suggested, nationalist affiliation can be grounded just as much in psychological group identification as other more traditional hallmarks of nationalism such as group language and shared culture.<sup>44</sup>

Having reasonably delineated who the peoples are, it is next necessary to illuminate how such peoples might obtain a right to UNC secession. Although the law of self-determination is articulated in both treaty and customary instruments, only the latter provides any justification for a right to UNC secession in international law. The first customary instrument to articulate such a right—albeit guardedly—was the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations<sup>45</sup> (Friendly Relations Declaration). After elaborating in Principle 5 paragraph 1 that “all peoples” have the right to self-determination, Principle 5 paragraph 7 continues:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting

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<sup>42</sup> Articles 73(b) and 76(b) of the UN Charter (dealing with colonial and trust territories respectively) use the phrase “each territory and its peoples.” This strongly indicates that more than one people can inhabit a non-self-governing territory. See RADAN, *supra* note 5, at 31.

<sup>43</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 10, art. 1(1); International Covenant on Civil and Political Rights, *supra* note 10 (providing that “[a]ll peoples have the right to self-determination”). This is repeated, *mutatis mutandis*, in Principle 5 paragraph 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. See G.A. Res. 2625 (XXV), *supra* note 11. Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples, see G.A. Res. 61/295, *supra* note 10, similarly confirms that self-determination applies to groups within sovereign states. Moreover, the Human Rights Committee in General Comment 12 has requested states to “describe the constitutional and political processes which in practice allow the exercise of [the] right [to self-determination].” This implies that more than one people can exist within a state. The UK, for example, when reporting to the Human Rights Committee has treated the Scottish, Welsh and Irish nations as separate peoples. See Robert McCorquodale, *Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination*, 66 BRIT. Y.B. INT’L L. 283, 294–98 (1995); Robert McCorquodale, *The Right to Self-Determination*, in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 91, 98 (David Harris & Sarah Joseph eds., 1995) (discussing the various peoples within the UK); RADAN, *supra* note 5, at 48.

<sup>44</sup> Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT’L L. 257, 276 (1981).

<sup>45</sup> G.A. Res. 2625 (XXV), *supra* note 11.

themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>46</sup>

This text is repeated, *mutatis mutandis*, in Article 1 paragraph 3 of the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations<sup>47</sup> (Fiftieth Anniversary Declaration), which provides that the UN will, *inter alia*:

Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right to self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and *thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind*.<sup>48</sup>

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<sup>46</sup> *Id.* Principle 5 ¶ 7.

<sup>47</sup> G.A. Res. 50/6, *supra* note 11.

<sup>48</sup> *Id.* art. 1, ¶ 3 (emphasis added). The text of Article 1 was substantially based on an earlier non-General Assembly document, The Vienna Declaration, article 2 of which states, “[1] *All peoples have the right of self-determination*. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development. [2] Taking into account the particular situation of peoples under *colonial or other forms of alien domination or foreign occupation*, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right. [3] In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and *thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind*.” See Vienna Declaration, *supra* note 27 (emphasis added).

Read together, both instruments provide an *a contrario* right for oppressed peoples to UNC secessionist self-determination.<sup>49</sup> This is because only those states that conduct themselves “in compliance with the principle of equal rights and self-determination of peoples” and that are “thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind” are guaranteed their “territorial integrity or political unity.”<sup>50</sup>

The articulation of a right to UNC secession in non-binding instruments, however, is insufficient to establish a rule of customary international law. This is because the requirement of *opinio juris* must also be satisfied.<sup>51</sup> In *Nicaragua v the United States of America*, the International Court of Justice (ICJ), with reference to the principle of non-intervention, enumerated a two-stage test for determining whether the requirement of *opinio juris* had been satisfied.<sup>52</sup> According to stage one:

[O]*pinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625(XXV) entitled “Declaration on

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<sup>49</sup> Glen Anderson, *Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects*, 41 DENV. J. INT’L L. & POL’Y, 345, 354–68, 370–71 (2013) [hereinafter Anderson, *General Assembly*] (providing an extended analysis of this declaration and its legal effects); Glen Anderson, *Unilateral Non-Colonial Secession and the Criteria for Statehood in International Law*, 41 BROOK. J. INT’L L. 1, 9–13, 97 (2015) [hereinafter Anderson, *Criteria for Statehood*]; Anderson, *A Post-Millennial Inquiry*, *supra* note 15, at 1215–30.

<sup>50</sup> G.A. Res. 50/6, *supra* note 11, art. 1, ¶ 3 (emphasis added). *See also* Vienna Declaration, *supra* note 27, art. I(2).

<sup>51</sup> The Latin phrase *opinio juris* or its untruncated variant, *opinio juris sive necessitatis*, can be traced to the French scholar, François Gény, who sought to differentiate between legal custom and mere social usage. *See* ANTHONY D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 47-49 (1971); Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 34, 43–44 (Curtis A. Bradley ed., 2016) (“A number of scholars have traced the *opinio juris* component to a French jurist, Francois Geny. In a treatise first published in 1899, entitled *Methode d’Interpretation et Sources en Droit Prive Positif (Method of Interpretation and Sources of Positive Private Law)*, Geny attempted to distinguish between legally binding custom and mere social usage, and for the former he suggested that one look for ‘a feeling among the persons who practice it that they act on [the] basis of an unexpressed rule which is binding for them as a rule of law.’ Although Geny was writing about domestic private law, the subjective element of his formulation is similar to the *opinio juris* requirement under what is now the standard view of [customary international law].”); Hillary Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTL. Y.B. INT’L L. 1, 4 n.23 (1984–1987); Anderson, *General Assembly*, *supra* note 49, at 384.

<sup>52</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.<sup>53</sup>

The Court later continued: “the adoption by States of this text [the Friendly Relations Declaration] affords an indication of their *opinio juris* as to customary international law on the question.”<sup>54</sup>

Stage two of the test required concomitance between the textual articulation of a principle and state practice more broadly before a rule of customary law would crystallize: “[n]otwithstanding the multiplicity of declarations by States accepting the principle of non-intervention . . . is practice sufficiently in conformity with it for this to be a rule of customary international law?”<sup>55</sup>

This new approach to *opinio juris* was interpreted as causing a shift in the parameters of customary law formation. Rather than the central question being whether there was a sufficient *corpus* of state practice underpinned by the requisite psychological belief that such practice was legally obligatory, instead, the textual articulation of legal principles was considered to *prima facie* create customary international law. This presumption could then only be displaced by other contradictory state practice.<sup>56</sup>

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<sup>53</sup> *Id.* ¶ 188.

<sup>54</sup> *Id.* ¶ 191. Franck has observed that “[t]he effect of this enlarged concept of the lawmaking force of General Assembly resolutions” is that it “may well . . . caution states to vote against ‘aspirational’ instruments if they do not intend to embrace them totally and at once, regardless of circumstance.” Thomas M. Franck, *Some Observations on the ICJ’s Procedural and Substantive Innovations*, 81 AM. J. INT’L L. 116, 119 (1987). Whilst Franck’s observation is valid, as Judge M. Schwebel pointed out in a 1972 Hague lecture, the Friendly Relations Declaration was “adopted by acclamation and accepted by the General Assembly as declaratory of international law.” Judge Stephen M. Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 136 RECUEIL DES COURS 411, 452 n.11 (1973). Schwebel holds the same opinion regarding the Definition of Aggression. *See id.* at 425. Supporting this view, Schachter remarks that “[m]ost States, including the United States, refer frequently to this resolution [the Friendly Relations Declaration] as an authoritative expression of the law of the Charter and related customary law.” Oscar Schachter, Lecture, *Just War and Human Rights*, 1 PACE Y.B. INT’L L. 1, 8 (1989).

<sup>55</sup> *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 205. Earlier the Court noted that “[t]he existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice.” *Id.* ¶ 202.

<sup>56</sup> Oscar Schachter, *New Custom: Power, Opinio Juris and Contrary Practice*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 531, 531–32



In light of these observations, account must be made for the impact of state practice, particularly acts of recognition, *vis-à-vis* the crystallization of a customary law right to UNC secession. Although an exhaustive examination of state practice is beyond the remit of the present article, UNC secessionist case studies such as Bangladesh, Croatia, Kosovo, the Turkish Republic of Northern Cyprus (TRNC), Chechnya, Abkhazia, South Ossetia, and Transnistria collectively indicate that a high threshold of human rights abuses must be met before UNC secession can occur.<sup>57</sup> The high threshold can be explained as requiring human rights abuses *in extremis* (ethnic cleansing, mass killings or genocide) as opposed to *in moderato* (political, cultural, or racial discrimination).

The culmination of the foregoing discussion is that the textually articulated *a contrario* right to UNC secession for oppressed peoples in the Friendly Relations Declaration and Fiftieth Anniversary Declaration operates at a lower threshold than that required by state practice more broadly.<sup>58</sup> While the textually articulated right captures human rights abuses *in extremis* and *in moderato*, state practice indicates that only the former will justify a right to UNC secession.<sup>59</sup> The customary law right of peoples to UNC secessionist self-determination therefore requires human rights abuses *in extremis* by the existing state, however unsatisfactory this may be from a normative perspective.<sup>60</sup>

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(Jerzy Makarczyk ed., 1996); P. P. Rijpkema, *Customary Law in the Nicaragua Case*, 20 NETH. Y.B. INT'L L. 91, 92–93 (1989).

<sup>57</sup> Anderson, *Criteria for Statehood*, *supra* note 49, at 23–24.

<sup>58</sup> *Id.* at 12.

<sup>59</sup> *Id.* at 12–13.

<sup>60</sup> See Anderson, *A Post Millennial Inquiry*, *supra* note 15, at 1241.

### C. Self-Determination as a Peremptory Norm

Self-determination has been widely accepted as a peremptory norm of international law.<sup>61</sup> Jiménez de Aréchaga, a former President of the ICJ, has defined peremptory norms as:

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<sup>61</sup> See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 51 (2008) (“The right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance, even if its peremptory character is sometimes disputed.”); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 171–72 (1995) [hereinafter CASSESE, SELF-DETERMINATION]; Hector Gros-Espiell, *Self-Determination and Jus Cogens*, in UN LAW, FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 167, 167 (Antonio Cassese ed., 1979) (“[S]elf-determination constitutes a peremptory norm of international law.”); Shana Tabak, *Aspiring States*, 64 BUFF. L. REV. 499, 525 (2016) (“[T]here exists general agreement that the right of peoples to self-determination is a norm of *jus cogens*.”); Vladyslav Lanovoy, *Self-Determination in International Law: A Democratic Phenomenon or an Abuse of Right?*, 4 CAMBRIDGE J. INT’L & COMP. L. 388, 390 (2015) (“Self-determination has been recognised as an *erga omnes* right and even as a peremptory (*jus cogens*) norm.”); Justin A. Evison, *Migs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of Uti Possidetis and Internationally Recognized Self-Determination*, 220 MIL. L. REV. 90, 98 (2014) (“[T]he right of self-determination can be considered *jus cogens*.”); Ulf Linderfalk, *The Source of Jus Cogens Obligations—How Legal Positivism Copes with Peremptory International Law*, 82 NORDIC J. INT’L L. 369, 373–74 (2013); Jure Vidmar, *International Legal Responses to Kosovo’s Declaration of Independence*, 42 VAND. J. TRANSNAT’L L. 779, 807 (2009); Christian Leathley, *Gibraltar’s Quest for Self-Determination: A Critique of Gibraltar’s New Constitution*, 9 OR. REV. INT’L L. 153, 177 (2007) (“As a norm of *jus cogens* the right to self-determination has a status higher than any other in international law.”); Alan Berman, *The Noumea Accords: Emancipation or Colonial Harness?*, 36 TEX. INT’L L. J. 277, 278 (2001); Manuel Rodriguez-Orellana, *Human Rights Talk... and Self-Determination, Too*, 73 NOTRE DAME L. REV. 1391, 1406 (1998) (“[T]he development of self-determination law has become part of *jus cogens*.”); Halim Moris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 ILSA J. INT’L & COMP. L. 201, 204 (1997) (“Today, the right to self-determination is considered *jus cogens*, and a part of customary international law that imposes binding obligations on all nation states.”); Louis René Beres, *Self-Determination, International Law and Survival on Planet Earth*, 11 ARIZ. J. INT’L & COMP. L. 1, 1 n.2 (1994); Sam Blay, *Self-Determination: A Reassessment in the Post-Communist Era*, 22 DENV. J. INT’L L. & POL’Y 275 (1994) (“[S]elf-determination has emerged as an operative legal right in international law and has arguably acquired the status of *jus cogens*.”); Katherine Doehring, *Self-Determination, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 70 (Bruno Simma ed., 1994) (“The right of self-determination is overwhelmingly characterized as forming part of the peremptory norms of international law.”); James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT’L L. & CONTEMP. PROBS. 131, 132 (1993) (“[I]t is frequently held that self-determination is a generally applicable norm of the highest order within the international system.”); C. Parker & L. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411, 441 (1989) (“The right to self-determination . . . is a *jus cogens* norm.”); Felix Ermacora, *Protection of Minorities before the United Nations*, 182 RECUEIL DES COURS 247, 325 (1983); H. Gros Espiell, *Self-Determination and Jus Cogens*, in UN LAW/FUNDAMENTAL

[C]ertain principles which safeguard values of vital importance for humanity and correspond to fundamental moral principles: these principles are of concern to all States and “protect interests which are not limited to a particular State or group of States, but belong to the community as a whole” . . . . The observance of these principles, firmly rooted in the legal conviction of the community of States, is required from all members of the community and their violation by any State is resented by all.<sup>62</sup>

The designation of self-determination as a peremptory norm opens the way for two important consequences: (1) that a UNC secessionist entity created *contrary* to the law of self-determination will be without statehood; and (2) that third states will be placed under a legal obligation of non-recognition with respect to such an entity.

The first of these consequences flows from the fact that there have been a variety of entities that have satisfied the traditional criteria for statehood (as laid down in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of

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RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 167–73 (A. Cassese ed., 1979); Henry J. Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185, 190 (1978) (“The self-determination of peoples has evolved into a principle of international *jus cogens*.”). *See also* Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 304 (Feb. 5) (separate opinion of Ammoun, J.) (describing the right of self-determination as an “imperative [rule] of law”). For scholars who argue against self-determination’s peremptory status, see JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW 84 (2nd ed., 2014) [hereinafter SUMMERS, PEOPLES] (“[S]elf-determination [is] problematic as a peremptory norm.”); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE OF THE UNITED NATIONS 70 (1982) (“[I]f ‘self-determination’ is not really *jus*—or only very questionably so—it is difficult to see how it could be presumed to be *jus cogens*.”); James Summers, *The Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance?*, 14 FINNISH Y.B. INT’L L. 271, 287 (2003) (“[A]lthough self-determination proposes that legal obligations which run counter to it are invalid, the idea that this can be explained by *jus cogens* is contradicted by the available evidence.”); Mark D. Weisbrud, *The Emptiness of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT’L L. 1, 23–24 (1995); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1, 31 (1994) (“[I]t is debatable whether the right of self-determination is *jus cogens*.”).

