

DOES QUÉBEC HAVE A RIGHT TO SECEDE AT INTERNATIONAL LAW?

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This article addresses the issue of whether Québec has the right to secede from Canada, and claim international recognition at international law. The authors argue that, absent recognition by the Government of Canada, the answer to both questions is in the negative.

The authors review conventional and customary international law respecting the right to self-determination, and conclude that that right is only applicable where the secessionist movement meets certain subjective criteria. First, the seceding unit must be comprised of "people" meeting both subjective and objective international law standards. Second, that people must have been subject to denial of political freedom or human rights in a discriminatory manner. Third, the seceding unit must demonstrate in practical terms that it can, and indeed has, created a practicable and governable state which can assert effective control over reasonably well defined and recognized territory.

The authors conclude that the province of Québec does not meet these criteria. As a result, if a third party State purports to recognize Québec's independence in the absence of Canadian recognition, that State would be challenging Canada's territorial integrity and thus be acting contrary to conventional and customary international law.

Cet article examine la question de savoir si le Québec a le droit de faire sécession du reste du Canada et de réclamer la reconnaissance internationale, en droit international. Les auteurs soutiennent qu'en l'absence d'une reconnaissance par le Gouvernement du Canada, la réponse à cette double question est négative.

Les auteurs passent en revue le droit international, tant coutumier que conventionnel, concernant le droit à l'autonomie; ils en concluent que ce droit ne peut s'appliquer que lorsque le mouvement sécessionniste satisfait une série de critères subjectifs. D'abord, l'entité qui se sépare doit comprendre un «peuple» qui réponde à la fois aux exigences subjectives et objectives du droit international. Deuxièmement, ce peuple doit avoir été victime d'un déni de sa liberté politique et de ses droits fondamentaux de manière discriminatoire. Troisièmement, l'entité qui se sépare doit démontrer concrètement qu'elle peut créer, et qu'elle a effectivement créé un État réalisable et gouvernable qui est capable d'exercer un véritable contrôle sur un territoire raisonnablement bien défini et identifié.

Les auteurs concluent que la province de Québec ne satisfait pas ces critères. En conséquence, si un État tiers prétendait reconnaître l'indépendance du Québec

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sans qu'il y ait aussi une reconnaissance par le Canada, cet État porterait atteinte à l'intégrité territoriale du Canada et, ainsi, agirait à l'encontre des conventions et de la coutume du droit international.

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Introduction

On December 6, 1994, the Premier of Québec tabled a draft bill entitled *An Act respecting the Sovereignty of Québec* (the “*Sovereignty Bill*” or the “*Bill*”) in the Québec National Assembly. The Explanatory Notes to the draft *Bill* state that it sets out “the political course of action put forward by the Government of Québec to settle definitively the constitutional problem that has been confronting Québec for several generations.” Notwithstanding those words, the draft *Sovereignty Bill* is highly ambiguous.

The draft *Bill* opens in section 1 with a statement that “Québec is a sovereign country,” but the meaning of that term is not set out in the *Bill*. “Sovereignty” is, of course, an imprecise term.¹ For example, the Legislature of Québec, like that of other provinces, now exercises sovereign legislative authority over matters within its jurisdiction pursuant to section 92 of the *Constitution Act, 1867*.² This does not mean that a provincial legislature exercises sovereignty as that term is cognizable in international law. International law emphasizes

¹ The ambiguity of the word “sovereignty” in the *Bill* is illustrated by a December, 1994 public opinion poll which, according to the *Toronto Star*, “suggested that 40 per cent of those planning to vote for sovereignty thought that meant that Québec would still remain part of Canada”. See: E. Stewart, “Ottawa trying to get back into the Game”, *Toronto Star* (14 January 1995) B5. Similarly, a poll asking Québécois the question in the *Sovereignty Bill* recorded a response of 37% yes; 43% no, and 20% undecided. When the question was “Do you want Québec to separate from Canada and become an independent country?”, the response was 34% yes; 51% no; and 15% undecided; P. Mackie, “Poll puts Québec federalists in lead” *Globe and Mail* (26 January 1995) A4.

² See *Hodge v. R.* (1883), 9 A.C. 117 at 132 (P.C.); and *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*, [1892] A.C. 437 at 441-443 (P.C.).

independence from other States as a crucial element of sovereignty. Independence, according to Shaw,³

"is crucial to statehood and amounts to a conclusion of law in light of particular circumstances. It is a formal statement that *the state is subject to no other sovereignty* and is unaffected whether by factual dependence upon other states or submission to the rules of international law."

Sovereignty, in terms of independence from other States, has never been exercised by Québec or any other Canadian province. Only the Government and Parliament of Canada have exercised this type of sovereignty.⁴ Presumably, this is what the draft *Sovereignty Bill* proposes to achieve for Québec. But the *Bill* is not framed that way and its terms do not put that case to Québécois to vote upon in a referendum.

Instead, pursuant to section 2, the Québec Government is "authorized to conclude" an agreement with Canada whose purpose is to "maintain an economic association between Québec and Canada." By contrast with other examples of secession, such as Latvia where voters were unequivocally and unconditionally asked whether they were "for a democratic, independent state of Latvia,"⁵ the only specific provisions of the draft *Bill* setting out the terms of sovereignty are those which seek to maintain the *status quo*: i) the retention of the existing federal boundaries of Québec in the *Sovereignty Bill* (section 4); ii) the retention of the Canadian dollar as the currency of Québec, notwithstanding the enormous subtraction from sovereignty and national economic control which that implies for any State (section 6); iii) the right to accede as a full party to treaties and conventions to which Canada is a party regardless of the views of the other contracting parties, and to "remain a member" (even though Québec is not now a member) of international alliances such as the Commonwealth, NATO, NAFTA and the GATT (sections 7-9). All of this is to happen upon the approval by "a majority of the votes cast by the electors in a referendum" (sections 16-17).

The *Bill* does not indicate what will happen if these arrangements cannot be achieved. This uncertainty leads to difficulties. For instance, the purpose of the *Bill* presumably is to provide Québécois with the opportunity to express their will as a people. As will be discussed below⁶, proof that a people have expressed

³ M.N. Shaw, *International Law*, 2d ed. (Cambridge: Grotius Publications Limited, 1986) (hereinafter "*International Law*") at 129 (emphasis added).

⁴ See *Nadan v. R.*, [1926] A.C. 482 at 492-493 (P.C.); *British Coal Corporation v. R.*, [1935] A.C. 500 at 517-518, 520-522 (P.C.); and *Ontario (A.G.) v. Canada (A.G.)*, [1947] A.C. 127 at 153-154 (P.C.).

⁵ See: M. Dobbs, "Latvians, Estonians Vote to Support Independence" *Washington Post* (4 March 1978) 91.8. who reports that "similar questions" were put to the Estonians and Lithuanians. The three Baltic Republics formally boycotted a referendum put to the Soviet Union by President Gorbachev on March 17, 1991 which asked voters to endorse "a renewed federation of equal sovereign republics", Cline, "Gorbachev Given a Partial Victory on Unity" *N.Y. Times* (19 March 1991) A4.

⁶ See text accompanying footnotes 26, 49-50 and 74-89.

their unequivocal will to form a State is the first (but only the first) step in establishing a secessionist unit's claim for Statehood at international law. The draft *Sovereignty Bill* studiously avoids measuring that unequivocal will by failing to ask an unequivocal question.

Rather than settling constitutional problems, then, the draft *Sovereignty Bill* raises a host of political and legal issues.

We have already analyzed the constitutional requirements for a legal separation by Québec *under domestic law*.⁷ In our view, secession requires a constitutional amendment pursuant to section 41 of the *Constitution Act, 1982*.⁸ Such an amendment would require the unanimous consent of all ten provincial legislative assemblies, as well as the federal House of Commons and, unless it exercises its power to veto for 180 days, the federal Senate. In the absence of such a constitutional amendment, it is unlikely that the Government of Canada would, or even could, exercise its prerogative (if indeed the authority to exercise its prerogative exists in the face of section 41 of the *Constitution Act*)⁹ to recognize Québec as a foreign State.

⁷ N. Finkelstein and G. Vegh, *The Separation of Québec and the Constitution of Canada* (Toronto: York University Centre for Public Law and Public Policy, 1992).

⁸ The basis for our conclusion was that a constitutional amendment which granted Québec's independence would be in relation to the offices of the Governor General and the Lieutenant Governor and thus fall within the terms of s.41(a) of the *Constitution Act, 1982*: see at 7-8 *op. cit. supra*.

Patrick Monahan comes to the same conclusion in *Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Québec Separation* (Toronto: C.D. Howe Institute, 1995) (hereinafter *Cooler Heads Shall Prevail*) at 8.

He also argues that unanimity would be required because the separation of Québec would require an adjustment in the composition of the Supreme Court of Canada to remove the requirement that three judges be appointed from the Québec Bar: see at 8. The difficulty with this conclusion is that the Supreme Court of Canada's current composition is set out in a statute, the *Supreme Court Act*, R.S.C. 1985, c. 5-26, s. 6, and not in the *Constitution*. Thus, this adjustment may be made by amending that statute. The amending procedure in Part V of the *Constitution Act, 1982*, applies only to "amendments to the Constitution of Canada." Thus, s. 41(d) of the *Constitution Act, 1982*, which requires unanimity for constitutional amendments in relation to "the composition of the Supreme Court of Canada," would not apply because the Court's composition is not a part of the *Constitution*.

⁹ In Finkelstein and Vegh, *supra* footnote 7 at 53, we took the position that "the federal executive would not be constitutionally prohibited from recognizing Québec as an independent country. Although this may not be entirely consistent with the limited jurisdiction of Parliament, the alternative is untenable".

The reason why the federal executive faces problems in recognizing Québec's independence is that such recognition would involve a constitutional amendment, which is beyond the authority of Parliament. Thus, the federal executive is constitutionally incapable of bestowing *de jure* recognition on Québec. A domestic court would therefore be justified in denying this power.

However, it should be noted that there may be circumstances under which domestic courts may take Canada's recognition of Québec's independence as evidence that Québec has obtained *de facto* control over its territory. As we summarize at 49 of that monograph:

This article analyses the issue of whether Québec has the right to secede from Canada at international law.¹⁰ The issue has enormous practical significance for Canada and Québec.¹¹ For example, if the Québec National Assembly enacts the draft *Sovereignty Bill*, it will be presuming in sections 7 to 9 that Canada and other nation-States are legally obligated to recognize Québec, and would recognize Québec, as an independent State if a majority of

As a result, if a court could, with certainty, predict that the Government of Canada was unwilling or unable to assert control over the province of Québec, that province may then be considered, as a matter of domestic law, to be an independent country.

The difference between *de jure* and *de facto* control is that the former is brought about lawfully and the latter is brought about by revolution. The constitutional limitations on the federal government prevent it from lawfully ceding control to Québec. However, should it do so in any event, the courts would likely conclude that, as a practical matter, Québec's revolution was successful and that it has obtained *de facto* effective control over its territory.

The authors would like to thank Professor Patrick Monahan for his helpful discussions on this point; see also: Monahan, *Cooler Heads Shall Prevail*, *supra* footnote 8 at 11.

¹⁰ In this paper, "secession" is used to describe the "action of one of the component regions of the federation concerned (rather than any mere informal grouping of individuals territorially delineated) in withdrawing from that federation, and thereby asserting its independence of both federal government and law". See G. Craven, *Secession: The Ultimate States Right* (Melbourne: Melbourne University Press, 1986) at 3-4. More generally, "separation" occurs when a region detaches itself from a unitary state. Given that the province of Québec is a member of the Canadian federation, its efforts to depart from Canada are secessionist rather than separatist. See J. Brossard, *L'accession à la souveraineté et le cas de Québec* (Montréal: Presses de l'Université de Montréal, 1976) at 94 and J. Brossard, "Le droit du peuple québécois de disposer de lui-même au regard du droit international" (1977) ann. can. dr. int. 1977 at 84 (hereinafter "Le droit de peuple").

