CONSTITUTIONALIZING SECESSION AS A MECHANISM FOR CONFLICT AVOIDANCE

SONGOK WINNIE CHEMUTAI

072277

DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR OF LAWS DEGREE

STRATHMORE UNIVERSITY

STRATHMORE LAW SCHOOL

MARCH 2016

Declaration of originality form

I, Songok Winnie Chemutai, declare that this study is my original work and has not been submitted elsewhere for examination, publication or award of a degree.

I understand what plagiarism is and I am aware of the university's policy regarding the matter. Where other people's work has been used this has been properly acknowledged and cited in accordance with the university's requirements.

I understand that any false claim in respect of the work shall result in disciplinary action.

Signature: Songok Winnie Chemutai

WCS

Submitted to Strathmore University with approval of supervisor.

Signature: Humphrey Sipalla

11 April 2016

Acknowledgements

I thank my family and friends for the support they have shown me whilst undertaking this project. I am most grateful to Mr. Sipalla for the guidance and insight he provided into this study.

Table of Contents

Abstract

The right to secede is most often based on the right to self-determination as espoused in the United Nations Charter of 1945. The realisation of this right can be either external or internal. External self-determination is often regarded as the last resort, where a people move to declare their own state. The internal aspect on the other hand regards practice of autonomy by a people within the boundaries of another state. The practice of self-determination by a people has been perceived as a major threat to the principle of territorial integrity of a state. It is this perception that has resulted in drawn out armed conflicts over seceding territories. It is based on this problem, the threat of violence in secessions to international peace and security, that there is need to generate a pacific solution. The best way this problem can be addressed is for governments to recognise that self-determination of peoples is an important right and to cater for it adequately by providing for it in the domestic constitution, so that self-determination becomes a constitutional right. Through the constitution, formal procedures of consultation can be outlined, the specific criteria that need to be met by a group claiming self-determination and a cogent negotiation process. Having studied countries that have constitutionalized secession, it is not always true that because of its legal recognition, secession has ceased to be a violent process. A peaceful secession only happens when the government recognizes the will of the people and accepts political divorce. It is not always that constitutional rights are adhered to. A peaceful secession fundamentally requires political will.

CHAPTER I: INTRODUCTION

1.1 Background to Study

Secession is a method through which new states are created. There exist varying definitions of this phenomenon, one of them being James Crawford's who posits it as 'creation of a State by the use or threat of force without the consent of the former sovereign.'[1] However, this definition falls short for the reason that it does not fathom that secession could be a peaceful process.[2] Tir aims to provide a more wholesome explanation by defining it as 'an internally motivated division of a country's homeland territory that results in the creation of at least one new independent state with full sovereign rights and legal recognition by the international community-and leaves behind the now territorially smaller rump state.'[3] The latter definition I find more suitable because it acknowledges that secession can be a peaceful process.

More often than not, secessions generate secessionist conflicts that can be extremely violent.[4] History is replete with instances of violent secessions, often at a huge cost in terms of lost lives in armed conflict.[5] The American Civil War resulted in the deaths of an estimated 1,030,000.[6] The secession of Biafra from Nigeria caused deaths of more than a million people, mostly from artificial starvation strategy employed by Nigerian forces.[7] The Nagorno-Karabakh conflict still prevails, the basis being contested claims over the region by both Armenia and Azerbaijan.[8]

---

[1] Crawford J, *Creation of States under international law*, Oxford University Press, 2007, 375.
[2] Tir J, 'Keeping the peace after secession: territorial conflicts between rump and secessionist states' *The Journal of Conflict Resolution*, Vol. 49, No. 5 2005, 720.
[3] Tir J, 'Keeping the peace after secession: territorial conflicts between rump and secessionist states', 714.
[4] 'Secessionist conflicts account for the deaths of tens of millions, not to mention the rape, torture, and disfigurement of millions more.'
Siroky D, 'Secession and survival: nations, states and violent conflict', unpublished PhD thesis, Duke University, 2009, 1.
[5] Bordignon M, Brusco S,'Optimal secession rules', *ZEW Discussion Papers No. 99-51*(1999), 2.
[6] https://web.archive.org/web/20070711050249/http://www.cwc.lsu.edu/other/stats/warcost.htm on 15 February 2015.
[7] http://www.blackpast.org/gah/nigerian-civil-war-1967-1970 on 16 February 2015.
[8] http://stream.aljazeera.com/story/201408071254-0024028 on 16 February 2015.

During secession the metropolitan state loses a portion of territory it previously controlled to the secessionist state and may want all or a section of it back.[9] It may have territory that is valuable strategically or economically, which may severely compromise its power base.[10] One of the reasons Nigeria was against the existence of Biafra was due to the fact that Biafra possessed oil wells and the strategic city of Port Harcourt.[11]

It is because of such violent outcomes that federal states need to reconsider the right to secession. The right to self-determination by peoples[12] is more often than not the rudder that guides the ship of secession. It is incumbent upon governments to realise that this right can be exercised legitimately by a people.[13] Therefore such governments should take into account measures that should reduce the cost of the breakup of a federation[14] and avoids the occurrence of armed conflict.

A possible solution is the inclusion of a provision regarding the right to secede in the constitution, as that of Ethiopia.[15]Such provision should not limit the circumstances under which secession can occur.[16] The constitutional provision needs to specify ground rules for

---

[9] Tir J, 'Keeping the peace after secession: territorial conflicts between rump and secessionist states', 716.
[10] Tir J, 'Keeping the peace after secession: territorial conflicts between rump and secessionist states',717.
[11] http://www.worldsocialism.org/spgb/socialist-standard/2000s/2008/no-1246-june-2008/nigeriabiafra-and-oil on 16 February 2015.
[12]Articles 1 and 55, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI; Article 1, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993; UNGA, *Declaration on the granting of independence to colonial countries and peoples*, UN A/Res/1514 (XV) 14 December 1960.
[13] 'No people and no part of a people shall be held against its will in a political association that it does not want.' Mises L, *Nation State and Economy*, Institute for Humane Studies, 1983,34; 'A government must derive its legitimacy from the consent of the governed.' McGee R, 'The theory of secession and emerging democracies: a constitutional solution', *Stanford Journal of International Law* Vol. 28 (1998), 451.
[14]Bordignon *et al* ' Optimal secession rules', 2.
[15] Article 39, Constitution of the Federal Republic of Ethiopia (1995).
[16]'... that secession is only justifiable on grounds of injustice. But that assumption begs one of the most important questions a normative theory of secession must address. One cannot simply dismiss without argument the possibility that there can be circumstances under which a group living within the jurisdiction of the state may reasonably seek to achieve political autonomy for a quite different reason: to be able to express and sustain values other than, though not opposed to, justice, such as a distinctive conception of community or a particular conception of the religious life. Suppose, for example, that a group is committed to achieving face-to-face, direct participatory democracy of the sort that Rousseau lauded.' See Buchanan A, 'Towards a theory of secession', *University of Chicago Press*, (1991), 325.

secession such as the size of the seceding group[17] and formal procedures to agree on territorial boundaries. Such a provision may go a long way in reducing the occurrence of violent conflict that unnecessarily claims lives and wastes economic resources.

1.2 Statement of Problem

The aim of my research is to critically investigate how a constitutional provision that allows for secession in a federal state can lead to avoidance of armed conflict during and after secession.

1.3 Statement of Objectives

My research aims to meet the following objectives:

i) To understand the right of self-determination and the right to secede.

ii) To explore the root causes of secessionist conflict through use of case studies of instances of such occurrences.

iii) To realise the extent-through comparative analysis- to which constitutional frameworks allowing for secession can go in averting occurrence of secessionist conflict.

[17] 'Group should be large enough to form an administrative unit.' McGee R, 'The theory of secession and emerging democracies: a constitutional solution', 472.

1.4 Literature Review

This review is divided into two parts: the examination of the right to self-determination and secession as well as the examination of Ethiopia and the former Yugoslavia's constitutional provisions allowing for secession.

1.4.1 Right to self-determination and secession

Crawford (2007), in examining secession, posits that any secessionary government possesses the general support of its people and can legitimately advance such interests despite forcible denial by the rump state.[18] He advances the position that a people's right to self-determination entitles them to cut ties with the metropolitan state. It is however inevitable, in his opinion, that conflict will occur.[19]

Klabbers (2006) contends that self-determination is a controversial right[20] which appeals to a people's sense of democracy and subsidiarity.[21] It is however unfortunate that along with it comes instability and disorder.[22] Indeed, the right to self-determination appeals to both democratic and lofty ideals as well as separatist and isolationist tendencies. It is for this reason, he contends, that burden should not be placed on the shoulders of international courts which have lukewarmly responded to issues of secession.[23] International courts in confronting issues of secession have separated the right to self-determination from the right to secede, or have declined to regard the right to self-determination as an enforceable right;[24] It is here that there exists a conundrum as to whether self-determination is a right or a mere principle of international law.

---

[18] Crawford J, '*Creation of states under international law*', 383-384.
[19] Crawford J, '*Creation of states under international law*', 375.
[20] Klabbers J, 'The right to be taken seriously: self-determination in international law', *Human Rights Quarterly, Vol. 28, No. 1* (2006) ,186.
[21] '...government for the people and by the people.' Klabbers J, 'The right to be taken seriously: self-determination in international law', 187.
[22] Klabbers J, 'The right to be taken seriously: self-determination in international law',187.
[23] Klabbers J, 'The right to be taken seriously: self-determination in international law', 191.
[24] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 1971 ICJ 16 (21 June), par. 52.

Buchanan (1991) considers the right of self-determination to be synonymous with the right to secede.[25] Despite this affirmation, he recognises that there is a difficulty that pervades the definition of 'peoples' in respect of this right. An additional problem compounding the practicality of the right to secede is the willingness of the rump state to cede territory without confrontation. Hetcher (1992) concurs with this view, observing that geopolitical realities limit a state's capability or willingness to cede territory.[26] It is at this point that Siroky (2009) observes that secessionist conflict is inevitable.[27]

Despite the inevitability of conflict, Kurrild-Klitgaard (2002) gleaning from an economic perspective offers that having a constitutional exit clause can go a long way in reducing the occurrence or casualties of secessionist conflict.[28] The author argues that having an exit clause shields the individual from high external costs (loss of life or property).[29]

1.4.2 The Ethiopian and Yugoslavian situation

Ethiopia is currently the only state in the world that has a constitutional provision allowing for secession. In this study I will explore the reasons behind having secession as a constitutional right and the mechanisms put in place to ensure its compliance in case the right is invoked. In comparison, I will analyse the same issues with respect the former Yugoslavia whose constitution also allowed for secession and its implications thereof.

