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Unilateral Non-Colonial Secessions: An Affirmation of the Right to Self-Determination and a Legal Exception to the Use of Force in International Law

Ilya Berlin, *The University of Western Ontario*

Supervisor: Dr.Valerie Oosterveld, *The University of Western Ontario*

A thesis submitted in partial fulfillment of the requirements for the Master of Studies in Law degree in Studies in Law

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Abstract

Secession has contributed to nearly 50 intra-state armed conflicts around the world, and remains a complex issue in public international law. Over the past 72 years, several cases stand out as providing evidence of state practice with regards to invoking a successful right to unilateral secession: Bangladesh, Croatia, South Sudan, East Timor, Eritrea and Kosovo, to name a few. However, apart from invoking a right to secession, these cases also share a common factor that legitimized their independence: their Unilateral Non-Colonial (UNC) secessions became legal as a result of two factors: (i) an invocation of a right to self-determination which was systematically denied and, (ii) the denial of self-determination was followed by egregious abuses of human rights deemed as *in extremis* (ethnic cleansing, genocide and mass killings). *A priori*, should a putative state have the right to unilaterally secede based on human rights considerations alone? And if it secedes, should the use of force by the putative state or a third-party state in its defense be considered a violation of the prohibition on the use of force, if it is done in response to *in extremis* cases of human rights abuses?

This thesis will defend the existence of three core suppositions of the principle of self-determination: (i) that the principle of self-determination exists as a legal right under international law, (ii) that the principle of self-determination provides a qualified right of a UNC secession, and lastly, (iii) that, in cases where the principle of self-determination is systematically denied (combined with human rights abuses designated as *in extremis*), a legal right may be invoked to a military intervention by a third-state. In turn, the preceding suppositions will be examined in light of case studies that either justify or reject UNC secessions on the basis of the previously outlined criteria; demonstrating a legal exception to the use of force in humanitarian crises of a self-determination nature, as well as a framework for the consideration of the legitimacy of newly formed states by way of UNC secessions.

Keywords

International Law, Self-Determination, R2P, Humanitarian Intervention, Use of Force, Secession

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Table of Contents

Abstract	i
Acknowledgments	ii
Preface	vi
Chapter 1	1
Chapter 1: An Introduction	1
1.0. Background	1
1.1. Objectives and Scope	1
1.2. Sources of International Law	11
1.3. Organization of Thesis	15
Chapter 2	18
Chapter 2: Self-Determination, Statehood and Secession: From Classical to Contemporary International Law	18
2.1. History of Self-Determination	21
2.1.1. The History of Self-Determination before the 19 th century	23
2.1.2. The History of Self-Determination after the 19 th century	27
2.2. Statehood, Recognition and Self-Determination	33
2.2.1. History of Statehood in International law	33
2.2.2. The “Montevideo” criteria explained	44
2.2.3. Sovereignty, Statehood and Recognition	48
2.2.4. Three Theories of Recognition in International Law	50
2.3. A Right to UNC Secession	62
Chapter 3	72
Chapter 3: State Creation & The Law on the Use of Force in International Law	72
3.1. General Doctrine of the Use of Force in International Law	73
3.1.1. History of Jus ad bellum	74

3.1.2. Jus ad bellum and the ‘Exceptions’ to the prohibition on the use of force..	85
3.1.3. State Creation and the Use of Force	94
3.2. Third-State Military Intervention, Humanitarian Intervention & R2P	101
3.2.1. Iustum Bellum & Ius Naturale	103
3.2.2. Contemporary Arguments for Humanitarian Intervention in the 20 th & 21 st Centuries	108
Chapter 4.....	117
Chapter 4: Case Studies – Bangladesh, Kosovo & South Ossetia and Abkhazia	117
4.1. Bangladesh.....	119
4.1.1. Bangladesh – a brief chronological history	120
4.1.2. Legality of India’s intervention in Bangladesh.....	123
4.2. Kosovo.....	130
4.2.1. Kosovo – a brief chronological history	131
4.2.2. United Nations, Kosovo and UNSC Resolution 1244	135
4.2.3. Legality of NATO’s military intervention in Kosovo.....	142
4.2.4. Kosovo’s right to UNC Secession.....	147
4.3. South Ossetia & Abkhazia.....	151
4.3.1. Abkhazia – a brief chronological history	153
4.3.2. South Ossetia – A brief chronological history	160
4.3.3. Legality of Russia’s military intervention	164
4.4. The Analysis Framework of Third-State Military Interventions	171
Chapter 5.....	183
Chapter 5: Conclusion	183
5.1 Chapter Summaries	184
5.1. The Right to a Military Intervention - Final Comments	186
Chapter 6.....	192

Chapter 6: Bibliography.....	192
6.1. Legislation	192
6.2. Jurisprudence	196
6.3. Secondary Material: Monographs.....	197
6.4. Secondary Material: Articles	207
6.5. Secondary Materials: News Sources and Other.....	218
Curriculum Vitae.....	223

Preface

Secession has contributed to over 50 intra-state armed conflicts around the world, and remains a complex issue in public international law.¹ Yet, apart from its devastating effects on international affairs, why does it pose such a challenge to the international legal order? The answer is layered and complex; however, one can start the enquiry by analyzing a corollary concept of international law that secession purports to violate: the principle of territorial inviolability.² Consider this opinion by Brad Roth, which illustrates some of the primary legal challenges with the concept of secession:

The Yugoslav and other cases [of secession] have inspired among many advocates and scholars a disparagement of the traditional territorial integrity norm for its insensitivity to claims based on considerations of democracy, constitutionality, history, or ethno-national coherence... By taking [such] considerations "off the table" in determinations of the admissibility of aid to secession, traditional norms against cross-border projections of coercive power transcend competing perspectives on the legitimacy and justness of internal arrangements. To predicate the foundations of the peace and security order on ideologically contested propositions would signal that an external use of coercion or force to revise sovereign boundaries amounts to just another political conflict, rather than an extraordinary breach requiring an emergent and coordinated international response.³

Stated otherwise, the legal and political ramifications of secessions are a topic of an

¹ In 2012, the number of conflicts was at 50. The number has likely risen since then. See Joel Day, "The Remedial Right of Secession in International Law" (2012) 4:1 J Intl Pol'y Stud 19 at 19.

² The principle of territorial inviolability (otherwise referred to as the principle of territorial sovereignty) is a corollary principle of international law. See Samantha Besson, ed, "Sovereignty" in Max Planck Encyclopedia of Public International Law (Oxford University Press) at online: <www.opil.oupplaw.com> ("[t]he principle of sovereignty, ie of supreme authority within a territory, is a pivotal principle of modern international law. What counts as sovereignty depends on the nature and structure of the international legal order and vice-versa. Most of the other, if not all institutions and principles of international law rely, directly or indirectly, on State sovereignty; it suffices to mention, for instance, the relationship between the conditions and attributes of statehood or the principles of territorial or personal jurisdiction, immunity, and non-intervention, on the one hand, and considerations of sovereignty, on the other. The 1945 United Nations (UN) system itself is based, albeit not directly on the principle of sovereignty itself, on a necessary corollary of that principle: the principle of sovereign equality of its Member States as guaranteed in Art. 2 (1) UN Charter (States, Sovereign Equality). Provided States have supreme authority within their territory, the plenitude of internal jurisdiction, their immunity from other States' own jurisdiction and their freedom from other States' intervention on their territory (Art. 2 (4) and (7) UN Charter), but also their equal rank to other sovereign States are consequences of their sovereignty" at paras 1-2).

³ Brad R Roth, "The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention" (2015) 16:3 Ger L J 384 at 386.

extensive debate in international law. As further explained by Glen Anderson, a scholar who has written extensively on the subject, “[i]ndeed the word ‘secession,’ is conspicuously absent from virtually all international legal instruments. This situation is explicable by the fact that secession represents a challenge to perhaps the two most fundamental principles of international law: the sovereignty and territorial integrity of states.”⁴ In short, the legal parameters of secession outside of the colonial context⁵ have not yet crystallized under international law.⁶

Outside of the legal parameters of secession, putative or emerging states that have thus far not succeeded in attaining statehood (such as South Ossetia, Abkhazia, Turkish Republic of Northern Cyprus (TRNC), etc.)⁷ have further exacerbated how the concept is

⁴ Glen Anderson, “Secession in International Law and Relations: What Are We Talking About?” (2013) 35:3 Loy LA Intl & Comp L Rev 343 at 343 [Anderson, “Secession in International Law”].

⁵ See Anderson, “Secession in International Law”, *supra* note 4 (“[o]utside of the colonial context’ refers to ‘...a territory [that] is ‘geographically separate and is distinct ethnically and/or culturally from the country administering it’ the territory concerned is, prima facie, of a colonial nature Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctiveness of a territory exists, other elements may then be brought into consideration. These additional elements may be, inter alia, of an administrative, political juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the UN Charter” at 375). See also *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, UN Doc A/1541 (14 December 1960) [*Declaration of the Granting of Independence*].

⁶ For evidence of support that the legal parameters of secession outside of the colonial context have not yet been clearly established in international law, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (New York: Cambridge University Press, 1995) at 72 [Cassese, “Self-Determination of Peoples”]. See also Ved P Nanda, “Self-Determination Under International Law: Validity of Claims to Secede” (1981) 13 Case W Res J Int’l L 257 at 258 [Nanda, “Self-Determination in IL”].

⁷ South Ossetia and Abkhazia may eventually become successful secessions but have not as of the time of writing achieved statehood. Their bids for statehood have exacerbated the need to define the legal status of secession in international law. See Glen Anderson, “Unilateral Non-Colonial Secession and the Criteria for Statehood in International Law” (2015) 41:1 Brook J Intl L 1 at 4, nn 6–7 [Anderson, “Unilateral Non-Colonial Secession”]. Chapter 4 will provide evidence of their statehood bids as being illegal under international law. The Turkish Republic of Northern Cyprus (TRNC) was deemed an “illegal secessionist entity” by a court ruling and referred to as a “purported state” in several General Assembly Resolutions. At time of writing, it has only been recognized by one state: Turkey. Additionally, with reunification talks underway between the TRNC and Cyprus (*infra* note 42), it can be inferred that the TRNC’s status as an entity, created through blatant violations of peremptory norms of international law, continues to impact its statehood formation process, and hence has obligated it to recount its illegal creation through a negotiated solution with the metropolitan state to which it belongs *de jure*. From this thesis’ standpoint, this provides evidence of the fact that illegal UNC secessions cannot ‘survive’ as states *ad infinitum*, and hence, will at some point (such as the case of TRNC), be forced to renegotiate their status under international law (*ibid* at 69, nn 254–57).

viewed in the contemporary world. In large part, a reliance on the strength of the territorial inviolability principle has done little to deter state actors from seeking to secede from their former metropolitan state.⁸ Given the lack of clarity in international law with respect to secession, this thesis intends to answer the following question: should the use of force by a third state acting in defense of a putative state or entity be considered a violation of international law if it is done in response to cases of human rights abuses deemed as *in extremis*?⁹

This thesis will argue that, through the principle of self-determination, unilateral non-colonial secessions (UNCs)¹⁰ have an established status under international law. It will do so by focusing on the principle of self-determination as the crucial factor in allowing for an entity to become a putative state in order to legally secede from an existing state under a particular set of circumstances. Additionally, it will provide a framework through which a third-state or collective of third-states *could* violate the prohibition on the use of force in cases of UNC secessions that involve human rights abuses deemed as *in extremis*. Hence, this thesis' primary argument will be built on the existence of three core suppositions related to the principle of self-determination: (i) that the principle of self-determination exists as a legal right under international law, (ii) that the principle of self-determination provides a qualified right of a UNC secession, and lastly, (iii) that, in cases where the principle of self-determination is systematically denied, combined with human rights abuses designated as *in extremis*, a legal right may be invoked to a military intervention by a third state. In turn, the preceding suppositions will be examined in light of case studies that either justify or reject UNC secessions on the basis of the previously outlined criteria. Lastly, it is important to note

⁸ Catalonia's bid to secede from Spain is a prime example of an ongoing dispute over the independence of the autonomous province. For more on this situation, see "Catalan independence movement seeks boost with mass protest", *The Guardian* (10 September 2016), online: <www.theguardian.com>.

⁹ '*In Extremis*' as defined by Glen Anderson refers to "...where a sub-state group, or people, has been subject to deliberate and sustained human rights abuses (ethnic cleansing, mass killings and genocide) by the existing state." See Glen Anderson, "Unilateral Non-Colonial Secession and The Use of Force: Effect on Claims to Statehood in International Law" (2013) 28 *Conn J Int'l L* 197 [Anderson, "The Use of Force"] at 197.

¹⁰ For the purposes of this thesis, a unilateral non-colonial secession can be defined as a unilateral withdrawal of a non-colonial territory by an entity from an existing state. Upon withdrawal, the entity declares itself a state. For more on this, see Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 8.

that this thesis will focus on the simultaneous examination of several, still-contested, areas of international law – the law on territorial integrity, legal and illegal use of force by states, and the right of peoples to self-determination – all of which will be considered collectively in order to come to the aforementioned conclusion.

Chapter 1

Chapter 1: An Introduction

1.0. Background

Chapter 1 will be separated into three parts. First, a brief sub-section on the scope and the objectives of this thesis will define the parameters of the subject being studied, as well as the objectives that this study will aim to achieve. Subsequently, a contemporary definition of the sources of international law will be presented in order to establish the interpretations of international law as they pertain to this thesis. Lastly, a final subsection will present a thesis roadmap in order to allow the reader to understand the methodology used in support its primary elements.

1.1. Objectives and Scope

The relationship between military interventions¹¹ and secessions invoked through the principle of self-determination has not been thoroughly defined under international law. On one hand, self-determination as a principle of international law should be respected given its status a peremptory norm¹² of international law, on the other hand, a

¹¹ It is important to specify that the terms *military intervention* and *humanitarian intervention* are often conflated. Outside of the context of self-determination, military operations and interventions by third-states have largely been termed 'humanitarian interventions.' For the purposes of this thesis, the term 'military intervention' will be used as a primary term to define all military interventions (regardless of whether the intervention has been claimed as being 'humanitarian' in nature, or not.) A thorough study of the doctrine of humanitarian intervention will be presented in Chapter 3 which will demonstrate the legally accepted definition of 'humanitarian intervention'. Another reason for using the term 'military intervention' is that it provides a neutral and objective context with which the act of the intervention can be analyzed without prejudice.

¹² Article 53 of the Vienna Convention on the Law of Treaties (VCLT) states that "...[A] peremptory [jus cogens] norm of general international law is accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, CAN TS 1980 No 37 art 53 (entered into force 27 January 1980) [VCLT]. See also Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 ("[t]here are two overlapping schools of thought as to the content or scope of peremptory norms. According to the "substantive" school, peremptory norms are substantive rules

self-determination claim that purports to advocate for a separation of territory clashes with the principle of territorial inviolability, which is equally as corollary to the international legal order of sovereign states.¹³ Thus, the dilemma of whether a hierarchy of principles can exist in the case of an external self-determination claim (such as a UNC secession) requires meticulous examination.

The significance of studying the legality of military interventions in the context of *in extremis* abuses of human rights was identified as early as the Roman era by Cicero, and reaffirmed by classical international legal scholars such as Grotius and Kant.¹⁴ For example, Grotius introduced the concept of *societas humana* (the universal community of mankind) whereby a senseless attack by a “tyrant” on humanity would command a ‘humanitarian’ intervention.¹⁵ Nevertheless, apart from its normative and philosophical meaning, the doctrine of humanitarian intervention, which purports to support the obligatory concept of military intervention in *all cases* of systematic oppression of civilians, has had a complicated relationship with both classical and contemporary international law.¹⁶ As explained by Nardin, several issues can be clearly identified once one faces the reality of providing a legal defense for the doctrine of humanitarian intervention under international law:

[Humanitarian intervention] holds that armed intervention is morally [legally] justified when people are violently mistreated by their rulers, and

of international law from which no derogation is permitted. According to this view, structural rules, such as *pacta sunt servanda* and *pacta tertiis*, which operate in the context of treaty law, are excluded. The “systemic” school, by contrast, defines peremptory norms as including substantive norms from which no derogation is permitted and structural rules” at 62, n 230).

¹³ This thesis argues that the principle of self-determination should be respected on the basis of its status as a peremptory norm in international law. For evidence of scholarly support of this position see generally, David Raic, *Statehood and the Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 2002) at 289; Cassese, “Self-Determination of Peoples”, *supra* note 6 at 140; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) at 51 [Orakhelashvili, “Peremptory Norms”]; Glen Anderson, “A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?” (2016) 49:4 *Vanderbilt J of Transnational L* 1183 at 1185 [Anderson, “A Post-Millennial Inquiry”].

¹⁴ Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (New York: Routledge Publishing, 2016) at 11.

¹⁵ James Brown Scott, ed, *Hugo Grotius, De Jure Belli ac Pacis* (Oxford: Oxford University Press, 1925), Vol II at 584 [Scott ed, “Grotius, DJBP”].

¹⁶ For a more detailed description of this statement, see *infra* note 330.

is reflected in the widely-held opinion that states, acting unilaterally or collectively, are justified in enforcing respect for human rights. It is this enduring tradition, not current international law, that best explains the moral basis of humanitarian intervention. In twentieth-century international law, a just war is above all a war of self-defense. But sixteenth- and seventeenth-century European moralists justified war as a way to uphold law and protect rights, of which self-defense was only one. Rulers, these moralists argued, have a right and sometimes a duty to enforce certain laws beyond their realms.¹⁷

As can be deduced from Nardin's argument, the challenge with the European moralist claim for humanitarian intervention is that any argument could be applied to justify a humanitarian intervention if based on a temporal moral standard. As a result, the contemporary justification for humanitarian intervention has reached a standstill, supported by both justifiable and unjustifiable violations of international law that have preceded and succeeded it. More precisely, recent military interventions in Iraq and Libya for example, have demonstrated that "there is no denying that widespread and egregious violations of human rights and of international humanitarian law are no longer within the 'exclusive' domestic jurisdiction of States but constitute a matter of concern of the international community as a whole."¹⁸ All in all, the nature of military interventions as being conducted by self-interested parties without recourse or interest for the consequences of their interventions has led to a general wariness of accepting the legal justifications behind the concept.¹⁹

With regards to the act of secession, a number of issues challenge its status in international law as well. As mentioned earlier, one of its primary issues is that it posits "a challenge to perhaps the two most fundamental principles of international law: the sovereignty and territorial integrity of states."²⁰ With regards to the latter, as sovereignty

¹⁷ Terry Nardin, "The Moral Basis for Humanitarian Intervention" (2002) 16:2 Ethics & Intl Affairs J 55 at 55-6.

¹⁸ Vaughan Lowe & Antonios Tzanakopoulos, eds., "Humanitarian Intervention" in Max Planck Encyclopedia of Public International Law (Oxford University Press) at para 41, online: <www.opil.oupilaw.com>.

¹⁹ Luke Glanville, "The Responsibility to Protect Beyond Borders" (2012) 12:1 Human Rights L Rev 1 at 32.

²⁰ *Ibid.*

is considered a corollary concept of statehood,²¹ it is important to briefly define its relationship with self-determination and secession, as well as the challenges they pose to the creation of states in international law.

The relationship between statehood and self-determination is an important topic of inquiry. Crawford posits that “[external] self-determination, is at the most basic level, a principle concerned with the right to be a State.”²² Although the process of state creation can take many forms in international law,²³ secession is by the far the most complicated and underdefined form of state creation.²⁴ This pertains in large part to the debate over whether secession is a process and an outcome, or a process that leads to an outcome.²⁵ This thesis supports the argument that the latter is true, taking a different path of interpretation than Crawford with respect to the act of secession. This claim is supported by the fact that a process of a successful secession has an eventual outcome of a new state being created; however, the process by which that state is created is not uniform and can take on many forms that are “not always contingent on [territorial] withdrawal.”²⁶ Kohen expands on this claim by observing that “[s]ecession is not an instant fact. It always implies a complex series of claims and decisions, negotiations and/or struggle, which may – or may not – lead to the creation of a new state.”²⁷ This is important to note as the process by which statehood is achieved via secession can include forms achieved by peaceful and non-peaceful means; a fact that distinguishes secession as a process that leads to an outcome, rather than a process or an outcome on its own.

²¹ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No7 art 2 (1) [*UN Charter*].

²² James R Crawford, *The Creation of States in International Law* (Oxford, Clarendon Press, 2006) at 107 [Crawford, “The Creation of States”].

²³ Some forms of state creation include: discovery, prescription, abandonment, cession, etc. For a full list, see John H Currie et al, *International Law: Doctrine, Practice, and Theory*, 2nd ed (Toronto: Irwin Law, 2014) at 314-27 [Currie].

²⁴ Anderson, “Secession in International Law”, *supra* note 4 at 343-4.

²⁵ *Ibid* at 349.

²⁶ *Ibid* at 350.

²⁷ Marcelo Kohen, ed, *Secession: International Law Perspectives* (New York: Cambridge University Press, 2006) at 14 as cited in Anderson, “Secession in International Law”, *supra* note 4 at 349.

Several scholars have argued against the fact that secession is a process that leads to an outcome. For example, according to Crawford, “secession is the creation of a State by the use or threat of force without the consent of the former sovereign...”²⁸ In other words, Crawford sees secession as a process dependent on the use or threat of force. This dependency creates a reliance on seeing secession as a singular and unilateral predetermined act, rather than a process that can offer numerous options on what can be a peaceful or nonpeaceful outcome. This view has certainly found support in the legal academic community, with academics such as John Dugard and Alexis Heraclides defending its existence.²⁹ The difficulty with accepting Crawford’s view of secession as a singular process is that it does not account for events that happen in the period between the initiation of the secession, and the ultimate success or failure of that secession. For example, Glen Anderson approaches Crawford’s definition somewhat differently by describing secession as “the withdrawal of territory (colonial or non-colonial)³⁰ from a part of an existing state to create a new state.”³¹ Indeed, Anderson’s definition looks to counter the attempts made by restrictive definitions (such as Crawford’s), as in general, they narrow the scope of the definition of secession itself, while failing to provide explanations for the ongoing series of events that shape the nature of the secession *ex post facto*.³² In other words, this indicates that the process of secession is initiated once the withdrawal of territory is invoked; however, it does not end until the entity in question earns legal personality under international law, a process which can take place over an extended period of time.³³ Needless to say, although the reality of any withdrawal

²⁸ Crawford, “The Creation of States”, *supra* note 22 at 375.

²⁹ See John Dugard, “A Legal Basis for Secession – Relevant Principles and Rules” in Julie Dahlitz, ed, *Secession and International Law: Conflict Avoidance – Regional Appraisals* (Hague: TMC Asser Press, 2003) at 89 [Dugard, “A Legal Basis for Secession”]; Alexis Heraclides, *The Self-Determination of Minorities in International Politics* (New Jersey: F Cass Publishing, 1990) at 1 [Heraclides, “Self-Determination of Minorities”] cited in Anderson, “Secession in International Law”, *supra* note 4 at 350, n 32.

³⁰ Anderson claims that “secession can be validly said to occur in a colonial context, as any new assertion of sovereignty over a colonial territory involves a modification to the sovereignty of the metropolitan power.” See Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 7.

³¹ Anderson, “Secession in International Law”, *supra* note 4 at 344.

³² *Ibid.*

³³ *Ibid.*

of territory relates to a consequential withdrawal of sovereignty as well, not all secessions are enforced through the threat or use of force and can in fact be executed through peaceful and legislated mechanisms. One such example is the secession of South Sudan from the Republic of Sudan in 2011 by way of a referendum and a legally-negotiated process.³⁴ Therefore, "...once it is accepted that the specific process of withdrawal is separate from the outcome, it emerges that there are two basic secession types: consensual and unilateral."³⁵

A consensual secession refers to the act of secession executed with the existing state's consent, while a unilateral secession occurs without the state's consent and may or may not include the threat or the use of force.³⁶ Consensual secessions can further be broken down into constitutional and politically-negotiated secessions. With respect to consensual secessions, a constitutional secession refers to the creation or the existence of a provision within the constitution of an existing metropolitan state, which allows for an act of secession to occur by virtue of a domestic legal mechanism. Examples of such mechanisms include, for example, the 1921 Liechtenstein Constitution and the 2003 *Constitutional Charter* of the State of the Union of Serbia and Montenegro.³⁷ Equally, the *Clarity Act*³⁸ in Canada is an example of a statute created to provide clarification on the procedural mechanism of secession in the Canadian Constitution. In essence, the Act "[reaffirms] the constitutional process prescribed by the [Supreme] Court: a clear

³⁴ Although South Sudan is an example of a consensual secession per se, it is important to note that its secession was preceded by two bloody civil wars which had led to the deaths of nearly 3.5 million people. Additionally, since the secession, a third civil war broke out in 2013 which caused another 300,000 deaths, as well as the displacement of nearly 3.5 million civilians. For the purposes of this footnote, it is necessary to point out that the objective of this sentence is solely to establish an example of a legally-negotiated secession via a referendum; however, the atrocities that preceded and succeeded this secession cannot be disregarded as part of this example. For more on the civil conflict in South Sudan, see generally Douglas H Johnson, *The Root Causes of Sudan's Civil Wars* (Oxford: Indiana University Press, 2003); Mario Silvio, "After Partition: The Perils of South Sudan" (2015) 3:1 U Balt J Intl L 63; Salman Salman, "South Sudan Road to Independence: Broken Promises and Lost Opportunities" (2013) 26:2 Pac McGeorge Global Bus & Dev L J 343.

³⁵ Anderson, "Secession in International Law", *supra* note 4 at 350.

³⁶ Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 7.

³⁷ Anderson, "Secession in International Law", *supra* note 4 at 352.

³⁸ *Clarity Act*, SC 2000, c 26, s 3(1).

referendum vote in favour of secession, followed by negotiated agreement between Quebec and the rest of Canada, and finally the passage of a constitutional amendment lawfully effecting Quebec's secession."³⁹ Although this type of legislation does not ensure a consensual separation,⁴⁰ the mechanism allows for a legislated process to exist in the case that separation becomes necessary.

On the other hand, politically-negotiated secessions are secessions that are completed through a diplomatic negotiation. As described by Anderson:

It requires that the existing state and the secessionist entity be willing to politically negotiate the resolution of a secessionist situation [and] is most likely to occur when the existing state fails to provide any constitutional avenue for secession for constituent national groups and when relations between the existing sovereign and secessionist entity are amicable.⁴¹

Examples of politically-negotiated secessions include such examples as the current unification negotiations between the Republic of Cyprus and the *de facto* Turkish Republic of Northern Cyprus (TRNC),⁴² or the dissolution of Czechoslovakia in 1993 through the peaceful secessions of the Czech and Slovak republics from the former federalist state.⁴³

Alternatively, unilateral secessions include the withdrawal of territory from a state *without* its consent. As expanded on by Thürer and Burri, "...what was formerly a constituent part of a State becomes independent—at least from a legal, though not necessarily a factual perspective. Rather than create a new State, the separating part of a State may choose to join an existing State."⁴⁴ As such, unilateral secessions can be further

³⁹ Anderson, "Secession in International Law", *supra* note 4 at 351.

⁴⁰ *Ibid* at 344. It is impossible to claim that a legislated process for secession can *ensure* a consensual separation as secession has been linked to anarchy, separation, civil conflict and instability.

⁴¹ *Ibid* at 352.

⁴² See Sara Stefanini, "Cyprus reunification talks to resume in Switzerland", POLITICO (11 November 2016), online: <www.politico.eu>.

⁴³ Anderson, "Secession in International Law", *supra* note 4 at 353.

⁴⁴ Daniel Thürer & Thomas Burri, eds., "Self-Determination" in Max Planck Encyclopedia of Public International Law (Oxford University Press) at para 1, online: <www.opil.oupilaw.com> [Thürer & Burri].

broken down into colonial and non-colonial secessions.⁴⁵ The former refers to a secession that occurs as part of a ‘peoples’⁴⁶ invoking their right to self-determination when their putative state is considered a colony of a metropolitan state; the latter refers to “the unilateral withdrawal of non-colonial territory from part of an existing state to create a new state.”⁴⁷

In addition to some of the major issues of the act of secession mentioned above, a lack of *opinio juris*⁴⁸ and state practice with regards to the legal process of UNC secessions has also contributed to the gray area surrounding its legal status under international law. As it stands, there are few guidelines and even fewer legal instruments in international law to prevent a secession from turning into a militarized territorial armed conflict.⁴⁹ Moreover, with secessionist movements citing the Kosovo declaration of independence⁵⁰ in 2008 as justification for *de jure* recognitions of their respective

⁴⁵ Anderson, “Secession in International Law”, *supra* note 4 at 353-4.

⁴⁶ See Christopher J Borgen, “Is Kosovo a Precedent? Secession, Self-Determination and Conflict Resolution” (Paper, delivered at the EES Noon Discussion, 13 June 2008), (2008) 47 Int’l Leg Materials 461, online: <www.wilsoncenter.org> [Borgen, “Is Kosovo a Precedent?”] (“[a]t various points in international legal history, the term “people” has been used to signify citizens of a nation-state, the inhabitants in a specific territory being decolonized by a foreign power, or an ethnic group” at 4). For more on the controversy surrounding the term ‘peoples’, see Chapter 2.

⁴⁷ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 3.

⁴⁸ See *Cornell Encyclopedia of Law*, *sub verbo* “*opinio juris*”, online: <www.law.cornell.edu> ([i]n customary international law, *opinio juris* is the second element (along with state practice) necessary to establish a legally binding custom. *Opinio juris* denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question”). See also *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7 (in force 24 October 1945) art 38 (1)(b) [*ICJ Statute*] which affirms that *opinio juris* is a general principle and source of customary international law.

⁴⁹ The only legal guidelines that can prevent a secession from turning into an armed conflict (peaceful settlement of disputes) are outlined in the United Nations Charter. See also *UN Charter*, *supra* note 21; “The Security Council & Mediation”, online: <www.peacemaker.un.org/peacemaking-mandate/security-council>.

⁵⁰ See Stefan Oeter, ed, “Dissolution of Yugoslavia” in Max Planck Encyclopedia of Public International Law by (Oxford University Press), online:<www.opil.ouplaw.com> [Oeter, “Dissolution of Yugoslavia”] (“On 17 February 2008, the Kosovo Assembly declared the independence of the Republic of Kosovo. The United States and a number of important Member States of the EU soon recognized Kosovo as an independent and sovereign State. Even within the EU, however, there was no consensus on the qualification of such a move, since some Member States had objections against recognition. Most UN Member States were even more reserved, which found its expression with the support for Serbia’s quest to ask the International Court of Justice (ICJ) for an advisory opinion on whether the unilateral declaration of the independence of Kosovo is in accordance with international law” at para 85).

secessions,⁵¹ the question of whether a ‘remedial right’ to secession exists outside of the colonial context continues to split the international legal community.⁵²

Overall, two theories exist that defend a right for remedial secession: the primary right and the remedial right. The dichotomy between the two theories is summarized by Thomas Simon in the following manner:

Under the remedial view, secession is justified only as a remedy of last resort for persistent and serious injustices. Primary right theorists, in contrast, argue that a right to secession does not depend upon a finding of injustices. They claim either that a right to secede can be made on ascriptive grounds, such as the nationality of the peoples claiming the right; on democratic, plebiscitary bases that reflect the preferences of peoples living within a territory; or on administrative grounds that simply assess the capability to function as an independent state.⁵³

As can be deduced from Simon’s summary, the ascriptive nature of a population is difficult to define. In fact, it is one of the major challenges to accepting the primary right theory. After all, how can ascriptive distinctions be made in a globalized, multi-cultural, and multi-ethnic world? Alternatively, what is the threshold for the argument of the use of force as the ‘last resort’? Does this theory defend a remedial right to secession only in cases of egregious human rights abuses such as genocide or ethnic cleansing? What about cases of human rights abuses that are considered as less egregious than the rest? Clearly, many *lacunae* can be identified in the theoretical argument for the right of remedial secession;⁵⁴ however, this thesis intends to prove that a right to a UNC secession exists

⁵¹ See Steve Gutterman, “Russia Denounces Kosovo Declaration”, *The Washington Post* (17 February 2008), online: <www.washingtonpost.com> (direct quotes from press releases by *de facto* leaders of South Ossetia and Abkhazia after Kosovo’s declaration of independence). For Transnistria, see Borgen, “Is Kosovo a Precedent?”, *supra* note 46.

⁵² Thomas W Simon, “Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo” (2011) 40:1 GA J Intl & Comp L 105 at 143.

⁵³ *Ibid.*

⁵⁴ One of the more important *lacunae* in the international law on secession is the question of whether “remedial secession” is a legal concept as part of a crystallized norm in customary international law or not. See Jure Vidmar, “Remedial Secession in International Law: Theory and (Lack of) Practice” (2010) 6:1 St Antony’s Intl Rev 37 at 37 [Vidmar, “Remedial Secession”]. See also Lee C Buchheit, *Secession: The Legitimacy of Self-Determination* (New York: Yale University Press, 1978) (Contemporarily, a general ‘fear’ exists around the institutionalization of remedial secession. “...[t]his fear is known under a number of names, including Pandora’s Box, balkanization, ethnic domino theory, and indefinite divisibility...” at 28). Additionally, it should be noted that multiple scholars

under international law insofar as the principle of self-determination is egregiously violated and denied, which can also subsequently lead to a justification for a third-state military intervention.⁵⁵

In sum, this thesis will use cases of third state military interventions in Bangladesh, Kosovo, South Ossetia and Abkhazia to identify a legal exception for the external use of force outside of the existing positive international law.⁵⁶ More precisely, this thesis will argue that a right of the use of force by a third state outside of the current legal parameters⁵⁷ exists *only* within the context of UNC secessions in which the peoples involved are suffering human rights abuses designated as *in extremis*. Additionally, this thesis will argue against the existence of an obligation of military intervention under international law (as supported by the doctrine of humanitarian intervention), pointing to a number of heterogeneous factors that support its rejection as a crystallized legal norm in

have attempted to argue, with varying degrees of success, that a remedial right to secession *should* exist in international law. Unfortunately, their arguments largely approach the question of remedial secession from a theoretical or sociological perspective, which at-times can be questionable on the basis of its relevance with respect to codified international law. This thesis will not use a theoretical analysis of the subject matter, rather, it will opt to a legal one on the basis of existing treaty and customary international law. For examples of pro-remedial secession theorists, see generally, Harry Beran, “A Liberal Theory of Secession” (1984) 32:1 Pol Stud 21; Christopher Wellman, “A Defense of Secession and Self-Determination” (1995) 24 Phil & Public Aff 142; Robert W McGee, “The Theory of Secession and Emerging Democracies” (1991) 28 Stan J Intl L 450 [McGee, “The Theory of Secession”].

⁵⁵ It is necessary to note that the idea of a third-state military intervention as being justified under international law in cases of self-determination is not novel. Generally, this argument is made by defending its legality under the auspices of the doctrine of humanitarian intervention. Several scholars have pronounced on the idea as *potentially* existing or existing under a pretext of conditions. that typically reaffirm the legality of the interventions’ humanitarian nature. This thesis intends to expand on the existing scholarship with regards to the notion of third-state military interventions in the context of UNC secessions, providing a conceptualized legal argument for the existence of a developed right of military intervention in international law under the pretext of self-determination in a very particular set of circumstances. For examples of authors who have proposed similar ideas, see generally Thomas D Grant, “Armed Force in Aid of Secession” (2014) 53:1 Military Law and the Law of War Rev 69 at 91; Anderson, “The Use of Force”, *supra* note 9 at 240; Juan Carlos de las Cuevas, “Exceptional Measures Call for Exceptional Times: The Permissibility under International Law of Humanitarian Intervention to Protect a People’s Right to Self-Determination” (2015) 37:1 Hous J Intl L 49.

⁵⁶ The existing international law on the use of force, as well as the current status of the doctrine of humanitarian intervention will be analyzed in detail in Chapter 3.

⁵⁷ It should be noted that international law prohibits the use of force by states except in cases of self-defence or through authorization by the United Nations Security Council. General prohibitions for the use of force can be found in *UN Charter*, *supra* note 21, arts 2(3)–(4), 39, 42,55.

international law.⁵⁸

1.2. Sources of International Law

This thesis will rely on the consideration that sources of international law are considered binding without derogation. Article 38(1) of the Statute of the International Court of Justice (ICJ) sets out the sources of international law:

1. 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 establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized 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 rules of law.⁵⁹

In order to better understand these sources *in toto*; a brief definition of each must be presented.

The most commonly-known source of international law is known as a ‘treaty’,⁶⁰ a form of “international [“contract”] between states and /or certain international organizations, [which sets] out rules that bind, as a matter of international law, the parties to them in their relations with one another.”⁶¹ The second source of international law is “international custom, as evidence of a general practice accepted as law,”⁶² usually

⁵⁸ The controversy relates to the legal status of humanitarian intervention in international law. An exception permitting the use of force as part of the doctrine of humanitarian intervention does not currently exist in international law, although some scholars have argued on its existence through the R2P (Responsibility to Protect) principle. This debate will be expanded on in greater detail in Chapter 3. For a description of the general controversy on the accept of a right to ‘humanitarian intervention’, see Lowe & Tzanakopoulos, *supra* note 18 at para 1.

⁵⁹ *ICJ Statute*, *supra* note 48, art 38 (1).

⁶⁰ It is necessary to point out that not everyone agrees with this statement. For a general description of this debate, see Currie, *supra* note 23 at 46.

⁶¹ *Ibid* at 48.

⁶² *VCLT*, *supra* note 12, art 38 (b).

referred to as customary international law.⁶³ Customary international law is composed of two elements: *opinio juris* and the practice of states. *Opinio juris* “denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question,”⁶⁴ while state practice refers to the practice of a particular custom by states. Customary international law is unwritten and is considered universally binding on all states.⁶⁵

Outside of the well-accepted notions mentioned above, this thesis will adopt a more contemporary interpretation of two important factors within the ambit of customary international law. First, the requirement of ‘state practice’ will be interpreted as evincing *general* and not *consistent* practice to become law, and second, the effect of General Assembly Resolutions will be interpreted as influencing the international law-making process where the answer to a legal question cannot be found through existing jurisprudence. With respect to the former, the traditional understanding of ‘practice’ requires state practice to be *consistent*, as set out the Permanent Court of International Justice (PCIJ) in the *Lotus Case*,⁶⁶ and subsequently by the ICJ in the *North Sea Continental Shelf Case*.⁶⁷ On the contrary, this thesis will use an interpretation that accepts claims by states⁶⁸ as well as physical acts and omissions, to underline the

⁶³ The author recognizes the existence of scholarship that questions, discounts or rejects the function of custom as a general source of international law. Although these challenges to the contemporary understanding of custom are important to point out, this thesis’ legal analysis will operate on the well-established precedent of customary international law as a general source of law as supported by the VCLT and the ICJ Statute. For examples of scholars questioning the normative function of custom in international law, see Emmanuel Voyaikis, “Customary International Law and the Place of Normative Considerations” (2010) 55:1 Am J Juris 164; Gerald J Postema, “Custom, Normative Practice and the Law” (2012) 62 Duke LJ 707.

⁶⁴ *Supra* note 48.

⁶⁵ It should be noted that there are three exceptions to the universality of customary international law. See Currie, *supra* note 23 at 116, 133. (“first...a treaty rule that is inconsistent with a rule of customary international law will generally prevail, as between parties to that treaty; second, rules of “regional” customary international law may displace, as between states within the relevant region, rules of general customary international law; and third, so-called persistent objectors may unilaterally escape the reach of customary international law” at 116).

