

**Strathmore University**

**Law School**

**FEATURES FOR A SOUND SECESSION REFERENDUM: HOW TO  
INCORPORATE REASON IN A HIGHLY EMOTIONAL MATTER**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,  
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## Declaration

I, NDENGA SHIRLENE ROSA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Prof. Borja Lopez-Jurado

## Abstract

*Self-determination sometimes raises expectations that can never be realised. It could be understood as a right or a principle with numerous obstacles that come in the way of its realisation, thus raising the question on whether it should exist to begin with. From claims of territorial integrity, to lack of clear features of an independence referendum, secession as a way in which the right to self-determination is practised has proven to be close to impossible for most states. However, due to the right to self-determination emerging in international law as a norm that all states have an obligation to promote and protect, it is readily accepted as a norm with erga omnes status. That is, an obligation by states towards the international community.*

*This dissertation seeks to investigate and highlight features of an independence referendum that informs the consent needed for the exercise of the right to external self-determination. This shall be done in the following chronological order. Chapter two will discuss secession as a way in which the right to self-determination is exercised externally. Chapter three will discuss the legality of secession despite it tampering with the principle of territorial integrity. Chapter four will deduce the necessary features needed for an independence referendum to be reliable. This shall be done using qualitative research methodology. Through these features, independence referendums' results will be sound, and the process will be uniform.*

## **List of abbreviations**

<b>ACmHPR</b>	African Commission on Human and Peoples' Rights
<b>CCPR</b>	UN Human Rights Committee
<b>ICJ</b>	International Court of Justice
<b>Res</b>	Resolution
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>UNTS</b>	United Nations Treaty Series
<b>U.S.S. R</b>	Union of Soviet Socialist Republics

## **List of cases**

### **African Commission on Human and Peoples' Rights case law**

*Katangese Peoples' Congress v. Zaire*, ACmHPR Comm,75/92 (1995).

### **International Court of Justice (ICJ) case law**

*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (2010)*, Advisory Opinion, 2010.

*Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (1986)*, Advisory Opinion, 1986.

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)*, Advisory Opinion, 2004.

*Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971.

*Western Sahara (1975)*, Advisory Opinion, 1975.

### **Kenyan case law**

*Randu Nzai Ruwa & 2 Others v Internal Security Minister & Another (2012)* eKLR.

### **Supreme Court of Canada case law**

*Reference Re Secession of Quebec (1998)* The Supreme Court of Canada.

## **List of legal instruments**

### **International instruments**

*African Charter of Human and Peoples Rights*, October 21, 1986

*Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

*European Convention of Human Rights*, September 3, 1953

*International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

*International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

*Montevideo Convention on the Rights and Duties of States*, 26 December 1934.

*Universal Declaration of Human Rights*, 10 December 1948.

*Vienna Declaration and Programme of Action*, 25 June 1993.

### **Legislation**

*Constitution of the Federal Democratic Republic of Ethiopia* (1994).

*Constitution of Saint Kitts and Nevis* (1983).

*Constitution of Spain* (1978).

*Constitution of Sudan* (1998).

*Constitution of the Union of Soviet Socialist Republics* (1936).

*Final Act of Helsinki* (1975).

### **Other UN Documents**

*CCPR General Comment No.12, The right to self-determination of peoples*, 13 March 1984.

*CCPR General Comment No 25, The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service*, 12 July 1996

### **UN General Assembly**

*UNGA, Declaration defining the three options for self-determination*, UN A/Res/1541(XV) 15 December 1960.

*UNGA Declaration on Essentials of Peace*, A/Res/290(IV), 1 December 1949.

*UNGA Declaration on Peace through deeds, A/Res/380(v), 17 November 1950.*

*UNGA Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, A/Res/2625 (XXV), 24 Oct. 1970.*

*UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples, A/Res/1514(XV), 14 December 1960.*

*UNGA Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, A/Res/2131(XX), 21 December 1965.*

*UNGA Declaration on the Occasion of the 50<sup>th</sup> Anniversary of the UN, A/Res/50 9 Nov. 1995.*

# CHAPTER ONE

## 1.1 Introduction

Statehood is mostly a question of law.<sup>1</sup> It is followed by an examination of international processes that lead to the creation of new states that include - the original acquisition of statehood by native communities; the creation of states dependent on other states for example protectorates; the formation of states by devolution, secession and the termination of mandates, international trusteeships and other forms of dependence.<sup>2</sup> Focus shall be placed on the formation of states through secession. This shall be done by discussing it as a consequence of the right to self-determination by looking at the background of secession, theories in support of secession and literature review providing for the same.

## 1.2 Background

From 1776 to 1900, there was the American War of Independence, the revolution of the former Spanish colonies of South and Central America, the secession of Greece from the Ottoman Empire and of Belgium from the Netherlands, among others.<sup>3</sup> Until 1914, secession was the most conspicuous and probably the most common method of the creation of new states.<sup>4</sup> Similarly, the idea was applied to colonial people and by the 1960s', it was widely accepted that oppressed colonised people ought to have a right to choose their political and sovereign status. The principle of self-determination, however, had to be restricted as decades passed due to the challenging of the concept of territorial integrity.<sup>5</sup>

As defined by the Montevideo Convention, a state is a person of international law that possesses a permanent population, has a defined territory, has a government and has the capacity to enter relations with other states.<sup>6</sup> The principle of territorial integrity protects all permanently populated territories with a parent state.<sup>7</sup>

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<sup>1</sup> Crawford J, *The Creation of States in International Law*, 2ed, Oxford University Press, New York, 2006, 498.

<sup>2</sup> Zaphiriou G, 'The Creation of States in International Law. By James Crawford' 74 *The American Journal of International Law* 3, 1980, 738.

<sup>3</sup> Crawford J, *The Creation of States in International Law*, 375.

<sup>4</sup> Crawford J, *The Creation of States in International Law*, 375.

<sup>5</sup> Sterio M, 'On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule' 19 *Minnesota Journal of International Law* 1, 2010, 137.

<sup>6</sup> Article 1, *Montevideo Convention on the Rights and Duties of States*, 26 December 1934.

<sup>7</sup> Vidmar J, 'Territorial integrity and the law of statehood' 44 *George Washington International Law Review* 4, 2013, 110.

For secession to have chances of success, consent of both the seceding party and the mother state is needed.<sup>8</sup> Ludwig Von Mises believed that expressing consent to desiring a different government is important in effecting secession.<sup>9</sup> This is also applicable in the case of the former part. The latter party's consent is informed through an independence referendum. The general rule is that referendums must be held in accordance with existing constitutions with the necessary provisions or as a result of an agreement between the area that seeking to secession and the host state.<sup>10</sup> The carrying out of a referendum to determine secession has been the mode of making decisions on such weighty matters.<sup>11</sup>

### 1.3 Statement of the problem

The aim of this research is to critically investigate the necessary features needed in an independence referendum that informs the consent leading to the realisation of the right to self-determination. Based on Allen Buchanan,<sup>12</sup> James Crawford,<sup>13</sup> Redie Bereketab<sup>14</sup> and the United Nations General Assembly (hereinafter 'UNGA'),<sup>15</sup> this shall be done by focusing on unilateral secession as a form of secession and the need for human rights violations for the claim to secession to be successful. In addition to this, based on Lea Brilmayer,<sup>16</sup> James Crawford<sup>17</sup> and Allen Buchanan<sup>18</sup> the legal status of secession will be investigated considering the way it tampers with the principle of territorial integrity. Lastly, the necessary features needed to make it sound and reliable shall be proposed.

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<sup>8</sup> <https://www.richmondfed.org/-/media/richmondfedorg/publications/research/econ> on 18 February 2019.

<sup>9</sup> Kreptul A, 'The Constitutional Right of Secession in Political Theory and History' 17 *Journal of Libertarian Studies* 4,2003,55-56.

<sup>10</sup> Qvortrup M, 'What's law got to do with it? Democracy, realism and the Tina Turner theory of referendums' Barcelona Centre for International Affairs, 2018,31.

<sup>11</sup> Onderi E, 'Legality of the Mombasa republican council's quest for secession' unpublished, University of Nairobi, 2009,16.

<sup>12</sup> Buchanan A, 'Toward a theory of secession' *Ethics*,1991 - [https://www.jstor.org/stable/2381866?seq=3#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/2381866?seq=3#metadata_info_tab_contents) on 17 February 2019.

<sup>13</sup> Crawford J, *The Creation of States in International Law*.

<sup>14</sup> Bereketab R, 'Self-determination and secessionism in Somaliland and South Sudan: challenges to post-colonial state-building' The Nordic Africa Institute, Discussion Paper 75, 2012, - <https://www.cmi.no/file/2162-self-determination-and-secessionism-in-somaliland-and-south-sudan.pdf> on 10 November 2019.

<sup>15</sup> UNGA, Declaration on principles of international law on friendly relations and cooperation among states in accordance with the charter of the United Nations, UN A/Res/2625(XXV) 24 October 1970.

<sup>16</sup> Brilmayer L, 'Secession and Self-determination: A Territorial Interpretation' 16 *Yale Journal of International Law* 177,1991.

<sup>17</sup> [https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL\\_LAW\\_AND\\_UNILATERAL\\_SECESSION.pdf](https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL_LAW_AND_UNILATERAL_SECESSION.pdf), *State practice and international law in relation to unilateral secession*, 199.

<sup>18</sup> Buchanan A, 'Theories of Secession' 26 *Philosophy and Public Affairs* 1, 1997.

## 1.4 Definition of terms

Due to the presence of technical terms in this dissertation, prudence dictates the need to define the terms in order to ensure clarity and understanding of concepts brought out in the paper.

Below are the definitions of the technical terms:

<b>Electorate</b>	People in a state who have the right to vote.
<b>Erga omnes</b>	Rights are owed to all and all have obligations regarding the same.
<b>Exploitation</b>	The mistreatment of a people who are being dominated over.
<b>Independence referendum</b>	A democratic process that may lead to the independence of a people from its parent state.
<b>Parent / host state</b>	An original state that a people is part of before seeking to secede.
<b>Quorum</b>	The required percentage of electorates needed to take part in the independence referendum process.
<b>Referendum question</b>	A close-ended question that leads to the voting process during a referendum.
<b>Secession</b>	A system used by a state to determine its political identity by becoming independent of its parent state.
<b>Self-determination</b>	The right of a people to determine its political identity.
<b>Subjugation/ domination</b>	The process of being in control of a people in a way that deprives them of freedom.
<b>Territorial integrity</b>	The prevention of interference with the physical jurisdiction of one state, by another state.
<b>Turnout</b>	The number of electorates that actually take part in an independence referendum process.

## **1.5 Statement of objectives**

The main objective of this paper was to devise the features an independence ought to have in order to be sound and to accurately reflect the consent of the people.

The specific objectives of this paper were: -

- (a) To understand secession as a way in which the right to self-determination is practised.
- (b) To investigate the legality of secession by looking at whether it is compatible with the principle of territorial integrity and constitutional provisions that provide a legislative framework for secession.
- (c) To evaluate the independence referendum process in different states.

## **1.6 Hypothesis**

An independence referendum is a complex process due to lack of clear features that could be found and used as a benchmark for all states seeking to secede.

## **1.7 Research questions**

- (a) How is the right to self-determination practised through secession?
- (b) What conditions lead to the legality of secession, yet it tampers with the territorial integrity of a state?
- (c) What makes an independence referendum reliable?

## **1.8 Significance of study**

Through this study, the necessary features of an independence referendum will be proposed. These features will not only ensure the uniformity of independence referendums, but also lead to the results of such referendums to be sound. The study will be necessary for peaceful, future relations between states, for people of the seceding new country and for the territory not seceding.

