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Cover Page Footnote

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SELF-DETERMINATION OF THE PEOPLES OF QUEBEC UNDER INTERNATIONAL LAW

JOHAN D. VAN DER VYVER*

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I. INTRODUCTION

There are currently several hundred secessionist movements that are active in the group-conscious communities of the world. The secessionists almost invariably claim legitimacy for their cause on the basis of the international law principle proclaiming the right to self-determination of peoples. They have it all wrong.

This article will show that the right to self-determination over the years has acquired different shades of meaning, determined by the contingencies that prompted emphasis of that right at a given time and particularly, by the nature of the "peoples" claiming the right. The right to self-determination has thus been invoked to sanction the competence of national states within the world empires of yesterday in their demand for sovereignty as independent states, to legitimize the political independence of nations subject to colonial rule or foreign domination, and to affirm the right of peoples subject to racist regimes to participate in the political structures of their countries. Currently, the emphasis has shifted to the entitlement of national, ethnic, religious, or linguistic societies within a political community to live according to the customs and traditions of their kind.

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The right to self-determination does not authorize the secession of sections of a nation from an existing state. After all, the right to self-determination is almost always proclaimed in conjunction with the territorial integrity of states. The right to self-determination furthermore belongs to a people whereas secession attaches to a territorial region. International law does, in exceptional circumstances, sanction the redrafting of national borders. State practice indicates that those exceptional circumstances are exclusively confined to general support of a political society, and secondly, to the redrafting of national frontiers as a condition of peace following an armed conflict. It should be emphasized at the outset that "general support" in this context denotes the support of a cross-section of the entire political community and not only of inhabitants of the region to be afforded separate statehood. The "right" to secession in these limited circumstances — it would perhaps be better to speak of international acquiescence in the emergence of a new state — is not a component of the right to self-determination but instead constitutes a distinct norm of international law.

This in turn raises the question as to the *essentialia* of statehood in international law. In this regard, it will be argued that statehood for the purposes of international law does not always coincide with statehood as a matter of (internal) constitutional reality; and secondly, that the theories of statehood subscribed to by the leading publicists — the declaratory theory and the constitutive theory — do not adequately account for the *de facto* exercise of sovereignty by the maverick states of the world. It will be argued that, within the confines of the constitutive theory, state practice has shifted the emphasis from recognition as a *sine qua non* of statehood in international law to collective non-recognition as the death knell of a newly established political entity claiming to be a state in international relations.

Moreover, a distinction should be drawn between the two kinds of relationships which a political entity might seek to establish with other states. In its inter-individual relations, a political entity might be recognized and treated as a state for certain purposes (for example, for the purpose of liability in tort) but not for others, or a political entity not generally recognized as a state might nevertheless establish inter-individual relations (for example, diplomatic exchanges or treaty arrangements) with a limited number of other states. On this inter-individual level, the conduct of the maverick

state is governed by rules of international law and it does, therefore, within those limited confines, function as a state.

But to become a member of the international community of states – and therefore be eligible for membership in an international organization and to be counted when the emergence of a rule of customary international law is at issue (here, one could speak of community relations of a state) – is another cup of tea. Here, collective non-recognition, signified mostly by refusal of United Nations membership, would be fatal.

These issues were recently put to the test in an opinion of the Supreme Court of Canada regarding the feasibility under Canadian constitutional law, and in virtue of the right to self-determination under international law, of the secession of the province of Quebec – providing the electorate of that province express themselves in favor of breaking their political ties with the Canadian federation.¹ A critical analysis of that judgment will serve to make the points summarized above.

In Part II, the judgment will be placed in its proper historical context. Part III briefly touches upon the constitutional issues pertinent to the secession of Quebec from Canada. Although a clear majority of the electorate of Quebec in favor of secession would not be enough to authorize the establishment of an independent state, it would place a duty on the other provinces to enter into negotiations with Quebec regarding the constitutional future of the federation. In Part IV, the secessionist policy of the dominant political party in Quebec will be evaluated in view of the right to self-determination as sanctioned by international law. It will be shown that the inhabitants of Quebec do not constitute a "people" for purposes of the right to self-determination, and that the right to self-determination, in any event, does not sanction territorial secession from an existing state. Part V considers the rules of international law pertaining to secession and how those rules might play themselves out in the case of Quebec. It will become evident that the prevailing circumstances in Quebec are far removed from those that would trigger a "right" to secession under international law. Part VI contains a brief outline of the requirements of statehood in international law viewed in consideration of the Canadian case and the conditions which Quebec will have to satisfy if it is to become an independent sovereign state. Unilateral secession of Quebec from Canada would make general recognition of the new political entity highly unlikely, and Quebec

1. See Reference Re Secession of Quebec [1998] 2 S.C.R. 217.

might then find that, absent such recognition, its international status would remain confined to the realm of isolated inter-individual relations.

II. HISTORICAL PERSPECTIVE

In November 1976, the *Parti Québécois* was elected into office in the province of Quebec. For the first time in the contemporary history of Canada, a provincial government advocating secession from the Canadian federation took (regional) political control in the country. In years gone by – indeed shortly after the enactment of the Constitution Act of 1867, which marked the birth of the Canadian federation – there was an attempt by Nova Scotia to sever its links with the federation.² The first Dominion elections of September 1867 resulted in an overwhelming victory in Nova Scotia for those in the province opposed to confederation (18 of the 19 seats in the federal legislature, and 36 of the 38 seats in the provincial legislature).³ Premier Joseph Howe of Nova Scotia thereupon led a delegation to London with instructions from his constituents to seek withdrawal of the province from the confederation, but the delegation's plea was rejected by the Colonial Office.⁴

More recently, the *Parti Québécois* led by Premier René Lévesque aspired toward full sovereignty for Quebec, combined with economic association with Canada. On May 20, 1980, the sovereignty-association option was put to the test in a referendum within the province. The question posed in the referendum was as follows:

The government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its own laws, administer its taxes and establish relations abroad, in other words, sovereignty and at the same time, to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will be submitted to the people

2. See *id.* at 243-44. See also H. Wade MacLauchlan, *Accounting for Democracy and the Rule of Law in the Quebec Secession Reference*, 76 CAN. B. REV. 155, 168 (1997).

3. See Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 243.

4. See *id.*

through a referendum; on these terms, do you agree to give the government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada? Yes/No.⁵

Sixty percent of the electorate of Quebec voted against it.⁶

The *Parti Québécois* was then defeated in the elections of 1985. The new provincial regime under Premier Bourassa followed a policy of reconciliation with the rest of Canada. The Constitution Act of 1982 had, in the mean time, been enacted by the British Parliament.⁷ This Act put Canada on its current constitutional course of securing full independence from the British legislature and subjecting the Canadian (federal and provincial) legislatures and governments to the supreme governance of a bill of rights. This consequently revived questions pertaining to the autonomy of Quebec.

Peter Hogg reminds that "Quebec, with its French language and culture, its civil law, and its distinctive institutions, is not a province like the others."⁸ Additionally, there was a time when religious considerations, involving tensions between a predominant Roman Catholic community in Quebec and a vast Protestant-*cum*-secular majority in the rest of Canada, also contributed to parochial sentiments in Quebec.⁹ Nevertheless, Hogg shows that throughout the constitutional history of Canada "accommodation of Quebec within Canada has always been the driving force behind the various constitutional arrangements of the settlements of the St. Lawrence valley."¹⁰

Of all the provinces constituting the Canadian federation, Quebec had been the only dissenter to the Constitution Act of 1982. Its government actually contested the legality of the new Constitution. But having been deprived – by that very Constitution – of its right

5. Pierre Bienvenu, *Secession by Constitutional Means: Decision of the Supreme Court of Canada in the Quebec Secession Reference*, 21 *HAMLIN J. PUB. L. & POL'Y* 1, 3 (1999).

6. *Id.*

7. See Canada Act, 1982, ch. 11 (U.K.); CAN. CONST. (Constitution Act, 1982) (The Constitution Act, 1982 is contained in a schedule to the former British Act).

8. Peter W. Hogg, *The Difficulty of Amending the Constitution of Canada*, 31 *OSGOODE HALL L.J.* 41, 45 (1993).

9. See Gilles Bourque, *Quebec Nationalism and the Struggle for Sovereignty in French Canada*, in *THE NATIONAL QUESTION: NATIONALISM, ETHNIC CONFLICT, AND SELF-DETERMINATION IN THE 20TH CENTURY* 199, 205-05 (Berch Berberoglu ed. 1995).