Having regard to the difficulties and possible tensions of secession, Sunstein (1991) recognises that if a constitution allows for break away, the governments have the responsibility to ensure that there are institutions in place to vindicate such a right.[30] Habtu

---

[25] Buchanan A, 'Toward a theory of secession', 324.
[26] Hetcher M., 'The dynamics of secession', *Sage Publications Ltd.*, (1992), 278.
[27] Siroky D, 'Secession and survival: nations, states and violent conflict', 276.
[28] Kurrild-Klitgaard P, ' The constitutional economics of exit', *American Journal of Economics and Sociology Vol. 61, No. 1*, (2002) , 124.
[29] Kurrild-Klitgaard P, ' The constitutional economics of exit', 140.
[30] Sunstein C, 'Constitutionalism and secession', *The University of Chicago Law Review*, (1991), 647.

(2005) explains that ethnic diversity and past political tensions were the main motivators behind the secession clause in the Constitution.[31] Moreover, there exist no limitations as to what reason a group that would wish to secede may claim.[32] He also recognises that there exist no institutional or political goodwill measures on the part of government to ever allow a group to break away from the state.[33]

1.5 Chapter Summary

This study will have the following segments:

Part I will seek to examine the right to secede as well as the right of self-determination. Here I endeavor to understand whether these two rights are mutually exclusive.

Part II will be a comparative segment that seeks to showcase the Ethiopian and former Yugoslavian constitutions that had provisions allowing for secession. I endeavor to understand the motivation behind such a provision, and its impact on the political situation on the countries to be studied. This section also seeks to explore the guarantees or mechanisms put in place to effect secession. This section also seeks to explore the practicality of having such a constitutional provision and whether there have been any attempts to secede since the promulgation of the 1995 Ethiopian Constitution.

Part III will seek to demonstrate the link between secession and constitutionalism.

Part IV seeks to link material discussed in the preceding chapters and understand how such a constitutional guarantee can reduce occurrences of violent secessions and instead a civilized mode of agreement to split territory. In applying this theory, I shall focus on current

---

[31] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', *Oxford University Press*, 313- 325.

[32] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 327.

[33] "The secession clause has a symbolic value, but it is unlikely that any regional state or ethnic group will actually be permitted to secede from Ethiopia. Federal soldiers and police regularly take measures against ethnic organizations fighting for secession. Currently, for example, the national government is battling armed combatants of the OLF who are apparently bent on secession."
Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 329.

situations where attempts of secession are underway or imminent. The aim here is to understand if, applied to these situations, a constitutional provision would dramatically alter the possibility of a secessionist conflict.

1.6 Scope and Limitations of Study

This study will focus on issues of statehood and self-determination. However, owing to the broadness of the question and states explored, it will be limited to desktop research.

1.7 Methodology

In conducting this study, I shall rely on extensive literature review consisting of primary and secondary sources along with case studies.

Primary sources include the Constitution of Ethiopia 1995, international treaties and conventions, and United Nations General Assembly decisions and the International Court of Justice decisions regarding secessions or secessionist conflict.

Secondary sources will consist of writings by scholars on the issue of secession and secessionist conflict around the world. I shall use credible books and journals.

I shall also employ the use of case studies in this dissertation. The intention is to highlight the prevalence of conflict in situations of secession or attempted secession. I shall use occurrences of secession in the former Yugoslavia and Ethiopia.

CHAPTER II: THEORETICAL FRAMEWORK

This chapter explores the question of what it means to have a secession right entrenched in a federal state's constitution. In that regard I will explore theoretical justifications and objections against constitutionalizing secession. It also explores if it is best that laws regulating secession should be in the aegis of domestic law as opposed to public international law.

2.1 Constitutionalizing secession

Kreptul[34] and Tesfaye[35] approach the issue of constitutionalizing secession dialectically with pertinent questions that will be relevant for this study. Should secession be constitutionalized? If so, what should be the limits of the right? Moreover, what should be the nature of the right: procedural or substantive? These questions guide the discussion that follow in this chapter.

2.2 Secession and constitutionalism

At first glance it may appear that the two concepts of law are alien to each other as observed by Jovanovic.[36] Traditionally, state constitutions have been emphatic on the need to preserve existing boundaries: an ode to the principle of territorial integrity.[37] The Council of Europe, in a study carried out among European states as well as South Africa, found that national constitutions impliedly prohibited secession by use of language.[38] Terms popularly used were such as indivisibility of the state,[39] state unity or national unity,[40] and territorial integrity.[41] In contrast, the principle of self-determination is more favored although on limited terms.[42] The

---

[34] Kreptul A, The constitutional right of secession in political theory and history', *Journal of Libertarian Studies,* (2003), 41.

[35] Tesfaye H, 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity', *Ethiopian News*, 20 November 2010 http://www.ethiopian-news.com/ethiopia-right-of-secession-as-tool-to-protect-territorial-integrity/ on 11 December 2015.

[36] Jovanovic M, 'Can constitutions be of use in the resolution of secessionist conflicts?', *Journal of International Law and International Relations*, (2009), 63.

[37] Jovanovic M, 'Can constitutions be of use in the resolution of secessionist conflicts?', 63.

[38] Venice Commission, 'Self-determination and secession in constitutional law', Report adopted by the Venice Commission on 11 December 1999, 3-4.

[39] 'The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions of which make it is composed.'
Article 2, *Constitution of Spain* (1978).

[40] 'All spheres of government and all organs of state within each sphere must preserve the peace, national unity and the indivisibility of the Republic.'
Article 41(1)(a), *Constitution of South Africa* (1996).

[41] 'The King only accedes to the throne after having sworn the following oath before the united Houses:
"I swear to observe the Constitution and the laws of the Belgian people, to preserve the country's national independence and its territorial integrity".'
Article 91, *Constitution of Belgium* (2014).

[42] Venice Commission, 'Self-determination and secession in constitutional law', 10.

right of self-determination in the South African Constitution applies only internally and excludes the right to secede.[43]

It remains however that there are exceptions to the norm as seen in the constitutions of Ethiopia and the former Yugoslavia. As will be observed from these two jurisdictions, including the right to secede in the constitution was a strategy to unite the constituent units; once this was achieved, the political will to actually allow for extrication was lacking.[44]

Constitutionalism denotes a sphere where the constitution of a state is supreme law above any individual and is to be enforced accordingly.[45] Seldom are constitutions written contemplating drastic measures that may lead to dissolution of a state.[46] Even so, where a right to secede has been included, it has historically been a tactic to lure smaller ethnic or national groups into a larger union.[47] As secession has an adverse implication to a state in terms of loss of territory,[48] even if the right to leave is entrenched in the Constitution hurdles will deliberately be placed to dissuade or delay or destroy secessionist movements.[49]

2.3 Political Context

In evaluating the viability of a secession clause, it would be important to examine the political context in which the right occurs. Kreptul observes this from a Hobbesian paradigm and an Althusian paradigm.

---

[43] 'The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude ... recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.'
Article 235, *South Africa Constitution.*

[44] Tesfaye H, 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity', Ethiopian News, 20 November 2010 http://www.ethiopian-news.com/ethiopia-right-of-secession-as-tool-to-protect-territorial-integrity/ on 11 December 2015.

[45] Jovanovic M, 'Can constitutions be of use in the resolution of secessionist conflicts?, 71; *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 70.

[46] 'Constitutions ordinarily reinforce ideas of sovereignty, representation, protection of individual rights and separation of powers.' Thomas Fleiner, 'Ageing Constitution', paper presented at the Concluding Conference of Summer University, Institute of Federalism, 14 September 2001, at 3; Jovanovic M, 'Can constitutions be of use in the resolution of secessionist conflicts?', 71.

[47] Kreptul A, 'The constitutional right of secession in political theory and history', 62-71.

[48] Hetcher M., 'The dynamics of secession', *Sage Publications Ltd.*, (1992), 278.

[49] 'The Chinese Communist Party implemented the express right of secession into the 1931 Chinese Constitution as a means to lure in the ethnic nationalities of the Chinese mainland and to subjugate neighboring territories like Tibet. Once the Chinese Communists consolidated control over the mainland and surrounding territories, the right of secession was dropped.' Kreptul A, 'The constitutional right of secession in political theory and history', 70.

2.3.1 Hobbesian paradigm

In the Hobbesian paradigm,[50] power is ceded to a sovereign based on individual consent to reduce incidences of 'inter-personal' warfare; the sovereign's power over individuals is considered to be indivisible, infallible, and irresistible.[51] In framing this theoretical analysis Kreptul assumes a state founded upon or practicing liberal democracy.

Liberal democrats adopt the view that a state is created through a social contract between the governed and the sovereign.[52] As such, consent given is permanent and irrevocable.[53] It would then be difficult for such a society to fathom secession:

'The logic of liberal democracy is that there must be a supreme arbiter, the State, to uphold a universal set of rights. It follows from that that the State must be universal as well. If multiple arbiters are permitted in the world, if there are other states (or non-states) with different procedures and values, then the authority of the liberal democratic State is in question. For the same reason, liberal democracy cannot permit secession.'[54]

In this society, the state protects human rights and democratic political participation; liberal democrats assume that theirs is a 'perfectly just state' and therefore there would be no need for a secession clause.[55] Secession would only permissible in a situation where there have been gross violations of human rights.[56] It then follows that if the state's purpose is to earnestly protect human rights then it is entitled to have its territorial integrity respected.[57]

2.3.1.1 Liberal democrat objections to secession

Eminent constitutional lawyer Sunstein raises the objection that

'To place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of

---

[50] Based on the work of English philosopher Thomas Hobbes in his seminal work, Leviathan published in 1651.
[51] Donald Livingston, "The Very Idea of Secession," Society 35, no. 5 (July–August 1998), p. 38-39.
[52] Kreptul A, 'The constitutional right of secession in political theory and history', 44.
[53] Kreptul A, 'The constitutional right of secession in political theory and history', 44; Brilmayer disagrees by positing that political legitimacy does not always necessarily derive from individual consent; a refusal to consent does not exclude an individual from state authority. See Brilmayer L, 'Secession and self-determination: a territorial interpretation' *Yale Law Journal* (1991) , 184.
[54] Kreptul A,' The constitutional right of secession in political theory and history', 44-45.
[55] Buchanan A, 'Theories of secession', *Philosophy & Public Affairs*, (1997), 34–35.
[56] Buchanan A, 'Theories of secession', 32.
[57] Buchanan A, 'Theories of secession', 47; James Crawford, 'State practice and international law in relation to unilateral secession', Expert Report filed by the Attorney General of Canada, supplement to the case on appeal in the Quebec Secession Reference, 1997, para. 67.

blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance.'[58]

Using the argument of strategic behavior, Sunstein argues that a political sub-unit in an economically endowed region would eschew the tedious task of creating a healthy democracy by not supplying the state with resources to dispense justice to the citizenry. In an ideal liberal democrat society, the concept of distributive justice is highly valued.

Another objection made is that constitutionalizing secession would threaten constitutional pre-commitment strategies[59] meant to shield minorities from majoritarian politics.[60] Allowing a secession clause in the constitution then would spell doom for the democratic process; if such a right exists then each sub-unit will be vulnerable to threats of secession by the others.[61]

2.3.1.2 Liberal democrat justifications for secession

Liberal arguments for secession are in essence claw back and involve an element of reverse psychology. They agree with those objecting on the basis that secession is undesirable in that kind of society.