<sup>62</sup> Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 64–65 (1978). *See also* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 3 (1988) (providing a similar and equally authoritative definition based upon Article 53 of the Vienna Convention on the Law of Treaties); ORAKHELASHVILI, *supra* note 61, at 46–49; Alan Brunder, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219, 249–50 (1985).

States)<sup>63</sup> but which have nonetheless been denied statehood by the international community. The Turkish Republic of Northern Cyprus (TRNC) and Transnistria are prime examples.<sup>64</sup> In both these instances, international fora refused to accord the title of “state” to these entities.<sup>65</sup> Given the widespread acceptance of the declaratory recognition theory,<sup>66</sup> this outcome can only be explained by the operation of peremptory norms, particularly, the right of peoples to self-determination and the prohibition on the illegal use of force. The TRNC and Transnistria violated both of these interconnected peremptory norms during their formative processes.<sup>67</sup> Neither entity was established pursuant to the right of peoples to self-determination, and both entities enjoyed the direct military intervention of third states—Turkey and the Russian Federation respectively—in order to effect ostensible independence.<sup>68</sup> Due to these peremptory breaches, the TRNC and Transnistria failed to attain statehood.<sup>69</sup>

The second consequence of self-determination’s peremptory status—the legal obligation of non-recognition for territorial entities created in violation of peremptory norms—can be traced to the ICJ’s *Namibia Advisory Opinion*.<sup>70</sup> The

<sup>63</sup> Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19, 49 Stat. 3097. Article 1 provides that “[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” These criteria antedated the adoption of the Montevideo Convention.

<sup>64</sup> Inversely, certain states born of self-determination possessing an ineffective government have been granted statehood. Raič has termed this phenomenon the “compensatory force principle.” See DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 104, 364 (2002); Anderson, *Criteria for Statehood*, *supra* note 49, at 22–43, 97 (discussing the compensatory force principle in the colonial and non-colonial contexts).

<sup>65</sup> With respect to the TRNC, for instance, Security Council Resolution 550, 11 May 1984 referred to “the Turkish Cypriot leadership” and “the purported State of the Turkish Republic of Northern Cyprus”. See RAIČ, *supra* note 64, at 156 n.298; Anderson, *Criteria for Statehood*, *supra* note 49, at 74 n.273.

<sup>66</sup> TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION: WITH REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES 14 (1951); CRAWFORD, CREATION OF STATES, *supra* note 3, at 22–23; ANTONIO CASSESE, INTERNATIONAL LAW 73–75 (2d ed. 2005).

<sup>67</sup> Anderson, *Criteria for Statehood*, *supra* note 49, at 71–75, 84–87; Glen Anderson, *Unilateral Non-Colonial Secession and the Use of Force: Effect on Claims to Statehood in International Law*, 28 CONN. J. INT’L L. 197, 235–37 (2013).

<sup>68</sup> Anderson, *Criteria for Statehood*, *supra* note 49, at 71–75, 84–87.

<sup>69</sup> *Id.* at 90. The examples of the TRNC and Transnistria can be contrasted with Bangladesh. See *id.* at 31–33, 74–75, 98.

<sup>70</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, 18 (June 21) [hereinafter *Namibia Advisory Opinion*]. The obligation of non-recognition arguably arose earlier (although not within the specifically articulated orbit of “peremptory norms”) with respect to Japan’s illegal seizure of Chinese Manchuria during late 1931 and subsequent purported establishment of Manchukuo. See Anderson, *Criteria for Statehood*, *supra* note 49, at 91–92.

background to the opinion lay in Pretoria's refusal to resurrect Namibia's "C" mandate which had fallen into desuetude with the demise of the League of Nations. Subsequent attempts by the UN to revive Namibia's non-self-governing status were rejected by Pretoria, which argued that it possessed an unfettered right to the former German colony. In 1966, the UN General Assembly adopted Resolution 2145 which declared in Article 2 that "[Namibia] is a territory having international status and that it shall maintain this status until it achieves independence."<sup>71</sup> Article 3 of the same resolution stated that, "South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of [Namibia], and has, in fact, disavowed the Mandate."<sup>72</sup> In 1970 Security Council Resolution 276 declared South Africa's continuing presence in Namibia illegal.<sup>73</sup>

Examining these events, the ICJ found that Pretoria's position was contrary to the law of self-determination and confirmed the Security Council's pronouncement of illegality.<sup>74</sup> Further, the ICJ held that UN member states were

under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.<sup>75</sup>

The contours of the obligation of non-recognition were found to extend to all situations where the South African government purported to act on behalf of or in relation to Namibia.<sup>76</sup> More specifically, the obligation extended to refrain from bilateral treaties entered into by Pretoria on Namibia's behalf which involved intergovernmental cooperation.<sup>77</sup> The Court further specified that there should be abstention from diplomatic and consular activity in Namibia and from "economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which entrenched its authority over the Territory."<sup>78</sup>

Importantly, however, the legal obligation of non-recognition did not extend to multilateral treaties of a "humanitarian character," as to do so may

<sup>71</sup> G. A. Res. 2145 (XXI) (Oct. 27, 1966).

<sup>72</sup> *Id.*

<sup>73</sup> S.C. Res. 276, ¶ 2 (Jan. 30, 1970).

<sup>74</sup> Namibia Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 121. *See generally* RAIČ, *supra* note 64, at 160; CRAWFORD, CREATION OF STATES, *supra* note 3, at 163.

<sup>75</sup> Namibia Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 133. *See generally* RAIČ, *supra* note 64, at 160.

<sup>76</sup> Namibia Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 122.

<sup>77</sup> *Id.*; CRAWFORD, CREATION OF STATES, *supra* note 3, at 164; Anderson, *Criteria for Statehood*, *supra* note 49, at 94.

<sup>78</sup> Namibia Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 124. CRAWFORD, CREATION OF STATES, *supra* note 3, at 164–65.

“adversely affect the people of Namibia.”<sup>79</sup> Nor could the obligation of non-recognition be said to affect private treaty matters such as “the registration of births deaths and marriages.”<sup>80</sup> The obligation of non-recognition was therefore subject to certain limits born of concern for the Namibian people’s welfare.<sup>81</sup>

The obligation of non-recognition in circumstances where self-determination has been contravened has been confirmed by subsequent ICJ cases, such as *Case Concerning East Timor (Portugal v. Australia)*<sup>82</sup> and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*.<sup>83</sup> More recently, these cases have been complimented by the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts 2001, which confirm the legal obligation of non-recognition for territorial entities that have breached peremptory norms during their formative process.<sup>84</sup>

<sup>79</sup> Namibia Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 122.

<sup>80</sup> *Id.* ¶ 125

<sup>81</sup> *Id.* That the obligation of non-recognition does not extend to multilateral treaties of a humanitarian character has been affirmed by the European Court of Human Rights: “The Court confines itself to the above conclusion and does not consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the TRNC. It notes, however, that international law recognizes the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths, and marriages, ‘the effects of which can be ignored only to the detriment of the inhabitants of the Territory.’” See *Loizidou v. Turkey*, App. No. 1531/89, 50 Eur. Ct. H.R. 1, ¶ 45 (1996) (quoting Namibia Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 125).

<sup>82</sup> *Case Concerning East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90, ¶¶ 31–32 (June 30); See generally CRAWFORD, CREATION OF STATES, *supra* note 3; Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT’L & COMP. L. REV. 323, 323–47 (1994); Christine M. Chinkin, *East Timor Moves into the World Court*, 4 EUR. J. INT’L L. 206, 206–22 (1993); Maria Clara Maffei, *The Case of East Timor before the International Court of Justice—Some Tentative Comments*, 4 EUR. J. INT’L L. 223, 223–38 (1993); Thomas D. Grant, *East Timor, The UN System, and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT’L L. 273, 273–310 (2000); André de Hoogh, *Australia and East Timor: Rights erga omnes, Complicity and Non-Recognition*, 6 AUSTL. INT’L L. J. 63, 63–90 (1999).

<sup>83</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 200 (July 9); CRAWFORD, CREATION OF STATES, *supra* note 3, at 172–73; Fr. Robert J. Araujo, *Implementation of the ICJ Advisory Opinion—The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?*, 22 BOS. U. INT’L L. J. 349, 349–98 (2004); Christine Gray, *The ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 63 CAMBRIDGE L.J. 527, 527–32 (2004).

<sup>84</sup> G.A. Res. 56/83, Articles on Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001). In Chapter III, which deals with breaches of peremptory norms, Article 41(2) provides that “[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.” For general commentary on Article 41(2), see James Crawford,

Self-determination in the 21st century is thus more than a mere rhetorical or quasi-legal postulate; it is a far-reaching *legal* doctrine that can affect the crystallization and recognition of statehood.

#### **D. Internal Self-Determination**

Self-determination can be internal or external. The denial of a people's right to *internal* self-determination gives rise to the possibility of *external* self-determination, which in the post-millennial era equates with UNC secession.<sup>85</sup> Two interrelated applications of internal self-determination can be isolated: preceding and proceeding UNC secession.

##### **1. Preceding UNC Secession**

Among scholars who recognize the qualified right of peoples to UNC secession in international customary law, there is general agreement that a key precondition is discrimination or maltreatment of some kind. It has been argued above that, *de lege lata*, only a particular type of discrimination—sustained and systematic human rights abuses *in extremis*—will enliven a customary law right to UNC secessionist self-determination.<sup>86</sup> This provides an initial benchmark for construing the parameters of internal self-determination.

##### **2. Proceeding UNC Secession**

There is almost no analysis in scholarly literature as to how internal self-determination is applied proceeding UNC secession. Is it possible that a UNC secessionist state must not simply avoid sustained and systematic human rights abuses *in extremis*, but must also institute democracy?<sup>87</sup> If so, this would create a double standard between existing states, many of which are undemocratic—even

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Jacqueline Peel, & Simon Olleson, *The ILC's Articles on Responsibility for the Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963, 978–79 (2001); The obligation of non-recognition has also been confirmed in the 2005 African Union Non-Aggression and Common Defence Pact, which in Article 4(c) requires that “States parties undertake not to recognize any territorial acquisition or special advantage, resulting from the use of aggression.” African Union [AU] Non-Aggression and Common Defence Pact, art. 4(c).

<sup>85</sup> In former times, external self-determination may have also typically included UC secession for colonial territories. Decolonization is now a practically extinct process. *But see Non-Self-Governing Territories*, UNITED NATIONS, <http://www.un.org/en/decolonization/nonselvgovterritories.shtml> (last visited Nov, 1, 2016) (provided by the Special Committee on Decolonization).

<sup>86</sup> See also Anderson, *Criteria for Statehood*, *supra* note 49, at 12–13; Anderson, *General Assembly*, *supra* note 49, at 394–95.

<sup>87</sup> CRAWFORD, *CREATION OF STATES*, *supra* note 3, at 150, 153–54.

autocratic and dictatorial—and new states created by UNC secessionist self-determination.

At its crux, this question asks whether there can be a difference of application of peremptory norms between an existing state and a state created by UNC secessionist self-determination. A slight segue indicates the answer: when the United States, United Kingdom (UK), Australia, Spain, and Poland invaded Iraq in 2003 without UN Security Council authorization (thereby violating the peremptory norm prohibiting the illegal use of force), their statehood was not called into question.<sup>88</sup> Yet, violations of the interconnected peremptory norms of the prohibition on the illegal use of force and the right of peoples to self-determination in the TRNC and Transnistria meant that both entities have been unable to achieve statehood.<sup>89</sup> Moreover, Turkey and the Russian Federation—the states that interceded militarily in the TRNC and Transnistria respectively—have not had their statehood called into question.<sup>90</sup>

A similar proposition emerges when the situations of Southern Rhodesia and South Africa's Bantu entities are considered (discussed *infra*).<sup>91</sup> In both cases, violation of the peremptory norm prohibiting systematic racial discrimination and apartheid meant that international fora denied statehood. This was accompanied by a legal obligation of non-recognition. Yet, with respect to South Africa, which was responsible for providing political support to Southern Rhodesia and the implementation of the Bantu entities, it is clear that its statehood remained intact.

Reasoning analogically from the foregoing examples, it would seem that the presence of undemocratic states within the international order is no barrier to states created by UNC secessionist self-determination being held to a stricter standard of democratic governance.

There are thus reasonable grounds for suggesting that internal self-determination might be applied differently in the context of existing states and newly formed UNC secessionist states. The latter, due to their being born of the peremptory norm of self-determination, may be subject to a more onerous imposition, including a requirement of democracy. Potentially, this might extend to requiring Western electoral democracy.

### III. THE RIGHT OF PEOPLES TO INTERNAL SELF-DETERMINATION

Various scholars have argued that the law of self-determination imposes ongoing governance requirements upon states. The origins of this position can be traced to Fawcett, who, in an article relating to Rhodesia's purported statehood, declared:

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<sup>88</sup> Anderson, *Criteria for Statehood*, *supra* note 49, at 90.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See infra* Part III(B)(2).



[T]o the traditional criteria for the recognition of a régime as a new State must now be added the requirement that it shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular equal and secret suffrage. This principle was affirmed in the case of Rhodesia by the virtually unanimous condemnation of the unilateral declaration of independence by the world community, and by the universal withholding of recognition of the new régime which was a consequence.<sup>92</sup>

More recently, Raič has remarked that “internal self-determination can generally be described as a mode of implementation of political self-determination which denotes a right of a people to participate (a right to have a say) in the decision-making processes of the State.”<sup>93</sup> According to this view, all peoples within a state must be able to participate equally within the political decision-making process. The same scholar later continues by noting that the right of peoples to equal political participation would, at the very least “relate to the determination or constitution of the political system of the State (*pouvoir constituant*).”<sup>94</sup> Other scholars, including Crawford,<sup>95</sup> Eide,<sup>96</sup> Eckert,<sup>97</sup> Radan,<sup>98</sup> Pomerance,<sup>99</sup> Franck,<sup>100</sup> Higgins,<sup>101</sup> Pellet,<sup>102</sup> Shaw,<sup>103</sup> Tomuschat,<sup>104</sup> Paust,<sup>105</sup>

<sup>92</sup> J. E. S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT’L L. 103, 112 (1965-1966).

<sup>93</sup> RAIČ, *supra* note 64, at 237.

<sup>94</sup> *Id.* at 238.

<sup>95</sup> James Crawford, *Outside the Colonial Context, in SELF-DETERMINATION IN THE COMMONWEALTH* 5–6 (W.J.A. Macartney ed., 1988).

<sup>96</sup> Eide has noted that internal self-determination is “the right of popular participation in the government of the State as an entity.” See Asbjørn Eide, Comm’n on Human Rights, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, ¶ 165, U.N. Doc. E/CN.4/Sub.2/1992/37 (Aug. 10, 1993). See also RAIČ, *supra* note 64, at 237.

<sup>97</sup> Eckert has noted that “internal self-determination involves a people’s right to choose its form of government and other internal structures.” Amy E. Eckert, *Free Determination or the Determination to be Free? Self-Determination and the Democratic Entitlement*, 4 UCLA J. INT’L L. & FOREIGN AFF. 55, 68 (1999).

<sup>98</sup> RADAN, *supra* note 5, at 45.

<sup>99</sup> MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 24 (1982).