10. Hogg, *supra* note 8, at 45.

of veto of the constitutional amendments at issue, its action failed.¹¹ The government of Premier Bourassa agreed to accept the Constitution Act provided, *inter alia*, that (a) Quebec is recognized as a separate entity; (b) the province is afforded a greater say in matters of immigration; (c) the province is given the power to participate in the election of judges to the Supreme Court of Canada; (d) limitations are imposed on federal spending powers; and (e) Quebec is given a veto in respect to constitutional amendments.¹² These concerns were addressed in the Meech Lake Accord of 1987.¹³ But in the end the Accord came to naught, as the Constitutional amendment to give effect to the provisions of the Accord required ratification by Parliament and all the provinces.¹⁴ Therefore, even though approved by the Senate and the House of Commons as well as eight of the ten provinces, the proposed constitutional amendments could not become law.

A further attempt to address the national sentiments of Quebec through extension of provincial autonomy was pursued under the Charlottetown Accord of August 28, 1992.¹⁵ A Constitutional amendment to give effect to the Accord was submitted by referendum on October 26, 1992, and was decisively defeated by the voters. The negative lobby gained a majority in six of the ten provinces, including Quebec.¹⁶

In January 1995, while Jacques Parizeau was Premier of Quebec, a Bill was published for presentation to the Parliament of Quebec.¹⁷ If enacted, the Bill would proclaim the sovereignty of Quebec and authorize the government of the newly established state to formulate an agreement with Canada to maintain an economic and political association between Quebec and the Canadian federation.¹⁸ The Bill further provided that this Act may not come into force without the

11. *Re Objection by Quebec to a Resolution to Amend the Constitution* [1982] 2 S.C.R. 793, 817-18.

12. See Meech Lake Communique of April 30, 1987, 1987 Constitutional Accord, and Constitutional Amendments 1987, reprinted in PETER W. HOGG, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED 56-85 (1988). See also COMPETING CONSTITUTIONAL VISIONS: THE MEECH LAKE ACCORD, 315-28 (Katherine E. Swinton & Carol J. Rogerson eds., 1988).

13. See HOGG, *supra* note 12, at 56-60.

14. See *Can. Const.* (Constitution Act, 1982), §41.

15. See *Consensus Report on the Constitution and the Draft Legal Text*, reprinted in *The CHARLOTTETOWN ACCORD, THE REFERENDUM AND THE FUTURE OF CANADA*, 279-361 (Kenneth McRoberts & Patrick Monahan eds., 1993).

16. See REFERENDUM 92: OFFICIAL VOTING RESULTS (Chief Electoral Officer of Canada, 1992).

17. The Sovereignty Bill, art. 1 (1995), available at <http://www.ccu-cuc.ca/en/library/referendum/95ref_bill.html>.

18. See *id.* art. 3.

affirmative consent of a majority of votes cast by the electors in a referendum.¹⁹ A referendum was accordingly held in Quebec on October 30, 1995 posing the following question:

Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?²⁰

The agreement cited in the referendum question was an election pact conducted between certain political groupings in Quebec, namely the *Parti Québécois*, the *Bloc Québécois* and the *Action Démocratique du Québec*. In this agreement, the parties pledged:

To join forces and to coordinate our efforts so that in the Fall 1995 referendum, Quebecers can vote for a real change; to achieve sovereignty for Quebec and a formal proposal for a new economic and political partnership with Canada, aimed, among other things, at consolidating the existing economic space.²¹

The secessionist endeavor was narrowly defeated with 50.56% voting "No" and 49.44% voting "Yes",²² according to the official results. Given the narrow margin of defeat and the continued resolve of the Party that remained in political control of Quebec to establish full sovereignty for the province, the secessionist ideology has still not gone away and seems unlikely to be soon abandoned.

On September 30, 1996, the Governor in Council of Canada referred questions pertinent to the secessionist policy of Quebec's ruling Party to the Supreme Court of Canada for their opinion.²³ First, under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec

19. See *id.* art. 17.

20. Quebec 1995 Referendum, available at <<http://www.ccu-cuc.ca/en/library/referendum/1995referendum.html>>.

21. Agreement between the *Parti Québécois*, the *Bloc Québécois*, and the *Action Démocratique du Québec*, ratified at Québec City, June 12, 1995 by Jacques Parizeau, Lucien Bouchard, & Mario Dumont, available at <http://www.ccu-cuc.ca/en/library/referendum/95ref_agreement.html>.

22. *Highlights of the Second Annual CRIC Survey on National Unity (2)*, DIRECTION, Dec. 17, 1998, available at <<http://www.cric.ca/cuc/en/dir/v3n45.html>>.

23. Order in Council C.P. 1996-1497, Sept. 30, 1996.

from Canada unilaterally? Second, does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature, or government of Quebec the right to effect secession of Quebec from Canada unilaterally? Third, in the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? Only the second of these questions will be fully discussed in this note.

III. THE CONSTITUTIONAL ISSUE

The Supreme Court handed down its opinion on August 20, 1998.²⁴ The opinion disposed of objections raised *in limine* as to the jurisdiction of the Supreme Court to give the opinion sought by the Governor in Council and the justiciability of the questions submitted to the Court. The opinion also touched upon important matters of history²⁵ and constitutional law that fall outside the scope of this article. A brief reference to some of those issues must therefore suffice.

It was, for example, argued that the Court, being a municipal tribunal, lacked jurisdiction to respond to the second (international law) question. Not so, responded the judgment. The Court would not be acting as an international tribunal or purport to bind other states or transform international law, though the international law position is relevant to legal questions pertaining to the future of the Canadian federation.²⁶ On the constitutional front, it is to be noted that the Canadian Constitution does not authorize the unilateral secession of any constituent region of the federation as did, for example, the constitutions of the Soviet Union,²⁷ Czechoslovakia²⁸

24. Reference Re Secession of Quebec [1998] 2 S.C.R. 217.

25. See Marc Chevrier, CANADIAN FEDERALISM AND THE AUTONOMY OF QUEBEC: A HISTORICAL VIEWPOINT (1996); Bourque, *supra* note 9.

26. See Reference Re Secession of Quebec [1998] 2 S.C.R. 271, 234; see also Bourque, *supra* note 9 at 235.

27. Art. 72, KONST. USSR (1990), reprinted in XVIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1993).

28. See Constitution Act No. 143/1968 Sb., enacted Oct. 27, 1968, Const. Czech Fed'n, Preamble ("recognizing the inalienable right of self-determination even to the point of separation, and respecting the sovereignty of every nation and its right to determine freely the manner and form of its life as a nation and state"); see also Constitution Act No. 327/1991 Sb., enacted July 18, 1991, about Referendum, art. 1(2) (creating a provision citing a referendum as "the only way the proposal for secession of the Czech Republic or the Slovak Republic may be

and the former Republic of Yugoslavia.²⁹ This feature of the Canadian Constitution, however, did not conclude the matter. The Court went on to construct an opinion based on certain basic principles that underpin the Canadian Constitution – in particular the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.³⁰ The Court was not requested to address how secession of a province could be achieved in a constitutional manner, and consequently refrained from expressing an opinion in that regard.³¹ The Court's opinion was confined to the question posed: Can the National Assembly, legislature, or government of Quebec, in terms of the Canadian Constitution, unilaterally effect the secession of Quebec from Canada? "Unilateral" secession was defined by the Court as "the right to effectuate secession without prior negotiations with the other provinces and the federal government."³² The Constitution is indeed silent as to the competence of a province to secede from the federation. However, this much is clear: secession would require an amendment of the Constitution,³³ which evidently must occur in conformity with the amendment procedure prescribed by the Constitution.³⁴

This does not mean that the expression of the will of "a clear majority on a clear question"³⁵ in Quebec in favor of secession can simply be ignored or discarded by Canadians from other parts of the country. The principle of democracy includes the constitutional right of each constituent part of the Canadian federation to initiate

decided"). Decisions in a referendum are taken by majority vote. *See id.* art. 5(2). Furthermore, a decision in favor of secession approved only in one of the two republics would suffice to authorize disbanding the federation. *See id.* art. 6(2).

29. CONST. FED. PEOPLE'S REPUBLIC YUGO., 1946, art. 1 (depicting Yugoslavia as "a community of peoples equal in right, who on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative state. . ."); *see also* CONST. FED. PEOPLE'S REPUBLIC YUGO., 1963, para. 1 Introductory Part (Basic Principles) (depicting Yugoslavia as "a federal republic of free and equal peoples and nationalities" united "on the basis of the right to self-determination, including the right to secession"); *see also* CONST. SOCIALIST FED. REPUBLIC YUGO., 1974 Introductory Part (Basic Principles) (referring to "the right of every nation to self-determination" and "the brotherhood and unity of the nations and nationalities"). The right to secede belonged to "nations" only and not to "nationalities" as defined in the constitutional law of Yugoslavia.

30. *See Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 247-74; *see also* Robert Howse & Alissa Malkin, *Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession*, 76 CAN. B. REV. 186, 196-211 (1997) (describing these principles as "foundational norms" that structure and govern constitutional change in Canada).

31. *See Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, 273-74.

32. *Id.* at 264.

33. *See id.* at 263.