One argument is that by enshrining such a right in the constitution, secessionist movements are procedurally denied incentives to leave the union. Wayne Norman writes:

'The issue here is not whether secessionist politics is bad for democracy and justice, but rather, what can be done through the constitutional engineering of a multinational state to take away the incentives for minority leaders to engage in secessionist politics.'[62]

One way of ensuring this is by creating 'choking mechanisms' that would make it difficult for a unit to leave the state.[63] Such mechanisms would include enforcement of minority rights, suppression of secessionist movements through use of force, or creating a high threshold supermajority requirement in the event of a plebiscite. The supermajority

---

[58] Sunstein C, 'Constitutionalism and Secession', *University of Chicago Law Review*, (1991), 634.
[59] Rights such as free speech and the right to vote, a healthy federation, or structural provisions that allow for a healthy political 'division of labour'.
[60] Sunstein C, 'Constitutionalism and secession', 637.
[61] Sunstein C, 'Constitutionalism and secession', 650.
[62] Norman W, 'Domesticating secession', *American Society for Political and Legal Philosophy* ,(2003), 212.
[63] Norman W, 'Domesticating secession', 199.

requirement would dissuade those intending to pursue secession for a vain cause and encourage those truly justified to secede.[64]

Another argument made is that having secession as part of a federal state's constitution will reduce the chance of disruption to the democratic process.[65] He argues that if there are no rules governing secession in the domestic sphere "a victory for secessionists in a referendum amounts to little more than the strengthening of the secessionists' hand in a game of power politics."[66]

Another major proponent, Weinstock, provides two approaches to allowing for secession: pragmatic and moral. Pragmatically, a government should constitutionalize secession in the same way they would legalize use of marijuana; because then the government can regulate behavior.[67] However, there should be in place several legal hurdles that would be almost impossible to achieve which will present secessionists with a lucid cost-benefit analysis.[68]

From a moral perspective, Weinstock observes constitutional participants (makers of a constitution). He argues that these participants are part of minority or majority groups in the state and because of the unpredictability of circumstances, they would be prudent to adopt a secession clause but avoid two extremes. On one hand, they would not want to make secession difficult because if they are actually oppressed they would have a hard time legitimately leaving the state. Conversely if secession becomes too easy then they would be foregoing the advantages of a democratic state such as wealth redistribution.[69]

2.3.2 Althusian paradigm

In opposing the liberal democratic view that governance is essentially an agreement between sovereign and subject, scholars of the Althusian persuasion[70] look to the time before such a contract was made; proponents argue that before the existence of the state an individual's right to self-ownership and right to property should be presupposed.[71]

---

[64] Norman W, 'Domesticating secession', 199-200.
[65] Norman W, 'Domesticating secession', 199.
[66] Norman W, 'Domesticating secession', 199.
[67] Weinstock D, 'Toward a proceduralist theory of secession', *Canadian Journal of Law and Jurisprudence*, (2000), 262.
[68] Weinstock D, 'Toward a proceduralist theory of secession', 262.
[69] Weinstock D, 'Toward a proceduralist theory of secession', 262.
[70] Based on the thinking of Dutch philosopher Johannes Althusius and his work 'Politica' published in 1603.
[71] Kreptul A, 'The constitutional right of secession in political theory and history', 58.

Under this political context, secession is viewed as an absolute right of individuals, as opposed to a group right that might be severely constrained procedurally.[72] In the Althusian view, the coercive and monopolistic nature of the state can be thwarted by independent social authorities.[73]

Following this line of thinking, Ludwig von Mises believed in the existence of a constitutional democracy but nevertheless the role of the state was limited to the protection of private property.[74] For Mises, citizens had the right to change their government by consent and this included the right to secede.[75]

'If a democratic republic finds that its existing boundaries . . . no longer correspond to the political wishes of the people, they must be peacefully changed to conform to the results of a plebiscite expressing the people's will. It must always be possible to shift the boundaries of the state if the will of the inhabitants of an area to attach themselves to a state other than the one to which they presently belong has made itself clearly known.'[76]

For Mises, if a people decide to secede even if the state that they are present in commits no violations against them, they are within their moral right to do so.[77] In effecting the secession, Mises observes the importance of a barometer of consent- a plebiscite- to express consent to desiring a different government; such a plebiscite however, is legally binding and not merely consultative.[78] If at all the right to secede is premised on the constitution, it should be unilateral and not subject to the permission of the political entity that is to be distended from.[79]

An objection within this school of thought is that allowing secession will open the door for anarchy as increasingly smaller units would wish to secede and this will lead to dissolution of states.[80]

[72] Kreptul A, 'The constitutional right of secession in political theory and history', 55.
[73] Kreptul A, 'The constitutional right of secession in political theory and history', 55.
[74] Kreptul A, 'The constitutional right of secession in political theory and history', 55-56.
[75] Kreptul A, 'The constitutional right of secession in political theory and history', 56.
[76] Kreptul A, 'The constitutional right of secession in political theory and history', 56.
[77] Kreptul A, 'The constitutional right of secession in political theory and history', 56.
[78] Kreptul A, 'The constitutional right of secession in political theory and history', 56-57.
[79] McGee R, 'Secession Reconsidered', *Journal of Libertarian Studies* (1994), 23.
[80] Kreptul A, 'The constitutional right of secession in political theory and history', 61.

2.3.3 Analysis

Comparing the two political contexts, Jovanovic argues that it is in a liberal democratic setting that constitutionalizing secession would appear to work.[81] This is mainly attributed to political prudence as opposed to a normative (tied with justice) rationale.[82] As will be observed in both the republics of Ethiopia and Yugoslavia, the secession clause was a way of cohering small units in order to form the larger federal state.

I agree with Jovanovic on this point, seeing as the democratic process will allow for negotiation and compromise if a unit would wish to leave the state. On the other hand, from the Althusian point of view, secession is an unfettered right that even the entity being seceded from has no say in; this is fertile ground for secessionist conflicts to occur.

It is to be noted however, that whatever kind of political context secession occurs or might occur in, the likelihood of armed resistance is still as high. As seen in Ethiopia, despite the detailed procedure for secession, the federal army regularly clamps down any secessionist movements if detected.

2.4 Domestic or international law issue?

Constitutionalizing secession makes it a domestic issue free from decisive interference by international actors.[83] This is because in international law there are no clear, binding legal rules on secession and the creation of new states is depends entirely on the power of recognition by other states, which is chiefly politically motivated.[84] Therefore, catering for secession in a domestic context frees it from the ambiguity and power politics that will plague it in the realm of international law.

2.5 Nature of the right

Depending on the constitution of the state involved, clauses on secession could be either procedural or substantive. With reference to the studies in chapter 3, the Ethiopian constitution made the right to secede both substantive and procedural while in the former Yugoslavia, the right was merely substantive.

---

[81] Jovanovic M, 'Can Constitutions Aid in the Resolution of Secessionist Conflicts?', 77.
[82] Jovanovic M, 'Can Constitutions Aid in the Resolution of Secessionist Conflicts?', 77.
[83] Jovanovic M, 'Can Constitutions Aid in the Resolution of Secessionist Conflicts?', 79.
[84] Deficiency in international law regarding secession can be attributed to: (*a*) non-existence of legal instruments and institutions to evaluate secessionist activities and their legitimacy; (*b*) ongoing primacy of the state as a protector of rights, which is accompanied by the international legal principle of 'non-interference'; and (*c*) the fact that the international community 'is composed of member-states with their own interests and equipped with very varying degrees of power to push through these interests.' In the end, 'power, not rights decides the issue.' Doering D, 'Secession Rights in a Liberal Perspective', paper presented at the Liberal Think Tank in Dakar, Senegal, 23 October 2003, at 4.

2.6 Conclusion

Depending on the political context to which an entity subscribes, the right to secede will be viewed as either quite repugnant or as an entitlement by citizens. Such attitudes are shaped by historical occurrences as well as government policies and in some instances despite the explicit approval of secession, governments will mount military attacks to prevent a group from leaving the union.[85]

[85]See the case of the Former Yugoslavia in chapter 4.

CHAPTER III: SELF-DETERMINATION AND SECESSION

This chapter covers a discussion of relevant literature on self-determination and the right to secede. With regards to the principle of self-determination I shall examine its origins and its eventual crystallization into a general principle of international law. With secession, I shall explore its legality in international law and its perception in general.

3.1 Principle of self-determination

Self-determination is a principle recognized under public international law.[86] Based on this right, a people is entitled to pursue its own social, political, and economic destiny. It will be critical for this discussion to understand the origins and development of this principle.

3.1.1 History and development of self-determination

The notion of self-determination developed in the throes of the American Revolution and germinated during the French Revolution in the ousting of British colonials and the monarchy, respectively.[87] Another school of thought contends that the idea of self-determination spread during the revolutionary turmoil of Europe, passing on from one state to another.[88] One scholar writes that what fueled the principle of self-determination at that time were the ideas of popular sovereignty and democracy fanned by the French Revolution:

"The history of self-determination is bound up with the history of the doctrine of popular sovereignty proclaimed by the French Revolution: government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong should be able to secede and organise themselves as they wish."[89]

The principle further evolved during the Bolshevik Revolution when it was defined and reshaped by Stalin and Lenin. However, it is to be noted that the Soviet espousal of this self-

---

[86] Articles 1 and 55, Charter of the United Nations, 24 October 1945, 1 UNTS XVI; Article l, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Article l, 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 50th Anniversary of the UN*, A/Res/50 9 Nov. 1995.

[87] Brilmayer L, 'Secession and self-determination: a territorial interpretation' *Yale Law Journal* (1991), 179-180.

[88] Brilmayer L, 'Secession and self-determination: a territorial interpretation', 179-180.

[89] Sureda A, *The evolution of the right of self-determination: A study of United Nations practice*, Sijthoff, 1973, 14.

determination was self-serving of the Communist agenda, where it was aimed to end class conflict and capitalism.[90]

This notion became more prominent after the end of the first World War, analogized by President Woodrow Wilson as equal to American ideals of democracy and political fairness.[91] This was during the redrawing of the map of Europe after the war, where considerable regard was taken not to separate ethnic groups in defeated states.

It is to be noted at this juncture that there were no international or regional treaties that explicitly stipulated that self-determination was a principle or right in law. Inferentially, the principle developed as a result of state practice more often than not brought on by dramatic shifts in political standing due to conflict.

After the Second World War, the notion of self-determination came to be codified in the most important treaty of the decade: the United Nations Charter of 1945.[92] Article 1(2) states:

"To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

Under article 55 of the Charter, the UN intends to promote global social and economic well-being based on the respect for the principle of equal rights and self-determination of peoples.

At this time, several powers that were signatories to the Charter had overseas colonial territories. To some extent, the affirmation and codification of the right of peoples to self-determination was instrumental in relinquishing oppressive rule in those territories.[93] This

---

[90]Thurer D and Burri T, 'Self-determination', *Max Planck Encyclopaedia of Public International Law*, 2008, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873 on 23 November 2015.