## 1.9 Theoretical framework

Allen Buchanan propounded two types of secession theories under the unilateral form of secession. These are: - Primary Right Only Theory and Remedial Right Only Theory.<sup>19</sup> The former provides that certain groups have a general right to secede without facing any injustice.<sup>20</sup> It falls into two main classes: - ascriptive group and associative group.<sup>21</sup> The latter provides that a group has a general right to secede only in the event that it has suffered certain injustices. Thus, secession is the last resort.<sup>22</sup> This paper shall focus on the latter which is also referred to as the just-cause theory.<sup>23</sup> Wayne Norman, a professor, defends the theory by citing five kinds of injuries to a group that are considered to give just cause. This paper shall focus on the fifth one which states that, the group seeking to secede finds that its constitutional rights are grossly ignored by the central government or the supreme court.<sup>24</sup> Buchanan goes farther to bring out the fact that, there is less of a threat to the territorial integrity of existing states with the application of the remedial right only theory as it advances a more restricted right to secede.<sup>25</sup>

Theories that may lead to invocation of self-determination are provided by Redie Bereketeab. They include: - liberal theory which advocates the right of the individual to determine her destiny, realist theory which focuses on the principle of territorial integrity of states and remedial theory which provides that oppression by government can be a valid ground for invoking the right.<sup>26</sup>

For secession to take place based on the Primary Right Only Theory and Remedial Right Only Theory, consent is required. This consent is acquired through an independence referendum. The conducting of an independence referendum is made possible as a result of the liberal theory which advocates for persons to determine their own destiny.

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<sup>19</sup> Buchanan A, 'Theories of Secession,' 34.

<sup>20</sup> Buchanan A, 'Theories of Secession,' 35.

<sup>21</sup> Buchanan A, 'Theories of Secession,' 37.

<sup>22</sup> Buchanan A, 'Theories of Secession,' 34.

<sup>23</sup> Moore M, 'Territorial right and secession: the problem of differential natural resource endowment' University of Bristol, 9.

<sup>24</sup> Moore M, 'Territorial right and secession: the problem of differential natural resource endowment' University of Bristol, 10.

<sup>25</sup> Buchanan A, 'Theories of Secession,' 45.

<sup>26</sup> Bereketeab R, 'Self-determination and secessionism in Somaliland and South Sudan: challenges to post-colonial state-building,' 13.

## 1.10 Literature review

### 1.10.1 Secession as a way in which the right to self-determination is practiced

Allen Buchanan considers the right to self-determination to be synonymous to secession.<sup>27</sup> This is, however, not the case.<sup>28</sup> Self-determination is a principle concerned with the right to be a state.<sup>29</sup> Redie Bereketeab provides ways in which the right to self-determination can be realised. They include: - the emergence of an independent state, free association with an independent state or through the integration with an independent state.<sup>30</sup> Similarly, UNGA provides ways in which self-determination can be practiced in two ways: - internal self-determination where a people's pursuit for its political, economic, social and cultural development is within the framework of an existing state or external self-determination where there is an establishment of a sovereign and independent state, a free association with an independent state or the emergence into any other political status freely determined by a people.<sup>31</sup>

James Crawford provides for two ways secession can occur which include: - secession in furtherance of self-determination or secession in violation of self-determination. The former is applicable when the right to self-determination is denied by the government and it works in favour of the seceding party.<sup>32</sup> The latter occurs in derogation of the principle of self-determination.<sup>33</sup>

### 1.10.2 Territorial integrity being affected by secession

Lea Brilmayer posits that the principle of territorial integrity is based on an area of land. Individuals who seek to secede wish for a piece of land on which they will be able to make their own claims of integrity of territorial borders.<sup>34</sup>

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<sup>27</sup> Buchanan A, 'Toward a theory of secession' 101 *Ethics* 2,1991, 324.

<sup>28</sup> Songok W, 'Constitutionalizing secession as a mechanism for conflict avoidance' unpublished, Strathmore University, Nairobi, 2016, 38.

<sup>29</sup> Crawford J, *The Creation of States in International Law*, 107.

<sup>30</sup> Bereketeab R, 'Self-determination and secessionism in Somaliland and South Sudan: challenges to post-colonial state-building,' 13.

<sup>31</sup> UNGA, Declaration on principles of international law on friendly relations and cooperation among states in accordance with the charter of the United Nations, UN A/Res/2625(XXV) 24 October 1970.

<sup>32</sup> Crawford J, *The Creation of states in international law*, 387.

<sup>33</sup> Crawford J, *The Creation of states in international law*, 388.

<sup>34</sup> Brilmayer L, 'Secession and Self-determination: A Territorial Interpretation,' 201.

The principle aims to maintain global peace and stability through the maintenance of boundaries.<sup>35</sup>

James Crawford posits that for a state's territorial integrity to be respected, the state ought to be governed democratically and it ought to respect the human rights of all its people<sup>36</sup> Due to the threat the territorial integrity of states faces because of secession, secession is disfavoured by the international community.<sup>37</sup>

Buchanan brought out the fact that states have a morally legitimate interest in maintaining their territorial integrity.<sup>38</sup> The legitimacy of the interest is because the principle of territorial integrity promotes the protection of individuals' physical security, the preservation of their rights and the stability of their expectation.<sup>39</sup> Buchanan also disputes the idea that persons have a primary right to secede that would in turn lead to a general right to violate the territorial integrity of a state if there is no past injustice.<sup>40</sup>

### **1.10.3 Complexities of an independence referendum**

Every nation, nationality and people in Ethiopia has an unconditional right to self-determination including the right to secession.<sup>41</sup> A two-thirds vote is required by the legislative council of the relevant unit seeking secession.<sup>42</sup> In May 1993, Eritrea successfully seceded from Ethiopia thus becoming an independent nation.<sup>43</sup> Similarly, South Sudan successfully seceded in 2011.<sup>44</sup> South Sudan undertook a referendum to decide on secession and 98.83% of the voters voted in favour of the secession.<sup>45</sup>

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<sup>35</sup>Reference Re Secession of Quebec (1998) The Supreme Court of Canada, para. 127.

<sup>36</sup>[https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL\\_LAW\\_AND\\_UNILATERAL\\_SECESSION.pdf](https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL_LAW_AND_UNILATERAL_SECESSION.pdf), *State practice and international law in relation to unilateral secession*, 1997,20.

<sup>37</sup> Eastwood L, 'Secession: state practice and international law after the dissolution of the Soviet Union and Yugoslavia' 3 *Duke journal of comparative and international law* 299, 1993, 300

<sup>38</sup> Buchanan A, 'Theories of Secession,' 47.

<sup>39</sup> Buchanan A, 'Theories of Secession,' 46.

<sup>40</sup> Seymour M, 'Secession as a remedial right' published, University of Montreal, Quebec,2011, 2.

<sup>41</sup> Article 39(1). *Constitution of the Republic of Ethiopia* (1994).

<sup>42</sup> Article 39(4). *Constitution of the Republic of Ethiopia* (1994).

<sup>43</sup> <http://www.tsinfocenter.com/services/Index/54> on 18 February 2019.

<sup>44</sup> <http://www.tehrantimes.com/opinion/447-the-secession-of-south-sudan> on 18 February 2019.

<sup>45</sup> Onderi E, 'Legality of the Mombasa republican council's quest for secession' unpublished, University of Nairobi, 2009,16.

Aleksandar Pavkovic and Peter Radan uncovered the logic of secession by pointing out that violent secessions were as a result of no referendum being held while peaceful secessions were as a result of referendums being held.<sup>46</sup>

Turnout and quorum required are relatively common in referendums on independence. In addition to this, special majority requirements are no objection. Mikhail Gorbachev, a soviet leader, insisted that a two-thirds majority should be required for the secession in Latvia. This was also the case during a peace deal between Israel and Palestine. However, in Sudan, the Khartoum government demanded at least 60 percent persons to vote.<sup>47</sup> The Canadian Clarity Act fails to provide the size of the majority of valid votes cast in favour of the secessionist option.<sup>48</sup>

### **1.11 Research design**

A qualitative research methodology will be used. Secondary sources of information will form the basis of my research. These will include: - text books, articles, journals, internet materials and dissertations. The primary sources of information will include: - legislation, case law and international instruments. My reference library shall be the Strathmore Law School library.

I shall also employ the use of case studies in this paper. Through this, the inconsistency of some individual independence referendum processes will be highlighted. I shall use occurrences where the independence referendum is provided for in a state's constitution and where it is not provided for.

### **1.12 Assumptions**

The first assumption is that secession is good for everyone if consented by a wide majority.

The second assumption is that an independence referendum will cater for the interests of all persons in a state.

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<sup>46</sup> Qvortrup M, 'Voting on independence and national issues: a history and comparative study of referendums on self-determination and secession' 20 *French Journal of British Studies* 2,2015,7.

<sup>47</sup> Qvortrup M, 'Voting on independence and national issues: a history and comparative study of referendums on self-determination and secession,' 7.

<sup>48</sup> Qvortrup M, 'Voting on independence and national issues: a history and comparative study of referendums on self-determination and secession,' 8.

## **1.14 Limitations**

This paper will focus on issues of statehood and referendums. Due to the broadness of the question and the states investigated, it will be limited to desktop research.

The willingness of my samples to give accurate information is questionable due to the element of bias. This is the case when getting information on secession as persons in favour of the principle of territorial integrity disapprove of it.

## **1.15 Chapter breakdown**

This paper is divided into five chapters.

Chapter One introduces the topic of study, gives a basic background of the research question and discusses the problem statement, hypotheses, theoretical framework, literature review and methodology of the research study.

Chapter Two discusses the right to self-determination and how it is practiced through secession.

Chapter Three investigates the legality of secession by looking into the conflict it has with the principle of territorial integrity and the presence of constitutional provisions that give it its legal status.

Chapter Four investigates the independence referendum process of different states in order to deduce the necessary features needed in an independence referendum.

Chapter Five takes a holistic view of the topic by summarising the findings and conclusions drawn within the context of the problem statement and research questions that informed the topic. This Chapter also offers recommendations.

## CHAPTER TWO: THE RIGHT TO SELF-DETERMINATION PRACTICED THROUGH SECESSION

*Self-determination has never simply meant independence. It has meant the free choice of people.*      -Rosalyn Higgins-

### 2.1 Introduction

This chapter seeks to answer the first research question as espoused upon in Chapter 1 which is how the right to self-determination is practiced through secession. It shall begin by looking into the right to self-determination by investigating all the applicable legal provisions and judicial provisions. Secondly, the chapter shall investigate secession by discussing all the applicable legal provisions, judicial provisions and case studies of South Sudan and Eritrea successfully seceding from Sudan and Ethiopia respectively. Lastly, the influence of the right to self-determination on secession shall be discussed.

### 2.2 The right to self-determination

#### 2.2.1 Legal provisions

The right to self-determination is a right recognised under public international law.<sup>49</sup> However, based on the United Nations Charter (hereinafter the UN Charter), self-determination was deemed a guiding legal principle under public international law.<sup>50</sup> In addition to this, General Assembly Resolution 2625 provides the principle of equal rights and self-determination of peoples as one of the seven principles of international law concerning friendly relations and co-operation among states.<sup>51</sup>

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<sup>49</sup> Articles 1 and 55, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI; Article 1, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171; Article 1, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3; Article 20, *African Charter of Human and Peoples Rights*, October 21, 1986; *UNGA Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, A/Res/2625 (XXV), 24 Oct. 1970; *UNGA Declaration on the Occasion of the 50<sup>th</sup> Anniversary of the UN*, A/Res/50 9 Nov. 1995.

<sup>50</sup> Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia, 1990,33.

<sup>51</sup> *UNGA, Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations*, UN A/Res/2625(XXV) 24 October 1970.