¹¹ Canadian pundits have argued that legal issues are irrelevant to the debate because law only has a role in this context where it is backed up by force. Thus, for example, Jeffrey Simpson argued in the *Globe and Mail* that those who offer a legal analysis "are not prepared to follow their own logic because they know few of their fellow citizens would sanction the use of force to quash a democratically taken position." See J. Simpson, "Legal Arguments Against Secession Avoid the Unthinkable: Force" *Globe and Mail* (6 January 1995) A18. Also in the *Globe and Mail*, Lysiane Gagnon said that "...the question of the 'legality' of separation is absolutely irrelevant, since illegality is a concept that relies on backing by force." See L. Gagnon, "Chrétien's Argument about the Illegality of Separation is Entirely Irrelevant" *Globe and Mail* (24 December 1994) D3. The *Globe and Mail* repeated this position in its editorial: *Globe and Mail* (10 January 1995) A16.

The problem with this argument is that governments do, on the whole, obey the law without being forced to. When courts declare that governments or legislatures have acted illegally, the response is not defiance, but rather compliance with the court's order. As well, the law is "enforced" against governments, not necessarily always by force of arms but also by the refusal of others, both individuals and other governments, to act upon illegal demands. In other words, if the *Sovereignty Bill* is legally ineffective, as we conclude it is, the government of Canada does not have to respond, as suggested by the *Montréal Gazette* columnist Don McPherson, by having "the Mounties throw the Parizeau government in jail." (See L. Gagnon, *supra*.) It may respond by refusing to acknowledge that the *Bill* requires it to do anything. In particular, if the *Sovereignty Bill* is illegal, the Government of Canada does not have to recognize Québec's sovereignty, negotiate a separation agreement, or follow any other obligations that the *Bill* purports to impose on it. In short,

Québecers approve of the *Sovereignty Bill* in a referendum.¹² A systematic review of the applicable international principles demonstrates that that presumption is incorrect. Such a review demonstrates that Québec does not have the right to secede from Canada upon the vote of a majority of electors in a referendum. A review of the applicable international law principles also shows that, should Canada refuse to recognize a separate Québec as a State at international law, recognition of Québec by other States would constitute an infringement by those States of Canada's sovereignty and territorial integrity.¹³

International recognition of a new State involves closely related political and legal considerations. Before recognizing a new unit as a State, existing members of the international community will require, *first*, that the secession be legitimate according to international law standards; *second*, that the new entity have a stable population and exercises control over a defined territory; and *third*, whether that recognition best meets the recognizing State's own political and economic interests.¹⁴

legislatures are not punished for enacting illegal bills: the sanction is that illegal bills need not be complied with.

Furthermore, there are other means available to the Government of Canada should Québec refuse to comply with the law. In "Cooler Heads Shall Prevail," *supra* footnote 8, Monahan observes that "military intervention seems unlikely" but considers other exercises of federal authority in Québec: "Canada would probably attempt to force Québec to rescind the UDI [unilateral declaration of independence] through some kind of economic pressure. Canada, as well as the ROC [rest of Canada] provinces, might suspend all transfer payments to Québec pending the resolution of the crisis. It might also attempt to seize Québec government assets or put in place some other form of economic sanctions" at 29.

¹² Recognition has been defined as "the free act by which one or more State acknowledges the existence of a definite territory of a human society politically organized, independent of any other existing State and capable of observing the obligations of international law, and by which they manifest therefore their intention to consider it a member of the international community." "The Resolution of Institut de Droit international" Brussels (1936) 30 Am. J. Int. Supp. 185 as cited in S. Williams, *International Legal Effects of Secession by Québec* (North York: York University Centre for Public Law and Public Policy, 1992) (hereinafter "*International Legal Effects*") at 48.

¹³ See discussion at accompanying footnotes 17-19, *infra*.

¹⁴ The second criterion refers generally to a State's viability. The qualifications of statehood set out in the *Montevideo Convention on Rights and Duties of States* [hereinafter *Montevideo Convention*] are, according to Harris, "commonly accepted as reflecting, in general terms, the requirements of statehood at customary international law". D.J. Harris, *Cases and Materials on International Law*, 3d ed. (London: Sweet and Maxwell, 1983) at 81. Article 1 of the *Montevideo Convention* provides:

"The State as a person of international law should possess the following qualifications:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with other states."

The third criterion involves a subjective analysis to be undertaken by each State individually. Since such an analysis depends on the socio-economic situation of each State, it can only be analyzed on a case by case basis and can often change from one period of a State's history

The purpose of the *Sovereignty Bill*, presumably, is to increase Québec's ability to meet these criteria should it receive majority approval in a referendum prior to declaring independence. More to the point, Québec's purported right to secede at international law is based on its assertion that the population of Québec is a "people" which has a right to self-determination, and the right at international law to vindicate that right by forming an independent State. We shall examine that assertion to determine the scope of the right to self-determination, and whether its consequence is the right to secede from an existing State.

We conclude that Québec does not have the right to secede from Canada to form a separate State at international law, and that Canada is not obliged to recognize Québec as an independent State following approval by a majority of electors of the draft *Sovereignty Bill* in a Québec referendum. Further, Québec's claim to recognition by members of the international community is unlikely without recognition by Canada.¹⁵ The rights of existing, or metropolitan, States

to another and, as Lee Buchheit remarks, can be "embarrassingly inconsistent." The position held by India over the fate of Kashmir and Bangladesh is a good example of such inconsistency. When Kashmir claimed independence in 1964, India was intransigently opposed to the application of the principle of self-determination. In 1971, when Bangladesh's secession was considered, India opined that, under certain circumstances, a people could legitimately secede from a parent state: See L. Buchheit, *Secession: The Legitimacy of Self-Determination* (London: Yale University Press, 1978) (hereinafter "*Secession*") at 106.

¹⁵ This conclusion is shared by a number of commentators. In *International Legal Effects*, *supra* footnote 12 at 20-21, S. Williams, states that "there is simply no basis for a claim that Québec is a self-determination unit at international law":

It is not sufficient to say that the Québec francophone population is a "people" in the special sense of that word at international law. The people of Québec are not incarcerated in a colonial or neo-colonial situation, nor are they subject to alien domination. They have not been dealt with on an unequal footing to other people in Canada, and cannot claim *carence de souveraineté*, that is, misgovernment, exploitation, and the denial of fundamental rights and freedoms. Québec has not been treated unfairly by Canada in a manner relegating it to the status of a non-self-governing territory. It has full representation in the federal Parliament, government and civil service. There has been no functional subjugation or disenfranchisement. (footnotes omitted)

The same author cites U. Umzurike, *Self-Determination in International Law* (Hamden: Avalon Books, 1972) (hereinafter "*Self-Determination*") who states at 259 that "[i]n as much as the political machinery of Canada has adopted a flexible approach to the problems of French Canadians, it is maintained that it remains an internal affair of Canada and not one of international concern."

D.J. Harris, *International Law*, *supra* footnote 14, states at 101:

On the question of self-determination for *minorities* such as the Scots, the Welsh, the French Canadians, the Kurds (in Iraq), the Nagas (in India), and the Somalis (in Kenya) in existing states and for *majorities* in non-democratic states, there is little evidence in United Nations or other state practice to suggest that the right to self-determination applies outside of the colonial or similar context.

Similarly, Lawrence Eastwood Jr. in "Secession: State Practice and International Law

to preserve their territorial integrity and sovereignty are jealously protected at international law. The reason for this is practical. When a State grants recognition to a prospective State, it sets a precedent which may one day be applied to itself. If States were to accept that the right to self-determination was denied whenever a proposed breakaway unit within an existing State was denied its independence, States would be subjecting their own continued existence to the risk of dismemberment.¹⁶ As a result, international law, which consists of conventions and practices of States and State-run institutions,¹⁷ treats premature

After the Dissolution of the Soviet Union and Yugoslavia" (1993) 3 Duke J. Comp. Int'l L. 299 at 342, (hereinafter "State Practice") observes that the right to self determination has not been extended to apply to Québec:

Permitting groups such as the Québécois in Canada to invoke the right of secession based upon cultural or group identity alone would threaten to open the floodgates and could exacerbate group conflicts. It is difficult to imagine any clear limits upon a secession right that permits groups to secede from pluralistic, non-oppressive states such as Canada (footnotes omitted); see also at 347.

Monahan, in *Cooler Heads Shall Prevail*, *supra* footnote 8 at 14, concludes as follows: "In this sense, Québec has no right under international law to declare independence unilaterally. This means that, if Canada disputed the validity of a Québec UDI, the province would attain statehood only in the event that it was able to oust the jurisdictions of Canada over Québec Territory."

¹⁶ Eastwood puts it as follows in "State Practice", *supra* footnote 15 at 314-315:

Secession is disfavoured by the international community because articulation of a secession right would threaten the territorial integrity of the states which themselves make international law. In contrast, decolonization is favoured by the large number of states in the international community that were once former colonies or that opposed the colonial powers in furtherance of their own interests. (footnotes omitted.)

¹⁷ The sources of international law include international conventions, international custom, the general principles of law recognised by civilised nations and judicial decisions and scholarly works. Article 38(1) of the *Statute of the International Court of Justice* states that: "the Court whose function is to decide in accordance with international law such disputes as are submitted to it shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law." As stated by the International Court of Justice in *Steamship Lotus*:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law as established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. See: P.C.I.J. (1927), Ser. A No. 10 at 18 as cited in H.M. Kindred *et al.*, *International Law Chiefly as Interpreted and Applied in Canada* (Toronto: Emond Montgomery Publications Limited, 1987) at 109.

International conventions, or treaties, are "the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or set up particular relations between themselves." The term 'treaties' may be used to refer to a variety of other

recognition of prospective states as an unlawful violation of the principle of territorial integrity. The international community *may* be entitled to intervene and recognize the secessionist unit in some situations, but that is only where there has been a history of oppression and discrimination. As stated by Buchheit:¹⁸

From the indications now available, therefore, the concept of "remedial secession" seems to occupy a status as the *lex lata*. The focus of attention here is on the condition of the group making the claim. Remedial secession envisions a scheme by which, corresponding to the various degrees of oppression inflicted upon a particular group by its governing State, international law recognizes a continuum of remedies ranging

instruments such as conventions, international agreements, pacts, general acts, charters, declarations and covenants: See Shaw, *International Law*, *supra* footnote 3 at 77-78. International custom is an amorphous concept which consists of both State practice, (i.e. State behaviour), and evidence of the State's belief that such behaviour is required by law (Shaw, *International Law*, *ibid.* at 61). It is quite similar to the concept of constitutional conventions in Canadian constitutional law: See *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 876-884. In determining whether State practice is customary, the courts must examine the duration of the practice, its uniformity and consistency, and its general nature. In the *Asylum* case (*Columbia v. Peru*), for example, the International Court of Justice required that customary law be "in accordance with a constant and uniform usage practised by the states in question." See ICJ Reports, 1950 p. 266 as cited in Shaw, *International Law*, *ibid.* at 63.

The Court will also look at whether States accept that the practice is to be binding as law. (Shaw, *International Law*, *ibid.* at 62. See also I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990) (hereinafter "*Principles*") at 6-7). International law does not require an act to have been practised for a specified period of time before recognizing it as a custom nor does it ask that its usage be widespread. Often, time and generality will come second to repetition and continuity. The State's belief in the lawful nature of its practice, along with its conviction that it has a duty to act in a certain way, are determinative of the practice's customary nature. This is known as *opinio juris*. In the *North Sea Continental Shelf Case* (*Federal Republic of Germany v. Denmark*), involving a dispute among Germany, the Netherlands and Denmark concerning an agreement delineating the boundaries of North Sea continental shelf, the International Court of Justice addressed the concept of customary law:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts in not in itself enough ([1969] I.C.J. Rep. 3); reprinted in Harris, *International Law*, *supra* footnote 14 at 27-28.