[91] Cobban A, *The nation state and national self determination,* Collins, 1970, 63.

[92] Thurer and Burri note that the incorporation of the principle into the UN Charter was merely for political reasons and that it was not foreseen to be legally binding on account of complexity and ambiguity.
"In trying to assess the legal significance of these provisions it should not be assumed that the concept of self-determination became a legally binding principle of conventional international law by the mere fact of its incorporation into the UN Charter. Although the provisions concerning non-self-governing and trust territories entail binding international obligations, the general principles of self-determination and of equal rights of peoples, which in the formula used by the UN Charter appear to be two component elements of the same concept, seem to be too vague and also too complex to entail specific rights and obligations. In particular, the UN Charter neither supplies an answer to the question as to what constitutes a 'people' nor does it lay down the content of the principle. In the absence of any concrete definition, and taking into account the highly various facts of international life, it cannot realistically be interpreted, applied or implemented like a legal norm and thus primarily possesses a very strong moral and political force in guiding the organs of the UN in the exercise of their powers and functions."
Thurer D and Burri T, 'Self-determination'.

[93] Brilmayer, 'Secession and self-determination: a territorial interpretation', 181; Onuoha G, 'Contemporary Igbo nationalism and the crisis of self-determination in the Nigerian public sphere' *African Studies* (2012), 30;

was further enunciated in a General Assembly resolution pushing for the decolonization of territories:[94]

And to this end declares that:

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

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

The notion was reiterated in other important international legal instruments to champion against colonialism.[95]

Post-colonialism, the principle of self-determination has been invoked in the creation of new state entities through secession. Secession or secessionism is a political withdrawal from one state to create a new one.[96] This was the case in the short-lived separation of Biafra from Nigeria,[97] the breakup of the former Yugoslavia to create among others the states of Slovenia and Croatia,[98] as well as the current push by the Catalans to secede and leave the territory of Spain.[99]

3.1.2 Invocation and effectuation of self-determination

Following the understanding that self-determination is a right in international law that a people is entitled to pursue its own political, social and economic destiny, it is then imperative to examine the circumstances under which the right can be invoked.

Berketeab R, 'self-determination and secessionism in Somaliland and south Sudan: challenges to post-colonial state-building' Discussion Paper 75, *Nordiska Afrikainstitutet Uppsala* (2012), 16.

[94] UNGA, *Declaration on the granting of independence to colonial countries and peoples adopted by general assembly resolution,* UN A/Res/1514 (XV) 14 December 1960.

[95] 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) ; Thurer and Burri concede that the UN, through practice, helped develop the principle of self-determination. See Thurer D and Burri T, 'Self-determination'.

[96] Berketeab, 'Self-determination and secessionism in Somaliland and south Sudan: challenges to post-colonial state-building', 12.

[97] Onuoha G, 'Contemporary Igbo nationalism and the crisis of self-determination in the Nigerian public sphere', 19-28.

[98] http://www.bundesheer.at/pdf_pool/publikationen/14_sr3_lutovac.pdf on 23 November 2015.

[99] http://lawstreetmedia.com/issues/world/independence-catalonia-will-it-become-reality/ on 24 November 2015.

Thurer and Burri provide three instances when the principle of self-determination can be invoked and become binding. Their contention is that these limited instances lend a legally compelling dimension to self-determination which they perceive as a moral and political right that is difficult to enforce.[100]

1. The principle of self-determination is binding upon the parties, whether they have adopted it as the basis or as a criterion for the settlement of a particular issue or dispute such as the peace treaties of World War I.
2. It also becomes binding in the case of decolonization.[101]
3. It might be considered to apply, as was suggested by the Commission of Rapporteurs in the Åland Islands case in 1921, in situations where the existence and extension of territorial sovereignty is altogether uncertain.

Berketeab, on the other hand, provides several theories that may lead to invocation of self-determination:

"Democratic theory stresses the democratic right of people to govern themselves, the right of free political association; liberal theory advocates the right of the individual to determine her destiny; communitarian theory conversely seeks the right of self-determination in the collective, the nation; realist theory focuses on the principle of the territorial integrity of states; territorial justice theory advances the idea that people have the right to supremacy in their territory; remedial theory stipulates that oppression or subjugation by government can be a valid ground for invoking the principle."[102]

He also notes that not every act of self-determination leads to secession.[103] He suggests that that self-determination could have the outcome of:

(a) emergence of an independent state;

(b) free association with an independent state;

(c) integration with an independent state.

It follows then that self-determination can be practiced in two ways: internally or externally.

---

[100]Thurer D and Burri T, 'Self-determination'.

[101] Affirmed by the ICJ *in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* , Advisory Opinion, ICJ Reports 1971 para. 52 and in *Western Sahara (1975)*, Advisory Opinion, paras 54–59. .

[102] Berketeab, 'Self-determination and secessionism in Somaliland and south Sudan: challenges to post-colonial state-building', 13.

[103] Berketeab, 'Self-determination and secessionism in Somaliland and south Sudan: challenges to post-colonial state-building', 13; *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 123; "The right to self-determination and the authority to secede exist as two distinct and separate concepts." http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1558&context=gjicl on 24 November 2015.

3.1.2.1 Internal self-determination

This is the enabling of a distinct people in a region to autonomously run their government, practise their culture without interference, without separating from the state.[104] Federalism is seen as a method through which a people can internally self-actualize.[105]

3.1.2.2 External self-determination

The external practice of self-determination is closely linked to the remedial theory proposed by Berketeab. It involves the extrication of a region from a state to declare an independent state.[106] Often it turns on the question of when a people can declare that their right of self-determination entitles them to secede. In modern discourse, external self-determination is possible where there have been massive human rights violations perpetuated by the sitting government and there is no solution to the problem.[107] The remedial theory was heavily implied in the decision of the Canadian Supreme Court regarding the intention of the region of Quebec to secede. The court noted that only in exceptional circumstances would self-determination lead to secession:[108]

i) A people oppressed by colonialism;
ii) A people dominated by foreign powers outside context of colonialism;
iii) When a people is blocked from meaningful exercise of self-determination internally.

As illustrated, secession is the most extreme self-determination remedy.[109]

3.1.3 Elements of the principle of self-determination

For effective practice of self-determination the following criteria has to be met: there has to exist a people; the people need to willfully express their desire to practice self-determination; the people need to have a link to territory within a state.

a) Conceptualizing 'a people'

A critical aspect of this discussion is to determine the right-holder of self-determination. The parameters of a people vary greatly from language, to ethnicity, to

---

[104] *Reference Re Secession of Quebec,* para 126; http://peacebuilding.asia/ethnic-groups-right-to-independence-self-determinationsecession-and-post-cold-war-international-relations/ on 24 November 2015.
[105] *Reference Re Secession of Quebec* paras. 43, 58, 59; *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), para 4.
[106] Brilmayer, 'Secession and self-determination: a territorial interpretation', 190.
[107] *Reference Re Secession of Quebec,* paras. 130-133.
[108] *Reference Re Secession of Quebec,* paras. 131-138.
[109] Brietzke P, 'Ethiopia's leap in the dark', *Journal of African Law*, (1995), 35.

shared religious beliefs[110] with Mazrui boldly stating that race or pigmentation may also indicate a people.[111] So far, there is no agreed upon definition of the term 'a people' in international law. In the Ethiopian 1995 Constitution, a definition of peoples or rather, a description is enunciated as follows:

> A "Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable predominantly contiguous territory.[112]

This however applies in the domestic realm of Ethiopia and is not binding upon any other state. The lack of definition of 'a people' does not by itself mean that it is always unclear in concrete instances whether one or more peoples exist.[113]
During decolonization it was possible to distinguish peoples based on borders of colonies or protectorates.[114] Outside the colonial context, in some instances, acceptance of a people is often acknowledged without further ado as was the case with Palestinian people.[115]

Thurer and Burri present a compelling argument with regards to the problematic nature of defining a people:

> "Problems regarding the precise composition of a people usually arise when the right to self-determination is invoked, in particular by way of referendum because then the focus shifts from the question 'who is the people' to 'who belongs to the people....these arguments are not only further complicated by the individual's free choice of its identity, based on human rights. They are also fuelled by—voluntary or forced—population shifts that typically happen in the context of self-determination situations and that cause more arguments about participation thresholds and qualified majorities to be applied in the referendum."[116]

---

[110] Brilmayer, 'Secession and self-determination: a territorial interpretation', 183.
[111] Mazrui A, 'Consent, colonialism, and sovereignty', *Wiley Online Library* (2006), 37; Thurer and Burri contend that a state created on the basis of racial discrimination would be a nullity in international law as seen in the Unilateral Declaration of Independence of Southern Rhodesia. See Thurer D and Burri T, 'Self-determination'.
[112] Art. 39.5, Constitution of the Federal Democratic Republic of Ethiopia 1995.
[113] Thurer D and Burri T, 'Self-determination'.
[114] *Western Sahara*, para. 70.
[115] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)*, Advisory Opinion, para. 118.
[116] Thurer D and Burri T, 'Self-determination'.

Iglar provides a two pronged approach in conceptualizing a people: subjective and objective.[117] The subjective standard requires individuals to manifest a desire to form a distinct political entity which can be satisfied through a plebiscite for instance. The objective criteria requires a group to possess certain common characteristics such as ethnicity, language or religion. Only a group that satisfies both criteria has a legitimate claim to self-determination.

Ouguergouz, in looking at the African Charter sees four ways in which the concept of 'people' can be interpreted: the nationals of a state; the inhabitants of a state (including non-nationals); those under racial or colonial domination; and ethnic groups.[118] He argues that the term is chameleon-like whose contours depend on the context in which it is applied.[119] He also analyses the General Assembly resolution 2625 which crystallized the principle and observes that it does not provide a cogent definition of a people except those under colonial or racial determination.[120]

In a decision of the African Commission on Human and Peoples' Rights, the people of South Cameroon were recognized as a people because they manifest characteristics and affinities which include a common history, linguistic tradition, territorial connection and political outlook.[121]

In recent history, there are secessionist movements that may overtly constitute a people although their right to secession may not be as obvious. The Catalan people that constitute a region in Spain share a unique language that is spoken by approximately 8 million.[122] Despite the large numbers and a distinguishing factor, their quest for self-determination has been denied continually by the Spanish government. In another context, where the 'people' are not as obvious, the Boko Haram group in Northern Nigeria is pursuing secession based on religious grounds.[123]

---

[117] Iglar F, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede', *Boston College International and Comparative Law Review*, (1992), 225-226.
[118] Ouguergouz F, *The African Charter of Human and People's Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa,* Martinus Njihoff Publishers, 2003, 206-210.
[119] Ouguergouz F, *The African Charter of Human and People's Rights,* 210.
[120] Ouguergouz F, *The African Charter of Human and People's Rights,* 230-231.
[121] *Kevin Mgwanga Gunme et al v Cameroon*, ACmHPR Comm. 266/03 (2009), para 175-179.
[122] http://www.jhubc.it/bcjournal/articles/desquens.cfm on 25 November 2015.
[123] http://www.gamji.com/article9000/NEWS9409.htm on 25 November 2015.

