RECOGNITION OF STATES AND SELF-DETERMINATION IN THE INTERNATIONAL REALM: A SHIFT FROM THE ARCHAIC MONTEVIDEO RULE TO THE MODERN RELEVANCE OF AUTONOMY

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INTRODUCTION

This paper explores the intricacies relating to Recognition of States and the Self-Determination of States in International Law. The paper trails the traditional view of Recognition of States (the Montevideo Convention) and analyses the shift from the erstwhile traditional theory to the current modern criteria's of statehood. In analyzing these two stances, the paper delves into the history, cases, covenants and declarations pertaining to recognition of states in the international realm. Furthermore, this paper also deeply ponders on the inherent right of self-determination that is ascribed to a State. The concept of self-determination though not strongly cemented, is a highly debatable topic in International Law. The right of self-determination of a State clashes with the theory of recognition of states on many fronts, and this paper seeks to balance the same. In order to do so, this paper explores the meaning of self-determination and touches upon the various declarations, articles of UN Charter and cases regarding self-determination in order to substantiate thought and theories with examples. It is no doubt that the notion of self-determination is very controversial in international law, quite unlike its counterpart, that is, state recognition, and therefore the last part of this paper seeks to provide a balancing view to the existing theories. The paper ends with a conclusion that presents the view of the co-author on this subject-matter.

TRADITIONAL VIEW

In any legal system, certain entities, whether they be individuals or companies, will be regarded as possessing rights and duties enforceable at law. These rights and duties are conferred to the entities by virtue of them being regarded as 'Legal Persons'. Legal personality is crucial. In absence of legal personality the institutions and groups cannot operate, for they need to be able to maintain and enforce claims. It is the law that recognizes the legal personality of an entity. The confusion for the definiteness of legal personality arises when the law is in itself disputed or not codified. Legal Personality under Municipal Law and International Law are very distinct in nature.

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Personality in international law necessitates the consideration of the interrelationship between rights and duties afforded under the international system and capacity to enforce claims. As Lauterpacht observes 'the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law'[700]. The traditional codification for the necessary elements for constitution of statehood was done under "The Montevideo Convention on the Rights and Duties of States". Itwas a treaty signed on December 26, 1933 which became operative a year later. Article 1 of the convention provides, traditionally, the most authoritative and widely accepted description of the elements of statehood.[701] The claimant shall constitute four criteria's, namely, *"a defined territory, possession of permanent population, an effective government and full capacity to engage in international relations."*[702]

The Arbitration Commission of the European Conference on Yugoslavia[703] in Opinion No. 1 declared that 'the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority' and that 'such a state is characterized by sovereignty'. It is also noted that the form of internal political organization and constitutional provisions constituted 'mere facts', although it was necessary to take them into account in order to determine the governments sway over the population and the territory.[704] The need for a territory focuses upon the requirement for a particular territorial base to operate. However, there is no necessity under international law for defined and settled boundaries.

The existence of a permanent population is naturally required and there is no specification of a minimum number of inhabitants, as examples such as Nauru and Tuvalu demonstrate (Populations of some 12,000 and 10,000 respectively)[705]. Therefore, a nomadic population might not count for the purpose of an established territorial sovereignty. The criterion of permanent population is intended to be used with that of territory and connotes a stable community. A state may be recognized as a legal person even though it is involved in a dispute with its neighbors as to the precise demarcation of its frontiers, so long as there is a consistent band of territory which is undeniably controlled by the government of the alleged state.[706]

[700]LAUTERPACHT H, INTERNATIONAL LAW, 489. (1975)
[701]CRAWFORD J, CREATION OF STATES IN INTERNATIONAL LAW, 32 (Oxford University Press, 2002)
[702]*Ibid* at 33.
[703]M. CRAVEN, *The EC Arbitration Commission on Yugoslavia*, 65 BYIL, 333 (1994)
[704]MALCOM NATHAN SHAW, INTERNATIONAL LAW, 178 (5th Ed, 2003).
[705]WHITAKER'S ALMANACK, 1010, 1089 (2003).
[706]SHAW,*Supra* note 5, at 179.