¹⁸ See Buchheit, *supra* footnote 14 at 222 (emphasis in the original). The *Declaration on Friendly Relations*, G.A. Res. 2625, U.N. GAOR 6th Comm., 25th Sess., Supp. No. 18 1883rd plen mtg., U.N. Doc. A/8018 (1970) (adopted without a vote) [hereinafter *The Declaration on Friendly Relations*], referred to by Buchheit in the quoted passage, confirms that States will not enjoy the privilege of inviolability of their territorial integrity if they do not conduct themselves "in compliance with the principle of equal rights and self-determination of peoples..." 'Compliance' is defined in the *Declaration on Friendly Relations* as a "government representing the whole people belonging to the territory

from protection of individual rights, to minority rights, and ending with secession as the *ultimate remedy*. At a certain point, the sovereignty of a State's treatment of its minorities becomes a matter of international concern. This concern may be evidenced by an international demand for guarantees of minority rights (which is as far as the League [of Nations] was willing to go) or suggestions of regional autonomy, economic independence, and so on; or it may finally involve an international legitimation of a right to secessionist self determination as a self-help remedy by the aggrieved group (which seems to have been the approach of the General Assembly in its 1970 declaration [on *Friendly Relations*]).

As one approaches the extreme end of this continuum, the remedies not only become more severe; they also undergo a remedial shift in emphasis. There is a significant difference, for example, between the international community using the coercive power of its collective opinion in influencing a delinquent State to accord greater protection for human rights, and the act of giving international legitimation to a group within a State seeking to pursue self-help remedies. In the latter case, the coercive effect results from what is actually a legal unleashing of forces within the State. (emphasis in original)

A secessionist unit must therefore persuade the world community that it deserves its attention and justifies its intervention in the metropolitan State's affairs. This intervention will only be provided where the secessionist movement meets a restrictive set of criteria: *First*, the seceding unit must be comprised of a "people", meeting international law standards.¹⁹ *Second*, that people must have been subject to a denial of political freedom or human rights in a discriminatory manner.²⁰ *Third*, the seceding unit must demonstrate in practical terms that it can, and indeed has, created a practicable and governable State which can assert effective control over a reasonably well defined and recognized territory.²¹

I. Self-Determination at International Law

Those who argue that Québec has a right to secede claim that accession to independence is an intrinsic part of the right to self-determination, and that it has been established in both state practice and international instruments such as the

without distinction as to race, creed or colour." Thus, the *Declaration on Friendly Relations* arguably allows for a negative right to secession if there is a violation of democratic government or if a people is governed by a "racist regime or other forms of alien domination"; see also Umozurike, *supra* footnote 15 at 177-203; and discussion at footnote 20, *infra*.

¹⁹ Meeting this standard requires showing a peoples' distinctiveness supported by both objective criteria, such as language or culture, and subjective criteria, i.e., an indication of a desire to be treated as a State. Buchheit, *ibid.* at 222 and discussion at footnotes 74 to 89, *infra*.

²⁰ See text accompanying footnotes 15 and 18, *supra*, and 26, 49-50 and 90-113, *infra*.

²¹ The criteria for Statehood, described at text accompanying footnote 14, *supra*, may be relaxed for self-determination units, but there is still a practical requirement that States be capable of governing and meeting international obligations. As discussed at text accompanying footnote 33, *infra*, the traditional test for secessionist movements of a metropolitan State is whether that State acquiesces in the secession or is defeated by force. Where the secessionist movement has the right to self-determination, that test is loosened.

Charter of the United Nations and in the *Declaration on Friendly Relations*.²² The difficulty is that international treaties, and indeed international law generally, is far from clear on the scope of the right of self-determination.²³ It does not support the notion that a "people," merely by being such, *ipso facto* has a right to form a separate sovereign State out of an existing State.²⁴ Rather, the principle of self-determination is a flexible concept. It is fundamentally based upon the notion that a State should be free to govern its domestic affairs without interference by other States, and that a people within a State has the right to influence its constitutional and political structure free from discrimination. Buchheit described these notions as follows:²⁵

²² See Brossard, *supra* footnote 10 at 84; D. Turp, "Le droit de secession en droit international public" (1982) ann. can. dr. int. 24; D. Turp, "Le droit à la sécession: l'expression du principe démocratique" in A.G. Gagnon and F. Rocher, eds., *Répliques aux détracteurs de la souveraineté du Québec* (Montréal v.l.b., 1992) at 503.

²³ The first obstacle being whether self-determination is, in fact, a right or if it is simply a principle of international law. Though a great debate has surrounded this issue, the general opinion among today's students of international law is that self-determination is now a legal right of peoples in both conventional law and customary law. As Ian Brownlie notes: "Until recently, the majority of Western jurists assumed or asserted that the principle had no legal content, being an ill-defined concept of policy and morality. Since 1945, developments in the United Nations have changed the position, and Western jurists now generally admit that self-determination is a legal principle. The generality and political aspect of the principle do not deprive it of legal content...": See Brownlie, *supra* footnote 17 at 595-96 and Shaw, *supra* footnote 3 at 157-161.

²⁴ Buchheit, *supra* footnote 14 at 55 (footnote omitted) argues that the mere desire to have an independent State, which he describes as parochialism, has never been sufficient to justify secession. Rather, even a natural law justification for secession requires an element of illegitimacy of the *status quo*. He notes the following with respect to the American Declaration of Independence:

In what is undoubtedly the most famous formulation of the natural rights doctrine of resistance to civil authority, the assumption that these rights appertain to individual men and may not be exercised in the absence of some degree of oppression is clear.

We hold these truths to be self-evident, that all men ... are endowed by their Creator with certain inalienable Rights. ... *That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government. ... Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; ... that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations ... evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government. (emphasis added)*

In summary, at no point in the evolution of natural rights thinking has the doctrine of a right to resistance on the part of individuals or groups of individuals been affirmed in an unqualified manner. (footnotes omitted). (emphasis added)

²⁵ Buchheit, *ibid.* at 14, quoting M. Sahovic, "Principles of Equal Rights and Self-Determination of Peoples" in *Principles of International Law Concerning Friendly Relations and Cooperation* at 323, 350 (N.Y. Oceana, 1972) (other footnotes omitted).

It has recently become popular to speak of the concept of self-determination as having two component parts: (1) a principle of *external* self-determination whereby a group of people are entitled to pursue their political, cultural and economic wishes without interference or coercion by outside States, and (2) a principle of *internal* self-determination which encompasses the right of all segments of a population to influence the constitutional and political structure of the system under which they live. In the words of one writer, the two parts of the dichotomy represent the rights to "external independence and internal autonomy."

It is generally accepted conventional and customary law that *colonial* regimes conflict with both external and internal self-determination in that the territory is governed by the Imperialist and the people are denied the right to democratically govern their own territory free from discrimination.²⁶ Thus, the Imperialist cannot rely upon the right to self determination to justify its authority. As such, other States do not interfere with an Imperialist's right to external self determination by recognizing the independence of a colony. Thus, in the 1960s, the United Nations passed resolutions criticizing Portugal's reluctance to release its colonial possessions. These culminated in a 1965 resolution which appealed to U.N. Members "to render the people of the Territories under Portuguese administration the moral and material support necessary for the resolution of their inalienable right."²⁷ According to Buchheit:²⁸

On the strength of such General Assembly pronouncements, a State wishing to relegate non-intervention and the prohibition against the use of force to a secondary normative status and to intervene, even forcibly, on behalf of a people struggling for self-determination would seem to have a colorable claim for the legality of its action. This certainty seems to be the case in circumstances of a colonial struggle for self-determination, and some of the resolution language arguably supports a belief that the right to intervene extends beyond the colonial situation into cases of "alien" domination or control by a "racist" regime.

The result is that self-determination in the colonial context does not threaten either a State's external right to self-determination, or its territorial integrity.

²⁶ Shaw, *supra* footnote 3 at 162 (footnotes omitted) argues that, since the Second World War, the right to self-determination is a settled principle of international law which is inconsistent with colonization. He bases this conclusion on U.N. Declarations, decisions of the International Court of Justice, and State practice. He defines the principle as follows:

The principle of self-determination provides that the people of the *colonially defined territorial unit* in question may freely determine their own political status. Such determination may result in independence, integration with a neighbouring state, free association with an independent state or any other political status freely decided upon by the people concerned. Self-determination also has a role within the context of creation of statehood, preserving the sovereignty and independence of states, in providing criteria for the resolution of disputes, and in the area of the permanent sovereignty of states over natural resources. (emphasis added)

²⁷ G.A. Res. 2107, *Question of Territories under Portuguese Administration*, 20 U.S. GAOR, Supp. 14 at 62; U.N. Doc. A/6014 (1966) cited in Buchheit *supra* footnote 14 at 35.

²⁸ Buchheit, *ibid.* at 36.

The colony and the Imperialist each already have a distinct legal status. According to the Principle of Equal Rights and Self-Determination of Peoples in the U.N.'s 1970 *Declaration on Friendly Relations*:

The territory of a colony or other Non-Self Governing Territory has, under the Charter, a status separate and distinct from territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

By contrast with decolonization, secession *does* threaten the metropolitan State's right to territorial integrity. As such, premature recognition of the secessionist movement by a third State is an unlawful violation of the metropolitan State's external right to self determination or territorial integrity.²⁹ Lauterpacht has argued that:

So long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal, the *de jure* recognition of the revolutionary party as a government constitutes premature recognition which the lawful government is entitled to regard as an act of intervention contrary to international law. For such recognition amounts to recognizing the rebels either as the government of the entire State or as the government of a new State.

An authority cannot be recognized *de jure*, as a government without being recognized as the government of a State. In either case recognition of the revolutionary party as a *de jure* government constitutes a drastic interference with the independence of the State concerned. The illegality of such action is so generally admitted that, as in the corresponding case of recognition of States, even those who adhere to the political view of recognition admit that at least this particular aspect of it is governed by international law.

The foregoing principles seriously restrict the would-be secessionist movement's right to secede.

²⁹ The applicability of international law to the secessionist unit, as opposed to States, is uncertain. As a general matter, international law governs the relations between States. Domestic political movements are generally governed by domestic law. Accordingly, the focus of the law in this area is on the activities of States, not the secessionist unit. According to Crawford:

It should be noted that much of the problem of the legitimacy of the rebellion, or of a local insurgent's 'right to self-defence against the colonial domination' is not really the point here. Debate on the lawfulness or otherwise of the use of force by a non-State entity pre-supposes at least some degree of legal personality of that entity. Assuming that the legal personality derives from the legal right of the entity in question to self-determination, it seems most unlikely that the use of force to assert that right should be illegal. On that view, the existence of a right would be precisely what made its exercise illegal. It is probably the case that the use of force by a non-State entity in exercise of a right to self-determination is legally neutral, that is, not regulated by law at all (although *jus in bello* may well apply). *A fortiori*, the question of a legal right to self defence is not in point either. What is relevant is the legality or otherwise of action by other States in arising or approving the self-determination unit. (Crawford, *The Creation of States*, in International Law (N.Y. O.U.P., 1990).