<sup>100</sup> Franck et al. have stated that “all peoples and parts of peoples are entitled to the recognition of their identity and to participate in the expression of the political will within the State.” THOMAS M. FRANCK ET AL., *THE TERRITORIAL INTEGRITY OF QUEBEC IN THE EVENT OF THE ATTAINMENT OF SOVEREIGNTY* § 3.07 (1992).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

Klabbers,<sup>106</sup> Lefeber,<sup>107</sup> Hannum,<sup>108</sup> and Buchheit<sup>109</sup> have broadly agreed with this position.

Support for the continuing nature of internal self-determination—and hence its ongoing applicability to states created by UNC secession—can be found in three sources of international law: treaties, customs, and judicial decisions.

With respect to the examination of treaty and customary instruments, normal canons of construction will be utilized. As specified by Article 31(1) of the Vienna Convention on the Law of Treaties<sup>110</sup> (Vienna Convention), whenever possible key words and phrases will be construed with regard to their “ordinary” meaning, bearing in mind the particular instrument’s “object and purpose.” When key words and phrases remain “ambiguous or obscure,” as specified in Article 32(a) of the Vienna Convention, recourse will also be made to the *travaux préparatoires* (preparatory work, normally of a documentary nature) and *procès verbaux* (preparatory work, documenting oral debate).

### **A. Treaty Law**

Article 1(2) of the UN Charter<sup>111</sup> provides the first mention of self-determination within any international legal instrument, stipulating that one of the UN’s purposes is “[t]o develop friendly relations based on the respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” Article 55 commits the UN to fostering “peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples.” Articles 2 and 56

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<sup>105</sup> Paust has written that internal self-determination is “the collective right of people to pursue their own political demands, to share power equally, and as a correlative right of the individual to participate freely and fully in the political process.” Jordan Paust, *Self-Determination: A Definitional Focus*, in SELF-DETERMINATION, NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 13 (Yonah Alexander & Robert A. Friedlander eds., 1980).

<sup>106</sup> Klabbers and Lefeber have written that “[i]n a multipeople state, it means that each people should be given the opportunity to participate in the decision-making process of the state.” Jan Klabbers & René Lefeber, *Africa Lost Between Self-Determination and Uti Possidetis*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 43 (Catherine Brölmann et al. eds., 1993).

<sup>107</sup> *Id.*

<sup>108</sup> Hannum, *supra* note 61, at 33–34 (“Both the right of a people organized as a state to freedom from external domination and the right of the people of a state to a government that reflects their wishes are essential components of the right of self-determination.”).

<sup>109</sup> Buchheit has stated that internal self-determination connotes “the right of all groups in a State to influence governmental behaviour in accordance with constitutional processes.” LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 16 (1978).

<sup>110</sup> See Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331.

<sup>111</sup> U.N. Charter, June 26, 1945, 1 U.N.T.S. XVI (entered into force Oct. 24, 1945).

urge member states to implement the provisions of Articles 1(2) and 55. However, as revealed by Articles 73(b) and 76(b) of the Charter, self-determination is directed towards the gradual attainment of self-government for non-self-governing and trust territories.<sup>112</sup> The ambit of internal self-determination as envisaged by the Charter, therefore, is rather limited. Not only does it possess the tenor of *lex desiderata*,<sup>113</sup> but the textual formulation contained in Article 1(2) and supplemented by Article 55 provides no grounds to suggest that peoples within sovereign states have a distinct *right* to political participation.

More certain grounds for the right of peoples to internal self-determination can be detected within the International Covenant on Economic,

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<sup>112</sup> Article 73(b) commits those states responsible for colonial territories “to *develop* self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.” (emphasis added). Article 73(b) therefore suggests that self-determination is concerned with “develop[ing]” the self-government of colonial territories. Article 76(b) repeats this formulation, *mutatis mutandis*, in the context of the UN trusteeship system: “[T]o *promote* the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards *self-government or independence* as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.” (emphasis added). The view that Article 73(b) was directed towards issues of self-government for colonial territories is confirmed by the adoption of Resolution 1541, which in Principle I of the Annex declared that the authors of the Charter “had in mind that Chapter XI should be applicable to territories which were known to be of a colonial type.” G.A. Res. 1541 (XV), at 11 (Dec. 15, 1960). See generally MUSGRAVE, *supra* note 35, at 95.

<sup>113</sup> See GNANAPALA WELHENGAMA, MINORITIES’ CLAIMS: FROM AUTONOMY TO SECESSION, INTERNATIONAL LAW AND STATE PRACTICE 257 (2000) (“The principle [of self-determination] was mentioned [in the UN Charter], as among other things, *desideratum*.”); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 33 (1990) (“There is probably a consensus among scholars that, whatever its political significance, the principle of self-determination did not rise to the level of a rule of international law at the time the UN Charter was drafted.”); Antonio Cassese, *Political Self-Determination—Old Concepts and New Developments*, in UN LAW FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 138 (1979); Yehuda Z. Blum, *Reflections on the Changing Concept of Self-Determination*, 10 ISR. L. REV. 509, 511 (1975) (“Clearly then, self-determination, in contrast to sovereignty and all that flows from it, was not originally perceived as an operative principle of the Charter. It was regarded as a goal to be attained at some indeterminate date in the future; it was one of the *desiderata* of the Charter rather than a legal right that could be invoked as such.”); Hannum, *supra* note 61, at 11; RAIĆ, *supra* note 64, at 200 n.123 (suggesting that the official English and French translations of the Charter differ as to whether self-determination is a principle or a right); Robert Trisotto, *Seceding in the Twenty-First Century: A Paradigm for the Ages*, 35 BROOK. J. INT’L L. 419, 426 (2010) (“After its inclusion in the U.N. Charter, self-determination quickly evolved from a principle to a right.”).

Social and Cultural Rights (ICESCR)<sup>114</sup> and International Covenant on Civil and Political Rights (ICCPR).<sup>115</sup> Both Covenants in common Article 1(1) declare “[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.” Although this is followed by an explicit mention of self-determination in the colonial context in common Article 1(3), this does not negate the obvious intention of common Article 1(1), namely, to enshrine the right of all peoples, be they colonial or otherwise, to self-determination.

Two principal interpretations exist regarding the exact scope of internal self-determination within the Covenants.<sup>116</sup> The first interpretation, supported by the *travaux préparatoires*, postulates that common Article 1 enshrines the right of all peoples to equal political participation. The American draft proposal for common Article 1, for example, provided that “[t]he existence of a sovereign and independent State possessing a representative Government, effectively functioning as such to all distinct peoples within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.”<sup>117</sup> The UK’s draft proposal similarly provided that “States enjoying full sovereignty and independence, and possessed of a representative government, effectively functioning as such to all distinct peoples within their territory, shall be considered to be conducting themselves in conformity with this principle (‘equal rights and self-determination’) as regards those peoples.”<sup>118</sup> These examples suggest that common Article 1 was intended to enshrine the right of all peoples to equal participation within the political system of their choosing.

The second interpretation of common Article 1, supported by the Human Rights Committee<sup>119</sup> and scholars such as Higgins<sup>120</sup> and Cassese,<sup>121</sup> is more

<sup>114</sup> See International Covenant on Economic, Social and Cultural Rights, *supra* note 10.

<sup>115</sup> See International Covenant on Civil and Political Rights, *supra* note 10.

<sup>116</sup> There is a third view, which holds that the covenants do not include the right of all peoples to self-determination. This interpretation of course, involves overlooking the plain text of Article 1(1) which refers to all peoples, not just those under colonialism. India, for example, noted that, “[w]ith reference to Article 1 . . . the Government of the Republic of India declares that the words ‘the right to self-determination’ appearing in this Article apply only to the peoples under foreign domination and that these words do not apply to sovereign independent states or to a section of a people or a nation—which is the essence of territorial integrity.” U.N. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 31 DECEMBER 1995, 113–14 (1996). Sri Lanka made a similar comment, see Allan Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 225, 242 n.53 (Christian Tomuschat ed., 1993) [hereinafter Rosas, *Internal Self-Determination*].

<sup>117</sup> MUSGRAVE, *supra* note 35, at 97 (internal citations omitted).

<sup>118</sup> *Id.*

<sup>119</sup> The treaty-applying organ of the ICCPR. In 1984 the Committee adopted a general comment on Article 1 which provides that Article 1 is: “interrelated with other provisions of the Covenant.” U.N. Doc. CCPR/C/21/Add.3. at 2; see also Rosas, *Internal Self-Determination*, *supra* note 116, at 244.

specific, stressing that internal self-determination can only be construed in context with other relevant provisions of the ICCPR, such as Articles 19, 21, 22, and 25.<sup>122</sup> According to this view, internal self-determination does not merely refer to the right of all peoples to equal participation within the political system of their choosing; it also mandates Western electoral democracy, including respect for freedom of expression, the right to peaceful assembly, the right to freedom of association, the right to vote, and the right to participate directly or indirectly through freely chosen representatives.

A final treaty dealing with the continuing nature of self-determination is the 1981 African Charter on Human and Peoples' Rights<sup>123</sup> (African Charter), adopted by the eighteenth Assembly of Heads of State and Government of the Organization of African Unity (OAU)—now known as the African Union (AU).<sup>124</sup> It provides in Article 20 that

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 States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.<sup>125</sup>

Article 20(1) makes certain that self-determination is applicable to all peoples, not just those under the yoke of colonialism.<sup>126</sup> This view is reinforced by Article 20(2), which lists “colonized or oppressed peoples” as a particular subcategory of peoples able to use “any means recognized by the international community” to “free themselves from the bonds of domination.” The specific reference to “colonized or oppressed peoples” in Article 20(2) strongly indicates

<sup>120</sup> Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1, 165–66 (1991).

<sup>121</sup> CASSESE, *SELF-DETERMINATION*, *supra* note 61, at 53.

<sup>122</sup> Rosas, *Internal Self-Determination*, *supra* note 116, at 244.

<sup>123</sup> Org. of African Unity [OAU], Banjul Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 (June 27, 1981).

<sup>124</sup> See Org. of African Unity [OAU] Constitutive Act of the African Union, arts. 2, 33 ¶ 1 (July 11, 2000).

<sup>125</sup> Banjul Charter on Human and Peoples' Rights, *supra* note 123, art. 20.

<sup>126</sup> See Rosas, *Internal Self-Determination*, *supra* note 116, at 245.

that Article 20(1) must refer to peoples that are not “colonized or oppressed,” otherwise the same terminology would have been used in both Articles.<sup>127</sup> The corollary of this reasoning is that Article 20(1), when referring to “all peoples,” must include peoples living within sovereign states.<sup>128</sup>

Article 20(1) gives some indication of how the right of peoples to internal self-determination might be fulfilled. It suggests that all peoples “shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.” This flexible phraseology is significant, as it does not specifically dictate that a people must subscribe to Western electoral democracy. In some respects, it is unsurprising, given the history of one-party rule and “developmental dictatorship” throughout post-colonial Africa.<sup>129</sup>

Examination of treaty law therefore reveals two related, yet different interpretations of internal self-determination. The first and most straightforward interpretation (contained within the Human Rights Covenants and African Charter) suggests that internal self-determination equates with the right of peoples to choose their political system and that peoples must have equal participatory rights. According to a second interpretation (only found within the context of the ICCPR), internal self-determination equates not only with the right of peoples to equal political participation, but also the right to exercise such participation within a Western electoral democracy.

## **B. Customary Law**

Customary law relating to the right of peoples to internal self-determination consists of two strands: (1) relevant non-binding instruments; and, (2) state physical acts and omissions, specifically, recognition. Both strands are discussed in turn below.

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<sup>127</sup> For a similar (if not concomitant) textual analysis of Article 20, see Obiora Chinedu Okafor, *Entitlement, Process, and Legitimacy in the Emergent International Law of Secession*, 9 INT’L J. ON MINORITY & GROUP RTS. 41, 53 (2002) (“Indeed, Umozurike has made the extremely crucial distinction between colonized and oppressed peoples. A people who are not colonized may still be oppressed in other ways! Is colonization not merely one specific kind of oppression?”). See also U.O. UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS* 53–54 (1997).

<sup>128</sup> See S. Kwaw Nyameke Blay, *Changing Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples’ Rights*, 29 J. AFR. L. 147, 158–159 (1985); Okafor, *supra* note 127, at 53 (“It is therefore clear that Article 20 of the African Charter guarantees a form of self-determination that may in some exceptional circumstances entitle a noncolonized people like the Katangese to secede from an already independent state such as Zaire.”).

<sup>129</sup> Robert Fatton Jr., *Liberal Democracy in Africa*, 105 POL. SCI. Q. 455, 455 (1990); Richard L. Sklar, *Democracy in Africa*, 26 AFR. STUD. REV. 11, 11–24 (1983); Carol Lancaster, *Democracy in Africa*, 85 FOREIGN POL’Y 148, 148–65 (1992).

### 1. Analysis of Non-Binding Instruments

The continuing nature of self-determination was articulated in Principle 5 paragraph 1 of the Friendly Relations Declaration:<sup>130</sup>

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.<sup>131</sup>

Although similar to the phraseology employed in common Article 1(1) of the ICESCR and ICCPR, Principle 5 paragraph 1 represents a more elaborate articulation of internal self-determination. Instead of beginning with the phrase “all peoples have the right to self-determination,”<sup>132</sup> paragraph 1 links self-determination with the equal rights of peoples. This affirmed that internal self-determination is connected to equality among peoples. Paragraph 1 also inserted the phrase “without external interference” which suggests that self-determination possesses endogeneity rather than exogeneity. The endogenous character of internal self-determination would thus seem to require that peoples choose their political system. It may go further, however, requiring that peoples have ongoing participation of an equal nature within their chosen political system.

Principle 5 paragraphs 2 and 4 elaborate on the application of self-determination specifically within the colonial context, but this does not detract from the generality of language employed in paragraph 1, which as shown above, extends to “all peoples.” As if to underscore this point, Principle 5 paragraph 7 provides compelling evidence that the term “peoples” is not confined to the colonial context:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people

<sup>130</sup> G.A. Res. 2625 (XXV), *supra* note 11.

<sup>131</sup> *Id.* Principle 5, ¶ 1.

<sup>132</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 10, art. 1(1); International Covenant on Civil and Political Rights, *supra* note 10.

belonging to the territory without distinction as to race, creed or colour.<sup>133</sup>

As noted previously, an *a contrario* reading of paragraph 7 establishes that “sovereign and independent states” that do not conduct themselves “in compliance with the principle of equal rights and self-determination of peoples” will not be guaranteed their “territorial integrity or political unity.” Paragraph 7 also specifies that the litmus test for such compliance is “a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”<sup>134</sup> Paragraph 7 thus moves beyond the scope of earlier instruments (such as the ICESCR and ICCPR) by enumerating criteria, which, if violated, will result in peoples within sovereign states being denied their right to internal self-determination.

The emphasis on internal self-determination for all peoples is also evident within Article 1 paragraph 3 of the Fiftieth Anniversary Declaration,<sup>135</sup> which provides that the UN will, *inter alia*:

Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right to self-determination.<sup>136</sup>

The foregoing unambiguously stipulates that “all peoples” are entitled to enjoy self-determination, which, by implication, must require that self-determination possesses an internal dimension. Furthermore, the phrase “[c]ontinue to reaffirm” suggests that the right of all peoples to internal self-determination antedates the Fiftieth Anniversary Declaration. The phrase “taking into account the particular situation of peoples under colonial or other forms of alien domination” does not confine self-determination to the colonial context. Rather, the specific but not singular emphasis upon colonial peoples suggests that self-determination logically extends to peoples in a non-colonial setting.<sup>137</sup> As with the Friendly Relations Declaration, it would seem that the extension of internal self-determination to “all peoples” within Article 1 paragraph 3 would, at a minimum, require that peoples choose their political system. It probably goes

<sup>133</sup> G.A. Res. 2625 (XXV), *supra* note 11, Principle 5, ¶ 7.