Every political society needs a reasonably effective form of government or control. It should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs. The capacity to enter into relations with other states is an aspect of the existence of the entity in question as well as an indication of the importance attached to recognition by other countries. But it is essential for a sovereign state to be able to create such legal relations with other units as it sees fit. Where this is not present, the entity cannot be an independent state.[707]

SHIFT FROM TRADITIONAL VIEW TO MODERN VIEW

It is widely said that at one time, international lawyers believed that states were the only persons under international law.[708] Putting aside whether in truth writers ever generally excluded non-state actors from international law,it does appear that modem developments have increased the relative legal status of such actors.

Capacity, as Crawford writes, "is not a criterion, but rather a consequence, of statehood, and one which is not constant but depends on the status and situation of particular States.[709]The capacity to enter into relations with other states protrudes to the concept of recognition of independence by other states. However, it is a capacity not limited to sovereign nations, since both international organizations and non-independent states can enter into legal relations with other entities under the rules of international law. Satisfying this criterion is tough in the realm of international law. It is under this tenet of Montevideo Convention, that the new or rather, modern subjects of international law arise. Few of them are entities proximate to state, Belligerent Movements, International Organizations, Individuals and United Nations Administered States.

Political settlements from time to time have produced entities which posses a certain autonomy, territory, population and some legal capacities on the international plane. Politically such entities are not states, yet legally the distinction is not very significant. The classic example of political settlements is the jurisprudence of Permanent Court of International Justice in Danzig Railway Officials case.[710] The court held that Danzig had international personality proximate to that of as state, except in so far as treaty obligations created special relations in regard to the League of Poland. Under Articles 100-108 of Treaty of Versailles, League of Nations had supervisory functions and Poland had control of foreign relations of Danzig.

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[707]SHAW,*Supra* note 5, at 181.
[708]O'CONNELL D.P, INTERNATIONAL LAW, 80 (2nd Ed 1970).
[709]CRAWFORD, *Supra* note 2.
[710]SHAW, *Supra* note 5, at 259.

A Belligerent Community often represents a political movement aiming at secession. In practice, belligerents within a state may enter into legal relations and conclude agreements on the international front. The law of belligerent occupation (which from now on we will refer to simply as the law of occupation) governs the relationship between the occupying power, on the one hand, and the wholly or partially occupied State and its inhabitants, including refugees and stateless persons, on the other. The reason for them to be accepted as subjects of international law is that, most of them are the outcome of independent movements. Similarly, international organizations have played a crucial role in the sphere of international personality. They are regarded as entities which act with delegated powers from states. By virtue of such delegation, it may appear to enjoy a separate personality and viability under international law. By agreement, states may create joint agencies with delegated powers of a supervisory, rule making or even judicial character.

There is no general rule that individuals cannot be the subject of international law. On the contrary, individuals have rights *inuitu personae* which they can vindicate by international action, notably in the field of human rights and investment protection.[711] Individuals as a general rule lack the standing to assert violations of international treaties in the absence of a protest by the state of nationality, although states may agree to confer particular rights on individuals which may agree to confer particular rights on individuals which will be enforceable under international law, independently of Municipal Law. Under article 304(b) of the Treaty of Versailles, 1919, for example, nationals of the Allied and Associated Powers could bring cases against Germany before the Mixed Arbitral Tribunal in their own names for compensation.[712]

From the past few years, the United Nations has become more involved in important administrative functions. In relation to the treaties marked out by United Nations as under the regime of illegal occupation and qualified for rapid transition into independence, an interim transitional regime may be installed under the United Nations' supervision. The United Nation Transitional Administration in East Timor [UNTAET], which was the result of a resolution passed by the Security Council, dealt with the crisis concerning the illegal Indonesian occupation of East Timor. This body had a mandate to prepare East Timor for independence. It had full legislative and executive powers and assumed its role independently of any competing authority. After elections, East Timor became independent in 2002.

[711]CRAWFORD, *Supra* note 2.at 121.
[712]CRAWFORD, *Supra* note 2.at 258.