There are three requirements that need to be met before a group may successfully assert the right to self-determination. They include: - there must be a people, the people must be oppressed, and the people must have been a colony.<sup>52</sup> The first requirement shall be focused on as the right to self-determination will be applicable to states that have already attained independence. There is no generally accepted definition of a people under international law.<sup>53</sup> Based on the interpretation of Article 1(2) of the UN Charter, 'people' meant 'colonial people' in light of Chapter XI and XII of the Charter suggesting 'people' refers to 'people in non-self-governing territories'. There is, however, a criterion identified to define a people in an ethnic sense. A group of individual human beings who enjoy some or all of the following features are considered people: - a territorial connection on which the group forms a majority, a common history, ethnic identity, group and religion or ideology.<sup>54</sup> The United Nations Human Rights Committee went further to provide that mere minorities do not have a right to self-determination similar to people.<sup>55</sup> Once the existence of a people is undisputable, then they need to indicate a desire to exercise their right to self-determination.<sup>56</sup>

The second requirement is that the people must be oppressed. The significance of this is that it prevents the unnecessary dismembering of states who do not violate a group's rights.<sup>57</sup>

The third requirement is that the people must have been a colony. The human rights committee has issued a general comment which supports the existence of a right to self-determination beyond decolonization.<sup>58</sup> The right to self-determination can therefore be applied to groups that are not considered traditional former colonies in the event that there is the subjection of people to:- subjugation, domination and exploitation.<sup>59</sup> In this case, if the government is not representative, the oppressed may be treated as if they were under colonial domination and will have the right to self-determination.<sup>60</sup> The extent to which a group suffers subjugation,

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<sup>52</sup> Marchildon G & Maxwell E, 'Quebec's Right of Secession under Canadian and International Law' 32 *Virginia Journal of International Law* 583, 1992,602-608.

<sup>53</sup> Musgrave T D, *Self-Determination and National Minorities*, Oxford University Press, New York, 1997,150.

<sup>54</sup> Raic D, *Statehood and the law of Self-Determination*, Klumer International Law, The Hague, 2002,262.

<sup>55</sup> Kingsbury B, 'Self-Determination and 'Indigenous People'' 86 *American Society of International Law*, 1992,383.

<sup>56</sup> Crawford J, *The Creation of States in International Law*,387.

<sup>57</sup> Hanna R, 'Right to Self-Determination in Re Secession of Quebec' 23 *Maryland Journal of International Law* 1, 1999,236.

<sup>58</sup> *CCPR General Comment No.12, The right to self-determination of peoples*, 13 March 1984.

<sup>59</sup> *UNGA Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, A/Res/2625 (XXV), 24 Oct. 1970.

<sup>60</sup> Hanna R, 'Right to Self-Determination in Re Secession of Quebec,' 239.

domination and exploitation is used to determine a group's severe deprivation of human rights.<sup>61</sup>

Full measure of self-government can be reached by a non-self-governing territory through:- the emergence of a sovereign, independent state, free association with an independent state and the integration with an independent state.<sup>62</sup> The resolution defining the three options for self-determination went further to stipulate free association with an independent state as a manner in which a non-self-governing territory can reach a full measure of self-government, should be as a result of free and voluntary choice by the peoples of the territory concerned. This free and voluntary choice should be expressed through informed and democratic processes.<sup>63</sup>

With all these legal provisions, it is quite evident that the right to self-determination is a vital right that is needed in order to avoid and/or seize the violation of human rights. It is worth noting that with the violation of human rights, the right to self-determination can be exercised as the three requirements needed to be met before a group may successfully assert the right to self-determination, is met. That is, the existence of a people whose human rights are being violated, the people being oppressed, and the oppressed being treated as if they are under colonial domination as the government is not representative.

Additionally, the infringement of the right to self-determination will lead to the exploitation of a people thus fulfilling the requirement needed for secession to take place. This was also brought out by the world conference which considers the denial of the right of self-determination as a violation of human rights.<sup>64</sup> However, the right to self-determination is limited to the extent that the exercise of the right does not result in the destruction of any other right provided for and protected in law. The realisation of this is through the express requirement that a state, group or people shall not have any right to engage in any activity or perform any act aimed at the destruction of any rights or freedoms recognised<sup>65</sup>

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<sup>61</sup> Nanda V, 'Self-Determination under International Law: Validity of claims to secede' 13 *Case Western Reserve Journal of International Law* 2, 1981, 278.

<sup>62</sup> Principle VI, UNGA, *Declaration defining the three options for self-determination*, UN A/Res/1541(XV) 15 December 1960.

<sup>63</sup> Principle VII, UNGA, *Declaration defining the three options for self-determination*, UN A/Res/1541(XV) 15 December 1960.

<sup>64</sup> Paragraph 2, *Vienna Declaration and Programme of Action*, 25 June 1993.

<sup>65</sup> Article 29(a), *African Charter of Human and Peoples Rights*, October 21, 1986; Article 17, *European Convention of Human Rights*, September 3, 1953; Article 5(1), *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171; Article 5(1), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

### 2.2.2 Judicial provisions

The International Court of Justice stated two important requirements for the exercise of the right to self-determination. The expression of the right should be free (be taken without outside interference) and genuine (be the expressed will of the people of the concerned territory).<sup>66</sup>

The right to self-determination can be practised in two ways: - internally or externally.<sup>67</sup>

The right to external self-determination applies to trusteeship territories<sup>68</sup>, colonial territories of the former European empires<sup>69</sup> and foreign occupations to some extent.<sup>70</sup> Due to the right developing in the colonial context, this resulted in it becoming synonymous to decolonisation independence.<sup>71</sup> It is permitted under three exceptional circumstances:- when a people is oppressed by colonialism, when a people is dominated by foreign powers outside colonialism context and when a people is blocked from the meaningful exercise of internal self-determination as the sitting government perpetuates massive human rights violations and there is no possible solution to the problem.<sup>72</sup>

A further question arises as to whether the right to external self-determination is a continuing right.<sup>73</sup> The continuity of the right is argued by most people to be unclear under international law but Antonio Cassese argues that the right expires upon its first exercise.<sup>74</sup> This paper is in agreement with Antonio Cassese in that, once the right is exercised it expires therefore requiring the people seeking to exercise the right to self-determination, to seek consent again through an independence referendum.

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<sup>66</sup> *Western Sahara* (1975), Advisory Opinion, 1975,55.

<sup>67</sup> Principle VIII, *Final Act of Helsinki* (1975).

<sup>68</sup> *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971,16.

<sup>69</sup> *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971,16.

<sup>70</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, 2004,136.

<sup>71</sup> Pomerance M, 'Self-determination in Law and Practice: The New Doctrine in the United Nations' 77 *American Journal of International Law* 3, 1982, 25.

<sup>72</sup> *Reference Re Secession of Quebec* (1998) The Supreme Court of Canada, para. 130-133.

<sup>73</sup> Cassese A, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge, 1995,54.

<sup>74</sup> Cassese A, *Self-determination of Peoples: A Legal Reappraisal*, 73.

On the hand, the right to internal self-determination is exercised when a government is run autonomously by the people in its region and the people practise their culture without interference or separation from the state.<sup>75</sup> That is, the right of the people to participate in the decision-making process of a state.<sup>76</sup> The right to participate in government is provided for in international law.<sup>77</sup> Ethnic groups are the holders of the right to self-determination according to the African Commission of Human and Peoples' Rights.<sup>78</sup> This right in turn generates a right to external self-determination.<sup>79</sup>

## 2.3 Secession

### 2.3.1 Legal provisions

No right to secession is provided for and protected in international law.<sup>80</sup> To second this, there are states that have argued that the right to self-determination included a right to secession thus the inclusion of the latter right in International Human Rights Covenants would be tantamount to an incitement to insurrection and separatism.<sup>81</sup>

There are two forms of secession: - unilateral secession and consensual secession. The former is undertaken without the consent of the state thus there is no constitutional sanction while the latter results from a negotiated agreement between the state and secessionist or through constitutional processes.<sup>82</sup> It is worth noting that there is no right to unilateral secession in international law.<sup>83</sup> This chapter shall focus on consensual secession as Chapter four shall discuss the need of an independence referendum as a tool that leads to the achievement of consensual secession.

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<sup>75</sup> *Reference Re Secession of Quebec* (1998) The Supreme Court of Canada, para. 126.

<sup>76</sup> Raic D, *Statehood and the law of Self-Determination*, 237.

<sup>77</sup> Article 21, *Universal Declaration of Human Rights* (10 December 1948); Article 2, *International Convention on Civil and Political Rights* (16 December 1966), 999 UNTS 171 and *CCPR General Comment No 25, The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service*, 12 July 1996, 1.

<sup>78</sup> *Katangese Peoples' Congress v. Zaire*, ACmHPR Comm, 75/92 (1995), para 10.

<sup>79</sup> *Reference Re Secession of Quebec* (1998) The Supreme Court of Canada, para. 138.

<sup>80</sup> Tancredi A, 'Secession and Use of Force' in Walter C, Ungern-Sternbery A and Abushov K *Self-determination and Secession in International Law*, Oxford University Press, Oxford, 2014, 68.

<sup>81</sup> Griffioen C, 'Self-Determination as a Human Right: The Emergency Exit of Remedial Secession' published, Utrecht University, Utrecht, 2010, 100.

<sup>82</sup> Onderi E, 'Legality of the Mombasa republican council's quest for secession' unpublished, University of Nairobi, 2009, 28.

<sup>83</sup> *Reference Re Secession of Quebec* (1998) The Supreme Court of Canada, 155.

Three requirements ought to be met for secession to arise as a possible consequence for the exercise of the right to self-determination. They include:- there must be a people forming a majority within a part of the territory of the parent state despite them being a minority of the rest of the population of the parent state, the people must be exposed to serious grievances in the form of a serious violation or denial of the right to internal self-determination or serious and widespread violation of fundamental human rights and lastly, there must not be further realistic and effective remedies for the peaceful settlement of the conflict.<sup>84</sup> Based on the last requirement, there are a range of possible remedies available to a secessionist group before secession which include the protection of individual rights and the protection of minority rights therefore leading to secession being the ultimate remedy.<sup>85</sup> Secession being the last resort is in line with the remedial right only theory that provides that a group has a general right to secede if and only if it has suffered certain injustices.<sup>86</sup>

### 2.3.2 Judicial provisions

Secession can occur in two distinct situations: - secession in furtherance of self-determination and secession in violation of self-determination.<sup>87</sup> The former is based on a free and effective choice of people in the concerned territory<sup>88</sup> while the latter occurs in derogation of the principle of self-determination.<sup>89</sup> This paper shall focus on the former that is the consensual form of self-determination.

Constitutionally authorised secession is achieved either through the exercise of an explicit constitutional right to secede or as a result of a constitutional amendment. In Kenya's jurisdiction, secession can only be achieved as a result of a constitutional amendment due to the fact that secession is banned in the Constitution of Kenya.<sup>90</sup> However, in Ethiopia and Sudan's jurisdiction, there is an explicit constitutional right to secede.<sup>91</sup> This jurisdiction in turn led to the successful secession of Eritrea from Ethiopia and South Sudan from Sudan.

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<sup>84</sup> Dugard J and Raic D, 'The role of recognition in the law and practice' in Kohen M *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, 2006, 109.

<sup>85</sup> Buchheit L, *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven and London, 1978, 222.

<sup>86</sup> Buchanan A, 'Theories of Secession,' 34.

<sup>87</sup> Crawford J, *Creation of states in international law*, 384.

<sup>88</sup> *Western Sahara (1975)*, Advisory Opinion, 1975, 12 and 32.

<sup>89</sup> Crawford J, *Creation of states in international law*, 388.

<sup>90</sup> *Randu Nzai Ruwa & 2 Others v Internal Security Minister & Another* (2012) eKLR.