<sup>134</sup> For an extended discussion of these terms, see Anderson, *General Assembly*, *supra* note 49, at 355–58; Anderson, *A Post-Millennial Inquiry*, *supra* note 15, at 1217–18. For an alternative discussion of the same terms, see CASSESE, SELF-DETERMINATION, *supra* note 61, at 112–14.

<sup>135</sup> G.A. Res. 50/6, *supra* note 11.

<sup>136</sup> *Id.* art. 1, ¶ 3.

<sup>137</sup> See Anderson, *General Assembly*, *supra* note 49, at 369.



further, however, requiring that peoples have ongoing participation of an equal nature within their chosen political system.

Further clues about the ambit of internal self-determination can be gleaned from the second sentence of Article 1 paragraph 3 of the Fiftieth Anniversary Declaration, which states:

This shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent state conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.<sup>138</sup>

This text suggests that more than one people may exist within the territory of a sovereign state. It also suggests that internal self-determination will not be satisfied where there is discrimination “of any kind” against a people.

Various non-UN instruments also propound the doctrine of self-determination in the context of sovereign and independent states. In 1975, the Conference on Security and Cooperation in Europe (CSCE)<sup>139</sup> adopted the non-binding Final Act<sup>140</sup> (Helsinki Final Act), which in Part VIII enumerates:

The participating States will respect the equal rights and self-determination of peoples and their right to self-determination acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with relevant norms of international law, including those relating to territorial integrity of States.

<sup>138</sup> G.A. Res. 50/6, *supra* note 11, art. 1, ¶ 3.

<sup>139</sup> On the origins of the CSCE, see *Origin and Development of the CSCE/OSCE* [http://www.cvce.eu/en/obj/origin\\_and\\_development\\_of\\_the\\_csce\\_osce-en-232d0b5f-8347-4540-8845-145f632de202.html](http://www.cvce.eu/en/obj/origin_and_development_of_the_csce_osce-en-232d0b5f-8347-4540-8845-145f632de202.html) (accessed 7/01/2017); Th.J. W. Sneek, *The CSCE in the New Europe*, 5 *IND. INT'L & COMP. L. REV.* 1, 1–73 (1994).

<sup>140</sup> Conference on Security & Co-operation in Europe, *Final Act* § 1(a)(VIII), 14 *I.L.M.* 1295 (Aug. 1, 1975) [hereinafter *Helsinki Final Act*]. Dominic McGoldrick has noted that “the [Helsinki Final Act] has an unusual status for such an important international instrument. It is relatively clear that it is not, *per se*, an internationally binding international treaty. However, the principles and rules in it are clearly based on contemporary international law rules—both conventional and customary law.” Dominic McGoldrick, *Human Rights Development in the Helsinki Process*, 39 *INT'L & COMP. L. Q.* 923 n.2 (1990). For the status of the instrument generally, see Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 *INT'L & COMP. L. Q.* 787–812 (1986); Oscar Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 *AM. J. OF INT'L L.* 296–304 (1977).

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

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and equal self-determination of peoples for the development of friendly relations among themselves as among all States: they also recall the importance of the elimination of any form of violation of this principle.<sup>141</sup>

Paragraph 1 of Part VIII resembles the wording of Principle 5 paragraph 1 of the Friendly Relations Declaration, explicitly linking the concept of equality among peoples with self-determination generally. Paragraph 2, after reiterating this linkage, confirms that self-determination applies to “all peoples”, including those within sovereign states. It also declares that “all peoples always have the right . . . to determine, when and as they wish, their internal and external political status.” No attempt is made to limit the operation of self-determination to the colonial context. Further extrinsic evidence confirming this fact is the nature of the thirty-five CSCE signatory states themselves, all of which were independent states. As Cassese has observed, the Helsinki Final Act was designed to bear upon relations *between* CSCE states, and it would thus seem logical that Principle VIII “must be construed as being relevant *vis-à-vis* the peoples of Europe; in other words, *vis-à-vis* peoples living in sovereign States.”<sup>142</sup>

At a minimum, the Helsinki Final Act<sup>143</sup> requires that peoples should choose their political system. It may go further, however, by requiring that peoples have ongoing participation of an equal nature within their chosen political system. This flexible interpretation is supported by the phraseology employed by paragraph 2, namely, that “all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status . . . and to pursue as they wish their political economic and cultural development.” This confirms that the Helsinki Final Act does not prescribe a certain type of political system for peoples within sovereign states. Rather, it is for the peoples within states to “determine when and as they wish.”

A subsequent non-binding instrument of the CSCE, the Concluding Document of the Vienna Meeting of the CSCE on the Follow-Up to the Helsinki Conference<sup>144</sup> (Concluding Document), reiterated the commitment of member

<sup>141</sup> *Helsinki Final Act*, *supra* note 140.

<sup>142</sup> CASSESE, SELF-DETERMINATION, *supra* note 61, at 286.

<sup>143</sup> *Helsinki Final Act*, *supra* note 140.

<sup>144</sup> Conference on Security & Co-operation in Europe, *Concluding Document of the Vienna Meeting 1986*, 28 I.L.M. 527 (Jan. 19, 1989).

states to the application of self-determination beyond the colonial context.<sup>145</sup> Principle 4 of the Concluding Document provides that member states:

[C]onfirm that, by virtue of the principle of equal rights and self-determination of peoples and in conformity with the relevant provisions of the Final Act, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.<sup>146</sup>

This was supplemented by Principle 5, which provided that participating states:

[C]onfirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provision of the Final Act, at violating the territorial integrity, political independence or the unity of the State. No Actions or situations in contravention of this principle will be recognized as legal by the participating States.<sup>147</sup>

Principle 4 thus restates the commitment to internal self-determination contained with Principle VIII of the Helsinki Final Act. Principle 5 continues by proscribing any action by states that would violate the territorial integrity of other states. Importantly, Principle 5 does not refer to actions by peoples, only states. Principle 5 does, however, proscribe any “direct or indirect” action by states aimed at undermining the territorial integrity of other states. *A priori*, Principle 5 would seem to forbid states from providing assistance, even of an indirect nature, to peoples potentially denied their right to internal self-determination. As Cassese has suggested, this move was motivated by “the recent events in Central and Eastern Europe [at the time of drafting] and the fear of an uncontrolled disintegration of existing States under the impulse of the national aspirations of ethnic groups.”<sup>148</sup>

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<sup>145</sup> See Arie Bloed, *Institutional Aspects of the Helsinki Process after the Follow-Up Meeting of Vienna*, 36 NETH. INT’L L. REV., 342–63 (1989).

<sup>146</sup> *Helsinki Final Act*, *supra* note 140, Principle 4.

<sup>147</sup> *Id.* Principle 5.

<sup>148</sup> CASSESE, SELF-DETERMINATION, *supra* note 61, at 286.

The CSCE further reiterated the continuing nature of self-determination with the non-binding Charter of Paris for a New Europe<sup>149</sup> (Paris Charter). Under the heading, “Friendly Relations among Participating States,” the Paris Charter provided:

Our relations will rest on our common adherence to democratic values and to human rights and fundamental freedoms. We are convinced that in order to strengthen peace and security among our States, the advancement of democracy, and respect for and effective exercise of human rights, are indispensable. We reaffirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to the territorial integrity of States.<sup>150</sup>

This text explicitly links the concept of equality among peoples with self-determination. However, the Paris Charter draws a subtle link between “adherence to democratic values and to human rights and fundamental freedoms,” arguably suggesting that Western electoral democracy is the most likely political system to comprehensively deliver internal self-determination. This shift, impelled by the process of state creation throughout Eastern and Northern Europe contemporaneous with the Paris Charter’s promulgation, represents a departure from the approach of previous CSCE instruments.<sup>151</sup>

## 2. Analysis of State Practice *vis-à-vis* Recognition

Examination of state practice *vis-à-vis* recognition suggests that in circumstances where a new state is created, internal self-determination imposes ongoing governance requirements. Although state practice is scant in relation to this particular matter, the example of Southern Rhodesia and its purported unilateral colonial (UC) secession in 1965 does shed informative light on the topic. So too does state practice in response to the purported Bantu states throughout South Africa in the 1970s and 1980s. Each is discussed below.

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<sup>149</sup> Conference on Security & Co-operation in Europe, *Charter of Paris for a New Europe*, 30 I.L.M. 193 (Nov. 21, 1990).

<sup>150</sup> *Id.*

<sup>151</sup> See CASSESE, SELF-DETERMINATION, *supra* note 61, at 286.

## a. Southern Rhodesia

Rhodesia came under the UK's colonial arc in the 19th century.<sup>152</sup> The territory was initially administered by the British South African Company, with white settlers granted a limited form of self-government.<sup>153</sup> In 1923, the territory was granted "responsible government," which resulted in the institutionalized subjugation of Africans to their white settler overlords.<sup>154</sup> As part of this process, African political parties were banned by the ruling white minority.<sup>155</sup> In 1961, as a result of Westminster's pressure, a constitution was introduced that resulted in some representation for Africans in the Legislative Assembly.<sup>156</sup> However, in practical terms, the political power of the ruling white minority remained firmly entrenched.<sup>157</sup> Throughout the early 1960s, Rhodesia's colonial relationship with the UK began to attract the UN's attention, culminating in the General Assembly's adoption of Resolution 1747, which declared the territory non-self-governing pursuant to Chapter XI of the UN Charter.<sup>158</sup>

On May 7, 1965, the Rhodesia Front (a white settler political party) "won" the Rhodesian national elections under the leadership of Prime Minister Ian Smith, and began to move towards instituting a policy of independence from the UK.<sup>159</sup> This allowed Rhodesia to comply with growing international pressure for decolonization, whilst at the same time preventing Westminster's interference in its internal political affairs.<sup>160</sup>

In an attempt to thwart any independence for the white minority régime, the Security Council passed Resolution 202 one day prior to the elections. The resolution requested "the United Kingdom Government and all States Members of the United Nations not to accept a unilateral declaration of independence for

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<sup>152</sup> Prior to European settlement the area today known as Zimbabwe was occupied by many different nations, the largest of which were the Shona (Monomapata and Rozwi Mambos) and Ndebele. In 1890, Cecil Rhodes and an armed private force of invaders made camp at Harare, and in 1889, Westminster granted a Royal Charter to Rhodes and his British South Africa Company to administer the territory. See NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 79 (1994); VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA 42 (1990).

<sup>153</sup> RAIČ, *supra* note 64, at 128.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*; GOWLLAND-DEBBAS, *supra* note 152, at 45, 49.

<sup>157</sup> Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 2 (1968) ("The franchise system, which was carried in amended form into the 1961 Constitution, assures the 6% white population dominance in every aspect of internal public order. The proclaimed goal of the white settler elite is to maintain this system of domination.").

<sup>158</sup> *Id.* at 2; GOWLLAND-DEBBAS, *supra* note 152, at 99–102; RAIČ, *supra* note 64, at 128.

<sup>159</sup> RAIČ, *supra* note 64, at 128.

<sup>160</sup> *Id.* at 128–29.

Southern Rhodesia by the minority Government.”<sup>161</sup> Further, the UK was implored “not to transfer under any circumstances to its colony in Southern Rhodesia, as at present governed, any powers or attributes of sovereignty but to promote the country’s attainment of independence by a democratic system of government in accordance with the aspirations of the majority of the population.”<sup>162</sup> These comments were designed to prevent a sovereign white minority government.

Undeterred by international pressure, Prime Minister Ian Smith sought an unconditional grant of independence from Westminster, but it was denied.<sup>163</sup> Instead of granting sovereignty, the UK demanded five conditions were to be fulfilled, including progress on ending racial discrimination and independence was acceptable to Rhodesia’s entire population.<sup>164</sup> Negotiations were entered into by both parties, but were ultimately fruitless, ending in a unilateral declaration of independence by the Smith Government on 11 November 1965.<sup>165</sup> The international response was unreceptive. On November 11, the General Assembly passed Resolution 2024, which condemned “the unilateral declaration of independence made by the racist minority in Southern Rhodesia.”<sup>166</sup> On November 12, the Security Council passed Resolution 216, declaring that the Council:

1. *Decides* to condemn the unilateral declaration of independence made by a racist minority in Southern Rhodesia; [and]
2. *Decides* to call upon all States not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime.<sup>167</sup>

Further resolutions followed, imploring states not to grant recognition to the minority régime. Security Council Resolution 217 of November 20, 1965, for example, referred to the Smith régime as “a racist settler minority” and called upon “all States not to recognize the illegal authority and not to entertain any diplomatic or other relations with it.”<sup>168</sup> When the Smith Government asserted the republican status of Southern Rhodesia in March 1970, the Security Council condemned “the illegal proclamation of republican status of the Territory by the illegal régime in Southern Rhodesia” and directed that “Member States shall refrain from recognizing this illegal régime or from rendering any assistance to

<sup>161</sup> S.C. Res. 202, § (c)(3) (May 6, 1965); see RAIČ, *supra* note 64, at 128 n.168.

<sup>162</sup> S.C. Res. 202, *supra* note 129, § (c)(5).

<sup>163</sup> RAIČ, *supra* note 64, at 128.

<sup>164</sup> *Id.* at 128–29; GOWLLAND-DEBBAS, *supra* note 152, at 67.

<sup>165</sup> GOWLLAND-DEBBAS, *supra* note 152, at 71; RAIČ, *supra* note 64, at 129.

<sup>166</sup> G.A. Res. 2024 (XX), ¶ 1 (Nov. 11, 1965).

<sup>167</sup> S.C. Res. 216 (Nov. 12, 1965) (emphasis added); see RAIČ, *supra* note 64, at 129.

<sup>168</sup> S.C. Res. 217, ¶¶ 3, 6 (Nov. 20, 1965); see RAIČ, *supra* note 64, at 129.

it.”<sup>169</sup> The same Resolution even sought to extend these implorations to non-UN members.<sup>170</sup>

Scholars including Crawford,<sup>171</sup> Raič,<sup>172</sup> Dugard,<sup>173</sup> Devine,<sup>174</sup> Fawcett,<sup>175</sup> Gowlland-Debbas,<sup>176</sup> Dore,<sup>177</sup> Marshall,<sup>178</sup> Okeke,<sup>179</sup> and Nkala<sup>180</sup> have reached consensus that Southern Rhodesia under the Smith régime satisfied the traditional criteria for statehood, namely, a permanent population, defined territory, effective government, the capacity to enter into relations with other states, and independence. However despite satisfying these criteria, Rhodesia was universally denied recognition, with the possible exception of South Africa.<sup>181</sup> Clearly, a further legal principle was in operation preventing Rhodesia from attaining recognition. Assessing the situation, Crawford has noted that three explanations are possible:

That Rhodesia was a State, and that action against it, so far as it was based on the contrary position, was unlawful; that recognition is constitutive, and in view of its non-recognition Rhodesia was not a State; or that the principle of self-determination in this situation prevented an otherwise effective entity from being regarded as a State.<sup>182</sup>

<sup>169</sup> S.C. Res. 277, ¶¶ 1–2, (Mar. 18, 1970); RAIČ, *supra* note 64, at 129.