SELF-DETERMINATION AND LEGAL IMPLICATIONS OF SELF-DETERMINATION

As these paper trails the intricacies involved in State Recognition, it is indispensible to analyze the proponents of Self-determination of States and the legal implications therein. Theories of Self-determination are alluring in the current era as the tenant of sovereignty and individual autonomy of states are more powerfully cemented than possibly ever.*Self-determination* primarily denotes the *legal* right of people to decide their own destiny in the international order. Self-determination is a core principle of international law, arising from customary international law, but also recognized as a general principle of law, and enshrined in a number of international treaties.[713]

The practicality of self- determination of states grew during the World War I, World War II and the subsequent decolonization movements. But, however one of the earliest trace of self-determination can be found in U.S. President Woodrow Wilson's proclamation. A month after his famous "Fourteen Points" speech to the U.S. Congress in January 1918 (in which the term "self-determination" does not appear), President Wilson proclaimed[714]:

"*Self-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.*"[715]

It is also important to note that self-determination did not form a proactive part of the Covenant of the League of Nations but it, however remained a debatable political concept rather that a well-accepted legal phenomenon.[716] But the prongs of self-determination were widely analyzed by two groups of international experts appointed by the League of Nations to examine the case of the Aland Islands, a culturally and linguistically Swedish territory that wished to reunite with its cultural motherland, Sweden, rather than remain part of the new Finnish state, which became independent of the Russian Empire in 1917.[717]The first bodies of experts were clear that self-determination had not obtained the status of international law.[718] The second group of experts reached a similar conclusion as to the scope of self-determination, and termed it as "*a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of*

[713]https://www.law.cornell.edu/wex/self_determination_international_law. Self Determination is enshrined in the Un Charter and the International Covenant on Civil and Political Rights
[714]Hurst Hannum, *Legal Aspects of Self-Determination*, ENCYCLOPEDIA PRINCETONIENSIS (31 Oct 2015) http://pesd.princeton.edu/?q=node/254
[715] 56 Congressional Record at 8671 (Feb. 11, 1918)
[716]DANIEL THÜRER, THOMAS BURRI, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW [MPEPIL] (31 Oct 2015)http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873#
[717]THÜRER *Supra* note 15.
[718]THÜRER *Supra* note 15.

opinion."[719] Thus it can be well ascertained that the erstwhile League of Nations did not attribute much importance and stance to the doctrine of self-determination and its interplay in the international system.

The principle of self-determination was however proclaimed in the Atlantic Charter (1941)[720], in which President Roosevelt of the United States and Prime Minister Churchill of the United Kingdom declared, *inter alia*, that they desired to see 'no territorial changes that do not accord with the freely expressed wishes of the peoples concerned'[721], that they respected 'the right of all peoples to choose the form of government under which they will live'[722] and that they wished to see 'sovereign rights and self-government restored to those who have been forcibly deprived of them'[723]. The provisions of the Atlantic Charter were restated in the Declaration by United Nations signed on 1 January 1942, in the Moscow Declaration of 1943 and in other important instruments of the time.[724] There also exist many Articles of the UN Charter which mention and enumerate about the principle of self-determination.

The Articles of the UN Charter that incorporate and hint at self- determination as a recognized principle are,

Article 1(2) UN Charter[725] – Article 1(2) of the UN Charter declares that one of the purposes of the United Nations is 'to develop friendly relations among nations based on respect for the principle of equal rights and *self-determination* of peoples, and to take other appropriate measures to strengthen universal peace'[726]

Chapter IX, Article 55 of the UN Charter[727]- Article 55 of the UN Charter starts off with the terms, 'with a view to the creation of 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, the United Nations shall promote.'[728] In addition, in this, the self-determination of peoples is cited as a principle on which "peaceful and friendly relations among nations" are conceived to be based.[729]

[719] *The Aaland Islands Question*, REPORT PRESENTED TO THE COUNCIL OF THE LEAGUE BY THE COMMISSION OF REPORTERS', LEAGUE OF NATIONS Doc. B.7.21/68/106 (1921) at 27.
[720] Declaration of Principles of 14 August 1941, http://www.nato.int/cps/en/natohq/official_texts_16912.htm?
[721] Atlantic Charter, Principle 2, Aug 14, 1941, E.A.S 236.
[722] Atlantic Charter, Principle 3, Aug 14, 1941, E.A.S 236.
[723] *Ibid*.
[724] THÜRER *Supra* note 15.
[725] United Nations Charter, Article 1(2), 24 October 1945, 1 U.N.T.S. XVI.
[726] *Ibid*.
[727] United Nations Charter, Article 55.24 October 1945, 1 U.N.T.S. XVI.
[728] *Ibid*.
[729] HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS59 (New York: Oxford University Press, 1988).