II. *The Principle of Self-Determination*

A. *Conventions*

The *Charter of the United Nations*,³⁰ adopted in 1945, was the first international law instrument to formally recognize the concept of self-determination. Article 1(2) of the *Charter* stated among its purposes “[t]o develop friendly relations among *nations* based on respect for the principle of equal rights and self-determination of *peoples*, and to take other appropriate measures to strengthen universal peace” (emphasis added). Section 55 adds that the United Nations will promote certain objectives “with a view of the conditions of stability and well-being which are necessary for peaceful and friendly relations among *nations* based on respect for the principle of equal rights and self-determination of *peoples*” (emphasis added). It is important to note that these provisions distinguish between “nations” and “peoples.” Nations must respect the right of the peoples within their borders to self-determination — that is, to equal treatment in the influence which they may have in the political and constitutional structure of the country. In other words, nations are obliged by these provisions to respect peoples’ rights to self-determination *within* their national framework. However, it does not follow that each people may form its own nation. On the contrary, the distinction between the concepts of “nation” and “people” means that one cannot equate the two. That is made particularly clear by Article 2(4) of the *U.N. Charter* which recognizes and protects a State’s territorial integrity from interference by other States by providing that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” Similarly, Article 2(7) prevents the United Nations from intervening “in matters which are essentially within the domestic jurisdiction of any state ...”³¹

³⁰ United Nations, *Charter of the United Nations and Statute of the International Court of Justice*, San Francisco, 1945 [hereinafter *U.N. Charter*].

³¹ Hans Kelsen has put forward a contrary interpretation of the terms “peoples” and “nations” in *The Law of the United Nations* (New York: Frederick A. Praeger, 1966). Although acknowledging that the term “peoples” in Article 1(2) “may not mean the state, but one of the elements of the state: the population”, Kelsen argues at 51-52 that, as only States are governed by the U.N., it is their self-determination which is the subject of Article 1(2):

Self determination of the people usually designates a principle of internal policy, the principle of democratic government. However, Article 1, paragraph 2, refers to the relations among states. Therefore the term ‘peoples’, too — in connection with ‘legal rights’ — means probably states, since, only states have equal rights according to general international law. That the Purpose of the Organisation is to develop friendly relations among states based on respect for the Principle of self-determination of ‘peoples’ does not mean that the friendly relations among states depend on democratic form of government and that the purpose of the Organisation is to favour such form of government. This would not be compatible with the principle of ‘sovereign equality’ of the Members, nor with the principle of non-intervention in domestic

Hence, the *U.N. Charter* entrenches both a “peoples” right to self-determination and a State’s right to maintain its territorial integrity. In 1970, the United Nations’ policy on self-determination was addressed by Secretary General U Thant as follows:³²

Self-determination of the people does not imply self-determination of a section of the population of a particular Member State... What is relevant for the consideration of the United Nations is the simple basic principles of the Charter. When a State applies to be a Member of the United Nations, and when the United Nations accepts that Member, the implication is that the rest of the membership of the United Nations recognizes the territorial integrity, independence and sovereignty of this particular Member State. (emphasis added)

The recognition of *both* the principle of self-determination and a State’s right to maintain its territorial integrity is found in other international conventions as well. Thus, *The Declaration on the Granting of Independence to Colonial Countries and Peoples*³³ adopts the principles of self-determination and territorial integrity without any mediating provisions.³⁴ Similarly, article 1(1) of both *The International Covenant on Civil and Political Rights*³⁵ and *The International Covenant on Economic, Social and Cultural Rights*³⁶ declare that “[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”³⁷ Similarly, *The 1975 Helsinki Accord*³⁸ includes both the

affairs established in Article 2, paragraph 7. If the term ‘peoples’ in Article 1, paragraph 2, means the same as the term ‘nations’ in the Preamble, then ‘self-determination of peoples’ in Article 1, paragraph 2, can mean only ‘sovereignty’ of the states.

The difficulty with Kelsen’s analysis is that it assumes that ‘self-determination’ is equivalent to democracy and, as such, represents a domestic form of government which is not shared by all U.N. members and cannot be imposed by the U.N. But self determination, when applied to people, does not give them a right to democracy, only a right to non-discrimination. That this right is not merely a matter of domestic concern to U.N. Members is seen in the *Declaration of Friendly Relations* which premises a State’s right to territorial integrity upon it having a “government representing the whole people belonging to the territory without distinction as to race, creed or colour”.

³² (1970) 7 U.N. Monthly Chronicle at 36 as cited in Buchheit, *Sucession*, *supra* footnote 14 at 88.

³³ G.A. res. 1514, U.N. GAOR, 15th Sess., Supp No. 16, U.N. Doc. A/4684 (1961).

³⁴ See Paragraph 2 of the *Declaration on Friendly Relations* as cited in E. Teric, “The Legality of Croatia’s Right to Self-Determination” (1992) 6 Temple Int’l and Comp. L.J. 403 at 412.

³⁵ Adopted Dec. 16, 1966, 999 U.N.T.S. 171. Canada became a party to this Covenant in 1976. The Covenant is regarded as a treaty in international law and is therefore binding on all parties. Canada became a party to this Covenant in 1976.

³⁶ Adopted Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360. Canada became a party to this Covenant in 1976.

³⁷ *Ibid.*

³⁸ *Final Act of the Conference on Security and Co-operation in Europe*, August 1, 1975 [hereinafter *Helsinki Accord*]. Part IV and Part VIII seem particularly contradictory. Canada signed the Accord in 1975 along with the United States and thirty-five European

principles of self-determination and territorial integrity. Principle VIII declares that States act "at all times in conformity with the purposes and principles of the United Nations and with the relevant norms of international law, including those relating to territorial integrity."³⁹ In addition, Principle IV of the Accord states that "[t]he participating States will respect the territorial integrity of each of the participating States."⁴⁰

*The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*⁴¹ is the most important modern document in conventional international law on the right to self-determination. In 1963, a Special Committee was established by the U.N. General Assembly to study the fundamental principles of the *Charter* and the duties derived therefrom with respect to, *inter alia*, the right to self determination.⁴² The *Declaration* which was the result of the Special Committee's deliberations, some seven years after the Committee was struck, was a possible expansion of the scope of the principle of self-determination to justify secession where the metropolitan State has, through discriminatory behaviour, violated the secessionist group's right to political representation. The *Declaration* proclaims that:

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

[2] Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

- (a) to promote friendly relations and cooperation among States; and
- (b) to bring a speedy end to colonialism, having regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

* * *

[7] *Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the*

countries. While this Accord is not legally binding in international law, due to its frequent use, it is becoming an important source of customary international law: See Turp, *supra* footnote 22 (1982) at 71.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Supra* footnote 18.

⁴² See Buchheit, *Secession*, *supra* footnote 14 at 88-97.

territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

[8] Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country. (emphasis added)

The *Declaration on Friendly Relations* is thus primarily aimed at giving effect to self-determination by bringing an end to colonialism, and does not expressly provide a right to secession. Furthermore, it reiterates the *Charter's* support for territorial integrity. Some commentators argue that the overriding importance which the *Declaration* accords to territorial integrity indicates that the drafters never intended it to extend to secession, as opposed to decolonization. According to Shaw:⁴³

If the principle [of self-determination] exists as a legal one, and it is believed that such is the case, the question arises then of its scope and application. As noted above, UN formulations of the principle from the 1960 Colonial Declaration to the 1970 Declaration on Principles of International Law and the 1966 International Covenants on Human Rights stress that it is the right of "all peoples". If this is so, then all peoples would become thereby to some extent subjects of international law as the direct repositories of international rights, and if the definition of "peoples" used was the normal political-sociological one, a major re-arrangement of international law principles would have been created. In fact, that has not occurred and an international law concept of what constitutes a people for these purposes have evolved, so that the "*self*" in question must be determined within the accepted colonial territorial framework. Attempts to broaden this have not been successful and the UN has always strenuously opposed any attempt at the partial or total disruption of the national unity and territorial integrity of a country. (emphasis added)

Similarly, Teric has remarked that:⁴⁴

Looking at the text of these covenants, it appears that the principle of self-determination applies to 'all peoples.' Yet this doctrine became widely accepted only in the context of decolonization. This is apparent by the General Assembly's passage 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*. This resolution called for self-determination of peoples in order to 'bring a speedy end to colonialism.'

Others have argued that the *Declaration on Friendly Relations* goes beyond the *U.N. Charter*, and permits the dismemberment of existing States where they violate the internal right to self-determination, i.e. where the State does not conduct itself in compliance with the "principles of equal rights and self-determination" in that it fails to "represent the whole people belonging to the territory without distinction as to race, creed or colour." As stated by Buchheit:⁴⁵

⁴³ Shaw, *International Law*, *supra* footnote 3 at 161.

⁴⁴ Teric, *supra* footnote 34 at 412; see also Williams, *supra* footnote 12 at 16-18.

⁴⁵ Buchheit, *supra* footnote 14 at 92-93.

[P]aragraph 7 of the principle seems to recognize, for the first time in an international document of this kind, the legitimacy of secession under certain circumstances. Like Gaul, paragraph 7 is divisible into three parts. The first warns that nothing in the foregoing text should be construed as authorizing or encouraging the dismemberment or impairment of the territorial integrity or political unity of sovereign and independent States. ... A similar warning that States should refrain from disrupting the unity and territorial integrity of sister States is given in paragraph 8 of the self-determination principle — after appearing in the draft proposals of the United States, the United Kingdom, and the ten nonaligned nations. Paragraph 7, however, implies that not *all* States will enjoy this inviolability of their territorial integrity but only those States “conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above.” Here again, had paragraph 7 ended on this note, the general nature of the duties prescribed in the declaration, calling upon States to “promote” and to “respect”, would have made it very difficult to indict with certainty any more than a few States for not conducting themselves in compliance with the principle. In a telling final clause, however, the paragraph offers a partial definition of what it means to act in compliance with the principle of equal rights and self-determination of peoples. The final clause expands on the meaning of the “compliance” provision by stating “and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

...

By placing the language at the end of the paragraph in the form of a saving clause, the drafters have apparently affirmed a corollary to the “consent of the governed” concept: if a government does not represent the whole people it is illegitimate and thus in violation of the principle of self-determination, and this illegitimate character serves in turn to legitimate “action which would dismember or impair, totally or in part, the territorial integrity or political unity” of the sovereign and independent State.

Umozurike makes a similar argument:⁴⁶

There is no rule of international law that condemns all secession under all circumstances. The principle of fundamental human rights is as important, or perhaps more so, than that of territorial integrity. *Neither a majority nor a minority has the legal right to secede, without more, since secession may jeopardize the legitimate interests of the other part ...* [A] majority or minority accorded its normal democratic rights cannot legally request the international community to help it secede. (emphasis added)

International conventions thus do not support the claim that a declaration of independence, whether preceded by a referendum or not, is sufficient to entitle a secessionist movement to secede. Even Buchheit and Umozurike, who argue that the *Declaration on Friendly Relations* would permit secession, argue that this would only be permitted when the secessionist unit is subject to discriminatory treatment by the metropolitan State.