34. *See* CAN. CONST. (Constitution Act, 1982), § 52(3).

35. *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, 268.

constitutional change.³⁶ This right, the Court held, "imposes a corresponding duty on the participants in [the] Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces."³⁷ Again, "[t]he corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table."³⁸ Although a referendum in itself cannot bring about unilateral secession, "the democratic will of the people of a province carries weight," provided the demands of a "clear" majority on a "clear" question have been satisfied and the expression of the democratic will of the people of the province is thus "free of ambiguity both in terms of the question asked and in terms of the support it achieves."³⁹

The duty of other provinces to negotiate with the one seeking secession by virtue of a clear majority of its constituency does not entail an obligation to concede secession.⁴⁰ On the other hand, they will not comply with their obligation to negotiate by "an absolute denial of Quebec's rights,"⁴¹ or by "unreasonable intransigence."⁴² The negotiations would be governed by the same constitutional principles that dictate the duty to negotiate — which include "federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."⁴³ Though the duty of the other provinces to respect and respond to the legitimate aspirations of their counterpart seeking secession is a matter of constitutional obligation, the final outcome of the negotiations would be a political decision beyond the jurisdiction of the courts.⁴⁴

The Court emphasized — and rightly so — that secession of one province implicates the rights and interests of all Canadians, as "[n]obody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec."⁴⁵ Secession, therefore, requires "clear" majorities on two fronts; a clear majority of the

36. See CAN. CONST. (Constitution Act, 1982), § 46(1); see also Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 257.

37. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 257.

38. *Id.* at 266.

39. *Id.* at 264.

40. See *id.* at 267.

41. *Id.* at 268.

42. *Id.* at 272.

43. See *id.* at 266.

44. See *id.* at 271-72.

45. *Id.* at 269; see also *id.* at 292-93.

population of Quebec that would set the negotiations pertaining to secession in motion, and a clear majority of Canada as a whole that would sanction the constitutional change required to effect secession.⁴⁶

The Court concluded as follows:

[T]he secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.⁴⁷

IV. THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW

The reasoning of the Court on the second question can be summarized as follows. The right to self-determination of peoples as proclaimed in various international instruments includes two distinct components: *internal* self-determination, which signifies "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state"⁴⁸; and

46. See *id.* at 268, 294.

47. *Id.* at 273.

48. *Id.* at 282.

external self-determination, which amounts to "a right to unilateral secession."⁴⁹ Since the right to self-determination is often mentioned in conjunction with "respect for the territorial integrity of existing states,"⁵⁰ it must be taken not to include a right to secession . . . except in very special circumstances.⁵¹ The Court limited the categories of peoples finding themselves in the special circumstances that would warrant secession to three groups: (a) those under colonial domination or foreign occupation;⁵² (b) peoples subject to "alien subjugation, domination or exploitation outside a colonial context;"⁵³ and, possibly, (c) a people "blocked from the meaningful exercise of its right to self-determination internally."⁵⁴ The Court concluded as follows:

Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples",⁵⁵ nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.⁵⁶

The conclusion of the Court cannot be faulted. The Courts exposition of the right to self-determination of peoples is, however, not free from anomalies. That is indeed also true of most political, and indeed academic, discourses on the right to self-determination.⁵⁷ For example, if the right to self-determination is to be reconciled with the sanctity of national borders and the territorial integrity of states, then self-determination and secession cannot possibly be accommodated under a common denominator. The concept of

49. *Id.*

50. *Id.*; see also *id.* at 277-78, 280.

51. See *id.* at 280-81.

52. *Id.* at 285.

53. *Id.*

54. *Id.*

55. The Court avoided a definition of "peoples" as the repositories of a right to self-determination under international law. See *id.* at 281-82, 295.

56. *Id.* at 287.

57. Hurst Hannum's comment is apposite in this regard: "Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles." HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 27 (1990).

external *self-determination* to denote secession, or depicting secession as "an offensive exercise of self-determination,"⁵⁸ is therefore a contradiction in terms. Again, if the right to self-determination of oppressed or disenfranchised peoples simply entails their entitlement to equal freedom within, or the right to participate in the political structures of the country of, their nationality, then surely secession does not come into play at all. The classification of peoples proposed by the Court for purposes of the (exceptional) right to secession is furthermore not consistent with the nature of their entitlement in each instance: "colonial domination," "foreign occupation," and "alien subjugation, domination or exploitation" are indeed, for purposes of secession, birds of a feather. If the substance of varying manifestations of self-determination is to be our guide, then a people "blocked from meaningful exercise of its right to self-determination internally"⁵⁹ falls in a different category. It must be taken to include two quite distinct groups, namely those who are excluded from political processes that determine their status in society, and those who are deprived of the entitlement to live according to their own customs and traditions.

These logical anomalies can be avoided by recognizing that over time the concept of self-determination has taken on quite different shades of meaning, and that the special and distinct significance of the concept is determined in each instance by the nature and predicament of the peoples claiming that right. Additionally, it must be recognized that the right to self-determination and the right under international law to secession must be construed as two quite distinct entitlements, each with its own beneficiaries, constituent elements, conditions of legitimate application, and consequences.

I shall next venture to put these presuppositions in their proper perspective.

A. *Historical Perspective*

The right to self-determination of peoples, alongside the equality of nations large and small, has been recognized as a basic norm of international law.⁶⁰ In terms of the International Covenant on Civil

58. Karl Doehring, *Self-Determination*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 56, 65 (1994).

59. Reference Re Secession of Quebec [1998] 2 S.C.R. 217, 285.

60. U.N. CHARTER art. 1, reprinted in 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 U.N.Y.B. 1043; see also *id.* arts. 15, 73.

and Political Rights,⁶¹ self-determination, as currently perceived, entails the following principle: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."⁶²

Religious, ethnic and cultural minorities have come to be recognized in public international law as "peoples" that have a right to self-determination. Although states remain the main subjects of international law, social institutions other than the state have long been recognized as entities with standing in international relations.⁶³ "Peoples" have thus come to be repositories in international law of a right to self-determination.

For a proper understanding of the right to self-determination in international law, three presuppositions must constantly be borne in mind. First, the concept of self-determination has over the years acquired different shades of meaning that must be clearly distinguished. Second, the meaning to be attributed to self-determination in any particular instance will be determined by the identity of the "people" who have a claim to that right. Finally, current state practice does allow the legitimate secession of a territory from an existing state, but that right to secession stands on its own feet and should not be construed as a component of the right to self-determination.

The right to self-determination⁶⁴ was introduced as a norm of international relations during World War I through separate contributions of the socialist leaders Joseph Stalin and Vladimir Lenin,⁶⁵ and the American President, Woodrow Wilson.⁶⁶ Since

61. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 27, G.A. Res. 2200 (XXI), *reprinted in* 999 U.N.T.S. 171, 179; 6 I.L.M. 360, 375 (1967).

62. *See generally* Felix Ermacora, *The Protection of Minorities Before the United Nations*, *reprinted in* IV RECUEIL DES COURS 246 (1983).

63. *See* REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS, 1949 I.C.J. 174, 179-80 (Apr. 11).

64. For a more complete account of the right to self-determination, see Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 395-416 (1991).

65. According to Antonio Cassese, "the first forceful proponent of the concept [of self-determination] at the international level was Lenin." ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 15 (1995). Earlier, in 1913, Joseph Stalin had written a detailed pamphlet on self-determination entitled *Marxism and the National Question*. *See id.* at 14. But, according to Cassese, Lenin's *Thesis on the Socialist Revolution and the Right of Nations to Self-Determination*, published in 1916, "contain[ed] the first compelling enunciation of the principle" of self-determination of peoples. *Id.* at 15.

66. The famous Fourteen Points Address delivered on January 8, 1918 to a joint session of Congress by President Wilson was, according to Robert Friedlander, seen as transforming self-

then, the concept has from time to time changed its meaning — and has in fact developed through three clearly distinguishable stages.

In the first phase of its development, demarcated more or less by the two World Wars, self-determination as perceived by Western protagonists of the principle remained focused upon legitimizing the disintegration of the Ottoman, German, Russian and Austro-Hungarian empires.⁶⁷ The secession of "peoples" from those empires was the major consideration, and in this stage of its development, the right to self-determination could have been said to vest in "ethnic communities, nations or nationalities primarily defined by language or culture" whose right to disrupt existing states derived justification from its substantive directive.⁶⁸

It should be noted, though, that even then secession from existing empires was not a right in itself. The advisory opinion of the International Committee of Jurists in the *Aaland Island Case* was, according to Nathaniel Berman, "one of the first extended legal discussions of self-determination."⁶⁹ It was pointed out that "the right of disposing of national territory" was essentially an attribute of sovereignty and that "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation."⁷⁰ It was only when "the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by applying the normal rules of positive law" that "peoples" may either decide to

determination into a universal right. See Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1 DET. C.L. REV. 71, 73 (1975). President Wilson included, in the fifth of those points, an appeal for "[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined." 1 THE PUBLIC PAPERS OF WOODROW WILSON: WAR AND PEACE, 155-59 (Ray Stannard Baker & William E. Dodd eds., 1927). See also VERNON VAN DYKE, HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY 86 (1970).