Chapter XI, Article 73 of the UN Charter[730]- This Article reads as follows, 'members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of *self-government* recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end.'[731] And Furthermore, Clause b of this Article implicitly refers to the principle of self-determination in the part concerning colonies and other dependent territories[732] by saying that, 'to develop *self-government*, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement...'[733]

Art. 76 (b) UN Charter[734] -Art.76 (b) UN Charter provides that one of the basic objectives of the trusteeship system is to promote the 'progressive development' of the inhabitants of the trust territories towards '*self-government or independence*', taking into account, inter alia, 'the freely expressed wishes of the peoples concerned'.[735]

However, it is to be noted that, it is disputed whether the reference to the principle of self-determination in these very general terms as proclaimed by the UN Charter is sufficient to entail its recognition as a binding right, but the majority view is against this and not every statement of a political aim in the Charter can be regarded as automatically creative of legal obligations.[736]

In addition to the aforementioned Articles enshrined in the UN Charter, there exists a plethora of Covenants and General Assembly Declarations that imbibe the idea of Self-Determination.

UN General Assembly (GA) Resolution 1514: The Declaration on the Granting of Independence to Colonial Countries and Peoples [737]adopted by the GA in 1960 states that; "all peoples have the right to *self-determination*;

[730] United Nations Charter, Article 73,24 October 1945, 1 U.N.T.S. XVI.
[731] *Ibid*.
[732] THÜRER *Supra* note 15.
[733] United Nations Charter, Article 73(b),24 October 1945, 1 U.N.T.S. XVI.
[734] United Nations Charter, Article 73(b), 24 October 1945, 1 U.N.T.S. XVI.
[735] THÜRER *Supra* note 15.
[736] SHAW, *Supra* note 5, at 226.
[737] United Nations General Assembly Resolution, 14 December 1960, 1514 (XV).

by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[738]

Article 1(3) of the International Covenant on Civil and Political Rights (1966) ('ICCPR')- Article 1(3) of this multilateral treaty adopted by the United Nations General Assembly on 16 December 1966,[739] states that ' the States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of *self-determination*, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'[740]

Article 1(1) of the International Covenant on Economic, Social and Cultural Rights (1966) ('ICESCR')- Article 1(1) of the ICESCR (adopted by the General Assembly, by means of the General Assembly resolution 2200A (XXI) of 16 December 1966)[741]reads that 'all people have the right of *self-determination*. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[742]

Therefore, by being included in Art 1 of ICCPR and ICESCR, the concept of self-determination as a whole is given the characteristic of a fundamental human right or, more accurately, that of a source or essential prerequisite for the existence of individual human rights, since these rights could not genuinely be exercised without the realization of the *collective right of self-determination.*[743]

Declaration on the Granting of Independence to Colonial Countries and Peoples[744]- The evolution of the right to self-determination culminated in the adoption by the UN General Assembly in 1960, of the Declaration on the Granting of Independence to Colonial Countries and Peoples. It proclaims solemnly 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations' and declares that 'all peoples have the right to *self-determination.* By virtue of that right they freely determine their political status and freely pursue theireconomic, social and cultural development.[745]

[738]SHAW, *Supra* note 5, at 227; BURAK.C&DOGAN. E, *The Right Of Self-Determination In International Law Towards The 40th Anniversary Of The Adoption Of ICCPR And ICESCR* (31 Oct 2015) http://sam.gov.tr/wp-content/uploads/2012/02/BurakCopAndDoganEymirlioglu.pdf
[739]The International Covenant on Civil and Political Rights, Article 1(3) 16 December 1966.GA res. 2200A (XXI).
[740]*Ibid*.
[741]International Covenant on Economic, Social and Cultural Rights,16 December 1966,General Assembly resolution 2200A (XXI).
[742]*Ibid*.
[743]THÜRER *Supra* note 15.
[744]Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, (GAR 1514) G.A. Res.1514, 15 UN GAOR, Supp.16, UN Doc. A/4684(1960).
[745]*Ibid*.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter[746]- This Declaration contributed to the formation of a set of general rules concerning the right to *self-determination*.[747]