B. *State Practice and Custom*

The same is true of customary international law. Customary law has generally followed the development of conventional law in that, excluding

⁴⁶ Umozurike, *supra* footnote 15 at 199.

situations of colonial rule, the international community has defended the principle of territorial integrity over that of self-determination. Although there is some argument based on recent State practice in response to the Yugoslav and Balkan situations, the general rule, until at least the late 1970s, was that State practice did not recognize a right to establish an independent State at all outside of the colonial context. The seminal examples are the unsuccessful attempts of Katanga and Biafra.⁴⁷

On June 30, 1960, Zaïre, then the Belgian Congo, gained independence from Belgium to become a Republic.⁴⁸ Katanga, the Congo's south-eastern province, attempted to secede eleven days later. Moïse Kapenda Tshombe, then Premier of Katanga, called upon Belgium for military assistance⁴⁹ and refused to allow United Nations' troops into Katanga, warning Dag Hammarskjöld, then Secretary-General, that U.N. involvement would only increase tension in the province. The U.N. responded by passing a resolution on July 14, 1960, requesting the withdrawal of Belgium troops from Katanga and authorizing the Secretary General to "take the necessary steps" to provide the national government with military and technical assistance until it "may be able ... to meet fully their tasks".⁵⁰ Following a series of unsuccessful negotiations among the U.N., the Congolese and the Katangans, the newly elected national government of the Belgian Congo requested the U.N.'s military assistance in defeating Katanga. On November 24, 1961, the Security Council provided a resolution authorizing the use of military force "to maintain the territorial integrity and political independence of the Congo."⁵¹

Fighting between the U.N. troops and the Katangan forces continued throughout 1962 and 1963. On January 14, 1963, Tshombe's political support had withered and he was forced to end all secessionist efforts. No State ever formally recognized Katanga. According to Buchheit:⁵²

In retrospect, the United Nations action in the Congo stands as a major precedent against an international recognition of secessionist legitimacy in circumstances similar to those surrounding the Congo at independence. After the assassination of Lumumba, the weight of opinion in the United Nations began to swing strongly in favour of opposing secession regardless of any consequent injury to the principle of non-interference. This was clearly the mandate thrust upon U Thant. Thus in February of 1963, U Thant could report to the Security Council that 'the United Nations has avoided any intervention in the internal politics of the country' and follow it

⁴⁷ These examples are employed in Crawford, *supra* footnote 29 at 263-266; Buchheit, *supra* footnote 14 at 141-153 and 162-176; Williams, *supra* footnote 12 at 8-9; and Eastwood, *supra* footnote 15 at 304-310.

⁴⁸ Patrice Lumumba was named Prime Minister of the Congo. Lumumba's political platform included strong support for a central government.

⁴⁹ Upon its military involvement in the Katangan secession, Belgium was accused of merely trying to protect the vestiges of its colonial economic interests by the international community: See Buchheit, *supra* footnote 14 at 147.

⁵⁰ *Ibid.* at 144.

⁵¹ *Ibid.* at 149-150.

⁵² *Ibid.* at 152.

immediately with a crucial qualification 'beyond the opposition to secession in general required by the Security Council resolutions and the Constitutional suggestions embodied in the Plan for National Reconciliation.'

A similar conclusion is drawn by Eastwood:⁵³

... viewed in historical context, the ultimate disapproval of the Katangan secession by the United Nations is significant because it established a precedent for the international community's abandonment of an impartial stance toward a secessionist movement in the face of political and military frustration.

Nigeria attained independence in 1960. In 1967, Biafra sought to secede and establish an independent State. The United Nations's involvement in the secession of Biafra was limited.⁵⁴ Secretary General U Thant delegated the matter to the Organization of African Unity. However, the mandate of that body was primarily to maintain territorial unity among African nations, so it gave little consideration to Biafran secessionist claims. Finally, the military efforts of the Nigerian government put an end to the Biafran secession. In January 1970, after three years of military struggle, the Biafran army chief of staff surrendered and declared "the republic of Biafra ceases to exist."⁵⁵

The United Nations' involvement in the Congo and the Nigerian conflicts, and the community of States' refusal to recognize the secessionist governments, suggest that, at least until the late 1970's, the international community preferred the maintenance of territorial integrity over a broadly defined principle of self-determination in cases outside of decolonization.⁵⁶ Though the United Nations was less affirmative in its dealings with the Nigerian conflict, the fact that U Thant deferred the matter to the OAU, a advocate of territorial integrity, is in itself an indication of its position. Furthermore, the facts supporting the secession were clearly stronger than those present in Québec today. Biafrans and Katangans each represented a distinct people who were overwhelmingly in favour of secession and who had been subject to human suffering and violations of human rights. Furthermore, their secessionist governments demonstrated a capability of exercising control over their respective territory, and the potential

⁵³ Eastwood, *supra* footnote 15 at 307.

⁵⁴ As stated in Buchheit, *supra* footnote 14 at 168, "[W]ith its fingers still smarting from burns suffered in the Congo crisis, the United Nations did not at any time consider the events in Nigeria during this period."

⁵⁵ *The New York Times* (16 January 1970) 13 as cited in Buchheit, *ibid.* at 168.

⁵⁶ Another unsuccessful attempt at secession occurred in Northern Cyprus in 1974. Feelings of separation had long been present within the Turkish Cypriot community. Tension was rooted in the wide ethnic and religious diversity of Cyprus where eighty percent of the occupants are Greek and practice Greek Orthodox while eighteen percent are Turkish and Moslem. In 1983, the Turkish Cypriots seceded from Cyprus to form an independent republic. However, this unilateral declaration of independence was quickly condemned by the U.N. as well as the European community: See S.E. Himmer, "The Achievement of Independence in the Baltic States and its Justifications" (1992) 6 *Emory Int'l L.R.* 253.

to form a viable state.⁵⁷ Nevertheless, no State recognized their right to secede by granting *de jure* recognition to either Katanga or Biafra.

State practice may have recently become somewhat more flexible, accepting some right of secession within formerly unified States, but only under very narrow circumstances.⁵⁸ Thus, for example, the international community has recognized the secessions of Bangladesh from Pakistan, the Baltic States from the former U.S.S.R., and Croatia, Slovenia and Bosnia-Herzegovina from the former Yugoslavia.⁵⁹ It is difficult to form a general legal principle from these

⁵⁷ Crawford, *supra* footnote 29, states that, prior to the military defeat, "the Katangan government was considered more stable than the central government of Congo ...". With respect to Biafra, Eastwood *supra* footnote 15 at 309 states that support for secession was "clear" and observes "the length of the civil war and the tenacity of the Biafran fighters are strong evidence of the Biafran claim to be a distinct group deserving full independence."

⁵⁸ It has done so partly by turning to the criteria found in *The Declaration on Friendly Relations*, the only international law instrument which gives priority to the right of self-determination when it declares that the right of territorial integrity applies "only to those sovereign and independent states conducting themselves in compliance with the principle of equal rights and self determination of peoples... [and] representing the whole people belonging to the territory without distinction as to race, creed or color", see *The Declaration on Friendly Relations*, *supra* footnote 18.

⁵⁹ There are, of course, numerous other examples of the creation of new States. The examples considered here are chosen because they offer illustrations of the very recent trend towards successful secessionist movement based upon the right to self-determination and therefore put the Québec sovereigntists' case most strongly.

One recent example which is not addressed in the text is the break-up of Czechoslovakia. The fundamental difference between the Czechoslovakian and Canadian federations is that Czechoslovakia was a bipartite federation in which the two constituent governments — Czech and Slovakia — agreed to dissolve the federal government and create two new States. It was a separation, not a secession. See R.A. Young, *The Breakup of Czechoslovakia* (Kingston: Institute of Intergovernmental Relations, Research Paper No. 32, 1994) at 67.

The primary implication of this distinction is that the new republics formed out of Czechoslovakia did not have an existing or metropolitan State from which they sought or required recognition. Rather, both republics had to apply for recognition from the international, and particularly the European, community. They were thus required to dissolve the union in accordance with negotiations overseen by leaders of the European Community. The European Community imposed substantive terms on separation such as a common market as a condition for recognition: see Young, *ibid.* at 49-52.

Because the threat of Québec's separation does not threaten Canada's international status, Canada remains capable of granting or withholding recognition.

The distinction between the two scenarios is illustrated by Slovakia's reluctance to declare itself independent. As Young states at 22, the Slovak National Council "twice postponed a vote on the Declaration of Sovereignty of Slovakia, in part because the Czech National Council had already resolved that such a declaration would be an unconstitutional act, would represent secession, and would make the remaining republic the successor to the federal republic's international rights and obligations. Since it would be a renegade unit, the seceding state would have to seek international recognition and renegotiate treaties". Thus, the secessionist scenario posed for Québec by the *Sovereignty Bill* was exactly that which Slovakia sought to avoid. It was finally capable of avoiding this by agreeing with the Czech Republic to dissolve the old republic in a constitutional manner: see Young, *ibid.* at 56.

examples. Bangladesh, for example, was able to obtain international recognition only after India's military intervention led to Pakistan's unconditional surrender.⁶⁰ Of the remaining examples, world recognition of the Baltic States was provided only after the failed coup in the Soviet Union in August, 1991 and Russian President Boris Yeltsin's recognition of Baltic independence. The formal end of the Soviet Union as the metropolitan State followed shortly.⁶¹ This, combined with the Soviet Union's lack of lawful title to the Baltic States,⁶² makes it questionable whether world recognition of the Baltics indicates a state practice of favouring secession. According to Eastwood:⁶³

The failure of the international community to support the Baltic secession movements more forcefully prior to their *de facto* achievement of success calls into question whether the international response to Baltic independence can be interpreted as the beginning of a pattern of state practice endorsing secession in some contexts. *Even if the response of the international community suggests some acceptance of secession, such support may mark only the beginning of international recognition of a limited secession right applicable to illegally annexed territories rather than a general right of secession.* In any event, the *ex post facto* recognition of the independence of the Baltic states alone does not establish international recognition of a right of secession under customary international law, even if such recognition may be interpreted as evidence of the beginning of such a trend. (emphasis added)

The secession of Croatia, Slovenia and Bosnia-Hercogovina from Yugoslavia is the clearest case of a successful secession based upon the right to self-determination. According to Eastwood, "it represents the first time widespread international state practice has favoured secession movements still engaged in armed struggle for independence outside of the colonial context."⁶⁴

This case also illustrates the connection between recognition of a secessionist movement which relies upon the principle of self-determination for its legal

⁶⁰ Bangladesh's secession from Pakistan does not easily fit into any of the precedents in that its secession was obtained by a successful exercise of effective control with the assistance of the military intervention of an outside State, India. Open warfare broke out between India and Pakistan on December 3, 1971 and India's recognition of Bangladesh followed shortly. The Pakistan military surrendered unconditionally on December 16, 1971. According to Eastwood, *supra* footnote 15 at 312-313 (footnotes omitted):

It appears that the distinguishing factor explaining the success of the Bangladesh secession was India's intervention, which led to the *de facto* existence of a newly independent state. Thus, the secession of Bangladesh suggests that the international community is likely to recognize successful secession movements. However, there is no way to predict in advance which secession efforts will succeed. Therefore, the case of Bangladesh is of little precedential value in predicting which future secessionist groups will be perceived by the international community as having, *a priori*, a right to secede."

⁶¹ The Soviet Union was effectively dissolved in December 1991: See D. Rennick, *Lenin's Tomb: The Last Days of the Soviet Empire* (New York: Vintage, 1994) at 499.

⁶² See: William Allison, "Self-Determination and the Recent Development in the Baltic States" (1991), 19 Den. J. Int'l L. & Pol'y 625 at 26 at 626.

⁶³ Eastwood, *supra* footnote 15 at 321 (footnotes omitted).

⁶⁴ *Ibid.* at 322.

support and the corresponding condemnation of the metropolitan State. As discussed earlier, recognition of a secessionist movement carries with it the denial of the metropolitan State's legitimacy to represent the secessionist unit at international law. Thus, when the world community recognized the independence of the Yugoslav republics, it also refused to recognize the legitimacy of the metropolitan State. Following the dissolution of Yugoslavia in April 1992, its former central government, formerly the republics of Serbia and Montenegro, which called itself the "Federal Republic of Yugoslavia", applied for, and was refused, successor status by the United States, the European Community and the United Nations.⁶⁵ The Serbia-Montenegro government's association with the practice of "ethnic cleansing"⁶⁶ led to international condemnation. According to Eastwood:⁶⁷

Serbian atrocities, including continued adherence to the policy of ethnic cleansing, may best explain why the international community has refused to recognize Serbia-Montenegro as the successor state to the former Yugoslavia. The actions of Serbia may also explain the relatively swift recognition of Bosnia-Hercogovina, Croatia and Slovenia by key members of the international community shortly after their secessions.