67. See ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 131-34 (1986); see also Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 463 (1971); Friedlander, *supra* note 63, at 71.

68. Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51, 86-87 (1988) (quoting Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 463 (1971)).

69. *Id.* at 72.

70. *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, LEAGUE OF NATIONS O.J. Supp. 3, at 5 (1920).

form an independent state or choose between two existing ones.⁷¹ In circumstances where sovereignty has been disrupted, "the principle of self-determination of peoples may be called into play."⁷² New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.⁷³

In the second, post-World War II phase of its development, the right to self-determination acquired a distinctly anti-colonialism nuance. In the *Western Sahara* case, it was thus decided that the right to self-determination was to be applied "for the purpose of bringing all colonial situations to a speedy end."⁷⁴ In the 1971 *Namibia* case, the right to self-determination was said to be applicable to territories under colonial rule and that it "embraces all peoples and territories which 'have not yet attained independence.'"⁷⁵ Nathaniel Berman rightly concluded that (in this phase of its development) "self-determination is a right of peoples that do not govern themselves, particularly peoples dominated by geographically distant colonial powers."⁷⁶

In the same phase of development, the right to self-determination was extended to also apply to peoples subject to racist regimes.⁷⁷ This development was probably prompted by the claim of South

71. *Id.* at 6.

72. *Id.*

73. *See id.*

74. Advisory Opinion No. 61, *Western Sahara*, 1975 I.C.J. 12, 31 (Oct. 16).

75. Advisory Opinion No. 53, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 31 (June 21).

76. Berman, *supra* note 68, at 54. *See also* CASSESE, *supra* note 67, at 76; VAN DYKE, *supra* note 66, at 87; Lynn Berat, *The Evolution of Self-Determination in International Law: South Africa, Namibia, and the Case of Walvis Bay*, 4 EMORY INT'L L. REV. 251, 283 (1990) (referring to self-determination and the equal right of peoples as "twin aspects of decolonization"); Emerson, *supra* note 67, at 463; Oscar Schachter, *The United Nations and Internal Conflict*, in LAW AND CIVIL WAR IN THE MODERN WORLD, 401, 406-07 (John Norton Moore ed., 1974); Gebre Hiwet Tesfagiorgis, Comment, *Self-Determination: Its Evolution and Practice by the United Nations and its Application to the Case of Eritrea*, 6 WIS. INT'L L.J. 75, 78-80 (1987).

77. The linkage within the confines of the right to self-determination of systems of institutionalized racism and colonialism or foreign domination may be traced to the United Nations General Assembly's *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* of 1965, in which the United Nations called on all states to respect "the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms," and to this end proclaimed that "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations." G.A. RES. 2131, U.N. GAOR, 20th Sess., Supp. No. 12, at 11; U.N. Doc. A/6014 (1965).

Africa that the establishment of independent tribal homelands as part of its apartheid policy constituted a manifestation of the right to self-determination of the different ethnic groups within the country's African population. Not so, responded the international community. The tribal homelands were a creation of the minority (white) regime and did not emerge from the wishes, or political self-determination, of the denationalized peoples themselves. In this context, self-determination signified the right of (disfranchised) persons subject to racist regimes to participate in the structures of government of their own countries which controlled their political status. It is important to note that the "self" in self-determination was no longer perceived to be sections of the population in multinational empires, but to be the entire community of a territory subject to either colonial rule, foreign domination or racist regimes.

In the third phase of its development, which chronologically emerged somewhat later than the decolonization phase but cannot be separated from the latter in terms of time, self-determination indeed came to be seen as a certain entitlement of segments of the population of independent, non-racist states. Antonio Cassese opined that the right to self-determination as enunciated in Article 1 of the International Covenant on Civil and Political Rights of 1966⁷⁸ – and this would also apply to the identical provision in the International Covenant on Economic, Social and Cultural Rights of the same year⁷⁹ – was not confined to non-independent peoples but also belonged to national or ethnic groups "constitutionally recognized as a component part of a multinational state."⁸⁰ Gaetano Arangio-Ruiz pointed out that the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations of 1970⁸¹ made the right to self-determination applicable to "all peoples."⁸² The Helsinki Final Act of 1975,⁸³ by defining the

78. International Covenant on Civil and Political Rights, *supra* note 61, at 173 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

79. See G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

80. Antonio Cassese, *The Self-Determination of Peoples, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 92, 96 (Louis Henkin ed., 1981). Cassese added, somewhat obscurely, that this was not a right of minorities as such.

81. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

82. GAETANO ARANGIO-RUIZ, *THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW* 135-36. (1979).

principle of equal rights and self-determination of peoples as entitling "all peoples always . . . in full freedom, to determine, . . . without external interference, and to pursue as they wish their political, economic, social, and cultural development,"⁸⁴ certainly seems to include the peoples of independent states.⁸⁵ The definition of self-determination as the right of peoples "freely [to] determine their political status and freely [to] pursue their economic, social and cultural development"⁸⁶ does not in itself exclude ethnic sections within a political community.

In the *Greco-Bulgarian Communities* case of 1930, the Permanent Court of International Justice gave the following definition of the "general traditional conception" of a community, which in contemporary usage would be called "a people":

the 'community' is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.⁸⁷

More recently, the peoples within an independent and sovereign state with a claim to self-determination have been more clearly identified as national or ethnic, religious and linguistic minorities.

83. Conference on Security and Co-operation in Europe: Final Act, 14 I.L.M. 1292 (1975) [hereinafter *The Helsinki Final Act*].

84. *Id.* art. VIII.

85. UN Special Rapporteur, Héctor Espiell, also made it clear that peoples under colonial and alien domination were not the only ones with a right to self-determination. See HECTOR GROS ESPIELL, *THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS*, para. 42; U.N. Doc. E/CN.4/Sub.2/405 (1978).

86. See International Covenant on Civil and Political Rights, *supra* note 61, art. 1(1); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 15, at 66; U.N. Doc. A/4371 (1960). See also *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970*, *supra* note 81; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11-12, U.N. Doc. A/6014 (1965).

87. Advisory Opinion No. 17, *Greco-Bulgarian "Communities"*, 1930 P.C.I.J. (ser. B) No. 30, at 21 (July 1930), reprinted in [1927-1932] 2 HUDSON WORLD CT. REP. 640, 653-54.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities⁸⁸ thus speaks to "the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practise [sic] their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination."⁸⁹

General definitions of the right to self-determination, such as the one contained in the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960,⁹⁰ which proclaimed the right of peoples to "freely determine their political status" and the right to "freely pursue their economic, social and cultural development," must thus be limited and understood in the context of the "peoples" whose right is at stake.

Governments, through their respective constitutional and legal systems, ought to secure the interests of distinct sections of the population that constitute minorities in the above sense. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities⁹¹ clearly spells out the obligation to protect and encourage conditions for the promotion of the concerned group identities of minorities under the jurisdiction of the duty-bound state:⁹² afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong;⁹³ do not discriminate in any way against any person on basis of his/her group identity,⁹⁴ and in fact, take action to secure their equal treatment by and before the law,⁹⁵ and so on.

In 1995, the Council of Europe's Framework Convention for the Protection of National Minorities⁹⁶ spelled out minority rights in much the same vein: it guarantees equality before the law and equal protection of the laws.⁹⁷ States Parties promise to provide "the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential

88. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/46/49/Add.1 (1992).

89. *Id.* art. 2.1.

90. ESPIELL, *supra* note 85, para. 62, n.33.

91. G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/46/49/add.1 (1992).

92. *See id.*

93. *See id.* art. 2.3.

94. *See id.* art. 3.

95. *See id.* art. 4.1.

96. 34 I.L.M. 351 (1995).

97. *See id.* art. 4.1.

elements of their identity, namely their religion, language, traditions and cultural heritage."⁹⁸ Furthermore, States Parties recognize the right of persons belonging to a national minority "to manifest his or her religion or belief and to establish religious institutions, organisations [sic] and associations,"⁹⁹ and the Framework Convention guarantees the use of minority languages, in private and in public, orally and in writing.¹⁰⁰

Failure of national systems to provide such protection to sectional interests of minorities must be seen as an important contributing cause of the secessionist drive. However, international law does not sanction secession as the answer to the plight of a repressed minority.

B. *Self-determination Revisited*

In *Reference Re Secession of Quebec*, the Court defined the right to (internal) self-determination as "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."¹⁰¹ In a more recent instrument of the United Nations,¹⁰² the General Assembly reaffirmed:

the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize[d] the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a

98. *Id.* art. 5.1.