There exist a slew of legal covenants and documents in addition to the ones mentioned above that embark upon self-determination of States. Some of these are, the Final Act of the Conference on Security and Co-operation in Europe (1975), the Charter of Paris, (1990) and the Vienna Declaration and Program of Action (1993).[748]

In order to understand the play of self-determination in the practical realm and the footing and recognition it beckons, it is vital to analyze some of the prominent cases on self-determination.

(i) THE CASE OF WESTERN SAHARA

In regard to the self-determination issue, the case of Western Sahara represents a unique case, because it remains unsettled as of today[749] and also as to how divided the world remains on whether to support self-determination in a territory[750].This case also affirmed at self-determination must be exercised within the confines of former (colonial) borders as of the time of independence.[751] The simplified facts of this case run thus- Morocco and Mauritania laid claim to the territory of Western Sahara whilst Spain and Algeria support its independence and the year1973 saw the formation of Polisario, the Algerian-backed Sahrawi rebel movement with the stated aim of establishing a sovereign state in Western Sahara.[752] In the light of this dispute, the Moroccan government applied to the International Court of Justice (ICJ) requesting that it provide an Advisory Opinion.[753] The ICJ found significant Moroccan and Mauritanian historical ties to the disputed region but noted that to divide the territory along these lines would not be in the interests of "*self-determination through the free and genuine expression of the will of the peoples of the Territory*", and that historic claims were '*irrelevant*' in the cause of self-

[746]Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Oct. 24, 1970 ,G.A.Res. 2625 (XXV).
[747]DAJENAKUMBARO,*The Kosovo Crisis In An International Law Perspective: Self-Determination, Territorial Integrity And The NATO Intervention,* North Atlantic Treaty Organisation Office Of Information And Press (31 Oct 2015) http://www.nato.int/acad/fellow/99-01/kumbaro.pdf
[748]*Ibid.*
[749]PROF. ENVERHASANI,National Defence Academy Institute for Peace Support and Conflict Management Vienna(31 Oct 2015)http://www.bundesheer.at/pdf_pool/publikationen/hasa03.pdf
[750] MICHLAPOMERANCE, *Self-Determination in Law and Practice,* 18.(MartinusNijhoff Publishers 1982) ;SAMUEL J. SPECTOR, *Western Sahara and the Self-Determination Debate,* 33-43 *(Middle East Quarterly2009).*
[751]HASANI, *Supra* 50.
[752]ALEX CHITTY, *Western Sahara territorial dispute, self-determination and the UN,* (31 Oct 2015)http://www.exploringgeopolitics.org/publication_chitty_alex_western_sahara_territorial_dispute_self_determination_un_polisario_sahrawi_plebiscite_minurso_morocco_rio_de_oro_terrritory_algeria_mauritania/
[753] *Ibid.*

determination .[754]. Currently, the proposed West Saharan independent state of the Sahrawi Arab Democratic Republic (SADR) is recognized by only 45-50 nations[755] and no state presently recognizes Morocco's present sovereignty over the entire territory, and Spain is still the *de jure* administrative power, though Morocco is the only *de facto* power in approximately 80% of the region.[756]

(ii) THE SECESSION OF BANGLADESH

The case of Bangladesh is a unique one. This uniqueness stems from different factors[757], namely the political situation, the mass mobilizations and various violations of rights in East Pakistan.[758] The case of Bangladesh has been and remains the only case of successful secession outside the colonial context, without having repercussions for other similar situations.[759]

(iii) THE CASE OF ERITREA

In this case, Ethiopia, had itself been subjected to colonial rule by Italy[760] (Eritrea was an Italian colony) but Ethiopia claimed that it had absolute legitimacy of Eritrea being an integral part of Ethiopia. Meanwhile, the Eritreans held that they were entitled to self-determination and that Ethiopia had ignored and actually denied that right. However, the Eritreans succeeded in their claims for independence for these reasons, firstly, their liberation movements took over control of the Eritrean territory; secondly, their right to self-determination was not implemented because of the fault decision of the international Community to create a Federation. Thus, therefore, the claim of territorial integrity had to yielded in favor of the right to self-determination[761]