The Northern part of Nigeria is populated by a mix of Muslims and non-Muslims and is not an exclusive region.

b) Express desire to exercise self-determination

In the event that there is a clear, undisputable fact that a people exists, then such a unit needs to indicate a desire to exercise their right of self-determination:[124] their will needs to be taken into consideration.[125] The will of a people can be formed in various ways: through government decision or a referendum.[126]

c) Link to territory within existing state

Groups that invoke self-determination need to show a clear link to territory within an existing state.[127] In the event that the right to secede crystallizes, groups that have no link to territory have poor chances of convincing the international community of this right.[128]

3.1.4 Problematic issues in self-determination

There is contention as to whether the right of self-determination is binding as it is.[129] Also, the composition of a people is quite ambiguous and a matter of subjective interpretation.[130] Despite the fact that it can be practiced either internally or externally, when the invocation of this right leads up to the point of secession, it disturbs territorial integrity and more often than not leads to conflict.[131] Moreover, an existential problem of the right to self-determination is

[124] Crawford J, *Creation of states in international law*, Oxford University Press, 2006, 387.
[125] Thurer D and Burri T, 'Self-determination'.
[126] See instances of Scottish (2014), Catalonian(2015), and South Sudanese (2011) referendums in the recent past.
[127] Brilmayer, 'Secession and self-determination: a territorial interpretation', 13, 17; Crawford J, *Creation of states in international law*, 389.
[128] Brilmayer, 'Secession and self-determination: a territorial interpretation', 13.
[129] Ouguergouz observes that the principle acquired a legally binding nature from UNGA Res 2625 (XXV) but this cannot be completely true as GA resolutions are not a source of international law as specified in article 38 of the International Court of Justice Statute. However, state practice in the the 20th century that resulted in independence of colonial states may have lent it a legal nature.
Ouguergouz F, *The African Charter of Human and People's Rights,* 230; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 2010, para 79.
[130] Brilmayer, 'Secession and self-determination: a territorial interpretation', 23.
[131] Berketeab, 'Self-determination and secessionism in Somaliland and south Sudan: challenges to post-colonial state-building', 13.

that a limited number of states purport to represent 5000 nations or peoples;[132] would it then be conducive to allow a proliferation of states based on these numbers? It should be noted that exercise of self-determination by a group does not necessarily lead to secession.

3.2 Right to secede

From the onset, there does not exist in international law a right to secede.[133] Crawford defines secession to be creation of a State by the use or threat of force without the consent of the former sovereign.[134] Another scholar contends that secession can be a peaceful process and defines it as 'an internally motivated division of a country's homeland territory that results in the creation of at least one new independent state with full sovereign rights and legal recognition by the international community-and leaves behind the now territorially smaller rump state.'[135]

The phenomenon of secession in international law is not always welcome because it threatens the principle of territorial integrity of states.[136] Additionally secession more often than not results in armed conflict which is contrary to the need to preserve peace and stability among sovereign states.[137]

With regards to the condemnation of secessions by the Security Council, the illegality of such declarations were not attached to their unilateral nature but because of the unlawful use of force or would have been violations of international norms of peremptory character.[138] It is open to interpret then, that in the instances where there is no likelihood of the use of force or violation of *jus cogens* principles, then a unilateral secession would be legal.

---

[132] Brietzke P, 'Ethiopia's leap in the dark', *Journal of African Law* (1995), 30.
[133] This can be implied from Security Council decisions condemning secessions of Southern Rhodesia, Northern Cyprus, and Republica Srpska.
[134] Crawford J, *Creation of states under international law*, 375.
[135] Jaroslav Tir, 'Keeping the peace after secession: territorial conflicts between rump and secessionist states' *The Journal of Conflict Resolution*, Vol. 49, No. 5 2005, 720.
[136] *Kosovo Opinion*, para 80; Berketeab, 'Self-determination and secessionism in Somaliland and south Sudan: challenges to post-colonial state-building', 13; Hechter M, 'Dynamics of secession', *Acta Sociologica* (1992), 277; Zacher M, 'The territorial integrity norm: international boundaries and the use of force', *International Organisation*, (2001), 219.
[137] *Reference Re Secession of Quebec*, para. 127.
[138] Kosovo Opinion, para 80.

Crawford provides two distinct situations in which secession can occur: secession in furtherance or in violation of self-determination.[139]

a) Secession in furtherance of self-determination

Based on extensive state practice analysis, secession of self-determination units has been inconsistent.[140] However, it is based on a free and effective choice of the people in the territory concerned.[141] In the instance that the right to self-determination is denied by the metropolitan government, then the principle of self-determination operates in favour of the statehood of the seceding territory, provided that the seceding government can properly be regarded as representative of the people of the territory.[142] In any scenario recognition of the seceding unit is imperative.[143]

b) In violation of self-determination

This occurs in a situation where secession occurs in derogation of the principle of self-determination as applied to the territory as a whole.[144] This was the case in the attempted Unilateral Declaration of Independence in Rhodesia which was largely based on racial discrimination.[145]

3.2.1 Secession outside colonial context

There is no right in international law to unilateral secession.[146] In some instances use of language in international law implicates illegality[147] as suggested in Security Council resolutions of Katanga[148] and Rhodesia.[149] Crawford contends that use of language in these Security Council resolutions does not mean that secession is illegal for two reasons. First, it would follow that the seceding entity is a subject of international law, although the objective

[139] Crawford J, *Creation of states under international law,* 384.
[140] Crawford J, *Creation of states under international law,* 387.
[141] *Western Sahara*, para.12 and para.32.
[142] Crawford J, *Creation of states under international law,* 387.
[143] Crawford J, *Creation of states under international law,* 387.
[144] Crawford J, *Creation of states under international law,* 388.
[145] UN Security Council, *Resolution 216 (1965), 12 November 1965,* S/RES/216 (1965); UN Security Council, *Resolution 217 (1965) of 20 November 1965*, S/RES/217 (1965).
[146] *Reference Re Secession of Quebec*, para. 155.
[147] Crawford J, *Creation of states under international law,* 389.
[148] UNSC S/RES/169 (1961) The Congo Question.
[149] UNSC S/RES/217 (1965) Question concerning the situation in Southern Rhodesia.

of the resolutions was to deny the entities international status.[150] Second, the resolutions mainly relied on internal law as opposed to international law.[151]

3.2.2 Secession and territorial integrity

States are rarely eager to cede territory to seceding units and the occurrence of conflict often turns on reacquiring this 'lost' territory.[152] The principle of territorial integrity in international law aims to maintain global peace and stability through the maintenance of boundaries.[153] In the Katanga decision under the African Commission on Human and Peoples' Rights, the commission in interpreting self-determination under article 20 of the African Charter held that it cannot be exercised to violate the territorial integrity of Zaire.[154] This therefore inclines states to resist secessionist movements through measures that employ armed force as will be explored in the next chapter.

3.3 Intersection of self-determination and secession

As discussed above, not every instance of invocation of self-determination can lead to secession. As noted by the African Commission on Human and Peoples Rights[155] self-determination can be practiced internally through federalism or autonomy. In the instance that a state prevents a people from exercising self-determination through human rights violations, then a people can choose to secede. This is viewed as a last resort measure. Self-determination, then, is seen as the rudder that guides the ship of secession.

In the instance that a people manage to secede, it is imperative that the new unit is recognized under international law to enjoy privileges bestowed on sovereign states.[156]

---

[150] Crawford J, *Creation of states under international law,* 389.
[151] Crawford J, *Creation of states under international law,* 389; Brilmayer offers a different point of view noting that since secession seeks to redraw political boundaries to create new states, it has been and should be relegated to international law.
Brilmayer, 'Secession and self-determination: a territorial interpretation', 177.
[152] Hechter M, 'Dynamics of secession', *Acta Sociologica* (1992), 277.
[153] *Reference Re Secession of Quebec*, para. 127.
[154] *Katangese Peoples' Congress v Zaire*, ACmHPR Comm No. 75/92 (1995), para 5.
[155] *Katangese Peoples' Congress v Zaire*, ACmHPR Comm No. 75/92 (1995), para 4; *Kevin Mgwanga Gunme et al v Cameroon*, ACmHPR Comm. 266/03 (2009), para 191.
[156] Crawford J, *Creation of states under international law*, 383.

CHAPTER IV: CASE STUDIES

In this section, I will analyze cases of two federal states that allowed for secession in their constitutions. I endeavor to understand the history of the state and their motivation for installing such a provision in their constitution. I will also seek to understand how such a provision would be enforced in a situation that requires it and whether the states to be studied would be willing to effectuate a secession following the procedure. In this study I will look at Ethiopia and the former Socialist Federal Republic of Yugoslavia (SFRY).

4.1 The Federal Democratic Republic of Ethiopia (FDRE)

Ethiopia is located in the Horn of Africa and is considered to be one of the oldest states in the world.[157] Origins of Ethiopia are traced back to the Old Testament in the times of King Solomon of Israel and Queen Sheba of Ethiopia.[158] Contemporary Ethiopia as we now know was shaped by Emperor Menelik II (1889-1913) by uniting the diverse and independent communities that lived within.[159] It is more significantly known for actively resisting colonial occupation and rule by a European power.[160] The state is composed of more than 80 ethnic groups that have throughout their history at one point or another have had challenges co-existing.[161]

After World War II and at the start of decolonization, newly independent countries in Africa struggled to create viable nation-states combining different ethnic groups within the territorial boundaries inherited from colonialism.[162] Ethiopia followed this trend despite not having been colonized as an aspirational step to become a 'modern state' proper.[163]

---

[157] Belay N, 'The new federal experiment and accommodation of diversity in Ethiopia: exploring a novel experience' *Institute of Federalism Fribourg University* (2009),1; Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution' *Publius* (2005), 315.

[158] 2 Chronicles 9: 1-12, King James Version Bible.

[159] Belay N, 'The new federal experiment and accommodation of diversity in Ethiopia: exploring a novel experience', 2.

[160] Belay N, 'The new federal experiment and accommodation of diversity in Ethiopia: exploring a novel experience', 2 ; Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 315; It is to be noted that Ethiopia was occupied by Fascist Italy in the 1930s until the end of World War II. The occupation did not last long and Ethiopia was not radically altered as other colonized African states as Italy did not stay long enough to be fully entrenched as a colonizer. See https://www.quora.com/Why-was-Ethiopia-never-colonized-1 on 28 November 2015.

[161] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 316.

[162] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 314.

[163] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 314.