<sup>170</sup> S.C. Res. 277, ¶ 18; RAIČ, *supra* note 64, at 128.

<sup>171</sup> CRAWFORD, CREATION OF STATES, *supra* note 3, at 128–29.

<sup>172</sup> RAIČ, *supra* note 64, at 130.

<sup>173</sup> JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 91 (1987).

<sup>174</sup> D.J. Devine, *The Requirements of Statehood Re-examined*, 34 MOD. L. REV. 410, 412–13 (1971); D.J. Devine, *The Status of Rhodesia in International Law*, 1 ACTA JURIDICA 1, 78–89 (1973).

<sup>175</sup> Fawcett, *supra* note 92, at 110–11; J.E.S. Fawcett, *The Requirement of Statehood Reexamined*, 34 MOD. L. REV. 417, 417 (Fawcett’s Note in Reply to Devine) (1971).

<sup>176</sup> GOWLLAND-DEBBAS, *supra* note 152, at 205–16.

<sup>177</sup> Isak I. Dore, *Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems*, 13 VAND. J. TRANSNAT’L L. 25, 35–38 (1980).

<sup>178</sup> CHARLES BURTON MARSHALL, CRISIS OVER RHODESIA: A SKEPTICAL VIEW 68–69 (1967).

<sup>179</sup> CHRIS N. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW 87–89 (1973).

<sup>180</sup> JERICO NKALA, THE UNITED NATIONS, INTERNATIONAL LAW, AND THE RHODESIAN INDEPENDENCE CRISIS 56 (1985).

<sup>181</sup> See WALLACE-BRUCE, *supra* note 152, at 82–83. South Africa, for example, dispatched its police force to Rhodesia in 1967 with the objective of consolidating the Smith Government’s rule. More importantly, South Africa maintained its diplomatic mission in defiance of UN resolutions. *Id.* This action can be contrasted with states such as India, Kenya, and the USSR which went so far as to cut post, telephone, and telegraph links with Rhodesia after 1965. *Id.* Clearly then, the actions of South Africa were akin to implied recognition. *Id.*

<sup>182</sup> CRAWFORD, CREATION OF STATES, *supra* note 3, at 129.

In light of the considerable body of resolutions emanating from the General Assembly and Security Council, declaring Rhodesia's statehood "illegal" (accompanied by near universal non-recognition by states), the first explanation is highly unconvincing.<sup>183</sup> The second explanation, that recognition is predominantly constitutive,<sup>184</sup> is not compelling given the contemporary preeminence of the declaratory recognition theory.<sup>185</sup> It is most likely that Rhodesia was denied statehood because it substantially contravened the peremptory norm prohibiting systematic racial discrimination and apartheid.<sup>186</sup> A survey by the International Commission of Jurists in 1976, for example, characterized the Rhodesian polity as a

vast network of . . . legislation [whose primary purpose was to] formalize and maintain a division between the races—a division which largely dictates the range of jobs open to a man, the education his children will receive, what wages he is paid, where he can live, how he may behave to his fellows and to members of another race, and what civil and political freedoms he may be permitted to enjoy.<sup>187</sup>

Without doubt, discrimination against indigenous peoples was systemic and systematic. Africans were effectively prohibited from participating in electoral politics, while whites enjoyed universal suffrage.<sup>188</sup> Until 1977, there were strict regulations governing the segregation between whites and Africans. These rules extended to mandating that Africans could not own property or live in white only areas, except in special cases.<sup>189</sup> When Africans were permitted to enter white-only areas, this was usually for purposes of employment, for which they earned appalling wages—on average, approximately one eleventh of their white employers.<sup>190</sup> As a result of the 1930 Land Apportionment Act, Africans were severely restricted in their ability to own land.<sup>191</sup> On average, a white settler

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<sup>183</sup> *Id.*

<sup>184</sup> According to the constitutive recognition theory, recognition is an integral component of statehood. *See generally id.* at 19–22; RAIĆ, *supra* note 64, at 29–31; Anderson, *Definition of Secession*, *supra* note 2, at 365–67.

<sup>185</sup> According to the declaratory recognition theory, recognition is declaratory of pre-existing statehood. *See generally* CRAWFORD, CREATION OF STATES, *supra* note 3, at 22–26; RAIĆ, *supra* note 64, at 32–33; Anderson, *Definition of Secession*, *supra* note 2, at 360–64. On the pre-eminence of the declaratory recognition theory, *see* Anderson, *Definition of Secession*, *supra* note 2, at 368–70; CRAWFORD, CREATION OF STATES, *supra* note 3, at 27,

<sup>186</sup> CRAWFORD, CREATION OF STATES, *supra* note 3, at 130–31.

<sup>187</sup> WALLACE-BRUCE, *supra* note 152, at 86 n.147.

<sup>188</sup> *Id.* at 86.

<sup>189</sup> *Id.* at 85.

<sup>190</sup> *Id.*

<sup>191</sup> Giovanni Arrighi, *The Political Economy of Rhodesia*, 39 NEW LEFT REV. 35, 38 (1966); WALLACE-BRUCE, *supra* note 152 at 85.



was apportioned 21 times as much land as an indigenous inhabitant.<sup>192</sup> Africans were also denied an equitable education, with the government spending ten times as much on the education of a white child compared to an African student.<sup>193</sup> As a result of the 1957 Registration and Identification Act, indigenous inhabitants were required by law to at all times have on their person identification passes.<sup>194</sup>

Rhodesia's indigenous population was thus subject to systematic discrimination of a political, racial, civic, and economic nature. This was incompatible with the peremptory norm prohibiting systematic racial discrimination and apartheid as expressed in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination,<sup>195</sup> and International Convention on the Elimination of All Forms of Racial Discrimination.<sup>196</sup> As the Rhodesian government failed to comply with peremptory norms, existing states were under a legal obligation of non-recognition.<sup>197</sup> Given that recognition is predominantly declaratory of statehood, this was tantamount to a denial of statehood itself.

#### b. The Bantu States Throughout South Africa

The attempted creation of the Bantu states throughout South Africa in the 1970s and 1980s revealed that putative states born of a particularly acute form of discrimination—apartheid—will not achieve statehood. This is because they violate the peremptory norm prohibiting systematic racial discrimination and apartheid.

The origins of South Africa's Bantu policy can be traced to the 1874 Glen Grey Act, which established representative councils in the Transkei area for the government of indigenous South Africans.<sup>198</sup> Over the first half of the 20th century, this basic legislative architecture was gradually expanded resulting in the establishment of multiple reserves that served as the territorial precursors for the

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<sup>192</sup> WALLACE-BRUCE, *supra* note 152 at 85.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*; GOWLLAND-DEBBAS, *supra* note 152, at 52.

<sup>195</sup> G.A. Res. 1904 (XVIII), Declaration on the Elimination of All Forms of Racial Discrimination, art. 5, (Nov. 20, 1963).

<sup>196</sup> G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 3 (Dec. 21, 1965).

<sup>197</sup> In this regard Fawcett has noted: "It would follow then that the illegality of the rebellion was not an obstacle to the establishment of Rhodesia as an independent State, but that the political basis and objective of the regime were, and that the declaration of independence was without legal effect." Fawcett, *supra* note 92, at 113. *See also* J.E.S. FAWCETT, *THE LAW OF NATIONS* 38–39 (1968); WALLACE-BRUCE, *supra* note 152, at 86 ("As Rhodesia was practicing racism, it violated the international norms of non-discrimination in particular and human rights as a whole. This brought into question the legitimacy of the regime and so its claim to statehood.").

<sup>198</sup> CRAWFORD, *CREATION OF STATES*, *supra* note 3, at 338.

Bantu states.<sup>199</sup> In 1950, the Nationalist Government of Prime Minister Daniel Malan established the Tomlinson Commission with the purpose of conducting

an exhaustive enquiry into . . . a comprehensive scheme for the rehabilitation of the Native Areas [reserves] with a view to developing within them a social structure in keeping with the culture of the Native and based on effective socio-economic planning.<sup>200</sup>

The Commission recommended that South Africa's indigenous population be grouped into seven discrete ethnic groups around separate "heartlands" or Bantus. Two principal justifications were advanced for this proposition, namely:

(a) the European population . . . has developed into an autonomous and complete national organism, and has furthermore preserved its character as a biological [racial] entity. There are not the slightest grounds for believing that the European population . . . would be willing to sacrifice its character as a national entity and as a European racial group . . .

(b) the Bantu peoples . . . do not constitute a homogeneous people, but form separate national units on the basis of language and culture.<sup>201</sup>

The creation of the Bantus was therefore designed to ensure white South Africans could maintain their racial and cultural homogeneity in isolation from the ethnically diverse indigenous population.<sup>202</sup>

A succession of statutes followed the Tomlinson Commission. The Promotion of the Black Self-Government Act No. 46 of 1959 designated eight

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<sup>199</sup> See, e.g., Black Land Act 26 of 1913 (S. Afr.); see also, e.g., Development Trust and Land Act 18 of 1936 (S. Afr.); Bantu Authorities Act 68 of 1951 (S. Afr.) (creating tribal, regional, and territorial authorities with the purpose of formalizing relations between indigenous leaders and the central government). These tribally-based authorities enjoyed the devolution of modest legislative, executive, and judicial powers. See generally CRAWFORD, CREATION OF STATES, *supra* note 3, at 338; WALLACE-BRUCE, *supra* note 152, at 96.

<sup>200</sup> WALLACE-BRUCE, *supra* note 152, at 95.

<sup>201</sup> *Id.*; JEFFREY BUTLER, ROBERT I. ROTBERG, & JOHN ADAMS, THE BLACK HOMELANDS OF SOUTH AFRICA: THE POLITICAL AND ECONOMIC DEVELOPMENT OF BOPHUTHATSWANA AND KWAZULU 25 (1978). The same authors go on to note that, according to the Tomlinson Commission, the Bantus were akin to separate organisms, which, "like the Afrikaner volk, would gain maturity through evolutionary growth." WALLACE-BRUCE, *supra* note 152, at 95.

<sup>202</sup> See generally WALLACE-BRUCE, *supra* note 152, at 94–95 (describing the Tomlinson Commission); BUTLER, ROTBERG, & ADAMS, *supra* note 201, at 24–25, 159–61.

national units (one more than recommended by the Tomlinson Commission) based upon linguistic and cultural factors, namely North Sotho, South Sotho, Swazi, Tsonga, Tswanu, Venda, Xhosa, and Zulu.<sup>203</sup> The Act decreed:

[T]he Bantu peoples of the Union of South Africa do not constitute a homogenous people, but form separate national units on the basis of language and culture; and whereas it is desirable for the welfare and progress of said peoples to afford recognition to the various national units and to provide for their gradual development within their own areas to self-governing units on the basis of Bantu systems of government.<sup>204</sup>

By 1963, six national units had been established, with each of these able to seek self-governing status.<sup>205</sup> The Black States Citizenship Act No. 26 of 1970 supplemented these reforms by assigning every indigenous person membership to one of the Bantustans.<sup>206</sup> Finally, the Black States Constitution Act No. 21 of 1971 allowed for the self-government and independence of the Bantu nations, authorizing the President of South Africa to establish a legislative assembly for a territory after consultation with the Bantu concerned.<sup>207</sup>

The rationale for the creation of independent Bantustans was the overarching philosophy of apartheid.<sup>208</sup> The separation of European from indigene under the Bantustan program would naturally perpetuate longstanding racial divisions. Moreover, the creation of the Homeland states would ensure that the political power exercised by Europeans, who comprised only 18% of the population, would be maintained in the future.<sup>209</sup>

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<sup>203</sup> WALLACE-BRUCE, *supra* note 152, at 97.

<sup>204</sup> CRAWFORD, CREATION OF STATES, *supra* note 3, at 339.

<sup>205</sup> WALLACE-BRUCE, *supra* note 152, at 98.

<sup>206</sup> This process was undertaken, often with little or no regard for the ties between an individual and the particular Bantustan assigned. Furthermore, upon the attainment of sovereign independence (according to South Africa domestic law) many citizens of the Bantustans lost their South African citizenship. *See id.* *See also* BUTLER, ROTBERG, & ADAMS, *supra* note 201, at 35–36.

<sup>207</sup> WALLACE-BRUCE, *supra* note 152, at 98; CRAWFORD, CREATION OF STATES, *supra* note 3, at 339.

<sup>208</sup> Wallace-Bruce suggests this can be traced to the ideology of *baaskap*, or white supremacy, which prevailed in the early years of European settlement. *See* WALLACE-BRUCE, *supra* note 152, at 102. *See also* COLIN LEGUM & MARGARET LEGUM, SOUTH AFRICA, CRISIS FOR THE WEST 54-57 (1964); CRAWFORD, CREATION OF STATES, *supra* note 3, at 340 (“[T]he racially discriminatory nature of the Bantustan policy, aimed at preserving the bulk of South Africa for its minority white population.”).

<sup>209</sup> In 1961, for example, the South African representative to the UN informed the General Assembly that the creation of Bantustans was necessary to remove “fears harboured by the white community of being politically swamped by the numerically superior Bantu.” *See* WALLACE-BRUCE, *supra* note 152, at 104. White South Africans thus wished to avoid a situation similar to Zimbabwe in 1980 when the white minority was

Four Bantustans—Transkei,<sup>210</sup> Bophuthatswana,<sup>211</sup> Venda,<sup>212</sup> and Ciskei<sup>213</sup>—eventually claimed sovereign independent status. As scholars such as Dugard,<sup>214</sup> Devine,<sup>215</sup> Wallace-Bruce,<sup>216</sup> Norman,<sup>217</sup> Heydt,<sup>218</sup> deKeiffer,<sup>219</sup> and Hartquist<sup>220</sup> have observed, these putative states satisfied the traditional criteria for statehood based upon effectiveness. However, despite satisfying these criteria, the international community universally refused to acknowledge the statehood of any of the four territories. Both the General Assembly and Security Council promulgated a doctrine of non-recognition for the Bantustans and consistently refused to accord them the title of “state.”<sup>221</sup> General Assembly Resolution 3411 D (XXX), for example, urged “all Governments and organizations not to accord

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relegated to the opposition benches, eventually resulting in their oppression and economic disenfranchisement.

<sup>210</sup> Transkei became independent under South Africa domestic law on October 26, 1976. *See* Republic of Transkei Constitution Act 15 of 1976 (S. Afr.).

<sup>211</sup> Bophuthatswana became independent under South African domestic law on December 6, 1977. *See* Status of Bophuthatswana Act 89 of 1977 (S. Afr.).

<sup>212</sup> Venda became independent under South African domestic law on September 13, 1979. Status of Venda Act 107 of 1979 (S. Afr.).

<sup>213</sup> Ciskei became independent under South African domestic law on December 4, 1981. Status of Ciskei Act 110 of 1981 (S. Afr.).