99. *Id.* art. 8.

100. *See id.* art. 10.1; *see also* Council of Europe, EUROPEAN CHARTER FOR REGIONAL MINORITY LANGUAGES (1992) (creating a charter to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage).

101. *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, 282.

102. *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, G.A. Res. 50/6, U.N. GAOR, 50th Sess., Supp. No. 49, at 13, U.N. Doc. A/50/49 (1995).

Government representing the whole people belonging to the territory without distinction of any kind.¹⁰³

The Declaration reaffirms that the right to self-determination belongs to all peoples. Several categories of peoples are, however, singled out in the Declaration as the ones whose right to self-determination deserves special emphasis. In particular, those under colonial or other forms of alien domination or foreign occupation and those who are not represented in the governmental structures of their country on the basis of equality and non-discrimination deserve special emphasis. These categories are, of course, not all-inclusive. The above historical exposition has shown that the right to self-determination developed over time and that its substantive meaning varies according to the disposition of peoples who, due to their particular situation, have a special stake in asserting that right.

Four components of the right to self-determination can thus be distinguished, determined in each instance by the identity of the "peoples" that emerged as repositories of that right. First, when World War I was drawing to a close, the idea of self-determination of peoples was advanced to legitimize the disintegration of the world empires of the time. Within this meaning existed the right of "peoples" in the sense of (territorially defined) nations to assert political independence. Second, following World War II, the emphasis of the concept of self-determination shifted to the principle of decolonization, the repositories of the concerned right now being colonized peoples and the substance of their right denoting political independence from foreign domination or colonial rule. Third, in the 1960s, yet another category of "people's" came to be identified: those subject to racist regimes. Here, the concept substantively denoted the right of such peoples to participate in the structures of government within the countries to which they belonged. Finally, the right to self-determination has been extended to national or ethnic, cultural, religious and linguistic minorities whose particular entitlements are centered upon a right to live according to the traditions and customs of the concerned group.

It should be evident that the inhabitants of Quebec, while not being a people as defined in international law, cannot claim a right to self-determination. Sections of the population of Quebec, united by a common ethnic extraction, cultural heritage or religious affiliation, could of course lament the denial of their right to self-determination

103. *Id.* at 13.

on the grounds that they are not permitted to accede to a life style dictated by their national or ethnic, religious or linguistic extraction. But that is *de facto* not the case — at least not as far as Francophone Quebecers are concerned.

V. SELF-DETERMINATION AND THE RIGHT TO SECESSION

In *Reference Re Secession of Quebec*, the Court defined secession as "the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane."¹⁰⁴ Except perhaps for noting that secession would entail more than "the effort" to redraw the boundaries of an existing state, this definition will suffice for purposes of our analysis of the right to secession under international law.

It is important to note that a people's right to self-determination does not include a right to secession,¹⁰⁵ not even in instances where the powers that be act in breach of a minority's legitimate expectations. A superficial reading of the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* cited above¹⁰⁶ has led the Court in *Reference Re Secession of Quebec* to construct, albeit hesitatingly, a right to secession in cases where the state is not "possessed of a Government representing the whole people belonging to the territory without distinction of any kind" because, if that were the case, the proscription in the Declaration of "any action that would dismember or impair, totally or in part, the territorial integrity or political unity of . . . states" would not apply.¹⁰⁷ The truth is that self-determination of peoples discriminated against in the allocation of political rights does not entail secession from the state of their nationality but simply requires the removal of the discriminatory laws and practices. Dismembering or impairing the territorial integrity or political unity of a racist state must not be taken to denote the territorial disintegration of the state but could, in

104. *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, 263.

105. See VAN DYKE, *supra* note 66, at 88; Berman, *supra* note 68, at 87; Emerson, *supra* note 67, at 464-65.

106. See *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, *supra* note 102.

107. *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, 280-81; however, the Court reveals its own doubt as to whether this circumstance would indeed create a right to unilateral secession. See *id.* at 286, 295. Karl Doehring is also of the opinion that "[i]t is . . . well arguable that discrimination against ethnic minorities could potentially give rise to a right of secession." Doehring, *supra* note 58, at 66.

the present context, mean a right to resistance, a legitimate armed struggle, or even foreign intervention to topple the regime.

Even in the case of colonialism, alien domination or foreign occupation, secession is not the appropriate remedy. Here, the colonized country already exists as a distinct territorial entity, and self-determination, therefore, simply denotes the right to independence of that territorial entity from (extra-territorial) foreign domination.¹⁰⁸

The following considerations bear out the proposition that self-determination and secession signify quite different modalities of political action. First, the establishment of a new state by means of secession applies to a particular territory,¹⁰⁹ while the right to self-determination belongs to a "people." Statehood essentially depends on a territorially defined foundation.¹¹⁰ The right to self-determination also differs from a right to secession in that the former constitutes a collective right, while legitimate secession may be exercised (in the limited circumstances alluded to hereafter) as an institutional group right. A "collective human right" is afforded to individual persons belonging to a certain category, such as children, women, or ethnic, religious and cultural minorities.¹¹¹ The right of national minorities to peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and

108. It could perhaps be argued that Algerian independence was gained through secession from France, because Algeria was supposedly a "department" of France and not a colony. See Doehring, *supra* note 58, at 66. However, the status afforded by France to Algeria never really amounted to political integration but was in reality probably no more than an attempt to avoid the stigma of colonialism. The same applied to Portugal's proclaiming Mozambique to be a province of Portugal and not a colony.

109. See Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 109 (1976) (noting that peoples seeking secession must be "located in a well-defined territorial area in which it forms a majority").

110. According to Hermann Mosler, "States are constituted by a people, living in a territory and organized by a government which exercises territorial and personal jurisdiction." Hermann Mosler, *Subjects of International Law*, 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 442, 449 (1984). Karl Doehring defined a state in international law as "an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals." Karl Doehring, *State*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 423, 423 (R. Bernhardt ed., 1987). Herman Dooyeweerd defined the foundational function of a state in terms of "an internal monopolistic organization of the power of the sword over a particular cultural area within territorial boundaries." HERMAN DOOYEWEERD, III, A NEW CRITIQUE OF THEORETICAL THOUGHT 414 (1969). He further maintained that the leading or qualifying function of the state finds expression in a public legal relationship which unifies the government, the people and the territory constituting the political community into a politico-juridical whole. *Id.* at 433.

111. Yoram Dinstein defined "collective human rights" as those "afforded to human beings communally, that is to say, in conjunction with one another or as a group — a people or a minority." See Dinstein, *supra* note 109, at 102-03.

religion¹¹² thus belongs to every member of the group and can be exercised separately or jointly with any other member(s) of the group. An institutional group right, on the other hand, vests in a social institutions as such, and can only be exercised by that collective entity through the agency of its authorized representative organs. The church's right to internal sphere sovereignty is in that sense, an institutional group right.¹¹³ So, too, is the right to secession of persons territorially united as a nation.¹¹⁴ Finally, international instruments proclaiming the right to self-determination almost invariably also postulate inviolability of the territorial integrity of existing states,¹¹⁵ and reconciling the two principles in question necessarily means that self-determination must be taken to denote something less than secession. The United Nations' 1993 World Conference on Human Rights said it all when the right of peoples to "freely determine their political status, and freely pursue their economic, social and cultural development" was expressly made conditional upon the following proviso:

[T]his [definition of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.¹¹⁶

Self-determination of peoples is thus a matter of *national independence* in the case of peoples subject to colonial rule or foreign

112. See Council of Europe: *Framework Convention for the Protection of National Minorities*, 34 I.L.M. 35 (1995).

113. See Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 825-28 (1991).

114. "Nation" is used here in the sense of subjects of a particular territorially defined political entity (the State) (in German, *die Nation*), in contradistinction to "a people," which denotes a social entity united through a common history and certain ethnic, cultural and linguistic ties (in German, *das Volk*) and who may constitute sections within a nation or whose members might indeed be scattered across national borders of any particular state. See Dinstein, *supra* note 109, at 103.

115. See, e.g., The Helsinki Final Act, *supra* note 83, art. IV (territorial integrity) and art. VIII (equal rights and self-determination of peoples).

116. *World Conference on Human Rights, Vienna Declaration and Programme of Action*, U.N. Doc. A/Conf. 157/24, art. I.2 (June 25, 1993), reprinted in 32 I.L.M. 1661, at 1665 (1993); see also *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, *supra* note 102, at 13.

domination, *participation in the political processes of a country* in cases where the people concerned have been denied such participation on a discriminatory basis, and *sphere sovereignty* of peoples that uphold a strong (sectional) group identity within a political community. Not one of these manifestations of self-determination amounts to the disruption of national borders of a territorially defined political community.