Ethiopia is modeled as a multi-ethnic federal state, with nine autonomous states as subnational entities.[164] The Constitution of 1995 is still in force and it is under this document that the right of self-determination of peoples up to the point of secession is stipulated.[165]

4.1.1 Historical background

From the reign of Emperor Haile Selassie to the end of the military rule of Haile Mariam Mengistu, tensions and violence in Ethiopia were propelled by government denial of various ethnicities to practice and use their culture, history and, way of being as observed by Tesfaye:

'...one of the major root causes of violence, internecine ethnic conflicts, civil wars and destruction in Ethiopia had been the denial by successive regimes of the rights of nations, nationalities, and peoples to determine their own affairs by themselves, to have command over their lands and other natural resources, to use and develop their languages, culture, history, to govern themselves, and to enjoy a fair and equitable sharing of the political and economic resources of the country, in short, their rights for self-rule and shared-rule.'[166]

Failure to acknowledge these differences resulted in centralization and the bringing together of these ethno-national entities under the domination of the ruling class which majorly consisted of two ethnic groups,[167]under the guise of maintaining territorial integrity and unity. This resulted in the alienation most ethnic groups which during the rule of Haile Mengistu Mariam led to unrest and formation of insurgent groups[168] within the country trying to battle repression.[169] The country was at the brink of disintegration at this point and it was not until the overthrow of Mengistu's military rule in 1991 that it was realized that a more inclusive framework for all ethnic groups was needed to hold the state together.[170]

---

[164] Tsegaye R, 'State Constitutions in federal Ethiopia: a preliminary observation' *Bellagio Conference* March 22-27 2004, 1; Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 314-317; Tesfaye H, 'The constitutional right of secession: a recipe for national disaster or a tool for protecting the territorial integrity of a multi-nation state?', *Ethiopian Observer,* http://www.ethioobserver.net/constitutional_right.htm on 2 December 2015; Brietzke P, 'Ethiopia's "leap in the dark": federalism and self-determination in the new Constitution' *Journal of African Law* (1995), 27; Harbo F, 'Secession right – an anti-federal principle? comparative study of federal states and the EU' *Journal of Politics and Law* (2008), 5.

[165] Article 39, *FDRE Constitution* (1995).

[166] Tesfaye H, 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity', *Ethiopian News*, 20 November 2010 http://www.ethiopian-news.com/ethiopia-right-of-secession-as-tool-to-protect-territorial-integrity/ on 2 December 2015.

[167] Tesfaye H, 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity'.

[168]These groups included the Eritrean People's Liberation Front (EPLF), Ethiopian People's Revolutionary Party (EPRP), Tigrayan People's Liberation Front (TPLF) and the Oromo Liberation Front (OLF).

[169] http://www.ncas.rutgers.edu/center-study-genocide-conflict-resolution-and-human-rights/ethiopian-civil-war-1974-1991 on 3 December 2015.

[170] Tesfaye H, 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity'.

The Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), led by Meles Zenawi, was at the helm of power at the time Mengistu's government was overthrown and the first step his party, in collaboration with other liberation movements, took was the adoption of a Transitional Period Charter in July 1991 that gave birth to the Transitional Government of Ethiopia (TGE).[171] This charter was significant as it palpably recognized the 'nations, nationalities, and peoples of Ethiopia and their inalienable right to self-determination up to the point of secession.[172]

The Constitution Drafting Commission established by the Council of Representatives within the TGE in 1992 prepared a draft constitution that espoused this right.[173] This right was the outcome of serious negotiations amongst the main liberation movements at the time, among whom there was tacit mistrust.[174] The draft constitution, which recognized the right to self-determination up to the point of secession, was approved by the TGE in 1994 and came into force the following year in 1995.[175] It was thus that Ethiopia became a multi-ethnic federation.

4.1.2 Rationale for the secession clause

Fundamentally, the clause was included to ensure a sense of equality among the ethnic groups within the federation.[176] During negotiation, Meles Zenawi took the majority position[177] advocating for the inclusion of the right to secession and multi-ethnic federalism providing the following four reasons:

---

[171] Belay N, 'The new federal experiment and accommodation of diversity in Ethiopia: exploring a novel experience', 3.

[172] Tesfaye H, 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity'.

[173] Tesfaye H, 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity'.

[174] Tesfaye H 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity'; The inclusion of the right of self-determination up to the point of secession was made to appease the movements (which were ethnically aligned) to stay within the state. At this time there were still tensions and small outbursts of violence. There was need to heal wounds and reconcile elements in Ethiopian society. The secession clause was designed as a ploy for unity at the time with no intention of allowing any unit to secede in the future. At the point of negotiation, it can be said to have been a desperate measure adopted at a desperate time for the sake of the union of the state. See Brietzke P, 'Ethiopia's "leap in the dark": federalism and self-determination in the new Constitution', 20; Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 323-325; Harbo F, 'Secession right – an anti-federal principle? comparative study of federal states and the EU', 7.

[175] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 326.

[176] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 323.

[177] On the contrary, the minority position rejected the idea of a secession clause on the basis that Ethiopia was separated along the lines of class and not ethnicity. Other opponents saw it as a move to disintegrate and weaken the union. See Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 326 and Belay N, 'The new federal experiment and accommodation of diversity in Ethiopia: exploring a novel experience', 10.

(1) "nations, peoples and nationalities are sovereign"; (2) "one of the basic tenets of democracy is the belief that people can decide on what is advantageous to them"; (3) "secession should be supported for the sake of peace and stability"; and (4) "we support the idea for the sake of voluntary union."[178]

This position was endorsed by a majority of the Council of Representatives. It is safe to infer that the clause that it was a move aimed to pacify the various movements to prevent the country from collapsing into civil war.[179] Ethiopia became a nine-state multi-ethnic federation with each state framing and adopting its own constitution as a mechanism for self-rule.[180]

The instructive parts of the 1995 Constitution espousing the right to secede are outlined below:[181]

Preamble

We the Nations, Nationalities and People of Ethiopia:

Strongly committed, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace guaranteeing, a democratic order, and advancing our economic and social development.

Article 8.1

All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.[182]

Article 39

1. Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.

2. Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.

3. Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.

---

[178] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 326.
[179] Tesfaye H, 'The constitutional right of secession: a recipe for national disaster or a tool for protecting the territorial integrity of a multi-nation state?'
[180] Tsegaye R, 'State Constitutions in federal Ethiopia: a preliminary observation', 2-5.
[181] *Constitution of the Federal Democratic Republic of Ethiopia* (1995).
[182] These terms are used to denote the ethnic groups of Ethiopia as being sovereign units capable of withdrawing consent from the federation. See Belay N, 'The new federal experiment and accommodation of diversity in Ethiopia: exploring a novel experience' , 4.

4. The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect:

(a) When a demand for secession has been approved by a two-thirds majority of the members of the legislative Council of the Nation, Nationality or People concerned;

(b) When the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession;

(c) When the demand for secession is supported by a majority vote in the referendum;

(d) When the Federal Government will have transferred its powers to the Council of the Nation, Nationality or People who has voted to secede; and

(e) When the division of assets is effected in a manner prescribed by law.

5. A "Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable predominantly contiguous territory.

4.1.3 Enforceability of the clause

In the event that a unit wishes to secede from the federation of Ethiopia, the mechanism of withdrawal is stipulated in article 39. A two thirds majority of the Legislative Council of the Nation needs to approve the demand for secession.[183] A referendum is then organized by the federal government three years after the request is made and the secession should be supported by a majority vote in the referendum.[184] This is then followed by a transfer of power to the seceding entity and a division of assets and liabilities as prescribed by law.[185]

4.1.4 Willingness to enforce

The intention behind the installation of the secessionist clause, to maintain unity and to appease various factions, indicates this was meant as a temporary measure to secure the

[183] Article 39(4) (a) *FDRE Constitution*; This has been described as a 'choking mechanism' by scholar Wayne Norman. The Constitution allows secession but claws back this right by requiring a high threshold supermajority in a referendum which would possible deter secessionist movements. See Tesfaye H, 'Ethiopia: Incorporating right of secession in the constitution as tool to protect territorial integrity' and Jovanovic M, 'Can constitutions be of use in the resolution of secessionist conflicts?', *Journal of International Law and International Relations* (2009), 16.

[184] 39(4)(b)(c) *FDRE Constitution*; Brietzke reckons that the three year wait is intended to allow for negotiation to pave way for an alternative solution as well as to orchestrate delay meant to tire and demoralize secessionist movements. See Brietzke P, 'Ethiopia's "leap in the dark": federalism and self-determination in the new Constitution', 32.

[185] 39(4)(d)(e), *FDRE Constitution.*

federation.[186] It would seem then, that once this goal was achieved, the clause got delegitimized either legally or politically.[187] In instances where a group has clamored for the right to secede, federal soldiers and police have taken measures to quell such units.[188] It becomes safe to conclude then that the political will required to effect a right to secede in Ethiopia is lacking and therefore it is almost impossible for a group to leave the union.

4.2 The Former Socialist Republic of Yugoslavia (SFRY)

The former Yugoslavia was located in the Balkan peninsula of Eastern Europe and consisted of the current states of Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Montenegro, and Macedonia. Yugoslavia existed as a nation since 1918 when the Kingdom of Serbia and Montenegro fused with remnants of the Austro-Hungarian Empire (Croatia and Slovenia).[189] The nation was composed of various ethnic groups and religions.[190] Throughout its existence there was strife and tension between the two larger groups,[191] the Croats and the Serbs, over issues of territory[192] and allegiance.[193] Tensions existed generally among all the groups from fear of domination by a particular ethnic group, especially the Serbs.[194]

This strife inflamed and in 1991 Croatia and Slovenia declared independence from Yugoslavia.[195] A protracted conflict ensued which resulted in the dissolution of the state with

---

[186] Habtu asserts the clause is merely of symbolic value and that there is no way possible that the government would allow exit from the federation. See Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 329.

[187] Kreptul A, 'The constitutional right of secession in political theory and history', *Journal of Libertarian Studies* (2003), 71; Harbo F, 'Secession right – an anti-federal principle? comparative study of federal states and the EU', 8; Brietzke P, 'Ethiopia's "leap in the dark": federalism and self-determination in the new Constitution', 37.

[188] Habtu A, 'Multiethnic federalism in Ethiopia: a study of the secession clause in the Constitution', 329.

[189] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', *Georgia Journal of International and Comparative Law* (1991), 492.

[190] Ethnic groups being Serbs, Croats, Bosniaks, Montenegrins, Slovenes, Macedonians, Albanians, and Hungarians. The major religious groups were Catholic Christians, Orthodox Christians, and Muslims.

[191] Border dispute within the union. See http://www.britannica.com/place/Yugoslavia-former-federated-nation-1929-2003 on 3 December 2015.

[192] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 493.

[193] Their relationship soured when some Croats became puppets of the German Nazi during World War II and committed atrocities against Yugoslavs. See Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 493.

[194] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 494; Iglar F, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede', *Boston College International and Comparative Law Review* (1992), 217.

[195] Iglar F, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede', 213.