⁶⁶ *S. S. Lotus* (France v Turkey), (1927), PCIJ (Se A) No 10 at 28.

⁶⁷ *North Sea Continental Shelf*, Judgment, [1969] ICJ Rep 3 at 44 [*North Sea Case*].

⁶⁸ This interpretation is supported by a number of ICJ Cases. For a few examples, see *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Judgment, [1986] ICJ Rep 14 at paras 188-89, 191, 205 [Nicaragua ICJ Judgment]; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] Rep 226 at paras 68-73 [Nuclear Weapons Advisory Opinion]. For a comprehensive summary of this interpretation, see Glen Anderson, “Unilateral Non-

changing threshold for what constitutes ‘practice’ under customary international law.⁶⁹ To be succinct, a combination of textual General Assembly Resolutions, as well as concomitant state practice will be used to argue for the existence of a qualified right for UNC secessions under international law. As for the interpretation of the latter, its importance rests on the fact that, as mentioned by the ICJ in the *Nicaragua Case*, a lack of uniformity in state practice, especially if conflictual, can find support through textual elaboration as part of *opinio juris*; insofar as both are assessed simultaneously.⁷⁰ Thus, in following this interpretation, this thesis will rely on the supposition that “Article 38(1)(b) of the Statue of the ICJ [which lists international custom, as evidence of general practice] includes statements such as those contained in declaratory General Assembly resolutions...”,⁷¹ which, in combination with physical acts and omissions, will reveal the existence of a qualified right to a UNC secession in customary international law.⁷² A more detailed summary of this interpretation as it pertains to UNC secessions will be presented in section 2.3.

Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects” (2012) 41 Denv J Int’l L & Poly 345 at 380-85 [Anderson, “Declaratory GA Resolutions”].

⁶⁹ For more on this see, Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 10.

⁷⁰ *Nicaragua ICJ Judgment*, *supra* note 68 at paras 188-9, 191, 202, 205.

⁷¹ Anderson, “Declaratory GA Resolutions”, *supra* note 68 at 388.

⁷² This interpretation of customary international law defends the view that “...statements, whether in relation to concrete situations or *in abstracto*, provided they are framed *de lege lata*, are capable of contributing to customary rules of international law.” See Anderson, “Declaratory GA Resolutions”, *supra* note 68 at 382. Such statements can include “...physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national laws, national judgments and omissions [and] practice of international organizations...”. See Michael Akehurst, “Custom as a Source of International Law” (1976) 47:1 Brit YB Intl L 1 at 10. This view is equally defended by numerous ICJ decisions. See e.g. *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, [1970] ICJ Rep 4, Judge Ammoun, separate opinion at 302-3; *North Sea Case*, *supra* note 67 at 38; *South West Africa (Liberia v. South Africa)*, [1966] ICJ Rep 28, Judge Tanaka, dissenting opinion at 291-22; *Judgment* 188-9,191; *Nuclear Weapons Advisory Opinion*, *supra* note 68 at 68-73. For scholarly support of this view see e.g. Rosalyn Higgins, *Development of International Law Through Political Organs of the United Nations* (Oxford: Oxford University Press, 1963) at 6-7; Gillian D Triggs, *International Law: Contemporary Principles and Practices*, (Sydney: LexisNexis Butterworths Law, 2006) at 62-70; Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 6 [Brownlie, “Principles of IL”]; Mark E Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd ed (Hague: Kluwer Law International, 1997) at 14-6.

The third source of international law is described as “general principles of law.”⁷³ These principles originate from one of two original sources: “meta-legal principles—i.e principles generated within a philosophical or ethical discourse [which are then] introduced into a normative system – or ... principles inherent in or developed from a particular body of law or law in general.”⁷⁴ Largely, the latter is used by international and regional courts as “an interpretative tool or as a source of concrete obligations.”⁷⁵ The existence of this source of law is valuable specifically where *lacunae* exist in international law.⁷⁶

The fourth and final source of international law refers to “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”⁷⁷ The ‘subsidiary’ aspect of this source of law does not allow for it to carry any binding capabilities; however, it can provide vital evidence of the law when necessary.⁷⁸ In reference to the ‘highest qualified publicists of the various nations,’ a good example is the International Law Commission. The Commission, which is comprised of highly trained jurists of international law, “initiate[s] studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification.”⁷⁹ Contemporarily, they “have been relied upon extensively by international courts and tribunals as an authoritative statement of the law on state responsibility.”⁸⁰ In this thesis, their contribution to the law on state responsibility will be used in relation to the concept’s conflation with the law on the prohibition on the use of force.

Apart from the four formal sources of international law, a number of other

⁷³ *VCLT*, *supra* note 12, art 38 (1)(c).

⁷⁴ Rüdiger Wolfrum, ed, “Sources of International Law” in Max Planck Encyclopedia of Public International Law (Oxford University Press) at para 33, online: <www.opil.ouplaw.com>.

⁷⁵ *Ibid* at para 34.

⁷⁶ *Ibid* at para 36.

⁷⁷ *VCLT*, *supra* note 12, art 38 (1) (d).

⁷⁸ James Crawford, ed, *Brownlie’s Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 38 [Crawford, “Brownlie’s Principles of IL”].

⁷⁹ *UN Charter*, *supra* note 21, art 13 (1) (a).

⁸⁰ Crawford, “Brownlie’s Principles of IL”, *supra* note 78 at 44.

instruments are also consulted when considering the content of international law, though they are not considered binding. Examples of this include reports and studies by non-governmental or international organizations,⁸¹ considerations of humanity⁸² and legitimate interests of states.⁸³ Such sources improve the balance between formal and material sources by providing governments with ‘soft law’ power, which can adapt more easily to changing circumstances, and act as a starting point on controversial issues such as for example, the scope and the extent of the universality of human rights in international law.⁸⁴ This proves to be a valuable asset in cases where the law requires flexibility, as well as subject-matter expertise; factors that international law considers extremely important.⁸⁵

Now that the sources of international law that will be used in thesis have been presented, it is necessary to introduce the outline of this thesis through a brief summary of its main arguments.

1.3. Organization of Thesis

Apart from this introductory chapter, this thesis consists of three main chapters. Chapter 2 will begin with an exploration of the principle of self-determination, starting

⁸¹ This example refers to the use of ‘soft law’ through the expertise of non-state contributors to the source of a particular area of international law. An example of this is are “manuals and guidance notes prepared by expert bodies [such as] the United Nations Refugee Agency (UNHCR) and the International Civil Aviation Organization (ICAO). See Currie, *supra* note 23 at 152.

⁸² Crawford, “Brownlie’s Principles of IL”, *supra* note 78 “[c]onsiderations of humanity are the notion that “human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite analogy. Such criteria are connected with general principles of law and equity, and need no particular justification. References to principles or laws of humanity appear in preambles to conventions in GA resolutions, and in diplomatic practice. The classic reference is a passage from *Corfu Channel*, in which the Court relied on certain ‘general and well-recognized principles’, including ‘elementary considerations of humanity, even more exacting in peace than in war’. On occasion, the provisions of the UN Charter concerning the protection of human rights and fundamental freedoms have seen use as a basis for the legal status of considerations of humanity” at 46).

⁸³ By legitimate interest of states, it is meant that “in particular contexts the applicability of rules of law may depend on criteria of good faith, reasonableness, and the like. Legitimate interests, including economic interests, may in these circumstances be taken into account.” See *ibid*.

⁸⁴ See Currie, *supra* note 23 at 151-2.

⁸⁵ Crawford, “Brownlie’s Principles of IL”, *supra* note 78 at 44-7.

with its history and continuing through to its contemporary meaning in international law. The focus on self-determination will allow for a thorough analysis of the separate roles that secession and recognition play in both international law and international relations.⁸⁶ Subsequently, this chapter will demonstrate the existence of a right to a unilateral non-colonial secession (UNC) through the principle of self-determination, as well as concomitant state practice which defines the terms under which a unilateral secession is possible. The overall objective of this chapter will be to establish the factors necessary for a legal separation of territory on the basis of self-determination.

Chapter 3 will focus on examining the use of force in international law. Specifically, it will first delve into the general doctrine on the use of force in positive and customary international law. This summary will include a historical analysis of the *jus ad bellum*, as well as expound on the concept's ties to the just war doctrine through its beginnings as part of the notion of *iustum bellum* (the concept of a just war.). Subsequently, the chapter will shift to the use of force and the creation of states, defining under which circumstances is the use of force legal, as well as what type of third-state support is permitted in circumstances where a right to self-determination is systematically denied. In doing so, this chapter will comb the use of force in self-determination disputes in both the colonial and non-colonial settings. The objective of this comparison will be to demonstrate the legal arguments that support the use of force in cases of external self-determination, as well as the threshold for the interference of third-states in such conflicts. Lastly, a final subsection will elucidate the theoretical aspirations of the 'Responsibility to Protect' (R2P) concept. This will be completed in order to dispute any connection between the argument of an *obligation* to and the *right* of military intervention in territorial disputes.

⁸⁶ Generally, it is challenging to separate the notion of *realpolitik* from a territorial dispute that necessitates a secession. External influences, regional location and geo-strategic interests are only some of the many factors that can influence a purported or completed secession in international relations. Therefore, this thesis will analyze both the international legal ramifications of each secession presented through a case study, as well as point out the inevitable self-interests of third-states in their respective military interventions. The exact tenets of state interests in a third-state military intervention will be provided at the end of Chapter 4.

Chapter 4 of this thesis will present a detailed case study comparison that will incorporate all of the elements presented in Chapters 1, 2 and 3. The case study will focus on four territorial disputes, examining the path to their potential statehoods and clarifying their contemporary status' under international law. The four case studies in question will be respectively: Kosovo, Bangladesh and South Ossetia and Abkhazia. The methodology of the case study will ensure that each territorial dispute includes an external self-determination claim, as well as a path to statehood⁸⁷ which included a third-state military intervention justified by an alleged commission of human rights abuses deemed as *in extremis*. At the conclusion of the case study, its most important elements will be combined into an analytical framework, which will outline the elements that may be used to justify or reject the legality of a third-state military intervention on the basis of four principal requirements. Lastly, Chapter 5 is the concluding section which will provide a summary of the primary arguments examined in each chapter, as well as clearly define the exception to the prohibition on the use of force in the context of UNC secessions.

⁸⁷ By path to statehood, it is not meant that the entity in question is in fact a sovereign state. Rather, it is meant that the entity has invoked its right to external self-determination and subsequently, has requested for it to be accepted as a state under international law.

Chapter 2

Chapter 2: Self-Determination, Statehood and Secession: From Classical to Contemporary International Law⁸⁸

Self-Determination is a complicated concept in international law. Although this thesis will be built on the well-accepted premise that “self-determination is widely regarded as a peremptory norm (*jus cogens*)”⁸⁹ in international law, the applicability of self-determination in the face of the principles of territorial integrity and state sovereignty remains unclear and is often contentious.⁹⁰ In fact, as the principle of self-determination seeks to allow ‘peoples’⁹¹ to “...freely determine their political status and freely pursue

⁸⁸ The author recognizes the existence of the ‘Third World Approaches to International Law’ (TWAIL) school which conducts the study of international law from the perspective of third world states. Although the author recognizes the importance of the TWAIL school in analyses related to euro-centric-derived concepts such as statehood, recognition and self-determination, it is beyond the scope of this thesis to include such an analysis for each concept. Therefore, the author recognizes that they are basing their historical and legal analyses on the basis of international legal concepts derived from euro-centric scholarship which has been influenced by imperialism and colonialism. For more on the TWAIL school, see Katz Cogan et al eds., *The Oxford Handbook of International Organizations* (Oxford, Oxford University Press, 2016) at 123-5.

⁸⁹ For an extensive list of scholarship supporting this claim, see Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1185-7, n 4.

⁹⁰ The issue is divisive in that by virtue of state dismemberment contributing to regional destabilization, the threshold for when that dismemberment becomes legally acceptable has not been firmly established in international law. The remedial right theory of secession claims that a secession is justified when an identifiable group secedes unilaterally from its mother state on the basis of grave breaches of human rights committed against it (irrespective of other considerations). See Daniel H Meester, “Remedial secession: a positive or negative force for the prevention and reduction of armed conflict?” (2012) 18:2 *Can Foreign Pol’y J* 151 (“[t]he case against remedial secession runs along five main lines of argument, in that remedial secession would lead to (1) increased incentives for secessionism and minority persecution; (2) not requiring the consent of the predecessor state for secession, which has been a condition for peaceful secession historically; (3) vulnerability of such a system to exploitation by regional hegemony and irredentist governments; (4) practical problems with implementation and enforcement; and (5) unintentional undermining of efforts to increase internal self-determination” at 156). Contemporarily, a general ‘fear’ exists around the institutionalization of remedial secession. See also Crawford, “The Creation of States”, *supra* note 22 at 108.

⁹¹ The definition of the term “peoples” within the context of self-determination can be controversial. The author shares Glen Anderson’s opinion that “...paragraph I declares that “all peoples” enjoy the right to self-determination, which prima facie indicates that “peoples” is an expression of broad and general applicability extending to the colonial and non-colonial context.” See Anderson, “Secession in International Law”, *supra* note 4 at 351. A more concise definition of peoples will be presented towards the end of Chapter 4.

their economic, social and cultural development,”⁹² the question can be asked, how far does the principle of self-determination impact the international law on self-determination, and do the two share a connection that requires a separate analysis of each? With respect to the first part of the question, Crawford mentions that the international law on self-determination can be considered as both a *lex lata* and a *lex obscura*.⁹³ In essence, Crawford points out that a paradox exists whereby the law of self-determination exists, yet is obscured by how the international community continues to receive and perceive it in both a negative and a positive light.⁹⁴ This is correct to some degree, as it is necessary to clarify exactly, who are the bearers of this ‘right’ of self-determination? Consider this response to this question by Stefan Oeter:

The overview of the historical evolution of the right of self-determination has demonstrated that there is a clear core area where the bearer of the right is beyond dispute. This is the case of decolonization, where State practice has confirmed that non-self-governing territories (as well as trusteeship territories) enjoy a clear right to self-determination, understood as a right freely to determine their political status. The ‘people’ in the sense of self-determination in these cases is the autochthonous population of the non-self-governing territories that has been grouped together to a polity by carving out a certain territory in colonial times in order to form a distinct political entity. These territories became independent States on the basis of the principle of *uti possidetis*, which means that the geographical shape of the territories had been definitely established in colonial times—and they simply inherited the boundaries from their colonial rulers. Self-determination did not mean that there was any scope for a decision of the local people concerned regarding whether they wanted to belong to the newly independent State, or to a neighbouring State. State practice clearly banned such a far-reaching claim, making the inherited territorial boundaries inviolable.⁹⁵

To expound on this point, it can be suggested that the original intention behind the international community’s acceptance of the principle was to tolerate the right of self-

⁹² *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 11, Can TS 1976 No 47, (1967) 61 ILM 368 (in force 23 March 1976) [ICPR].

⁹³ James Crawford, “The Right of Self-Determination: Its Development and Future” in Philip Alston, ed, *People’s Rights* (Oxford: Oxford University Press, 2001) at 10.

⁹⁴ *Ibid.*

⁹⁵ Stefan Oeter, “Self-Determination” in Bruno Simma et al. eds., *The Charter of the United Nations - A Commentary*, Vol I, 3rd ed (Oxford: Oxford University Press, 2012) at 325 [Oeter, “Self-Determination”].

determination as a means to establish a legal process for decolonization of indigenous and colonized peoples around the world. Nevertheless, as the decolonization era passed, a renewed call for the interpretation of the principle outside of the colonial context has reinvigorated the debate surrounding its breadth and scope under international law. As further expanded on by same author, the issue of whether self-determination applies to ‘peoples’ outside of the context of colonialism is a matter of fierce debate:

An important strand in international legal scholarship argues that every group of persons bound together by common objective characteristics, like language, culture, religion, race, might be qualified as a ‘people’, as long as such a group has also a common (subjective) understanding of belonging together and being distinct from all the other surrounding groups. Such an understanding might be termed as a ‘naturalist’ concept of peoples. Another strand insists on the territorial element of self-determination. Self-determination, thus the argument goes, has always been linked to historically pre-constituted political entities with a specific territory. ‘People’ in this understanding is not simply a group of persons, one could also say an ‘ethnic group’, but the constituent people of a certain territorial entity formed by history...A careful analysis of State practice clearly supports the second understanding. Beyond the context of decolonization, there has never been any serious international support for a claim of self-determination raised by a simple ‘ethnic group’ having no firm territorial basis in a pre-existing political entity.⁹⁶

Therefore, on the basis of understanding how self-determination posits itself within the tenets of contemporary international law, it is necessary to propound on its historical evolution in order to establish the extent of its applicability. Prior to doing so, a final point must be made with regards to the principle of self-determination. The principle can be further separated between internal and external self-determination. The former refers to the granting of a certain level of autonomy and self-governance to the peoples in question within the territorial boundaries of a sovereign state. The latter refers to an invocation of a right of absolute independence from the sovereign state through an act of unilateral secession, implying a simultaneous withdrawal of sovereignty and territory.⁹⁷ This is important to note as, for the purposes of this thesis, the focus will remain on external self-determination, specifically with respect to its invocation in the non-colonial

⁹⁶ *Ibid* at 325-6.

⁹⁷ *Ibid* at 328.

context.

This chapter will demonstrate the interconnectivity between the principle of self-determination and the concept of statehood in international law. Overall, the objective will be to establish how the principle of self-determination has been engrained as a crystallized norm in international law, clearing the way for how its applicability, when invoked through a separation of territory, can involve the use of force under particular circumstances. The second portion of this argument will be expanded on in Chapter 3 of this thesis.

This chapter is divided into four sections. The first section of this chapter will provide a summary of the history of the principle of self-determination. This will be done in order to present an interpretation of self-determination as a “progressive concept, counterpoised to the divine right of kings and associated with popular revolution and anti-colonialism.”⁹⁸ The second section of this chapter will build on the history of the principle by identifying how it fits into the ambit of the concept of statehood in international law. More specifically, a detailed historical analysis of the notion of state recognition will elucidate how the legal conceptualization of statehood is challenged by the changing nature of UNC secessionist claims. The third and final section of this chapter will examine the contemporary applicability of external self-determination claims through the existence of a qualified right to a UNC secession.

2.1. History of Self-Determination

It appears that the initial use of the term ‘self-determination’ became popular sometime during the Enlightenment era.⁹⁹ Derived from the German term *selbstbestimmung*, it originally “referred to the connections between reason, individuation and emancipation.”¹⁰⁰ Although the use of the term may have become popular in the 18th century, its etymological origin as a liberalist concept can be traced back to nearly the

⁹⁸ Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1189-90.

⁹⁹ Eric D Weitz, “Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right” (2015) 120 *American History Rev* 462 at 469.

¹⁰⁰ Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1191, n 15.

beginning of time. Consider this analysis of the early historical roots of self-determination by Anderson:

A possible starting point [to the historical roots of self-determination] might be indigenous hunter-gatherer societies in which the clan had collective input into decision making, law creation, and leadership. Alternatively, it might be postulated that self-determination arose with the Greek city-state and *demos kratos*, whereby citizens (male and property-owning) politically coalesced and determined their collective destiny. Other starting points might include Marsilius of Padua, a fourteenth century Italian scholar who suggested that the consent of the people was necessary to legitimize the powers of a ruler, or Stanislaw of Skarbimierz, a fifteenth century Polish scholar the President of the Cracow Academy, who postulated the then-progressive view that non-Christian peoples were entitled to their own independence.¹⁰¹

Indeed, the normative meaning of self-determination can be found in the last word of Anderson's analysis: *independence*. After-all, the relationship that self-determination holds with independence is one of the primary factors that renders it contested in international relations, as well as under international law.¹⁰² In large part, this is due to the well-accepted notion that secessionist movements which invoke their right to self-determination, inevitably clash with the metropolitan state from which they seek independence.¹⁰³ Nevertheless, although the historical beginnings of self-determination may remain unclear, according to Anderson, the "contemporary doctrine of self-determination can be traced to several key historical influences: the Glorious Revolution, the American Revolution, the French Revolution, the political theories of Vladimir Lenin, and the democratic ideals of U.S president Woodrow Wilson."¹⁰⁴ Thus, the following

¹⁰¹ *Ibid* at 1192.

¹⁰² Malcolm N Shaw, *International Law*, 7th ed (Cambridge: Cambridge University Press, 2014) at 143-7.

¹⁰³ Bertus de Villiers, "Secession – The Last Resort for Minority Protection" (2012) 48:1 J of Asian & African Stud 81 at 81.

¹⁰⁴ Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1192. A similar historical approach is taken by a number of other scholars, for examples of this see generally, Aleksandar Pavkovic & Peter Radan, eds., *On the way to Statehood: Secession and Globalisation* (Hampshire: Ashgate Publishing, 2008) at 10; Crawford, "The Creation of States", *supra* note 22 at 96; Juha Salo, "Self-Determination: An Overview of History and Present State with Emphasis on the CSCE Process" (1991) 2 Finnish Y B Int'l L 268 at 268; James E Falkowski, "Secessionary Self-Determination: A Jeffersonian Perspective" (1991) 9 BU ILJ 209 at 211-3.

sub-section will summarize the historical development of the principle of self-determination in Europe by following Anderson's historical timeline of influential events, which, in turn, will establish the foundation of the principle in relation with the concept of the Westphalian state.

2.1.1. The History of Self-Determination before the 19th century

There is no overarching agreement on the origins of the independence movement in post-Medieval Europe.¹⁰⁵ However, as will be pointed out in detail in the next sub-section, a starting point, from a euro-centric perspective, can be attributed to the fall of divine legitimism (also known as European legitimism), or the rule by divine monarchs in the early 17th century.¹⁰⁶ Indeed, its fall from popularity must be briefly summarized through a historical analysis of popular revolutions. Specifically, it will be established how the concept of self-determination, coupled with the rising notion of liberalism, acted as a catalyst for the era of popular revolutions in Europe throughout the 17th and 18th centuries.

The removal of the English monarch, James II, through the Glorious Revolution (1688-1689) and his subsequent replacement by a representative parliament,¹⁰⁷ can be understood to be the first step in adopting the philosophical notions of liberalism as evinced by such scholars as John Milton and later by John Locke and Baron de Montesquieu.¹⁰⁸ In fact, as argued by Anderson, the Glorious Revolution found scholarly support through the writings of such authors:

The unofficial philosophical basis for the [Glorious] Revolution was found in John Locke's Two Treatises of Government, which posited that government was a trust instituted for the benefit of citizens and attended

¹⁰⁵ *Infra* note 120.

¹⁰⁶ Ulrich Niggemann, "Some Remarks on the Origins of the Term 'Glorious Revolution'" (2012) 27:4 *The Seventeenth Century* 477 at 477-87 cited in Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1193.

¹⁰⁷ For more on Locke's writings in relation to self-determination, see Lois G Schwoerer, "Locke, Lockean Ideas, and the Glorious Revolution" (1990) 51 *J Historical Ideas* 531 at 535. For more on Montesquieu's writings, see U O Umozurike, *Self-Determination in International Law* (Hamden: Archon Books, 1972) at 8-9.

¹⁰⁸ Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1193.

with their consent. The overriding aims of government were to preserve the physical integrity of citizens, their liberties, and their property. Locke argued that if government violated these basic principles it would become illegitimate, and citizens could then establish a new government to achieve these ends. Such changes, however, were only justified following “a long train of abuses.” Something more than “great mistakes in the ruling part, many wrong and inconvenient laws, and . . . slips of human frailty” was required.¹⁰⁹

Therefore, if one is to accept the significance of the liberalist school in the relative success of the Glorious Revolution, it becomes clear that its theoretical underpinnings can be better explained through the lens of formalist independence in the then dynasty-dominated Europe. Further, Anderson adds that although the nature of the Revolution primarily revolved around representative government, its emphasis on promulgating the illegality of the ‘divine right of kings’ make of it “an early progenitor of modern self-determination, even if it was as yet unrecognizable through modern eyes.”¹¹⁰

Following in the footsteps of the Glorious Revolution, a wave of change swept across Europe and the colonized world. Building on the ideals of government that represents the will of the people and is equally governed by it, the United States of America declared its independence from England on July 4, 1776. Upon a close review of the *United States Declaration of Independence*, the normative and textual meaning of self-determination becomes evident:

When in the course of human events, it becomes necessary for one people to dissolve the political bonds which had connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, *a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.* That to secure these rights, Governments are instituted among Men, deriving the just powers from the consent of the governed. 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, laying its foundation on such principles and organizing

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid* at 1193.

its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, 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, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.¹¹¹

Indeed, the most salient message in the Declaration was its insistence on the right of the American people, as a collective group, to choose their destiny if an elected government transiently violated their trust. Generally, this is seen as the first instance, from a euro-centric perspective, that a state codified the right of its peoples to self-determination in a domestic democratic constitution, alienating the notion of colonial and monarchical rule on the basis of conquest and a ‘divine right to rule’.¹¹² Conclusively, “[t]he American Revolution...added a progressive constitutionally-based aspect to self-determination. The conservative shackles of the Glorious Revolution, which only viewed political change as a remedy of very last resort, were perhaps slightly relaxed.”¹¹³

As will be demonstrated in the next section, the American Revolution would not hasten independence for the rest of the world seeking to end monarchical rule; apart from one state: France.¹¹⁴ In the early 18th century, French Philosophers such as Jean-Jacques Rousseau and Baron de Montesquieu contributed greatly to the literature that would influence the era of popular revolutions. For example, their writings were instrumental in supporting the work of American revolutionaries such as Thomas Jefferson, who used them to advocate for independence from England.¹¹⁵ With regards to the series of events

¹¹¹ “*Declaration of Independence of the United States of America*”, online: < www.archives.gov/founding-docs/declaration-transcript >.

¹¹² Thüerer & Burri, *supra* note 44 at para 1. See also Raic, *supra* note 13 at 173.

¹¹³ Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1195.

¹¹⁴ *Infra* note 173.

¹¹⁵ George E Rudé, “The Outbreak of the French Revolution” (1955) 8:1 Past and Present J 28 at 33-6. See also Robert W McGee, “Secession Reconsidered” (1994) 11:1 The J of Libertarian Studies 11 at 15-8; Francis D Cogliano, *A Companion to Thomas Jefferson* (Malden: Wiley-Blackwell Publishing, 2012) at 127.

that led to the French Revolution, as France found itself on the brink of civil war and facing grain shortages through a near-empty treasury, Louis XVI (the monarch at the time) began to slowly lose power with the French people and nobility.¹¹⁶ Once it became known that he would side with the nobility, furthering the economic suffrage of France, the middle-class represented by the ‘Third-Estate’ revolted in June, 1789.¹¹⁷ A power struggle ensued, and Louis XVI was eventually deposed and subsequently executed. Although the French Revolution would continue attempting to implement its reforms for many years following the initial revolt in 1789, the text it produced, also known as *la Déclaration des droits de l'homme et du citoyen* (the Declaration of the Rights of Man), would become one of the first documents in modern European history which codified an extensive, agnostic and humanistic purview of universal human rights.¹¹⁸

Unfortunately, although the text of the *Declaration of the Rights of Man* created a positive precedent with respect to its support of universal human rights for French citizens, its interpretation by the newly-formed French state authorities demonstrated early how the concept of self-determination can be used to violate the same principles it theoretically strove to uphold. In particular, annexations of foreign territories by French armies became a popular interpretation of the Declaration’s ‘French revolutionary self-determination’, which sought to ‘liberate’ any peoples under monarchical rule through the use of force.¹¹⁹ Nevertheless, the underlying achievement of the time was the fact that self-determination became intertwined with the notions of liberalism and independence, two important factors when considering how the principle of self-determination developed into a peremptory norm of international law.

To conclude, it can be understood that the notion of a peoples’ right to self-determination became engrained as a tangible concept as part of its promulgation through three popular revolutions (Glorious, American and French, respectively) between the 17th

¹¹⁶ Jack R Censer & Lynn Hunt, *Liberty, Equality, Fraternity: Exploring the French Revolution* (University Park: Pennsylvania State University Press, 2004) at 8-14.

¹¹⁷ *Ibid* at 31.

¹¹⁸ *Ibid* at 163.

¹¹⁹ Thürer & Burri, *supra* note 44 at paras 1-2.

and 18th centuries. Consequently, a contentious debate on its true meaning began in the 19th century. In particular, the question of whether self-determination is a legal concept or a political one shaped the sphere of its development in both classical and, subsequently, contemporary international law. The next subsection will briefly touch on this point, while also summarizing the inception of self-determination in post-19th century Europe, followed by its association with nationalism, as well as socialism, and ending with its eventual codification in the United Nations Charter in 1945.

2.1.2. The History of Self-Determination after the 19th century

After the Glorious, American and French Revolutions, the principle of nationalism began to slowly give way to the concept of self-determination. Although the exact timeline of when the principle of self-determination transitioned from a political concept into a legal one is unclear, the fragmentation of the Austro-Hungarian, Ottoman and German Empires in the wake of the end of the First World War certainly contributed to its rise in popularity in early 20th century Europe.¹²⁰ Nevertheless, certain scholars have attempted to theorize on when the principle bridged the politico-legal divide. For example, Crawford separates the history of self-determination into two parts: prior to and after 1945.¹²¹ Although, as previously mentioned, some scholars attribute the codification of self-determination to being founded as far back as the French and American Revolutions,¹²² Crawford prefers to associate its inception as an “operative principle [which] dates from the Bolshevik revolution and the peace settlements at the end of First World War.”¹²³ Indeed, he points to the fact that there was little legal development of the principle before 1945,¹²⁴ even if it was considered *in principio* as early as 1920 in the *Aaland Islands* case.¹²⁵ An alternative viewpoint to the origins of the principle is

¹²⁰ Oeter, “Self-Determination”, *supra* note 95 at 317-8.

¹²¹ Crawford, “The Creation of States”, *supra* note 22 at 108.

¹²² Lee Seshagiri, “Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law” (2010) 51:2 Harv Intl LJ 553 at 553.

¹²³ Crawford, “The Creation of States”, *supra* note 21 at 108.

¹²⁴ *Ibid* at 110.

¹²⁵ *Aaland Islands Case*, (1920) League of Nations OJ Special Supp No 3 at 3.

presented by Thürer and Burri, who suggest that the legal development of the principle occurred as early as 1941.¹²⁶ Although both claims have validity due to the political situations surrounding the development of the principle during that time (i.e. the promulgation of self-determination claims during the Second World War), for the purposes of this thesis, the principle of self-determination can be considered as having been developed in the legal sense sometime between the start and end of the Second World War. Nevertheless, it is still necessary to recognize that, even if the principle of self-determination was first identified as being entirely political in nature,¹²⁷ its influence, even as a political concept, on the wave of socialist revolutions which took place in the beginning of the 20th century,¹²⁸ as well as its subsequent consideration in the League of Nations at the conclusion of the First World War, warrant its consideration as part of this historical summary.

The principle of self-determination was attractive to socialist thinkers in large part due to the fact that it highlighted the inequalities of imperialism, as well as of monarchical rule and conquest.¹²⁹ In other words, the imposition of government through imperialism, colonialism or monarchical rule naturally violated a peoples' right to self-

¹²⁶ Thürer & Burri, *supra* note 44 “[t]he principle of self-determination was invoked on many occasions during World War II. It was also proclaimed in the Atlantic Charter (1941) (Declaration of Principles of 14 August 1941), 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’ (Principle 2 Atlantic Charter), that they respected ‘the right of all peoples to choose the form of government under which they will live’ (Principle 3 Atlantic Charter) and that they wished to see ‘sovereign rights and self-government restored to those who have been forcibly deprived of them’ (Principle 3 Atlantic Charter). The provisions of the Atlantic Charter were restated in the Declaration by United Nations (United Nations (UN)) signed on 1 January 1942, in the Moscow Declaration of 1943 and in other important instruments of the time” at para 5).

¹²⁷ Crawford, “The Creation of States”, *supra* note 22 at 143.

¹²⁸ The wave of socialist revolutions refers to the Russian and Spanish civil wars in 1917 and 1936 respectively, as well as to the general rise in socialist uprisings in the beginning of the 20th century. For more on the rise of socialism in the early 20th century, as well as the influence of socialism on the development of international law, see Peter Lamb & J C Doherty, *Historical Dictionary of Socialism*, 2nd ed (Lanham: The Scarecrow Press, 2006); B S Chimni, “Marxism and International Law: A Contemporary Analysis” (1999) 34:6 *Economic and Political Weekly* 337 [Chimni, “Marxist and IL”]; B S Chimni, “An Outline of a Marxist Course on Public International Law” (2004) 17 *LJIL* 1 at 3 [Chimni, “Marxist course on PIL”].

¹²⁹ Cassese, “Self-Determination of Peoples”, *supra* note 6 at 16.

determination, which (in the opinion of socialist thinkers such as Vladimir Lenin) could only be solved through a federation which encompassed the self-determination rights of all.¹³⁰ This view, which was promulgated by Lenin in the early 20th century, sought to underline the importance of the principle. Anderson describes Lenin's interpretation of self-determination as existing in three strands:

First, self-determination could be utilized by nationalist groups to freely determine their political destiny, which, by necessity, included a right to UNC secession. Second, self-determination could be invoked in the aftermath of military conflicts between sovereign states to allow the citizens of conquered territories to determine by whom they would like to be ruled. Third, self-determination could be anti-colonial, intended to expedite the freedom and political independence of colonial peoples.¹³¹

As can be formulated from Anderson's summary, multiple problems can be identified in Lenin's argument for a peoples' right to self-determination. First, all three strands, even just in principle, did not come to fruition during the existence of the USSR (United Soviet of Socialist Republics) between 1922-1991. Second, although provisions for self-determination were included in several versions of the USSR constitution,¹³² their actual invocation and execution were nearly impossible, overshadowed by the provisional and ultimate objective of implementing socialism.¹³³ Therefore, it can be inferred that, although Lenin and the Bolsheviks propagated the idea of 'national self-determination' as an important political weapon to rid the world of imperialism, democracy and capitalism; the real intention behind it was most likely the spread of socialism, to which national self-determination belonged mostly as a propagandistic tool.¹³⁴

¹³⁰ *Ibid.*

¹³¹ Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1197.

¹³² For exact citations of the several translated versions of USSR constitutions which mention the right of self-determination, see Peter Radan, *On the way to Statehood: Secession and Globalisation* (Hampshire: Ashgate Publishing, 2008) at 26 [Radan, "On the way to Statehood"].

¹³³ Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1198-9.

¹³⁴ It should be noted that although nearly every aspect of self-determination during the rule of the USSR was overshadowed by the primary objective of socialism, the anti-colonialist advocacy promoted by the Soviet authorities can be said to have contributed significantly to the decolonization movement in international law, as well as to the solidification of self-determination as a *jus cogens* norm. Therefore, the socialist self-determination movement can be seen as successfully lobbying for the right of self-determination to be expected as a universal right of all peoples. Nevertheless, it cannot be ignored that contemporarily, many former socialist states consider the period of

Self-determination was not solely limited to socialist thinking in the early 20th century. In fact, at the onset of the end of the First World War, it was officially codified through a mandates system introduced in the *Covenant of the League of Nations*.¹³⁵ Originally proposed by United States' President Woodrow Wilson as part of the peace negotiations after the First World War,¹³⁶ the principle defended the idea of independence, as well as the notion of peoples being able to select their future absent of any foreign claims of territory or interference.¹³⁷ In other words, "Wilson...came to view self-determination as encompassing the notion that governments must be based on "the consent of the governed. Citizens were therefore to have a direct and meaningful input into who would represent them."¹³⁸ Yet, even though Wilson's intention was to provide autonomy to formerly conquered and colonized peoples, his ideals quickly unraveled once the potential consequences of his words became evident through their direct resistance against two core concepts of the euro-centric system of states: state sovereignty and territorial integrity.¹³⁹ Thus, the liberal- democratic interpretation of self-determination was eventually left behind in the face of the potential consequence of anarchy and civil wars should it be fully implemented on an international scale.¹⁴⁰ In other words, it became evident that it would be better to live in a society with less formal independence for indigenous peoples and communities, but more collective peace, than in a society whereby each peoples can lay claim to a historic right of territory on the basis of oppression or colonialism, and demand self-governance and territorial independence. Largely, this assertion is true to this day given the fact that internal self-determination and greater autonomy is considered a much more desirable approach than acceptance of an external self-determination claim executed through secession. Additionally, as

'Sovietization' as an era of foreign occupation and influence. For more on this see Oeter, "Self-Determination", *supra* note 95 at 317-8; Cassese, "Self-Determination of Peoples", *supra* note 6 at 19.

¹³⁵ See *Covenant of League of Nations*, 28 June 1919, 225 CTS 195 at art 22 (entered into force 1 January 1924) [*Covenant of League of Nations*].

¹³⁶ Radan, "On the way to Statehood", *supra* note 132 at 26-8.

¹³⁷ Cassese, "Self-Determination of Peoples", *supra* note 6 at 21.

¹³⁸ Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1199-2000.

¹³⁹ Allen Lynch, "Woodrow Wilson and the Principle of 'National Self-Determination': A Reconsideration," (2002) 28 *Rev Int'l Stud* 419 at 432-4.

¹⁴⁰ Radan, "On the way to Statehood", *supra* note 132 at 27.

“international boundaries are constructions of humans at a specific point in time,”¹⁴¹ there can be very little room for argument that a return to historical boundaries should not have a set temporal standard. It should also be mentioned that contemporary international law addresses the contentiousness of historical territorial boundaries through the *uti possidetis juris* principle, which *a priori*, prevents territorial boundaries from changing in cases of self-determination.¹⁴²

Hence, all things considered, the principle of self-determination’s legal evolution can be attributed to the post-Second World War period, starting with its inclusion in the United Nations Charter.¹⁴³ Eventually, treaties,¹⁴⁴ international cases,¹⁴⁵ and affirmations

¹⁴¹ de Villiers, *supra* note 103 at 83.

¹⁴² It should be noted that the principle of *uti possidetis juris* was established during the era of decolonization and was meant, above-all, to prevent newly decolonized states from claiming new and historical boundaries on the basis of their newly found independence. As can be deduced from this definition, it cannot be ignored that *in superficie*, the principle is an unfair concept whereby a peoples’ under colonial rule who achieve independence, must adhere to the same boundaries drawn up by the colonial states they fought for independence from. Nevertheless, the inevitable anarchy that would follow should newly independent states, whether former or colonies or not, be able to claim historical boundaries, prevents any considerations of alternative options to the principle. This argument has been reaffirmed in the *Frontier Dispute* judgment, where the ICJ held that “[*uti possidetis juris*] is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.” See *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, [1986] ICJ Rep 554 at para 20. For more on the debate surrounding the principle in international law, see Currie, *supra* note 23 at 217-21.

¹⁴³ *UN Charter*, *supra* note 21, arts 1 (2), 52,55.

¹⁴⁴ Some of these treaties are, respectively: *Declaration of the Granting of Independence*, *supra* note 5; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance With the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25th Sess, 5 UN Doc A/2625 (1970) Principle 5 [*Friendly Relations Declaration*]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 art 1 (entered into force 3 January 1976) [*ICESR*]; ICPR, *supra* note 92, art 1; *African Charter of Human and Peoples’ Rights*, 27 June 1981, 1520 UNTS 245 at arts 19–22 (entered into force 21 October 1986) [*ACHPR*]; *Vienna Declaration and Programme of Action*, GA Res 48/121, UNGAOR, 48th Sess, UN Doc A/CONF 157/23 (12 July 1993) at para 2 [*Vienna Declaration*]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295, reprinted in UNGAOR, 61st Sess, Supp No 49, Vol III at 15-25 UN Doc/A/61/49 (2007)[*Declaration on the Rights of Indigenous Peoples*].