<sup>91</sup> Preamble, *Constitution of Ethiopia* (1994) and Article 139(3)(g), *Constitution of Sudan* (1998).

It is worth noting that there are three existing fora that can be used to adjudicate secessionist claims. They include:- domestic courts which are generally not a viable option, international human rights bodies which have generally declined to entertain such matters on the grounds that it is only available to individuals and not groups and lastly, the International Court of Justice which is the only viable option.<sup>92</sup>

### 2.3.3 Case studies

#### 2.3.3.1 South Sudan

Despite the 1998 constitution of Sudan providing for the right to acquire property<sup>93</sup>, the freedom of religion<sup>94</sup>, the freedom from slavery<sup>95</sup>, the right against detention<sup>96</sup> and the right to nationality<sup>97</sup>, the people of South Sudan's rights were violated. The gross human rights violations included: - their subjection to political and economic marginalisation thus preventing them from meaningful participation in the affairs of the state, forced displacement from their lands, arbitrary arrests, the subjection of the people of South Sudan to slavery, religious and ethnic cleansing and the imposition of sharia law and Islamic policies by various regimes which came into power after independence that in turn denied them their religious freedom.<sup>98</sup> In addition to these human rights violations that were infringing on the human rights provided for in the constitution of Sudan, there was also enforced disappearances and intimidation of journalists.<sup>99</sup>

With the right to self-determination being provided for in the constitution, South Sudan would cease to be governed under a transitional federal system once the right is exercised.<sup>100</sup> This was the case in the year 2011 when South Sudan became independent after the people of South Sudan overwhelmingly voted for secession in the referendum held on 9<sup>th</sup> January 2011.<sup>101</sup>

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<sup>92</sup> Sloss D, 'Using International Court of Justice Advisory Opinions to Adjudicate Secessionist Claims' 42 *Santa Clara Law Review* 2, 2002, 368.

<sup>93</sup> Article 28, *Constitution of Sudan* (1998).

<sup>94</sup> Article 24, *Constitution of Sudan* (1998).

<sup>95</sup> Article 132(a), *Constitution of Sudan* (1998).

<sup>96</sup> Article 30, *Constitution of Sudan* (1998).

<sup>97</sup> Article 22, *Constitution of Sudan* (1998).

<sup>98</sup> Leo L and Prodromou E, '(Yet Another) Crisis in Sudan: Khartoum's Religious Freedom and Human Rights Abuses' 36 *The Fletcher Forum of World Affairs* 2, 2012, 68.

<sup>99</sup> Madut J, 'State, Law and Insecurity in South Sudan' 69 *The Fletcher Forum of World Affairs*, 2013, 76.

<sup>100</sup> Article 139(3)(g), *Constitution of Sudan* (1998).

<sup>101</sup> Inga J, *The Politics of Water in Africa: Norms, Environmental Regions and Transboundary Cooperation in the Orange-Senqu and Nile Rivers*, 1 ed, Bloomsbury Publishing, New York, 2012, 134.

South Sudan is the second successful secession after that of Eritrea. The two states gained sovereignty with the consent of their motherland though after a long and violent struggle.<sup>102</sup>

### 2.3.3.2 Eritrea

In 1992, a draft constitution that contained the right to self-determination to the point of secession was prepared by the Constitution Drafting Commission of Ethiopia which was established by the Council of Representatives within the Transitional Government of Ethiopia.<sup>103</sup> The draft was approved in 1994 by the Transitional Government of Ethiopia and came into force in 1995.<sup>104</sup> The constitution of Ethiopia provides for the full and free exercise of the right to self-determination.<sup>105</sup> It goes further to provide that every nation, nationality and people in Ethiopia has an unconditional right to self-determination including the right to secession.<sup>106</sup> Lastly, the constitution provides instances in which the right to self-determination, including the right to secession shall come into effect. The instances include: - The approval of a demand for secession by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned; when a referendum has been organized by the Federal Government and takes place within three years from the time the Federal Government receives the decision for secession from the council; when there is support by a majority vote in the referendum; when powers of the Federal Government are transferred to the council of the Nation, Nationality or People that has voted to secede; and when assets are divided in a manner prescribed by law.<sup>107</sup>

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<sup>102</sup>Tull D, 'Separatism in Africa: The Secession of South Sudan and its (Un-)likely Consequences' German Institute for International and Security Affairs, 2011, 1- [https://www.swp-berlin.org/fileadmin/contents/products/comments/2011C18\\_tll\\_ks.pdf](https://www.swp-berlin.org/fileadmin/contents/products/comments/2011C18_tll_ks.pdf) on 12 November 2019.

<sup>103</sup> Songok W, 'Constitutionalizing secession as a mechanism for conflict avoidance' unpublished, Strathmore University, Nairobi, 2016, 38

<sup>104</sup> Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the constitution' 326.

<sup>105</sup> Preamble, *Constitution of Ethiopia* (1994).

<sup>106</sup> Article 39(1), *Constitution of Ethiopia* (1994).

<sup>107</sup> Article 39(4), *Constitution of Ethiopia* (1994).

Eritrea became one of the fourteen provinces of Ethiopia through its annexation by Ethiopia.<sup>108</sup> A referendum held in 1993 led to the Eritrean people voting almost unanimously in favour of independence and they successfully seceded in the same year.<sup>109</sup>

## 2.4 How self-determination influences secession

Not every instance of invocation of self-determination leads to secession.<sup>110</sup> This was reflected beforehand when looking at the different ways in which the right to self-determination is practised. That is internal self-determination and external self-determination. It is therefore safe to say that, the right to self-determination is not always linked to secession as secession is merely one way of exercising the right to self-determination.<sup>111</sup>

The right to self-determination acts as a trigger for the occurrence of secession. This is the case as; secession cannot take place without the right to self-determination. This is clearly brought out in the third requirement that needs to be met before a group may successfully assert the right to self-determination. The requirement stipulates that failure of the government to be representative gives the oppressed the right to self-determination. This is to say that, the deprivation of the right to internal self-determination to the oppressed people leads to them being entitled to the right to external self-determination.

## 2.5 Conclusion

The rise of human rights violations is startling considering the fact that various international human rights instruments provide for the protection of these rights. To make matters worse, states are failing to ensure the protection of these rights and/ or causing the violation of these rights. With all these atrocities that arise due to the violation of a peoples' human rights, the seeking of the exercise of external self-determination becomes one of the many solutions

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<sup>108</sup> Onderi E, 'Legality of the Mombasa republican council's quest for secession' unpublished, University of Nairobi, 2009,39.

<sup>109</sup> Onderi E, 'Legality of the Mombasa republican council's quest for secession' unpublished, University of Nairobi, 2009,38.

<sup>110</sup> Songok W, 'Constitutionalizing secession as a mechanism for conflict avoidance' unpublished, Strathmore University, Nairobi, 2016, 26.

<sup>111</sup> Costa J, 'Does Catalonia have the right of self-determination?' Public Diplomacy Council of Catalonia, Discussion Paper Series E, 2017,3 [https://www.elconfidencialdigital.com/media/elconfidencialdigital/files/2017/09/27/ECDFIL20170927\\_0002.pdf](https://www.elconfidencialdigital.com/media/elconfidencialdigital/files/2017/09/27/ECDFIL20170927_0002.pdf) on 20 August 2019.

available to achieve a better humanitarian situation in territories. Other solutions include: - international human rights revolution strengthened by international human rights instruments that are in force today<sup>112</sup> and a change of government to one respectful of human rights either peacefully or through a coup d'état.

Therefore, despite secession being the last resort that ought to be sought in the event of human rights violations, there are several successful cases of secession. This is possible due to legal provisions, including international instruments and domestic laws, and judicial provisions that provide for the right to self-determination. It is, however, worth noting that there is a possible clash between the exercise of the right to self-determination through secession and the principle of territorial integrity as will be brought out in the next chapter.

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<sup>112</sup> Buergenthal T, 'The Human Rights Revolution' 23 *St. Mary's Law Journal* 3,1991,7.

## CHAPTER THREE: LEGALITY OF SECESSION DESPITE IT TAMPERING WITH THE PRINCIPLE OF TERRITORIAL INTEGRITY

### 3.1 Introduction

This chapter seeks to answer the third research question as espoused upon in Chapter 1. The question is under what conditions should secession be legal, yet it tampers with the territorial integrity of a state. It shall commence by looking into the principle of territorial integrity, its external and internal dimensions and legal and judicial provisions under each dimension. The chapter shall focus on the internal dimension of territorial integrity. Secondly, the chapter shall investigate the effect of secession on the internal dimension of the territorial integrity of a state. Lastly, the legality of secession stemming from constitutional provisions shall be discussed.

### 3.2 The principle of territorial integrity

The principle of territorial integrity stems from the Montevideo Convention (hereinafter ‘the Convention’) which recognises the sovereignty of states by providing that no state has the right to intervene in the internal or external affairs of another.<sup>113</sup> In addition to this, the Convention provides for the inviolable nature of the territory of a state therefore leading to it not being the subject of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.<sup>114</sup>

The principle of territorial integrity is a *jus cogens norm*<sup>115</sup> therefore creating an *erga omnes* obligation.<sup>116</sup> With this being highlighted, when looking into the principle of territorial integrity, it is important to discuss its external, intermediary and internal dimension. The focus of this chapter will be the internal dimension of territorial integrity after briefly discussing the external dimension of territorial integrity.

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<sup>113</sup> Article 8, *Montevideo Convention on the Rights and Duties of States*, 26 December 1934.

<sup>114</sup> Article 11, *Montevideo Convention on the Rights and Duties of States*, 26 December 1934.

<sup>115</sup> Shaw M, *International Law*, Grotius Publications Limited, Cambridge, 1991, 686.

<sup>116</sup> Libarona I, ‘Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo’ 16 *Levistd d’Etudis Autonomics; Federals* 16, 2012, 114.

### 3.2.1 External Dimension

The external dimension of territorial integrity protects the territory of a state against the threat or use of force as provided for in public international law.<sup>117</sup> Article 2(4) of the UN Charter provides that all members will refrain from the threat or use of force against the territorial integrity of any state in their international relations.<sup>118</sup> Based on this provision, the prohibition of force is therefore a general and authoritative principle.<sup>119</sup> The General Assembly Declaration on the principle of international law interpreted the principle refraining from the threat or use of force to only refer to military force.<sup>120</sup> This narrow concept of the refraining principle being limited to military force was similarly supported by the International Court of Justice.<sup>121</sup> A wide concept of the use of force provides that every use of force amounts to an armed attack.<sup>122</sup>

It is therefore necessary to investigate the aspect of threat of force and use of force. This paragraph shall focus on the former. Ian Brownlie described the threat of force as a promise which may be express or implied, by a government, of a choice to force conditional on non-acceptance of certain demands of that government.<sup>123</sup> Threat as a form of coercion is based on the purpose of an outcome of the threat as a relevant feature and not the kind of force applied.<sup>124</sup> For threat to be effective, the target must perceive it as being as grave as to leave no reasonable option but compliance.<sup>125</sup>

Use of force looks at how a state's territory integrity can be violated directly or indirectly. Direct violations concern the use of force attributable to another state's organs especially, its

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<sup>117</sup> Articles 2(4), *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI; *UNGA Declaration on the Occasion of the 25<sup>th</sup> Anniversary of the UN*, A/Res/2627(XXV), 24 October 1970; *UNGA Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, A/Res/2625 (XXV), 24 October 1970; *UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/Res/1514(XV), 14 December 1960; *UNGA Declaration on Essentials of Peace*, A/Res/290(IV), 1 December 1949; *UNGA Declaration on Peace through deeds*, A/Res/380(v), 17 November 1950; *UNGA Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, A/Res/2131(XX), 21 December 1965.