<sup>214</sup> Dugard notes: “[w]riters who have examined this subject generally concede that Transkei (and by implication, the other homeland-States) meet the traditional requirements of statehood.” *See* DUGARD, *supra* note 173, at 100.

<sup>215</sup> D.J. Devine, *Recognition, Newly Independent States and General International Law*, 10 S. AFR. Y.B. INT’L L. 18, 30 (1984).

<sup>216</sup> *See* WALLACE-BRUCE, *supra* note 152, at 148.

<sup>217</sup> Geoffrey Norman, in his detailed exposition of Transkei has concluded: “The Transkei would appear to meet the [traditional] criteria for statehood. It has a territory and, although it may still have certain land claims against the South African government, its land area is well enough defined to cover this criterion. It has a settled population even though a large percentage of its population is settled permanently outside its borders . . . . In a strict legal sense, there is no doubt that the Transkei has effective control over the area within its borders, and that it is capable of conducting international relations with other nations.” *See* Geoffrey E. Norman, *The Transkei: South Africa's Illegitimate Child*, 12 NEW ENG. L. REV. 585, 619 (1977).

<sup>218</sup> Donald A. Heydt, *Non-recognition of the Independence of Transkei*, 10 CASE W. RES. J. INT’L L. 167, 184 (1978).

<sup>219</sup> Donald E. deKeiffer & David A. Hartquist, *Transkei: A Legitimate Birth*, 13 NEW ENG. L. REV. 428, 429–30 (1978) (focusing particularly on Transkei).

<sup>220</sup> *Id.*

<sup>221</sup> The genesis of the non-recognition policy arguably antedates the purported independence of the Bantustans. General Assembly Resolution 2671F (XXV) for example, in Article 3 condemned, “the establishment by the racist minority Government of South Africa of ‘Bantustans’ in so-called African reserves as fraudulent, a violation of the principle of self-determination and prejudicial to the territorial integrity of the State and the unity of its people.” *See* G. A. Res. 2671F (XXV) (Dec. 8, 1970). *See also* G. A. Res. 2775E (XXVI) (Nov. 29, 1971).

any form of recognition to [the Bantustan homelands].<sup>222</sup> A later resolution expounded specifically on Transkei's fictive independence, providing that the General Assembly:

1. *Strongly condemns* the establishment of bantustans as designed to consolidate the inhuman policies of *apartheid*, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the Africa people of South Africa of their inalienable rights;
2. *Rejects* the declaration of "independence" of the Transkei and declares it invalid;
3. *Calls upon* all Governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other bantustans.<sup>223</sup>

This call for non-recognition was subsequently endorsed by the Security Council in Resolutions 402<sup>224</sup> and 407.<sup>225</sup> When Bophuthatswana purportedly gained independence in 1977, the General Assembly reiterated its policy of non-recognition, denouncing "the so-called independent Bantustans."<sup>226</sup> In response to Venda's purported proclamation of independence in 1979, the President of the Security Council issued a statement on behalf of the Council, declaring:

The Security Council condemns the proclamation of the so-called "independence" of Venda and declares it totally invalid. This action by the South African régime, following similar

<sup>222</sup> G. A. Res. 3411D (XXX) (Nov. 28, 1975); CRAWFORD, CREATION OF STATES, *supra* note 3, at 341–42. This policy was endorsed by the Organization of African Unity, which in July 1976 implored "all States . . . not to accord recognition to any Bantustan, in particular, the Transkei whose so-called independence is scheduled for the 26 October 1976." See C.M. Res. 492 (XXXVII), ¶ 2 (Jul. 3, 1976); see also C.M. Res. 490 (XXVII), ¶¶ 21–23 (Jul. 3, 1976).

<sup>223</sup> G.A. Res. 31/6, art. A ¶¶ 1–3 (Oct. 26, 1976); see generally RAIČ, *supra* note 64, at 136 & n.199.

<sup>224</sup> S.C. Res. 402 (Dec. 22, 1976). The impetus for the resolution was a complaint by Lesotho that South Africa was attempting to coerce her recognition of Transkei by closing strategic border posts to Lesotho. The Council "commended" Lesotho for not recognizing Transkei and, condemned Pretoria's actions. See also G.A. Res. 31/6 A, ¶¶ 1–3 (Oct. 26, 1976).

<sup>225</sup> S.C. Res. 407 (May 25, 1977). Resolution 407 unanimously reaffirmed Resolution 402 and its endorsement of General Assembly Resolution 31/6A. See DUGARD, *supra* note 173, at 100–01.

<sup>226</sup> G.A. Res. 32/105 N ¶ 2 (Dec. 14, 1977). The resolution was adopted by 140 votes to none. See DUGARD, *supra* note 173, at 101.

proclamations of Transkei and Bophuthatswana, denounced by the international community, is designed to divide and dispossess the African people and establish client states under its domination in order to perpetuate *apartheid*. It further aggravates the situation in the region and hinders international efforts for just and lasting solutions.

The Security Council calls upon all Governments to deny any form of recognition to the so-called “independent” Bantustans; to refrain from any dealings with them; to reject travel documents issued by them; and urges Member Governments to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called “independent” Bantustans.<sup>227</sup>

When Ciskei purportedly gained independence in 1981, the President of the Security Council again condemned the Homelands policy stating:

The Security Council does not recognize the so-called “independent homelands” in South Africa: it condemns the purported proclamation of the “independence” of the Ciskei and declares it totally invalid. This action by the South African régime, following similar proclamations in the case of the Transkei, Bophuthatswana and Venda, denounced by the international community, is designed to divide and dispossess the African people and establish client States under its domination in order to perpetuate *apartheid*. It seeks to create a class of foreign people in their own county. It further aggravates the situation in the region and hinders international efforts for just and lasting solutions.<sup>228</sup>

The universal policy of non-recognition for the South African Homelands has been generally explained by reference to the peremptory norm prohibiting systematic racial discrimination and apartheid, as expressed in instruments such as the United Nations Declaration on the Elimination of All forms of Racial Discrimination,<sup>229</sup> the International Convention on the Elimination of All forms of Racial Discrimination,<sup>230</sup> the International Convention

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<sup>227</sup> S.C. Pres. Statement S/13549 (Sept. 21, 1979). This statement was made at the 1268th meeting of the Security Council on September 21, 1979. *See* DUGARD, *supra* note 173, at 101.

<sup>228</sup> S.C. Pres. Statement S/14794 (Dec. 15, 1981). This statement was made at the 2315th meeting of the Security Council on December 15, 1981. *See* DUGARD, *supra* note 173, at 101-02 n.104.

<sup>229</sup> G.A. Res. 1904 (XVIII), *supra* note 195.

<sup>230</sup> G.A. Res. 2106 (XX), *supra* note 196.

on the Suppression and Punishment of the Crime of Apartheid,<sup>231</sup> and the Declaration on Apartheid and its Destructive Consequences on Southern Africa.<sup>232</sup> The Homeland states thus demonstrate that the origins of statehood and the overall context of a state's creation are important. Entities that are created in violation of peremptory norms such as the prohibition on systematic racial discrimination and apartheid will be denied statehood. This is because they are incompatible with the most basic human rights' standards.

### 3. Précis

The foregoing analysis of customary law yields three different (but similar) conceptions of internal self-determination. The first interpretation, supported by the Friendly Relations Declaration, Fiftieth Anniversary Declaration, Helsinki Final Act, the Concluding Document, the Rhodesian independence crisis, and purported Bantu states in South Africa, suggests that, at a minimum, the concept equates with the right of peoples to choose their political system, with the probable additional requirement of ongoing participation of an equal nature within

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<sup>231</sup> G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid (Nov. 30, 1973).

<sup>232</sup> G.A. Res. 16/1, annex, Declaration on Apartheid and its Destructive Consequences on Southern Africa (Dec. 14, 1989). Crawford has written: "There is considerable support for the principle of racial equality and non-discrimination as a peremptory norm of general international law, a conclusion now consolidated by the apt inclusion of apartheid and similar systematic acts as crimes against humanity for the purposes of the International Criminal Court. The creation of the Bantustans was an integral part of a policy which violated this fundamental principle. Thus a third category of peremptory norms [the prohibition on systematic racial discrimination and apartheid] has been recognized as relevant to statehood." CRAWFORD, CREATION OF STATES, *supra* note 3, at 345. Norman, after examining in detail the norms of internal self-determination and the prohibition on systematic racial discrimination and apartheid has written: "Can a new state created contrary to these two fundamental principles be regarded as legally created? The answer appears to be in the negative." Norman, *supra* note 217, at 631; See DUGARD, *supra* note 173, at 98–108; Merrie Faye Witkin, *Transkei: An Analysis of the Practice of Recognition—Political or Legal?*, 18 HARV. INT'L. L. J. 605, 621–27 (1977). After discussing the *jus cogens* norm of apartheid at some length, and the creation of the Bantustans, Wallace-Bruce has noted: "Assuming for the moment that the Bantustans can be regarded as having satisfied the traditional criteria, our conclusion will still be that they are not states, because they have not met the additional and modern criterion. Like Rhodesia, their claims to statehood must be rejected as they have been created in clear violation of well-established international norms." WALLACE-BRUCE, *supra* note 152, at 149. After discussing apartheid and the creation of the Bantustans, Raič has observed: "There is practical unanimity both among States and among international lawyers as to the fundamental character of these prohibitions. Therefore, the fact that these norms were violated flagrantly in the process of the formation of the Homelands, arguably constitutes another ground for the complete denial of their claim to statehood," see RAIČ, *supra* note 64, at 141; Heydt, *supra* note 218, at 188.

this political system. The second interpretation, supported by the Friendly Relations Declaration, Fiftieth Anniversary Declaration, the Rhodesia independence crisis, and purported Bantu states in South Africa suggests that in addition to the above-mentioned politically based requirements, there must also be an absence of sustained and systematic discrimination of any kind against peoples. The third interpretation, supported by the Paris Charter, suggests that the concept requires the equal political participation of peoples in the context of a Western electoral democracy.

### **C. Judicial Decisions**

Support for the continuing nature of internal self-determination draws support from various judicial decisions. In *Katangese Peoples' Congress v. Zaire*,<sup>233</sup> the African Commission on Human and Peoples' Rights examined a communication submitted under Article 65(5) of the African Charter on Human and Peoples' Rights by the President of the Katangese Peoples' Congress. The communication sought to recognize the Katangese Peoples' Congress as a liberation movement with the right to undertake UNC secession from Zaire.<sup>234</sup> Importantly, the Katangese People's Congress (representing the Katangese People) was a political movement within an existing sovereign state.<sup>235</sup> The Commission held that the Katangese people were entitled to self-determination, which by implication suggests self-determination possesses a continuing or internal character.<sup>236</sup> The Commission then proceeded to expound upon the criterion of internal self-determination, stating:

In the absence of concrete violations of human rights to the point that the territorial integrity of Zaire should be called into question and in the absence of the evidence that the people of Katanga are denied the right to participate in government guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.<sup>237</sup>

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<sup>233</sup> *Katangese Peoples' Congress v. Zaire*, Communication 75/92, Decision, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Nov. 3, 1994), [http://www.achpr.org/files/sessions/16th/comunications/75.92/achpr16\\_75\\_92\\_eng.pdf](http://www.achpr.org/files/sessions/16th/comunications/75.92/achpr16_75_92_eng.pdf).

<sup>234</sup> See RAIČ, *supra* note 64, at 330; Ved Nanda, *Self-Determination and Secession Under International Law*, 29 DENV. J. INT'L. L. & POL'Y 305, 311 (2001).

<sup>235</sup> RAIČ, *supra* note 64, at 330.

<sup>236</sup> *Id.*

<sup>237</sup> *Katangese Peoples'*, 75/92, Afr. Comm'n H.P.R.



The foregoing text makes clear that internal self-determination would not be satisfied when a people experience “concrete violations of human rights” or are “denied their right to participate in government.”<sup>238</sup>

Support for the continuing nature of self-determination is also evident within *Loizidou v. Turkey*,<sup>239</sup> where Rysdhal and Wildhaber JJ. of the European Court of Human Rights stated by way of *obiter dicta* that

[u]ntil recently, in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonization. In recent years a consensus has seemed to emerge that peoples may also exercise a right to [external] self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic or discriminatory way [i.e., denied internal self-determination]. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.<sup>240</sup>

More recently the Canadian Supreme Court in *Reference re Secession of Quebec*<sup>241</sup> has also endorsed the continuing nature of internal self-determination:

[I]nternational law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of [UNC] secession may arise.<sup>242</sup>

The Court later stated:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the

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<sup>238</sup> *Id.*

<sup>239</sup> *Loizidou v. Turkey*, App. No. 1531/89, 50 Eur. Ct. H.R. 1, 24 (1996) (Wildhaber, J., concurring).

<sup>240</sup> *Id.*

<sup>241</sup> *Reference re Secession of Quebec*, [1998] S.C.R. 217 (Can.).

<sup>242</sup> *Id.* ¶ 122.

most extreme of cases and, even then, under carefully defined circumstances.<sup>243</sup>

The text above makes it clear that self-determination is normally fulfilled by “a people’s pursuit of its political, economic and cultural development within the framework of an existing state.” This open-ended statement strongly suggests that the court equated internal self-determination with the equal political participation of peoples within the political system of their choosing. The court did not suggest, for example, that internal self-determination could only be fulfilled by the equal participation of peoples with a Western electoral democracy.

Significantly, the court also endorsed the interlinking between internal and external self-determination, with denial of the former opening the way to the latter:

A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying position is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent “the whole people belonging to the territory without distinction of any kind” adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.<sup>244</sup>

Although the court could have strengthened its analysis by referring to Article 1 paragraph 3 of the Fiftieth Anniversary Declaration at this point, it nonetheless did not consider internal self-determination to only require the equal political participation of peoples within the political system of their choosing. Rather, the court indicated that internal self-determination also extended to require an absence of discrimination “of any kind.”

On balance, analysis of the foregoing judicial decisions reveals two different (but closely related) conceptions of internal self-determination. The first conception, supported by *Katangese Peoples’ Congress v. Zaire*<sup>245</sup> and *Loizidou v. Turkey*,<sup>246</sup> suggests that internal self-determination mandates the right of peoples to equal political participation and freedom from sustained and systematic discrimination of any kind. The second conception, supported by *Reference re*

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<sup>243</sup> *Id.* ¶ 126.

<sup>244</sup> *Id.* ¶ 134.

<sup>245</sup> *Katangese Peoples’ Congress v. Zaire*, Communication 75/92, Decision, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.] ¶¶ 5-6 (Nov. 3, 1994), [http://www.achpr.org/files/sessions/16th/comunications/75.92/achpr16\\_75\\_92\\_eng.pdf](http://www.achpr.org/files/sessions/16th/comunications/75.92/achpr16_75_92_eng.pdf).

<sup>246</sup> *Loizidou v. Turkey*, App. No. 1531/89, 50 Eur. Ct. H.R. 1, 24 (1996) (Wildhaber, J., concurring).

*Secession of Quebec*,<sup>247</sup> suggests internal self-determination: (1) mandates the right of peoples to choose their political system; (2) that within this system peoples must have equal participatory rights; and (3) that there must be an absence of sustained and systematic discrimination of any kind against peoples.