(iv) THE CASE OF EAST TIMOR

The ICJ briefly addresses self-determination in the East Timor case, on Portugal's suggestion that by entering into a treaty with Indonesia, Australia had failed to observe the right to self-determination of the East Timorese. While the Court would dismissed the case, it did note that '*the principle of self-determination exists in positive international law and may even be viewed as a having an ergaomnes character*'[762]

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[754]CHITTY, *Supra* 53.
[755]CHITTY, *Supra* 53.
[756]CHITTY, *Supra* 53.
[757]HASANI, *Supra* 50.
[758]SARAH GLYNN,*The Spirit of '71: how the BangladeshiWar of Independence has haunted TowerHamlets*. Institute of Geography Online Paper Series: GEO-020(31 Oct 2015) http://www.geos.ed.ac.uk/home/homes/rgroves/glynnpub1.pdf
[759]HASANI, *Supra* 50.
[760]KUMBARO, *Supra* 48
[761]KUMBARO, *Supra* 48
[762] East Timor (Portugal v. Australia), 1995 ICJ REP. 89, para. 29; JAN KLABBERS, *The Right to be Taken Seriously: Self-Determination in International Law*,(31 Oct 2015) http://www.helsinki.fi/eci/Publications/Klabbers/JKYOGJA.pdf

(v) THE CASE OF YUGOSLAVIA

In the case of the former federal state of Yugoslavia, the different federal provinces, such as Croatia and Slovenia, each proclaimed sovereignty.[763] In order to reconcile this issue, the Badinter Commission was endowed with the task of assisting the European Union in formulating its policies towards the dissolution of Yugoslavia and was confronted with the question of whether the Serbian population of Bosnia-Herzegovina and Croatia would have a right to self-determination. The Arbitration Commission of the European Community Peace Conference on Yugoslavia 1991–93 which dealt with matters arising after the dissolution of the federal state of Yugoslavia provided their opinion on the nature of self-determination.[764] This Arbitration Commission applied the principle of *utipossidetis* in its opinion no.3, and held that "the boundaries between Croatia and Serbia, between Bosnia and Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at." and "except where otherwise agreed, the former boundaries become frontiers protected by international law.[765] But however, due to the further frictions that emerged Yugoslavia collapsed when separate, exclusivist Serbian and Croatian nationalism triumphed politically, thus rendering the joint state nonviable. This same triumph of nationalism, ratified internationally by the diplomatic recognition of the self-determination of the republics in the former Yugoslavia, also rendered the joint state of Bosnia and Herzegovina nonviable.[766]

(vi) THE CASE OF KOSOVO:

Kosovo was an autonomous province until 1989 and its population consisted of a majority of ethnic Albanians with a Serb minority. After the dissolution of Yugoslavia the province became part of Montenegro. But however, Albanians in Kosovo agitated for but this was suppressed with military action by the Serbs. The various negotiations between Serbia and Kosovo were in vain and the parliament of Kosovo declared independence from Serbia in February 2008[767] Thus, from the Declaration of Independence of Kosovo in July 1990, and the popular referendum in 1991 to confirm the Declaration, reference to self-determination has been continuously made to uphold the Kosovo Albanians claim for independence from Serbia[768]

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[763]*Exploring the boundaries of international law*, (31 Oct 2015)http://www.open.edu/openlearn/people-politics-law/exploring-the-boundaries-international-law/content-section-2.4
[764]*Ibid*.
[765] PETER RADAN,*Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*,50–76 Melbourne University Law Review **24** (2000).
[766]ROBERT HAYDEN, *Serbian and Croatian Nationalism and the Wars In Yugoslavia*, Nationalism in Eastern Europe (1995) http://www.culturalsurvival.org/ourpublications/csq/article/serbian-and-croatian-nationalism-and-wars-in-yugoslavia
[767]*Supra* 64
[768]KUMBARO, *Supra* 48