Serbia and Montenegro remaining together. Montenegro eventually separated from Serbia in 2003 and Kosovo declared unilateral independence from Serbia in 2008.[196]

4.2.1 Historical background

Yugoslavia became a federal state after World War II and up to its dissolution four constitutions were adopted.[197] From the first constitution of 1946, the right of self-determination was reflected and it was on this basis that the federation consisting of various republics[198] was formed.[199] The right of self-determination was however symbolic and it was until the constitution of 1963 that the regions acquired the privilege of self-government.[200] The constituent republics then made and adopted their own constitutions which were necessarily not to be modeled after the federal one, as they are expressions of autonomy.[201] Nevertheless, they were to be made in such a way as not to contradict the federal one.[202]

The constitution of 1974 altered this system by declaring Yugoslavia to be a confederation.[203] It is to be noted that to keep the state together while preserving the illusion that constituent republics were independent, republics and autonomous units owed to the federal government

---

[196] Siroky David, 'Secession and survival: nations, states and violent conflict', unpublished PhD thesis, Duke University, 2009, 149.

[197] 'Four post-war constitutions have been adopted comprising the Constitutions of 1946, 1953, 1963, and 1974. See Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 497; Popovic D, 'Constitutional history of the former Yugoslavia', Institute for European Studies http://www.cecl.gr/RigasNetwork/databank/REPORTS/r1/YUG_1_popovic.html on 3 December 2015.

[198] In Article 2 of the constitution of 1946 the constituent parts of the Federation were recognized: The Federative People's Republic of Yugoslavia is composed of the People's Republic of Serbia, the People's Republic of Croatia, the People's Republic of Slovenia, the People's Republic of Bosnia and Hercegovina, the People's Republic of Macedonia, and the People's Republic of Montenegro. The People's Republic of Serbia includes the Autonomous Province of the Vojvodina and the Autonomous Kosovo-Metohijan Region.

[199] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 498.

[200] The state was controlled by the Communist Party, under the leadership of Josep Broz Tito, which initially favoured a centralized approach to government. See Popovic D, 'Constitutional history of the former Yugoslavia'.

[201] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 513.

[202] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 513.

[203] 'The SFRY is defined by the 1974 constitution as a state community of voluntarily united nations and their socialist republics, as well as two autonomous provinces which are constituent parts of the Socialist Republic of Serbia.'
Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 503. See also Popovic D, 'Constitutional history of the former Yugoslavia'. Harbo argues that a confederation is formed by an international treaty and consists of independent member states that still retain their sovereignty and individual citizenship. The member states are allowed to withdraw but not unilaterally. The European Union for example is a confederation. A federation differs fundamentally because sovereignty is shared by the constituent regions or groups of a common citizenship. Taken accordingly in the Yugoslavian context, it can be said that the assertion of a confederation was a fallacy, as it still retained the characteristics of a federation. See Harbo F, 'Secession right – an anti-federal principle? comparative study of federal states and the EU', 1.

a 'duty of loyalty'.[204] This required constituent units to avoid any action that would hinder international policy of the federation or threaten the unity of the state.[205] This duty was meant to create a chokehold on the constituent republics to prevent them from leaving the union.[206]

In the Yugoslavian situation, it was explicit that the right of self-determination was envisioned.[207] The contention was whether the right to secede- explicitly mentioned in the constitution-[208] existed and could be practiced. The republican constitutions of both Croatia[209] and Slovenia[210] stipulated that the right of secession existed.[211] Constitutional scholars expressed that a right of secession could not be assumed by member republics as it would ultimately lead to the dissolution of the Yugoslav federation.[212] Furthermore it was argued that by uniting into a federation the republics had made use of their right to self-determination and therefore the right of secession had been consummated.[213]

Following the position adopted by the Croatian and Slovenian constitutions regarding secession, the federal Yugoslav government was forced to state the constitution's position regarding the matter. In 1990, the collective presidency of the federation declared that the

---

[204] Article 203, *Constitution of SFRY* (1974); a peculiarity of the Yugoslav Constitution was that other than being a framework for government it was also a succinct framework for society. Doctrines such as the 'duty of loyalty' applied to citizens as well as republics. It was to some extent a code of conduct. See also Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 502.

[205] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 503-508.

[206] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 505.

[207] See Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 508; Iglar F, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede', 214-215.

[208] 'The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historical aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, have, together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people-the Socialist Federal Republic of Yugoslavia.'
Basic Principles I, para. 1, *Constitution of SFRY* (1974); Even with this explicit framing, there existed no clear procedure for exit by a republic hence making it almost superfluous.

[209] Article 135, *Constitution of Republic of Croatia* (1990).

[210] Amendment 99, *Constitution of Republic of Slovenia* (1989).

[211] This was a constitutional faux pas as under article 206 of the Yugoslavian Constitution 1974 it was stipulated that republican constitutions could not contradict the federal one.

[212] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 509.

[213] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 510; This argument is debatable; does it mean that a unit can only practice self-determination only once then the right becomes extinguished?

republics had the right to secede based on the Constitution.[214] This was also affirmed by the Federal Executive Council of Yugoslavia.[215] The caveat to this affirmation was that the process was to be strictly democratic and not a unilateral act.[216] The requirement was that an elaborate negotiation process would take place within the Yugoslav nations in order to assess whether secession was the best solution.[217]

4.2.2 Rationale for the clause

As in the Ethiopian case, the self-determination and secession clause was a method to unite the republics:[218]

"Cursory inspection of this clause could lead one to determine that secession was not intended as a right to be reserved, but was instead a stepping stone towards a united federation. The fact the people expressed their will to live together would imply that the right of separation was forfeited upon consolidation into the federation. Therefore, self-determination and secession as a basis for the formation of the Yugoslav federation suggests no reservation of those principles as a right, but rather a method by which the freed peoples of Yugoslavia brought themselves together as a nation."

Beyond the unity of the federation, a right to secede was not envisioned to be practicable as confirmed in the absence of procedure in the event that the right was to be invoked.[219]

4.2.3 Dissolution of SFRY

Inevitably, after decades of strife and tensions, the former Yugoslavia declined into war that led to its ultimate dissolution beginning 1991.[220] This was triggered after the declarations of independence of Croatia and Slovenia –following contested referendums- which led to military invasion into both these territories with the intention of retaining them in the

---

[214] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 510.
[215] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 511.
[216] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 511; Iglar F, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede', 219.
[217] Iglar F, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede', 220.
[218] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 516.
[219] Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', 517.
[220] Iglar F, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede', 213.

union.[221] The situation deteriorated into a protracted conflict that lasted ten years and the disintegration of the federation.

In the former Yugoslavia ethnic alignments and the autonomy of the republics allowed a festering of tensions and the ultimate solution for some republics was extrication from the state. The only legitimate way was to invoke the right to secede but the process was winded and vague and not envisioned in law.[222] The unclear interpretation of the secession provision in the 1974 Constitution led to the decimation of the country due to different positions taken by the various republics.

4.3 Comparing Ethiopia and Yugoslavia

A cursory glance at the two states reveals similarities and differences that affect(ed) their view of self-determination and secession.

4.3.1 Similarities

Both states have various ethnic groups on a large territory. In both situations there was need to unite these groups to create a cohesive state while respecting their autonomy. Additionally, relations between the groups were strained owing to fear of dominance by a particular ethnic group; Ethiopia had the Amhara elite while in Yugoslavia Serbs were perceived to be the main threat. The need to quell these tensions and allow the groups to be considered as equals led to recognition in their constitutions of each group's right to self-determination to the point of secession.

In order to further entrench autonomy of the constituent groups, the states were modeled as federations. These units were meant to encourage self-government and seen as a mode for groups to exercise their self-determination. Moreover, the constituent states of Ethiopia and the republics of Yugoslavia had their own constitutions that would outline the framework for internal self-government.

In both scenarios the motivation to install a secession clause in the constitution was the need to unite the state. This was a reverse psychology mechanism; by giving groups the assurance

[221] Harbo F, 'Secession right – an anti-federal principle? comparative study of federal states and the EU', 5.

[222] In contrast the Constitution of the Republic of Croatia 1990 had a clear process for secession from the republic which was never approved by the federal government. Article 135 regulated how alliances between Croatia and other states could be formed or dissolved. To form or dissolve alliances, one-third of the Chamber of Representatives-one of the three legislative bodies constituting the Assembly- must submit a proposal, and two-thirds of the Croatian Assembly must approve it. Decisions become final if more than 50 percent of registered voters approve the resolution in a referendum conducted within 30 days. In emergency situations, however, Croatia could secede by a vote of only two-thirds of the Chamber of Representatives present, without any requirement for a referendum.

that they could leave the federation at any point and were inherently autonomous, they successfully managed to cohere the federation. After this motive was achieved, the federal government then became reluctant to effect the clause. In both Ethiopia and Yugoslavia, there is (was) no political will to allow a secession to occur.

As seen in the previous chapter, for a people to have a legitimate claim to self-determination and subsequently secession, the group needs to have a potent link to specific territory. In both Yugoslavia and Ethiopia, ethnic groups were deliberately scattered so that there was no strong link to territory. This would discourage a secession claim if it arose.

More importantly, in both scenarios, the presence of a secession clause in the constitution has not been a panacea to violence. As seen, in Ethiopia federal soldiers and police clamp down any secessionist movements before they become too vocal. In the former Yugoslavia, the declarations of inependence of both Croatia and Slovenia triggered response from the Yugoslavian military and a conflict that ensued for almost a decade. This leads to the inference that, politically, it is difficult to allow a secession to occur. The occurrence of violence therefore stems from the need to keep the union together and is almost inevitable.

4.3.2 Differences

One of the differences between the two countries is that the Ethiopian Constitution has an elaborate leaving procedure outlined in the event that a group wishes to secede. The Yugoslavian Constitution did not have a clear procedure and relied on interpretation by the Federal Executive Council. In protest, the Croatian Republican Constitution created its own procedure in the event that it wanted to exit the federation. This lack of procedure may have exacerbated the conflict that eventually led to the state's dissolution.

Finally, in both scenarios the autonomous regions were allowed to have their own constitutions for self-government. In Ethiopia the constitution is to be modeled after the federal one whereas in the former Yugoslavia the autonomous republics were allowed to have their own independent ones not based on the federal constitution. However, such a constitution was supposed not to contradict the federal one.

4.4 Conclusion

In the studies undertaken, embedding the right of secession in the constitution was a ploy to unite the groups that make up the federation. There exists (existed) no political will to allow a unit to secede in both contexts. While Ethiopia still maintains the union, Yugoslavia no longer exists owing to the breaking away of the republics. Ethiopia's success can be attributed to a strong federal government that has the ability to whip constituents in line. The former Yugoslavian federal government was mistrusted owing to the fact that it was constituted mainly by Serbs. Besides, the constituent republics had formidable 'military' units that could mount defence against the Yugoslavian National Army.

Ultimately, in both situations, it appears that despite the recognition of the right of self-determination in the constitution, the right has been delegitimized politically.

CHAPTER V: CONCLUSION

This study set out to determine whether allowing a secession clause in the constitution of a federal state would reduce or deter secessionist conflict. The discussion of secession is relevant to federal states as their political structuring might allow for seceding units to thrive.[223] Secessionist conflicts have proven to be costly and can stretch over long periods of time as with the Nagorno-Karabakh region.