¹⁴⁵ See e.g. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403 [*Advisory Opinion on Kosovo*]; *Reference Re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession Reference*]; *Legal Consequences of the Construction of a*

through United Nations General Assembly resolutions,¹⁴⁶ confirmed the crystallization of the principle into a peremptory norm of international law.¹⁴⁷ Furthermore, the principle became cited by domestic courts. For example, the Supreme Court of Canada in the *Quebec Secession Reference* (1998), discussing the potential secession of the province of Quebec, stated that:

...the existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law.¹⁴⁸

Similar examples of these affirmations can be found in the *International Covenant on Civil and Political Rights*¹⁴⁹ as well as Articles 1 (2) and 55 of the United Nations Charter.¹⁵⁰ As such, the importance of this principle must be examined through both a legal and a historico-political lens, in an effort to identify how it has come to be identified with the act of secession. Additionally, the consideration of the principle alongside other concepts that it touches on directly, such as statehood formation and the recognition of states, requires further inquiry. The next section will expand on these considerations by examining the post-Second World War development of the relationship between the three concepts, as well as their contemporary status' under international law.

Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Rep 136 [*Wall Advisory Opinion*].

¹⁴⁶ *Inclusion in the International Covenant or Covenants on Human Rights of an Article Relating to the Right of Peoples to Self-Determination*, GA Res 545 (VI), UNGAOR, 6th Sess, UN Doc A/Res/545 (1952).

¹⁴⁷ Thürer & Burri, *supra* note 44 at para 13.

¹⁴⁸ Cassese, "Self-Determination of Peoples", *supra* note 6 at 171-2; K Doehring, "Self-Determination" in Bruno Simma, ed, *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) at 70 as cited in *Quebec Secession Reference*, *supra* note 145 at para 114.

¹⁴⁹ ICPR, *supra* note 92, art 1(1).

¹⁵⁰ See *UN Charter*, *supra* note 21 ("[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... [w]ith 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" arts 1 (2) (55)).

2.2. Statehood, Recognition and Self-Determination

The legal challenges associated with the interpretation of the principle of self-determination begin when attempting to understand it as part of the process of state creation. Moreover, whether the principle exists as a legal *right* or a political one remains a divisive issue. Principally, this contention can be attributed to the fact that “[s]elf-determination as a legal right or principle threatened to bring about significant changes in the political geography of the world, not limited to the dismemberment of Empires.”¹⁵¹ Thus, a potential change of ‘political geography’ prompts the study of the concept of statehood in international law. This section will do this by addressing the interrelatedness of self-determination, secession and statehood processes, specifically within the context of newly formed states through UNC secessions. Additionally, this section will expand on the act of secession – a corollary process in certain cases of self-determination – from which the notion of state recognition can be properly analyzed and its significance defined from both the legal and political perspectives.

2.2.1. History of Statehood in International law

The birth of independent states in Europe relates closely to the development of the concepts of statehood, recognition and self-determination in international law. Indeed, the rise in unilateral secessions in the 18th and 19th centuries provides a clear example of how the concepts evolved since the development of European statehood starting in early 17th and 18th century Europe.¹⁵² According to Fabry, a clear connection can be drawn between the birth of European states and their respective state recognitions through the Westphalia Treaties, which are “conventionally understood as ushering in sovereignty as a new mode

¹⁵¹ Crawford, “The Creation of States”, *supra* note 22 at 108.

¹⁵² John Dugard, “The Law of State Secession in the Wake of the Kosovo Advisory Opinion” in *Collected Courses of The Hague Academy of International Law* (Hague, Hague Academy of International Law, 2011) vol 357 195 at 36 [Dugard, “The Law of State Secession”].

of political and legal organization.”¹⁵³ Although this claim is not universally accepted,¹⁵⁴ Fabry points out that:

Mindful of possible pitfalls of being too categorical about the exact date of origin of [state] institutions, two points can be made about the early phase of recognition of new states. It could emerge as a full-fledged and discrete practice only once European countries came to regard themselves as forming a large association of formally like entities and once positive law of this association gained a distinct foothold over natural law as its defining institution.¹⁵⁵

As can be deduced from Fabry’s analysis, state recognition is not only connected with the birth of European statehood, but also with the general secularization of classical international law that began to take place towards the end of the 18th century¹⁵⁶ (also known as the rise of legal positivism¹⁵⁷). Thus, in order to better understand the geopolitical landscape of 18th century-Europe, it is necessary to present a short summary of a number of important historical events which furthered the development of the concept of statehood in relation to classical international law.

The principle of European legitimism (also known as dynastic legitimism) dominated the nature of statehood up until the 18th century. Grant describes it as the “prevalent theory of sovereignty during the age of monarchy.”¹⁵⁸ At its core, this model

¹⁵³ Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (New York: Oxford University Press, 2010) at 23.

¹⁵⁴ *Ibid* (“[w]hile Martin Wight finds some evidence of modernity as early as the Council of Constant (1414-18), F H Hinsley argues that we can only talk about a fully formed system of independent states since the beginning of the eighteenth century...” at 24).

¹⁵⁵ *Ibid* at 23.

¹⁵⁶ The first “writings on recognition of new states can be traced to the German jurists Jacob Moser (1778), Johann von Steck (1783), and George-Friedrich von Martens (1789).” Their works rose in importance due to an increased interest of legal positivism towards the end of the 18th century, which sought to define the practice of states as a way to formulate legal guidance for the creation of new states moving forward. See *ibid* at 24.

¹⁵⁷ See Currie, *supra* note 23 ([l]egal positivism is “[g]enerally characterized by three core suppositions. First, true law is created only by a “laying down” of that law, at a discrete point in history. Second, this “laying down” must be performed by a sovereign entity. Third, such laws are effective, even if unjust when measured against some other, moral (or natural law) standard. Thus, for extreme positivists, law exists only to the extent that it is effectively imposed by a sovereign power, and it persists as law even if viewed as unjust by some other measure” at 15).

¹⁵⁸ *Ibid* at 8.

rested upon the ‘principle of inheritance’¹⁵⁹ – whereby the monarch had personal ownership of the land and had a “historic right to rule the state.”¹⁶⁰ In essence, even if monarchs were to be dethroned, they would continue to reign as the rightful sovereign of their lands and properties. While this concept was firmly entrenched up until and throughout 18th century-Europe, it began to lose traction after the American and French Revolutions, and was abandoned altogether in 1918 after the disappearance of “the four great monarchies (Germany, Austria-Hungary, Russia and Turkey).”¹⁶¹ As mentioned in the previous sub-section, this disappearance can be attributed *prima facie* to the rise of liberalism. The liberalist school of thought, as promulgated by scholars such as John Locke, Jean-Jacques Rousseau, and Immanuel Kant, believed that citizens of states were the ‘source of political authority’¹⁶² rather than the monarch. This belief was based on the notion that humans had the ability to reason and were therefore “capable of determining the political direction of their countries.”¹⁶³ Additionally, the liberalist school posited that, for a government to be legitimate, “it must be based on the will of the people – those subject to it – and not on the ‘benevolent will of kings.’”¹⁶⁴ According to Locke, a prolific scholar of the liberalist school, the consent of the people was the key element to the foundation of states.¹⁶⁵ With the declining notion of dynastic legitimism in Europe, the notion of statehood became more and more secularized, and consequently developed as part of a custom of democratic and mostly-independent states. Additionally, the decline in the legitimacy of unprovoked foreign conquests (apart from the Napoleonic era) was also responsible for advocating for a system of independent states by way of recognition.¹⁶⁶ Nonetheless, two major events are said to have been the primary catalysts for the development of the concept of state recognition from a political to a legal concept:

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* at 9.

¹⁶² *Ibid* at 24.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ John Locke, *Second Treatise of Government* in Peter Laslett ed., John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988) at 384.

¹⁶⁶ Fabry, *supra* note 153 at 26.

respectively, they were the American and French revolutions of 1776 and 1789.¹⁶⁷ It is necessary to elaborate on the circumstances that led to their commencement, as well as their subsequent influence on the Congress of Vienna¹⁶⁸ which solidified the notion of independent states in Europe.

The matter of recognizing an emerging state, created through a manner other than dynastic European legitimism, can be traced back to the proclamation of independence by the thirteen colonies to create the United States of America (US) on July 4, 1776. In particular, the issue of recognizing a former colony became a notion of concern for many European states, who were forced to consider the potential diplomatic and military implications of such an action. Hence, for nearly a decade after the proclamation, support for the US was only expressed by-proxy by powerful imperialist states such as France and Netherlands, which were favourable to the revolution, but in a bid not to inflame a new European conflict, promoted their interests and their support to the US revolutionaries through private companies or secret organizations.¹⁶⁹ More specifically, while both states refused to officially recognize the sovereignty of the United States, they supplied it with advisors and military arms to support the American war effort against

¹⁶⁷ *Ibid.*

¹⁶⁸ "Congress of Vienna" in Britannica Academic, Encyclopaedia Britannica, online: <www.academic.eb.com> ([t]he "Congress of Vienna, [was an] assembly [which took place] in 1814–15 that reorganized Europe after the Napoleonic Wars. It began in September 1814, five months after Napoleon I's first abdication and completed its "Final Act" in June 1815, shortly before the Waterloo campaign and the final defeat of Napoleon. The settlement was the most-comprehensive treaty that Europe had ever seen. The Final Act of the Congress of Vienna comprised all the agreements in one great instrument. It was signed on June 9, 1815, by the "eight" (except Spain, which refused as a protest against the Italian settlement). All the other powers subsequently acceded to it. As a result, the political boundaries laid down by the Congress of Vienna lasted, except for one or two changes, for more than 40 years. The statesmen had successfully worked out the principle of a balance of power. However, the idea of nationality had been almost entirely ignored—necessarily so because it was not yet ready for expression. Territories had been bartered about without much reference to the wishes of their inhabitants. Until an even greater settlement took place at Versailles after World War I, it was customary for historians to condemn the statesmen of Vienna. It was later realized how difficult their task was, as was the fact that they secured for Europe a period of peace, which was its cardinal need. The statesmen failed, however, to give to international relations any organ by which their work could be adapted to the new forces of the 19th century, and it was ultimately doomed to destruction").

¹⁶⁹ Fabry, *supra* note 153 at 27.

Britain.¹⁷⁰ Eventually, the Netherlands recognized the United States in 1782 by “admitting Adams [US representative] as minister plenipotentiary and thus acknowledging the United States as a sovereign state.”¹⁷¹ Subsequently, Britain conceded and recognized US independence in a peace treaty in 1783. The consequences of this example of recognition are summarized by Fabry:

The United States became widely recognized and thus admitted into international society only after it had become acknowledged as independent by its parent country. To treat it as a sovereign state before this acknowledgment was considered by most states to be a hostile act violating the rights of the British crown...The American case revealed other important things in regards to state recognition. It demonstrated the fate awaiting unrecognized entities: before its acknowledgment and despite the assertions of the Declaration of Independence, the United States could not sign international treaties, have diplomatic relations, form formal military alliances, raise foreign loans, join international organizations, or benefit from regularized trade and commerce. Its survival depended almost solely on its internal strength.¹⁷²

Finally, France recognized the United States through a treaty with US commissioners in 1788.¹⁷³ Although the recognition of the United States established a precedent in dynastic Europe for the creation of states through ‘consent of the governed’,¹⁷⁴ another event in the same century created a lasting effect that would impact European dynastic legitimacy in particular: the French Revolution of 1789. The French Revolution was a further disruption to the “order based predominantly on the rule of legitimate royal houses.”¹⁷⁵ As previously mentioned, actions such as the passing of the *Declaration of Man and of the Citizen* which acknowledged the right of peoples to freely choose their government, were not readily accepted by the rest of the European community. On the contrary, as a result of Napoleonic defeat, such notions were disregarded entirely until the early 20th century.¹⁷⁶

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid* at 33.

¹⁷² *Ibid* at 34-5.

¹⁷³ *Ibid* at 29.

¹⁷⁴ *Ibid* at 37.

¹⁷⁵ *Ibid* at 36.

¹⁷⁶ *Ibid* at 37.

Although the French Revolution espoused the notion of self-determination, contradictions persisted with respect to how it could be administered as a principle of a newly secularized and universal customary law. By acknowledging that the principle of self-determination was valid not simply for France, but for the entire world, the French revolutionaries decided that they had the ultimate obligation to propagate this right to the peoples of the world. In other words, they believed that France had a right to interfere in the affairs of foreign states so long as it meant the reinstatement of the ‘will of the governed’.¹⁷⁷ Although, as previously mentioned, this idea failed in large part through the defeat of Napoleon in 1815; a consensus on allowing new states to be formed without the consent of their original sovereign state was disavowed entirely if such ‘independence’ came as a result of a foreign invasion or occupation. Fabry suggests that this claim confirms two points with regards to the concept of statehood in the 19th century:

International legitimacy in the pre-1815 period clearly centered on the notion of state rights in customary international law, which, given that most states were hereditary monarchies, was taken to imply dynastic rights...[and] the insistence on these rights despite changes in effective statehood (i.e., appearance and disappearance of *de facto* states) shows that the ability to take effective control of a territory, whether from within or without, could not, by itself, establish legitimate titles.¹⁷⁸

Stated otherwise, the pre-1815 history of state recognition began through a reverberation of dynastic legitimism, leading to the development of certain precedents as a result of the subsequent revolutions in the United States and France. Additionally, the occupation of territory, which occurred frequently during this time on account of multiple intra-state armed conflicts in Europe, did not lead to an acquiescence of *de jure* land rights.¹⁷⁹ These two points should not be disregarded with respect to state recognition. In fact, they could be said to be precursors to the ensuing dissolution of euro-centric colonial empirical model of statehood and the extensive decolonization of the world which took place

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid* at 41.

¹⁷⁹ Thomas D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Westport, Praeger, 1999) at 71.

towards the end of the 19th and 20th centuries.¹⁸⁰ The next sub-section will explore the impact of these two points as a result of the conceived pre-1815 understanding of state recognition, leading to analyze the concepts that emerged as a result of its relative success in Europe: self-determination and secession.

The American and French Revolutions of 1776 and 1789 led to an overturn of the European dynastic order; however, it was another area of the world that would usher in a new era of sovereignty. Between 1810 and 1830, Central and South America “witnessed the birth of twelve new countries.”¹⁸¹ In fact, according to Fabry, it was here (and not in Europe) that dynastic legitimacy received “its first sustained blow.”¹⁸² More precisely, as colonies seceded from their colonizing states, a debate raged around the question of whether an existing state’s recognition was a *sine qua non* for statehood or not.¹⁸³ For example, multiple scholars at the time could not come to a consensus on whether an existing state’s recognition legitimized a secession in the eyes of the classical international legal system. As per Anderson:

[For example,] Pufendorf maintained that the existing state's recognition was necessary for a secessionist entity to obtain statehood. A priori, an entity created by consensual or unilateral secession must enjoy the existing state's recognition before statehood could be legally conferred. Other early scholars, however, such as Vattel, took a different view, arguing that the existing state's recognition was unnecessary.¹⁸⁴

Nevertheless, even as scholars were unable to come to a consensus on the legal strength of state recognition, one potential theory observes that the debate on the legitimacy of state recognition as a legal requirement for statehood could be considered as settled from 1809, as “various Spanish colonies declared their independence from Madrid and

¹⁸⁰ The era of decolonization that took place towards the end of the 19th and 20th centuries refers to the process by which colonies were granted independence. The importance of this process is integral to understanding the roots of the principle of self-determination. See Rahmatullah Khan, ed, “Decolonization” in Max Plank Encyclopedia of Public International Law (Oxford University Press) online: <www.opil.ouplaw.com>.

¹⁸¹ Fabry, *supra* note 153 at 49.

¹⁸² *Ibid.*

¹⁸³ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 51.

¹⁸⁴ *Ibid* at 52.

functioned without any effective Spanish opposition for over a decade.”¹⁸⁵ It goes on to claim that although the US feared a potential military conflict with Spain, it felt pressure to recognize the former Spanish colonies in an effort to encourage the secession of colonized states from colonial rule. Subsequently, in June 1822, “contrary to Spanish desires, U.S. President James Monroe extended recognition to Colombia. Similarly, the British extended recognition to Argentina in February 1825, Colombia in April 1825, and Mexico in December 1826.”¹⁸⁶ It is clear from these examples that the consent of Spain was not considered by the US in recognizing its former colonies, thereby changing the previous custom which dictated that recognition be granted to a seceding colony only after the official recognition of the secession by the colonizing state. On a side note, even though the *de facto* recognition of secessions became an “undisputed standard of recognition in America and the Americas,”¹⁸⁷ its challenge to legitimist powers established a new standard in customary international law which assumed that the newly formed state would observe and be bound by all international treaties concerning it, prior to its accession to statehood.¹⁸⁸ Although this notion imposed a respect for a legal system derived from the same colonizing states that conquered territories in the first place, the challenge to the status quo imbued the first step in throwing off the yolk of legitimist powers in former colonies.

Nevertheless, the disagreements on the legitimacy of *de facto* and *de jure* state recognitions had not been resolved towards the end of the 18th century.¹⁸⁹ It was only in the middle of the 19th century, and with a crumbling Ottoman Empire, that states began to realize that state recognition plays an important role in the political formation process of statehood. As further explained by Frowein:

In the 19th century some examples of collective recognition became important. Art. 7 *Paris Peace Treaty* (1856) ([1855–56] 114 CTS 409) was

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Fabry, *supra* note 153 at 106.

¹⁸⁸ This view would eventually be enshrined in Article 3 (4) 1 of the VCLT. See *VCLT*, *supra* note 12, art 3 (4) 1. See also Fabry, *supra* note 153 at 106.

¹⁸⁹ Jochen Frowein, ed, “Recognition of States” in Max Planck Encyclopedia of Public International Law (Oxford University Press) at para 3, online: <www.opil.ouplaw.com>.

generally seen as a collective act with regard to admission and recognition of Turkey as a member of the European legal order. [Additionally,] the *Berlin Congress* (1878) amounted to the collective recognition of territorial changes and the independence of several States formerly under Turkish sovereignty.¹⁹⁰

Through the Paris Peace Treaty, the debate around state recognition now reemerged with a focus on collective recognition of statehood, and whether it provided legal status to a newly formed state or not. Eventually, this debate led a congregation of states to sign the *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*¹⁹¹ (commonly known as the *Montevideo Convention*) in 1933. The Convention set out four criteria as necessary for a state to achieve legitimacy under international law. According to the Convention,

[t]he state as a [legal] 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 the other states.¹⁹²

Nonetheless, the vagueness of the four criteria, coupled with their applicability to a changing dynamic of statehood in the 20th century, has not solved the issue of determining a strict set of rules required in order for an entity to become a state under international law. In many ways, this has left the emergence of new states in the 20th and 21st centuries, a matter of open and contested debate. Notwithstanding the fact that the extent of the Conventions' influence has been a matter of contested debate,¹⁹³ it must be noted nonetheless that it continues to serve as the cornerstone of modern statehood in the 21st century, with the 'classical criteria' of statehood continuing to define the effectiveness and existence of a 'state' under international law.¹⁹⁴

¹⁹⁰ *Ibid* at para 4.

¹⁹¹ Fabry, *supra* note 153 at 36.

¹⁹² *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, 26 December 1933, 165 LNTS 19 art 1 (entered into force 26 December 1934) [Montevideo Convention].

¹⁹³ The debate is explained through the three theories of recognition, expanded on in detail in subsection 1.2.5.

¹⁹⁴ James Crawford, ed, "State" in Max Planck Encyclopedia of Public International Law (Oxford University Press) online: <www.opil.ouplaw.com> [Crawford, "State"] ("[w]hat may be called the 'classical' criteria for statehood involved incidents of the exercise of effective power by an authority

As the Montevideo requirements set out the only codified legal guidelines for obtaining statehood in the early 20th century, an important question began to be posed after the First World War: under what conditions should an entity be refused statehood. In other words, are there conditions or circumstances under which a state should refuse to recognize an emerging state?¹⁹⁵ Frowein explains the importance of considering this question, as the actions of an emerging state and its relations with other states cannot be ignored if its statehood claim of may be illegitimate. He explains this dilemma in the following manner:

To establish what States consider to be the essential criteria for statehood, it is more expedient to consider under which circumstances they refuse recognition as a State (Non-Recognition). There are two main reasons why States have withheld full recognition although, at least on the face of it, some entity resembling a State existed. The reason most frequently given is lack of independence in relation to a State which has brought the new entity into existence by unlawful intervention... It is this reason which was advanced for the non-recognition of Manchukuo as a Japanese ‘puppet-State’ in the 1930s or of Croatia as a German creation of that sort in the 1940s... A second reason, which was used to withhold recognition in the case of Rhodesia (Rhodesia/Zimbabwe), was the fact that independence had been brought about by a white minority government in a former colonial territory in the 1960s. The clear lack of any act of self-determination was seen as justifying non-recognition.¹⁹⁶

Put differently, the violation of peremptory norms of international law such as the unlawful use of force (military intervention and invasion)¹⁹⁷ or denial of the right to self-determination for all peoples within an emerging state, could delegitimize the emerging states’ bid for statehood from an international legal perspective, and consequently alienate it from recognition by other states.¹⁹⁸ The importance of complying with

over a territorial community, and the representation of the community in its relations with like communities” at para 13).

¹⁹⁵ Frowein, *supra* note 189 at para 6.

¹⁹⁶ *Ibid* at para 4.

¹⁹⁷ The only legal guidelines that can prevent a secession from turning into an armed conflict (peaceful settlement of disputes) are outlined in the United Nations Charter. See *UN Charter*, *supra* note 21.

¹⁹⁸ For more on how compliance with peremptory norms of international law has become integral to the state formation process in contemporary international law, see generally Raic, *supra* note 13 at 156-7; Crawford, “The Creation of States”, *supra* note 22 at 107; Anderson, “The Use of Force”, *supra* note 9 at 239-40.

peremptory norms as part of the statehood formation process will be expanded on in more detail towards the end of this chapter; however, the connection between the process of statehood formation and the concept of state recognition cannot be ignored when analyzing the principle of self-determination.

In sum, the history of state recognition emerged out of a dying European dynastic order. Although the revolutions in France and the United States disseminated the notions of self-determination and elected government, state recognition remained largely a symbolic measure until the early 19th century. Through the development of the definition of statehood in international law, a positivist campaign to codify its requirements ended with the signing of the *Montevideo Convention* in 1933. Although the Convention emerged as the foundation for the contemporary requirements of statehood, it failed to engender change in the legal interpretation of the statehood formation process in the face of decolonization and conflict (specifically, for ‘peoples’ seeking self-determination.)¹⁹⁹ Further, throughout and after the First and Second World Wars, the concept of statehood shifted from embracing self-determination, to its incorporation into the decolonization campaign orchestrated by the United Nations in the early 1960s. However, state recognition reemerged as a contested subject in the wake of the dissolution of the Soviet Union. In fact, through the adoption of the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*,²⁰⁰ which set the stage for a more modern interpretation of statehood requirements for emerging states in Eastern Europe, it became less clear whether state recognition can continue to be interpreted as a symbolic rule under international law. In order to solve this issue, the next sub-section will explore the connection of state recognition with the act of secession, as well as its relationship with the principle of self-determination and the concept of state sovereignty. This will be accomplished through a brief contemporary analysis of the Montevideo criteria, as well as a summary of the issues posed by its applicability to secessions completed on the basis of self-determination. Subsequently, a summary of the three theories of recognition will

¹⁹⁹ Frowein, *supra* note 189 at para 12.

²⁰⁰ *European Community: Declaration on the Guidelines on the Recognition of New States* (1992) 31:6 ILM 1485 at 1485-87.

demonstrate the strength of the declaratory theory of recognition in cases of external self-determination, establishing the importance of considering the legal aspects of a UNC secession, rather than relying on its recognition by other states as a way of legitimizing its existence.

2.2.2. The “Montevideo” criteria explained

The challenge of interpreting the four criteria of statehood outlined in the Montevideo Convention is that “...[i]nternational law does not impose rigid or arbitrary quantitative criteria when it comes to [their] requirements. There must be some territory, some permanent population, some effective government and enough independence to enter into international relations.”²⁰¹ Therefore, when looking at each criterion individually, it becomes evident that their classical definition is viewed more as a flexible legal rule rather than a rule of law *strictu sensu*. In order to demonstrate this, as well as how the arbitrariness of the criteria impacts the act of secession, a careful study of each criterion is necessary.

The first criterion requires a state to have a defined territory. The debate over what is meant by the term “defined” has led scholars to suggest that its most fair interpretation, is that a defined territory must be based on territorial boundaries that the state in question agrees upon (even if such territorial boundaries are contested by other states.)²⁰² This is supported by two ICJ cases, *North Sea Continental Shelf*²⁰³ and *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*.²⁰⁴ The only instance where this claim could be challenged is where a state consistently changes its boundary claims for a ‘defined territory’. For example:

...Serbian Krajina's attempted secession from Croatia failed to satisfy the defined territory criterion, due to the constantly shifting nature of its external borders. It was unclear, for instance, which municipalities were

²⁰¹ Currie, *supra* note 23 at 189.

²⁰² James Crawford, “Personality and Recognition, Recognition of States and Governments” in James Crawford, ed, *Brownlie's Principles of Public International Law*, 8th ed (London: Oxford University Press, 2012) at 128 [Crawford, “Personality and Recognition”].

²⁰³ *North Sea Case*, *supra* note 67 at 32.

²⁰⁴ *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, [1994] ICJ Rep 6 at 52.

included within Serbian Krajina and which were excluded...²⁰⁵

Therefore, as can be seen through this example, a defined territory can be claimed by an emerging state, under the condition that the original boundary claim cannot be changed once an act of secession is initiated.

The second criterion requires that a state have a permanent population. Concerning the stringency of the term ‘permanent’, the *Western Sahara*²⁰⁶ advisory ruling pointed out that a population of a territory *does not* need to be permanent in the sense of its constant habitation within the confines of the claimed territory.²⁰⁷ This view has been supported by most scholars when analyzing claims of land title based on a permanent population criterion in remote communities such as the Arctic, Antarctic and northern parts of Greenland for example.²⁰⁸ Consequently, this criterion can be interpreted as requiring only that a defined population, considered as inhabiting within a defined territory, exist for a claim of statehood to be made legitimate.

The third criterion requires a state to have an effective government. Out of the four criteria, this one has proven to be the most complex in its interpretation, in particular with regards to its applicability in cases of decolonization.²⁰⁹ For example, Anderson suggests that the challenge of the traditional definition of the concept can be seen through “two interrelated limbs: first, there should be a political, executive, and legal structure for the purpose of regulating the population; and second, this political, executive, and legal structure must be effective, which means that it must be able to project authority throughout the population...”.²¹⁰ Of note is that this interpretation has shifted with the emergence of the principle of self-determination, which has affirmed that a government of a state does not have to be fully *effective* in order for this criterion to have been

²⁰⁵ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 14.

²⁰⁶ *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 at 61.

²⁰⁷ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 15.

²⁰⁸ For example, see *Legal Status of Eastern Greenland* (Denmark v Norway) (1933), PCIJ (Se A/B) No 53; *Canadian Sovereignty Claims in the Arctic* cited in Currie, *supra* note 23 at 339.

²⁰⁹ Raic, *supra* note 13 at 104, 364.

²¹⁰ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 22.

satisfied.²¹¹ Nevertheless, this interpretation has not been universally accepted by contemporary legal scholarship. For example, Crawford provides an alternative view, claiming that the effective government criterion is central to the existence of the state. This is evidenced by the fact that "...territorial sovereignty is not ownership but governing power with respect to territory."²¹² The challenge with accepting that a state must have an effective government *prima facie* is that it becomes exclusionary in cases of unilateral secessions, specifically when an entity secedes to form an emerging state, yet whose government does not possess the capacity to execute its functions as a state (legislative, executive and/or judicial). As an entity invoking its right to self-determination could unilaterally secede on the basis of that right, the effectiveness of its government could not meet the requirements of effectiveness, as interpreted by Crawford, at the time of the secession. Thus, the question can be asked: in that particular scenario, does the entity lose its legal personality as a new state on the basis of it not meeting the requirement of having an effective government? The answer may lie in the 'compensatory force principle', which, as suggested by Raic and Anderson, can explain the exceptional status of a state government post-secession:

In the second half of the twentieth century...the effective government criterion has been modified by the law of self-determination. This modification-termed by Raic the "compensatory force principle" has ensured that a state created by UNC secession and in conformity with the right of peoples to self-determination will *not* be required to strictly satisfy the effective government criterion. Conversely, contemporary international law indicates that a state created by UNC secession in violation of the right of peoples to self-determination will be simply unable to satisfy the effective government criterion. On this basis, it might be asserted that the effective government criterion has been reformulated as coextensive with

²¹¹ Examples include Bangladesh and Croatia, whose governments at the time of their attainment of statehood were in principle; not effective. Nevertheless, their eventual attainment of statehood attests to the fact that the principle of self-determination has been extended beyond the colonial context, and consequently, supports the argument that a government of a new state does not have to be fully effective. See Raic, *supra* note 13 at 364.

²¹² Crawford, "State", *supra* note 194 at para 46. See also Crawford, "Personality and Recognition" *supra* note 202 at 49, 129; John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987) at 78-9 [John Dugard, "Recognition of UN"]; Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Netherlands: Brill & Nejhoff, 2004) at 180.

the right of peoples to external self-determination.²¹³

State practice has also supported the existence of the compensatory force principle. In fact, multiple cases of state secessions during the decolonization era of the 1960s, such as Guinea-Bissau, Algeria, Angola and Republic of Congo, provide evidence of how a state can be created without an effective government in place.²¹⁴ Outside of the decolonization context, states created by UNC secessions on the basis of systematic denials of self-determination such as Kosovo, Bangladesh and Eritrea have similarly been granted statehood without governments that were considered *effective* at the time.²¹⁵ *A priori*, it can be concluded that a putative state must have at least a *functioning* government; however, full effectiveness of the government is not a stringent requirement in cases of self-determination, and must be carefully analyzed on a case-by-case basis, as in the case of Kosovo, where a complete absence of government did not preclude it from obtaining statehood.²¹⁶

The fourth and last criterion requires that a state must have the capacity to enter into relations with other states. Crawford and Anderson both agree that this criterion is actually a combination of both the effective government criterion and a ‘fifth’ criterion of independence.²¹⁷ As independence is a crucial factor in cases of UNC secessions (even more-so in cases of self-determination),²¹⁸ a consortium of scholars has advocated for its inclusion into the contemporary criteria for statehood.²¹⁹ There is widespread agreement that the criterion can be divided into two categories, formal and actual independence. Formal independence refers to the seceding entity as being self-governed, deriving its rule of law from domestic legislation such as a constitution or a declaration of

²¹³ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 22-3. See also Raic, *supra* note 13 at 104.

²¹⁴ *Ibid* at 23.

²¹⁵ *Ibid* at 30-1.

²¹⁶ Paul R Williams, “Earned Sovereignty: The road to resolving the conflict over Kosovo’s final status” (2002) 31:3 *Denv J Intl L & Poly* 387 at 406.

²¹⁷ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 45.

²¹⁸ See *Island of Palmas Case* (Netherland, USA) (1928) II Rep of Intl Arbitral Awards 829 at 838.

²¹⁹ For a long list of scholars who have suggested the inclusion of this criterion, see Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 43-7, nn 160-174.

independence. Conversely, actual independence stipulates that the state must take its own directives with regards to its independence. In other words, a *bona fide* statehood must exist which ensures that the state acts on its own will and in good faith without foreign interference.²²⁰ Stated otherwise, both categories of independence must exist concomitantly. Therefore, the criterion of having the capacity to enter into relations with other states relies on the requirements of formal and actual independence. This interpretation must be carefully considered, given that a state without independence or an effective government (even in the ‘not-entirely effective’ sense) will be unable to enter into relations with other states, and hence, may not earn legal personality under international law.²²¹

In sum, the four criteria, although fundamental to the conceptualization of statehood in international law, are vague in their respective definitions while still representing a flexible legal rule under international law. The most convincing factor evidencing this claim is that independence, although not officially recognized under the Convention, “...remains a central criterion for statehood.”²²² Nevertheless, it should also be noted that the concept of independence can be correlated directly with the concept of sovereignty, which “can be notoriously vexing to define.”²²³ In large part, this is due to the fact that state sovereignty should presumably acknowledge a state’s ability to act independently. The next sub-section will explain this correlation, as well as how the concepts of sovereignty and state recognition fit into the tenets of the modern conceptualization of statehood under international law.

2.2.3. Sovereignty, Statehood and Recognition

Identifying the characteristics of a state which grant it ‘legal personality’ is a challenging task. Apart from referencing the Montevideo criteria, no general agreement exists on the matter, leading one to rely on scholarly opinion to understand the concept of

²²⁰ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 45.

²²¹ Crawford, “State”, *supra* note 194 at para 27.

²²² *Ibid* at para 26.

²²³ See Anderson, “Secession in International Law”, *supra* note 4 at 346.

a new state achieving sovereignty in both a legal and a political sense.²²⁴ As mentioned earlier, Sovereignty is of fundamental importance within the context of statehood as it defines the exclusive status of states within international law. No other entity possesses such an exclusive right and status. When consulting *opinio juris* on the subject, one is pointed to the words of Justice Alvarez who stated in his dissenting opinion in *Corfu Channel* that:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations upon them...²²⁵

Alternatively, in *Customs Regime Between Germany and Austria*,²²⁶ Justice Anzilotti interpreted sovereignty as factually being conflated with independence. He held that:

The term independence is no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no higher authority than that of international law.²²⁷

As can be seen from both definitions, the concept of sovereignty surpasses any criteria that may formulate statehood and by that fact is considered *jus cogens* in international law. This view is further expanded on by Crawford to include ‘international rights of a state’ as well:

In its most common modern usage, sovereignty is the term for ‘the totality of international rights and duties recognized by international law’ as residing in an independent territorial unit – the State. It is not itself a right, nor is it a criterion for statehood (sovereignty is an attribute of States, not a precondition).²²⁸

In demonstrating the potency of sovereignty as an attribute only subject to the overarching limits of international law,²²⁹ Crawford confirms that it is in fact a *qualified*

²²⁴ Frowein, *supra* note 189 at para 7.

²²⁵ *Corfu Channel Case (United Kingdom v Albania)*, Merits, [1949] ICJ Rep 4 at 43.

²²⁶ *Case of the Customs Regime Between Germany and Austria* (1931), Advisory Opinion, PCIJ (Ser A/B) No 41.

²²⁷ *Ibid* at 41,45, 47, Judge Anzilotti, individual opinion.

²²⁸ Crawford, “Creation of States”, *supra* note 22 at 34.

²²⁹ Anderson, “Secession in International Law”, *supra* note 4 at 348.

and not an *absolute* right. In other words, a state can assert sovereignty and legal jurisdiction only over its own territory, and is restricted only by the limits imposed on it by international law through treaties, customs and general principles.²³⁰ Indeed, by concluding that sovereignty is not absolute, it can equally be inferred that a unilateral secession's withdrawal of territory from part of an existing state to create a new one, by virtue of that separation, also leads to a withdrawal of sovereignty and legal title from the existing state's territory.²³¹ Thus, once the territory has withdrawn from the existing territory to create a new state, a final step looks to the recognition of the new territory as playing an important role in its existence. The next sub-section will explore the role of state recognition in greater detail, outlining the three theories of recognition, and establishing whether the role of state recognition in international law is simply a symbolic act acknowledging the legitimacy of the state or an absolute *sine qua non* for statehood under international law.

2.2.4. Three Theories of Recognition in International Law

As previously mentioned, the theoretical approach to recognition was initiated in response to the growing confusion surrounding the creation of new states. In other words, it was developed in order to establish an understanding of the requirements for statehood beyond the *Montevideo Convention* criteria.²³² Additionally, as statehood in international law derives its roots from a euro-centric concept founded during the era of European imperialism, the understanding that states are not a creation of international law, rather that international law is premised on their existence, must be emphasized.²³³ Moreover, the practice of states towards recognition in the past century has consistently focused more on the grounds for non-recognition of emerging states, paving the way to suggest that statehood will not be granted if an egregious violation of international law was

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² Raic, *supra* note 13 at 93-4.

²³³ Beat Dold, "Concepts and Practicalities of the Recognition of States" (2012) 22 *Swiss Rev Intl & Eur L* 81 at 83.

committed as part of the statehood formation process.²³⁴ This section will briefly summarize the three main theories of recognition: collective-constitutive, declaratory and constitutive, with the objective of confirming the reasons for which the declaratory theory is considered as the primary theory that explains the role of recognition under existing international law.

2.2.4.1. The Collective and Collective-Constitutive Theories

The collective and collective-constitutive theories of international law stipulate that recognition by other states is a *sine qua non* for statehood.²³⁵ The most significant difference between the two theories is that the collective-constitutive theory suggests that *collective* recognition by states is a *sine qua non* for statehood, whereby the collective theory of recognition stipulates that any number of states (even individual states) can grant their recognition to acknowledge a state's legal existence. Although both theories tend to focus on the creation of new states in the 20th century, no mention of support for the constitutive theory can be found when referencing international treaty law.²³⁶ On the contrary, in regards to the collective-constitutive theory, suggestions of recognition as being implicitly connected to membership in the United Nations (UN) do exist.²³⁷ One such suggestion looks at Article 4 of the UN Charter as evidence that "admission to the UN is tantamount to the conferral of statehood by collective means."²³⁸ Several issues exist with this claim. First, the term 'state' was used specifically in the wording of Article

²³⁴ Examples of putative states that have not achieved statehood on the basis of alleged violations of peremptory norms during the statehood formation process include: Turkish Republic of Northern Cyprus (TRNC), Abkhazia, South Ossetia and Transnistria. Additionally, it should be noted that a clear indication is given when states express the belief that a certain entity that they do not recognise as a state is nevertheless bound by international law. See e.g. *ibid* ("[f]or example, Israel and Arab states have refused to recognise each other but have not contended that the other party is devoid of legal obligations. Indeed, failure to adhere to the rules of international law (which can only be committed by a subject of law) is sometimes adduced as a ground for non-recognition" at 84). See also Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 4.

²³⁵ Martin Dixon, *Textbook on International Law*, 7th ed (London: Oxford University Press, 2013) at 133.

²³⁶ Anderson, "Secession in International Law", *supra* note 4 at 365.

²³⁷ *Ibid* at 366.

²³⁸ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (New York: Frederick A. Praeger, 1964) at 79.

4 (1) of the *UN Charter* to contrast the wording in Article 1(2) of the *League of Nations Covenant*,²³⁹ which granted membership to “any fully governing State, Dominion or Colony.”²⁴⁰ The exclusion of such entities was intended to avoid the admission of member-states not considered as having the status of a sovereign state. Second, as suggested by Anderson, when analyzing the *travaux préparatoires* of the UN Charter, a response to the “Norwegian proposal to endow the UN with the power to recommend collective recognition of statehood was discarded.”²⁴¹ In essence, both constitutive and constitutive-collective theorists see the consent of states as the ineluctable feature for obtaining statehood under the current system of states. Nevertheless, scholars have not entirely discarded support for the collective recognition theories. For example, Dugard indicates that there are several major issues with the arguments that interpret collective recognition as having weak legal standing under international law. First, the implication that a ‘state is a state through the recognition of other states’, suggests that there is no absolute existence of states.²⁴² A primary example of this is Kosovo, which exists as an independent state (as confirmed through its acknowledgement by over 100 states);²⁴³ however, its non-recognition by a number of powerful states such as Russia,²⁴⁴ India²⁴⁵ and China²⁴⁶ implies that, to them, Kosovo does not exist as a state and thus cannot be granted the same international rights as other sovereign states. Similar issues occurred during the Cold War with the recognitions and non-recognitions of East and West

²³⁹ *Covenant of League of Nations*, *supra* note 135, art 22.