Kosovo's declaration had seemingly redoubled claims by Abkhazia and South Ossetia for independence from Georgia. Soon after Kosovo's declaration, Russia ended its adherence to a 12-year-old economic embargo of Abkhazia.[769]

Thus concluding, whether self-determination gives a remedy of secession outside the colonial context is, in the words of Professor Malcolm Shaw, "*the subject of much debate*." And any attempt to claim secession as a remedy must at least show that: Firstly, the secessionists are a "people" (in a sense recognized by the international community). Secondly, the state from which they are seceding seriously violates their human rights; and, lastly, there are no other effective remedies under either domestic law or international law.[770]

SOVEREIGNTY

After chalking the theories and the cases under self-determination, it is important to analyze the link between self-determination and sovereignty.

The concept of sovereignty originated from the Peace of Westphalia that brought the Thirty Years' War to an end in 1648. Before the Thirty Years' War, which was partly a religious war, the European world of Christendom was largely a diarchic one of pope and emperor. But as a result of its defeat, the Holy Roman Empire was dissolved into hundreds of relatively independent authorities with more or less equal sovereignty over their populations and territories, which theoretically marked the birth of the modern nation-state system.[771] The concept of sovereignty is also enshrined in Article 1 of The Montevideo Convention on Rights and Duties of States of 1933.[772] But, under the current system of International Law, sovereignty is defined as follows,

'Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law'[773]Thus, sovereignty is the 'ultimate authority, held by a person or institution, against which there is no appeal'[774]Sovereignty of a state

[769]CHRISTOPHER J. BORGEN, *Is Kosovo a Precedent? Secession, Self-Determination and Conflict Resolution*, Wilson Center Home, (31 Oct 2015) https://www.wilsoncenter.org/publication/350-kosovo-precedent-secession-self-determination-and-conflict-resolution

[770]*Ibid.*

[771]MIYOSHI MASAHIRO, Sovereignty and International Law, University of Durham (31 Oct 2015) https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf

[772]MASAHIRO, *Supra* 72

[773]H STEINBERGER, *Sovereignty, Max Planck Institute for Comparative Public Law and International Law, Encyclopedia for Public International Law*, 414(North Holland, 1987)

[774]*Sovereignty*, (31 Oct 2015) http://nationalunitygovernment.org/pdf/Sovereignty-Guidelines-Alessandro-Pelizzon.pdf

expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person.[775]

This paper asserts that as the end result of self-determination is the creation of states and as states are *ipso facto*sovereign in the International realm, the need for other states to recognize the birth of a new state in order to grant it legitimacy is futile. A state, by virtue of being born becomes legitimate and valid due to its sovereignty.

STATE RECOGNITION OR SELF-DETERMINATION

Many areas of international law, including state succession, state responsibility, the law of treaties, the law relating to title to territory, recognition, and the law of international organizations, are relevant to the legal analysis of claims by non-state groups. However, claims bynon-state groups are characteristically expressed at the international level in five principal domains of discourse. They are claims to self-determination, minority rights claims, human right claims, claim to sovereignty legitimized by historical arguments or other special circumstances, and claims to special rights by virtue of prior occupation.[776]

The right to self-determination is one of the most important, yet contentious, principles of international law. It has served as a powerful slogan and a vital justification for the independence of many people, especially the colonial people. The political analog to self-determination is nationalism. Independence is the crux of sovereignty and under international law, states often desire to remain sovereign. Hence, whether international law works on self-recognition, which is politically colored, or self-determination, which thrives for nationalism, is a matter of discussion at length. The right to self-determination is included in the UN Charter. This incorporation is not just a mere codification but also a sign of a development of a new principle in international law, namely the principle of people's equal rights and self-determination of peoples (as opposed to States), as it is expressed in article 1(2) and 55 of the charter.[777]The rhetoric of self-determination is universal, and the range of possible claimants (peoples) supported by the rhetoric is very wide. The reality of international practice has been that self-determination has been available only to a limited range of units, each of which is, in principle, eligible for separate statehood if that is the choice of the unit.[778]

[775]R.Y. JENNINGS AND A.D.WATTS,*Oppenheim's International Law*,Chapter 5.(9th ed. 1992)
[776]KINGSBURY BENEDICT, *Claims by Non-State Groups in International Law*, Volume 25, Issue 3 Symposium 1992.
[777]ABDULLAH MAYA,*The Right to Self Determination in International Law*, Master Thesis, Public International Law, May 2006, p. 12.
[778]*Ibid*.