International law has been quite adamant in proclaiming the sanctity of post-World War II national borders,¹¹⁷ and in censuring attempts at secession in instances such as Katanga, Biafara and the Turkish Republic of Northern Cyprus.¹¹⁸ As explained by Vernon van Dyke, "the United Nations would be in an extremely difficult position if it were to interpret the right to self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members."¹¹⁹ The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 reiterated that its provisions must not be taken to contradict the principles of the United Nations pertaining to, *inter alia*, "sovereign equality, territorial integrity and political independence of States."¹²⁰ The Framework Convention for the Protection of National Minorities, 1995 of the Council of Europe also proclaims that "[n]othing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States."¹²¹

117. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 104-05 (1963). See, e.g., The Helsinki Final Act, *supra* note 83, art. III. The Charter of the Organization of African Unity, art. III, para. 3, 2 I.L.M. 768 (1963) committed Member States to adhere to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence." In furtherance of this principle, a Resolution adopted by the Assembly of Heads of State and Government, held at Cairo in 1964, reprinted in IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA* 10-11 (1979), called on all Member States of the OAU "to respect the borders existing on their achievement of national independence."

118. See Van der Vyver, *supra* note 64, at 403-07. For a more detailed discussion, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 235-36 (Katanga) and 265 (Biafara) (1979); JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS*, 86-90 (Katanga), 84-85 (Biafara) and 108-111 (Turkish Republic of Northern Cyprus) (1987). See also Johan D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 35-37 (Katanga), 42-44 (Turkish Republic of Northern Cyprus) (1991).

119. VAN DYKE, *supra* note 66, at 102.

120. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *supra* note 88, art. 8.4.

121. Council of Europe, *supra* note 100, art. 21.

In terms of the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations, secession (or the restructuring of national frontiers) will indeed be lawful, provided the decision to secede is "freely determined by a people."¹²² It is submitted that the decision rests with a cross-section of the entire population of the state to be divided and not only the inhabitants of the region wishing to secede.¹²³ On that basis alone, could the United Nations find peace with the reunification of Germany, and the disintegration of the Soviet Union and of Czechoslovakia.¹²⁴ On that basis, too, Quebec could lawfully secede from Canada, as *Reference Re Secession of Quebec* rightly held.

The establishment of a new state through secession will also be recognized in international law if, following armed conflict, distinct territories of an existing state should agree to part ways under the terms of a peace treaty.¹²⁵ The secession of Eritrea from Ethiopia exemplifies a recent manifestation of this norm.

Secession is thus sanctioned by international law in only two instances: if a decision to secede is "freely determined by a people," that is to say, by a cross-section of the entire population of the state to be divided and not only the inhabitants of the region wishing to secede; and secondly if, following armed conflict, national boundaries are redrawn as part of the peace treaty.

122. ARANGIO-RUIZ, *supra* note 82. The Declaration provides, under the heading: "The principle of equal rights and self-determination of peoples" that "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, *supra* note 81.

123. Jan Heunis lost sight of this truism when arguing that the establishment of the South African (racially defined) homeland states (the TBVC-countries) occurred in conformity with the right to self-determination. See JAN HEUNIS, UNITED NATIONS VERSUS SOUTH AFRICA 328-30 (1986); See also HERCULES BOOYSEN, VOLKEREG, 'N INLEIDING (1980). For a critical comment on the Heunis/Booyesen argument, see Van der Vyver, *supra* note 116, at 83 n.354.

124. Lee Buchheit specified, as elements for legitimizing secession in any given case, that the section of a community seeking partition should possess a distinct group identity with reference to, for example, cultural, racial, linguistic, historical or religious considerations; that those making a separatist claim must be capable of an independent existence, including economic viability (but bearing in mind international aid programs that might help a newly established political entity over its teething problems); and that the secession must serve to promote general international harmony, or at least not be disruptive of international harmony or disrupt it more than the status quo is likely to do. See LEE BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 228-38 (1978).

125. See CASSESE, *supra* note 67, at 359-63.

VI. STATEHOOD OF A RECALCITRANT COMMUNITY

The prevailing circumstances in the province of Quebec cannot be likened to those that would vest in the collective peoples of Quebec a right to secession under international law. Constitutional change, approved by a cross-section of the entire Canadian population, would provide a legitimate basis for the secession of Quebec; but failing that, international law sanction of the secession of Quebec will remain wanting.

However, it has been said that "successful revolution begets its own legality,"¹²⁶ or as paraphrased by Bracton, "What is not otherwise lawful necessity makes lawful."¹²⁷ This raises the question – hypothetical one would hope – of what the status of Quebec would be if its political leaders forcefully and unilaterally were to declare the territory an independent state.

International law personality of a people united or compounded by territorial boundaries is dependent on the capacity of statehood being attributed to such a political entity. Statehood, in other words, is a precondition for a territorially defined political entity to enter into treaties, to be eligible for membership of organizations that possess international law status, to exercise standing before international tribunals, to be counted when the creation of customary international law is in issue, and in general, to be the bearer of powers, rights and obligations in international law relations. Statehood, in a word, is the key for political entities of the kind under consideration to gain entry into the domain that is governed by public international law. What, then, are the qualities which a political entity need to have in order to be a state in the technical sense of international law?¹²⁸

In *Reference Re Secession of Quebec*, the Court touched upon this question, siding quite explicitly with the constitutive theory of statehood.¹²⁹ While laboring the premise of the constitutive theory

126. S.A. de Smith, *Constitutional Lawyers in Revolutionary Situations*, 7 W. ONT. L. REV. 93, 96 (1968), also cited in *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, 290.

127. Venkat Iyer, *States of Emergency – Moderating their Effects on Human Rights*, 22 DALHOUSIE L.J. 125, 128 (1999). "Id quod alias non est licitum, necessitas licitum facit." *Id.* at 128 n.7 (citing Glanville Williams, *The Defence of Necessity*, in CURR. LEG. PROBS. 216, 218 (1953)).

128. Van der Vyver, *supra* note 118, at 11.

129. *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, 296 ("The ultimate success of . . . [de facto] secession would be dependent on [effective control of a territory and] recognition by the international community."). See also Van der Vyver, *supra* note 118, at 289 ("Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states.").

that support for secession expressed by a clear majority of the inhabitants of Quebec should prompt the federal and other provincial governments to enter into negotiations with Quebec on the question of constitutional change, the Court observed that:

a failure [by Quebec] of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, . . . a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process.¹³⁰

The Montevideo Convention on Rights and Duties of States (1933)¹³¹ laid down in its definition clause¹³² four requirements of statehood. The political entity claiming to be a state must have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.¹³³ In terms of the *declaratory theory* of statehood, a political entity professing to be a state would in fact be one if it, objectively, complies with the criteria of statehood enunciated in the Montevideo Convention. Succinctly stated, the basic premise of the declaratist position is that "[r]ecognition presupposes a state's existence; it does not create it."¹³⁴

The *constitutive theory* of statehood, on the other hand, is founded on the assumption that statehood is dependent — in addition to the Montevideo criteria — on the political entity in question being recognized as a state by other states. Oppenheim encapsulated the basic premise of the constitutive position as follows: "A State is, and

130. *Id.* at 272-73; *see also id.* at 289 (holding that "national interest and perceived political advantage to the recognizing state" as well as "legality of the secession" would influence *de facto* recognition).

131. 49 Stat. 3097, T.S. 881, 165 L.N.T.S. 19, 3 Bevens 145.

132. *Id.* art. 1.

133. *See id.*

134. ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 147 (1986).

becomes, an International Person through recognition only and exclusively."¹³⁵

A head-count will show that an overwhelming majority of international law experts subscribe to the declaratory theory.¹³⁶ Certainly in the United States, the leading authorities entertain a distinct bias in favor of the objective approach of the declaratory criterion of statehood.¹³⁷ Several international law instruments, likewise, expressly proclaim that the political existence of a state shall not be dependent on recognition by other states.¹³⁸ Although supporters of the constitutive theory of statehood included eminent international lawyers such as George Jellinek,¹³⁹ Hans Kelsen,¹⁴⁰ and

135. LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 125 (8th ed., H. Lauterpacht ed., 1955); see also JOHN G. HERVEY, *THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW AS INTERPRETED BY THE COURTS OF THE UNITED STATES* 7 (1974) ("... recognition ... confers upon a state ... the legal right to exist"); GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 58 (6th ed. 1976) ("The normal method for a new State to acquire international personality is to obtain recognition from existing States.").

136. See Doehring, *supra* note 110, at 427; see also CRAWFORD, *supra* note 118, at 22-23 n.88 (where he listed some of the declaratists), 17 n.62 (a list of the best known authorities who support the constitutive position). To Crawford's list of declaratists may be added, as far as non-American writers are concerned, Doehring, *supra* note 110, at 450 and JAMES, *supra* note 134, at 13-14, 147-48; and to his list of constitutivists, that of BERNARD R. BOT, *NONRECOGNITION AND TREATY RELATIONS* 17-19 (1968).

137. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 201 (1987) (Under international law, "a sovereign state must have a defined territory and a permanent population, under its own governmental control, and must engage in, or have the capacity to engage in, formal relations with other sovereign states.").

138. See *Inter-American Convention on the Rights and Duties of States* (1933), art. 3, 49 Stat 3097, T.S. No. 881, 165 L.N.T.S. 19, 3 Bevans 145; *Charter of the Organization of American States* (1948), art. 9, 2 U.S.T. 2394, T.I.A.S. No. 2361, 117 U.N.T.S. 3, amended by *Protocol to the Charter of the Organization of American States* 21 U.S.T. 607, T.I.A.S. No. 6487 (1967).

139. See GEORGE JELLINEK, *ALLGEMEINE STAATSLEHRE* 273 (3rd ed. 1960) ("Der Staat ist Staat kraft seines inneren Wesens. In die Gemeinschaft des Völkerrechts aber tritt er erst vermöge der ihm von den anderen Mitgliedern dieser Gemeinschaft ausdrücklich oder stillschweigend zuteil werdenden Anerkennung ein, wie jede Individualität zur Person durch Anerkennung von seiten einer Rechtsgemeinschaft erhoben wird. Das Völkerrecht knüpft daher an das Faktum der staatlichen Existenz an, vermag dieses Faktum aber nicht zu schaffen.") [The state is state because of its inner nature. However, it can only join the community of international law in virtue of its having been recognized, expressly or implicitly, by other members of that community, in the same way as every individuality is elevated to being a person through recognition by a legal community. International law to this end is based upon the fact of an entity being a state, and cannot create this fact.] See also GEORGE JELLINEK, *DIE RECHTLICHE NATUR DER STAATSVETRÄGE* 48 (1880) ("Auch für den Staat wird ein anderer zum Rechtssubject dadurch, dass es ihn als solches anerkennt . . .") [Also as far as the state is concerned, someone else becomes a legal subject by the state recognizing him as such]; GEORGE JELLINEK, *DIE LEHRE VON DEN STAATENVERBINDUNGEN* 97 (1882) ("Wenn heute ein neues Staatswesen entsteht, so wird seine Geburt stets von anderen gefördert, ja es erhält sogar häufig seine erste innere Organisation von anderen Mitgliedern der Staatengemeinschaft.") [When currently a new state entity is created, its birth will always be attributed to others; indeed, it often even acquires its first internal organization from other members of the community of states.]; *id.* at 99-100.

140. See Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 607 (1941): "The answer to this question, the establishment of the fact that in a

Sir Hersch Lauterpacht,¹⁴¹ their following remained confined to a relatively small circle. Perhaps it was Lauterpacht himself that gave the constitutive theory a bad name, namely by adding to the basic premise the rider that once a political community complied with the "definite and exhaustive" (objective) conditions of statehood (for example, "external independence and effective internal government within a reasonably well-defined territory"¹⁴²) the international community would be under an obligation to afford to that political community the recognition required to constitute its statehood.

To recognize a political community as a State is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition. In the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfill that function in their capacity as organs of international law. In thus acting, they administer the law of nations. This legal rule signifies that in granting or withholding recognition, States do not claim, and are not entitled to serve exclusively, the interests of their national policy and convenience regardless of the principles of international law in the matter. Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfillment of a legal duty, is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood. Prior to recognition, such rights and obligations exist only to the extent to which they have been expressly conceded or legitimately asserted, by reference to compelling rules of humanity and justice, either by the existing members of international society or by the people claiming recognition.¹⁴³

Analysis of state practice in respect of the Montevideo criteria of statehood¹⁴⁴ revealed all kinds of "anomalous" or "special cases",¹⁴⁵ which in turn prompted certain publicists to supplement those

given case a 'state in the sense of international law' exists, falls, according to general international law, within the jurisdiction of the states concerned. This establishment (*la constatation*) is the legal act of recognition." *Id.*

141. See HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 6 (1947) ("To recognize a political community as a State is to declare that it fulfils the conditions of statehood as required by international law.").

142. *Id.* at 31.

143. *Id.* at 6.

144. See, e.g., CRAWFORD, *supra* note 118, at 36-48; Doehring, *supra* note 110, at 424-27.

145. See CRAWFORD, *supra* note 118, at 142-143.

criteria with additional requirements of statehood. For example, in what seemingly constitutes a concession to the constitutive theory of statehood, D.W. Greig defined a state for the purposes of international law as a territorial unit, containing a stable population, under the authority of its own government, and recognized as being capable of entering into relations with other entities with international personality.¹⁴⁶ Declaratist J.E.S. Fawcett, again, with reference to the special case of Rhodesia and in view of the principle of self-determination, proclaimed that the requirement of organized government would not be satisfied for purposes of statehood as long as there is a systematic denial to a substantial minority, or worse still, to a majority of the people, of a place and a say in the government.¹⁴⁷ Consequently, he suggested that the requirement of self-determination be added to the Montevideo criteria of statehood.¹⁴⁸

Hans Reinhard argued, on the contrary, that the right to self-determination should not be seen as a constituent part of sovereignty – or statehood, I would add – since it essentially belongs to (non-sovereign) dependent peoples, and – again I would add, in terms of more recent adaptations of that principle – also to peoples subjected to racist regimes.¹⁴⁹ James Crawford, perhaps without conceding that the right to self-determination essentially belongs to non self-governing peoples, confined the pertinence of that right in respect of the question of statehood – in conformity, though, with the point made by Reinhard – to the legal subjectivity of newly established independencies only. Crawford stated: "It appears then that a new rule has come into existence, prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self-determination."¹⁵⁰

Within the ranks of adherents to the constitutive position, problems associated with self-determination and other peremptory norms of general international law, on the one hand, and statehood

146. D.W. GREIG, *INTERNATIONAL LAW* 93 (1976).

147. J.E.S. FAWCETT, *THE LAW OF NATIONS* 38 (1968). In a subsequent publication, *Security Council Resolutions on Rhodesia*, 41 *BRIT. Y.B. INT'L. L.* 103, 112 (1965-66), he seemingly held out this requirement as a distinct constitutive element of statehood, proclaiming that the regime claiming statehood "shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage. *Id.* See also Fawcett's brief response in 34 *MOD. L. REV.* 417 (1971) to the critique of D.J. Devine relating to the above point of view.

148. See FAWCETT, *supra* note 147, at 38.

149. H. REINHARD, *RECHTGLEICHHEIT UND SELBSTBESTIMMUNG DER VÖLKER IN WIRTSCHAFTLICHER HINSICHT* 23-26 (1980).

150. CRAWFORD, *supra* note 118, at 106.

on the other, led to a shift in emphasis from recognition as a condition of statehood to non-recognition as the death knell of a prospective state. A noteworthy variation on this theme comes from John Dugard. He noted that it would be absurd to contend that territorially defined communities, while not recognized as states, have attained international legal personality or the status of statehood.¹⁵¹ His contention was premised on a lucid and extremely persuasive analysis of United Nations practice in respect to the "law of non-recognition."¹⁵² It has become increasingly evident that in contemporary international law the objective *essentialia* of statehood, with or without the added dimension of recognition, has been supplemented with additional requirements focused on "the 'quality' of statehood."¹⁵³ Dugard, while recognizing the existence of "factual anomalies" and "logical inconsistencies" in state practice regarding the recognition of aspirant states, concluded in essence on the basis of his own empirical analysis of the sources of customary international law that (formally):¹⁵⁴

- statehood is conditional upon collective recognition of a political community as a subject in international law;
- the international community of states has delegated the authority to recognize a political entity as a state to the United Nations Organization;
- recognition as a prerequisite of statehood is exercised by the international community of states through admission of the political entity in question to membership of the United Nations;¹⁵⁵

and that (substantively)

151. See DUGARD, *supra* note 116, at 123.

152. *Id.*

153. Gerhard Erasmus, *Criteria for Determining Statehood: John Dugard's Recognition and the United Nations*, 4 S. AFR. J. HUM. RTS. 207, 215 (1988) (book review). That, perhaps, is why Hermann Mosler proclaimed that the declaratory and constitutive theories of statehood had become "outdated." Mosler, *supra* note 108, at 450.

154. See DUGARD, *supra* note 118, at 164.

155. See *id.* at 73, where the submissions thus far are put forward in respect of decolonized states.

- non-recognition in the above manner is prompted by violations of the peremptory rules of general international law (*ius cogens*) by, or in relation to the establishment of, the political community claiming statehood.¹⁵⁶

Perhaps analysts tend to define basic legal concepts in too general and absolute of terms. Legal subjectivity for the purpose contract (the capacity to enter into an agreement, which capacity is conditioned by one's ability to appreciate the consequences of a legal act that creates or terminates legal obligations) is, substantive-wise, not identical to legal subjectivity for the purpose of criminal liability or accountability in tort (the capacity to commit unlawful acts, which capacity is conditioned by one's ability to appreciate the wrongful nature of an unlawful act, and in some jurisdictions, the ability to control one's conduct in accordance with an understanding of right and wrong).