It is accordingly difficult to draw general principles based on the right to self-determination from the above. It may, however, be possible to see these examples — especially in the case of Yugoslavia — as analogous to the right of self-determination in colonial contexts: where a secessionist unit is politically disempowered and discriminated against, it is effectively in a colonial type of situation. The people within that unit are, like colonial peoples, denied the right to influence their political system because of internal discrimination. The metropolitan political system which enforces this discrimination, may thus be found to have violated the right to self-determination. In this sense, consistent with the development of conventional international law discussed earlier, customary international law may support the proposition that, where a secessionist unit in a metropolitan State suffers the same type of disenfranchisement as a colonial people, the secessionists may also claim a right to establish an independent State. As Buchheit argues:⁶⁸

One searches in vain ... for any principled justification of why a colonial people wishing to cast off the domination by its governors has every moral and legal right to do so, but a manifestly distinguishable minority which happens to find itself, pursuant to a paragraph in some medieval territorial settlement or through a fiat of cartography, annexed to an independent State must forever reman without the scope of the principle of self-determination.

⁶⁵ *Ibid.* at 325-326.

⁶⁶ Ethnic cleansing was an attempt by the Yugoslav federal military to increase Serbian territory by attempting to force all non-Serbs out of territories which were populated by Serbs or contiguous to the Yugoslav republic of Serbia: see Eastwood, *supra* footnote 15 at 326-327.

⁶⁷ *Ibid.* at 327.

⁶⁸ Buchheit, *supra* footnote 14 at 17.

Thus, although the application of the right to self-determination in the secessionist context has not been settled,⁶⁹ it is useful to study and contrast these examples with the Québec case to determine whether Québec has the right to secede and be recognized as a State at international law.

III. *The Québec Case*

A. *People*

No international legal body has ever made a formal pronouncement on the definition of "people." According to Buchheit, a people must meet both objective and subjective criteria in order to invoke a legitimate claim to self-determination.⁷⁰ As to objective criteria, Elster put it as follows: a "people" is "a community with common traditions, common language, common religion, and — perhaps most important — common enemies."⁷¹ The subjective criteria are essentially whether the people have manifested an unequivocal will to live

⁶⁹ Eastwood, *supra* footnote 15 at 329 is not convinced that there is a customary right to secession based on self-determination.

Recent state practice in response to secession movements has not created a secession right under customary international law. As previously discussed, the international community's broad support for the secessions of the Baltic states from the Soviet Union and the speedy recognition of several seceding former Yugoslav republics may mark the beginning of a pattern of state practice that could in time reveal a right of secession under international law. However, these developments are recent and are not widespread. Thus the necessary conditions that the practice be respected over a considerable time period or be sufficiently widespread to create customary international law are not fulfilled in the secession context.

Eastwood's cautious approach seems justified. At the time of writing, the government of Russia is engaged in a military struggle with the province of Chechnya which declared independence in 1992. Despite the use of military force against civilians, no European government has recognized Chechnya. German Chancellor Helmut Kohl described Russia's use of force as "complete madness" but gave no indication of support for the secessionists.

We must not give the impression that the West is interested in the dissolution of the Russian federation. (P. Koring, "Conflict in Chechnya Reveals Europe's Flaws" *Globe and Mail* (10 January 1995) A10.

The United States has also refused to challenge Russia's territorial integrity. President Clinton stated that "Chechnya is part of the Russian Federation, and we support the territorial integrity as [sic] Russia, just as we support the territorial integrity of all its neighbours." (President Bill Clinton, Remarks By the President to the Plenary Session of the White House Conference on Trade and Investment in Central and Eastern Europe (13 January 1995)).

⁷⁰ Buchheit, *supra* footnote 14 at 9-10. See also F. Iglar, "The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination", (1992), 25 B.C. Int'l Comp. L. Rev. 231 at 224-25.

⁷¹ J. Elster, "Constitutionalism in Eastern Europe: An Introduction" (1990) 58 U. Chi. L. Rev. 447 at 450.

together and be recognized as distinct.⁷² Applying these criteria to Québec, the presence of a common language and political tradition of Québec *francophones* would meet the objective requirements of a "people." However, other "peoples" reside within Québec on those criteria as well. For example, English-speaking Québécois and native peoples also qualify. The presence of these other "peoples" does not by itself undermine the claims of Québec separatist leaders, but it shows the tautology of the criteria.⁷³ To illustrate, one could relax the criteria to expand the "people" under consideration to include all "Québécois," but then why stop at the Québec border? Why not all Canadians? There is a sufficient lack of homogeneity in the Québec population, when one includes francophones, anglophones, allophones and natives, that one could equally expand the "people" to include all Canadians, including Québécois, as a "people" for these purposes.

Indeed, the draft *Sovereignty Bill* recognizes that natives are a "people," saying in section 3 that the new Québec *Constitution*, when drafted, must "recognize the right of Aboriginal nations to self-government." As to the English speaking community, section 3 of the *Sovereignty Bill* states that Québec's new constitution shall "guarantee the English-speaking community that its identity and institutions will be preserved." Section 3 goes on to try to avoid the implication that natives and anglophones have the right to self-determination outside a separate and sovereign Québec by stating that "such guarantee and recognition shall be exercised in a manner consistent with the territorial integrity of Québec." This is, of course, a statutory recognition in the *Sovereignty Bill* of precisely the point which we are making that a people's right to self-determination must be exercised, absent racist and discriminatory behaviour in Canada, within the framework of the existing State. That principle applies equally to Québec within Canada as to, say, the natives who reside within both Québec and Canada.

The subjective criteria are based upon the unequivocal will of a people to live together and be recognized as distinct. This can be identified by an election or a referendum.

Although a referendum as such was never formally held on the issue of Bangladesh secession, the overwhelming victory of the Awami League, whose platform consisted of regional autonomy, is indicative of the East Pakistan's desire to accede to sovereignty. In the December 1970 election, the Awami

⁷² According to Buchheit, *supra* footnote 14 at 10 one should "examin[e] the will of the people who share similar racial, religious and language bonds." He further notes that:

[T]his approach has the virtue of supplying the international community with a set of relatively objective, verifiable criteria, some or all of which may be satisfied before a group may legitimately claim to be a self and therefore entitled to the process of determination.

⁷³ This overriding problem of identification has been addressed by Sir Ivor Jennings as follows: "On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people.", I. Jennings, *The Approach to Self-Government* (Cambridge: University Press, 1956) at 56.

League secured 167 of the 169 seats allotted to East Pakistan in the National Assembly. It also won 298 of the 310 seats in the East Pakistan provincial elections. This can be compared with the Parti Québécois' 44.7% popular support in the 1994 Québec election. Furthermore, the Awami League dominated East Pakistani politics for fifteen years and was clearly in control of the East. As Saxena put it: "a national consciousness and awakening was quite clearly discernible and the 1970 elections set at naught if any doubts had remained."⁷⁴

Each of the Baltic States' declarations of independence were preceded by a series of plebiscites in which 90% of Lithuanians, 78% of Estonians and 74% of Latvians voted in favour of secession from the Soviet Union.⁷⁵ These results point to an unequivocal will to live as a sovereign State. In fact, following these plebiscites, Mr. Gorbachev, then Premier of the U.S.S.R., held a referendum offering the Baltics a form of sovereignty association. The nationalists boycotted this referendum, and the results were completely discredited.⁷⁶

In 1991, the Slovenes and Croats voted strongly in favour of independence in a plebiscite where 88.5% of Slovenes and 94% of Croats favoured autonomy from Yugoslavia.⁷⁷

In this case, the draft *Sovereignty Bill* does not pose the question to Québécois whether they want to live separate and apart from other Canadians. Instead, section 17 of the *Bill* asks Québécois whether they are in favour of the *Sovereignty Bill* itself, which includes the as yet hypothetical conclusion of an economic association agreement with Canada, the retention of Canadian currency, and the retention of Canadian treaties and international relations. The question is therefore closer to Gorbachev's sovereignty association question which the Baltic nationalists boycotted⁷⁸ than the true Baltic secession plebiscites which passed.

The question set out in section 17 of the draft *Bill* is in many respects reminiscent of the 1980 Québec referendum,⁷⁹ where the government of Québec sought a mandate to negotiate sovereignty-association, not secession, with the

⁷⁴ J.N. Saxena, *Self-Determination: From Biafra to Bangladesh* (Bombay: N.M. Tripathi, 1978) at 81.

⁷⁵ M.H. Halperin, D. Scheffer and P. Small, *Self-Determination in a New World Order* (Washington D.C.: Carnegie Endowment for International Peace, 1992) at 141.

⁷⁶ See footnote 5, *supra*.

⁷⁷ Iglar, *supra* footnote 70 at 218.

⁷⁸ See footnote 5, *supra*.

⁷⁹ The text of the May 20, 1980 Referendum Question was as follows: "The Government of Québec 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 Québec to acquire the exclusive power to make its laws, levy 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; no change in political status resulting from these negotiations will be effected without approval by the people through another referendum; on these terms, do you give the Government of Québec the mandate to negotiate the proposed agreement between Québec and Canada?" Votes and Proceedings of the National Assembly of Québec, Fourth Session, Thirty-first Legislature, March 20, 1980.

rest of Canada. The terms of association were never set out in any concrete form, any more than section 3 of the *Sovereignty Bill* does that here, but the idea was that Québec would "associate" with Canada in some form and retain economic ties. These ties would presumably have included the maintenance of Canadian currency (and thus of necessity Canadian central banking and monetary policy), Canadian defence, and the maintenance of Canadian passports. That is not dissimilar to the draft *Sovereignty Bill* here, notwithstanding that section 1 of the *Bill* states that Québec would be a "sovereign country." It is therefore useful to note that, even in 1980 where something less than that asserted here was claimed, only 40.4% of the Québec voters voted in favour of "sovereignty-association."⁸⁰ Unlike the East European cases, where the voting was overwhelmingly in favour of independence, Québec voters were not willing to vote strongly in favour of a separate Québec.

Furthermore, where ambiguous words like "sovereignty" are used in polls even today, less than 50% of those polled are in support. Where "separation" or "secession" is used, the numbers drop substantially.⁸¹ In fact, based on a survey compiling 153 public opinion polls, Québec support for sovereignty-association has never been higher than 60%, and support for separatism has never passed 45%.⁸² Students of the Québec secessionist movement conclude that only about 40% of Québécois are hardcore *indépendentistes* today.⁸³ At the time of writing, although the Parti Québécois has formed the government of Québec, polls show that over 60% of Québécois believe that a Québec secession from Canada is highly unlikely.⁸⁴ A further indication of Québécois' will to remain a part of Canada is expressed by the results of the 1994 Québec provincial elections, where the Parti Québécois ran on a separatist platform, arguing that a vote for it was a vote to *begin the process* of leaving Canada, not a vote to secede *per se*. Even then the Parti Québécois attained only 44.7 per cent of the popular vote and the federalist Liberals received a close 44.3 per cent of the electorate's support.⁸⁵

It is not useful to speculate on a magic number which must be achieved in a referendum to satisfy the subjective criterion of the unequivocal expression of a will to live separate and apart from Canada. However, in the example of the Baltic and Yugoslavian states previously discussed, the level of support for

⁸⁰ Yves-Henri Nouailhat, *Le Québec de 1944 à nos jours* (Paris: Imprimerie nationale, 1992) at 167.

⁸¹ *Ibid.*

⁸² D. Drache, "Negotiating with Québec: A new Division of Powers or Secession?" in D. Drache and R. Perin, eds., *Negotiating with a Sovereign Québec* (Toronto: James Lorimer and Company, 1992) at footnote 168. The survey shows that support for separatism, sovereignty and sovereignty-association reached its peak in 1990-1991. But these results may be tainted by particular negative feelings as a result of the failed Meech Lake negotiations which were going on at the time.