²⁴⁰ *Ibid*, art 1(2).

²⁴¹ Anderson, “Secession in International Law”, *supra* note 4 at 366, n 127.

²⁴² Dugard, “The Law of State Secession”, *supra* note 152 at 45.

²⁴³ See “International recognitions of the Republic of Kosovo” *Ministry of Foreign Affairs of Kosovo* (30 February 2017), online: <www.mfa-ks.net/?page=2,224> (this link contains the most up to date list of states who have recognized Kosovo’s statehood).

²⁴⁴ See “Slim Odds: Why Does Kosovo Seek Recognition by Russia, Spain?”, *Sputnik News* (24 February 2017), online: <www.sputniknews.com> (see quote on official Russian position with regards to recognizing the independence of Kosovo).

²⁴⁵ See Sachin Parashar, “India to support Serbia’s stand on Kosovo in UN” *Times of India* (21 September 2008), online: <www.timesofindia.indiatimes.com> (see quote on official Indian position with regards to recognizing the independence of Kosovo).

²⁴⁶ Lindsay Beck, “China’s U.N. envoy speaks out against Kosovo move” *Reuters* (18 February 2008), online: <www.reuters.com> (see quote on official Chinese position with regards to recognizing the independence of Kosovo).

Germany, and North and South Vietnam and Korea by the US and the USSR. It should be noted that efforts were made to prevent this from occurring. Writing shortly after 1945, scholars such as Hersch Lauterpacht and Hans Kelsen suggested that an obligation must be imposed on states to recognize new states on condition that they fulfill the Montevideo criteria for statehood; however, their suggestions failed in large part due to the reluctance of states to impose rigid guidelines to the formation of statehood in the 20th century.²⁴⁷

Second, the constitutive theory suggests that a non-recognized state has no rights or obligations vis-à-vis other states so long as it remains unrecognized.²⁴⁸ According to Dugard, this has also proven to be untrue when applied against state practice. For example, Israel, although not recognized by multiple states in the Middle East, maintains its international legal obligations and vice versa.²⁴⁹ In fact, a growing scholarship maintains that non-recognized states are being held accountable for violations of peremptory norms of international law.²⁵⁰ Additionally, an extension of this argument claims that the dissolutions of Yugoslavia and the Soviet Union created a set of new guidelines for the recognition of states.²⁵¹ In essence, “[t]hese Guidelines provided that recognition should only be granted to states that respect the provisions of the UN Charter, guarantee the human rights of any ethnic and national minorities, respect the inviolability of internationally recognized boundaries, subscribe to nuclear non-proliferation and meet international standards regarding human rights.”²⁵² However, as discussed by Anderson, this interpretation has also been found to have no legal basis:

The legitimacy of this claim, however, is highly suspect. To begin with, the long title of the Guidelines—Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union—inherently suggests that they are targeting acts of *recognition* and not the conferral of statehood. This view is also borne out by reference to the language employed throughout the Guidelines, which arguably suggests that new states may exist prior to recognition...Had the Guidelines been

²⁴⁷ Dugard, “The Law of State Secession”, *supra* note 152 at 46.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.* See also Crawford, “The Creation of States”, *supra* note 22 at 26.

²⁵⁰ Dold, *supra* note 233 at 92.

²⁵¹ See *supra* note 144.

²⁵² Anderson, “Secession in International Law”, *supra* note 4 at 367.

intended to propound a constitutive approach to recognition, paragraph four would more than likely have employed the words ‘entity’, ‘territorial entity’ or ‘putative state’ in place of the word ‘state’.²⁵³

As can be deduced from Anderson’s analysis, a close interpretation of the guidelines confirms that they are indeed nothing more than just that – guidelines – which are meant to serve as a threshold for considerations of recognition for newly formed states.²⁵⁴ In sum, the constitutive and constitutive-collective theories possess serious legal gaps. The leading legal theory – the declaratory theory of recognition – addresses those gaps by emphasizing a more juristic approach to the international law on statehood, rather than a reliance on the act of state recognition.

2.2.4.2. The Declaratory Theory

The declaratory theory rests on the premise that recognition of a putative state by other states is *not a sine qua non* for statehood.²⁵⁵ Stated succinctly, the declaratory theory of recognition establishes that the recognition of states, although an important symbolic gesture, is not a legal requirement of statehood. Although the UN Charter does not explicitly address this recognition, “[r]egional treaties...indicate support for the declaratory approach. [Specifically,] Article 3 of the Montevideo Convention and Articles 13 and 14 of the Charter of the Organization of American States suggest that statehood antedates recognition, thereby supporting the declaratory recognition theory.”²⁵⁶ Additionally, customary international law has historically insisted on the applicability of international law norms in cases of aggression or conflict by both recognized and non-recognized states.²⁵⁷

In December 1974 the General Assembly adopted the nonbinding Definition of Aggression, Article 1 of which provided that “[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, ‘where “the term ‘State’ . . . [i]s used without prejudice to questions of recognition or to whether a State is a

²⁵³ *Ibid.*

²⁵⁴ *Ibid* at 368.

²⁵⁵ *Ibid* at 361.

²⁵⁶ *Ibid.*

²⁵⁷ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 53.

member of the United Nations’.²⁵⁸

This is important to note as the next three chapters will demonstrate that, although a right for a UNC secession is permitted under international law, the process by which an entity becomes a state is of equal importance as the act of secession itself. More precisely, the violation of peremptory norms as part of the statehood process by an UNC secessionist entity will lead to the rejection of its statehood as part of the obligation of non-recognition. Prior to moving into a summary of the relative state practice with regards to UNC secessions, it is necessary to briefly expand on this point.

As pointed out by Judge Skubiszewski in the *Case Concerning East Timor (Portugal v Australia)*,²⁵⁹ in the context of a breach of a peremptory norm (in this case, it was the illegal use of force), the rule of non-recognition as a result of such a breach exists in a self-executing function.²⁶⁰ In essence, this signifies that “individual states are legally obligated to not extend recognition to UNC secessionist entities that have violated peremptory norms during their formative process.”²⁶¹ Additional jurisprudential evidence with regards to the legal obligation of non-recognition can also be found in the *Namibia Advisory Opinion*.²⁶² In that Case, the ICJ opined that each state is

Under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.²⁶³

Fundamentally, the court imposed an obligation on each state to alienate and deny any legitimacy to a state which has breached a peremptory norm of international law. If one applies this analogy to the case of a putative state committing the same offence, it can be

²⁵⁸ *Ibid* at 54.

²⁵⁹ *Case concerning East Timor (Portugal v. Australia)* [1995] ICJ Rep 90 at 90,92 [*East Timor Case*].

²⁶⁰ See dissenting opinion of Justice Skubiszewski, *ibid* at 262-63.

²⁶¹ See Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 90.

²⁶² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at 16.

²⁶³ See Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 121.

concluded that the notion of compliance with peremptory norms as a requirement of contemporary statehood has crystallized into a customary international law.²⁶⁴

As can be reasoned from the statement above, the complexity of analyzing putative statehood inevitably comes back to the issue of collective-recognition of the putative state by existing states.²⁶⁵ In response to the claims by scholars such as Dugard²⁶⁶ or Devine²⁶⁷ that compliance with peremptory norms is not a requirement for statehood due to its legitimization via the collective recognition of states, Anderson points to the fact that this argument establishes a two-state system in international law; “first, those that exist in international law and have legal effect; and second, those that exist in international law and do not have legal effect.”²⁶⁸ This is problematic for several reasons. If a state can exist by virtue of satisfying the statehood criteria, but has no legal personality on the basis of its violation of peremptory norms as part of its formation process, the international legal order of sovereign states can be said to have had its threshold for statehood dissipated. This argument cannot be accepted for the simple reason that any UNC secessions that have been found to violate peremptory norms of international law are only granted legal effect by states that ignore international law on the basis of their foreign policies. In other words, Russia may grant legal effect to Abkhazia through the signing of cooperation treaties;²⁶⁹ however, this neither grants Abkhazia international legal personality, nor does it validate the illegality of the treaties

²⁶⁴ The legal obligation of non-recognition is supported by ICJ rulings such as *Case Concerning East Timor (Portugal v. Australia)* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*. Support can also be found for this principle in Article 4 (d) of the 2005 African Union Non-Aggression and Common Defence Pact and Articles 40 and 41 of the Articles on Responsibility of States for Internationally Wrongful Acts 2001 by the International Law Commission. For supporting scholarship and jurisprudence on the legal obligation of non-recognition, see Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 96, nn 355-9.

²⁶⁵ John Dugard, “Recognition of UN”, *supra* note 212 at 130.

²⁶⁶ *Ibid.*

²⁶⁷ Derry J Devine, “Rhodesia since the Unilateral Declaration of Independence” (1973) 1:1 *Acta Juridica* 86 at 86.

²⁶⁸ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 69.

²⁶⁹ See “Putin Signs Law Ratifying Russia-Abkhazia Strategic Partnership Treaty” *RadioFreeEurope – Radio Liberty*, (4 February 2015), online: <[www. www.rferl.org](http://www.rferl.org)> (See confirmation of ‘treaties’ signed and ratified by Russia and the breakaway Republic of Abkhazia, internationally recognized as a part of the Republic of Georgia).

sub silentio. Similarly, the rejection of the TRNC as a state both through domestic law in Britain²⁷⁰ and through international law²⁷¹ cannot be superseded by the fact that Turkey granted the TRNC ‘legal effect’ through its recognition. Without analyzing the details of the TRNC and Abkhazian secessions; one common factor can be identified which prevents either entity from being granted legal personality regardless of their claim to a right of external self-determination; the fact that multiple peremptory norms were violated as part of their respective secessions and subsequent annexations in Cyprus and Georgia respectively.

In conclusion, it can be suggested that compliance with peremptory norms of international law is a precondition for a successful UNC secession to emerge as a state in international law. As pointed out by Anderson, major scholarly opinion supports this view, with prominent scholars such as Raic²⁷² and Crawford²⁷³ enlisting their support to the establishment of a newly emerged international legal standard for statehood which states that "...the existence of a State under international law is to be determined on the basis of (a) criteria based on the concept of effectiveness (the traditional criteria) and (b) criteria based on legality [compliance with peremptory norms]."²⁷⁴

Now that this point has been clarified, it is necessary to return to the issue of state practice with regards to the declaratory theory of recognition. Additional examples of state practice that reaffirm the declaratory interpretation include such incidents as Britain seeking compensation from Israel for a downed military jet (even though Britain still had not recognized Israel as a state), or several states in the Middle-East making claims against Israel’s alleged violations of the UN Charter while equally not recognizing its

²⁷⁰ John Dugard, “Recognition of UN”, *supra* note 212 at 131.

²⁷¹ See *Security Council Resolution 541*, SC Res 541, UNSCOR, S/Res/541 (1983) at 15; *Security Council Resolution 550*, SC Res 550, UNSCOR, S/Res/550 (1984); *Loizidou v Turkey* (1996), 10 ECHR 1, 21 EHRR 188 at 2216, 2224-5.

²⁷² Raic, *supra* note 13 at 156.

²⁷³ Crawford, “The Creation of States”, *supra* note 22 at 107.

²⁷⁴ Raic, *supra* note 13 at 167.

status as a state.²⁷⁵ In addition to most scholars supporting this view,²⁷⁶ multiple judicial decisions have reaffirmed the declaratory nature of recognition in international law.²⁷⁷

Some of the more recent examples,

...can be found in the decisions of the Badinter Arbitration Commission, established to advise the European Peace Conference on Yugoslavia. In its Opinion No. 1, handed down on 29 November, 1991, the Commission stated that “the effects of recognition by other states are purely declaratory.” This position was reiterated by Opinion No. 8, handed down on 4 July 1992, which held that “recognition of a State by other States [only has] declarative value . . . Support for the declaratory recognition theory is also arguably found within the Canadian Supreme Court advisory opinion, *Reference re Secession of Quebec*. There, the court noted that although recognitions would be politically advantageous for a newly seceded Quebec, they would not be a *sine qua non* for statehood. Indeed the court explicitly held that “recognition by other states is not . . . necessary to achieve statehood.”²⁷⁸

Notwithstanding the popular support for the declaratory theory in international law, several issues have been identified as challenging its legitimacy which must be addressed.²⁷⁹

First, as the declaratory theory relies profoundly on the *Montevideo Convention* criteria,²⁸⁰ two challenges can be raised to the fact that “[i]n the first instance, these criteria may be objectively ascertainable, but in practice, it is left to each State to decide subjectively whether the criteria have been met...[and in the second]...the Montevideo criteria are no longer the only criteria for statehood, but there is no certainty as to

²⁷⁵ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 55.

²⁷⁶ Dugard, “The Law of State Secession”, *supra* note 152 at 47.

²⁷⁷ Some judicial decisions that have reaffirmed this include *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, [1996] ICJ Rep 595 at 661,668.; *Quebec Secession Reference*, *supra* note 145 at para 142.; “*Deutsche Continental Gas Gesellschaft c. Etat polonais*” [*Deutsche Continental Gas Gesellschaft v Polish State*] (2010) II Bréviaire de jurisprudence intl [handbook of international jurisprudence] at 1272. For more evidence on this reaffirmation, see Stefan Talmon, “The Constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?” (2005) 75:1 Brit YB Intl L 101 at 107, n 35.

²⁷⁸ Anderson, “Secession in International Law”, *supra* note 4 at 369.

²⁷⁹ Dugard, “The Law of State Secession”, *supra* note 152 at 47.

²⁸⁰ Talmon, *supra* note 277 at 105.

precisely what the new criteria are.”²⁸¹ To summarize, the question of how many criteria exist in the modern conceptualization of statehood is often left unanswered by the declaratory theorists. Although such criticisms are salient in that they point out a general vagueness of the *Montevideo Convention* criteria, the obscure interpretations of existing law are prevalent in large areas of public international law and thus are not exclusive to the issue of state recognition. Moreover, the consistency of *opinio juris* through state practice with regards to state recognition, has exacerbated the notion that it exists *de lege lata*, denoting its existence as part of customary practice limited to the sovereign decision of each existing state.²⁸²

A second major criticism of the declaratory theory is that it recognizes that a state may exist without the recognition of other states.²⁸³ In other words, if a state can exist without recognition by other states, this would indicate that, logically, it cannot enter into relations with other states, not complying with the fourth criterion of statehood under the *Montevideo Convention*.²⁸⁴ Although this claim has merit, an *a contrario* reading of this requirement suggests that the criterion for entering into relations with other states does not indicate a threshold for demonstrating a capacity to enter into relations with other States.²⁸⁵ Rather, a state can exist insofar as it meets the requirement of formal independence, meaning, for example, that the state in question must not be considered a proxy state or basing its actual independence on a foreign occupation. In other words, this indicates that, hypothetically, a state can exist, even if a number of other states do not recognize its existence. Kosovo and Israel are prime examples of states which remain unrecognized *de jure* by a number of states, yet remain active in the international community, which by majority, accepts their legal status as such.²⁸⁶ In essence, this criticism can be downgraded to the indication that a state can exist (regardless of how

²⁸¹ Dugard, “The Law of State Secession”, *supra* note 152 at 47-9.

²⁸² Crawford, “The Creation of States”, *supra* note 22 at 22-3.

²⁸³ Dugard, “The Law of State Secession”, *supra* note 152 at 48.

²⁸⁴ *Ibid.*

²⁸⁵ Anderson, “Secession in International Law”, *supra* note 4 at 370.

²⁸⁶ For evidence of this, see section 2.2.4 on the three theories of recognition.

many states recognize it),²⁸⁷ insofar as it meets the Montevideo criteria, and has not been created in violation of peremptory norms (via foreign state occupation, illegal use of force, violation of territorial inviolability etc.). In reality, a state created out of such a violation would be neither granted legitimacy nor be recognized by the international community, while a state created in accordance with international law would. Therefore, there is a very small probability that a state created in accordance with international law will be left alienated by the majority of the international community. Concerning those entities that were created through a violation of peremptory norms of international law, examples such as South Ossetia and Abkhazia (recognized only by Russia, Nicaragua, Venezuela and Nauru)²⁸⁸ or the Turkish Republic of Northern Cyprus (TRNC – recognized only by Turkey),²⁸⁹ indicate that, apart from alienation by the international community, from an international law perspective, their status as ‘states’ is illegal and infringes on the territorial sovereignty of their metropolitan states (in this case, Georgia and Cyprus respectively).²⁹⁰

A final criticism of the declaratory theory is how it interprets and explains the concept of failed states.²⁹¹ It is claimed that the declaratory theory does not adequately explain how a failed state is able to fulfill the third and fourth criteria of the *Montevideo Convention*.²⁹² Examples of perceived failed states include Somalia, South Sudan and

²⁸⁷ Israel, Taiwan and Kosovo are examples of states that although not-recognized by a number of states around the world, retain their legal status’ as states due to their statehood formation processes not being in violation of peremptory norms of international law.

²⁸⁸ On the recognition of South Ossetia and Abkhazia by Nauru, Russia, Nicaragua and Venezuela, see Grant Wyeth, “The Sovereign Recognition Game: Has Nauru Overplayed Its Hand?”, *The Diplomat* (17 May 2017), online: <www.thediplomat.com>.

²⁸⁹ Crawford, “The Creation of States”, *supra* note 22 at 143-7.

²⁹⁰ The majority of world states consider South Ossetia and Abkhazia to be under *de facto* Russian occupation. For more on this see, James Ker-Lindsay, *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States* (Oxford: Oxford University Press, 2012) at 113-5 [Ker-Lindsay, “Counter Secession”]. Similarly, the TRNC, is only recognized by one state, Turkey, while the most states’ official foreign policy sees Turkey’s military presence in the TRNC as an illegal occupation. For more evidence of views on the TRNC by the international community, see Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 75 n 277.

²⁹¹ Dugard, “The Law of State Secession”, *supra* note 152 at 53.

²⁹² *Ibid.*

Yemen, among others.²⁹³ Although constitutive-collective theorists such as Dugard are correct in pointing out that a failed state will find it difficult to prove that it has an effective government or a capacity to enter into relations with other states, the preponderant legal issue in responding to this argument lies in the principle of effectiveness as applied to the two aforementioned criteria.²⁹⁴ In applying the principle of effectiveness to the individual cases of failed states, it can be seen that, regardless of the effectiveness of a government or its overall capacity to enter into relations with other states, there is yet to be a case of a pre-existing state that has not been able to fulfill either of the two criteria. This fact is applicable across the spectrum of failed states. Even in Somalia or North Korea, an internationally-recognized government, which represents the territory of the state, is able to enter into relations with other states through a functioning government (even if the effectiveness of that government can be questionable). Therefore, it can be suggested that this argument functions more on the basis of analyzing the legal status of the government of a state, a concept that has been rejected by international law as representing the legal status of the state itself.²⁹⁵ Moreover, as mentioned earlier, the issue of recognition of new states in the 21st century has been connected to the rise in unilateral secessions, and therefore the role of state recognition must be developed to focus on the legality of secession itself, rather than the act of

²⁹³ The majority of world states consider South Ossetia and Abkhazia to be under *de facto* Russian occupation. For more on this Ker-Lindsay, "Counter Secession", *supra* note 290 at 113-5. Similarly, the TRNC, is only recognized by one state, Turkey, while the most states' official foreign policy sees Turkey's military presence in the TRNC as an illegal occupation. For more evidence of views on the TRNC by the international community, see Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 75, n 277.

²⁹⁴ *Ibid* at 13.

²⁹⁵ The recognition of governments in international law is a contentious issue. Generally, the challenge in recognizing a government stems from the level of foreign interference that may have led to the election or usurpation of power by that government. For example, should the United States have recognized the Taliban government as it was recognized by other entities during the Taliban rule in the 1990's? Two opposing doctrines exist in international law on recognizing governments. Namely, these are the Estrada Doctrine and the Tobar Doctrine. The former encourages the recognition of governments through a non-interference approach. Notably, this has been leveled against regime change spurred, supported and at-times executed by other governments. The latter refers to what Dr. Julian Tobar Donoso considered an obligation on behalf of the recognizing state; the consideration of human rights abuses, legitimacy and fair elections among other things. See Currie, *supra* note 23 at 209.

recognizing a state, which typically follows it. The next section will further address this point by identifying the circumstances under which a right of a UNC secession is permitted under international law.

2.3. A Right to UNC Secession

In 2016, while speaking to the European Subcommittee of the United States Congress, Paul Williams, President and Co-Founder of Public International Law and Policy Group, estimated that there were more than 60 ongoing national self-determination conflicts around the world.²⁹⁶ Additionally, he alleged that, since 1990, half of the world's active armed conflict zones involved disputes related to self-determination, with an estimated civilian death-toll of over 20 million.²⁹⁷ Clearly, questions of the applicability and the use of self-determination have become prevalent in the contemporary world, and hence, call for a principled solution that can be justified under international law.

As previously mentioned, the principle of self-determination has been affirmed as a legal right through both state practice and numerous international legal instruments. Although this has established the legal right to self-determination; it has not clarified whether that legal right encompasses the right to a UNC secession. One of the most difficult questions that the right to self-determination fails to clearly answer is: to which peoples can this right be applied to? In other words, although it is clear that such a right was granted to peoples requesting independence during the era of decolonization,²⁹⁸ the scope of its applicability to peoples outside of the decolonization context is less clear and hence, requires further examination. With that said, an approach to defining the right of a unilateral secession outside of the colonial context requires confirmation as well.

Anderson approaches this issue in the following manner:

Unlike many other human rights, self-determination is applicable to groups, or "peoples" (defined as a nationally-based substate group) that are

²⁹⁶ "United States Policy Toward National Self-Determination Movements" online: <www.foreignaffairs.house.gov/> at 4.

²⁹⁷ *Ibid.*

²⁹⁸ Oeter, "Self-Determination", *supra* note 95 at 387.

empowered to "freely determine their political status and freely pursue their economic, social and cultural development." This means that should a people within an existing state be systematically and egregiously denied this right, then the prospect of UNC secession will become available. Thus, should a people within an existing state be denied their right to internal self-determination, then a right to external self-determination, or UNC secession, will arise.²⁹⁹

Although Anderson provides a clear interpretation of the principle of self-determination, the right to secede under certain conditions must not be interpreted as an *absolute* right of secession in every instance of denial of internal or external self-determination. Indeed, the legal basis for a UNC secession can be found in customary international law as a qualified right which is permissible *only* under certain conditions.

As part of customary international law, two requirements must be satisfied in order for the law to be deemed as admissible: state practice and *opinio juris*. Prior to moving forward, it is necessary to briefly propound on the two criteria, specifically with regards to their interpretation as it pertains to UNC secessions. In short, a

...mere textual articulation of a qualified right to UNC secession in declaratory General Assembly resolutions, without other concomitant state practice, such as grants of recognition in response to UNC secessionist disputes, will not constitute a binding rule of customary international law. This is because the requisite element of *opinio juris* will not have been satisfied.³⁰⁰

This component of customary international law is vital in understanding from where a *qualified* right to a remedial UNC secession derives its legality. As mentioned in the introductory section of this thesis, although it can be generally agreed that state practice is a vital component of customary international law, the threshold for the uniformity of that practice has changed over time. Anderson refers to this 'change of threshold' as the 'new species of *opinio juris*'.³⁰¹ He explains that

²⁹⁹ Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 8.

³⁰⁰ *Ibid* at 10.

³⁰¹ It is important to underline that *opinio juris* recognizes declarations and UN resolutions as formulating a part of the operative and normative evidence in customary international law. For evidence of this, see the 'two-stage test' on non-intervention in Nicaragua ICJ Judgment, *supra* note 68 at paras 188, 205 cited in Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 ([s]tage

This new species of *opinio juris* tailored to the context of declaratory General Assembly Resolutions would seem to contradict the more traditional formulation, as expressed in the *Lotus Case* and *North Sea Continental Shelf Cases*, which provided that *opinio juris* could only be established after a train of *consistent* state acts or omissions attended by the requisite psychological belief that such acts or omissions were rendered legally obligatory.³⁰²

Indeed, the nature of *opinio juris* first questioned and consequently overturned the previous notion of customary international law as requiring consistent state practice in order to become accepted law. As further explained by Oscar Schachter,

...in place of a practice that began with the gradual accretion of acts and subsequently received the imprimatur of *opinio juris*, the Court reversed the process: an *opinio juris* expressed first as a declaration would become law if confirmed by general practice [instead of *consistent* practice].³⁰³

This view of a more enhanced notion of *opinio juris* is also supported by Tullio Treves who suggested that

...the practice relevant for establishing the existence of a customary international rule must neither necessarily include all States, nor must it be completely uniform. Whatever oppositions of behaviour and of opinion there may have been in the formative stage of the rule, the existence at a given time of the rule requires that the generality of States consider the rule as binding.³⁰⁴

Fundamentally, apart from the general practice of states, other sources of law such as diplomatic correspondence, *travaux préparatoires*, *procès verbaux*, policy statements,

one: "*Opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions...The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves... [Stage two:] [n]otwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions: first, what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law?" at 10).

³⁰² *Ibid* at 11 [emphasis added].

³⁰³ Oscar Schachter, *New Custom: Power, Opinio Juris and Contrary Practice*, in Jerzy Makarczyk, ed, *Theory of International Law at the Threshold of the 21st Century* (The Hague: Kluwer Law International, 1996) at 531-2.

³⁰⁴ Tullio Treves, ed, "Customary International Law" in Max Planck Encyclopedia of Public International Law (Oxford University Press) at para 35 online: <www.opil.ouplaw.com>.

press releases, the opinions of government legal advisers, official manuals on legal questions [etc.], can be considered to formulate a customary practice alongside *opinio juris*.³⁰⁵ Specifically, such forms of correspondence can be considered to formulate customary practice where the language of “key words and phrases of UN instruments remain[s] ambiguous and obscure.”³⁰⁶ This is vital to underlining the existence of a qualified right to a UNC secession under international law, and more importantly, a right to the use of force by a third state in cases of UNC secessions where human rights abuses by the existing state reach levels deemed to be *in extremis*. Therefore, in utilizing this understanding of both state practice and *opinio juris* as forming customary international law, it can now be established where the qualified right of UNC secession derives its legality from.

The legal basis for UNC secessions finds its genesis in Principle 5 paragraph 7 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* (Friendly Relations Declaration).³⁰⁷ A closer analysis of Principle 5 reveals that states found to be conducting themselves in violation of the principle of equal rights and self-determination will inevitably not be protected by the beginning of paragraph 7, which reaffirms that there is no authorization for “any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”³⁰⁸ Thus, it can be concluded that the respect for the territorial integrity and sovereignty of a state can only exist where the state represents its peoples’ internal self-determination rights without distinction.³⁰⁹ Anderson explains this requirement in the following manner:

³⁰⁵ Crawford, “The Creation of States”, *supra* note 22 at 24.

³⁰⁶ Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1202. See also VCLT, *supra* note 12, arts 61, 31 (1), 32 (a); Crawford, “The Creation of States”, *supra* note 22 at 383-4.

³⁰⁷ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 8, n 22.

³⁰⁸ Declaration of the Granting of Independence, *supra* note 5; *Friendly Relations Declaration*, *supra* note 144, Principle 5 (7).

³⁰⁹ Representing a population without distinction to creed, race, or religion is affirmed in GA Res 50/6, *supra* note 23, art 1 [emphasis added] cited in Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 10, n 24.

The Friendly Relations Declaration therefore allows self-determination to predominate over state sovereignty and territorial integrity in the event of deliberate, sustained, and systematic human rights violations against peoples. By doing so, the Declaration draws a link between internal and external self-determination: the neglect of the former provides justification for the invoking of the latter, which may be exercised by UNC secession. This is a seminal development, challenging—albeit modestly—the long-entrenched incontrovertibility of state sovereignty and territorial integrity.³¹⁰

Notably, Anderson is certainly neither the first, nor the only, scholar to perceive the *Friendly Relations Declaration* as allowing a qualified right to a UNC secession. For example, Cassese has equally suggested that

...although secession is implicitly authorized by the [Friendly Relations] Declaration, it must however be strictly construed, as with all exceptions. It can therefore be suggested that the following conditions might warrant secession: when the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure. Thus, denial of the basic right of representation does not give rise *per se* to the right of secession. In addition, there must be gross breaches of fundamental human rights, and, what is more, the exclusion of any likelihood for a peaceful resolution within the existing State structure.³¹¹

As can be interpreted from both analyses, the implied authorization of a UNC secession can be found within the *Friendly Relations Declaration*. This analysis has been shared by an extensive list of legal scholars, albeit with varying levels of acknowledgement to the circumstances under which a right to a UNC secession exists, can exist or may exist.³¹²

The significance of the *Friendly Relations Declaration* has also been recently mentioned in the *Kosovo Advisory Opinion* by the ICJ. As part of the Advisory Opinion, an emphasis on the respect for the right of self-determination, as well as the

³¹⁰ Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1221.

³¹¹ Cassese, “Self-Determination of Peoples”, *supra* note 6 at 119–20.

³¹² For an exhaustive list of legal scholars, as well as their respective legal opinions on the issue, see Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1221-5, n 172.

consequences of ignoring that right, become abundantly clear. For example, Judge Abdulqawi Yusuf held that

...if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State.³¹³

Equally, Judge Cançado Trindade contested in a separate opinion that

Recent developments in contemporary international law were to disclose both the external and internal dimensions of the right of self-determination of peoples: the former meant the right of every people to be free from any form of foreign domination, and the latter referred to the right of every people to choose their destiny in accordance with their own will, if necessary — in case of systematic oppression and subjugation — against their own government. This distinction challenges the purely inter-State paradigm of classic international law. In the current evolution of international law, international practice (of States and of international organizations) provides support for the exercise of self-determination by peoples under permanent adversity or systematic repression, beyond the traditional confines of the historical process of decolonization. Contemporary international law is no longer insensitive to patterns of systematic oppression and subjugation.³¹⁴

Nevertheless, the opponents of a qualified right to a UNC secession³¹⁵ generally claim that the right is largely hypothetical and ‘is therefore limited to an *obiter dictum*’ reading

³¹³ *Advisory Opinion on Kosovo*, *supra* note 145, 618-22 at paras 11-12, Justice Yusuf, separate opinion.

³¹⁴ *Ibid* at para 184, Justice Trindade, separate opinion.

³¹⁵ There is a group of scholars who oppose the existence of a qualified or absolute right to remedial secession in international law, see generally Katherine Del Mar, “The Myth of Remedial Secession” in Duncan French, ed, *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013); Gregory H Fox, “Self-Determination in the Post-Cold War World: A New Internal Focus?” (1995) 16 *Mich J Int’l L* 733; Simone van den Driest, “Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law” (2015) 62 *Neth Int’l L Rev* 329; Antonello Tancredi, “Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia” (2008) 18 *Italian YB Intl L* 37; Johan D van der Vyver, “Self-Determination of the Peoples of Quebec Under International Law” (2000) 10 *Florida State J Transnatl L & Poly* 22; James Myall, “Non-Intervention, Self-Determination and the New World Order” (1991) 67 *Intl Aff J* 421.

of the aforementioned ICJ case and UN declarations.³¹⁶ Additionally, another argument claims that most legal scholars do not firmly admit that a qualified right to secession *exists* under international law, rather opting for the conclusion that it *may* exist instead.³¹⁷ For example, Jure Vidmar states that

...the relevant judicial decisions and academic writings do not provide sufficient evidence to suggest that in international legal doctrine, remedial secession is a universally-accepted entitlement of oppressed peoples. But...the idea underlying remedial secession—the last resort for ending the oppression of a certain people— can still influence the recognition policies of states.³¹⁸

Vidmar's point is relevant in that it provides a well-articulated opinion of those that argue for the existence of a right to a UNC secession. However, as previously mentioned in this sub-section, the obscure language of a UN document *can* find clarification through an assessment of secondary correspondence. Thus, when assessing such criticisms with regards to the right of a UNC secession as existing in the *Friendly Relations Declaration*, it is necessary to consider that

...the answers [to the criticisms leveled by opponents of remedial secession such as Vidmar] lie in the declaration's drafting, which, as the *travaux préparatoires* reveal, was split between opposing viewpoints: those states that favored the inclusion of a qualified right to UNC secession and those states that did not. The communist bloc, with its traditionally more open stance towards self-determination, argued in favor of an inherent right to UNC secession. This was opposed by many Western and African states, however, which felt that self-determination did *not* include such a right, qualified or otherwise. Confronted with these opposing viewpoints, the representative for the Netherlands suggested a compromise that allowed for UNC secession in circumstances where 'basic human rights and fundamental freedoms . . . were not being respected.' To satisfy the group of states opposed to any right of UNC secession, paragraph 7 was thus crafted to avoid any overt mention of UNC secession, even though an *a contrario* reading reveals that it was implicitly made under certain circumstances.³¹⁹

³¹⁶ Vidmar, "Remedial Secession", *supra* note 54 at 39.

³¹⁷ James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Leiden: Martinus Nijhoff, 2007) at 347.

³¹⁸ Vidmar, "Remedial Secession", *supra* note 54 at 40.

³¹⁹ Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1228.

If the *Friendly Relations Declaration* is interpreted in this manner, the evidence behind the negotiations of this Declaration become evident; the right to a UNC secession exists *only* insofar as the peoples of a particular state “are subjected to deliberate, sustained, and systematic discrimination on the grounds of ‘race, creed or colour’, which includes racial, religious, linguistic, cultural, and customary discrimination.”³²⁰

Additionally, it is necessary to mention that the text of this Declaration has been “vicariously integrated into numerous subsequent General Assembly Resolutions [and Declarations].”³²¹ Some examples include the *Resolution on the Definition of Aggression*,³²² *Manila Declaration on the Peaceful Settlement of International Disputes*,³²³ *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*,³²⁴ *Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field*³²⁵ and the *Fiftieth Anniversary Declaration*.³²⁶ All of the aforementioned documents reiterate the text of Principle 5 (7) of the *Friendly Relations Declaration mutatis mutandis*, solidifying the existence of a qualified right to a UNC secession under customary international law.³²⁷

³²⁰ *Ibid* at 1228-9.

³²¹ *Ibid* at 1229.

³²² *Resolution on the Definition of Aggression*, GA Res 3314 (XXIX), UNGAOR, 29th Sess, UN Doc A/Res/29/3314 (1974) art 7 (3) [*Resolution on the Definition of Aggression*].

³²³ *Manila Declaration on the Peaceful Settlement of International Disputes Between States*, GA Res 37/10, UNGAOR, UN Doc A/Res/37/10 (1982) Art 2 (6).

³²⁴ *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, GA Res 42/22, UNGAOR, UN Doc A/Res/42/22 (1987) art 3 (3) [*Declaration on the Threat or Use of Force*].

³²⁵ *Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field* General Assembly resolution 43/51, GA Res 43/51, UNGAOR, UN Doc A/Res/43/51 (1988) art 3 (3).

³²⁶ *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res 50/6, UNGAOR, 56th Sess, UN Doc A/Res/50/6 (1995) art 1. It is crucial to point out that Article 1 of this Declaration reaffirmed the right of *all* peoples to self-determination, an important difference from the previous Friendly Relations Declaration text which purported to affirm this right based on *creed, race and colour*. A more in-depth analysis of the difference between the two texts and the definition of peoples’ will be done in Chapter 4 (section 4.4).

³²⁷ Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1229.

Lastly, it must also be mentioned that, although the aforementioned texts provide a qualified right to a UNC secession *prima facie*, they do so for cases of human rights abuses which can be considered as *in moderato* and *in extremis*. More precisely, human rights abuses such as systematic political oppression, which can be considered as human rights abuses deemed as *in moderato*, differs from the systematic denial of human rights coupled with their abuses that can include forced exile and migration, genocide and ethnic cleansing (that can be deemed as *in extremis*). This view is further expanded on by Christopher Borgen, who claims that

Jurists who interpret the law of self-determination [in this view] generally contend that any attempt to claim secession as a remedy must *at least* show that (a) the secessionists are a “people” (in a sense recognized by the international community); (b) the state from which they are seceding seriously violates their human rights; and, (c) there are no other effective remedies under either domestic law or international law.³²⁸

As the next paragraph will demonstrate, when analyzed side-by-side with state practice, only the qualified right to a UNC secession coupled with human rights abuses deemed as *in extremis* has been able to find support under customary international law.³²⁹

Now that the ‘new species of *opinio juris*’ has been defined, it is necessary to recognize the concomitant state practice with regards to the right to a UNC secession. Over the past fifty years, several cases stand out as providing evidence of state practice with regards to invoking a qualified right to UNC secession: Bangladesh, Croatia, East Timor, Eritrea and Kosovo to name a few.³³⁰ These cases share two common factors that legitimized their actions; their UNC secessions became legal “in response to human rights abuses *in extremis* (ethnic cleansing, mass killings, and genocide) as opposed to *in moderato* (political, cultural, and racial discrimination),” as well as an invocation to a right of self-determination which was subsequently denied without significant

³²⁸ Borgen, “Is Kosovo a Precedent?”, *supra* note 46 at 4.

³²⁹ Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1235, n 213. A more thorough clarification of human rights abuses *in moderato* vs *in extremis* will be provided in Chapter 5. For this Chapter, it is only necessary to keep in mind the concomitant state practice with the text in international legal instruments that confirms the right to a UNC secession.

³³⁰ Anderson, “Unilateral Non-Colonial Secession”, *supra* note 7 at 11.

consideration. On the basis of these examples, it can therefore be concluded that a right to a UNC secession exists in international law *only* as an *ultimum remedium*.³³¹

Nevertheless, it is important to reiterate that the objective of this thesis is to build on the concept of a right to a UNC secession, by proving that a right to the use of force by a third-state in support of a UNC secession exists under international law. The next chapter will define the ambit of the use of force in international law in order to demonstrate how its development throughout history and in contemporary times can be applied to cases of UNC secessions.³³²

³³¹ It should be noted that each case of UNC secession must be analyzed separately. Anderson, "A Post-Millennial Inquiry", *supra* note 13 (Anderson explains that "...this is especially the case when resolutions "declare" the law—whether customary or general principles—and the resolution is adopted by consensus (as with the Friendly Relations Declaration) or by unanimous or near unanimous vote (as with the Fiftieth Anniversary Declaration). In such cases, there is a strong presumption that the rules and principles contained within the declaration are legally binding obligations" at 1238).

³³² It should be noted that philosophical analyses of the concept of self-determination exist in both classical and modern international legal scholarship. Although these approaches are important contributions to the existing scholarship, it is beyond the scope of this thesis to summarize them in detail or use them as part of a theoretical analysis. Nevertheless, a thorough analysis of the applicability of the just war doctrine and the *jus ad bellum* will be completed in Chapter 3. Examples of scholars who have attempted to defend the right of self-determination on the basis of legal theory include: Lauri Malksoo, "Justice, Order and Anarchy: The Right of Peoples to Self-Determination and the Conflicting Values in International Law" (1999) IV *Juridica Intl* 75 at 75; Patrick Capps, "Natural Law and the Law of Nations" in Alexander Orakhelashvili, ed, *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar Publishing, 2011) at 72 ; Allen Buchanan, *Theories of Secession*, (1997) 26 *Philosophy and Public Affairs J* 31 at 36; Avishai Margalit & Joseph Raz, "National Self-Determination" (1990) 87:9 *439* at 443-9; McGee, "The Theory of Secession", *supra* note 54 at 463; Harald Borgebund, "Review Article: Modus Vivendi Versus Public Reason and Liberal Equality: Three Approaches to Liberal Democracy" (2015) 18 *Critical Rev Intl Society and Political Phil* 564.