#### IV. PRECISELY DELIMITING THE PEREMPTORY NORM OF INTERNAL SELF-DETERMINATION

Having determined that treaty, custom and subsidiary sources mandate that internal self-determination applies within existing states, it is necessary to precisely delimit the scope of the concept. In other words, does internal self-determination equate with the right of peoples to choose their political system, the equal political participation of peoples, the absence of discrimination of any kind against peoples, or adherence to Western electoral democracy?

This is a difficult question. At first glance, the preponderance of evidence tends to suggest that *de lege lata*, internal self-determination equates with the right of peoples choose their political system, and that within this framework peoples must have equal participatory rights. This interpretation is compatible with the Human Rights Covenants, African Charter, Friendly Relations Declaration, Fiftieth Anniversary Declaration, Helsinki Final Act, the Concluding Document, the Rhodesian independence crisis, the repudiation of the Bantu states in South Africa, and *Reference re Secession of Quebec*.<sup>248</sup>

However, although this view is correct, it does not represent a *complete* interpretation of internal self-determination. The Friendly Relations Declaration, Fiftieth Anniversary Declaration, *Katangese Peoples' Congress v. Zaire*,<sup>249</sup> *Loizidou v. Turkey*,<sup>250</sup> and *Reference re Secession of Quebec*<sup>251</sup> also indicate that internal self-determination extends beyond the political context, mandating the absence of discrimination of any kind against peoples. Thus, it is submitted that internal self-determination comprises three strands: (1) the right of peoples to choose their political system; (2) that within this framework peoples must have equal participatory rights; and (3) that there must be an absence of sustained and systematic discrimination of any kind against peoples.

A more controversial interpretation (which, on balance, may not have yet passed the threshold of *lex lata*) is that internal self-determination requires states to adhere to Western electoral democracy. Western states, for example, have often sought to equate internal self-determination with multiparty electoral democracy. In a speech before the Third Committee of the General Assembly on October 15, 1986, for instance, a delegate of the UK (acting on behalf of the European Community) declared:

<sup>247</sup> *Reference re Secession of Quebec*, [1998] S.C.R. at 281–82, ¶¶ 122, 126.

<sup>248</sup> *Id.*

<sup>249</sup> *Katangese Peoples'*, 75/92, Afr. Comm'n H.P.R, at ¶¶ 5–6.

<sup>250</sup> *Loizidou*, 50 Eur. Ct. H.R. 1.

<sup>251</sup> *Reference re Secession of Quebec*, [1998] S.C.R. 217.

In accordance with the principles set out in the Charter, the common first article of both International Covenants proclaims the right of self-determination. It is important to remember that, under the Covenants, self-determination is a right of peoples. It applies with equal force to all peoples, without discrimination . . . . Self-determination is not a single event—one revolution or one election. The exercise of the right is a continuous process. If peoples are to, in the words of the Covenants, “freely determine their political status and freely pursue their economic, social and cultural development,” they must have regular opportunities to choose their government and their social systems freely, and to change them when they so wish.<sup>252</sup>

Similar remarks were made by the Australian delegate before the same Committee, who noted: “[s]elf-determination implie[s] the continuing right of all peoples and individuals within each nation to participate fully in the political process by various means, including free and fair elections.”<sup>253</sup> The foregoing suggests that internal self-determination can only be satisfied when the peoples and citizens within sovereign states are permitted to engage in regular elections.

Further support for the notion that internal self-determination mandates Western electoral democracy is provided by scholars such as Higgins and Cassese. The former asserts that Article 1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>254</sup> must be interpreted in light of Article 25, which states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.<sup>255</sup>

Linking the above provision with Article 1, Higgins reasons that:

<sup>252</sup> MUSGRAVE, *supra* note 35, at 98–99.

<sup>253</sup> *Id.* at 99 n.35.

<sup>254</sup> International Covenant on Civil and Political Rights, *supra* note 10.

<sup>255</sup> *Id.* art. 25.

Article 25 provides that every citizen shall have the right to take part in the conduct of public affairs, to vote and to be elected at periodic elections on the basis of universal suffrage, and to have access to public service in his country. There is undoubtedly a close relationship between Article 1 and Article 25. But Article 25 is concerned with the detail of how free choice (necessarily implied in Article 1) is to be provided—by periodic elections, on the basis of universal suffrage.<sup>256</sup>

Cassese mounts a similar argument when analyzing internal self-determination in the context of the Human Rights Covenants, suggesting that the term “freely” in the second sentence of Article 1(1) by necessity requires that “peoples choose their legislators and political leaders free from any manipulation or undue influence from the domestic authorities themselves.”<sup>257</sup> The same scholar continues:

Thus, internal self-determination is best explained as a manifestation of the totality of rights embodied in the . . . [ICCPR], with particular reference to: freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association (Article 22); the right to vote (Article 25b); and more generally, the right to take part in the conduct of public affairs, directly or indirectly or through freely chosen representatives (Article 25a).<sup>258</sup>

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<sup>256</sup> Higgins, *supra* note 120, at 165–66. Interestingly, the Federal Republic of Germany made a very similar statement in 1978 before the UN General Assembly, stating: “The right of self-determination had far broader connotations than simply freedom from colonial rule and foreign domination. Article 1 [of the International Human Rights Covenants] . . . defined the right of self-determination as the right of all peoples freely to determine their political status and freely to pursue their economic, social and cultural development. The question as to how peoples could freely determine their status was answered in Article 25 of the International Covenant on Civil and Political Rights. The right to self-determination was indivisible from the right of the individual to take part in the conduct of public affairs, as was very clearly stated in Article 21 of the Universal Declaration of Human Rights. The exercise of the right to self-determination required the democratic process which, in turn, was inseparable from the full exercise of such human rights as the freedom of thought.” U.N. GAOR, 43rd Sess., 7th mtg. at 3, U.N. Doc. A/C.3/43/SR7 (Oct. 17, 1988); *see also* Allan Rosas, *Democracy and Human Rights, in HUMAN RIGHTS IN A CHANGING EAST-WEST PERSPECTIVE* 30, 33 (Jan Helgesen ed., 1990) [hereinafter Rosas, *Democracy and Human Rights*]; Rosas, *Internal Self-Determination, supra* note 116, at 239.

<sup>257</sup> CASSESE, SELF-DETERMINATION, *supra* note 61, at 52-53.

<sup>258</sup> *Id.* at 53.

Cassese thus argues that internal self-determination includes other rights in addition to those contained under Article 25, such as those in Articles 19, 21, and 22.<sup>259</sup>

In the context of the ICCPR, the views of Higgins and Cassese are almost certainly correct. It could scarcely be argued that signatories would endorse the right of all peoples to internal self-determination, contained in Article 1, but at the same time ignore the right to Western electoral democracy contained in Articles 19, 21, 22, and 25. Is it correct though, to assert that articles within the ICCPR that mandate Western electoral democracy complement other instruments expounding upon matters of internal self-determination, such as the African Charter, the Friendly Relations Declaration, the Fiftieth Anniversary Declaration, the Helsinki Final Act, and the Concluding Document?

As indicated above, it is argued here that the *general* legal scope of internal self-determination does *not* include the specificity dictated by Articles 19, 21, 22, and 25 of the ICCPR. Various instruments before and after the ICCPR do not contain specific mention of Western electoral democracy. Instead, as was shown above, they suggest that internal self-determination comprises of three general branches: (1) the right of peoples to choose their political system; (2) that within this framework people must have equal participatory rights; and (3) that there must be an absence of sustained and systematic discrimination of any kind against peoples. Indeed, a draft proposal by Italy of Principle 5 paragraph 7 of the Friendly Relations Declaration which provided that only those states possessed of a “democratic government” would enjoy the protection of their political unity and territorial integrity was rejected.<sup>260</sup> Furthermore, UK representatives discussing a draft proposal for Principle 5 paragraph 4 of the same instrument indicated that the word “representative” within this proposal was *not* intended to exclusively connote Western electoral democracy.<sup>261</sup> It would seem therefore, that internal self-determination in the context of the Friendly Relations Declaration—the basic tenor of which has been repeated, *mutatis mutandis*, in the Fiftieth Anniversary Declaration—does not link internal self-determination with conditions analogous with Articles 19, 21, 22, and 25 of the ICCPR.

The view that the legal right to internal self-determination does not include the specificity contained within relevant provisions of the ICCPR is supported by various scholars. Rosas, for example, relying predominantly on customary law, has noted:

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<sup>259</sup> *Id.* Cassese mounts a similar argument in the context of the non-binding Helsinki Final Act, stating that: “[t]he debates preceding the adoption of the Helsinki Declaration illustrate that the phrase ‘in full freedom’ reflects the Western view that the right to self-determination cannot be implemented if basic human rights and fundamental freedoms, in particular the freedom of expression and association, are not ensured to members of the people concerned.” *Id.* at 286.

<sup>260</sup> See RAIČ, *supra* note 64, at 276.

<sup>261</sup> *Id.* at 276 n.201.

[C]ommon Article 1, stated in identical terms in both Covenants of 1966, and with its links to the UN Charter, the 1970 Friendly Relations Declaration, the 1975 Helsinki Final Act, and other instruments of this kind, arguably lends itself more easily to affirmation as general (customary) international law than does Article 25 of the Civil and Political Covenant. It is also more convincing to argue for the *jus cogens* character of Article 1 than of Article 25.<sup>262</sup>

Rosas thus asserts that Article 1 of the ICCPR—which affirms the right of all peoples to self-determination—is reflective of general customary law and possesses a peremptory character.<sup>263</sup> Parallel with this finding, though, Rosas asserts that Article 25 is not reflective of general customary law and does not possess a peremptory character.<sup>264</sup> If it is accepted that the rights conferred under Article 25 of the ICCPR must be complemented by those under Articles 19, 21, and 22 for full affect, it follows that internal self-determination does not necessarily equate with Western electoral democracy.

A similar position has been espoused by Raič, who after finding that internal self-determination refers to “‘representative’ government,”<sup>265</sup> notes: “whether ‘representative’ government must *ex definitione* be *equalized* with the Western conception of democratic government is, to say the least, seriously questionable.”<sup>266</sup> The same scholar later concludes that

Internal self-determination seems to require the existence of a “representative” government, which arguably includes Western conceptions of representative governance but may also include other forms of government which are considered to be representative by the people concerned . . . . Thus, the notion of “representative-ness” assumes that government and the system of government is not imposed on the population of the State, but that it is based on the consent or assent of the population and in that sense is representative of the will of the people, regardless of the *forms or methods* by which the consent or assent is freely expressed.<sup>267</sup>

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<sup>262</sup> Rosas, *Internal Self-Determination*, *supra* note 116, at 247.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> RAIČ, *supra* note 64, at 272–73. Raič defines this term as “the representativeness of the government in relation to the *population* of the State.” *Id.* at 273 n.187.

<sup>266</sup> *Id.* at 275–76. The same scholar later reiterates this general sentiment stating “there is no *communis opinio* that ‘representative’ government actually means the model of representative democracy as perceived by the West.” *Id.* at 276.

<sup>267</sup> *Id.* at 278–79 (emphasis added).

It follows, therefore, that if internal self-determination is flexible regarding the “forms or methods” by which it is expressed, rigid adherence to Articles 19, 20, 21, and 25 of the ICCPR is unnecessary.

Eckert also rejects the view that internal self-determination must equate with the content of Articles 19, 21, 22, and 25 of the ICCPR, stressing that there is considerable difference between the right to internal self-determination and a people’s desire to establish Western electoral democracy:

In spite of the good intentions on the part of those who advocate the right to democracy, the right to democracy is not equivalent to self-determination . . . . Mandating that a people *must* determine to be free, as defined by a particular procedural model of democracy, significantly constrains their right to make a free determination of their own political status.<sup>268</sup>

Although Eckert does not employ the phrase “internal self-determination” in her analysis, it is nonetheless evident that she is alluding to the alleged right of peoples to Western electoral democracy, which is generally regarded as one of the legitimate forms of internal self-determination.

The argument against the *mandatory* inclusion of Articles 19, 21, 22, and 25 of the ICCPR within the ambit of internal self-determination is strengthened by analysis of Article 4 of the same instrument, which provides:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the

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<sup>268</sup> Eckert, *supra* note 97, at 57.



same intermediary, on the date on which it terminates such derogation.<sup>269</sup>

Crucially, Article 4(2) does not suggest that the content of Articles 19, 21, 22, and 25 are non-derogable in times of “a public emergency which threatens the life of the nation,” which implies that the rights concerned are not of a peremptory character. Although Article 4(2) does not include Article 1 as a non-derogable clause, the frequent citation of the terminology contained within Article 1, particularly the phrase, “all peoples have the right to self-determination” in declaratory resolutions of the General Assembly,<sup>270</sup> strongly indicates that adherence to this article would be given preference over the more specific content of Articles 19, 21, 22, and 25.<sup>271</sup>

A further argument against the *mandatory* inclusion of Articles 19, 21, 22, and 25 of the ICCPR within the ambit of internal self-determination is that it would leave no room for a people to implement their own variant of self-government, which, as the result of culture and tradition, may not comport with Western electoral democracy. Brownlie, for example, has concluded that internal self-determination refers to “the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.”<sup>272</sup> Where a community’s distinct character is not predicated upon Western democratic ideals, it thus follows that alternative political structures may be legitimately adopted accorded to the will of the people(s) concerned.

Salmon has propounded this position more forcefully, suggesting that the equation of internal self-determination with Western electoral democracy would be, in ideological terms, unjustifiably narrow:

The real difficulty . . . is to define how a people exercises its internal right to self-determination. If sovereignty resides in the people, how does that people voice its will? . . . In the Western countries it is generally believed that the only right answer is a system of liberal regime coupled with market economy. Such reasoning is purely ideological; there are many regimes in the world which are not similar to Western parliamentarianism and which may, however, be viewed as truly representative of the

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<sup>269</sup> International Covenant on Civil and Political Rights, *supra* note 10, art. 4.

<sup>270</sup> See G.A. Res. 1514 (XV), *supra* note 10; G.A. Res. 2625 (XXV), *supra* note 11 (employing the similar although different wording, “all peoples have the right freely to determine”); G.A. Res. 50/6, *supra* note 11 (employing the similar although different wording, “[c]ontinue to reaffirm the right of self-determination of all peoples”); G.A. Res. 61/295, *supra* note 10.

<sup>271</sup> See Rosas, *Internal Self-Determination*, *supra* note 116, at 247.

<sup>272</sup> Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 5 (James Crawford ed., 1988).

peoples concerned according to their own social and historic traditions.<sup>273</sup>

Implicit in Salmon's reasoning is that the very phraseology of the term "internal self-determination" connotes an endogenous quality; that is, the group to which the concept is applicable must have input into how they would like to be governed.<sup>274</sup> Traditional societies based upon monarchy, for example, would be incompatible with the strictures enumerated by Articles 19, 21, 22, and 25 of the ICCPR. In the event that a people wished to voluntarily adopt a monarchical political structure, it would seem strange if "internal self-determination" would overrule the popular will of the people concerned. As Raic<sup>275</sup> and Packer<sup>276</sup> have noted, even Rousseau<sup>277</sup> conceded that a legitimate government based upon consent might include monarchy.<sup>278</sup>

<sup>273</sup> Jean Salmon, *Internal Aspects of the Right to Self-Determination*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 116, at 280.