<sup>118</sup> Articles 2(4), *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>119</sup> Henkin L, 'Use of Force: Law and US Policy' in *Right v Might: International Law and The Use of Force*, Council on Foreign Relations Press, New York, 1991, 38.

<sup>120</sup> *UNGA Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, A/Res/2625 (XXV), 24 October 1970.

<sup>121</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (1986)*, Advisory Opinion, 1986, para. 191.

<sup>122</sup> Dinstein Y, *War, Aggression and Self-Determination*, 3 ed, Cambridge University Press, Cambridge, 2001, 13.

<sup>123</sup> Brownlie I, *International Law and the Use of Force by States*, Oxford University Press, London, 1963, 364.

<sup>124</sup> Sadurska R, 'Threats of Force' 82 *The American Journal of International Law* 2, 1988, 242.

<sup>125</sup> Sadurska R, 'Threats of Force,' 245.

military.<sup>126</sup> In addition to this, direct violations also arise when a state has directed irregular fighters such as armed groups or militias. Acts of direct physical impact in the territory of another state and sovereign acts carried out by one state on the territory of another state are rendered illegal.<sup>127</sup><sup>128</sup> Indirect violations are a less grave form of the use of force.<sup>129</sup> This is because the potential offender state has neither used its organs nor sent regular fighters.<sup>130</sup>

There are, however, two types of justifications for the use of force which are:- the use of force solely to vindicate or secure a legal right<sup>131</sup> and when a state uses force to resist illegal incursions into its territory.<sup>132</sup> The latter is self-defence which is possible in the presence of cases of armed attack by one state against another state.<sup>133</sup> Article 51 of the Charter provides for the same and goes further to also provide that the Security Council may use forceful measures in the territories of the states involved in a conflict.<sup>134</sup> For force to be considered to be necessary, peaceful measures should clearly be futile.<sup>135</sup>

### 3.2.2 Internal Dimension

The internal dimension of territorial integrity focuses on the state exercising sovereignty over a delimited territory and its inhabitants.<sup>136</sup> Jean Bodin defines sovereignty as the highest, complete and perpetual power over the citizens and subjects in a Commonwealth, put space unrestricted by law.<sup>137</sup> The UN Charter recognises the sovereign equality of all its members.<sup>138</sup> Similarly, the Declaration on Principles of International Law recognises the sovereign equality

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<sup>126</sup> Marxsen C, 'Territorial Integrity in International Law-Its Concept and Implications for Crimea' 75 *Heidelberg Journal of International Law* 1,2015,16.

<sup>127</sup> Marxsen C, 'Territorial Integrity in International Law-Its Concept and Implications for Crimea,' 12.

<sup>128</sup> Marxsen C, 'Territorial Integrity in International Law-Its Concept and Implications for Crimea,' 17.

<sup>129</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (1986), Advisory Opinion, 1986, para. 191.

<sup>130</sup> Marxsen C, 'Territorial Integrity in International Law-Its Concept and Implications for Crimea,' 18.

<sup>131</sup> Schachter O, 'The Right of States to Use Armed Forces' 82 *Michigan Law Review* 5,1984,1625.

<sup>132</sup> Schachter O, 'The Right of States to Use Armed Forces,' 1628.

<sup>133</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, 2004, para 139.

<sup>134</sup> Article 51, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>135</sup> Schachter O, 'The Right of States to Use Armed Forces,' 1635.

<sup>136</sup> Pavkovic A and Radan P, 'In Pursuit of Sovereignty and Self-Determination: Peoples, States and Secession in the International Order' 3 *Macquarie Law Journal*,2003,3.

<sup>137</sup> Bodin J, *The Six Books of the Republic remove space: Book 1*,1576, Chapter 8.

<sup>138</sup> Article 2(1), *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

enjoyed by all states and goes further to mention that states have equal rights and duties thus making them equal members of the international community.<sup>139</sup>

The concept of sovereignty, traditionally, has always been exercised in relation to a state's internal affairs and in relation to a state's external affairs. The former is usually referred to as internal sovereignty while the latter is referred to as external sovereignty.<sup>140</sup> This paper shall focus on internal sovereignty which is manifested within the state borders by affording the legislative, executive and judicial powers.<sup>141</sup> Law making activities undertaken through the relevant authorities are centralised in the hands of the state.<sup>142</sup> Therefore, a state may adopt any constitution that it sees pleasant for the organisation of its management and pass desirable laws that respect the demands of customary international law or international treaties that are obligatory to it.<sup>143</sup>

Through this dimension of territorial integrity, the provision on the right to self-determination is provided for in a state's constitution once the state sees such a provision desirable. This is the case in the constitution of Ethiopia, the constitution of Sudan, among others.

### 3.3 The effect of secession on the territorial integrity of a state

Secession in international law is not always welcome due to its threat to the principle of territorial integrity.<sup>144</sup> This is the case as a claim of external self-determination equates to a claim to a territory.<sup>145</sup> Therefore, secession is considered to dismember the territory of a state.<sup>146</sup>

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<sup>139</sup> UNGA Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, A/Res/2625 (XXV), 24 October 1970.

<sup>140</sup> <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472>

<sup>141</sup> Gevorgyan K, 'Concept of State sovereignty; Modern Attitudes' Yerevan State University Press, 2014,446-[http://www.y-su.am/files/Karen\\_Gevorgyan.pdf](http://www.y-su.am/files/Karen_Gevorgyan.pdf) on 9 September 2019.

<sup>142</sup> Gevorgyan K, 'Concept of State sovereignty; Modern Attitudes' Yerevan State University Press, 2014,442-[http://www.y-su.am/files/Karen\\_Gevorgyan.pdf](http://www.y-su.am/files/Karen_Gevorgyan.pdf) on 9 September 2019.

<sup>143</sup> Jennings R and Watts A, *Oppenheim's International Law*, 9 ed, Longmans, Harlow,1992,384.

<sup>144</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (2010)*, Advisory Opinion, 2010, para.80.

<sup>145</sup> Brilmayer L, 'Secession and Self -Determination: A Territorial Interpretation,' 202.

<sup>146</sup> Crawford J, 'State Practice and International Law in Relation to Unilateral Secession' In Bayefsky A, *Self-Determination in International Law, Quebec and Lessons Learned*, Brill Publishers, Nijhoff,2000,60.

Once a state meets the requirement of possessing a democratic government, it is entitled to protection from any action which would impair its territorial integrity.<sup>147</sup> The focus shall now be centered on the internal dimension of territorial integrity by investigating the effect of secession on the sovereignty of a state. This shall be done by looking into state actions that can justify secession claims and the effect of such secession on the sovereignty of the state.

The question that arises is whether a state's right to self-determination can be forfeited due to the denial of a right to internal self-determination. David Raic propounded that if a people's right to internal self-determination is consistently denied by a state, the people have the remedy of external self-determination thus the state forfeits its territorial integrity.<sup>148</sup> For Raic's proposition to be applicable, some conditions need to be present. It is not at all self-evident. Such conditions would include: - the people facing oppression in the form of: - subjugation, domination and exploitation, failure of the government to promote and protect human rights of its people, among others. Raic's proposition is in line with the Remedial Right Only Theory which provides that a group has a general right to secede only if it has suffered certain injustices. Therefore, secession is the last resort.<sup>149</sup> This is in line with the remedial right only theory. Hence, for a state action to lead to the occurrence of secession it must lead to the oppression of its people. This in turn prevents dismembering of states who do not violate a group's rights.<sup>150</sup>

In such a scenario, secession would be legal and thus it would not undermine the territorial integrity of the parent state.<sup>151</sup> It is therefore safe to say that, the internal dimension of the principle of territorial integrity accommodates the right to self-determination.<sup>152</sup> This is the case where a legal secession is carried in furtherance of the Remedial Right Only Theory due to a state's action that warranted the occurrence of the secession.

This is well illustrated by the secession of South Sudan from Sudan as a result of the gross human rights violations suffered by the people of South Sudan as was espoused in Chapter 2.

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<sup>147</sup> Nanda V, 'Self-Determination under International Law: Validity of Claims to Secede,' 269.

<sup>148</sup> Raic D, *Statehood and the law of Self-Determination*, 321.

<sup>149</sup> Buchanan A, 'Theories of Secession,' 34.

<sup>150</sup> Hanna R, 'Right to Self-Determination in Re Secession of Quebec,' 236.

<sup>151</sup> Sorovatskaja M, 'Right of the people to self-determination or territorial integrity' published, Tallinn University of Technology, Tartu, 2015, 36.

<sup>152</sup> Brilmayer L, 'Secession and Self -Determination: A Territorial Interpretation,' 202.

The violations included: - arbitrary arrests, forced displacement from their lands, subjection to slavery, their subjection to political and economic marginalisation, among others.<sup>153</sup>

### 3.4 Legality of secession

The legality of secession can either stem from international law or/and internal law of the state in question. Therefore, if secession is internally illegal, it can be legal in the international sphere. This explains why secession can take place without it being reflected in the constitution of a state. An example of internal legality of secession is seen in Ethiopia and Saint Kitts and Nevis whose constitutions have secession clauses. In both states, secession can take place due to both internal law and international law legality. International law legality of secession arises due to its recognition by the International Court of Justice as seen in the case *Re Secession of Quebec*.<sup>154</sup>

In addition to this, despite the legal aspects, legal limitations and legal consequences for some secessions, secession is political rather than legal. This is the case as politics of regional actors drive the process.<sup>155</sup> In addition to this, the regional actors take regional politics into consideration when formulating foreign policy regarding a secession.<sup>156</sup> The continuing political nature of secession enables it to be successful despite it not following the applicable laws of the sovereign in question.<sup>157</sup> Furthermore, the act of secession and the issues that arise ante and post are questioned as to whether they can truly be captured in legal terms to begin with.<sup>158</sup> The fact that secessionist activities have occurred in states lacking any constitutional provisions for secession shows how secession can independently function without constitutional provisions.<sup>159</sup>

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<sup>153</sup> Leo L and Prodromou E, '(Yet Another) Crisis in Sudan: Khartoum's Religious Freedom and Human Rights Abuses,' 68.

<sup>154</sup> *Re Secession of Quebec* (1998) The Supreme Court of Canada.

<sup>155</sup> Nelson E, 'Power and Proximity: The politics of State Secession' Published Bachelor's in Political Science, City University of New York, New York, 2006, iv.

<sup>156</sup> Nelson E, 'Power and Proximity: The politics of State Secession' Published Bachelor's in political science, City University of New York, New York, 2006, 40.

<sup>157</sup> Ebenroth C and Kemner M, 'The Enduring Political Nature of Questions of State Secession and Secession and the Quest for Objective Standards' 17 *University of Pennsylvania Journal of International Economic Law* 3, 1996, 803.

<sup>158</sup> Waele H, 'The Secession Conundrum-Through the Looking Glass' 11 *European Constitutional Law Review* 3, 2015, 611.

<sup>159</sup> Weinstock D, 'Constitutionalizing the Right to Secede' 9 *The Journal of Political Philosophy* 2, 2001, 8.