One of the major problems that plagues the issue of secession in international law is ambiguity. There are no recognized rules or principles that allow for secession. One of the cornerstones of public international law is territorial integrity which makes states reluctant to endorse laws that would compromise this integrity.

This is why it would then be viable to delegate the issue of secession to domestic law as opposed to international law. In a domestic law context, it is easier for all stakeholders to be involved in negotiations and seek a peaceful way out. In the event that the secession is ultimately successful, recognition by the rump state[224] of the seceding entity gives that new state legitimacy in international law.[225]

5.1 Self-determination

The right to self-determination often forms the basis of a right to secede claim by units that wish to leave a union. As seen in chapter 2, it is a solidarity right where a people are entitled to determine their own social, economic, and political destiny. This right can be exercised internally (within a state, for instance autonomous regions within a state) and as a last resort externally (where a group secedes from an existing political entity). It is important to note that while self-determination may lead to secession, it is not synonymous with the right to secede.

5.2 Right to secede

There does not exist a right to secede in international law. However, some domestic constitutions have a provision for this right as seen in the case studies in the third chapter. The right to secede was included in these constitutions as a way to lure smaller units to create a larger federal state and once this goal was achieved, the right was somehow delegitimized. In the former Yugoslavia, despite allowing for secession in their 1974 Constitution, there was

[223] Harbo F, 'Secession right – an anti-federal principle? Comparative study of federal states and the EU', 133-134.
[224] Political entity being seceded from.
[225] Crawford J, 'Creation of states in international law', 376.

no procedure outlined in the event that a constituent republic wished to leave the union. In contrast, the 1995 Ethiopian Constitution clearly provides a procedure for leaving the union but any detection of secessionist movements is quickly descended upon by the federal army. Therefore despite the constitutional right, there exists no political will to allow for a unit to leave the federation.

5.3 Constitutionalizing secession

Constitutionalizing secession in a federal state is a positive step because the process can commence in a non-violent way.[226] This would be ideal in a liberal democratic society, so that a democratic process can be adhered to in case a group wishes to secede. Liberal democratic scholars Norman and Weinstock[227] advocate for constitutionalizing secession but making it difficult to attain through legal hurdles such as having a supermajority. This seems to be the in the process outlined in the Ethiopian constitution where a there is a high threshold of consent required before secession is allowed.

Other scholars argue that secession would be incompatible with federal constitutions for reasons outlined below:

'(1) If secession is legally recognised in a federal polity, it could weaken the federal system by giving a tool of political coercion to the federal units, i.e. greater bargaining power. Thus, every time they do not agree with the policy of the federal level, they will threaten it with secession. The threat might be particularly dangerous if the federal unit can or might want to exist on its own.

(2) The secession right could have negative consequences on fundamental federal principles such as cooperation and solidarity. When a federal unit wants to secede, it no longer accepts its federal obligations. This could lead to the fact that the other federal units losing their trust in the federal polity and thus to a breakdown in 'federal loyalty' among the entities.

(3) If the constitution provides a right to secede, each federal unit will be vulnerable to threats of secession coming from other units.

(4) A possibility of secession could be an element of uncertainty for federal economic development and unity of the system as a whole.

(5) A federal polity that admits the right of secession demonstrates that it is generally failing e.g. former USSR.'[228]

---

[226] Jovanovic M, 'Can constitutions aid in the resolution of secessionist conflicts?', 76.
[227] See Chapter 4.
[228] Harbo F, 'Secession right – an anti-federal principle? Comparative study of federal states and the EU', 134.

It appears that the incentives of having a domestic recognition of secession are diminished for the reason that the union will be politically weaker owing to the threat of departure by units.

5.4 Violence averted?

In constitutionalizing secession, is violence truly deterred? At the onset, possibly. However, as it has been seen, federal states that allow for secession lack the political will to allow for secession to occur. Even in Ethiopia where the procedure is clearly set out, the military moves in to quell the movement before it gains momentum. In the event that a secessionist movement gains traction in such a scenario, would it hesitate resisting military attacks in order to further its cause? It seems not.

In 2014, Scotland (a territory of Great Britain) held a referendum to secede from the kingdom of Great Britain. The referendum was consented to by the United Kingdom government as well as the Scottish parliament. The result of the vote was that Scotland would still remain in the UK. In this scenario, the will of the Scottish people was respected and a process, devoid of violence, was effected to possibly allow for the departure of Scotland from the UK.[229]

It should be noted that the UK has no written constitution and in legally allowing for the referendum to happen, the Scottish Independence Referendum Act 2013 was passed, with the approval of both governments. The process was entirely peaceful and the result was accepted without any violent tendencies. It appears then that, a sound legal process coupled with a political will on the part of the rump state can allow for peaceful secession. Recognizing the will of the people and adhering to democratic principles would allow governments to accept and allow for secession.

5.5 Conclusion

Ultimately it appears that secession, even if allowed in a state's constitution, will more often than not be fervently resisted. Rarely are states eager to allow units to exit with territory they consider invaluable. Constitutionalizing secession becomes an advantage because it is within the domestic realm that the issue is decided as opposed to ambiguous international law. Despite the provision, there appears to be no political will present in states that allow for

[229] Rachman G, 'Scotland can be a model for how to handle separatism', 17 February 2014 http://www.ft.com/cms/s/0/c7759f0c-97c2-11e3-ab60-00144feab7de.html#axzz3wXoM2aCx on 5 January 2016.

secession to allow for the phenomenon to happen. Therefore, it would be safe to conclude that, constitutionalizing secession does not guarantee aversion of violence.

BIBLIOGRAPHY

Treaties

African Charter on Human and People's Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

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

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.

UN Resolutions

UNGA *Declaration on the granting of independence to colonial countries and peoples*, UN A/Res/1514 (XV) 14 December 1960.

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 50th Anniversary of the UN*, A/Res/50 9 Nov. 1995.

Security Council Resolutions

UNSC S/RES/169 (1961) The Congo Question.

UNSC S/RES/216 (1965) Question concerning the situation in Southern Rhodesia.

UNSC S/RES/217 (1965) Question concerning the situation in Southern Rhodesia.

International Court of Justice (ICJ) case law

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.

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

Regional case law

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

Kevin Mgwanga Gunme et al v Cameroon, ACmHPR Comm. 266/03 (2009).

Domestic statute

Constitution of the Federal Republic of Ethiopia (1995).

Constitution of the Socialist Federal Republic of Yugoslavia (1974).

Constitution of Republic of Croatia (1990).

Constitution of Republic of Slovenia (1989).

Constitution of Spain (1978).

Constitution of South Africa (1996).

Constitution of Belgium (2014).

Domestic case law

Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 (Canada Supreme Court).

Books

Crawford J, *Creation of States under International Law*, Oxford University Press, (2007).

Achebe C, '*There was a Country: A personal history of Biafra*', The Penguin Press, (2012).

Mises L, *Nation state and economy*, Institute for Humane Studies, (1983).

Sureda A, *The evolution of the right of self-determination: A study of United Nations practice*, Sijthoff, (1973).

Cobban A, *The nation state and national self determination,* Collins, (1970).

Ouguergouz F, *The African Charter of Human and People's Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa,* Martinus Njihoff Publishers, (2003).

Articles

Thurer D and Burri T, 'Self-determination', *Max Planck Encyclopaedia of Public International Law*, 2008.

Jaroslav T, 'Keeping the Peace after Secession: Territorial Conflicts between Rump and Secessionist States' *The Journal of Conflict Resolution*, Vol. 49, No. 5, (2005).

Siroky D, 'Secession and Survival: Nations, States and Violent Conflict', unpublished PhD thesis, Duke University, (2009).

Belay N, 'The new federal experiment and accommodation of diversity in Ethiopia: exploring a novel experience' *Institute of Federalism Fribourg University* (2009).

Tsegaye R, 'State Constitutions in federal Ethiopia: a preliminary observation' *Bellagio Conference* March 22-27 2004.

Bordignon M and Brusco S, 'Optimal secession rules', *ZEW Discussion Papers No. 99-51, (*1999).

McGee R, 'The Theory of Secession and Emerging Democracies: A Constitutional Solution', *Stanford Journal of International Law* Vol. 28, (1998).

Buchanan A, 'Towards a Theory of Secession', *University of Chicago Press*, (1991).

Haljan P. 'A Constitutional Duty to Negotiate Amendments: Reference Re Secession of Quebec', *The International and Comparative Law Quarterly, Vol. 48, No. 2*, (1999).

Berg J. 'The Right to Self-determination', *University of Illinois Press* (1991).

Klabbers J, 'The Right to Be Taken Seriously: Self-Determination in International Law', *Human Rights Quarterly, Vol. 28, No. 1* (2006) .

Hetcher M., 'The Dynamics of Secession', *Sage Publications Ltd.*, (1992).

Kurrild-Klitgaard P, ' The Constitutional Economics of Exit', *American Journal of Economics and Sociology Vol. 61, No. 1*, (2002).

Sunstein C, 'Constitutionalism and Secession', *The University of Chicago Law Review*, (1991).

Habtu A, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution', *Oxford University Press*, (1998).

Jovanovic M, 'Can Constitutions Be of Use in the Resolution of Secessionist Conflicts?', *Journal of International Law and International Relations*, (2009).

Kreptul A, 'The Constitutional Right of Secession in Political Theory and History', *Journal of Libertarian Studies* (2003).

Onuoha G, 'Contemporary Igbo nationalism and the crisis of self-determination in the Nigerian public sphere' *African Studies* (2012).

Choudhry S and Howse R, 'Constitutional Theory and the Quebec Secession Reference', *Canadian Journal of Law and Jurisprudence*, (2000).

Brietzke P, 'Ethiopia's "Leap in the Dark": Federalism and Self-Determination in the New Constitution', *Journal of African Law* (1995).

Harbo F, 'Secession Right – an Anti-Federal Principle? Comparative Study of Federal States and the EU', *Journal of Politics and Law* (2008).

Brilmayer L, 'Secession and Self-Determination: A Territorial Interpretation', *Yale Faculty Scholarship Series* (1991).

Bereketeab R, 'Self-determination and Secessionism in Somaliland and South Sudan: challenges to postcolonial state-building', *Nordic Africa Institute, Discussion Paper 75* (2012).

Bagwell B, 'Yugoslavian constitutional questions: self-determination and secession of member republics', *Georgia Journal of International and Comparative Law*, (1991).

Mazrui A, 'Consent, colonialism, and sovereignty', *Wiley Online Library* (2006).

Iglar F, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede', *Boston College International and Comparative Law Review*, (1992).

Zacher M, 'The territorial integrity norm: international boundaries and the use of force', *International Organisation*, (2001).

Norman W, 'Domesticating secession', *American Society for Political and Legal Philosophy*, (2003).

Weinstock D, 'Toward a proceduralist theory of secession', *Canadian Journal of Law and Jurisprudence*, (2000).