⁸³ *Ibid.* at 19.

⁸⁴ R. Mackie, "Québécois Don't Expect Split" *Globe and Mail* (7 September 1994) A1.

⁸⁵ J. Gray, "Johnson Wants Fast Referendum" *Globe and Mail* (14 September 1994)

unqualified independence was between 74-95%. Based on the precedents, a simple majority would be insufficient to support this claim.

The measurement of a peoples' will to live separately also raises the question of who ought to be consulted about the issue and how that consultation ought to take place. To pose the referendum question to the Québec population, as contemplated in section 17 of the *Sovereignty Bill*, presupposes that Québécois are the relevant "people" for international law purposes. One may, for example, ask whether anglophone or native Québécois should be entitled to have their votes counted separately so that *their* preference as distinct "peoples" should govern whether they want to live in a separate Québec. The response provided by the *Sovereignty Bill* is that the existence of different "peoples" in Québec cannot threaten Québec's territorial integrity. But again, this is question begging: if the majority of all Québécois can bind the different peoples of Québec, it should follow that the majority of all Canadians can bind the different peoples of Canada, including Québécois.

To conclude on this point, if Québécois *unequivocally* express their will to separate by referendum, they will have passed the subjective condition that there is a national will to be governed differently as a people which is not being fulfilled. Two points must be recognized however. The *first* is that others in Québec may equally have a claim to secede from Québec, or remain in Canada, on the basis that they also are a people whose rights to self-determination will not be vindicated in an independent Québec, e.g. natives and anglophones. The second point is that a national will, unequivocally expressed, is only one element of the right to secede at international law. The analysis must therefore proceed.

B. Discrimination

As previously indicated, the right to self-determination was originally formed in the context of decolonialism. A colonizing State does not permit a people to choose its government freely, but rather imposes a government. Although the principle of self-determination may now also be violated outside of the colonial context, it is a condition that human rights and the principle of representative rule be infringed before that can happen. Buchheit, who argues strongly in favour of a right to secession based on the *Declaration on Friendly Relations*, recognizes its limitations:⁸⁶

It is crucial to note that the terms of this document offer very little comfort to groups demanding political autonomy simply for the sake of parochialism. What seems to be required is a denial of political freedom and/or human rights as a *sine qua non* for a legitimate separatist claim. *This does not of course totally invalidate the claims of, for instance, the French Canadians, the American Blacks, Welsh or Bretons, but it does suggest that their respective States are under no obligation imposed by international law to recognize their demands beyond providing protection for human rights, a*

⁸⁶ Buchheit, *supra* footnote 14 at 94.

representative government that does not discriminate on the basis of race, creed or color, and the other requirements set forth in the declaration. If these conditions are satisfied, the instrument apparently consigns discussions regarding the political status of such groups within their States to the level of internal constitutional law. (emphasis added)

Similarly, Umozurike posits that secession may be permitted where a people has been subjected to "a wholesale denial of human rights as a result of a deliberate policy of the existing state."⁸⁷ Nanda writes that the focus of the validity of a claim to self-determination must be on the "nature and the extent of the deprivation of human rights of the group making the claim."⁸⁸

Violation of a group's human rights may be determined by inquiring into whether the group has suffered from "subjugation, domination and exploitation,"⁸⁹ and "the extent to which the members are deprived of the opportunity to participate in the political process."⁹⁰ More specifically, certain core human rights are recognized today by international law, and any State which practises or encourages "activities such as genocide, slavery or slave trade, murder, causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishments and systematic racial discrimination [is] in violation of international law."⁹¹

Thus, for example, in the case of Pakistan, although East Pakistan had surpassed West Pakistan in population, West Pakistan exercised political dominance over East Pakistan and exploited its natural resources. This Western domination led Easterners to feel as though they were "second class citizens."⁹² Not only was Urdu the official language of Pakistan, but West Pakistan benefited from a preferential economic and educational relationship with the central government. Agricultural efforts were often geared towards the West, as was power development, education and foreign aid.⁹³ Finally, according to Saxena, both before and during the Civil War which ensued during 1971, West Pakistan engaged in clear human rights' violations:⁹⁴

[T]he troops unleashed a terrible orgy of killing and destruction, lasting some forty eight hours. The Awami League Party workers and sympathizers were brutally gunned down in Dacca Streets. Brutal military force was used to kill unarmed people. Houses were demolished, women were raped and killed and children were mercilessly butchered. University of Dacca, where the attack was directed both at the students and the teachers, was a main target. It was not merely indiscriminate killing, it was genocide.

⁸⁷ Umozurike, *supra* footnote 15 at 177.

⁸⁸ Ved. P. Nanda, "Self-Determination Under International Law: Validity of Claims to Secede" (1981) 13 Case W. Res. J. Int'l L. 257 at 277.

⁸⁹ *Ibid.*

⁹⁰ Allison, *supra* footnote 62 at 628-29.

⁹¹ K. Ryan, "Rights, Intervention, and Self-Determination" (1991) 20 Den. J. Int'l L. & Pol'y 55 at 59.

⁹² Saxena, *supra* footnote 74.

⁹³ For a further discussion on West Pakistan's economic exploitation of the East: See Saxena, *ibid.* at 60-65 and Buchheit, *supra* footnote 14 at 198.

⁹⁴ Saxena, *ibid.* at 78.

With respect to the Baltic States, their annexation by the Soviet Union in 1940 was achieved by force. In June 1940, on the basis that it was protecting itself from German advance into Western Europe, the Soviet insisted upon total occupation of the Baltics. The Baltics acquiesced to this demand on the belief that the non-aggression/non-interference treaties with the Soviet Union would protect them. In these treaties, the Soviet Union agreed to abandon "voluntarily and for all time" any claims to the Baltic territories.⁹⁵ Notwithstanding the treaties, the Baltic States were annexed. Halpern, Scheffer and Small have argued that "the Soviet annexation of the Baltic states was unlawful. Arguably, the members of the international community should not have accorded the annexation even *de facto* recognition."⁹⁶ Today, this "forcible acquisition"⁹⁷ of territory would be illegal based on international prohibition of annexation of territory.⁹⁸

Following World War II, the Soviet Union imposed brutal sanctions on the Baltics. In a one year period, over 20,000 Estonians, 100,000 Latvians and 200,000 Lithuanians were faced with deportation orders to Siberia.⁹⁹ Over 600,000 Balts (of only six million) were deported from 1945 to 1949.¹⁰⁰ To dilute the ethnic unity of the region, the Soviet government encouraged a rapid influx of workers from other parts of the U.S.S.R., such that today Estonians and Latvians make up only slim majorities in their nations.¹⁰¹

During the 1990 confrontation between Soviet troops and nationalist groups in Lithuania, soon after the passage of the Soviet resolution declaring Lithuania's secession unlawful, Soviet troops were sent to Vilnius, Lithuania's capital. On January 13, 1991, Soviet troops took over a Vilnius newspaper and television stations, and killed fourteen Lithuanians.¹⁰² According to Allison, "[m]uch of the 1991 crackdown was reminiscent of the 1940 annexation."¹⁰³

As for Croatia, the international community initially refused to accord recognition upon a declaration of independence. This restraint is consistent with the principle of territorial integrity. As Iglar remarks, "[u]nderlying the reluctance to recognize Slovenia and Croatia was a fear of violence in Europe and the precedent that independence would establish for the multitude of separatist ethnic groups in Eastern Europe."¹⁰⁴ However, following a violent

⁹⁵ Allison, *supra* footnote 62 at 626.

⁹⁶ Halpern, Sheffer and Small, *supra* footnote 75.

⁹⁷ B. Meissner, "The Right of Self-Determination, After Helsinki and Its Significance for the Baltic Nations" 13 Case W. Res J. Int'l L. 375 at 381.

⁹⁸ For further discussion on the illegality of annexation in international law see: V. Rudrakumaran, "The Legitimacy of Lithuania's Claim For Secession, (1992) 10 Boston U. Int'l L. J. 33.

⁹⁹ Allison, *supra* footnote 62 at 626.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* at 634.

¹⁰³ *Ibid.*

¹⁰⁴ Iglar, *supra* footnote 70 at 213.

military intrusion by the Yugoslav army, world opinion came to sympathize with the two seceding Republics. Since then, the United States and the European community have recognized them as States.

By comparison with the foregoing examples, it is difficult to make the case that Québec is being denied equal treatment or is being excluded from the political process within Canadian federalism, and is therefore being refused its rights to self-determination as these are understood at international law. Québec has proportionate representation in Parliament and the federal Cabinet, and is substantially represented in the federal civil service and the armed forces. It is legally entitled pursuant to the *Supreme Court Act*¹⁰⁵ to have 3 of the 9 Supreme court of Canada judges appointed from the Bar of Québec, and Québec is the only province with such guaranteed representation on the Court. This is so notwithstanding that Québec's one-third of the judges on the Court exceeds its proportionate share of the Canadian population (i.e. about 25%). Québécois have held the Office of Canadian Prime Minister for 49 of the 127 years since Confederation and, commencing with Louis St. Laurent in 1948, Québécois have been Prime Minister for 34 of the last 47 years. The Québec National Assembly also maintains internal provincial control over its civil law system, education and social services, and exercises exclusive jurisdiction over all classes of subjects coming within section 92 of the *Constitution Act, 1867*.

The Parliament and government of Canada have also developed laws and policy in view of promoting services in the French language. An increase in the employment of French-speaking Canadians in government has been an objective of both the federal and provincial governments.¹⁰⁶ In addition, the Province of Québec has "consistently received federal spending that has been at least proportionate to its population and fiscal contribution."¹⁰⁷ Québec participates in international conferences, and is a frequent negotiator in transnational agreements with private and governmental entities abroad. In short, there has been no functional subjugation or disenfranchisement of Québécois or the Province of Québec.

Yet, Daniel Turp argues that Québécois have been subject to misrepresentation in government as a result of failed negotiations to meet Québec's constitutional demands:¹⁰⁸

It is undoubtedly arguable that the passing of the *Constitutional Act, 1982* without Québec's consent and the rejection of the Meech Lake Accord (including the five conditions put forth by Québec) constitute a refusal to allow the people of Québec to achieve internal self-determination.[translation]

With respect to the passing of the *Constitution Act, 1982*, Québécois participated in the negotiations, and indeed represented both the governments

¹⁰⁵ R.S.C. 1985, c. S-26, s. 6.

¹⁰⁶ Marchildon and Maxwell, "Québec's Right of Secession under Canadian and International Law" (1992) 32 *Virginia Journal of International Law* 583, 618.

¹⁰⁷ *Ibid.*

¹⁰⁸ Turp, *supra* footnote 22 at 58.

of Québec (Premier Lévesque) and Canada (Prime Minister Trudeau). The legality of the passage the *Act* was approved by both the Supreme Court of Canada and the U.K. Court of Appeal.¹⁰⁹ There is therefore no basis to claim that such passage was inconsistent with domestic or international law.

It is equally dubious to equate the failure of the *Meech Lake Accord* and the *Charlottetown Accord* to some form of misrepresentation by the government. The *Meech Lake* and *Charlottetown Accords* were examples of an exercise in which representatives of all provinces and Parliament were involved in negotiating the restructuring of a Canada's constitutional framework. Indeed, in *Charlottetown*, native groups and the Northwest and Yukon Territories were also represented. There was a national referendum in relation to the *Charlottetown Accord*, although not *Meech Lake*. Neither process was a denial of Québécois' rights to participate in the political process. The failure of the two Accords is more accurately viewed as a failure to find an acceptable final answer in the context of an ongoing constitutional and administrative process than as a denial of Québec self-government.