Chapter 3

Chapter 3: State Creation & The Law on the Use of Force in International Law

As mentioned in Chapter 1, state creation through unilateral secession is controversial in both its application under international law and its effectiveness in the face of growing discontent with the act of secession in the contemporary world. Although state creation occurred more frequently throughout the 20th century in large part due to a number of armed conflicts and a period of decolonization, the legal dilemma of whether a state can be created through the use of force continues to split the legal scholarly community.³³³ Questions such as ‘could an oppressed peoples use force in order to create their own state?’³³⁴ or ‘how does state creation function when the entity in question is involved in an independence struggle?’, involve multiple layers of analysis, and hence, require a detailed study of the international law on the use of force *de lege lata*.

This chapter consists of two main parts. The first part will introduce the history and the general doctrine of the use of force in international law, as well as its current applicability as it pertains to the UN Charter. Subsequently, the second part of this chapter will focus on demonstrating how the contemporary doctrine on the use of force in international law can be applied to the creation of states, and consequently, its status within the context of direct and indirect third-state support of unilateral non-colonial secessions. Additionally, a clarification of how the use of force in self-determination conflicts is framed within the ambit of the doctrine of humanitarian intervention will be

³³³ Crawford, “The Creation of States”, *supra* note 22 at 375. See also Peter Radan, “Secession: A Word in Search of a Meaning” in Aleksandar Pavkovic & Peter Radan, eds., *On the way to Statehood: Secession and Globalisation* (Aldershot: Ashgate Publishers, 2008) at 15-9.

³³⁴ Internal conflicts typically involve an independence movement that uses force to fight against its oppressor (typically the state authorities). Since the conflict occurs within the confines of a sovereign state, it is usually classified as an internal conflict. For more on the difference between an internal and external armed conflict, see Kathleen Lawand, “Internal conflicts or other situations of violence – what is the difference for victims?” ICRC (12 October 2012), online: <www.icrc.org> (“A non-international (or “internal”) armed conflict refers to a situation of violence involving protracted armed confrontations between government forces and one or more organized armed groups, or between such groups themselves, arising on the territory of a State...In contrast to an international armed conflict, which opposes the armed forces of States, in a non-international armed conflict at least one of the two opposing sides is a non-State armed group”).

presented. This will be done in order to dispel the notion that an absolute obligation to a humanitarian intervention exists in international law, and further, to set the stage for the identification of the exception to the prohibition on the use of force as it pertains to UNC secessions. Accordingly, this will support the primary argument of this thesis: that an exception exists under international law for the external use of force by a third state in the event that a peoples' right of self- is systematically denied, and is coupled with human rights abuses deemed as *in extremis*.

3.1. General Doctrine of the Use of Force in International Law

The challenge of understanding the international law on the use of force begins with understanding its most enticing concept: that it “prohibits the use of force by states against other states, subject only to certain narrowly defined definitions.”³³⁵ The central international law on the prohibition on the use of force is found in Article 2(4) of the UN Charter which states that:

All 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.³³⁶

Although states do not agree on the exact meaning of Article 2(4),³³⁷ the ICJ in *Armed Activities on the Territory of Congo* has proclaimed it to be a founding principle of the

³³⁵ Currie, *supra* note 23 at 843.

³³⁶ *UN Charter*, *supra* note 21, art 2 (4).

³³⁷ Generally, this disagreement is around the threshold for the use of force and the thread for the use of force in international law. For more on this see Christine Gray, *International Law and the Use of Force*, 3rd ed, (Oxford: Oxford University Press, 2009) (“...there are disagreements between states as to the meaning of Article 2(4). There is a split between developed and developing states as to whether ‘the use of force’ includes not only armed force but economic coercion. There is also some debate as to what types of activities can amount to ‘use of force’ as opposed to intervention or mere law enforcement. The judgment in Nicaragua distinguished between, on the one hand, the arming and training of armed opposition forces, which could amount to an unlawful use of force, and on the other hand, the supply of funds, which could not. The recent arbitral award in *Guyana v Suriname* pronounced briefly and controversially on the distinction between threat of use of force and mere law enforcement. In another controversial ruling the Claims Commission held in Ethiopia’s *Ius ad Bellum* Claims that Eritrea had violated Article 2(4) through its use of force in defence of what a Boundary Commission subsequently decided to be its own territory” at 31).

UN Charter.³³⁸ Additionally it is suggested that “[s]tates and commentators generally agree that the prohibition is not only a treaty obligation but also customary law and even *ius cogens*, but there is no comparable agreement on the exact scope of the prohibition.”³³⁹ The questions surrounding the scope of the prohibition on the use of force inevitably fall within the category of territorial conflicts. After all, military incursions by Russia into Georgia in 2008, or military skirmishes in Nagorno-Karabakh between Armenia and Azerbaijan in 2016, are only two of the more recent examples that demonstrate that inter-state armed conflicts persist to this day.³⁴⁰ Although such examples may demonstrate that the prohibition on the use of force in international law is not absolute, it is still important to note its extensive development and implementation throughout time. Thus, prior to exploring the applicability of the *jus ad bellum* in contemporary international law, it is necessary to briefly summarize its history and the developments which led to its codification in the UN Charter.

3.1.1. History of *Jus ad bellum*

Attempts to limit the indiscriminate and unilateral use of force by States can be traced as far back as the ‘*iustum bellum*’³⁴¹ concept introduced by theologians such as

³³⁸ *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda); Request for the Indication of Provisional Measures, [2005] ICJ Rep 168 at para 148 [*Territory of Congo Case*].

³³⁹ Gray, *supra* note 337 at 30. For evidence that the prohibition for the use of force has been construed as a *jus cogens* norm in international law, see Nicaragua ICJ Judgment, *supra* note 68 at para 190; Gordon Christenson, “The World Court and Jus Cogens” (1987) 81 AJIL 1 at 93; Natalino Ronzitti, “Use of Force, Jus Cogens and State Consent” in Antonio Cassese, ed, *The Current Legal Regulation of the Use of Force* (Dordrecht: Nijhoff Publishers, 1986) at 147.

³⁴⁰ For literature on the territorial conflicts in the Caucasus region see Nina Caspersen, “From Kosovo to Karabakh: International Responses to de facto States” (2008) 56 Südost-Europa 1 at 58–83; Thomas de Waal, *The Karabakh Trap: Dangers and Dilemmas of the Nagorny Karabakh Conflict* (London: Conciliation Resources, 2009); Gregory Dubinsky, “The Exceptions That Disprove the Rule? The Impact of Abkhazia and South Ossetia on Exceptions to the Sovereignty Principle” (2009) 34 Yale J Intl L 241 at 241–6.

³⁴¹ It should be noted that the history between the just war doctrine and the history of the *jus ad bellum* can be considered as interrelated until the early 19th century. For a comprehensive history of the *jus ad Bellum*, see generally Stephen C Neff, *War and the Law of Nations. A General History* (Cambridge: Cambridge University Press, 2005); James Q Whitman, *The Verdict of Battle. The Law of Victory and the Making of Modern War* (Cambridge: Harvard University Press, 2012); Benedict Kingsbury & Benjamin Straumann, eds., *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010).

Plato (428-527), Saint Augustine (354–430) and, later, Saint Thomas Aquinas (1225–74).³⁴² For example, Saint Augustine undertook the task of applying the notion of justice to armed conflict. In doing so, he attempted to connect the dialectical teachings of Christianity with the concept of a *just* armed conflict that *in principio* would lead to a peaceful co-existence of society.³⁴³ Virtually half a century later, Saint Thomas Aquinas “[sought] to reconcile the Greek concept of natural law with Christian theology. Aquinas [held] that natural law is that by which God governs the universe-and...that man as a creature has the eternal law imprinted on him and by it derives the natural inclination to proper acts and ends.”³⁴⁴ For Aquinas, law served as a measurement of human activity, with the corresponding action resulting in the rule of reason satisfying a moral obligation.³⁴⁵ Consequently, this allowed him to write extensively on the notion of a *just war*. As expanded on by Nick Vorster:

...Aquinas’s classical discussion of just war is found in the *Secunda-secundae* part of *Summa Theologia* that gives a typology of the various virtues. This indicates his concern to place warfare within the overall moral scheme of the Christian aim of salvation. Aquinas distinguishes four cardinal virtues, namely prudence that applies reason to practical situations, justice that directs the will to good acts, and courage that helps us to act in situations of danger and temperateness that controls our sensual desires.³⁴⁶

Apart from the four cardinal virtues, Aquinas also outlined three criteria that should govern a just war: the war must be waged by a recognized authority (prince), the *causus belli* must be just (i.e. in response to an injury by an enemy) and lastly, the intent of the war must be done in good faith and to promote the common good, while negative consequences after the war, if egregious enough, could turn a just war into an unjust one *ex post facto*.³⁴⁷ These ‘criteria’ are important to keep in mind as they will re-emerge in

³⁴² Nico Shrivjer, “The Prohibition on the Use of Force” in Marc Weller, ed, *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015) at 465.

³⁴³ Brownlie, “Principles of IL, *supra* note 72 at 329.

³⁴⁴ John Igobogo Ebeth, “Thomas Aquinas’ Thought on Natural Law: A New Look at an Old Issue” (2016) 9:4 *Quaestio Iurijis* 2041 at 2042.

³⁴⁵ *Ibid.*

³⁴⁶ Nick Vorster, “Just war and virtue: revisiting Augustine and Thomas Aquinas” 2015 34:1 *South African J of Phil* 55 at 60.

³⁴⁷ Thomas Aquinas, *Summa Theologiae*, translated by Timothy McDermott ed (London: Thomas Moore Publishing, 1997) at 367-71.

the justifications for the acceptance of the legality of humanitarian intervention later in this chapter.

The early modern age (16th – 18th centuries), equally left an impact in post-Medieval Europe. In fact, developments during this time set the stage for the expansion of the just war doctrine throughout the Enlightenment period.³⁴⁸ Although these developments did not occur solely as a result of the work of Enlightenment-era scholars, historical, religious and territorial developments in Europe also contributed to the changing nature of how warfare was perceived in the early modern age:

During the first half of the 16th century, the context in which the old *jus ad bellum* operated radically changed. The Reformation caused the collapse of the religious unity of the Latin West and struck a mortal blow to the main pillars of authority—canon law and ecclesiastical jurisdiction—upon which the bridge between the doctrine and reality of just war rested. The discoveries and conquests in the New World necessitated a frame of reference for the laws of war other than those of Christian theology, canon and Roman law. The rise of great dynastic power complexes such as Habsburg Spain, Valois France, and Tudor England, out of which the modern sovereign states grew as well as the Military Revolution and the massification of armies, navies, and warfare it brought, denied the notion of war as a limited law enforcement action. All this brought important changes in the *jus ad bellum*, without however signaling the utter demise of the just war doctrine.³⁴⁹

These changes, coupled with a more humanistic vision of Europe allowed for important amendments to be made to the notion of what constitutes a ‘just war’. For example, Francisco de Vitoria, a theologian and scholar at the infamous *School of Salamanca*,³⁵⁰

³⁴⁸ Randall Lesaffer, “Too Much History: From War as Sanction to the Sanctioning of War” in Marc Weller, ed, *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015) at 39 [Lessaffer, “Sanctioning of War”].

³⁴⁹ *Ibid* at 39.

³⁵⁰ The School of Salamanca was infamous for its contribution to classical international law and its subsequent modernization and secularization. Some of its most famous scholars included Francisco de Vitoria, Francisco Suarez and Giovanni Botero. See Geoff Gordon, “Natural Law in International Legal Theory” in Anne Orford & Florian Hoffman, eds., *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016) at 279-305. See also, A H Snow, “The Law of Nations” (1912) 6 AJIL 890 at 890-2; Ignacio de la Rasilla del Moral, “Francisco de Vitoria’s Unexpected Transformations and Reinterpretations for International Law” (2013) 15:3 International Community L Rev 287 at 287-310; Martti Koskeniemi, “Empire and International Law: The Real Spanish Contribution” (2011) 61 UTLJ 1 at 1-36.

“introduced the concept of *bellum justum ex utraque parte* (war just on both sides) at the subjective level.”³⁵¹ This allowed for a more inclusionary vision of war that did not discriminate against a just or unjust side in a conflict, a significant development from the early theoretical tenets of Aquinas who suggested the opposite.³⁵²

Aquinas’ work was further developed on the subject of war by Hugo Grotius (1583-1645), who claimed individuals to have the same natural rights as states. As explained by Patrick Capps:

It is by this analogy that [Grotius was] able to claim that war is a form of punishment for those states which violate natural rights. To explain, in the same way as for natural human agents, natural law establishes a set of narrow natural rights which govern the conduct of states. The content of these natural rights are identical to those held by human agents. So, states have rights to their continued existence, their territory and property, to freedom from impediment on the high seas, and a right to have promises kept. From this final natural right, the agreements which states enter into through their direct and indirect consent are binding as a matter of natural law.³⁵³

In underlining the importance of natural law in state interaction, Grotius saw war as a form of punishment for the violation of that natural law – a method of restraint in an international system without a physical enforcement mechanism.³⁵⁴ Additionally, Grotius identified the *recto intentio* in war, which “implied that the war needed to be waged with the intention of doing justice, and ultimately, to attain a just peace.”³⁵⁵ This synthesized the theological-canonist vision of just war, with the more humanistic vision of war as a legal concept.³⁵⁶ Lastly, a crucial finding by Grotius enabled the identification of the concept of war as being related to the concept of statehood, otherwise known as the

³⁵¹ Lesaffer, “Sanctioning of War”, *supra* note 348 at 40.

³⁵² Francisco de Vitoria, *De Indis et de jure belli relectiones* translated by Ernest Inst, ed, (Washington: Carnegie Institution of Washington, 1917) at S 2.4-5.

³⁵³ Capps, *supra* note 332 at 77.

³⁵⁴ *Ibid.*

³⁵⁵ Lesaffer, “Sanctioning of War”, *supra* note 348 at 37.

³⁵⁶ *Ibid* (“[i]n *De jure belli ac pacis*, Grotius sustained both conceptions of war, just war and legal war (*bellum solemne*). He relayed the question of the justice of war to the domain of natural law, which applied in conscience (*in foro interno*), while the question of the legality of war fell within the domain of the positive, human law of nations, which was externally enforceable (*in foro externo*)” at 41). See also Scott ed, “Grotius, DJBP”, *supra* note 15 at S 1.3.4.1, 3.3.4-5, 3.3.12-13.

‘doctrine of state of affairs’.³⁵⁷ More precisely, “[w]hereas under the medieval just war doctrine, war had been conceived of as a limited law enforcement action by a prince and his adherents against the perpetrator of the injury which had caused the war, in Early Modern Europe, war became clashes between sovereign states in their entirety.”³⁵⁸ Such a development allowed for the rise of the sovereign order of states, a phenomenon that was well-noticed within Early Modern Europe. Overall, in undertaking a more secularized interpretation of classical international law, Grotius was able to extensively contribute to the development of the *jus ad bellum*.³⁵⁹

Alberico Gentili (1587-1608) was another Enlightenment-era scholar who contributed to the notion of just war by stressing the primacy of a more humanistic, secular and organized approach to analyzing warfare. For example, he suggested the importance of diplomacy and arbitration as a first rule of settling disputes before engaging in armed conflict.³⁶⁰ Additionally, he solidified the idea first proposed by Francisco de Vitoria; that both sides in a war have a right to wage war, and “as such, the laws of war were to be applied indiscriminately to both sides.”³⁶¹ This new vision of warfare, which was built on the concepts of Roman Law (an approach initiated by

³⁵⁷ Randall Lesaffer, “Alberico Gentili’s *ius post bellum* and Early Modern Peace Treaties” in Benedict Kingsbury & Benjamin Straumann, eds., *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010) at 210-4 [Lesaffer, “Gentili’s *ius post bellum*”].

³⁵⁸ Lesaffer, “Sanctioning of War”, *supra* note 348 at 41. See also Scott ed, “Grotius, DJBP”, *supra* note 15 at S 1.2.1.1.

³⁵⁹ See Kaius Tuori, “The Reception of Ancient Legal Thought in Early Modern International Law” in Bardo Fassett & Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) (“Grotius utilized Roman law to develop a denominationally neutral alternative to Christian ethics as a foundation of natural law. There was also a widespread idealization of classical antiquity, classicism, which manifested itself in legal scholarship in the conviction of the superiority of Roman legal science and its use as an example for contemporary jurisprudence” at 1015). See also Benjamin Straumann, ““Ancient Caesarian Lawyers” in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius’s “*De iure praedae*”” (2006) 34:3 *Political Theory* 328; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999); Benedict Kingsbury, Hedley Bull & Adam Roberts, *Hugo Grotius and International Relations* (New York: Oxford University Press, 1990).

³⁶⁰ Alberico Gentili, *De Jure Belli*, translated by Sir Thomas Erskine Holland (Oxford: Clarendon Press, 1877) at 18.

³⁶¹ Lesaffer, “Sanctioning of War”, *supra* note 348 at 40.

Grotius),³⁶² “...articulated the concept of legal war, or war in due form.”³⁶³ This was a significant addition to the development of *jus ad bellum* as a humanistic concept with a certain degree of legal objectivity. As explained by Randall Lesaffer, Gentili’s contribution tried to drastically change the way the notion of ‘war’ was interpreted during that time:

Gentili brought this new conception of war to its full complement in his *jus post bellum*. Since one could not be certain about the justice of war and since victory did not indicate justice, the outcome of war itself—or in the absence of clear victory, of the peace negotiations—determined the attribution of the claims over which the war was waged. *This radically changed the conception of war from a law enforcement action (executio juris) into a substitute for a legal trial: a form of dispute settlement. Whereas under the just war doctrine, the attribution of property and all kinds of claim had to be vested in the justice of a cause preceding the war, under the doctrine of legal war it was vested in the outcome of war itself. The jus post bellum became a jus victoriae.*³⁶⁴

By analyzing the conception of war from an outcome-based perspective, Gentili sought to underline the importance of moving away from attempting to justify war, while equally focusing on the success of the final outcome of the conflict. In turn, this demonstrated how armed conflict, regardless of which entity or state was the aggressor, could rely more on the *jus post bellum* or the *jus victoriae*, rather than simply the notion of *iustum bellum* on its own.

Irrespective of the scholarly developments on the *jus ad bellum* produced by Vitoria, Grotius or Gentili, the just war doctrine, in the classical sense, was still very popular among the rulers of Early Modern Europe. In fact, “...princes and republics of Early Modern Europe went to a lot of trouble to justify their decision to resort to war. Formal declarations of war were often substantial texts in which the reasons for the war

³⁶² Tuori, *supra* note 359 at 1015-6.

³⁶³ Lesaffer, “Sanctioning of War”, *supra* note 348 at 40. For more on the effects of Roman Law in Gentili’s development of the Just War doctrine, see Lesaffer, “Gentili’s *ius post bellum*”, *supra* note 357 at 210–40.

³⁶⁴ Lesaffer, “Sanctioning of War”, *supra* note 348 at 40-1 [emphasis added]. See also, Alberico Gentili, “De jure belli libri tres (1598)” in James Brown Scot, ed, *Classics of International Law* (Oxford: Clarendon Press, 1933) at S 1.2.18, 1.6.47–52.

were explained in detail; these, as well as the less formal manifestos of war, were widely distributed. In these declarations and manifestos, the discourse of just war was utilized.”³⁶⁵ Furthermore, the 17th-18th centuries became popular with the expansion of ‘defensive wars’, meaning that states were becoming more adept to wage war for defensive, rather than offensive reasons. Of course, the just war doctrine eventually evolved to reflect this interpretation. Under this development, “...all just wars were defensive *sensu lato* to the extent that they constituted a reaction against prior injury by the enemy—armed or otherwise. But they were only defensive *sensu stricto* if they were fought in reaction to a prior or threatening armed attack by the enemy, however big or small it might have been.”³⁶⁶ Although it is logical to assume that some of these developments may have occurred as a result of the doctrine’s development, it can be suggested that most likely, the development was a reaction by states to the growing reliance on regional treaties and alliances which became popularized during this period of history.³⁶⁷ Overall, the strength of the just war doctrine as a norm of classical international law began to fade, with less and less states paying consideration to its moral and just considerations of warfare.³⁶⁸ Conclusively, although the practice of states and rulers in Early Modern Age Europe still mirrored a theological interpretation of the just war doctrine, with the decline of religious influence and the rise of humanism throughout the 18th century, “the language [of warfare] changed to the extent that the protection of the security and interests of the state came to supplement, and with time, supplant the invocation of rights.”³⁶⁹

The 19th century brought with it an even more humanistic approach to interpreting

³⁶⁵ *Ibid* at 41.

³⁶⁶ *Ibid* at 45.

³⁶⁷ *Ibid* at 45. See also, Neff, *supra* note 341 at 126-30.

³⁶⁸ Lesaffer, “Sanctioning of War”, *supra* note 348 at 43. See also Partel Piirimäe, “Just War in Theory and Practice. The Legitimation of Swedish Intervention in the Thirty Years War” (2002) 45:3 Historical J 499.

³⁶⁹ *Ibid* at 45. Certain specific aspects of the law of warfare were not mentioned here as they would fall outside of the scope of this thesis and extend this brief historical summary. For a more specific description of the contributions of the Early Modern Age to both the *ius ad bellum* and the *ius in bello*, see *ibid* at 42-5.

international law. In general, although the ‘law of nations’ was described in the early Enlightenment period to be a dualist system separated between natural and positive law, “[t]he legal positivism of the 19th century brought this dualism to an end, as natural law was cast out of the world of law and reduced to a code of morality. Thus, modern international law shrunk to what had been the secondary, voluntary or positive law of nations...[and] the just war doctrine was therefore ousted from the field of international law.”³⁷⁰ Indeed, the interpretation of warfare continued to change from a proactive mechanism to largely a reactive one. Although the notion of a more defensive tone being used to justify warfare occurred in the two centuries prior as well, this was the first time that states had collectively adopted the concept as a ‘general guideline’ *prima facie*. Lessafer explains the reasons behind this occurrence in the following manner:

Over the course of the 19th century, states continued to offer express justifications to their subjects and allies when they resorted to war or force. Certainly, states more often than before neglected to make a formal declaration of war to the enemy, the forms in which justifications were made became more diverse, and explanations became less extensive. The language shifted further away from war as a means of legal self-help to that of war as a means of self-help altogether—or war as ‘a pursuit of policy by other means’ to use the famous phrase of Carl von Clausewitz (1780–1831) — as wars became justified in terms of the safeguarding of security, territorial integrity, ‘vital interests’, or honour of states rather than legitimate rights. But wars were by and large justified as reactions to prior unwarranted action, preferably armed action, by the enemy. They were justified for being defensive. By the late 19th and the early 20th centuries, this focus on defensive war found its correlation in an increasingly general rejection of aggression by the international community.³⁷¹

In addition to a general disagreement of the concepts of state aggression and the general use of force, the French and American Revolutions provided a further emphasis on the protection of fundamental rights of citizens to which warfare applied strictly as a manner of self-defense. In other words, as previously mentioned in Chapter 2 on the history of self-determination, “[h]umanitarian and political interventions were justified as actions to

³⁷⁰ *Ibid* at 45-6.

³⁷¹ *Ibid* at 46. See also Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 19-50 [Brownlie, “IL and Use of Force by States”]; Neff, *supra* note 341 at 161-214.

safeguard or restore other people's fundamental rights or actions for the sake of international order and stability."³⁷² Moreover, the rise in strength of civil society in 19th century Europe through such mechanisms as peace associations and civil movements, equally contributed to the discernment of warfare by denouncing the notion of warfare *in toto*.³⁷³ As part of this radical change, it became evident that the belief of warfare as being inherent and natural to humanity (as claimed by the just war doctrine), was no longer acceptable as a norm. In turn, this led to calls for the international codification of a normative approach which seeks to prevent and avoid warfare between states, as well as protects fundamental human rights. Consequently, in the late 19th and early 20th century, the first codified attempts were made to limit and eliminate the offensive use of military force by states in Europe.³⁷⁴ Nico Shrivjer explains the details behind this codification as central to the promulgation of the notion of 'peace' in a continent ravaged by centuries of bloodshed:

In fact, during the Westphalian order, only The Hague Peace Conferences of 1899 and 1907 introduced the first serious interstate diplomatic attempts to restrict the recourse to war. The Hague Convention (I) was aimed at the peaceful adjustment of international differences, 'before an appeal to arms'. Contracting parties were 'animated by a strong desire to concert for the maintenance of the general peace' and 'resolved to second by their best efforts the friendly settlement of international disputes.' In Convention (III) relative to the Opening of Hostilities, contracting parties agree not to commence hostilities between them without previous and explicit warning, in the form of either a declaration of war containing reasons for the commencement of hostilities, or an *ultimatum* with a conditional declaration of war.³⁷⁵

Through the Hague Peace Conferences, the impetus for the prohibition on the use of force began to slowly resonate with the international community in the early 20th century.³⁷⁶ Although from a practical standpoint, inter-state armed conflict continued

³⁷² *Ibid* at 46-7. See also, Neff, *supra* note 341 at 215-49.

³⁷³ Lesaffer, "Sanctioning of War", *supra* note 348 at 47.

³⁷⁴ Oliver Dorr, ed, "Prohibition on the Use of Force" in Max Planck Encyclopedia of Public International Law (Oxford University Press) at para 2, online: <www.opil.ouplaw.com>.

³⁷⁵ Shrivjer, *supra* note 342 at 467.

³⁷⁶ It should be noted that no international treaties prohibited the use of force prior to the 1928 Kellogg-Briand Pact; however, the Drago-Porter Convention (1907) did introduce restriction to the

well-into the 20th century (especially with the breakout of the First and Second World Wars), the idea of engendering an international law that understood the concept of warfare as an *ultimum remedium* did not. At the First World War's conclusion, several international documents commenced the dialogue around the codification for first the restriction, then the overall prohibition on the use of force in international law. These documents must be briefly summarized in order to define the scope of the ever-changing nature of the use of force as a restrictive concept.

The League of Nations Covenant was the first international treaty document to undertake a comprehensive effort to restrict military conflict.³⁷⁷ As explained by Oliver Dorr, Articles 11 and 12 of the Covenant

...prohibited nations resorting to war before a dispute had been submitted to peaceful settlement and for three months after an arbitral award or a judicial decision had been given, thus providing, in essence, merely for a moratorium on war. It was only in very special cases that the League members were definitely deprived of their freedom to go to war, namely against another member that complied with an arbitral award or a decision of the Permanent Court of International Justice (PCIJ) (Art. 13 (4) League Covenant) (Art. 15 (6) League Covenant). In case the Council failed to adopt a report by unanimous vote, the League members reserved to themselves 'the right to take such action as they shall consider necessary for the maintenance of right and justice' (Art. 15 (7) League Covenant). Those provisions were remarkable in their time as the first efforts of something like the international community to outlaw war, but they did not have much practical effect in the end.³⁷⁸

Further to the League Covenant, another international treaty signed in 1924, *the Geneva Protocol for the Pacific Settlement of International Disputes*, made a similar attempt to avoid inter-state armed conflict by imposing compulsory dispute settlement on warring states.³⁷⁹ Although this idea generated interest, it ultimately failed with opposition from

use of force. For more on this see *ibid* at para 4. See also *Hague Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, 18 October 1907, 36 Stat 2241 art 1 (entered into force 26 January 1910) [Drago-Porter Convention].

³⁷⁷ Dorr, *supra* note 374 at para 5. See also Shrivjer, *supra* note 342 at 468.

³⁷⁸ Dorr, *supra* note 374 at para 5.

³⁷⁹ See Shrivjer, *supra* note 342 at 468. See also *The Geneva Protocol for the Pacific Settlement of International Disputes*, 25 June 1925, SDN 1600 (F) 1450 (A) 8/2 art 10.

colonial states who saw the treaty as an affront on their sovereign rights to control and defend their colonial territories.³⁸⁰

Finally, the *Kellogg-Briand Pact*³⁸¹ (also known as the *1928 General Treaty for the Renunciation of War*) was signed on August 27, 1928. This treaty significantly changed the purview of the prohibition on the use of force from an idea that once seemed impossible, into a realistic concept. In fact, this treaty represents the first instance where a collective group of states attempted to delineate into an agreement over a general prohibition on the use of force. As further explained by Anderson, this agreement meant, among other things, a certain withdrawal of sovereignty when it came to the unilateral use of force by a state:

Article 1 of the Pact provide[d] that parties "condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relationship with one another." This provision effectively eliminated the eighteenth and nineteenth century notions of ultimate positivistic sovereignty, whereby no state had any restrictions upon its "right" to wage war as an instrument of policy. Although the Pact made no specific mention of the right to self-defence, the *travaux preparatoires*, or preparatory works, indicate that such an exception was overwhelmingly accepted. The Kellogg-Briand Pact thus enunciated two key propositions: first, that war was not to be pursued as a matter of policy and second, that states had an inherent right to resist any warfare undertaken by other states against them.³⁸²

Unfortunately, several issues on the use of force by states became apparent shortly after the Pact was signed. An absence of sanctions for breaches of the Pact, as well as its insistence on outlawing war and not specifically the use of force by states, allowed for an effortless circumvention of this new norm. Incidents such as the Japanese invasion of Chinese Manchuria in 1931, as well as the military invasions by the Axis powers at the outbreak of the Second World War in the mid-late 1930s ultimately condemned the idea of an overall prohibition on the use of force.³⁸³ Thus, it was only at the conclusion of the

³⁸⁰ Shrivjer, *supra* note 342 at 468.

³⁸¹ *Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy*, 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929) [Kellogg-Briand Pact].

³⁸² Anderson, "The Use of Force", *supra* note 9 at 205-6.

³⁸³ Shrivjer, *supra* note 342 at 469.

Second World War that a congregation of states decided to include the prohibition on the use of force as a corollary norm of international law in the United Nations Charter (UN Charter). The next sub-section will list the many factors that outline an overall prohibition on the use of force in contemporary international law, as well as establish its applicability vis-a-vis the UN Charter and state practice since the Second World War. Ultimately, this will lead to a consideration of the use of force in colonial and non-colonial contexts, setting the stage for a discussion on the doctrine of humanitarian intervention and its status under international law.

3.1.2. *Jus ad bellum* and the ‘Exceptions’ to the prohibition on the use of force

The UN Charter is the international treaty which contains the primary codified international law on the use of force. Even through the previous treaties attempted to delimitate the use of force and aggression by states, they ultimately failed due to a number of factors, including the absence of a strict codified prohibition on the use of force, as well as the absence of sanctionary and enforcement mechanisms which failed to prevent the outbreak of two World Wars.³⁸⁴

A good place to start when analyzing the international law on the use of force through the UN Charter is Article 1 (1) which states that the purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and *for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.³⁸⁵

Equally, Article 2(4), which as previously mentioned is arguably the most relevant article with regards to the prohibition on the use of force, states that:

All Members shall refrain in their international relations from any threat or

³⁸⁴ *Ibid.*

³⁸⁵ *UN Charter, supra note 21, art 1 (1) [emphasis added].*

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.³⁸⁶

Finally, an enforcement mechanism through Chapter VII provides an extra layer of protection for Member States through the right to the use of force as a measure of self-defence (Article 51) or via military action *only* through the direct authorization of the UNSC (Articles 42 and 43).³⁸⁷

In short, the aforementioned Articles decry the extent of the use of force in international law as can be interpreted in the UN Charter. Nevertheless, as with any legal interpretation, the UN Charter's prohibition on the use of force, and its subsequent enforcement and sanctionary mechanisms via the UNSC, have not resulted in an aggregate cessation of armed conflict between states. In fact, rather than attempt to develop the prohibition on the use of force, states have alluded to 'exceptions' as existing through its *a contrario* reading.³⁸⁸ Therefore, prior to establishing how the law on the use of force applies to the creation of states via UNC secessions, it is necessary to produce a brief summary which explains these 'exceptions', and establishes the present state of the law on the use of force since its codification in the UN Charter.

The prohibition on the use of force in international law, as was demonstrated through the history of the *iustum bellum* concept, has become a pillar of the international legal system. Outside of its mention in the UN Charter, it has been alluded to in

³⁸⁶ *Ibid*, arts 2 (4), 42,43,51.

³⁸⁷ Chapter VII of the United Nations Charter dictates the actions available to UN members in response to the use of force. The collective response mechanism was developed in response to the failures of the previous League of Nations Covenant that did not include such enforceable actions. For more on this see *ibid* arts 39-51. See also Dorr, *supra* note 374 at para 8.

³⁸⁷ It has been argued that the role of the UNSC was not necessarily to cease all inter-state conflict, but simply to limit them (as well as avoid another outbreak of a Third World War.) For more on this see Niels Blokker & Nico Schrijver, eds., *The Security Council and the Use of Force* (Leiden: Martinus Nijhoff Publishers, 2005) at 17-26.

³⁸⁸ *Ibid*. It has been argued that the role of the UNSC was not necessarily to cease all inter-state conflict, but simply to limit them (as well as avoid another outbreak of a Third World War).

numerous UN Declarations,³⁸⁹ as well as several ICJ cases,³⁹⁰ thereby solidifying its status as both a conventional norm and a rule of customary law. However, this view is not universally accepted. The argument for humanitarian intervention evidently opposes this view, as does the argument for pre-emptive self-defence.³⁹¹ For example, with regards to the former, the doctrine of humanitarian intervention clearly identifies an exception to the prohibition on the use of force in situations of humanitarian crises.³⁹² On the other hand, the latter refers to an established doctrine of pre-emptive self defense which allows for the pre-emptive use of force by states provided certain criteria of necessity and proportionality are met.³⁹³ In any case, both ‘exceptions’ will be discussed at large later on this chapter; however, prior to doing so, it is necessary to point out the crux of the debate which surrounds the extent of the prohibition on the use of force. This must be done in order to identify the obscure areas of the UN Charter with regards to the prohibition, out of which the ‘exceptions’ to the concept have evolved.

Largely, the debate around the extent of the prohibition on the use of force interpretation of Article 2(4) rests on the second part of the article: “should the words ‘against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’ be construed as a strict prohibition on all use of force against another state, or did they allow the use of force provided that the aim was not to overthrow the government or seize the territory of the state and provided that the action was consistent with the purposes of the UN?”³⁹⁴ As can

³⁸⁹ *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131 (XX), UNGAOR, 20th Sess, Supp No 14, UN Doc A/RES/20/2131 (1965) [Protection of Independence and Sovereignty Declaration]; *Friendly Relations Declaration*, *supra* note 144; *Declaration on the Threat or Use of Force*, *supra* note 324; *Resolution on the Definition of Aggression*, *supra* note 322.

³⁹⁰ *Nicaragua ICJ Judgment*, *supra* note 68 at para 73. See also *Wall Advisory Opinion*, *supra* note 145 at paras 187-90.

³⁹¹ Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed (Cambridge: Cambridge University Press, 2001) at 269-70.

³⁹² See Marjorie Cohn, “The Myth of Humanitarian Intervention in Kosovo” in Aleksander Jokic, *Lessons of Kosovo: The Dangers of Humanitarian Intervention* (Peterborough: Broadview Press, 2003) at 160-5.

³⁹³ Gray, *supra* note 337 at 149-50.

³⁹⁴ *Ibid* at 31.

be inferred from this question, the prohibition on the use of force was not clearly defined in the UN Charter, leaving the door open for its interpretation by member states. For example, it was a well-known fact that throughout the Cold War, a conglomerate of American scholars argued that the legal interpretation of Article 2(4) should depend on the effectiveness of the UNSC as a whole and the collective security system it purports to represent through the UN Charter.³⁹⁵ Although this argument may seem partisan due to the United States' role in the Cold War, the veritable reality of a situation where the UNSC can become 'paralyzed' and unable to act through one of its permanent members imposing a veto has proven to be a major obstacle of the debate on the prohibition of the use of force. In fact, this situation has played a major role in the inaction of the UNSC in response to some of the world's most egregious atrocities.³⁹⁶ In addition to this barrier, the effectiveness of the UNSC was also questioned during the Cold War in response to a string of bi-proxy armed conflicts³⁹⁷ supported by the two world superpowers during the Cold War (the United States and the Soviet Union). Moreover, as a result of the Cold War, the UNSC had its political influence split ideologically between the West and the East, paralyzing it further when the prohibition on the use of force was violated by one side or the other. Nevertheless, the most difficult challenge to the prohibition occurred towards the end of the Cold War, when the ideological split narrowed and the 'West' began to emerge as the winning side.³⁹⁸

While the dissolution of the Soviet Union preoccupied most of the world, it emerged that the prohibition on the use of force was challenged once again outside of

³⁹⁵ *Ibid.*

³⁹⁶ The conflicts that this statement refers to include but are not limited to: Syria (2012-present) and Kosovo (1998-1999) (where the UNSC has been paralyzed to act due to Russian vetoes), Israel (since 1990) (where the UNSC has been paralyzed to act due to vetoes from the United States). For more on the challenges of the UNSC veto rule and UNSC paralysis, see Sir Michael Wood, ed, "United Nations Security Council" in Max Planck Encyclopedia of Public International Law by (Oxford University Press) at paras 41-43, online: <<http://opil.ouplaw.com>>.

³⁹⁷ Examples of such bi-proxy conflicts include the United States support in the conflict in Vietnam and the Soviet Union support of the conflict in Afghanistan.

³⁹⁸ It has long been considered that the West won the Cold War due to the dissolution of the Soviet Union. See e.g. Curtis Bauer, "The East Lost the Cold War, but did the West Win?" (1999) 8 Past Imperfect J 117.

UNSC approval. However, this time it was no longer as part of an armed conflict, but as part of a mission to halt a systemic and egregious armed attack against civilians. Indeed, the first Gulf War proved to be much more than an armed conflict between states. The US, UK and France's military intervention in Iraq opened a new era of post-Cold War armed conflicts which questioned the strength and the scope of the prohibition on the use of force in its entirety.³⁹⁹

As the world moved towards globalization and away from an ideological east and west split, the question of how does the international law on the use of force apply in humanitarian crises, cases of self-determination denial and territorial conflicts, took center-stage now that the possibility of nuclear armed conflict and Mutual Assured Destruction (MAD) had curtailed.⁴⁰⁰ For the purposes of this thesis, the focus of the proceeding sub-sections in this Chapter will be to sketch out the applicability of the international law on the use of force in cases of self-determination and territorial conflicts, specifically as the end of the Cold War brought with it multiple cases of such conflicts. These conflicts reverberated in the debate on the legality of sponsorship and support of oppressed peoples' within the context of self-determination, but outside of the general decolonization context.⁴⁰¹ Thus, before moving forward, it is necessary to evaluate the law on the use of force as it pertains to such conflicts, using the history of the *jus ad bellum* as a background to analyze the legitimacy of the emerging 'exceptions' to the prohibition on the use of force due to the rise in such conflicts in the contemporary world.

³⁹⁹ For more on the UK and US positions on the First Gulf War in Iraq see "UK Materials on International Law" (1992) 63 Brit YB Intl L 824 at 824-40.

⁴⁰⁰ The breakup of the Soviet Union in 1992 left many former Soviet states possessing nuclear weapons. Russia and the United States combined efforts and took a number of steps to prevent the use of nuclear weapons by smaller states as leverage in an armed conflict. See Associated Press, "Guarding nukes: How Moscow and Washington avoided the threat of nuclear doomsday after Soviet breakup" (8 January 2012), *Daily Mail* Online online: <www.dailymail.co.uk/news/article-2083885/How-Moscow-Washington-avoided-nuclear-doomsday-Soviet-breakup.html#ixzz4mArEJO6L>.