It is therefore safe to say that, secession being constitutionalised is not the general rule as constitutional secession rights are rare.<sup>160</sup> This is the case as the nature of a constitution is to build states and not to disintegrate states as is brought out in article 2 of the Constitution of Spain which provides for the indissoluble unity of the Spanish Nation.<sup>161</sup> Similarly, there are arguments against the constitutionalising of secession which include the following: - constitutionalising of secession would oppose the will of stability and perpetuity of the constitution because constitutionalism opposes secession; the risk of political blackmailing by the territories threatening to secede that would in turn endanger long-term governance and the creating of more serious political conflicts than the ones secession would try to face.<sup>162</sup> Lastly, constitutionalising of secession does not guarantee aversion of violence.<sup>163</sup>

However, there are states whose constitutions contain secession clauses.<sup>164</sup> In addition to this, there are states whose constitutions provide ease of amendments which would in turn provide for secession clauses. These clauses are in support of the arguments for the constitutionalising of secession which include the following:- through the constitutionalising of secession, the process of secession can commence in a non-violent way<sup>165</sup>; decisions regarding secession will be decided within the domestic realm as opposed to ambiguous international law<sup>166</sup>; constitutionalising secession is a precautionary consideration in that it prevents secessionist politics from occurring in a legal vacuum that will be more harmful compared to such politics occurring in a legal and procedural parameter<sup>167</sup>; the developing of diverse political relationships<sup>168</sup> and to prevent unilateral secession from violating the institutional premise of a constitution.<sup>169</sup>

In addition to constitutions providing for the right to secede, they establish concrete procedural rules on how to exercise it. Article 39 of the constitution of Ethiopia is an extreme expression

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<sup>160</sup> Andrem S, 'Constitutional Secession Rights, Blackmail, Threats and Multinational Democracy' 62 *Political Studies* 1, 2010,4.

<sup>161</sup> Article 2, Constitution of Spain (1978).

<sup>162</sup> Corral B and Freijedo F, 'Constitutionalizing Secession in Order to Harmonize Constitutionality and Democracy in Territorial Decentralized States like Spain' Second Ways of Federalism Conference, Bilbao,2015,6.

<sup>163</sup> Songok W, 'Constitutionalizing secession as a mechanism for conflict avoidance' unpublished, Strathmore University, Nairobi, 2016, 42.

<sup>164</sup> *Constitution of the Federal Democratic Republic of Ethiopia* (1994); *Constitution of Saint Kitts and Nevis* (1983)

<sup>165</sup> Songok W, 'Constitutionalizing secession as a mechanism for conflict avoidance' unpublished, Strathmore University, Nairobi, 2016, 40.

<sup>166</sup> Songok W, 'Constitutionalizing secession as a mechanism for conflict avoidance' unpublished, Strathmore University, Nairobi, 2016, 41.

<sup>167</sup> Andrem S, 'Constitutional Secession Rights, Blackmail, Threats and Multinational Democracy,'5.

<sup>168</sup> Andrem S, 'Constitutional Secession Rights, Blackmail, Threats and Multinational Democracy,'5.

<sup>169</sup> Haljan D, *Constitutionalising Secession*, Hart Publishing, Bloomsbury, 2015,192.

of the unconditional right to self-determination including the right to secession.<sup>170</sup> Moreover, it provides the following procedure as to how the right is to be exercised:- a demand for secession which requires the approval of two-thirds of the legislature of the nation, nationality or people wishing to secede; the federal government having up to three years to organise a referendum for the nation, nationality or people wishing to secede; a simple majority required to pass the referendum and the obligation of the federal government to negotiate the terms of the secession and transferring its power to the parliament of the nation, nationality or people that has opted for it.<sup>171</sup> From the example of Ethiopia, the right to secession is a constitutional provision wholly distinct in aim and justification and not a logical extension of the right to self-determination.<sup>172</sup>

Furthermore, article 115 of the constitution of Saint Kitts and Nevis provides the island of Nevis the right to cease being federated with the island of Saint Christopher in the event that the Nevis Island Legislature enacts a law providing the same.<sup>173</sup> The effect of the secession of the island of Nevis would include:- the constituencies in the island of Nevis ceasing to be included among the number of constituencies, vacating of seats in the National Assembly by representatives and any senator who is ordinarily a resident of the island of Nevis, among others.<sup>174</sup>

As seen in the case of Ethiopia and Saint Kitts and Nevis, the right to secession gained its legality from the constitutions of the respective states due to the secession clauses. Therefore, secession gains its legality from the constitutional provisions of the respective states that facilitate its exercise through secession clauses. The opposite is the case when it comes to Spain as the Constitution of Spain constrains secession.

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<sup>170</sup> Article 39(1), *Constitution of the Federal Democratic Republic of Ethiopia* (1994).

<sup>171</sup> Article 39(4), *Constitution of the Federal Democratic Republic of Ethiopia* (1994).

<sup>172</sup> Weinstock D, 'Constitutionalizing the Right to Secede' 9 *The Journal of Political Philosophy* 2, 2001,8.

<sup>173</sup> Article 115, *Constitution of Saint Kitts and Nevis* (1983).

<sup>174</sup> Schedule 3, *Constitution of Saint Kitts and Nevis* (1983).

### 3.5 Conclusion

The denial of the legitimacy of secessionist claims can be invoked by political considerations and legal norms. The latter may include: - *pacta sunt servanda*<sup>175</sup> and territorial integrity.<sup>176</sup> This chapter focused on territorial integrity. The aim of the principle is to maintain global peace and stability through the maintenance of boundaries.<sup>177</sup> Any measures which encourage territorial separation would be considered disruptive of the system thus unacceptable.<sup>178</sup>

Ideally, the right of a nation's preservation of its territorial integrity is to be balanced with the right of the oppressed to secede.<sup>179</sup> Thus, it is safe to say that, in accordance with international law, the principle of territorial integrity of states does not act as an obstacle to the people entitled to the right to self-determination.<sup>180</sup> The right to self-determination can, however, be conferred precedence over the principle of territorial integrity in the event that the people of the state in question are being subjected to subjugation, domination and exploitation.<sup>181</sup>

In conclusion, the safeguarding of the legal system should lead to the constitutionalising of secession. By doing so, the legal ways as to how secession can be allowed, and the control of secession will be established, and this will in turn give secession its legal status. In addition to this, secession will be in line with the internal dimension of territorial integrity.

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<sup>175</sup> The latin phrase means, agreements which are legally binding must be performed. <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449> on 9th September 2019.

<sup>176</sup> Nanda V, 'Self-Determination under International Law: Validity of Claims to Secede,' 263.

<sup>177</sup> *Reference Re Secession of Quebec* (1998) The Supreme Court of Canada, para.127.

<sup>178</sup> Nanda V, 'Self-Determination under International Law: Validity of Claims to Secede,' 264.

<sup>179</sup> Onderi E, 'Legality of the Mombasa republican council's quest for secession' unpublished, University of Nairobi, 2009,21.

<sup>180</sup> Libarona I, 'Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo,' 123.

<sup>181</sup> Nanda V, 'Self-Determination under International Law: Validity of Claims to Secede,' 270.

## **CHAPTER FOUR: THE RELIABILITY OF INDEPENDENCE REFERENDUMS**

### **4.1 Introduction**

This chapter seeks to answer the third research question as espoused upon in Chapter 1. The question is what makes an independence referendum reliable? It shall begin by looking into the legal basis of independence referendums which are: - constitutional, international agreements and unilateral.<sup>182</sup> Secondly, the chapter shall investigate the actors of an independence referendum by looking at the different levels of an agreed independence referendum process and the actors involved in each level. Thereafter, the support needed for an effective independence referendum to take place shall be investigated by looking into: - a referendum campaign, a referendum design and voter turnout and quorum. Afterwards, the independence referendum of Quebec and Scotland shall be discussed. Lastly, the chapter shall conclude by highlighting the characteristics of an independence referendum and determine whether they make such a referendum reliable.

### **4.2 Legal basis for independence referendums**

There are three bases upon which independence referendums in furtherance of secession can be legal. They are: - constitutional basis, those established by international agreements and unilateral basis.<sup>183</sup> This part of the chapter shall analyse all three legal bases.

#### **4.2.1 Constitutional based independence referendums**

Constitutional based independence referendums are rare.<sup>184</sup> Where there is a secession provision in a state's constitution, there is said to be internal legality of secession. An example of this is seen in Ethiopia, Saint Kitts and Nevis and the Union of Soviet Socialist Republics (hereinafter 'the U.S.S.R') whose constitutions have secession clauses. Article 39 of the

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<sup>182</sup> Gokhan Sen, *Sovereignty Referendums in International Law and Constitutional Law*, Springer International Publishing, Cham, 2015, 42-44.

<sup>183</sup> Gokhan Sen, *Sovereignty Referendums in International Law and Constitutional Law*, Springer International Publishing, Cham, 2015, 42-44.

<sup>184</sup> Giulia L, 'Secession and Referendum: a new Dimension of International Law on Territorial Changes?' published PHD Thesis, University of Florence, Florence, 2017, 128.

constitution of Ethiopia provides for the unconditional right to self-determination including the right to secession.<sup>185</sup> The constitution goes further to provide for the need of a referendum as part of the procedure for secession to be exercised.<sup>186</sup> Similarly, article 115 of the constitution of Saint Kitts and Nevis provides the island of Nevis the right to cease being federated with the island of Saint Christopher in the event that the Nevis Island Legislature enacts a law providing the same.<sup>187</sup> Lastly, the constitution of the U.S.S.R provides every Union Republic the right freely to secede from the U.S.S.R.<sup>188</sup>

#### **4.2.2 Independence referendums established by international agreements**

It is the most common basis upon which independence referendums take place.<sup>189</sup> In an agreed referendum process, consent is more important than legality as lack of opposition increases the likelihood of secession taking place by default.<sup>190</sup> Despite an agreed referendum process not being legally binding, it is politically binding due to its consensual nature.<sup>191</sup> It is therefore safe to say that, there are two components that need to be met for an independence referendum to qualify as an agreed independence referendum. They are: - the lack of outright opposition and the engagement of two primary actors who are the national government and the regional secessionist movement leaders.<sup>192</sup> An example of such a referendum is the Scottish independence referendum where the United Kingdom government and the Scottish government signed an agreement on 15 October 2012 that was to pave the way to the referendum taking place before the end of 2014.<sup>193</sup>

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<sup>185</sup> Article 39(1), *Constitution of the Federal Democratic Republic of Ethiopia* (1994).

<sup>186</sup> Article 39(4), *Constitution of the Federal Democratic Republic of Ethiopia* (1994).

<sup>187</sup> Article 115, *Constitution of Saint Kitts and Nevis* (1983).

<sup>188</sup> Article 17, *Constitution of the Union of Soviet Socialist Republics* (1936).

<sup>189</sup> Giulia L, 'Secession and Referendum: a new Dimension of International Law on Territorial Changes?' 128.

<sup>190</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective' Published PHD Thesis, The University of Edinburgh, Edinburgh, 2017, 6.

<sup>191</sup> Nurmi H, 'Research Design: An Exercise in Applied Social Choice Theory' 20 *Scandinavian Political Studies* 1, 1997, 33.

<sup>192</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 33.

<sup>193</sup> <https://www.cairn.info/revue-civitas-europa-2013-1-page-201.htm#> on 17 November 2019.

### 4.2.3 Unilateral based Independence referendums

Unilateral independence referendums are undertaken without consent of the host state.<sup>194</sup> As a result of this, they lack legitimacy subsequently leading to it lacking a politically binding effect.<sup>195</sup> Therefore, due to lack of a politically binding effect, a unilateral referendum is not expected to result in the creation of a new independent state regardless of the level of support given for secession to take place.<sup>196</sup> Examples of such referendums were carried out in the cases of Crimea and Catalonia.

### 4.3 Actors of an independence referendum

To begin with, it is important to discuss the levels within which an agreed independence referendum operates as there are different actors in each level. The levels include: - the international level, the state level, the sub-state level and the electorate level. The actors in each of these levels interconnect the systems of laws, norms, competing norms and dynamics in the different levels.<sup>197</sup> At the international level, the actors of an independence referendum are states and international organisations and it is governed by international law and norms. However, at the state level, the actor of an independence referendum is the national government and political parties and it is governed by the constitution of the state. At the sub-state level, the actors are the sub-national secessionist actors while at the electorate level, the actors are voters and political cleavages. These actors will have varying degrees of legitimisation power over the independence referendum process.<sup>198</sup>

At the state level, the national government or the host-state government may consent to an independence thus opening the possibility of secession due to the following reasons:- the government has reasons to believe there is an unlikely majority support for secession that is, the 'it won't happen approach'; fighting to keep the region attempting to secede is deemed not

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<sup>194</sup> Onderi E, 'Legality of the Mombasa republican council's quest for secession' unpublished, University of Nairobi, 2009,28.