C. *Effective Control*

Section 4 of the draft *Sovereignty Bill* states that "Québec shall retain the boundaries it has within the Canadian Confederation at the time section 1 comes into force." A State cannot, however, simply legislate its borders. Québec must be able to establish that, under international law, it is entitled to that territory.

For a seceding entity to be regarded as a State, it must have a stable and effective government that is capable of ruling "over a reasonably well defined territory, to the exclusion of the metropolitan state, in such circumstances that independence is either in fact undisputed, or manifestly indisputable"¹¹⁰ (emphasis added). International law presumes that the State which originally exercises control may only be ousted if the new regime can effectively assert its control. It must be shown that independence is not "disputed without a rational hope of success."¹¹¹ An exception to this presumption exists where the emergent State is a non self-governing territory with a right of self-determination. In such a case, according to Crawford, "the degree of effectiveness required may be substantially less than the case of secession within a metropolitan unit."¹¹²

The seceding unit must thus be able to show that it has a stronger claim on the territory it intends to govern than the State from which it proposes to separate. It may do so by demonstrating either (i) a history of exercising effective control over that territory as a state, or (ii) that the metropolitan State has violated international law by maintaining its control over that territory

¹⁰⁹ See: *Re Resolution to Amend the Constitution*, *supra* footnote 18; *Re Objection by Quebec to Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; and *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 1 Q.B. 892 (C.A.).

¹¹⁰ Crawford, *supra* footnote 29 at 266 (emphasis added).

¹¹¹ *Ibid.* at 261.

¹¹² *Ibid.*

through methods which deny the right to self-determination.

With respect to a history of effective control, it is necessary to show that the seceding unit exercised control as a *State*, to the exclusion of other *States*. Shaw states the principle as follows:¹¹³

The principle of effective control applies in different ways to different situations, but its essence is that "the continuous and peaceful display of *territorial sovereignty* is as good as title." Such control has to be *deliberate sovereign action*, but what will amount to effectiveness is relative and will depend upon, for example, the geographic nature of the region, the existence or not of competing claims and other relevant factors, such as international reaction.

...

The acquiescence of a party directly involved is also a very important factor in providing evidence of the effectiveness of control. Where a dispossessed sovereign disputes the control exercised by a new sovereign, title can hardly pass. Effectiveness is related to the international system as a whole, so that mere possession by force is not the sole determinant of title. This factor also emphasizes and justifies the role played by recognition (emphasis added).

The arbitrator in the *Island of Palmas Case* put it as follows:¹¹⁴ "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State." He went on to say:¹¹⁵

"...it cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region."

Thus, in the example of Pakistan, the desire to secede was provoked in part by the incongruous geographic positioning of East and West Pakistan (being geographically divided by India). East Pakistan clearly possessed a defined territory. Furthermore, throughout the years of conflict, the Awami League and its leader, Sheikh Rehman, demonstrated that it had the capacity to exercise effective control over East Pakistan as the East Pakistani population demonstrated an acceptance of the League's rule for over fifteen years.¹¹⁶

Perhaps most importantly, following India's military intervention, the government of Pakistan surrendered. Thus, Bangladesh's proof of effective control was based on *de facto* success as much as an *a priori* right to self-determination.¹¹⁷

The Baltic States also had exercised control over a well-defined territory. Estonia was formally recognized as a State by the Soviet Government in 1920 and was accepted to the League of Nations in 1922. The Soviet Union

¹¹³ Shaw, *supra* footnote 3 at 262.

¹¹⁴ (1928), 2 U.N.R.I.A.A. at 838.

¹¹⁵ *Ibid.* at 857.

¹¹⁶ S.K. Mukhljee, *Bangladesh and International Law* (Calcutta: West Bengal Political Science Association, 1971) at 2.

¹¹⁷ See discussion at text accompanying footnote 60 above.

recognized the Latvian state in 1920. Latvia was admitted to the League of Nations in 1922. Following the First World War, Lithuania declared independence. Upon the endorsement of the *Treaty of Peace* in 1920, the Soviet Union surrendered all rights to Lithuania, as it had done for Estonia and Latvia, allowing Lithuania to be accepted into the League of Nations as an independent State in 1922.¹¹⁸ The Baltic States has thus all exercised control *as sovereigns*, an entirely different situation from the control exercised by Québec.

The Baltic States also went a long way in exercising *de facto* control. By the time of recognition by the world community in the late summer and early fall of 1991, the Soviet Government had just gone through a coup which was quickly followed by the State's formal dissolution. The President of Russia, who dictated much of Soviet activity during and after the coup, had already recognized their independence.¹¹⁹

Despite a strong sense of ethnic identity between the Yugoslav republics, the secessionist groups did not have a history of independent Statehood.¹²⁰ Accordingly, it was international condemnation of Serbia's policy of ethnic cleansing which proved determinative of the claim to statehood of Serbia, Slovenia, and Bosnia-Hercgovina.¹²¹

In this case, Québec has not historically asserted control except as part of the Canadian federal system.¹²²

Even apart from the issue of control, it is noteworthy that, at Confederation, Québec was constituted by what was then Lower Canada.¹²³ The northern portion of what is currently the province of Québec — approximately two-thirds of its current area — consisted of Rupert's Land. Section 146 of the *Constitution Act, 1867* permitted the Queen, on Addresses from the Houses of Parliament of Canada, to admit Rupert's Land into Canada. Upon admission in 1868 and 1870, Rupert's Land became a federal territory, subject to the authority of Parliament.¹²⁴ By legislation in 1898 and 1912, Parliament, with the consent of the Québec Legislature, extended the northern boundaries of Québec to its current area.¹²⁵ That territory was never settled by the French, and Québec obtained jurisdiction by federal grant given *within* the context of the Canadian federal system.¹²⁶

¹¹⁸ Himmer, *supra* footnote 56 at 257.

¹¹⁹ See text accompanying footnotes 65-66, *supra*.

¹²⁰ See Teric, *supra* footnote 34 at 404-406.

¹²¹ See text accompanying footnote 64-67, *supra*.

¹²² See text accompanying footnotes 3-4, *supra*.

¹²³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3, s. 6.

¹²⁴ P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1993) at 2.5(c).

¹²⁵ S.C. 1898, c. 3; S.C. 1912, c. 45.

¹²⁶ Williams, *supra* footnote 12 at 7, argues that Québec does not have a strong claim for that territory.

From a historical territorial prospective, they [i.e., Innu and First Nations' people] were and are living in the territory that was transferred to Québec by Acts of the federal Parliament in 1898 and 1912. "Self-Determination" means choosing how to be

Since that time, Québec has exercised legislative jurisdiction over that territory. Canada has, of course, continued to exercise State sovereignty over the area as being within the territorial boundary of Canada. That territory is inhabited primarily by native people and, as noted above, natives may have an equally valid claim to self-determination to francophones in portions of Québec where they presently predominate. Scholars have suggested that a method of settling border disputes in the context of self-determination is a series of plebiscites to determine the territorial wishes of the affected peoples.¹²⁷ This option is foreclosed by the draft *Sovereignty Bill*.

One may argue, however, that the proper principle here is *Uti Possidetis, Ita Possideatis*, i.e. "as you possess, so you may possess." The principle has been expressed as follows:¹²⁸

When the common sovereign power was withdrawn, it became indispensably necessary to agree on a general principle of demarcation, since there was a universal desire to avoid resort to force, and the principle adopted was a colonial *uti possidetis*; that is, the principle involving the preservation of the demarcation under the colonial regimes corresponding to each of the colonial entities that was constructed as a State.

Uti Possidetis is a principle of Roman Law which functioned to permit persons in possession of disputed goods to retain them unobstructed from a challenge to title. It was first applied to border disputes by agreement between the Spanish colonies in Southern and Central America and has since been adopted in Asia and Africa.¹²⁹ It has also been applied in Yugoslavia and the U.S.S.R. This principle has been relied upon in support of Québec maintaining its current borders by a 1992 report by a committee of five international law experts commissioned by the Québec National Assembly.¹³⁰

There are, however, limitations to the application of this principle to Québec's borders, and in our view the five experts misapplied it.

governed. The Innu and First Nations peoples living in what is now Québec could decide to remain in Canada, or alternatively, could seek separate statehood. Thus, the portions of present day Québec inhabited traditionally by these peoples and only transferred to Québec in 1898 and 1912, would not become part of Québec.

Patrick Monahan, *supra* footnote 8 at 16 takes a somewhat different approach. Because he concludes that Québec does not have the right to self determination, he argues that its borders will constitute the territory over which it exercises effective control. "Thus, in the event that Québec was able to exercise effective control over the entire territory of the former province, its claims over such lands would eventually come to be legally effective. Nothing in the history or evolution of Québec's boundaries would affect this result."

¹²⁷ Crawford, *supra* footnote 29 at 93; Shaw, *supra* footnote 3 at 264.

¹²⁸ Brownlie, *supra* footnote 17, at 134-135.

¹²⁹ See *ibid.* at 135. See also: A.O. Cukwarah, *The Settlement of Boundary Disputes in International Law* (Manchester: University Press, 1967) at 112-116; and M.N. Shaw, *Title to Territory in Africa* (Oxford: Clarendon Press, 1986) at 184-187.

¹³⁰ Thomas Frank *et al.* "l'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté" in *Commission d'étude des questions affrontées à l'accession du Québec à la souveraineté: Projet de Rapport* (Annexe) (Québec: The Commission, 1992).

First, Uti Possidetis is not a mandatory rule. Its binding force comes from agreement between disputants.¹³¹

Second, Uti Possidetis arose in the context of decolonization to avoid a vacuum in sovereignty when the colonizing State has withdrawn. This vacuum was also a threat when the Soviet Union and Yugoslavia dissolved. Here, there would be no vacuum, because Canada would still be in a position to continue to exercise sovereignty over the territory. Accordingly, the rationale for this principle is not applicable to Québec.¹³²

Third, even if applied, Uti Possidetis is not helpful where, as here, the size of the territory has been altered from time to time. The issue is whether Confederation is the relevant time to mark its boundaries, or whether the present boundaries are the relevant ones. This temporal identification has been called the "critical date." As Brownlie notes:¹³³

There are several types of critical date, and it is difficult and probably misleading to formulate general definitions: the facts of the case are dominant (including, for this purpose, the terms of the special agreement empowering the tribunal to hear the case) and there is no necessity for a tribunal to choose any date whatsoever. In many cases there will be several dates of varying significance.

Conclusion

As a general rule, there is no positive international law right to secede as part of the right to self-determination. Sovereign states have thus far preferred territorial integrity to any asserted right of secession. The recognition of any right to secede at all is recent, and then it is only in situations where all of the following are present: overwhelming popular support, unequivocal assertion of control and sovereignty by the seceding State, and discrimination or human rights violations by the existing State. It is only where a government fails to ensure the human rights of a people within its territory in a discriminatory manner that the international community would be justified at international law in taking the extraordinary step of recognizing the secessionist unit as a State.

To summarize Québec's case, even apart from the issues related to the application of the principle of self-determination which have already been discussed, Québec's claim of sovereignty over the entire province is problematic. Québec has never exercised sovereign control over any of its territory; it is not asserting nationhood and sovereign control now in an unequivocal way; Canada has never exercised its sovereignty in a way which infringes the international law principle of self-determination; and the appropriate borders are uncertain.

Canada's refusal to recognize Québec if the *Sovereignty Bill* is approved by a majority in a referendum would be proper, and recognition of Québec by other States would infringe Canadian sovereignty.

¹³¹ Brownlie, *supra* footnote 17 at 135.

¹³² Patrick Monahan comes to the same conclusion, *supra* footnote 8 at 15-16.

¹³³ Brownlie, *supra* footnote 17 at 130.