⁴⁰¹ Examples include Slovenia, Croatia and Bosnia and Herzegovina in the former Yugoslavia. See e.g. Marco Martins, "An Alternative Approach to the International Law of State Succession: Lex Naturae and the Dissolution of Yugoslavia" (1993) 44 *Syracuse L Rev* 1019 at 1020.

The UN Charter includes three codified exceptions to the general prohibition on the use of force. The first exception can be found in Articles 53(1) and 107.⁴⁰² Needless to say, these Articles, which were created to allow for military action against former enemy states from the Second World War, have no contemporary legal relevance.⁴⁰³ The second exception, as mentioned above, exists through the powers vested in the UNSC under Article 24 which allows it to recommend and execute military action under its discretion through Articles 39 and 42.⁴⁰⁴ The last exception, as evinced by the UN Charter, can be found in Article 51 which allows for a state to use force *only* in self-defence.⁴⁰⁵ Outside of the ambit of these three exceptions, no other codified legal rules permit the use of force by states in international law. Yet, it is no secret that states have systematically violated, at least *prima facie*, the prohibition on the use of force since its inception in 1945.⁴⁰⁶ Therefore, the question can be asked, under what legal precedent do such states operate?

The absence of any further exceptions (apart from those mentioned above) has led to the emergence of two schools of thought that interpret the scope of the prohibition on the use of force. The permissive and restrictive schools of thought emerged as a result of

⁴⁰² Article 53 (1) and 107 both allow for either unilateral or the collective use of force outside of UNSC approval against 'enemy states' of signatory Member States of the UN (enemy states generally referred to axis powers states during and briefly after the Second World War.) Both articles are now considered defunct and no longer legally relevant. See *UN Charter, supra* note 21, arts 53 (1), 77, 107.

⁴⁰³ There have even been attempts to remove these provisions from the Charter, most recently in the 2005 World Summit Outcome. See Shrivjer, *supra* note 342 at 473.

⁴⁰⁴ See *UN Charter, supra* note 21, arts 39, 42.

⁴⁰⁵ *Ibid*, art 51.

⁴⁰⁶ This statement can be controversial in the sense that there is generally no overall agreement by international legal scholars on what constitutes recent breaches or violations of the prohibition on the use of force. For example, certain scholars consider the United States' invasion of Iraq as justified under the principle of pre-emptive defense. Many scholars disagree with this point of view, in large part due to the selective nature of American justifications for the use of pre-emptive self-defense in certain situations, and Article 51 in others (such as was used in the justification for the use of force in Syria and Iraq in the 'war on terror.' For an in-depth consideration of this debate, see generally: Chris Bolderon, "The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law" (2005) 9:1 Chap L Rev 111; Michael J Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York: Palgrave Macmillan, 2001); Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16:4 EJIL 369; William Taft & Todd Buchwald, "Pre-emption, Iraq and International Law" (2003) 97 AJIL 557; Thomas Franck, "What happens now? The UN after Iraq" (2003) 97:1 AJIL 607.

a growing dichotomy between the interpretations of the true meaning of Article 2(4) of the UN Charter.⁴⁰⁷ Anderson defines each school's viewpoints in the following manner:

According to the [permissive school], Article 2(4) only prohibits the use of force "against the territorial integrity or political independence" of any state or "in any other manner inconsistent with the purposes" of the UN. *A priori*, the use of force in contexts that do not specifically threaten "the territorial integrity or political independence" of any state, or are commensurate with the purposes of the UN, are *not* proscribed by Article 2(4)."... The restrictive school, by way of contrast, asserts that Article 2(4) prohibits in *toto* a state's right to use force, unless some explicit exception is grounded within the Charter itself. According to this view, force may only be used when compliant with Article 51, or the now defunct Article 107, which allows action against former enemy states.⁴⁰⁸

In other words, the permissive school looks to define certain exceptions in international law for the use of force, while the restrictive school commits to holding states accountable for any use of force outside of the legal parameters outlined in the UN Charter.⁴⁰⁹ Overwhelmingly, the restrictive school's approach has been supported by scholarly opinion and state practice.⁴¹⁰ This has been evidenced by numerous states using an interpretation of Article 51 as a justification for the use of force (which permits defensive military action), rather than a restrictive reading of Article 2 (4).⁴¹¹ The controversy surrounding such interpretations can be analyzed through a close reading of Article 51 of the UN Charter which permits the use of force in cases of self-defence:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to

⁴⁰⁷ Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspect" (1999) 10:1 Eur J Intl L 1 at 1-2 [Simma, "NATO, UN and Use of Force"].

⁴⁰⁸ Anderson, "The Use of Force", *supra* note 9 at 207-8.

⁴⁰⁹ *Ibid* ("[this literal interpretation of Article 2(4) has been advocated by Britain before the ICJ in the *Corfu Channel Case (UK v Albania)* and by Israel in relation to its commando raid of Uganda's Entebbe Airport in 1976. The viewpoint has also attracted some support from scholarly quarters" at 208).

⁴¹⁰ For a lengthy list of scholars who support the restrictive school, see *Ibid* at 208-9, n 43.

⁴¹¹ Dixon, *supra* note 235 at 384-95. See also Anderson, "The Use of Force", *supra* note 9 at 208 ("[f]or example, the US invasion of the Dominican Republic (1965), the US invasion of Grenada (1983), the Israeli bombing of Iraq's nuclear reactor (1981), the Indian invasion of East Pakistan (1971), the Tanzanian invasion of Uganda (1979) and the NATO actions against Serbia (1998-1999), were all justified by alleged exceptions to Article 2(4), rather than a permissive reading" at 208, n 44).

the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁴¹²

As can be deduced from the wording of Article 51, the exception to the prohibition on the use of force exhibits that “self-defence is permissible in response to an “instant [and] overwhelming” threat that leaves ‘no choice of means and no moment for deliberation’.”⁴¹³ This interpretation of self-defence is reiterated in several ICJ cases, such as *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*,⁴¹⁴ *Oil Platforms*⁴¹⁵ and *Armed Activities on the Territory of the Congo*,⁴¹⁶ which also support the notion that “...necessity and proportionality are limits on all self-defence, individual and collective.”⁴¹⁷ Therefore, it can be confirmed that a *necessary* and *proportionate* military response by a state acting in self-defence can be conceived as a lawful use of force under contemporary international law and customary international law.⁴¹⁸ Yet,

⁴¹² See *UN Charter*, *supra* note 21, art 51.

⁴¹³ Anderson, “The Use of Force”, *supra* note 9 at 210.

⁴¹⁴ Nuclear Weapons Advisory Opinion, *supra* note 68 at para 141.

⁴¹⁵ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, [2003] ICJ Rep 161 at para 43 [Oil Platforms].

⁴¹⁶ *Territory of Congo Case*, *supra* note 338 at para 147.

⁴¹⁷ Gray, *supra* note 337 at 149-50.

⁴¹⁸ The extent of the principle of self-defence through Article 51 is not universally accepted as applying only to the definition outlined in the famous 1837 *Caroline* incident. For example, the United States, Australia, Israel and the United Kingdom are examples of states that justify their attacks on non-state and state-armed groups as stemming from a right to self-defence under Article 51. For more on the academic debate on the extent of the principle of self-defence see *ibid* at 117-19 (“[a]s part of the basic core of self-defence all states agree that self-defence must be necessary and proportionate. The requirements of necessity and proportionality are often traced back to the 1837 *Caroline* incident, involving a pre-emptive attack by the British forces in Canada on a ship manned by Canadian rebels, planning an attack from the USA. This episode has attained a mythical authority. States and writers still refer to it, generally to support their own wide claims to self-defence, but also to support the necessity and proportionality limitation. They invoke the famous formula that there must be a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation’. Others challenge the authority of this episode for the modern doctrine of self-defence, seeing it rather as an episode of self-help pre-dating the modern law on the use of force and as a one-off episode of pre-emptive action not of relevance to the conduct of wider-scale conflict. But, irrespective of the status of the *Caroline* incident as a precedent, necessity and proportionality have played a crucial role in state justification of the use of force in self-defence and in international response...” at 117-8). See also, Brownlie, “IL and Use of Force by States”, *supra* note 371; Stanimir Alexandrov, *Self-Defense Against the Use of Force in International Law* (Hague: Brill & Nijhoff, 1996).

outside of the protection of Article 51, another perceived exception to the prohibition on the use of force has recently taken center stage. Although this purported ‘exception’ will be examined in detail later in this Chapter, it is important to reiterate that, outside of the ‘exceptions’ listed above, no others have been generally accepted as forming a crystallized and well-accepted legal rule in international law.

Although, in theory, the general prohibition on the use of force should have restricted and discouraged blatant violations of inter-state use of force; nearly 73 years after the codification of the UN Charter, multiple instances of states using force both individually and collectively,⁴¹⁹ has reignited the debate on whether their use of force is indeed justifiable under any of the acknowledged ‘exceptions’ to the prohibition on the use of force. One of the most controversial exceptions to the prohibition, which is relevant to this thesis, is the notion of an obligation to undertake a military intervention in order to halt a humanitarian crisis, better known contemporarily as the doctrine of humanitarian intervention.⁴²⁰ However, prior to delving into a legal analysis of the doctrine, it is necessary to define one final issue that is relevant to the main objective of this thesis: the applicability of the international law on the use of force in the creation of states. As unilateral secessions can also be seen as forms of state creation, it is imperative to define the ambit of the use of force in such instances, especially within both the colonial and non-colonial contexts. The legal parameters identified in the next subsection will then be used to defend the objective of this thesis in providing an exception to the prohibition on the use of force in special cases related to UNC secessions, while denying the legitimacy of the doctrine of humanitarian intervention.⁴²¹

⁴¹⁹ A very recent example of a breach or an alleged breach of the prohibition is the attack by the United States against a Syrian military air base on April 6, 2017. See Michael R Gordon, Helene Cooper & Michael D Shear, “Dozens of U.S. Missiles Hit Air Base in Syria” (6 April 2017), online < www.nytimes.com>. Other examples include the Russian invasion of Georgia in 2008 and the United States invasion of Iraq in 2003.

⁴²⁰ Ian Brownlie, “Thoughts on Kind-Hearted Gunmen” in Richard B Lillich, ed, *Humanitarian Intervention and the United Nations* (Charlottesville: University of Virginia Print, 1973) at 139–48.

⁴²¹ It is important to reiterate that for the purposes of this thesis, the terms ‘military intervention’ and ‘humanitarian intervention’ will be used intermittently. The breadth, legality and threshold of this statement will be examined in detail throughout the next two chapters. See *supra* note 11.

3.1.3. State Creation and the Use of Force

It is well established that, under international law, state creation can occur as a result of unilateral colonial (UC) secession pursuant to the law of self-determination. More precisely, a breadth of evidence affirms the right of colonized peoples to a unilateral colonial (UC) secession under both codified and customary international law. This evidence includes a long history of acceptance of unilateral colonial secessions and their subsequent claims to statehood, as well as numerous reaffirmations of this right through well-accepted *opinio juris*. One such example enlists the support of Resolution 1541 which stipulates that “territories defined as colonial by Resolution 1541 are entitled to pursue their sovereign independence from metropolitan powers.”⁴²² More contemporarily, the ICJ in the *Kosovo Advisory Case* has equally upheld the right of UC secessions by ruling *quod hoc*, that:

During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right.⁴²³

As can be deduced from the ICJ’s advisory opinion, the right to a UC secession, although largely a product of the 20th century, can be confirmed as existent in international law. Nevertheless, the question can be asked, what is its applicability of the use of force with regards to UC secessions? More precisely, it is necessary to inquire into whether any exceptions to the prohibition on the use of force exist outside of the current legal parameters with respect to colonized peoples.

⁴²² Anderson, “The Use of Force”, *supra* note 9 at 216-7.

⁴²³ *Advisory Opinion on Kosovo*, *supra* note 145 at para 79.

UN General Assembly (UNGA) Resolutions 2105⁴²⁴ and 2787⁴²⁵ are considered to be two of the primary non-binding international documents calling for the acceptance of a right for the use of force by colonized peoples seeking to secure their independence.⁴²⁶ Although these resolutions are non-binding in nature, declaratory resolutions equally reaffirm the right of colonized peoples to the use of force *mutatis mutandis*. For example, the *Friendly Relations Declaration*,⁴²⁷ as well as the *Definition of Aggression and Inadmissibility Declaration*,⁴²⁸ build on the wording found in Resolutions 2105 and 2787 to reiterate that “[n]othing...shall prejudice in any manner the right to self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes, and the right to seek and receive support in accordance with the purposes and principles of the Charter.”⁴²⁹ This view has similarly been supported by a number of legal scholars⁴³⁰ who have concluded correspondingly, that the “...right of colonial peoples to forcibly resist an oppressive metropolitan power is firmly grounded within customary international law.”⁴³¹ However, the debate around the threshold for third-state support becomes less clear once the aspect of *direct* and *indirect* support is considered. After-all, what constitutes material support by a third-state? Anderson equally observes in assessing this question that the meaning of direct and indirect support by third-states has remained largely unclear:

Unlike the non-declaratory resolutions, however, the Friendly Relations Declaration, Definition of Aggression and Inadmissibility Declaration explicitly provide that colonial peoples forcibly resisting an oppressive metropolitan power may only seek and receive third state "support in

⁴²⁴ Declaration of the Granting of Independence, *supra* note 5.

⁴²⁵ *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res 2787 (XXVI), UNGAOR, 26th Sess, Supp 49, UN Doc A/RES/2787 (1971) [*Resolution on Universal Right to Self-Determination*].

⁴²⁶ John Norton Moore, “The Control of Foreign Intervention in Internal Conflict” (1969) 9 VA J Intl L 209 at 267.

⁴²⁷ *Friendly Relations Declaration*, *supra* note 144, Principle 5 (5).

⁴²⁸ *Resolution on the Definition of Aggression*, *supra* note 322.

⁴²⁹ *Ibid*, art 4.

⁴³⁰ See Crawford, “The Creation of States”, *supra* note 22 at 139; Cassese, “Self-Determination of Peoples”, *supra* note 6 at 153-55. For an extensive list of scholars who support this view, see Anderson, “The Use of Force”, *supra* note 9 at 220, n 91.

⁴³¹ *Ibid*.

accordance with the purposes and principles of the Charter." This raises the controversial question: what exactly does the word "support" and the phrase "in accordance with the purposes and principles of the Charter" actually mean? Do they together denote indirect third state assistance, or instead, direct third state intervention?⁴³²

The answer to the question of what is meant by direct or indirect support is complex. In large part, this is due to the fact that the threshold for third-state support can induce some of the more negative consequences of secession, such as regional destabilization, anarchy and civil conflict.⁴³³ Undoubtedly, strong support exists within international legal scholarship with regards to the right of a colonized population to seek and receive *indirect* third state assistance.⁴³⁴ For example, both Resolutions 2105 and 2787 support the use of force by a colonized peoples against a metropolitan power, while equally advocating and inviting third states to "...to render aid by way of 'political, moral and material assistance.'"⁴³⁵ Additionally, most scholars point to Paragraphs 1, 2 and 3 of Resolution 3070⁴³⁶ as evidencing that right:

Recognizing the imperative need to put an early end to colonial rule, foreign domination and alien subjugation,

1. *Reaffirms* the inalienable right of all people under colonial and foreign domination and alien subjugation to self-determination, freedom and independence in accordance with General Assembly resolutions 1514 (XV) of 14 December 1960, 2649 (XXV) of 30 November 1970 and 2787 (XXVI) of 6 December 1971;

2. *Also reaffirms* the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, *including armed struggle*;

3. *Calls upon* all States, in conformity with the Charter of the United

⁴³² *Ibid* at 221.

⁴³³ de Villiers, *supra* note 103 at 81.

⁴³⁴ See generally, Crawford, "The Creation of States", *supra* note 22 at 139; Albrecht Randelzhofer & Oliver Dörr, "Article 2(4)" in Bruno Simma et al, eds., 3rd ed, *The Charter of the United Nations: A Commentary*, vol I (Oxford: Oxford University Press, 2012) at 200, 228–9. See also Rosalyn Higgins, "International Law and Civil Conflict" in Evan Luard, ed, *International Regulation of Civil Wars* (New York: New York University Press, 1972) at 183 [R Higgins, "IL and Civil Conflict"]; Cassese, "Self-Determination of Peoples", *supra* note 6 at 150-4; Anderson, "The Use of Force", *supra* note 9 at 221.

⁴³⁵ Anderson, "The Use of Force", *supra* note 9 at 218.

⁴³⁶ *Resolution on Universal Right to Self-Determination*, *supra* note 425.

Nations and with relevant resolutions of the United Nations, to recognize the right of all peoples to self-determination and independence *and to offer moral, material and any other assistance to all peoples struggling for the full exercise of their inalienable right to self-determination and independence.*⁴³⁷

Moreover, multiple scholars have argued that the combination of General Assembly Resolutions and Declarations that consistently encourage states to provide *indirect* support and assistance to colonial peoples, coupled with the evidence of state practice that provides it, confirms the legality of such practice *intra legem*.⁴³⁸ Most importantly, evidence points towards the fact that "...in situations where indirect assistance has been rendered by third states to colonial insurgent groups, the latter have not been prohibited from attaining independence."⁴³⁹ Therefore, it can be confirmed that international law permits the *indirect* support of colonial insurgent groups fighting for independence on the basis of their right to external self-determination.⁴⁴⁰

In contrast, support for *direct* third state assistance has remained largely an illegal act. Simply put, *direct* third state assistance can be considered a form of military intervention, violating not only the prohibition on the use of force, but the peremptory norms of territorial inviolability and non-interference into the internal affairs of a sovereign state (otherwise known as the principle of non-intervention). As summarized by Anderson, the international legal parameters on such assistance is fairly evident:

An examination of the UN Charter...particularly Articles 2(1), 2(4) and 2(7), implicitly suggests that such direct third state intervention to colonial insurgent groups is categorically illegal. Assuming that the word "state" encompasses a metropolitan power's entire territory, this finding is supported by the contents of the Friendly Relations Declaration [Principle 1, paragraphs 4, 8 and 9, Principle 3, paragraphs 1 and 2], Definition of Aggression and Inadmissibility Declaration [Articles 3,6].⁴⁴¹

⁴³⁷ *Ibid* at paras 1-3 [emphasis added].

⁴³⁸ See Rosalyn Higgins, "IL and Civil Conflict", *supra* note 434 at 183; Cassese, "Self-Determination of Peoples", *supra* note 6 at 153; M Rafiqul Islam, "Use of Force in Self-Determination Claims" (1985) 25:3 *Indian J Intl L* 424 at 442-3; Moore, *supra* note 426 at 267.

⁴³⁹ Anderson, "The Use of Force", *supra* note 9 at 223.

⁴⁴⁰ *Ibid* at 222-3.

⁴⁴¹ *Ibid* at 223.

Additionally, the ICJ in the *Nicaragua Case* pronounced on the importance of the effectiveness of the principle of non-intervention, underlining the impracticability of raising or lowering the legal threshold on *direct* third-state support under *any* circumstance:

The principle of non-intervention derives from customary international law- It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State - supposing such a request to have actually been made by an opposition to the regime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.⁴⁴²

As can be deduced from the ICJ's reasoning, the inevitable anarchy that will follow should the principle of non-intervention lose its effectiveness, dissipates any opportunity to legalize the right of third states to directly support a colonized peoples in their struggle for independence.⁴⁴³ Hence, the overarching international law on third state intervention in the context of colonialism can be confirmed as illegal. In large part, a strong legal precedent for (currently, less than 1% of the world's population can be considered as living in colonial territories) international law that advocates for overall decolonization can and has been used to ensure that former colonies earn independence from their metropolitan powers.⁴⁴⁴ Yet, how does international law interpret third state assistance in

⁴⁴² *Nicaragua ICJ Judgment*, *supra* note 68 at paras 126, 246 cited in Anderson, "The Use of Force", *supra* note 9 at 225.

⁴⁴³ Buchheit, *supra* note 54 at 36. Of note, is the fact that despite the illegality of direct third state assistance, one formerly-colonized state, Angola, earned its independence specifically in this manner (although this case can be considered *sui generis*, as well as the only one of its kind.) Angola is a former Portuguese colony. In 1975, Cuba sent 15,000 military troops to assist Angola as part of its communist-backed liberation movement. At the same time, South Africa backed the opposing US-backed liberation movement. Despite the violation of the principle of non-intervention, Angola was admitted to the UN in 1976. See also Wolf Grabendorff, "Cuba's Involvement in Africa" (1980) 22 J Inter-American Stud & World Affairs, 1 at 3-15.

⁴⁴⁴ See Khan, *supra* note 180 ("[d]ecolonization has thus been an impressive achievement of the post-World War II world community. But the less than 1% that still live in colonial territories, combined with their economic and strategic (in)significance, might lull into sanguinity" at para 2). See also

the non-colonial context? After-all, could an absence or lack of jurisprudential support for unilateral non-colonial secessions eliminate the opportunity for direct or indirect third-state support? Prior to delving into the intricacies of third-state military intervention, it is necessary to briefly examine this point.

As previously mentioned in the Introduction and Chapter 1, the existence of a right to UNC secession exists in extreme situations of gross human rights abuses pursuant to the right of self-determination under customary international law. If one is to defend the right of a UNC secession as defined through an *a contrario* reading of Principle 5 (7) of the *Friendly Relations Declaration*, the question can be asked: does a right to a UNC secession encompass direct or indirect third state assistance? Anderson recommends turning to Principle 5(5) of the same Declaration to find the response:

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. *In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.*⁴⁴⁵

Similar to the case of UC secessions, the Declaration reveals a right of *indirect* support by a third state provided the assistance is pursuant to Articles 2(1), 2(4) and 2(7) of the UN Charter. Although the Declaration is non-binding in nature, multiple scholars have concluded that the right of peoples to indirect third state assistance should exist in both the colonial and the non-colonial context.⁴⁴⁶ The primary reason for this conclusion is that a systematic denial of a peoples' right to self-determination can be said to equate to the denial of a right of a colonized peoples to independence. Indeed, both concepts

Anne-Hélène Béranger « Décolonisation et droit des peuples selon le droit international » (2005) 44 *Le Genre Humain* 143 at 143-5; M Thomas, B Moore & LJ Butler, *Crises of Empire: Decolonization and Europe's Imperial States, 1918-1975* (London : Hodder Education, 2008).

⁴⁴⁵ See *Friendly Relations Declaration*, *supra* note 144, Principle 5 (5).

⁴⁴⁶ Some examples of other prominent scholars who have come to this conclusion are: Cassese, "Self-Determination of Peoples", *supra* note 6 at 153-5; Georg Nolte, "Secession and External Intervention" in Marcelo G Kohen, ed, *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) at 77, 95-7; Crawford, "The Creation of States", *supra* note 22 at 139-41; Anderson, "The Use of Force", *supra* note 9 at 234-6.

demonstrate a struggle against an oppressor state, with little difference between the more refined definition of a colonized state, and a peoples within a state being systematically denied their right of self-determination. Cassese, writing before the advent of the *Friendly Relations Declaration* in 1995, stated:

Turning to internal self-determination, one cannot speak of an oppressed racial group's *right* to use arms against the central authorities. Nor, however, can the group's resort to violence be better thought of as a mere fact of life, a reality. Here again [as with the UC context], the contention can be made that the group has been granted a *legal licence* to resort to armed force, subject to the strict conditions set out above [short of sending military troops as assistance].⁴⁴⁷

Indeed, the endemic character of self-determination appears to apply to cases outside of the decolonization context as well, in which case, similar to UC secessions, a right of *indirect* third-state support will be permitted in cases of UNC secessions as well.⁴⁴⁸ In other words, on the basis of the evidence presented in support of an *indirect* right to third-state support, it can hardly be disregarded that a peoples' inside a particular state "...do not breach international law if they engage in armed action against a State that forcibly denies their right to self-determination."⁴⁴⁹ Hence, it can be suggested that *indirect* third state assistance in the context of a UNC secession is permissible under international law.

Coincidentally, *direct* third state assistance outside of the colonial context is the most controversial concept not only in the context of UNC secessions, but also in the context of its direct contention with the general prohibition on the use of force. Indeed, the precision of when direct third state assistance is permissible under international law, if permissible at all, is the primary question that this thesis intends to answer. Accordingly, a detailed study of the notion of third-state military interventions (not just 'humanitarian interventions') is required in order to firmly establish that the only legal exception to the prohibition of the use of force outside of the current international law, is found within the context of a UNC secession claim and under very particular

⁴⁴⁷ Cassese, "Self-Determination of Peoples", *supra* note 6 at 153-5 cited in Anderson, "The Use of Force", *supra* note 9 at 234-6.

⁴⁴⁸ Islam, *supra* note 438 at 429.

⁴⁴⁹ Cassese, "Self-Determination of Peoples", *supra* note 6.

circumstances.

3.2. Third-State Military Intervention, Humanitarian Intervention & R2P

The legality of humanitarian intervention is a controversial subject in international law.⁴⁵⁰ In large part, this is due to the fact that finding the balance between the “evolving conceptions of human rights and ethical state behavior,”⁴⁵¹ is a daunting task considering that international law limits the use of force by states to self-defence or through authorization by the UNSC.⁴⁵² The first use of the term ‘humanitarian intervention’ can be attributed to the Carnegie Endowment for International Peace,⁴⁵³ in a book titled *Self-Determination in the New World Order*,⁴⁵⁴ which invented the term as part of an explanation for the rise of “collective military intervention to accomplish strictly humanitarian objectives.”⁴⁵⁵ Nevertheless, the origins of the doctrine of humanitarian intervention, that is, a foreign power’s military intervention on behalf of a population experiencing mass oppression - can be traced as far back as the 19th Century. During this time, a perceived necessity of military action to rescue Christians undergoing persecution in the Ottoman Empire is said to have given birth to the concept.⁴⁵⁶ This necessity of military action, purported to be executed on grounds of morality and justice, strongly resembles the *iustum bellum* concept, which in turn, relates to the doctrine of humanitarian intervention. This section will define this relationship in detail, putting

⁴⁵⁰ Aidan Hehir, “NATO’s ‘Humanitarian Intervention’ in Kosovo: Legal Precedent or Aberration?” (2009) 8:3 J of Human Rights 245 at 246.

⁴⁵¹ *Ibid.*

⁴⁵² On the prohibition on the use of force in international law, see *UN Charter*, *supra* note 21, arts 29, 33, 36, 37, 38, 52.

⁴⁵³ Cohn, *supra* note 392 at 138.

⁴⁵⁴ Morton Halperin & David Sheffer, *Self-Determination in the New World Order* (Washington, DC: Carnegie Endowment for International Peace, 1992).

⁴⁵⁵ Cohn, *supra* note 392 at 160.

⁴⁵⁶ For more on this see Gray, *supra* note 337 at 30–59. See also Nigel Rodley, “Humanitarian Intervention” in Dinah Shelton, ed, *Human Rights and General International Law* (Oxford: Oxford University Press, 2013) (“England, France, and Russia intervened in Greece in 1827 to stop massacres by Turkey, and France intervened again in Syria in 1860, to stop the killings of Maronite Christians. Various European powers also intervened in defence of Christians in Crete (1866–68), the Balkans (1875–78), and Macedonia (1903–08)” at 819).

forward an analysis of the doctrine that will connect it with the notion of just war, while providing evidence that the moral obligation for the use of force by states in international law is nonexistent.

In contemporary terms, humanitarian intervention can be defined as an “...armed intervention [that] is permissible to enforce standards of civilized conduct when rulers violate those standards, and finds expression today in the widely held opinion that states, acting unilaterally or collectively, are justified in enforcing respect for human rights.”⁴⁵⁷ While many believe that the post-UN Charter concept of military intervention for the purposes of halting mass abuses of human rights began with the Balkan wars of the 1990s,⁴⁵⁸ its genesis can actually be traced as early as the 1970s “in connection with several armed attacks at that time (i.e. especially in Eastern Pakistan/Bangladesh).”⁴⁵⁹ At that time, India’s militarily intervened to halt mass atrocities and human rights abuses being suffered by the Bengal peoples in East Pakistan.⁴⁶⁰ In the opinion of Jerzy Zajadlo, the concept has evolved in the following manner ever-since:

In the 1960s and 1970s cases of intervention in internal conflicts took place and they can be recognised as humanitarian interventions from today's perspective and standpoint, even if interveners referred to self-defence aspect rather than to humanitarian reasons (i.e. India's intervention in East Pakistan, or to some extent Tanzania's intervention in Uganda and Vietnam's in Cambodia).⁴⁶¹

According to another prominent scholar, in looking at the codified international law on the use of force, an interesting observation can be made in that, perhaps, the unilateral and indiscriminate use of force by states after the Second World War was simply unimaginable, yet became a reality once peace was restored. Nigel Rodley explains this line of thinking by stating that

Contextually, it must surely have been unthinkable that the drafters of the

⁴⁵⁷ Nardin, *supra* note 17 at 57.

⁴⁵⁸ The ‘Balkan Wars’ refers to the conflict in the Federal Republic of Yugoslavia between 1990 – 1999. See András J Riedlmayer, “Crimes of War, Crimes of Peace: Destruction of Libraries during and after the Balkan Wars of the 1990s” (2007) 56:1 *Library Trends* 107 at 111.

⁴⁵⁹ Jerzy Zajadlo, “Humanitarian Intervention: Threat to International Order, Moral Imperative, or Customary Norm in statu nascendi?” (2004) 27 *Polish Y B Intl L* 33 at 35.

⁴⁶⁰ A detailed analysis of this conflict will be presented as part of a separate case study in Chapter 4.

⁴⁶¹ Zajadlo, *supra* note 459 at 36.

UN Charter could have expected that, after the Nazi-perpetrated genocides, the world would again have to stand by if widespread atrocities were being committed behind the veil of national sovereignty. The world could not have unlearned the lesson so soon. In any event, if it was not the case at first, since it has come to be accepted that there is now not only a right, but a responsibility to protect against the major atrocities that scarred the conscience of the world, it is unconscionable to leave the fate of populations to the will of the Security Council, especially when that will is determined by a veto that may be cast for reasons having nothing to do with the clarity of the call and the need for rescue of those in danger.⁴⁶²

In that respect, it is important to briefly summarize the arguments for and against the existence of an obligation for a humanitarian intervention, starting with its theoretical conception and ending with its contemporary applicability through the Responsibility to Protect principle.

3.2.1. *Iustum Bellum & Ius Naturale*

As mentioned in section 3.1.1., one of the major arguments which favours humanitarian intervention traces its roots back to the concept of just war. Be that as it may, it should be noted that the concept of *iustum bellum* must not be conflated with the international legal principle on the prohibition on the use of force. Although the former can be said to have contributed to the idea of a just reason to wage war, its inherent nature, which was built on ideals of warfare often developed through a natural law theory lens, prevents its use as part of a legal analysis in this thesis. Hence, it can be firmly stated that “neither the UN Charter system nor the classic just war theory provides an adequate analysis of *jus ad bellum* for the twenty first century.”⁴⁶³ Additionally, a primary reason that a just war doctrinal analysis will not be completed in this thesis, is that unfortunately, its theoretical underpinnings cannot be effectively incorporated into a contemporary international legal examination of the subject at hand. More precisely, it is suggested that the classical just war theory fails to conceptualize the legal, moral and political factors that are seen to govern the international law on the use of force (specifically in relation to military intervention). This view has found support in the legal

⁴⁶² See Rodley, *supra* note 456 at 779.

⁴⁶³ Robert J Delahunty & John Yoo, “From Just War to False Peace” (202) 13:1 Chicago J Intl L 1 at 44.

scholarly community. For example, Delahunty and Yoo echo this position, specifying that there are multiple challenges related to using the classical just war theory as an assessment mechanism of military interventions:

While it [classical just war theory] permits humanitarian interventions, it forbids preventive war: war is only "just" when, like the criminal law, it serves punitive justice. The injuries that war can properly redress, on the classic just war theory, are past ones; the threat of future injury, no matter how grave, cannot justify war except when the injury is actually impending. In an age when rogue states can credibly threaten millions of innocent civilians with instantaneous destruction, that consequence is simply not acceptable.⁴⁶⁴

Indeed, solely from a legal perspective, the religious tenets of morality, which find their basis in the theory, prevent it from being used as part of the legal analysis. As colorfully defined by Nussbaum while writing during the Second World War:

It appears that the traditional doctrine of just war is essentially religious where its religious spirit evaporates, only a shallow and stale residue remains. Certainly, the issue of just war deserves discussion in any course or textbook on international law, but only as a matter of analysis and historical information. This view will eliminate a prolific source of doubts and obscurities. The just-war-on-both-sides problem is illustrative. It is there that insoluble troubles befell the writers who tried to elaborate the just-war concept in a legal or semi-legal way.⁴⁶⁵

Nonetheless, it must be reiterated that the importance of *iustum bellum* in influencing the contemporary doctrine of humanitarian intervention cannot be ignored. Although aspects of the classical just war theory border on the theoretical, and at-times canonical teachings that are no longer fully applicable to modern warfare or international law, certain ideals

⁴⁶⁴ *Ibid.* See also Stephen Lee, "The Who and the Why of Humanitarian Intervention" (2011) 30:3 Criminal Justice Ethics J 302 ("Humanitarian intervention is a state's use of military force to rescue people in another state who are the victims of serious human rights violations. Humanitarian intervention has been a major topic for discussion among just war theorists over the past two decades, and it is generally, though not universally, regarded as sometimes justified. As a justified use of military force, it poses a challenge to contemporary just war theory because it contravenes the notion that state sovereignty is unconditional; it violates the non-intervention principle. An unconditional notion of state sovereignty implies that only defensive wars are justified, but humanitarian intervention involves the first use of force across an international border. This uncomfortably resembles aggression. To this extent, our moral understanding of humanitarian intervention is in tension with the broader contemporary understanding of just war theory" at 302).

⁴⁶⁵ Arthur Nussbaum, "Just War--A Legal Concept" (1943) 42:3 Mich L Rev 453 at 478.

of the theory have surpassed its criticism and have influenced important aspects of the contemporary doctrine of humanitarian intervention. Such ideals include “the common idea that war must be waged as a last resort...or Vitoria’s idea that a balance should always exist between war and the utility which is sought by using such force.”⁴⁶⁶ Therefore, one way to see classical just war theory is to acknowledge its influence in resurrecting similar moral principles when applied to the notion of warfare through an advocacy for the existence of an overall obligation for humanitarian intervention.⁴⁶⁷ In other words, the basis of the theory has been found to make up the crux of the argument for the existence of a morality-derived legal parameter for humanitarian intervention, which finds that an international responsibility exists amongst states, as a matter of last resort, to use military force in an effort to halt mass and systematic humanitarian atrocities. Hence, although the theory itself will not be used as part of this thesis’ legal analysis of the issue at-hand, the connection between the doctrine of humanitarian intervention, *iustum bellum* and natural law must be made abundantly clear. The next sub-section will briefly do so in order to introduce the theoretical foundation of the doctrine of humanitarian intervention, whose status under international law can then be established accordingly.

The philosophical relationship between natural law theory and military intervention (specifically humanitarian intervention) traces its roots as far back as ancient Greece and Rome.⁴⁶⁸ A suggested definition of humanitarian intervention holds that “...armed intervention is permissible to enforce standards of civilized conduct when rulers violate those standards, and finds expression today in the widely held opinion that states, acting unilaterally or collectively, are justified in enforcing respect for human rights.”⁴⁶⁹ Fundamentally, the moral aspect of adhering to a ‘civilized conduct’ in respecting human rights, points to the use of classical natural law principles in the

⁴⁶⁶ Benedetto Conforti, "The Doctrine of Just War and Contemporary International Law" (2002) 12 Italian YB Intl L 3 at 10.

⁴⁶⁷ *Ibid* at 11.

⁴⁶⁸ Breau, *supra* note 14 at 11.

⁴⁶⁹ Nardin, *supra* note 17 at 57.

aforementioned definition. This dictates a return to the roots of morality within the contemporary international legal system, a task that revives the abandoned philosophical approach to morality using natural law.⁴⁷⁰

The early philosophical stages of natural law can be better defined as ‘classical natural law’ emphasizing the natural law maxim of “...what naturally is, *ought* to be.”⁴⁷¹ The commencement of classical natural law theory can be principally attributed to the literary works of Plato and Aristotle.⁴⁷² Notwithstanding these contributions, the contemporary approach of analyzing pre-modern legal theory typically falls silent on natural law; preferring to refer to legal positivism as a more tangible alternative to natural law’s ‘outdated’ philosophy.⁴⁷³ In spite of these statements, natural lawyers believe that international law “entails some elementary normative propositions and consequently, as per Aquinas – is supposed to [serve] the common good.”⁴⁷⁴ In light of this view, it can be suggested that classical natural law perceives certain processes to be predetermined, and thus inherent to humanity. If this statement is applied to the primacy of human rights in the international law on the use of force, it becomes evident that they can be considered as inherent to humanity and hence, should be considered as forming the basis of the that law, while providing legitimacy for the doctrine of humanitarian intervention.⁴⁷⁵ Yet, this argument begs an important question with regards to the legal status of the doctrine: how can such a primacy be enforceable in international law? Herein lies the most challenging issue with regards to the doctrine of humanitarian intervention. More precisely, the same criticism leveled against the use of classical just war theory to defend the development of the international law on the use of force, can also be applied, *ipso facto*, to the doctrine of

⁴⁷⁰ David Kennedy, “International Law and the Nineteenth Century: History of an Illusion” (1997) 65:3 *Nordic J Intl L* 385 at 389.

⁴⁷¹ Raymond Wacks. *Understanding jurisprudence: an introduction to legal theory*, 4th ed (Oxford: Oxford University Press, 2015) at 15.

⁴⁷² *Ibid.*

⁴⁷³ Eric Heinze, “The Status of Classical Natural Law: Plato and the Parochialism of Modern Theory” (2007) 20:2 *Can J L & Jurisprudence* 323 at 323.

⁴⁷⁴ Fernando Teson, “Natural Law as Part of International Law: The Case of the Armenian Genocide (2013) 50 *San Diego L Rev* 813 at 825 [Teson, “Natural Law”].

⁴⁷⁵ For an excellent and detailed analysis of this argument, see Nardin, *supra* note 17.

humanitarian intervention. Moreover, their general absence in international treaties or *opinio juris* supports this argument.⁴⁷⁶ Therefore, although the *iustum bellum* concept may have contributed to the development of the *jus ad bellum* through its implication of the right of self-defence for example,⁴⁷⁷ the current status of international law prevents the existence of a law solely on the basis of ‘morality’ or ‘justice’, especially without evidence of adherence to such a law in treaties or customs through state practice. Similarly, the absence of a ‘tribunal’ or any type of assessment or enforcement mechanism to evaluate the notion of justice or morality as it pertains to the act of humanitarian intervention seemingly prevents its invocation as a legal right under international law. This is applicable to both customary and treaty sources of international law as they pertain to the international law on the use of force.

In conclusion, it can be suggested that the connection between classical just war theory and the doctrine of humanitarian intervention weakens the overall argument of the latter. This leads this thesis to recommend that the doctrine of humanitarian intervention should be put through a legal evaluation under the positivist understanding of international law. In other words, the doctrine should be put through an examination using the understanding of international law as deriving from treaty or custom, and not simply on the basis of its morality and justice towards humanity. The next subsection will

⁴⁷⁶ Nussbaum, *supra* note 465 at 474.