<sup>195</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 41.

<sup>196</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 44.

<sup>197</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 31.

<sup>198</sup> Quinlan P, 'A Foot in Both Camps: Moldova and the Transnistrian Conundrum from the Kozak Memorandum' 42 *East European Quarterly* 2, 2008, 129.

to be worth it and refusing being deemed to be too costly.<sup>199</sup> The risk of such a government granting an independence referendum can be dangerous as it sets an important precedent that would make it difficult to contest the holding of an independence referendum in the future. This is similar to concessions made by a state to separatist groups.<sup>200</sup>

At the sub-state level, actors need to have places to hold the vote, print ballots and campaign for people to go and vote.<sup>201</sup>

At the electorate level, the question that arises is who can vote? Citizens of the host state living in the secessionist region are legible to vote as they are the core of the electorate. Non-citizens in the secessionist region are another group of people who can be considered to be part of the electorate due to residency. The final group of people who may be included in the electorate are the citizens of the host state who live in another state or in another part of the host state who can be considered to be part of the electorate due to nationality.<sup>202</sup> An additional question that arises is who among the leaders in the host state decides who votes? By excluding a certain group from voting, means the group is not bound by the referendum results.<sup>203</sup>

## 4.4 Support for secession

### 4.4.1 Referendum design and Referendum Campaign

Referendum design is all about who can campaign for the referendum process and how to mobilise voters.<sup>204</sup> It can thus make a difference to the referendum outcome especially the campaign and the quorums.<sup>205</sup> Research campaign on the other hand, is used to achieve a

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<sup>199</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 56.

<sup>200</sup> Walter B, 'Why Governments Fight Some Separatists but Not Others' 50 *American Journal of Political Science* 2, 2006, 315.

<sup>201</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 48.

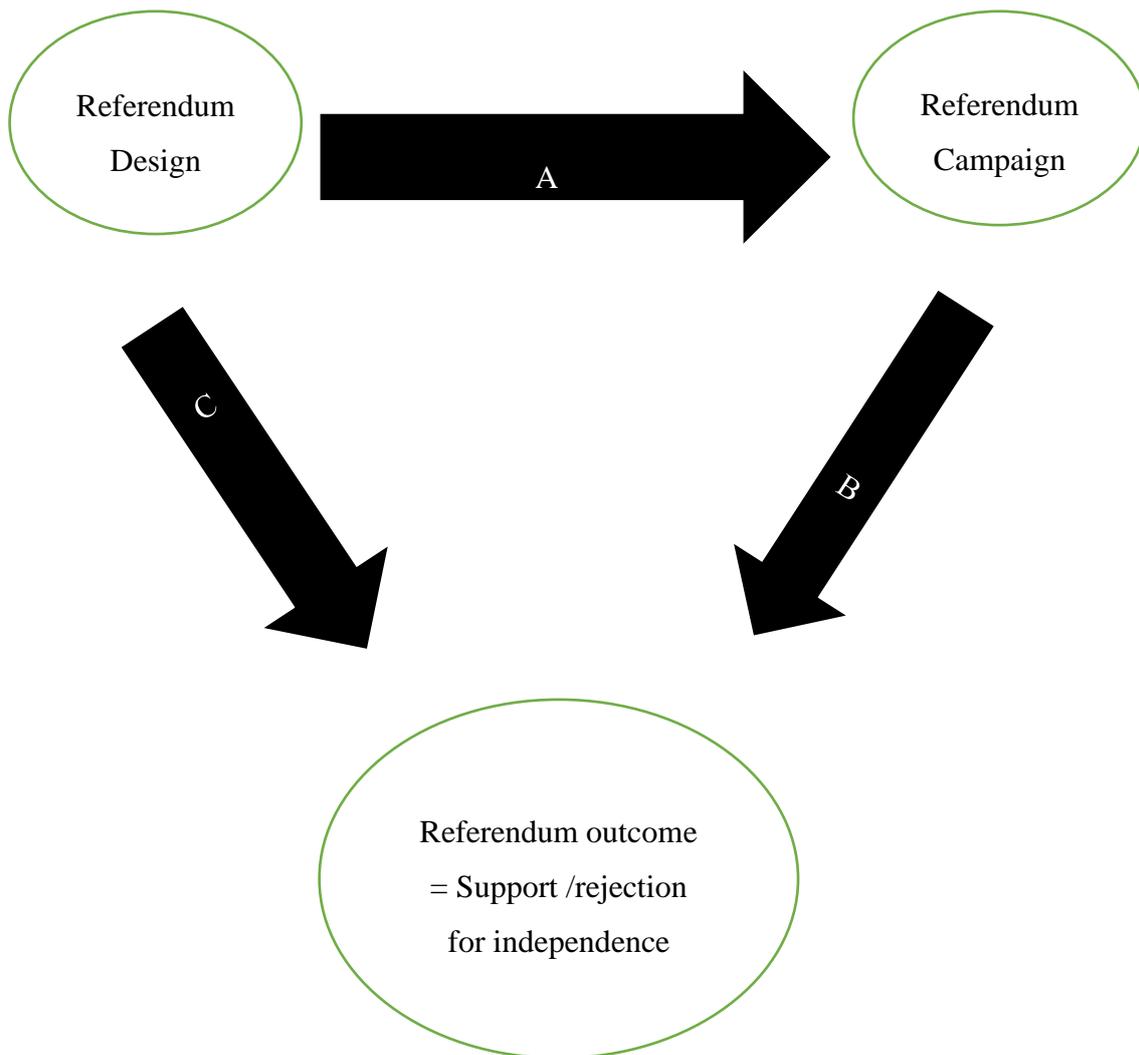
<sup>202</sup> Ziegler R, Shaw J and Baubock R, 'Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?' European University Institute, Paper number RSCAS 2014/90,45 - [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2494832](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494832) on 30 September 2019.

<sup>203</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 70.

<sup>204</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 73.

<sup>205</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 6.

qualifying majority. Therefore in the event that there is no majority support for secession, a referendum campaign will be used to breach the gap in order to achieve a qualifying majority.<sup>206</sup> It is also worth noting that, the most important actors involved in the referendum design and campaign are: - political elites; civil society; the media and the electorate.<sup>207</sup>



The diagram above is an illustration of an independence referendum process.<sup>208</sup>

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<sup>206</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 45.

<sup>207</sup> Vreese C, 'Context, elites, media and public opinion in referendums: Why campaigns really matter' in Vreese C *The dynamics of referendum campaigns in international perspective*, Palgrave Macmillan, London,2007,7.

<sup>208</sup> In the diagram above, A shows that a referendum design determines who the referendum campaign can mobilise as electorates and how; B demonstrates that the referendum campaign ensures electorate mobilisation that in turn affects the referendum outcome through the support they provide and C shows that the research design directly determines who supports the referendum and how much support is needed. The support given is directly

#### 4.4.2 Turnout and quorum

Turnout rate is extremely important in assessing the true level of support or lack of support.<sup>209</sup> Quorum requirements provide that a referendum will only be valid if a said percentage of the eligible electorate turns up to the polls.<sup>210</sup> A low turnout is seen as a threat to the legitimacy of a referendum process.<sup>211</sup> If the turnout is low, the referendum process will fail due to lack of quorum and the status quo will remain as it is.<sup>212</sup> A high turnout is therefore needed in order to change the status quo.

If a majority supports secession through the independence referendum, the host state may accept the exercise of secession.<sup>213</sup> The question that arises is which majority should be required for secession to be exercised? Allen Buchanan thinks that a three-quarter majority should be required.<sup>214</sup> Daniel Weinstock on the other hand, supports a supermajority without specifying which percentage should support secession.<sup>215</sup>

Lack of enough support may, therefore, lead to secessionists giving up or postponing their demand for independence.<sup>216</sup>

### 4.5 Independence referendum of Quebec and Scotland

#### 4.5.1 Independence referendum of Quebec

Parti Quebecois as the government formed by the secessionist (Quebec) organised two independence referendum in 1980 and 1995.<sup>217</sup> Both referendums were broad in nature and

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proportionate to the referendum outcome. This is as cited by Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 60.

<sup>209</sup> Baogang He, 'Referenda as a Solution to the National-Identity/Boundary Question: An Empirical Critique of the Theoretical Literature' 27 *Alternatives: Global, Local, Political* 1, 2002,78.

<sup>210</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 71.

<sup>211</sup> Qvortrup M, *A Comparative Study of Referendums: Government by the People*, Manchester University Press, Manchester, 2002,164.

<sup>212</sup> Herrera H and Mattozzi A, 'Quorum and Turnout in Referenda' *Social Science Research Network*, 2006, 3-[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003803](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003803) on 1 October 2019.

<sup>213</sup> Antic M, 'Procedure for Secession' 44 *Political Thought* 3, 2007, 154.

<sup>214</sup> Buchanan A, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Westview Press, Boulder, 1991, 100.

<sup>215</sup> Weinstock D, 'Constitutionalizing the Right to Secede,' 197.

<sup>216</sup> Antic M, 'Procedure for Secession,' 154.

<sup>217</sup> Lecours A, 'The two Quebec independence referendums: Political strategies and international relations' *Barcelona Centre For International Affairs*, 63-

anchored into the development of Quebecois nationalism.<sup>218</sup> Quebec nationalism wanted the improvement of the minority and second-class citizens in Canada and in Quebec.<sup>219</sup>

#### 4.5.1.1 The 1980 independence referendum

The question of the 1980 independence referendum question was long and complex.<sup>220</sup> According to Quebec legislation, victory was achieved by obtaining an absolute majority of the votes or 50% plus one.<sup>221</sup> To achieve this victory, a referendum campaign was launched on 15<sup>th</sup> April 1980.<sup>222</sup> Below is a table reflecting the results of the 1980 Quebec independence referendum.<sup>223</sup>

Results of the 1980 Quebec independence referendums		
	Total	Per cent
No option	2,187,991	59.56%
Yes option	1,485,851	40.44%
Total valid ballots	3,673,842	98.26%
Majority in favour of the no option	702,140	11.91%

[https://www.cidob.org/en/articulos/monografias/secession\\_and\\_counter\\_secession/the\\_two\\_quebec\\_independence\\_referendums\\_political\\_strategies\\_and\\_international\\_relations](https://www.cidob.org/en/articulos/monografias/secession_and_counter_secession/the_two_quebec_independence_referendums_political_strategies_and_international_relations) on 1 October 2019.

<sup>218</sup> Balthazar L, *Nouveau bilan du nationalisme au Quebec*, VLB Editeur, 2013,317 as cited by Lecours A, 'The two Quebec independence referendums: Political strategies and international relations' *Barcelona Centre For International Affairs*, 64-

[https://www.cidob.org/en/articulos/monografias/secession\\_and\\_counter\\_secession/the\\_two\\_quebec\\_independence\\_referendums\\_political\\_strategies\\_and\\_international\\_relations](https://www.cidob.org/en/articulos/monografias/secession_and_counter_secession/the_two_quebec_independence_referendums_political_strategies_and_international_relations) on 1 October 2019.

<sup>219</sup> Rocher F, 'Self-determination and the Use of Referendums: the Case of Quebec' *27 International Journal of Politics, Culture and Society* 1, 2014,27.

<sup>220</sup> Rocher F, 'Self-determination and the Use of Referendums: the Case of Quebec,' 29.

<sup>221</sup> Rocher F, 'Self-determination and the Use of Referendums: the Case of Quebec,' 30.