Similarly, I would suggest that legal subjectivity of political entities in the context of constitutional law also does not have exactly the same material content as in international law. The need to differentiate is not a matter of relativity, it is a matter of teleological determinism. Substantive definitions of legal concepts, if they are to serve a useful purpose, are determined by the function in empirical law of the object of definition. Within the internal confines of the constitution, states compound a people within a defined territory and, through governmental institutions, execute a wide range of legislative, administrative, and judicial functions.¹⁵⁷ Where these basic attributes of a state are found to exist, there is an existential state within the meaning of constitutional law. However, for this political entity with internal (constitutional) statehood to enter the arena of transnational relations, considerations of a different kind apply and other, or rather further, conditions need to be satisfied; considerations and conditions which must essentially be accommodated within one's definition of statehood in the context of international law.

156. *See id.* at 80.

157. The celebrated Dutch legal philosopher, Herman Dooyeweerd, defined the state as the institutional community of a government and subjects, regulated by public law on the historical foundation of a monopolistic organization of the power of the sword (political authority) within a defined territory. *See* HERMAN DOOYEWEERD, *DE STRIJD OM HET SOUVEREINITEITSBEGRIJP IN DE MODERNE RECHTS — EN STAATSLER 54* (1950); HERMAN DOOYEWEERD, *VERKENNINGEN IN DE WIJSBEGEERTE, DE SOCIOLOGIE EN DE RECHTSGESCHIEDENIS 127* (1962); *see also* Dinstein, *supra* note 109, at 102.

In the latter context, recognition becomes vital. This stands to reason. Though political communities, even if acting foolishly and improperly, can continue to operate as states within the four walls of their domestic territorial enclave, but without recognition they cannot enter into relations with any other state unless that other state expressly or — by tolerating such relations — tacitly recognizes the political community as a subject of international law.

Here, however, further classification is called for. A political community only constitutes a state for purposes of international law inasmuch as other states, through recognition and by entering into international relations with that political community, permit it to participate in the areas governed by international law. *Vis-à-vis* Turkey, but no one else, the Turkish Republic of Northern Cyprus is a state. Diplomatic exchanges between these two states, as far as they — but no one else — are concerned, are governed by rules of international law. There are, therefore, states in the international law sense with a greater or lesser degree of recognition. In order to give a scholarly account of the implications of this phenomenon, it might be useful to take a closer look at the actual functioning of international law (state practice) in respect to the "generally recognized" and maverick states of the world.

In this regard, I find the distinctions made in the sociological analysis of the Dutch legal philosopher, Herman Dooyeweerd, particularly instructive.¹⁵⁸ Dooyeweerd classified social relationships into two major categories.

- (a) Inter-individual or inter-personal relationships (*'maatschapsverhoudingen'*) are those where the parties to the relationship in a coordinated manner function alongside one another without acting as members of a natural or organized social entity — for instance the relationship between contracting parties, or relations of friendship or animosity.
- (b) Community relationships (*'gemeenschapsverhoudingen'*), on the other hand, are those that precisely presuppose a communal bond between the persons concerned by virtue of their common

158. See, e.g., DOOYEWEERD, *DE STRIJD OM HET SOUVEREINITEITSBEGRIJ*, *supra* note 157, at 55; *VERKENNINGEN*, *supra* note 157, at 73; III *A NEW CRITIQUE*, *supra* note 110, at 177-78; HERMAN DOOYEWEERD, *A CHRISTIAN THEORY OF SOCIAL INSTITUTIONS* 74 (Magnus Verbrugge trans., John Witte Jr. ed., 1986).

membership of a natural or organized social structure — such as the relationship between parent and child, or between a government and its subjects.¹⁵⁹

There is a certain similarity between these concepts and the distinction made by the International Court of Justice in *Barcelona Traction* between the obligations of states *inter se* and the obligations of a state *erga omnes*.¹⁶⁰

The international community is made up of many community structures, some of which confine their membership to states from a particular region (for example, the Organization of American States), while others confine their membership for the promotion of special interests (for example, the International Labor Organization). In each instance, the capacity of states to participate in the community relationships of those transnational structures remains confined to the members of the regional organizations or specialized agencies concerned. Nothing would, in principle, prevent such members from entering into inter-individual relations with non-member states, or for non-member states to enter into inter-individual relations with any of those organizations or agencies.

The world community of states, likewise, constitutes an international public order governed by an international normative system. Participation in community relations within the structures of the international community is similarly confined to those bodies politic that are recognized as members of the group. It would be incorrect to assume that a political entity has to be afforded United Nations membership before it can become a member of the international public order. Countries like Switzerland who do not wish to become member states of the United Nations are not necessarily excluded from community relations within the international community of states. However, a definite resolve not to admit a political entity to United Nations membership (collective non-recognition) would most certainly bar that entity from the international community of states and deprive it of the competence to participate in the relationships of the international community.

159. The translation of "*maatschapsverhouding*" and "*gemeenschapsverhouding*" in A CHRISTIAN THEORY OF SOCIAL INSTITUTIONS, *supra* note 158, i.e. as "social relationship" and "communal relationship" respectively, is not at all acceptable.

160. *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)* (Second Phase), 1970 I.C.J. 3, para. 33 (Feb. 5).

Such political entities may still exercise the capacities of statehood in isolated, inter-individual relations – but that is all.

The government of Ian Smith was thus invited, on the inter-individual level, to negotiate the independence of Zimbabwe in spite of the refusal of the international community to admit Rhodesia to their number.¹⁶¹ South Africa was likewise a party to inter-individual negotiations that culminated in the independence of Namibia, even though South Africa's continued administration of South West Africa/Namibia had been declared illegal by the Security Council of the United Nations¹⁶² and the International Court of Justice.¹⁶³

What, then, are the functions of state associated, respectively, with inter-individual and community relations in international law? Inter-individual relationships emanate in essence from contract and delict, including both criminal and tortious conduct. It is therefore reasonable to assert that states that comply with the constitutional criteria of statehood but are not generally recognized as such are nevertheless capable of entering into bilateral treaties with those states that are prepared to recognize their statehood. The maverick states of the world can furthermore be held liable in tort,¹⁶⁴ and their functionaries are likewise subject to the proscriptions of international crimes.

The capacity to enter into multilateral treaties that establish an international public order – albeit on the regional level, or with either a broader or more narrowly defined area of specialized

161. See Res. 216, U.N. SCOR, 20th Sess., 1258th mtg. at 8, R 20.7.1(b)(ii) (1965) (condemning the Smith government as being the "illegal racist minority regime in Southern Rhodesia"); Res. 217, U.N. SCOR, 20th Sess., 1258th mtg. at 8, R 20.7.1(b)(ii) (1965) (imposing mandatory sanctions against Rhodesia).

162. See Res. 276, U.N. SCOR, 25th Sess. 1529th mtg. at 1, Res. 276 (1970).

163. See Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 3 (June 21).

164. In England it has been held that a non-recognized state, along with its government officials and officers can be afforded standing in English courts in civil proceedings as representatives of the government that established the unrecognized regime. See *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd.*, [1966] 2 All E.R. 536; [1967] App.Cas. 853 (H.L.). The case concerned the German Democratic Republic, which at the time was not recognized by the U.K. Lord Reid explained the rule as follows:

We must therefore hold that the U.S.S.R. set up the German Democratic Republic not as a sovereign state but as an organization subordinate to the U.S.S.R. . . . and we must regard the acts of the German Democratic Republic, its government organs and officers, as acts done with the consent of the government of the U.S.S.R. as the government entitled to exercise governing authority. *Id.* at 547.

interests in mind -- is conditioned, on the other hand, by collective recognition; or, more accurately, frustrated by collective non-recognition. Being excluded from the international community by collective non-recognition deprives the maverick state of all the benefits and facilities of that community, including the law-creating competence of contributing, through its practices, to the formation of customary international law.

John Dugard was perfectly right in concluding from actual state practice that the primary insignia of collective non-recognition finds expression in resolutions of the United Nations, inspired, it would seem, by the sanctity of *ius cogens*. The consequences of such collective non-recognition should be confined, however, to the denial of statehood for purposes of community relations within the international public order. Collective non-recognition does not deprive a political community that complies with the substantive *essentialia* of statehood of the power to execute the functions of state within the internal confines of constitutional law. As long as the maverick state can find any other state willing to associate with it, that maverick state will furthermore be capable of entering into inter-individual relations, governed by the norms of international law, with that other state.

Though legality may, within these confines, attend the existence and *de facto* functioning of the maverick state, collective non-recognition of that political community through the agency of the United Nations clearly signifies that its existence and functioning lack legitimacy.