⁴⁷⁷ See e.g. Dino Kritsiotis, “Theorizing in International Law on Force and Intervention” in Anne Orford & Florian Hoffmann eds, *Regimes and Doctrines*, Part III (Oxford: Oxford University Press, 2016) (“Hugo Grotius had earlier advised us to consider war ‘in a two-fold light’, either (as he wrote) ‘as a reparation for injuries, or as a punishment’. Before that, Gentili formed the view that ‘it has been shown that it is just to avenge wrongs, to punish the guilty, and to maintain one’s rights’. Traces of this thinking continued to permeate through to the twentieth century where, at least in the first decades, international law distinguished between the purpose of self-defence and that of armed reprisal while admitting the permissibility of both. Whereas the right of self-defence exists ‘for the purpose of protecting the security of the state and the essential rights ... upon which that security depends’, armed reprisals, in contrast, have been said to be ‘punitive in character’ for ‘they seek to impose reparation for the harm done’. The lawfulness of the former remains assured under the *Charter* in the form of article 51; the latter commanded the support of the law at one point, but have been frowned upon by the *Charter*. Perhaps this development is one of the factors to explain the ‘more general disappearance’ that has been observed of the concept of punishment ‘from the theories and vocabulary of contemporary legal theorists writing about war’, although complications attend the application of this distinction in practice” at 679).

accomplish this in order to firmly establish that an *overall* right or obligation for humanitarian intervention does *not* exist in contemporary international law.

3.2.2. Contemporary Arguments for Humanitarian Intervention in the 20th & 21st Centuries

Throughout post-UN Charter history, atrocities committed by states and their respective governments have kept alive the debate surrounding the existence of an overall right of collective or unilateral military intervention. Specifically, whether that right encompasses an absolute right to the use of force or not centered precisely on the attempt to halt them and consequently, prevent them from reoccurring in the future.⁴⁷⁸ Indeed, it is difficult to argue against the fact that the principle of state sovereignty, which remains corollary to the international legal system, can be left unfettered in the face of mass atrocities committed in Rwanda (1994) or Srebrenica (1995), for example.⁴⁷⁹ Additionally, the fact that such atrocities have not been limited to certain states or regions of the world begs the question of: at what point does a state lose its sovereignty in the face of such atrocities being committed on its territory? Conversely, it can be asked, should a state lose its sovereignty at all? Would that not open up a ‘Pandora’s Box’ in an international legal system without an effective enforcement mechanism? Such valid questions remain a part of an ongoing debate promulgated through extensive scholarship that has attempted to argue their respective interpretations of the doctrine of humanitarian intervention. As the past chapters have demonstrated, with the international legal system being reluctant to support laws solely by reason of morality or justice, it is necessary to assess the strength of the doctrine of humanitarian intervention by appraising its legal status and foundation. Once completed, it will be easier to understand the strongest argument of this thesis, which denies the legality of humanitarian intervention, rather arguing that an exception to the prohibition on the use of force exists solely under customary international law and under the condition of a systematic denial of a right to

⁴⁷⁸ Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010) at 495-6.

⁴⁷⁹ Mindia Vashakmadze, “Responsibility to Protect” in Bruno Simma et al, 3rd ed, *The Charter of the United Nations: A Commentary*, vol I (Oxford: Oxford University Press, 2012) at 1204.

self-determination, coupled with human rights abuses deemed as *in extremis*.

The advocacy for the existence of a right to humanitarian intervention as a norm evolved principally throughout the Cold War period.⁴⁸⁰ In large part, two central arguments promulgated the concept: either as a justification for the use of force outside of the ambit of the UN Charter's prohibition on the use of force, or as a responsibility to uphold a moral standard for an intervention in an oppressed state undergoing massive and systematic abuses of human rights.⁴⁸¹ In response to the latter, the UK Foreign and Commonwealth Office stated in 1984 that "the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal."⁴⁸² With regards to the former, as previously mentioned, an ongoing debate persists over the extent of the prohibition on the use of force in international law. In any case, it should be mentioned that attempts were made to develop the doctrine of humanitarian intervention into an enforceable legal norm through the introduction of the Responsibility to Protect principle, otherwise known as R2P.⁴⁸³ Before moving on, it is necessary to briefly summarize R2P's development and contemporary status under international law, as the current doctrine on humanitarian intervention has embraced the concept as part of its

⁴⁸⁰ *Ibid* at 1205.

⁴⁸¹ Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed (Ardsley: Transnational Press, 1997) at 180-95 [Teson, "Humanitarian Intervention"].

⁴⁸² 'UK Materials on International Law', 57 Brit YB Intl L (1986) 614.

⁴⁸³ Ingo Winkelmann, ed, "Responsibility to Protect" in Max Planck Encyclopedia of Public International Law by (Oxford University Press), online: <<http://opil.ouplaw.com>> ("Responsibility to protect, as a legal notion, entered the vocabulary of modern international law in 2001. The term 'responsibility to protect' rests on two basic considerations... '(1) State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself; (2) Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect' (Report of the International Commission on Intervention and State Sovereignty XI). Intervention, Prohibition of; Sovereignty) In order to determine the circumstances in which the responsibility of the State concerned might yield to an international responsibility, the new concept spells out criteria for assessing whether or not an intervention is justified. If all criteria are fulfilled, the international community shall have a duty to protect under international law" at para 22). See also *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at 23.

attempts to be codified into international law.⁴⁸⁴

In response to the 1994 genocide in Rwanda, and the claims of inaction by UN peacekeeping forces ‘paralyzed’ by bureaucratic and nebulous guidelines on the prohibition on the use of force,⁴⁸⁵ a discussion began to be had around the question of “...whether there is now a ‘responsibility to protect’, that is a duty on states to intervene in certain cases of humanitarian crisis.”⁴⁸⁶ In 2004, the *High-level Panel on Threats, Challenges and Change* set up by the UN Secretary-General released a report titled: *A More Secure World: Our Shared Responsibility*.⁴⁸⁷ Its contents reiterated the responsibility of states to collectively protect and work towards eliminating mass humanitarian atrocities. As further summarized by Gray, the Report advocated for a collective security mechanism against mass atrocities:

[The Report] endorsed the emerging norm that there is such a collective responsibility to protect in cases of genocide and other large scale killing, ethnic cleansing or serious violation of international humanitarian law. The primary duty to protect lies with the state, but when a state fails to act to protect its own citizens the international community has a responsibility to act, by force if necessary, though only as a last resort. The responsibility to protect was exercisable by the Security Council authorizing military intervention.⁴⁸⁸

One year later, the contents of the report were transferred into the *World Summit Outcome Document* during the World Summit in 2005. Paragraphs 138 and 139 of the document distinctively pointed out the responsibilities of states from the perspective of both international law and the international community. With regards to the R2P principle in particular, Paragraph 139 clearly demonstrated the intent of establishing a collective security mechanism for the purposes of a military intervention:

⁴⁸⁴ Louise Arbour, “The Responsibility to Protect as a Duty of Care in International Law and Practice” (2008) 34:3 *Rev of Intl Stud* 445 at 445-8.

⁴⁸⁵ For more on the Rwandan Genocide and the UN’s failure to act, see L Melvern, “The Security Council: Behind the Scenes in the Rwanda Genocide” in A Jones, ed, *Genocide, War Crimes and the West: History and Complicity* (London: Zed Books, 2005) at 260-9. See also Jared Cohen, *One Hundred Days of Silence: America and the Rwanda Genocide* (Lanham: Rowman & Littlefield, 2007).

⁴⁸⁶ Gray, *supra* note 337 at 52.

⁴⁸⁷ UN Secretary General, *Transmitting report of the High-level Panel on Threats, Challenges and Change, entitled: A more secure world: our shared responsibility*, UNGAOR, 59th sess, UN Doc A/59/565 (2004) at paras 199–203.

⁴⁸⁸ Gray, *supra* note 337 at 52.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. *In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.* We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁴⁸⁹

Although this paragraph, and its wording, was hailed as a monumental achievement by the UN Secretary General at the time,⁴⁹⁰ the debate over the implication of creating a legal obligation for states to act began to slowly fragment the R2P principle and consequently, the doctrine of humanitarian intervention in general. In large part, a group of states calling themselves the ‘non-aligned movement’ saw R2P as simply a pretext for powerful states to invade smaller states under the auspices of that doctrine, while also imposing their political and economic will in the intervened state *ex post facto*.⁴⁹¹ Generally, proponents of R2P point to numerous examples where the ‘principle’ was invoked and used successfully. However, although such proponents point to Resolutions 1674 (2006)⁴⁹² and 1973 (2011)⁴⁹³ as acknowledging the use of the ‘responsibility to

⁴⁸⁹ 2005 *World Summit Outcome*, GA Res 60/1, UN Doc A/RES/60/1 at paras 138-9 [emphasis added].

⁴⁹⁰ Gray, *supra* note 337 at 52.

⁴⁹¹ Christina Gray, “A Crisis of legitimacy for the UN Collective Security System?” (2007) 56 ICLQ 157 at 167-8. See also Vashakmadze, *supra* note 479 at 1201-36; Thomas G Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed (Cambridge: Polity, 2012); Alex J Bellamy, “Realizing the Responsibility to Protect” (2009) 10 Intl Stud Perspectives 111 at 111 - 28.

⁴⁹² *Security Council resolution 1706*, SC Res 1706, UNSCOR, UN Doc S/RES/1706 (2006) (“recalling *Security Council Resolution 1674*, SC Res 1674, UNSCOR, UN Doc S/RES/1674 (2006)” at preamble.

⁴⁹³ *Security Council resolution 1973*, SC Res 1973, UNSCOR, UN Doc S/RES/1973 (2011) at preamble.

protect' doctrine with regards to the humanitarian crises in Sudan and Libya for example, the underlying debate over the meaning of R2P has interrupted any idea of the concept emerging into a customary norm in international law.⁴⁹⁴ In other words, even those who still claim that R2P has the potential to crystallize into a customary international law norm in the future, have acknowledged the challenge of invoking the doctrine outside of UNSC approval, reaffirming the original challenge with the prohibition on the use of force in the first place.⁴⁹⁵ Generally speaking, it can be suggested that R2P's legal status can be measured as being at best an instrument of soft law, encouraging states to limit and avoid committing atrocities.⁴⁹⁶ In order to reaffirm this statement, it is necessary to assess first, which states, if any, have openly supported the doctrine, and second, has state practice adequately supported it, as well?

As previously mentioned, until very recently, states were reluctant to recognize a legal right or obligation for a humanitarian intervention in their domestic or foreign policies. This has contributed to probably the largest criticism of humanitarian intervention: the absence of any direct legal justification for its existence, as well as a reluctance of lawyers and legal scholars to adamantly confirm its existence, instead opting to state that it *could* or *should* exist.⁴⁹⁷ Still, consider this extract from a speech delivered on January 11, 2017 by the Right Honourable Jeremy Wright, the United

⁴⁹⁴ Vashakmadze, *supra* note 479 at 1223. See also Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101:1 AJIL 99 at 101, 120; Jutta Brunne & Stephen J Troope, *Legitimacy and Legality in International Law*, (Cambridge: Cambridge University Press, 2010) at 339-40. Numerous scholars have also argued that the case of military intervention in Libya amounted more to a 'regime change' than an invocation of R2P and the protection of civilians. See also. Sarah Brockmeier, Oliver Stuenkel & Marcos Tourinho, "The Impact of the Libya Intervention Debates on Norms of Protection" (2016) 30: 1 Global Society 113 at 117; Rebecca Adler-Nissen & Vincent Pouliot, "Power in Practice: Negotiating the International Intervention in Libya" (2014) 20:4 Eur J Intl Relations 1 at 13; Christopher Chivvis, *Toppling Qaddafi: Libya and the Limits of Liberal Intervention* (Cambridge: Cambridge University Press, 2013) at 174.

⁴⁹⁵ For examples of scholars who defend this view see generally, Anne Peters, "The Security Council's Responsibility to Protect" (2011) 8:1 IOLR 1 at 15, 26-8; David Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" (2007) 40:1 Case W Res J Intl L 111 at 111, 115; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocities Once and For All* (Washington D.C: Brookings Institution, 2008) at 61.

⁴⁹⁶ Vashakmadze, *supra* note 479 at 1230-1.

⁴⁹⁷ Gray, *supra* note 337 at 34. See also Teson, "Humanitarian Intervention", *supra* note 481 at 192.

Kingdom's Attorney General on the modern law of self-defence whereby the right to humanitarian intervention is clearly mentioned:

To be clear, today I address only the law relevant to the resort to the use of armed force (*jus ad bellum*), and not the law which applies to the conduct of military operations (*jus in bello*). As you know, the starting point is that the use of force is prohibited under Article 2(4) of the UN Charter. That is such a fundamental tenet of the post 1945 world order that it is considered by many to be a peremptory norm from which no derogation is permissible. Even so, there are clear exceptions to that prohibition, both in the UN Charter itself and, in the United Kingdom's view, in customary international law. Under the UN Charter, armed force may be used both pursuant to a Chapter VII authorisation by the UN Security Council and in individual or collective self-defence under Article 51 of the UN Charter. The *UK also recognises humanitarian intervention as a potential legal basis for the use of force in certain exceptional circumstances*.⁴⁹⁸

As can be deduced from the Attorney-General's speech, the United Kingdom recognizes the right for a humanitarian intervention in 'certain exceptional circumstances'. This declaration is significant in that it denotes one the first times in the last decade that a government's policy has openly supported a legal justification for humanitarian intervention outside of the current prohibition on the use of force. Unfortunately, it also one of the only times a government has openly acknowledged its existence. Nonetheless, it is important to note that proponents of the doctrine of humanitarian intervention have not ignored the criticism of unenforceability with regards to its evaluation. Generally, it is argued that a threshold or a test must be developed to assess the gravity of the situation and the necessity of the intervention.⁴⁹⁹ Rodley, for example, summarizes the generic test for humanitarian intervention requiring an assessment through six separate criteria:

⁴⁹⁸ Rt Hon. Jeremy Wright QC MP, "The Modern Law of Self-Defence" (Speech delivered at the International Institute for Strategic Studies, London, 11 January 2017) online: <www.ejiltalk.org/the-modern-law-of-self-defence/#more-14885>. It should be noted that this is not the first time that the United Kingdom has embraced the notion of 'humanitarian intervention' as official policy; however, it is the most recent direct mention of the term. The first mention of humanitarian intervention by the United Kingdom was issued in 1992, after the UK intervention in Iraq. The doctrine would further be developed in 1998, 2000 and 2001. For more on the UK's development of the 'humanitarian intervention' argument, see generally "UK Materials on International Law" (1992) 63 Brit YB Intl L 1 at 826, 827; "UK Materials on International Law" (1999) 70 Brit YB Intl L 1 at 595; "UK Materials on International Law" (2000) 71 Brit YB Intl L 1 at 643-6; "UK Materials on International Law" (2001) 72 Brit YB Intl L 1 at 695-6 cited in Christine Gray, *International Law and the Use of Force*, 3rd ed (Oxford: Oxford University Press, 2008) at 36, n 32.

⁴⁹⁹ Rodley, *supra* note 456 at 788.

1. Gravity of the situation (i.e are human rights abuses *in moderato* vs. *in extremis*?)
2. Political neutrality (i.e is there national self-interest on behalf of the intervening state or states?)
3. UNSC paralysis (i.e has the UNSC been paralyzed in its ability to invoke the use of force through its Chapter VII mandate?)
4. Necessity (i.e is the necessity of the intervention similar to the threshold invoked for self-defence: ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’)
5. Proportionality (i.e what is a proportional military response to the situation? This consideration would avoid the occurrence of senseless destruction of civilian infrastructure and collateral damage such as the ones in perpetrated in NATO’s bombing campaign of Kosovo in 1999)⁵⁰⁰
6. Accountability (i.e what is the threshold for the accountability of the intervening party? What governmental body would have the authority to hold the intervening state or states accountable on the basis of the validity of the intervention?).⁵⁰¹

Such tests, although important if one is to consider the legitimacy of an intervention, pose a number of different issues. For example, who will administer these tests on the international level? Can an independent arbiter truly assess the nature, necessity, or political neutrality of an intervention? Further, what type of sanctions, if any, can be imposed on those that violate their responsibilities under this test? In many ways, these types of questions cannot be answered in the face of the contemporary status of the

⁵⁰⁰ For a summary on the damages to civilian infrastructure caused by NATO’s bombing of Kosovo see George Thomas, “NATO and International Law”, *On Line Opinion* (15 May 1999), online: <www.onlineopinion.com.au> [G Thomas].

⁵⁰¹ Rodley, *supra* note 456 at 788-94. It is important to note that Nigel Rodley is one of many scholars to propose a ‘humanitarian intervention legitimacy test.’ This has generally come out of the discussion on the Responsibility to Protect (R2P) which looks at proportionality and justification to evaluate the legitimacy of an intervention (which in addition to the aforementioned criteria, should only be executed as a matter of last resort.) For a finalized list of the six legitimacy criteria for a military intervention see, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at para 4.41. For other examples of ‘criteria for humanitarian intervention’ as proposed by other scholars see generally, Lowe & Tzanakopoulos, *supra* note 18 at paras 38-44; Simma, “NATO, UN and Use of Force”, *supra* note 407 at 19; Christine Chinkin, “Kosovo: A ‘Good’ or ‘Bad’ War?” (1999) 93 AJIL 841 at 844; Antonio Cassese, “Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” (1999) 10:1 EJIL 23 at 23-5 [Cassese, “ex iniuria ius oritur”]; Ruth Gordon, “Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti,” (1996) 31:1 Tex Intl LJ 43 at 45.

doctrine from a legal perspective. Overall, Nodley equates the rendition of humanitarian intervention as a legal doctrine to the introduction of assisted suicide into a domestic legal system. In other words, Nodley sees a troubling trend emerging should a humanitarian intervention doctrine be officially introduced into international law. In particular, he sees states abusing the exception to the prohibition on the use of force, seeing as no sanctionary mechanism can prevent them from acting unilaterally on that basis, similar to the legal ramifications of implementing an overall right to deregulated assisted suicide in a domestic legal system.⁵⁰² Nodley's arguments are salient in that they identify a seemingly insurmountable argument against the concept of humanitarian intervention: the building of legal threshold for an obligation of humanitarian intervention, that can be independently assessed and enforced if a blatant violation were to occur. From a legal perspective, as noted by Mindia Vashakmadze, the R2P principle has not attained the necessary strength of a rule in international law:

The enthusiasm for a possible legal nature of R2P may increase in the years to come and it is to be expected that the debate on the normative significance of R2P will continue. However, it must not be overlooked that the success of the concept as such cannot be measured by its suitability to be translated into a binding legal principle. At this stage, the R2P may be a more powerful and effective mechanism if it is used as a tool for a slow normative change and not as an established (or emerging) principle of international law.⁵⁰³

Simply put, it is impossible at this juncture to argue for the existence of an overall right to humanitarian intervention as evinced by the R2P principle. Nonetheless, it should be noted that the main argument of this thesis does not defend an overall obligation for humanitarian intervention. Additionally, it must be reiterated that this thesis defends the *right*, and not a *responsibility* or *obligation*, for a third state military intervention in the case of human rights abuses deemed as *in extremis*, and only if a claim of self-determination has been invoked and has been systematically denied to the peoples in question. Hence, a thorough analysis of three case studies will be presented in the next Chapter in order to better understand the implications of a situation whereby an attempted UNC secession is followed by the commission of human rights abuses deemable as *in*

⁵⁰² Rodley, *supra* note 456 at 796.

⁵⁰³ Vashakmadze, *supra* note 479 at 1236.

extremis. The case studies will focus on three relatively recent examples of military interventions with the objective of demonstrating the legal requirements necessary to justify a third-state military intervention. Namely, the three examples will consist of interventions by India in Bangladesh in 1971, NATO in Kosovo in 1999 and Russia in South Ossetia and Abkhazia in 2008. Once a thorough analysis of each case is completed, a concluding sub-section will present a legal framework through which an exception to the prohibition on the use of force under customary international law can be established.

Chapter 4

Chapter 4: Case Studies – Bangladesh, Kosovo & South Ossetia and Abkhazia

The history of third-state military interventions in the pre-UN Charter period is controversial in relation to the nature, the reason and the end result of the interventions on the state in question. As mentioned in Chapter 3 with respect to the history of the *iustum bellum* concept, until the mid-19th century, states had been reluctant to call interventions ‘humanitarian’, rather opting for other justifications as part of their recourse to the use of force. Overall, “history casts a heavy shadow over any intervention claimed to be ‘humanitarian,’”⁵⁰⁴ in large part due to the conflation of humanitarian intervention with neo-imperialism.⁵⁰⁵ For example, the military intervention in Cuba by the United States in 1898 was claimed by the United States as justified on the basis of protecting United States citizens and interests, while also freeing the Cuban citizens from Spanish colonial rule. Ultimately, this led Cuba to become a US protectorate until the Cuban Revolution in 1959, which, on many accounts, occurred either on moral and hence justifiable grounds, or due to the willingness of the United States to impose its hegemony in Cuba, which ultimately led to the exploitation of Cuban resources by American companies.⁵⁰⁶ As can be seen through this example, finding instances of state practice with regards to a true ‘humanitarian intervention’ is extremely challenging.⁵⁰⁷ As explained by Rodley, the criteria for what constitutes a justifiable military intervention are generally vexing to

⁵⁰⁴ Lowe & Tzanakopoulos, *supra* note 18 at para 5. See also Nico Krisch, “Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo” (2002) 13 EJIL 330.

⁵⁰⁵ Martti Koskenniemi, “The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law” (2002) 65 Mod L Rev 159 [“[s]peaking of Serbia’s civilian losses during the Kosovo bombings] [“The sacrifice of 500 civilians would then appear as violent reaffirmation of the vitality of a concrete international order created sometime after the second world war and in which what counts as law, or humanitarianism, or morality, is decided with conclusive authority by the sensibilities of the Western Prince” at 170-1)].

⁵⁰⁶ For more on the example of the US intervention in Cuba and the different arguments on its nature or reason, see Thomas Frank & Nigel Rodley, “After Bangladesh: The Law of Humanitarian Intervention by Military Force” (1973) 67 AJIL 275 at 283-5. See generally, Hubert Clinton Herring, *A History of Latin America: From the Beginnings to the Present* (New York: Knopf, 1967) at 541; Richard A Falk, “American Intervention in Cuba and the Rule of Law” (1961) 22:3 Ohio St LJ 546; P H Winfield, “The Grounds of Intervention in International Law” (1924) 5:1 Brit YB Intl L 149 at 154-6.

⁵⁰⁷ Rodley, *supra* note 456 at 779.

identify:

Again it will only be the more evident that candidacies for the title of example of humanitarian intervention are hard to come by. It is not intended to consider rescues of the intervening state's national (or other foreign nationals) abroad. To the (questionable) extent that such interventions may be lawful, they are rarely if ever justified as being undertaken pursuant to a general right of humanitarian intervention, that would protect all those in the territory of the state in question, but only for the more limited right to protect foreign nationals; sometimes self-defence is advanced as an underlying justification. Certainly, such a defence is the only one consistent with the original notion that the only exceptions to the prohibition on the use of force were self-defence and Security Council-authorized action under Chapter VIII of the UN Charter...Any inhibition on the use of force, short of resort to outright war, must inevitably have had more than a trace of flimsiness about it, thus creating space for the possibility of armed action for many politically convenient purposes. It is after the advent of the universal prohibition on the use of force that state practice becomes especially important.⁵⁰⁸

Without going further into the 'flimsiness' of military interventions executed on 'humanitarian' grounds, it should be noted that the intent of this thesis is to identify state practice with regards to third-state interventions *only* in cases related to external self-determination combined with human rights abuses deemed as *in extremis*. Therefore, the case studies which will be explored in this chapter will be analyzed with the understanding that strategic and ulterior motives *can* exist within the ambit of third-state military interventions (whether or not they are perceived or conceived to be of a humanitarian nature). In turn, the threshold of whether such strategic or ulterior motives constitute a violation of non-derogable peremptory norms of international law will also be considered. Conclusively, the factors that will be established as legitimizing the military intervention under international law, will provide the necessary burden of proof that the intent, proportionality and final execution of the intervention outweigh any notion of the interventions' ulterior or strategic motives.

The case studies analyzed in this Chapter have been selected on the basis of the following three variables as *generally* applying to three separate conflicts: a) the

⁵⁰⁸ *Ibid* at 779-80.

territorial conflict in question includes a peoples that have been systematically denied their right to internal self-determination and thus have invoked their right to external self-determination, b) the systematic denial of self-determination has been followed-up with human rights abuses deemed as *in extremis* and c) a third-state or a collective of third-states has(ve) militarily intervened in the conflict. Additionally, the three case studies will be considered separately to demonstrate the scope of legal and illegal third-state military interventions. More precisely, the military interventions in Bangladesh and Kosovo will demonstrate how systematic denials of a peoples' self-determination, combined with human rights abuses deemed as *in extremis*, have validated or justified the interventions in those conflicts. Alternatively, the cases of South Ossetia and Abkhazia will demonstrate how, even as both entities can claim to meet the international legal requirements for statehood, the absence of systematic denials of internal and external self-determination do not justify or validate the Russian military intervention and subsequent occupation of the Georgian territories. Overall, the case comparison will establish the legal requirements necessary for a third-state intervention in violation of the prohibition on the use of force, but justified as part of customary international law.

4.1. Bangladesh

As one of the few successful secessionist movements in the 20th century, Bangladesh is the first case whereby a serious systematic violation of self-determination rights was met with direct military intervention perpetrated by a third state (India).⁵⁰⁹ Additionally, the case has been considered as one of the first instances of 'legitimate' interventions, leading to the subsequent creation of a sovereign state post-1945.⁵¹⁰ The rapidity of its acceptance into the international community, coupled with over 28 *de jure* state recognitions in 1972, and earning full *de jure* recognition once conceded by Pakistan in 1974, speaks to the importance of the factors which led to and subsequently

⁵⁰⁹ Alexander Heraclides, "Secessionist Movements and External Involvement" (1990) 44:3 International Organisation J 341 at 349.

⁵¹⁰ Ved P Nanda, "A Critique of the United Nations Inaction in the Bangladesh Crisis" (1972) 49:1 Denv L J 49 at 52-4 [Nanda, "Bangladesh"].

completed its path to independence.⁵¹¹ Prior to delving into the developments of the Bengali independence movement, it is necessary to briefly summarize the history of the region. This will establish a firm understanding of the ethno-religious plight of its multinational history, made more complex by multiple waves of invasions and colonial rule over the last two millennia.

4.1.1. Bangladesh – a brief chronological history

The history of the contemporary state of Bangladesh is complex as it “is intertwined with that of India, Pakistan and other countries in the area.”⁵¹² Moreover, the impact of religion as introduced by the numerous colonial conquests of the territory, provide an added opportunity to understand the complexity of its ethno-diverse population. From the onset, Buddhism dominated the region during the Mauryan Empire from around the 3rd Century BCE, followed by a re-establishment of Hinduism between 4-6 BCE by the Gupta kings.⁵¹³ The two religions were able to coexist fairly peacefully until an overthrow of the Senas by Muslim invaders in 1200 AD. After the invasion, the religion of the majority of the population changed to Islam. Nevertheless, as explained by this extract from Britannica Encyclopedia, the multiconfessional makeup of Bangladesh after 1200 AD was not an immediate cause for the ethnic conflict that would follow in the centuries to come:

Muslim rule in Bengal promoted a society that was not only pluralistic but also syncretic to some degree. The rulers largely remained uninterested in preaching religion; rather, they concentrated on incorporating local communities into the state system. In their administration, high office holders, influential traders, eminent literati, and musicians came from diverse religious traditions. Nevertheless, practitioners of Sufism (mystical Islam) and Muslim saints did indeed preach Islam, and Muslim settlers received patronage. Although high-caste Hindus received land grants under early Muslim rule, under the Mughals most grants were awarded to Muslim settlers. These settlers developed an agrarian economy in Bengal that ultimately helped the spread of Islam. Meanwhile, the extensive interaction

⁵¹¹ Crawford, “The Creation of States”, *supra* note 21 at 141.

⁵¹² “Bangladesh” in *Britannica Academic, Encyclopedia Britannica*, online: <www.academic.eb.com> [“Bangladesh”].

⁵¹³ *Ibid.*

between Islam and Hinduism was reflected in social behaviour and the flourishing of various cults, notably that of the Hindu saint Caitanya (1486–1533). In contrast to more orthodox forms of Hinduism, the Caitanya sect—like Islam—was open to all members of society, regardless of caste or social rank. Under the Mughals the political boundaries of Bengal expanded to become Suba Bangalah (the Province of Bengal), and economic activity increased.⁵¹⁴

Once the English East India Company was granted the right to establish its headquarters in Calcutta (known as Kolkata) in the early 18th century, the British were able to exploit the weaknesses of the Mughal empire through their military dominance and monopoly in operating international trade routes.⁵¹⁵ In 1757, the East India Company with the backing of British troops fought a war against the weakened Mughal empire, ultimately defeating them and establishing the ‘Bengal Presidency’, a permanent settlement which implemented a feudal-type colonial system through a policy known as the *bhandralok*. The policy created a new middle-class, which unbeknownst to the British, would advocate for eventual independence and Indian self-government.⁵¹⁶

The difficulties of governing such a large territory were demonstrated early in the 20th century when the British decided, for geopolitical and geostrategic reasons, to separate the Bengal Presidency into Western and Eastern Bengal. Western Bengal at that time had a Hindu majority, while Eastern Bengal was primarily inhabited by a Muslim population.⁵¹⁷ As expected, the partition did not go well with the local minority populations in each territory. This led to the eventual annulment of the partition in 1912 (due to opposition from the Indian and Hindu-dominated National Congress); however, the seeds of religious and ethno-based separatism had already been planted.⁵¹⁸ Over the next twenty years, the Hindu-dominated National Congress party and the Muslim-

⁵¹⁴ *Ibid.*

⁵¹⁵ James J Novak, *Bangladesh: reflections on the water* (Dhaka: University Press, 1993) at 130-3.

⁵¹⁶ “Bangladesh”, *supra* note 512. See also Novak, *supra* note 515 at 140-54; Richard Maxwell Eaton, *The Rise of Islam and the Bengal Frontier, 1204-1760* (New Delhi: Oxford University Press, 2011) at 321-9.

⁵¹⁷ “Bangladesh”, *supra* note 512.

⁵¹⁸ Gordon Johnson, “Partition, Agitation and Congress: Bengal 1904 to 1908” (1973) 7:3 *Modern Asian Stud* J 533 at 541.

dominated Muslim League party fought over control of a reunited Bengal (albeit amicably). Yet, despite British efforts to dissipate ethno-religious tensions, "...in August of [1946] an intense Muslim-Hindu communal conflict erupted in Calcutta, and it eventually spread well beyond the borders of Bengal."⁵¹⁹ As Britain began to lose control over India, its partition followed by civil conflict became inevitable.⁵²⁰ Finally, in August 1947, India and Pakistan emerged as independent countries, with their territorial boundaries sketched and separated by the British, with West Bengal going to India and East Bengal going to Pakistan.⁵²¹ Evidently, the partition of East and West Bengal was not well received by the local populations. The reasons for this disenchantment are described by Li-ann Thio as revolving around several factors:

The geographically non-contiguous eastern wing of Pakistan, where 56 per cent of the total population lived, was separated from the western wing by 1200 miles of Indian territory. Islam was the sole unifying factor, given the cultural and linguistic differences of West and East Pakistanis. Rather than implementing a proposed federal system, military rule was imposed; further, Pakistani nationalism shaped the central policies that were designed to keep East Pakistan under-developed, negating the Bengali cultural identity. This unjust socio-economic and political order bred Bengali armed resistance and the desire to establish a Bengalese nation-State as a curative to the repressive West Pakistani rule.⁵²²

As can be deduced from Thio's explanation, the boundaries that were drawn up by the British to separate East and West Bengal did not entirely represent the religious and linguistic demographic of the regions.⁵²³ Additionally, "...since the Partition of British India in 1947, India and Pakistan had been fierce enemies, strategic and ideological rivals with clashing claims on Kashmir. The newly independent states fought a war in 1947-48, and then again in 1965 over Kashmir."⁵²⁴ Indeed, by the early 1960s, civil armed conflict became inevitable, as the developments that followed the partition, would lead to the rise

⁵¹⁹ "Bangladesh", *supra* note 512.

⁵²⁰ Hermann Kulke & Dietmar Rothermund, *A History of India* (New Jersey: Barnes & Noble, 1986) at 314.

⁵²¹ Li-ann Thio, "International law and secession in the Asia and Pacific regions" in Marcel G Kohen, ed, *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) at 304.

⁵²² *Ibid* at 306.

⁵²³ Archer K Blood, *The cruel birth of Bangladesh: Memoirs of an American diplomat* (Dhaka: University Press, 2002) at 12-30.

⁵²⁴ Garry J Bass, "The Indian Way of Humanitarian Intervention" (2015) *YJIL* 40:2 227 at 234.

of a secessionist movement that would eventually bring independence to Bangladesh. The next sub-section will provide greater detail on the legitimacy of the Bangladesh independence movement, as well as the historical developments which led to India's support and subsequent military intervention in 1971.

4.1.2. Legality of India's intervention in Bangladesh

The conflict in Bangladesh arose in the region known formerly as East Bengal, which was partitioned from West Bengal and given to the newly-independent state of Pakistan in 1947. As the emergence of the Pakistani state was largely a product of Islamic nationalism,⁵²⁵ the ethno-religious tensions flared in the region once nationalist movements in Pakistan began to infringe on the rights of the more Hindu-dominated ethnic populations of East Bengal. Consequently, by 1948, "Bengalis had begun to resent the nonacceptance of Bengali as an official language, the domination of the bureaucracy by non-Bengalis, and the appropriation of provincial functions and revenue by the central government."⁵²⁶ Further, in 1955, East Bengal was renamed East Pakistan to represent its status as an eastern province of the Pakistani Union (a more federative-modeled state). Nevertheless, after the Awami league, a leading Bengali political party, backed a 1956-proposed constitution that purported to provide equal representation and rights to each ethno-religious group in East Pakistan; a proposition was made for Eastern Pakistan autonomous rule as early as 1962.⁵²⁷ The Awami league argued that this is "the only way

⁵²⁵ Thio, *supra* note 521 at 306. See also Diane E Desierto, ed, "International Law, Regional Developments: South and South-East Asia" in Max Planck Encyclopedia of Public International Law (Oxford University Press) at para 11, online: <www.opil.oupilaw.com>.

⁵²⁶ "Bangladesh", *supra* note 512.

⁵²⁷ S Hashmi, "Self-Determination and Secession in Islamic Thought" in Mortimer Sellers, ed, *The New World Order: Sovereignty, Human Rights and the Self-Determination of Peoples* (Oxford: Washington Berg, 1996) at 139-40. It should also be noted that the call for independence came after an armed conflict in 1965 between India and Pakistan concerning the region of Jammu-Kashmir (otherwise the Jammu-Kashmir conflict). The Kashmir conflict is itself an example of a secessionist conflict and a territorial dispute. Presently Kashmir's administration is divided between the Pakistan-controlled north-west, the India-controlled central and south-west and the Chinese-controlled northeast. The ongoing territorial dispute between India and Pakistan over Kashmir is yet to be resolved, with regular clashes reported as recently as 2017. For more on this see Rajat Ganguly, "Kashmiri Secessionism in India and the Role of Pakistan Kin State Intervention" in Rajat Ganguly, ed, *Ethnic Conflicts: Lessons from South Asia* (New Delhi: Sage Publications, 1998) at 30-9. On the recent clashes between India and Pakistan with regards to the Kashmir region, see also Tom O'Connor,

of resolving the disparity between Pakistan's two parts [East and West Bengal and the Pakistani Union]."⁵²⁸ Subsequently, the Awami League won the national elections in 1970-1 with an overwhelming majority in East Bengal, "...which would have given it a majority in the National Parliament and most probably would have led to the federalisation of Pakistan."⁵²⁹ Naturally, this news was not met with enthusiasm by the Pakistani Union, with the military pronouncing an ultimate rejection of the democratic election results while equally proclaiming that the results were marred with 'civil disobedience'.⁵³⁰ Pakistan then launched a large-scale military operation on March 25, 1971, sending thousands of troops into the region. Consequently, the leaders of the Awami league, as well as several other Bengali and pro-Bengali politicians were jailed for their opposition to Pakistan's response.⁵³¹ As a result, on March 26, East Pakistan proclaimed its unilateral independence from the Pakistani Union; however, the atrocities committed against civilians had started the day before. It is well documented that, during the Pakistani military operations, multiple atrocities were committed, with "over one million Bengalis...killed[,] some 10 million driven into exile in India [as refugees], nearly 40 million displaced from their homes and tens of thousands of Bengali women raped."⁵³² Many states and state representatives decried the Pakistani military operation as 'genocidal'.⁵³³ In response to such actions, India attacked Pakistan 'pre-emptively' on

"India and Pakistan Conflict Erupts in 'Deadly' Border Battles between Nuclear Rivals" *Newsweek* (3 June 2017), online: <www.newsweek.com>.

⁵²⁸ John Dugard & David Raic, "The Role of Recognition in the Law and Practice of Secession" in Marcel G Kohen, ed, *Secession: international law perspectives* (Cambridge: Cambridge University Press, 2006) at 121[Dugard & Raic]. See also S R Chowdhury, *The Genesis of Bangladesh, A Study in International Legal Norms and Permissive Conscience* (Bombay: Asia Publishing House, 1972) at 42.

⁵²⁹ *Ibid* 121. See also Thio, *supra* note 521 at 305.

⁵³⁰ Thio, *supra* note 521 at 305.

⁵³¹ Dugard & Raic, *supra* note 528 at 121-2.

⁵³² *Ibid* 121. See also Manik Chakraborty, *Human Rights and Refugees- Problem, Laws and Practices* (New Delhi: Deep & Deep Publications Pvt. Ltd, 2001) at 154.

⁵³³ The events that took place in 1971 in Bangladesh as part of Pakistan's military operation have been described as the "1971 Bengali Genocide." It is outside of the scope of this thesis to analyze whether this atrocity can be considered a genocide under international law; however, there is strong evidence that the atrocities committed against the people of East Bengal fall into the category of human rights abuses designated as *in extremis*. See e.g., "East Pakistan Staff Study" (1972), International Commission of Jurists, *The Review* 8 (1972) at 23, 26-41; Anasua Basu Raychaudhury, "Life After Partition: A Study on the Reconstruction of Lives in West Bengal" (Paper delivered at the 18th European Conference on Modern South Asian Studies at Lund University, 9 Jul 2004) available

December 3, 1971⁵³⁴ and on December 6 officially recognized Bangladesh as an independent state. Nearly fourteen days later, “Pakistani troops were routed in the east...with Indian forces deep inside Bangladesh, Pakistan offered its surrender in Dhaka on December 16, 1971.”⁵³⁵ By May 1972, Bangladesh’s independence was recognized by nearly 70 states, with nearly 100 states recognizing its *de jure* status by September 1973.⁵³⁶ At first, Pakistan, attempted to break off diplomatic relations with every state which recognized Bangladesh, but ultimately, they were forced to rescind this action when “the major powers such as the the Soviet Union and the United States, and the European Council countries granted recognition”⁵³⁷ as well. Accordingly, after several delays caused by China’s use of the veto in the UNSC due to its close relationship with Pakistan,⁵³⁸ on September 17, 1974, Bangladesh was officially admitted into the United Nations.⁵³⁹

Pakistan’s argument for respecting its territorial sovereignty largely included pointing to Article 2(4) of the UN Charter as the reason for denouncing India’s actions as illegal under international law.⁵⁴⁰ Additionally, Pakistani diplomats pointed to Article 2(7) as another reason for which India and outside states had no business in meddling

online: <www.sasnet.1u.se/EASASpapers/33AnasuaBasuray.pdf>. See also, A R Siddiqi, *War and Secession: Pakistan, India, and the Creation of Bangladesh* (Oxford: Oxford University Press, 1991) at 180-91; R J Rummel, *Death by Government* (New Jersey: Transaction Publishers, 1994) at 320-1; Ben Kiernan, *Blood and Soil: A World History of Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2009) at 575; Angela Debnath, “The Bangladesh Genocide: The Plight of Women” in S Totten, ed, *The Plight and Fate of Women during and Following Genocide* (New Jersey: Transaction Publishers, 2009) at 48-57; Rounaq Jahan, “The Bangladesh Genocide” in Samuel Totten ed, *Teaching About Genocide: Issues, Approaches, and Resources* (Greenwich: Information Age Publishing, 2004) at 146-50.