<sup>222</sup> Rocher F, 'Self-determination and the Use of Referendums: the Case of Quebec,' 31.

<sup>223</sup> Quebec: Directeur general des elections, 2001,39.

On 20<sup>th</sup> May 1980, nearly 60% of the electorate voted no towards the independence of Quebec. The electorate was diverse in terms of language, age, employment sector and education. However, 48% of Francophones and 5% non-francophones supported the yes option.<sup>224</sup>

#### 4.5.1.2 The 1995 independence referendum

The question of the 1995 independence referendum was, ‘Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed on 12 June 1995? Yes or no’<sup>225</sup> It is worth noting that the same argument used during the 1980 referendum campaign was raised in the 1995 referendum campaign.<sup>226</sup> In addition to this, similar to the 1980 independence referendum process, victory was to be achieved by obtaining an absolute majority of the votes or 50% plus one.<sup>227</sup>

Below is a table reflecting the results of the 1980 Quebec independence referendum.<sup>228</sup>

Results of the 1995 Quebec independence referendums		
	Total	Per cent
No option	2,308,360	79.42%
Yes option	2,362,648	50.58%
Total valid ballots	4,671,008	98.18%
Majority in favour of the no option	54,288	1.16%

<sup>224</sup> Rocher F, ‘Self-determination and the Use of Referendums: the Case of Quebec,’ 32.

<sup>225</sup> Rocher F, ‘Self-determination and the Use of Referendums: the Case of Quebec,’ 37.

<sup>226</sup> Rocher F, ‘Self-determination and the Use of Referendums: the Case of Quebec,’ 38.

<sup>227</sup> Smith B, ‘The Quebec referendums’ House of Commons Library, Research Paper Number 13/47, 2013, 35 - <http://researchbriefings.files.parliament.uk/documents/RP13-47/RP13-47.pdf> on 17 November 2019.

<sup>228</sup> Quebec: Directeur general des elections, 2001, 54.

The 1995 independence referendum is referred to as ‘the referendum nobody won’ as there was a small margin of the per cent results of the no option and the yes option.<sup>229</sup> This is likely to give way to a third independence referendum as Quebec’s sovereignty is inevitable and thus the fight continues.<sup>230</sup>

#### **4.5.2 Independence referendum of Scotland**

On 18<sup>th</sup> September 2014, Scotland held an independence referendum to decide on whether it would be an independent country.<sup>231</sup> Due to the belief by the people that there is a right to secede, there is a legal framework to do so through a referendum.<sup>232</sup> The government of the United Kingdom therefore, worked closely with the secessionists on how the referendum would take place by figuring out the details and logistics of its occurrence.<sup>233</sup> The referendum question was ‘Should Scotland be an independent country? Yes or no?’<sup>234</sup> The results were 44.7% in favour of independence and 55.3% opposed to independence. Despite the defeat in the referendum, the support for independence has remained high.<sup>235</sup>

#### **4.6 Features of an independence referendum**

The following features are necessary for an independence referendum process: - a short and simple independence referendum question, a clear definition of the required turnout, a clear definition of the electorates who can take place in the referendum process and a majority requirement for a victory in the process. This part of the dissertation shall delve into the four proposed features.

To begin with, the referendum question ought to be short and simple. The need for this to ensure it is free of any ambiguity and it is understood by all electorates taking part in the

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<sup>229</sup> Clarke H and Kornberg A, ‘Choosing Canada? The 1995 Quebec Sovereignty Referendum’ 9 *Political Science and Politics* 4, 1996,681.

<sup>230</sup> Remond A, ‘Questioned Sovereignties: Independence Referendums and Secession in a Comparative Perspective,’ 244.

<sup>231</sup> Wilden B, ‘Independence Referendum: An Analysis of Central Government Decision Making’ published, University of California, San Diego, 2018, 19.

<sup>232</sup> Remond A, ‘Questioned Sovereignties: Independence Referendums and Secession in a Comparative Perspective,’ 13.

<sup>233</sup> Wilden B, ‘Independence Referendum: An Analysis of Central Government Decision Making,’ 10.

<sup>234</sup> *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, Edinburg, 2012.

<sup>235</sup> Wilden B, ‘Independence Referendum: An Analysis of Central Government Decision Making,’ 19.

process. The referendum question of the 1980 independence referendum of Quebec was long and complex; however, the referendum question of the 1995 independence referendum of Quebec was short and simple. The former is not only difficult to dissect, but it also contains complex language that would not be considerate for any illiterate electorate. Therefore, with the existence of a short and simple referendum question, it will be understandable by a majority of people in a society despite their diverse level of education. As a result of a short and simple referendum question, the freedom of voters can be fulfilled.<sup>236</sup>

Secondly, a clear definition of the required turnout is necessary. Through this, the will of the people is protected and promoted. The Venice Commission, in its opinion stated that, there is no international binding standards concerning the minimum turnout.<sup>237</sup> It is worth noting that, turnout directly affects the size of the majority. This is the case as, when there is a low turnout, the size of the majority is small and subsequently, the independence referendum process will be unsuccessful.<sup>238</sup> Therefore, there is a need for a defined turnout for an independence referendum process. This will ensure a low turnout is avoided and subsequently, the referendum does not fail as a result of a low turnout. In addition to this, there will be no doubts regarding the implementation of the results of the referendum.<sup>239</sup> The Venice Commission opinion provides that a minimum turnout of 50% is in compliance with the principle of democracy.<sup>240</sup> This paper sides with the opinion mentioned beforehand and provides the need of a 50% minimum turnout for an independence referendum process.

Thirdly, a defined majority for a victory in the independence referendum process is necessary. The Venice Commission, in its opinion stated that, there is no international binding standards

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<sup>236</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro concerning the organization of Referendums with Applicable International Standards*, CDL-AD (2005)041, 19 December 2005. As cited by Giulia L, 'Secession and Referendum: a new Dimension of International Law on Territorial Changes?' published, University of Parma, Parma, 2017, 190

<sup>237</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro concerning the organization of Referendums with Applicable International Standards*, CDL-AD (2005)041, 19 December 2005. As cited by Giulia L, 'Secession and Referendum: a new Dimension of International Law on Territorial Changes?', 191.

<sup>238</sup> <http://www.democraticaudit.com/2019/03/13/how-turnout-majority-size-and-outcome-affect-whether-citizens-think-the-result-of-an-eu-referendum-should-be-implemented/> on 17 November 2019.

<sup>239</sup> <http://www.democraticaudit.com/2019/03/13/how-turnout-majority-size-and-outcome-affect-whether-citizens-think-the-result-of-an-eu-referendum-should-be-implemented/> on 17 November 2019.

<sup>240</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro concerning the organization of Referendums with Applicable International Standards*, CDL-AD (2005)041, 19 December 2005. As cited by Giulia L, 'Secession and Referendum: a new Dimension of International Law on Territorial Changes?', 191.

regarding the applicable majority in a referendum process.<sup>241</sup> With this, there is a lack of uniformity in the international sphere as to the majority that in turn leads to a successful independence referendum. The size of a majority ranges from a narrow majority which is 51%, a clear majority which is 55%, supermajorities which are 67% (two-thirds) or three-quarters (75%).<sup>242</sup>

Lastly, a definition of the electorates that can take place in the referendum process needs to be provided. The possible electorates include: - persons from the host state and persons from the state seeking to secede. This paper provides for the need of both parties granted the right to vote, therefore leading to the interests of the host state and the state seeking to secede being represented equally.

#### 4.7 Conclusion

The primary function of an independence referendum is to legitimise secession.<sup>243</sup> It is therefore safe to say that, holding an independence referendum doesn't guarantee secession unless it is consented to. With consent being present, the host-state acknowledges the right of the people to secede consequently leading to a majority support.<sup>244</sup> Due to lack of characteristics needed for an independence referendum to be reliable, a benchmark needs to be created in order to ensure uniformity in the process through specific characteristics. The characteristics that should be present in an independence referendum thus triggering a legitimate secession include:- a short and simple independence referendum question that is understandable by a majority of people in a society depending on their level of education, defining the electorates who can take place in the referendum process, defining the majority requirement for a victory in the process and defining the turnout requirement of the process. With such characteristics that ensure uniformity of independence referendums, the results of such referendums will be sound.

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<sup>241</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro concerning the organization of Referendums with Applicable International Standards*, CDL-AD (2005)041, 19 December 2005. As cited by Giulia L, 'Secession and Referendum: a new Dimension of International Law on Territorial Changes?', 191.

<sup>242</sup> Arnesen S, Broderstad T, Johannesson M and Linde J, 'Conditional legitimacy: How turnout, majority size, and outcome affect perceptions of legitimacy in European Union membership referendums' 20 *European Union Politics* 2, 2019, 187

<sup>243</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 32.

<sup>244</sup> Remond A, 'Questioned Sovereignities: Independence Referendums and Secession in a Comparative Perspective,' 44.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 Introduction

This paper investigates the complexities of secession as a result of the independence referendum process. The first chapter introduced this paper, and by doing so, brought out the significance of the study conducted with the goal of achieving the research objectives and addressing the research questions. This paper eventually brought out the convoluted nature of an independence referendum process due to the lack of precise features of the process. Approximately sixteen states have managed to secede successfully over the years.<sup>245</sup> There is, however, lack of uniformity with regards to how these states have seceded. There is therefore a need to ensure precise features of an independence referendum process in order to ensure uniformity. The existence of these features is not enough. Further solutions need to be sought.

Based on the findings in Chapter 2, the right to self-determination can be exercised either internally or externally. The former can lead to the former if certain conditions are met such as oppression of people in a state, failure of the government to promote and protect the rights of the people in the state, among others. The latter can, however, occur independently with the fulfilment of three requirements:- the existence of a people forming a majority within a part of the territory of the parent state despite them being a minority in the rest of the population of the parent state, the people must be exposed to serious grievances in the form of a serious infringement or denial of the right to internal self-determination or grave and prevalent violation of fundamental human rights and lastly, there must not be further realistic and effective remedies for the peaceful settlement of the conflict.<sup>246</sup>

Based on the findings in Chapter 3, the legality of secession is not pegged on whether it tampers with the territorial integrity of a state. The legality of secession stems from both the internal laws of a state and international law. Lastly, based on the findings in Chapter 4, there is a need of clear features of an independence referendum process that will in turn lead to its uniformity. They include:- a short and simple independence referendum question that is understandable by a majority of people in a society depending on their level of education, defining the electorates

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<sup>245</sup> Qvortrup M, 'Referendums on Independence' 85 *The Political Quarterly* 1,2014,59.

<sup>246</sup> Dugard J and Raic D, 'The role of recognition in the law and practice,' 109.

who can take place in the referendum process, a majority requirement for a victory in the process and a set turnout for the referendum process.

This dissertation hopes that the recommendations it will make below will pave the way when it comes to a uniform independence referendum internationally with the aid of the features provided for in Chapter 4.

## **5.2 Recommendations**

### **5.2.1 Setting a threshold for successful secession**

A threshold must be met for a state to successfully secede thus ensuing uniformity in the exercise of secession. The threshold should contain the following requirements:- people in a state must inform the government of any violations of their human rights; failure of the government to protect their human rights shall grant the people standing to seek to secede by expressing their interest to the host state by providing evidence of the violation of their human rights; carrying out an independence referendum process with the required features in order to get consent to secede from the mother state; once consent is granted the people can successfully secede. Failure to meet this threshold shall act as a barrier for secession to take place.

### **5.2.2 The presence of all features in an independence referendum process**

Once the threshold above has been met, there will be a need to ensure the features proposed in Chapter 4 are present. That is:- a 50% turnout of electorates, a minimal majority(51%) for the referendum process to be successful, there ought to be a short and simple referendum question and two parties to be considered as electorates( persons from the host state and persons from the state seeking to secede)

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