<sup>274</sup> See CRAWFORD, CREATION OF STATES, *supra* note 3 at 153; *see also* James Crawford, *Democracy and International Law*, 1993 BRIT. Y.B. INT'L L. 113, 113 (1993) [hereinafter Crawford, *Democracy*]; Erica Irene Daes, *Native Peoples' Rights*, 27 LES CAHIERS DE DROIT 123, 126 (1986); Kristin Henrard & Stefaan Smis, *Recent Experiences in South Africa and Ethiopia to Accommodate Cultural Diversity: A Regained Interest in the Right of Self-Determination*, 44 J. AFR. L. 17, 23 (2000); Peter Jones, *Human Rights, Group Rights, and Peoples' Rights*, 21 HUM. RTS Q. 80, 103 (1999). Jones has similarly stated that "[t]he doctrine of popular sovereignty does not entail a commitment to democracy. To be committed to democracy is to be committed to the rightness of a particular form of government. To be committed to the doctrine of popular sovereignty is to be committed to the rightness of whatever form of government a people chooses for itself." Jones, *supra*, at 103 n.38; Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 550 (1999). Fox has also commented on the notion of popular sovereignty: "Stated broadly, popular sovereignty is the view that individual citizens bestow legitimacy upon a government through their implied or actual consent to its rule." Fox, *supra*, at 550; *see generally* Gerard Alexander, *There Are No Alternatives to the "Western" Model of Democracy*, 12 BROWN J. WORLD AFF. 155, 155–63 (2005). Alexander, however, seems implicitly predisposed to the view that internal self-determination by peoples could not be legitimately satisfied by moves beyond the Western model of democracy. Alexander, *supra*, at 155–63.

<sup>275</sup> RAIĆ, *supra* note 64, at 277.

<sup>276</sup> John Packer, *On the Definition of Minorities*, in THE PROTECTION OF ETHNIC AND LINGUISTIC MINORITIES IN EUROPE 23, 49–50 (John Packer & Kristian Myntti eds., 1993).

<sup>277</sup> JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 29 n.10 (G. D. H. Cole trans., 1972), [https://www.ucc.ie/archive/hdsp/Rousseau\\_contrat-social.pdf](https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf). *See also generally id.* at 51, 55–62. *See also* Gordon H. McNeill, *Rousseau and Monarchy*, 10 ARK. ACAD. SCI. 13, 16 (1957).

<sup>278</sup> A further point that might be made is that even if one believes in the right to liberal democratic governance, this, by implication, connotes tolerance to other political systems. John Rawls, for example, has noted that liberal democratic societies, if they are to remain consistent with their alleged core principles, must respect the choices of other societies *not* to adopt liberal democratic methods: "[j]ust as a citizen in a liberal society must respect other persons' comprehensive religious, philosophical and moral doctrines

On the basis of the foregoing analysis, it is concluded that *de lege lata*, the peremptory norm of internal self-determination does not go so far as to include the specifics contained in Article 19, 21, 22, and 25 of the ICCPR. This means that internal self-determination does not equate with Western electoral democracy, although the latter is certainly compatible with the former.<sup>279</sup>

In a *de lege ferenda* sense, however, it is certainly arguable that international customary law is tending towards making Western electoral democracy coterminous with internal self-determination. It is undeniable, for example, that since the end of the Cold War, Western democratic political systems have increasingly been adopted by states. Franck, for example, has argued:

The transformation of the democratic entitlement from moral prescription to [emerging] international legal obligation has evolved gradually. In the past decade, however, the tendency has accelerated. Most remarkable is the extent to which an international law-based entitlement is now urged by governments themselves.... As of late 1991, there are more than 110 governments, almost all represented in the United Nations, that are legally committed to permitting open multiparty, secret ballot elections with a universal franchise. Most joined the trend in the past five years. While a few, arguably, are democracies more in form than in substance, most are, or are becoming, genuinely open to meaningful political choice. Many of these new regimes want, indeed need, to be validated by being seen to comply with global standards for free and open elections.<sup>280</sup>

Crawford has similarly noted:

Since 1986 the world has itself undergone vast changes. In particular, there has been a significant change in the democratic balance. In the last decade the proportion of States with democratic systems, however fragile or tentative, has increased sharply—a process beginning in Southern Europe, extending to Latin America and Eastern Europe, the Soviet Union and many of its former republics, and even to East Asia. In Africa, according to one analysis, there were only 4 democracies, as

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provided they are in accordance with a reasonable political conception of justice, so a liberal society must respect other societies organized by comprehensive doctrine, provided their political and social institutions meet certain conditions that lead the society to adhere to a reasonable law of peoples.” John Rawls, *The Law of Peoples*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993 43 (Stephen Shute & Susan Hurley eds., 1994).

<sup>279</sup> Rosas, *Internal Self-Determination*, *supra* note 116, 249-50; RAIĆ, *supra* note 64, at 276.

<sup>280</sup> Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 47-48 (1992).

against 40 States with apparently stable non-democratic regimes, in 1989. By 1992, the number of democracies had increased to 18 and the number of non-democracies was reduced to 12. Significantly, there had also been a great increase (from 3 to 22) in the number of regimes in a stage of transition to democracy.<sup>281</sup>

A litany of other scholars, including Raič,<sup>282</sup> Lanovoy,<sup>283</sup> Fukuyama,<sup>284</sup> Boutros-Ghali,<sup>285</sup> Kegley,<sup>286</sup> Rich,<sup>287</sup> Fox,<sup>288</sup> Rustow,<sup>289</sup> Eckert,<sup>290</sup> Maogoto,<sup>291</sup>

<sup>281</sup> Crawford, *Democracy*, *supra* note 274, at 121–22.

<sup>282</sup> Raič observes: “It is thus certainly true that at least since the mid-1980s ‘representative’ government has come to be *identified* more and more with representative liberal democracy.” RAIČ, *supra* note 64, at 275. With reference to the work of Franck, Raič continues, “it is perhaps even true that a right to democratic governance is emerging.” *Id.*

<sup>283</sup> Lanovoy has observed that, “a right to democracy or democratic governance remains *de lege ferenda*.” Lanovoy, *supra* note 61, at 399.

<sup>284</sup> Fukuyama has noted: “As mankind approaches the end of the millennium, the twin crises of authoritarianism and socialist central planning have left only one competitor standing in the ring as an ideology of potential universal validity: liberal democracy, the doctrine of individual freedom and popular sovereignty.” FUKUYAMA, *supra* note 27, at 42. The same scholar contends teleologically, that this “liberal revolution” represents “a Universal History of mankind in the direction of liberal democracy.” *Id.* at 48.

<sup>285</sup> See U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, ¶ 3, U.N. Doc. A/47/277-S/24111 (June 17, 1992); Boutros Boutros-Ghali, *Democracy: A Newly Recognized Imperative*, 1 GLOBAL GOVERNANCE 3, 4–5 (1995).

<sup>286</sup> See CHARLES W. KEGELY, *WORLD POLITICS: TREND AND TRANSFORMATION* 406 (12th ed. 2009).

<sup>287</sup> Rich for example has written: “The conclusion of the Cold War has afforded the international community its third chance. There is strong evidence over the past decade pointing to the incorporation of democracy in international law, which develops through a process of international consensus, or at least widespread agreement. The expression of this incorporation varies from “the right to democracy” to “democratic entitlement” to “the right to democratic governance.” This norm is both articulated in various regional and global instruments and increasingly demonstrated in international practice by such policies as promoting democracy abroad, making democracy a qualification for membership in certain regional organizations, establishing democratic conditionality for development cooperation, and, in a limited number of cases, defending democracy through collective security mechanisms.” Roland Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY 20, 21 (2001).

<sup>288</sup> Fox has noted: “The 1980s and early 1990s have witnessed the extraordinary demise of authoritarian regimes once thought to be a permanent fixture of the political landscape. Defying old orthodoxies and alliances, communist governments in Eastern Europe, military juntas in Latin America, and one-party states in Africa have given way to governments chosen in free and open elections.” Fox, *supra* note 274, at 540.

<sup>289</sup> Writing in 1990, Rustow observed: “A tide of democratic change is sweeping the world.” Dankwart A. Rustow, *Democracy: A Global Revolution?*, 69 FOREIGN AFF. 75, 75 (1990).

Roberts,<sup>292</sup> Burchill,<sup>293</sup> Carothers,<sup>294</sup> Marks,<sup>295</sup> and Donnelly<sup>296</sup> have broadly agreed with these observations.<sup>297</sup>

The growing trend towards making internal self-determination coterminous with Western electoral democracy—particularly in the context of states created by UNC secession—is exemplified by the European Community’s adoption in December 1991 of the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union,<sup>298</sup> which, *inter alia*, stipulated that new states must comply with the criteria of self-determination and democracy. After indicating support for the principles enumerated in the Helsinki Final Act and Paris Charter, the Declaration provided that member states:

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<sup>290</sup> See Eckert, *supra* note 97, at 56–57.

<sup>291</sup> Maogoto has claimed that “[t]he end of the Cold War witnessed a dramatic increase in the number, diversity and proportion of states formally committed to democratic principles.” Jackson Nyamuya Maogoto, *Democratic Governance: An Emerging Customary Norm?*, 56 U. NOTRE DAME AUSTL. L. REV. 55, 58 (2003).

<sup>292</sup> Roberts has noted that “1989 was only the most dramatic year in a decade of rapid, broad based movement toward democracy.” Brad Roberts, *Democracy and World Order*, 15 FLETCHER F. WORLD AFF. 9, 9 (1991).

<sup>293</sup> See Richard Burchill, *The Developing International Law of Democracy*, 64 MOD. L. REV. 123, 123–24 (2001).

<sup>294</sup> Carothers is more cautious in his analysis. Nonetheless, he concedes democracy is becoming more prevalent throughout the world, just not as prevalent as other scholars, such as Frank, would suggest. See Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOC’Y INT’L L. PROC. 261, 261–64 (1992).

<sup>295</sup> Marks coined the expression “Liberal Millenarianism” to describe the post-Cold War upswing in democratic governance. See Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT’L L. 449, 455 (1997).

<sup>296</sup> Donnelly suggests that the triumvirate of “development, democracy and human rights” have become “hegemonic political ideals” since the end of the Cold War. Donnelly, *supra* note 27, at 608.

<sup>297</sup> But see Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT’L L. 601, 601, 605, 608–09 (2003) (providing highly skeptical views). Donald Horowitz also evinces skepticism about the post-Cold War trend towards democracy suggesting that ethnic cleavages are undermining the *substance* of many new allegedly democratic régimes: “The election was democratically conducted. The results are in conformity with the principle of majority rule. But that is the sticking point. Majority rule in perpetuity is not what we mean by ‘majority rule.’ We assume the possibility of shifting majorities, of oppositions becoming governments, of an alterable public opinion . . . . The election, intended to be a vehicle of choice was no such thing and will be no such thing in the future; it registered, not choice, but birth affiliation. This was no election—it was a census.” DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 86 (2d ed. 2000).

<sup>298</sup> European Political Cooperation Press Release P. 129/91, European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States (Dec. 16, 1991).

[A]ffirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new States, which, following the historic changes in the region, *have constituted themselves on a democratic basis*, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.<sup>299</sup>

The Declaration subsequently emphasized respect for democracy and international law as prerequisites for recognition, mandating:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of the United Nations, especially with regard to the rule of law, democracy and human rights;
- guarantees the rights of the ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.<sup>300</sup>

The Declaration thus required states arising directly and indirectly from UNC secession to possess electoral democracies and guarantees for the rights of ethnic and national minorities. As Raič has noted though, the instrument was only *advisory* and not legally binding.<sup>301</sup> Thus, state action pursuant with the Guidelines could not be said to solidify new rules of customary international law, as the essential requirement of *opinio juris*—the subjective belief that such action was rendered legally obligatory—was not satisfied. Furthermore, the Declaration should *not* be read as enumerating guidelines for *statehood*, but rather *recognition*.<sup>302</sup> Despite these limitations, the adoption and formulation of the Declaration does indicate the increasing legal relevance of democracy to matters of statehood and recognition.<sup>303</sup>

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<sup>299</sup> *Id.* (emphasis added).

<sup>300</sup> *Id.*

<sup>301</sup> RAIČ, *supra* note 64, at 166–67. Germany’s recognition policy toward Croatia and Slovenia was reflective of this non-binding authority. See Beverly Crawford, *Explaining Defection from International Cooperation: Germany’s Unilateral Recognition of Croatia*, 48 *WORLD POL.* 482, 482 (1996).

<sup>302</sup> Raič argues: “These requirements must be understood as intended to lay down conditions for *recognition* first and foremost, and not conditions for statehood.” RAIČ, *supra* note 64, at 166; see also CRAWFORD, *CREATION OF STATES*, *supra* note 3, at 153; but cf. Sean Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 *INT’L COMP. & L.Q.* 545, 565 (1999). Murphy notes that the requirements “clearly contained notions of democratic legitimacy,” however, erroneously attributes the requirements as relevant specifically to “Statehood”—not recognition as the title of the Declaration suggests. Murphy, *supra*, at 565.

<sup>303</sup> See *id.* at 566.

## V. CONCLUSIONS REGARDING INTERNAL SELF-DETERMINATION AND UNC SECESSION

Internal self-determination is a peremptory norm of contemporary international law, although its precise scope is perhaps less prescriptive than scholarly orthodoxy has tended to indicate. As revealed by an examination of treaty law, customary law, and judicial decisions, internal self-determination is applicable to all states, regardless of exactly what type of political system each state selects. *A priori*, internal self-determination is a criterion that any territorial entity born of UNC secession must satisfy in order to claim statehood. It is not enough for a putative UNC secessionist state to possess an effective government. Instead, the political system and constitutional structure of a state created by UNC secession must also ensure that it satisfies the three limbs of internal self-determination, namely: (1) the right of peoples to choose their political system; (2) that within this framework people must have equal participatory rights; and, (3) that there must be an absence of sustained and systematic discrimination of any kind against peoples.

For advocates of Western electoral democracy, this conclusion may disappoint. It would seem, however, that there is an emerging *de lege ferenda* right of Western electoral democracy for new states born of UNC secessionist self-determination. Moving into the future, the impact of already important instruments such as the ICCPR is likely to strengthen, and further impel the uptake of citizen orientated political systems. This process would appear to be presaged by the continuing vitality and resilience of electoral democratic government throughout the world.<sup>304</sup>

Understanding the ambit of internal self-determination in the 21st century is important. Not only is it necessary to better understand how a right to external self-determination, or UNC secession, may or may not be triggered, but it also facilitates a superior understanding of the internal governance requirements that are likely to be placed on such states *after* external self-determination has been exercised. In effect, self-determination is today not simply the right of peoples to create a state by UNC secession in light of human rights abuses *in extremis* by the existing state; it also extends to imposing ongoing governance requirements on states created by UNC secession. Failure to adhere to these governance standards, most obviously by the adoption of a suitable constitution, will mean that a UNC secessionist entity will fail to crystallize statehood, and a legal obligation of non-recognition will ensue. This development is emblematic of the growing emphasis on human rights and peremptory norms, and corresponding de-emphasis on the principle of effectiveness, as international law moves into the 21st century.

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<sup>304</sup> See, e.g., Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOCRACY 141, 143 (2015).