Nothing in the world is constant and change is an inevitable part of every aspect. International law and society is also not immune to changes. New states are created and old units fall away. New governments come into being within states in a manner contrary to declared constitutions whether or not accompanied by force. There are basically two theories of recognition. The constitutive theory maintains that it is the act of recognition by other states that creates a new state and endows it with legal personality and not the process by which it actually obtained independence. The second theory, the declaratory theory, adopts the opposite approach and is little more in accord with practical realities. It maintains that recognition is merely an acceptance by states of an already existing situation. A new state will acquire capacity in international law not by virtue of the consent of others but by virtual of a particular factual situation. This aspect of recognition by other states is a process adopted by 'civilized nations', mostly the colonial regime, in the early nineteenth and twentieth century. Also one may say that this kind of development protrudes fromOppenheims' definition on international law. He defined law of nations as 'the name of body of customary and conventional rules which are considered legally binding by civilized states in their relation with each other' this definition depicts an Euro centric view on international law. The present twenty first century to an extent largely adopts the same practice. In many situations, expressed requirements for recognition may be seen as impacting upon the question of statehood. There is also an integral relationship between recognition and the criteria of statehood in the sense that the more overwhelming the scale of international recognition is in any given situation, the less may be demanded in terms of the objective demonstration of adherence to the criteria. Conversely, the more sparse international recognition is, the more attention will be focused upon proof of actual adherence to the criteria of statehood.[779]

Modern International Law is based upon the principle of sovereign equality (articulated in articles 2(1) and 78 of the charter) and it forms one of the basic tenets that is linked directly to self-determination. Principle of sovereign equality, territorial integrity and non intervention entails an obligation in international law to respect the sovereignty of an independent State by refraining from the use of force or from interfering with the internal affairs of that State in other ways.[780] Also self-determination thrives on the idea that people have a right to govern themselves. Modern International Law is not only restricted to the states but has its effect on the individuals as well. International Law is no more considered as having a Euro centric view. The aspect of self-determination is the modern standpoint on the international law. It is so basic the elements of self-determination form a crucial part ones lives. State recognition, in a way, is a practice followed by those nations who are insecure about their powers, be it political or defense. International community is not new to the failures of this principle. In the case

[779]SHAW,*Supra* 11, at 208.
[780]THÜRER *Supra* note 15, at 11.

of Rhodesia, UN resolutions denied the legal validity of the unilateral declaration of independence on November 11 1965 and called upon the member states not to recognize it. No state did recognize Rhodesia and a civil war ultimately resulted in its transformation into the recognized state of Zimbabwe.[781] The evidence of complete non recognition, the strenuous denunciations of its purported independence by the international community ad the developing civil war militate strongly against this. It could be argued on the other hand that, in the absence of recognition, no entity could become a state, but this way to achieve recognition is not acceptable.

CONCLUSION

Whether or not the issues and entities discussed in the paper above constitute international persons or indeed states or merely part of some other international person is a matter for careful consideration in the light of the circumstances of each case. Acceptance of some international personality need not be objective so as to bind non consenting states nor unlimited as to time and consent factors. It should be kept in mind that the international community itself has needs and interests to bear upon the question of statehood.

The authors believe that the modern criteria of statehood, that is, Sovereignty, Function as a State, Degree of civilization and permanence ad willingness to observer International Law should be the defining elements of statehood. Time is an element of statehood, as is space. Relying on the concept of stable community, it might be superfluous to stipulate a degree of permanence. The entity should also between internal legality (Municipal Law) and external Legality (International Law). Furthermore, the term sovereignty may be used as a synonym for independence which is an important element of statehood. Hence the authors contemplate that these criteria's not only cater to the traditional view of definition of state but try to balance the old and the modern criteria for determination of state as a subject of international law and having a legal personality.

[781] SHAW, *Supra* 11, at 206.