⁵³⁴ The reason that India’s attack was considered pre-emptive is that there is substantive evidence that India had prepared for a potential conflict with Pakistan, and was actively sponsoring a Bengali insurgency within its borders and in East Bengal. For evidence of this, see Bass, *supra* note 524 at 234-5, nn 28-37.

⁵³⁵ *Ibid* at 235.

⁵³⁶ *Ibid* at 235-6.

⁵³⁷ Dugard & Raic, *supra* note 528 at 122.

⁵³⁸ *Ibid* at 122.

⁵³⁹ *Admission of the People’s Republic of Bangladesh to Membership in the United Nations*, GA Res 3203 (XXIX), UNGAOR, 29th Sess, UN Doc A/PV2233 (1974).

⁵⁴⁰ Bass, *supra* note 524 at 236.

into the internal affairs of their country.⁵⁴¹ Interestingly, this view was supported by a number of democratic states including the United States, Britain, France, West Germany and Japan.⁵⁴² It was alleged at the time that regardless of the atrocities being committed by Pakistan in East Bengal, the principles of state sovereignty and non-intervention in international law must be respected to the highest degree and without derogation.⁵⁴³ This leads to the question: on what grounds did India justify its military intervention?

India's argument for military intervention has been questioned on the grounds of its military training and support for the Bengali nationalist movements prior to the intervention, as well as "seizing [on the] opportunity to dismember Pakistan."⁵⁴⁴ In addition to this argument, India's internal cabinet saw military intervention as the only feasible policy left, especially in an era where other democratic governments were equally, if not more involved in executing similar actions around the world:

This kind of abnegation of international law was prominently suggested by the strategist Subrahmanyam in an influential secret report sent to the senior ranks of the government, including Haksar, Foreign Minister Swaran Singh, Defense Minister Jagjivan Ram, the army chief of staff, and others. Subrahmanyam noted that India had gotten away with its 1961 seizure of Goa from Portuguese colonial rule, despite international condemnation. "Over a period of time in international community all actions tend to be overlooked," he argued candidly. "U.S. intervention in Guatemala, Cuba, Dominican Republic, Soviet intervention in Czechoslovakia and Hungary and French intervention in Chad are all now vague memories." None of these nations had as much justification to intervene as India now has in Bangla-Desh.⁵⁴⁵

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid* at 237.

⁵⁴³ Nicolas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2003) at 58.

⁵⁴⁴ Bass, *supra* note 524 at 236. Generally, the grounds of military intervention under the pretense of 'humanitarianism' are questioned first under their purview of their actual intent. For example, there is a strong argument that 'humanitarian' military intervention is another form of neo-imperialism. See e.g. Martha Minow, "Instituting Universal Human Rights Law: The Invention of Tradition in the Twentieth Century" in Austin Sarat et al, eds., *Looking Back at Law's Century* (Ithaca: Cornell University Press, 2002) at 58-60; Thomas Lee, "The Augustinian Just War Tradition and the Problem of Pretext in Humanitarian Intervention" (2005) 28:1 *Fordham Intl L J* 756; Ryan Goodman, "Humanitarian Intervention and Pretexts for War" (2006) 100 *AJIL* 107 at 109-11.

⁵⁴⁵ Bass, *supra* note 524 at 242.

In other words, India looked to comply with international law, yet draw a fine line with regards to the nature of its military operation in East Bengal. It is important to consider that India's violation of the prohibition on the use of force should not detract from its commitment and support of international law. In fact, India prided itself on its record of supporting and complying with international law since the ratification of the UN Charter.⁵⁴⁶ At the end, "Indian officials and legal authorities advanced four interlocked claims for intervention in East Pakistan: arguments from human rights, genocide, self-determination, and India's own sovereignty."⁵⁴⁷ In order to confirm the legitimacy of these arguments, it is necessary to look at several interpretations of the intervention by legal scholars.

Inevitably, the most challenging factor in India's intervention was the violation of the principle of territorial inviolability. With respect to the importance of the principle, even in contemporary times, consider this opinion by Roth:

To be sure, the traditional insistence on territorial inviolability of existing states has an element of arbitrariness at its core. On occasion, this arbitrariness places intolerable stress on the putative rule, justifying the emergence of a narrow exception in keeping with the traditional framework's basic logic; a normative order that cannot bend will likely break. But an overall approach more favorable to external encouragement of secession would ultimately serve neither the moral principle of self-determination nor the practical project of inter-state peace.⁵⁴⁸

Simply put, the principle of territorial inviolability clashes with the right of self-determination, specifically when that right is exercised externally through an attempted

⁵⁴⁶ See Manu Bhagavan, "A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights" (2010) 44 *Modern Asian Stud J* 311 at 311-4.

⁵⁴⁷ Bass, *supra* note 524 ("India had cited the 'Southern Rhodesia' situation as an example of how a 'racist regime' could be put in place where one state imposes its will and sovereignty on a minority population. Southern Rhodesia was a British colony which declared unilateral independence under Ian Smith, a staunch white-nationalist in 1965, supported by Britain. The declaration was the cause of nearly 20 years of civil wars, with Britain only granting independence to the territory in 1980 under its current name: Zimbabwe" at 242). For more on Southern Rhodesia, see generally Hany Besada, *Zimbabwe: Picking up the Pieces* (Palgrave-Macmillan, 2011); Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Dodrecht: Martinus Nijhoff, 1990); H R Strack, *Sanctions: The Case of Rhodesia* (Syracuse: Syracuse University Press, 1978).

⁵⁴⁸ Roth, *supra* note 3 at 387.

separation of territory, which as explained earlier, could lead to a withdrawal of sovereignty as well. Furthermore, the separation of territory is typically either completed through military support of the entity wishing to separate by a third-state, or through a third-state military intervention in cases where the entity's resistance is met with systematic human rights abuses deemed as *in extremis*. Therefore, in looking at the legality of India's actions, it is important to consider its record of compliance with international law (as mentioned above), as well as its considerations of the status of the Bengali people as a peoples under international law.

The ramifications of the military intervention on India's part, and the recognition of Bangladesh on the other, make for a very interesting case with regards to its evaluation under international law. Consider this opinion of the 'remedial right to secede' for Bangladesh by John Dugard and David Raic:

Supporters of the qualified right of secession agree that Bangladesh met all the suggested criteria for the exercise of a unilateral right to secede. There is no doubt that the Bengalis constituted a people, in an ethnic sense, which formed a majority within East Pakistan. It is also clear that the people of East Pakistan were exposed to serious harm in the form of a denial of internal self-determination and widespread violations of fundamental human rights. Moreover, all realistic options for the realisation of internal self-determination were exhausted.⁵⁴⁹

Equally, consider this opinion on the same matter by Crawford:

Genocide is the clearest case of abuse of sovereignty, and this factor, together with the territorial and political coherence of East Bengal in 1971, qualified East Bengal as a self-determination unit within the third, exceptional, category discussed above, even if it was not treated as a non-self-governing territory. The view that East Bengal had, in March 1971, a right to self-determination has received juristic support.¹⁶⁷ Moreover, the particular, indeed the extraordinary, circumstances of East Bengal in 1971 to 1972 were undoubtedly important factors in the decisions of other governments to recognize, rather than oppose, the secession: by its conduct the Pakistan army had disqualified itself, and the State, from any further role in East Bengal.⁵⁵⁰

Additionally, with respect to the illegal use of force by India, Anderson suggests that,

⁵⁴⁹ Dugard & Raic, *supra* note 528 at 122-3.

⁵⁵⁰ Crawford, "The Creation of States", *supra* note 22 at 140-1.

given the circumstances, the strength of the principle of self-determination was solidified through India's careful consideration of its military actions:

The principal factor which prevented Bangladesh from breaching the peremptory norm prohibiting the illegal use of force was the scale and severity of the human rights abuses suffered by East Pakistanis at the hands of the Pakistani military prior to Indian intervention. In effect, these abuses - which have been generally characterized as genocidal - functioned as an antidote to the corresponding illegal use of force by Indian troops. Thus, although Indian intervention was illegal, this did not result in Bangladesh's statehood being called into question...A further factor which assisted Bangladesh in not breaching the peremptory norm prohibiting the illegal use of force is that India did not, in the judgment of the international community, directly intervene in order to secure sovereignty or de facto authority throughout East Pakistani territory. Rather, India's direct intervention was a response to the estimated nine million East Pakistani refugees that entered India and established makeshift camps.⁵⁵¹

If all three opinions' primary arguments are analyzed collectively, it can be determined that several factors support the notion that, although India's actions violated the prohibition on the use of force, India's intent for the intervention, as well as the proportionality of its response, provide an exception to the prohibition on the use of force which was justifiably accepted by the international legal community. In fact, this exception can be summarized through five primary factors that form the basis for the 'exception' to the prohibition on the use of force in international law: a) the Bengalis were systematically denied their right of international self-determination since the partition of India and Pakistan, b) the Bengalis had their right of external self-determination suppressed by the Pakistani military, c) the Bengalis had become the subject of human rights abuses designated as *in extremis* (ethnic cleansing and possibly even genocide) while the nearly 9 million refugees encroached on India's sovereignty,⁵⁵²

⁵⁵¹ Anderson, "The Use of Force", *supra* note 9 at 235-6.

⁵⁵² India had claimed that the influx of refugees strained resources in its country, as well as provided an opportunity for a potential domestic humanitarian catastrophe. By threatening the peace and stability of India's domestic situation, the refugee influx was used as another element that supported India's argument for the necessity of the military intervention. See Bass, *supra* note 524 at 269. Additionally, on the topic of India's claim of mass refugee flow as a factor for military intervention see M K Nawaz, "Bangladesh and International Law" 11 Indian J Intl L 251 at 263-5. This would not be the last time that a state claims that a massive influx of refugees from a territorial conflict encroaches on the peace and stability of the receiving state. The United States' support of ousting the

d) India's military intervention became justified in response to factor c, and finally, d) India's military intervention into Pakistan ended as soon as the fear of human rights abuses had dissipated, with no subsequent imposition of Indian sovereignty, culture or language on the Bengali peoples.

In sum, it can be concluded that, although India's military intervention in Bangladesh was a violation of the prohibition on the use of force, its proportionality, along with its intent and its execution effectively legitimized it. Next, it is necessary to analyze another case of a military intervention which occurred more recently, and hence, can provide a more contemporary assessment of the argument which supports the right of third-state military interventions in cases of external self-determination. Although it will be demonstrated that certain aspects of NATO's military intervention in Kosovo were different from those in Bangladesh, the underlying similarities between the two will reaffirm the factors which support and justify the 'violation of the prohibition on the use of force in the case of Kosovo as well. In turn, this will solidify the argument that third-state military interventions can be justified provided they are executed within the context of UNC secessions as supported by the principle of self-determination in international law.

4.2. Kosovo

The NATO intervention in Kosovo tested the limits of 'humanitarian intervention' from the perspective of international legitimacy and state sovereignty. As expanded on by Zajadlo, this type of collective and unilateral action, against the clearly-defined parameters of the prohibition on the use of force, was of extreme concern for the international community:

From this point of view, NATO's intervention in Kosovo was a turning point

Haitian military junta in 1994 (authorized under Chapter VII of the UN charter) and NATO's arguments with regards to the influx of refugees from Kosovo and Yugoslavia into neighbouring states are also examples of this. See also Anthea Roberts, "Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?" in Philip Alston & Euan MacDonald, eds., *Human Rights, Intervention and the Use of Force* (Oxford: Oxford University Press) at 178-85; Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002) at 134-40.

- both legality and legitimation of this action [intervening militarily without United Nations Security Council approval] have been the subject of debates until the present day. The conclusion to the report of the International Commission on Kosovo is the best example for that. It reads: ‘The Commission acknowledges that the NATO’s military intervention was illegal, though legitimate’. And further it goes on to state: ‘The lesson from NATO’s intervention in Kosovo shows that there is a need to bridge a gap between legality and legitimation’.⁵⁵³

More succinctly, it became unclear whether the territorial integrity and sovereignty of states - both considered to be non-derogable and well-accepted norms of international law – had changed on the basis of the legitimization of the intervention arguments posited by NATO.⁵⁵⁴ Hence, it is important to examine both sides of the legality vs. legitimization debate with respect to the NATO intervention in Kosovo, as well as provide a background to the conflict itself; however, prior to doing so, it is necessary to summarize the historical development of the Kosovo region. This will, similar to the historical summary of Bangladesh, allow for a more comprehensive study of the complex and distinctive makeup of the future state of Kosovo.

4.2.1. Kosovo – a brief chronological history

The first use of the name ‘Kosovo’ can be attributed to the Battle of Kosovo (June 25, 1389), a major battle between the “Serbian prince Lazar and the Turkish forces of the Ottoman Sultan Murad I (reigned 1360–89). The battle ended in a Turkish victory, the collapse of Serbia, and the complete encirclement of the crumbling Byzantine Empire by Turkish armies.”⁵⁵⁵ It is from this battle, named ‘Kosovo Polje’ or ‘field of blackbirds,’ that Kosovo derives its name. Prior to 1389, the region was home to a majority ethnic

⁵⁵³ Zajadlo, *supra* note 459 at 36.

⁵⁵⁴ Former UN Secretary General Boutros Gali, in *Agenda for Peace* stated that: “The foundation-stone of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.” See Report of the Secretary General, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, UNGAOR, 47th Sess, UN Doc A/47/277-S/24111 (1992) at para 17.

⁵⁵⁵ “Battle of Kosovo, 1389” in *Britannica Academic, Encyclopedia Britannica*, online: <www.academic.eb.com>.

Serb Christian Orthodox population.⁵⁵⁶ However, following this battle, the majority Serbian Christian Orthodox population fled north to Serbia proper, leaving the region to be populated by an Albanian-speaking and predominantly Muslim population that was part of the Ottoman Empire.⁵⁵⁷ In 1698, an attempt by the Austro-Hungarian Empire to retake Kosovo failed, leading to an even larger exodus of 40-50,000 ethnic Serbs settling outside of the territorial bounds of Kosovo.⁵⁵⁸ The abolishment of the Serbian Patriarchate in 1766 further diminished the ethnic Serb population (including its influence in the region).⁵⁵⁹ The ethno-centric challenges continued well into the 18th and 19th centuries; however, Kosovo remained a multiethnic and multiconfessional region of the Balkans. As summarized by Thomas, the role of the Albanian-speaking population in Kosovo is typically misunderstood:

It was the Ottoman Empire, though, and not the Albanian population, that was responsible for the emigration of ethnic Serbs from Kosovo. When the Serbian principality was founded in 1830, Kosovo was not included in the territory. Not until the founding of the Albanian State in 1912/13 was Kosovo, by that time predominantly populated by Albanians, incorporated, not into Albania, but into the Serbian principality... The remaining territory, the Kingdom of Serbs, Croats and Slovenes – to be renamed Yugoslavia in 1929 included Kosovo and its 400,000 Albanians.⁵⁶⁰

Nevertheless, when Serbia regained control over Kosovo for brief periods of time in the early 19th and 20th centuries, thousands of Kosovar Albanians fled neighboring countries in fear of persecution. Attempts by the Kosovar Albanians to integrate Kosovo with Albania failed in 1921 and again after the Second World War.⁵⁶¹ The attempts for rapprochement between Kosovar Albanians and Albania were further exacerbated by the

⁵⁵⁶ *Ibid.*

⁵⁵⁷ Julianne Kokott, *Human Rights Situation in Kosovo 1989-1999* in Christian Tomuschat, ed, *Kosovo and the International Community: A Legal Assessment* (Hague: Kluwer Law International, 2003) at 23.

⁵⁵⁸ See Carole Rogel, *The Breakup of Yugoslavia and its Aftermath: Revised Edition* (Westport: Greenwood Press, 2004) at 39.

⁵⁵⁹ "Kosovo" in *Britannica Academic, Encyclopedia Britannica*, online: <www.academic.eb.com>[Britannica, "Kosovo"].

⁵⁶⁰ Ronald Thomas, "The Distinct Cases of South Ossetia and Kosovo" (2008) 32:6 *Fordham Intl L J* 1990 at 2015 [R Thomas].

⁵⁶¹ In 1944, a revolt by Kosovar Albanians in Kosovo who wanted Kosovo to join Albania was crushed by the Yugoslav Communist Army. See Martins, *supra* note 401 at 1020.

ideological split of Yugoslavia from the USSR (Union of Soviet Socialist Republics) and subsequently Enver Hoxha's communist Albania in the 1950s, leading to an overall alienation of Kosovo from Albania and other communist-friendly states.⁵⁶²

After the Second World War, Kosovo was incorporated into the Federative structure of Yugoslavia by Josip Broz Tito. In light of the temporary halt to ethnic conflict, the internal federative structure of Yugoslavia attempted to integrate the multinational makeup of the state. The post-Second World War period saw Kosovo gain autonomous provincial status; however, ethnic discriminations continued to be perpetrated by Yugoslav authorities dominated by an ethnic-Serb majority (who did not forget the role that Kosovar Albanians played during the Nazi occupation of the Balkans).⁵⁶³ Nevertheless, Tito's rise to power aimed to quell the ethno-influenced tensions in the region. In the mid-1960s, Yugoslavia began adopting policies to acknowledge and integrate the ethnic Kosovar Albanian identity into provincial and federal administrations.⁵⁶⁴ Consequently, "[b]eginning in 1963, the status of Kosovo within Yugoslavia improved, becoming a province and, with the 1974 Constitution, equal to that of the other seven units of the Yugoslav federation."⁵⁶⁵ Towards the final years of Tito's rule, ethnic tension between the Serbs and Albanians in Kosovo began to flare up, followed by a series of events which would set the foundations for their respective independence movements. This period of time is summarized by Krueger as demonstrating a time of civil unrest in Kosovo:

The Kosovo Albanians continued to demand their independence more vehemently. This led to an increase in tensions between the Albanian majority and the Serbian minority, as well as early trouble at the beginning of the 1980s. The migration of tens of thousands of Serbians and Montenegrins over the following period unleashed Serbian fears, which the future Serbian President Slobodan Milosevic used to his advantage in 1986. This subsequently led to a restriction of Kosovo's autonomy and reprisals,

⁵⁶² R Thomas, *supra* note 560 at 2016.

⁵⁶³ *Ibid.*

⁵⁶⁴ Martins, *supra* note 401 at 1020-5. On the ideological split between Yugoslavia and the USSR, see Ivo Banac, *With Stalin Against Tito: Cominformist Splits in Yugoslav Communism* (Pittsburgh: Cornell University Press, 1988) at 215.

⁵⁶⁵ R Thomas, *supra* note 560 at 2015.

breeding further tensions. In 1989 the autonomy of Kosovo was completely suspended.⁵⁶⁶

In the early 1990s, the question of Kosovo's status was regarded as a domestic Yugoslavian matter, and consequently, little attention was devoted to it by the international community.⁵⁶⁷ However, it should be noted that "...the Kosovo Albanians lobbied heavily for the question to be considered as part of the Dayton peace process,⁵⁶⁸ which led to the resolution of the conflict in Bosnia."⁵⁶⁹ In response to the reluctance of the international community to address the 'independence of Kosovo' question, under the leadership of Ibrahim Rugova, the Kosovo Liberation Army (KLA/UÇK) began to execute radical forms of guerilla warfare on the Serbian-led Yugoslavian army, as well as on the ethnic Serb population in 1996.⁵⁷⁰ Then, "[b]eginning in January 1997, the KLA

⁵⁶⁶ Heiko Kreuger, "Implications of Kosovo, Abkhazia and South Ossetia for International Law: The Conduct of the Community of States in Current Secession Conflicts" (2009) 3:2 *Caucasian Rev of Intl Affairs* 121 at 127.

⁵⁶⁷ James Ker-Lindsay, "Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo 'Unique Case' Argument" (2013) 65:5 *Europe-Asia Studies J* 837 at 843 [Ker-Lindsay, "Preventing Self-Determination"].

⁵⁶⁸ The Dayton Peace Process led to the signing of the Dayton Agreement or the Paris protocol on December 14, 1995. The Agreement was signed by Croatia, Republic of Bosnia & Herzegovina and the Federal Republic of Yugoslavia. The Agreement meant to put an end to the conflict in Bosnia & Herzegovina, as well as provide regional peace and stability. For more on the Dayton Agreement see *General Framework Agreement for Peace in Bosnia and Herzegovina*, UN Doc S/1995/999, Annex, UN Doc A/50/790 (1995).

⁵⁶⁹ Wesley Clark, *Waging Modern War: Bosnia, Kosovo, and the future of combat* (New York: Public Affairs, 2001) at 65 cited in James Ker-Lindsay, "Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo 'Unique Case' Argument" (2013) 65:5 *Europe-Asia Studies J* 837 at 843.

⁵⁷⁰ Although a more in-depth study of the KLA is outside of the scope of this thesis, the claims of whether the KLA is a resistance movement or a terrorist organization remain unclear and contentious. For one opinion, see John R Fulton, "Global Security Studies" (2010) 1:3 *Global Security Studies* 130 ("[s]tarting in the 1990s, ethnic Albanian separatists waged a campaign of terrorism against Yugoslavian security forces and non-ethnic Albanian civilians in Kosovo. Although the United States initially recognized the Kosovo Liberation Army (KLA) as a terrorist organization, they ultimately switched sides and opted to support the KLA against the Yugoslavian Government...It is well-documented that horrific atrocities were committed by both sides in the conflict. While most Serbs that were involved in these atrocities had withdrawn from Kosovo as dictated by the peace accords, the members of the KLA who committed similar atrocities were left in power. The KLA was not disarmed but simply renamed the Kosovo Protection Corps" at 131-2). But see, Henry H Perritt, *Kosovo Liberation Army: The Inside Story of an Insurgency* (Chicago: University of Illinois Press, 2008) ("[n]o reported instance of suicide attacks occurred during the KLA insurgency, and very few attacks on purely civilian targets were made...Terrorism targeted at civilians was inconsistent with the historic Albanian culture of resistance" at 68).

stepped up its bombing campaign and, during the summer of 1998, it grew stronger. Originally, the group's numbers were small, but by July 1998, the KLA enjoyed wide popular support across Kosovo and controlled roughly one third of the territory."⁵⁷¹ By 1998, United States-mediated peace talks were failing to put an end to the armed conflict.⁵⁷² After mass atrocities against Kosovar civilians were documented and attributed to the Milosevic regime,⁵⁷³ NATO began a bombing campaign on March 24, 1999 as part of Operation Allied Force.⁵⁷⁴

All in all, the reaction to NATO's bombing campaign requires further assessment. What legal rule gave NATO the right to execute a military operation on the sovereign territory of another state? The following sub-section will explore this question in greater detail, pronouncing on the UNSC Resolutions prior to, during and after the conflict. A *fortiori*, this analysis will look to draw similarities between NATO's actions in Kosovo and the military intervention in Bangladesh, demonstrating that their actions can be considered as legitimate in accordance with the law of self-determination.

4.2.2. United Nations, Kosovo and UNSC Resolution 1244

While the situation of ethnic cleansing and discrimination in Kosovo deteriorated throughout the late 1980s and early 1990s, the international community did not formally react to the atrocities being committed in Kosovo until 1998.⁵⁷⁵ As part of the

⁵⁷¹ Michael E Smith, "NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?" (2001) 2001:2 Army Lawyer 1 at 3.

⁵⁷² See Klinton W Alexander, "NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the absence of Security Council approval" (2000) 22:3 Hous J Intl L 403 at 435.

⁵⁷³ The peace-talks failed in large part due to the atrocities committed by the Milosevic regime as part of a reprisal on Kosovar Albanian civilians. See Smith, *supra* note 571 ("[i]n May 1998, U.S. envoy Richard Holbrook brought Milosevic and Rugova together for peace talks, but the fighting continued. The presence of the KLA and their violent attacks on Serbian police gave Milosevic the justification he needed for the ensuing vicious attacks on Albanian Kosovars. In the summer of 1998, Milosevic repeated history and used the Yugoslav Army and the Interior Ministry to force over 800,000 ethnic Albanians from Kosovo into Albania, The Former Yugoslav Republic of Macedonia (FYROM), and Montenegro..." at 4).

⁵⁷⁴ *Ibid* at 3.

⁵⁷⁵ Kreuger, *supra* note 566 at 129.

international community's response, several important UN resolutions were presented leading up to the 1999 NATO bombing campaign, which put an end to the conflict and led to a transition of power.⁵⁷⁶ This subsection will explore the legal aspects of these resolutions as part of the Kosovo conflict between 1998–1999. Additionally, a brief literature review will present several viewpoints of the actions perpetrated by NATO and Yugoslavia, as part of the Kosovo conflict. This will be done in order to objectively analyze the emergence of the state of Kosovo.

In the Spring of 1998, the situation on the ground in Kosovo continued to worsen.⁵⁷⁷ This prompted the UNSC to pass Resolution 1160,⁵⁷⁸ which condemned acts of violence by both militarized Serb and Kosovar Albanian factions.⁵⁷⁹ At the same time, "...Resolution [1160] stressed that any solution to the Kosovo question would be based on the territorial integrity of former Yugoslavia and would take into account the [Kosovar] Albanians' position under international law. [Additionally,] [t]he preamble to the resolution emphasized the continuing sovereignty and territorial integrity of Yugoslavia in even clearer terms."⁵⁸⁰ This is noteworthy, as the pattern of reaffirming the territorial integrity of Yugoslavia would continue in each UNSC resolution passed afterwards until the cessation of hostilities.⁵⁸¹ Nevertheless, after numerous condemnations of atrocities committed against civilians, hostilities did not cease, rather,

⁵⁷⁶ See *Security Council resolution 1160*, SC Res 1160, UNSCOR, 53rd Sess, UN Doc S/Res/1160 (1998) at 2-3 [*Resolution 1160*]; *Security Council resolution 1199*, SC Res 1199, UNSCOR, 53rd Sess, UN Doc S/Res/1199 (1998) at 3-4 [*Resolution 1199*]; *Security Council resolution 1203*, SC Res 1203, UNSCOR, 53rd Sess, UN Doc S/Res/1203 (1998) [*Resolution 1203*].

⁵⁷⁷ The deterioration of the situation on the ground is summarized in detail in Alexander, *supra* note 572 ("[t]he conflict in Kosovo erupted between Serbian forces and the Kosovo Liberation Army (KLA) in March 1998, following attacks by ethnic Albanian guerrillas on Serbian police forces. In response to the attacks, Serbian forces raided dozens of villages over the next several months in an apparent effort to drive the KLA forces from populated areas. To dissuade civilians from supporting the KLA, Serbian forces conducted massacres, burned villages, raped innocent women, and looted towns all over Kosovo. Thousands of ethnic Albanian civilians fled their homes into the densely wooded hills surrounding their villages. Many crossed the border into the neighboring states of Albania and Macedonia, and some even made it as far as Italy" at 431).

⁵⁷⁸ *Security Council resolution 1160*, *supra* note 576.

⁵⁷⁹ See Alexander, *supra* note 572 at 431.

⁵⁸⁰ Kreuger, *supra* note 566 at 130.

⁵⁸¹ The territorial integrity of Yugoslavia was reaffirmed in the preambles of UNSC Resolutions 1160, 1199, 1203 and 1244 respectively. See *supra* note 576.

reports indicated that Yugoslav-led Serb security forces “[intensified] the policy of ethnic cleansing against Albanians.”⁵⁸² These actions prompted the UNSC to adopt Resolution 1199.⁵⁸³ This resolution demanded an immediate cessation of hostilities and an implementation of an immediate ceasefire in Kosovo.⁵⁸⁴ Additionally, and most importantly, the UNSC called on both sides to “take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe.”⁵⁸⁵ Labeling the conflict as an ‘impending humanitarian catastrophe’ prompted, according to some scholars, the United States and NATO to act in a ‘moral capacity’ as part of a humanitarian intervention mission.⁵⁸⁶ Yet, no concerted military action took place during the time. Notwithstanding the international pressure, and believing that no military intervention would take place, the Yugoslav-led military forces continued their campaign of ethnic cleansing, with a mass grave discovered in September 1998,⁵⁸⁷ prompting an intense outcry from the international community.⁵⁸⁸

Recognizing a policy that was failing the Kosovar civilians, activation orders “were issued by NATO to allow it to carry out air strikes, if the Federal Republic of Yugoslavia continued to fail to comply with the demands of Security Council Resolution 1199.”⁵⁸⁹ NATO’s implicit threat of action prompted Milosevic to agree to a last-minute compromise with “United States envoy, Richard Holbrooke, under which the Federal Republic would allow NATO reconnaissance planes to overfly the region, and the Organisation for Security and Co-Operation in Europe (OSCE) to deploy a 2,000 strong Kosovo Verification Mission’ to monitor a cease-fire, agreed between the Yugoslav

⁵⁸² Oeter, “Dissolution of Yugoslavia”, *supra* note 50 at para 74.

⁵⁸³ *Security Council resolution 1199*, *supra* note 576 at 3-4.

⁵⁸⁴ *Ibid* at para 1.

⁵⁸⁵ *Ibid* at para 2.

⁵⁸⁶ See e.g. Steven Wheatley, “The NATO Action Against the Federal Republic of Yugoslavia: Humanitarian Intervention in The Post-Cold War Era” (2012) 50:4 *N Ir Legal Q* 478 at 478. See also Alexander, *supra* note 572 at 440.

⁵⁸⁷ See “World: Europe UN Meets to criticise Kosovo massacre”, *BBC News* (1 October 1998), online: <www.news.bbc.co.uk>.

⁵⁸⁸ Alexander, *supra* note 572 at 432.

⁵⁸⁹ See e.g. Wheatley, *supra* note 586 at 480.

authorities and the Kosovo Liberation Army.”⁵⁹⁰ Nonetheless, the situation on the ground continued to deteriorate,⁵⁹¹ forcing the UNSC to adopt UNSC Resolution 1203⁵⁹² “which sought to protect unarmed monitors who were overseeing the cease-fire from the ground.”⁵⁹³ As explained by Klinton Alexander, this Resolution was also interpreted by certain NATO member states as acknowledging the right to the use of force:

Specifically, the resolution affirmed that ‘in the event of an emergency, action may be needed to ensure [the monitor's] safety and freedom of movement ...’^[594] It also provided for "relevant equipment for the sole use of the Verification Missions." which NATO countries interpreted to mean weapons.⁵⁹⁵

In retrospect, NATO would later point to UNSC Resolution 1203 as a legal justification for the military intervention; however, this did not take away from the controversy of NATO’s action.⁵⁹⁶ The Resolution’s instructions to cease hostilities against civilians would not be followed by Yugoslavia, and a subsequent meeting in Rambouillet, France⁵⁹⁷ failed to secure a signature from Yugoslav officials. In response, NATO began its aerial bombardment on March 24, 1999, prompting a lukewarm reception by the international community.⁵⁹⁸

On one hand, NATO acted unilaterally and outside of the legal parameters of the UN Charter. On the other, there was a clear indication that hostilities were being

⁵⁹⁰ *ibid* at 480-481. See also *Agreement on the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe*, Annex, UN Doc S/1998/978 (1998).

⁵⁹¹ Wheatley, *supra* note 586 at 481.

⁵⁹² *Resolution 1203*, *supra* note 576.

⁵⁹³ Alexander, *supra* note 572 at 433.

⁵⁹⁴ *Resolution 1203*, *supra* note 576 at para 9.

⁵⁹⁵ Alexander, *supra* note 572 at 433.

⁵⁹⁶ See John M Goshko, “UN Council Backs Kosovo Pact, Clears Way for NATO Intervention”, *Washington Post* (25 October 1998), online: <www.washingtonpost.com> (stating that threats of intervention have been made under an earlier Security Council Resolution, which the United States interpreted as permitting airstrikes if Yugoslav forces remain in Kosovo and continue attacks on ethnic Albanian villages).

⁵⁹⁷ *Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords)*, Annex, UN Doc S/1999/648.

⁵⁹⁸ See Barton Gellman, “US, Allies Launch Air Attack on Yugoslav Military Targets”, *Washington Post* (25 March 1999), online: <www.washingtonpost.com> (noting that all NATO nations supported the execution of Operation Allied Force on March 24, 1999, with 13 members deploying military forces).

perpetrated against a peoples who had invoked their right to self-determination. Needless to say, the dilemma surrounding the legality of NATO's military intervention was left unsolved. After a 72-day bombing campaign, Milosevic and the Yugoslav army agreed to a cessation of hostilities⁵⁹⁹ through a peace plan that was subsequently adopted through the passing of UNSC Resolution 1244.⁶⁰⁰ Accordingly, it became the pivotal document in determining the legitimacy of Kosovo's bid for independence and statehood.⁶⁰¹ However, the Resolution posed several logistical and legal challenges in Kosovo's succession as an autonomous entity, still within the territorial sovereignty of Serbia.⁶⁰² These challenges require a brief mention, as they will underline the complexity of rebuilding an ethnically-divided Kosovo post-conflict, and answer the question of why the idea of Kosovar independence resonated with the majority of the international community.

The primary challenge posed by UNSC Resolution 1244 was the question of its effects on the territorial integrity of Yugoslavia, specifically whether its operative language implied an autonomous or independent status for Kosovo. Borgen summarizes the dichotomy of the arguments put forward in the document by pointing to drastically different interpretations by the warring parties in the conflict:

Serbia and Russia, referring to Resolution 1244's preambular language '[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia...', have argued that Resolution 1244 does not allow the secession of Kosovo without the agreement of Serbia. By contrast, the EU has taken the position that Resolution 1244 is not a bar to Kosovo's independence as, in its view, the resolution does not define the outcome of final status talks.⁶⁰³

⁵⁹⁹ See Steven Erlanger, "Crisis in the Balkans: The Overview; Milosevic Yields on NATO's Key Terms; 50,000 Allied Troops to Police Kosovo", *New York Times* (4 June 1999), online: <www.nytimes.com>. ("The peace proposals were worked out between American Deputy Secretary of State, Strobe Talbott, and Russian envoy, Victor Chernomyrdin, who was acting for Belgrade. Once Chernomyrdin and Talbott agreed on the basics of the deal, Milosevic, who was indicted for war crimes a week earlier, felt that he had no choice but to accept the plan or endure further destruction").

⁶⁰⁰ Alexander, *supra* note 572 at 437.

⁶⁰¹ Borgen, "Is Kosovo a Precedent?", *supra* note 46 at 2.

⁶⁰² *Ibid.*

⁶⁰³ *Ibid* at 3. See also Oeter, "Dissolution of Yugoslavia", *supra* note 50 ("[t]he UN Security Council authorized the NATO Member States (together with Russia and a number of other non-NATO members) to establish an international security force ('KFOR'). It decided that the responsibilities of such would include deterring renewed hostilities, verifying the phased withdrawal of Serb troops,

Thus, the ‘end status of Kosovo’ question became a pressing issue for the United States, NATO and the EU, which only increased in contention throughout the implementation of the UNMIK plan.⁶⁰⁴ In large part, this contention existed through the challenge of finding the balance between respecting the territorial integrity of Serbia and the granting of independence to the Kosovar peoples, which ultimately rested on the implementation of the eight standards [fixed by UNMIK]. The eight standards included democratic governance, the rule of law, freedom of movement, the rights of ethnic minorities, property rights, the economy, the field of cultural heritage, and dialogues that were to be met by the provisional local authorities elected under the control of UNMIK. Only as far as these standards of democratic governance would be met by the elected local authorities of Kosovo – which was initially the guiding concept of UNMIK – would it be possible to negotiate on the definitive political and legal status of Kosovo (i.e. autonomy in Serbia or independence).⁶⁰⁵

In February 2007, a report submitted by Martti Ahtisaari (also known as the Ahtisaari plan)⁶⁰⁶ summarized the frustrations of nearly “...17 rounds of direct talks and 26 expert missions to Belgrade and Prishtina that [he] had carried out.”⁶⁰⁷ The core of the proposal insisted on independence as the only realistic solution. As summarized by Oeter:

The proposal [was] built on the finding that the standards policy pursued by UNMIK had not yielded the expected results and that Kosovo’s unclear political status is a cause of economic backwardness and political instability. Ahtisaari’s conclusion was that a continued international administration is not sustainable and that independence is the only viable option. Such independence should be conditioned, and there should be an international supervision of the newly formed sovereign State, exercised by

demilitarizing the UCK, establishing a secure environment for the return of refugees, the establishment of a transitional administration, and the delivery of humanitarian aid, as well as ensuring public safety and order” at para 78). See also Resolution 1244, *supra* note 102 at para 33.

⁶⁰⁴ Robert Muharremi, “The European Union Rule of Law in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law” (2010) 70 Heidelberg J Intl L 358 at 371.

⁶⁰⁵ Oeter, “Dissolution of Yugoslavia”, *supra* note 50 at para 82.

⁶⁰⁶ Henry H Perritt, *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan* (New York: Cambridge University Press, 2010) at 24.

⁶⁰⁷ See Oeter, “Dissolution of Yugoslavia”, *supra* note 50 at para 83.

regional organizations (in particular the EU).⁶⁰⁸

Therefore, although a closer review of the Resolution concludes that it neither prohibits nor advances Kosovo's secession,⁶⁰⁹ it can be suggested that the operative language on the future status of Kosovo was left deliberately vague, a potential precursor of things to come and a reaffirmation of the gray area in international law surrounding the act of unilateral non-colonial secession when coupled with human rights abuses perpetrated by the metropolitan state that are deemed as *in extremis*.⁶¹⁰ Moreover, this point of contention has, to-date, not been resolved even as the alliance of states recognizing Kosovo's independence has grown exponentially⁶¹¹ since the *Kosovo Advisory Opinion* ruling by the International Court of Justice (ICJ).⁶¹² Therefore, although the question of Kosovo's independence continues to be challenged by multiple states, its status under international law remains unchanged. To support this supposition, it is necessary to assess the legality of NATO's intervention as part of the international law on the use of force, as well as determine whether the peoples of Kosovo, can be considered as such, leading to the confirmation of the factors necessary to legitimize the intervention *de lege lata*.

⁶⁰⁸ See *ibid* at para 84. But, see Gianluca Serra, "The International Civil Administration in Kosovo: A commentary on some major legal issues" (2008) 18 Italian Y B Intl L 63 ("UNSC Resolution 1244 (1999) is the legal basis for the establishment and deployment of UNMIK. It is supplemented by the formal consent given by the host State, namely FRY of which Kosovo was thereby reaffirmed to be part. At least two main theoretical issues need to be scrutinized when assessing such legal bases from the international law point of view: i) where is Resolution 1244 drawing its force from? ii) was the FRY's consent validly given? In connection to the first one, a third question is to be raised: iii) what is the legal ground for the acts adopted by UNMIK?" at 67).

⁶⁰⁹ Borgen, "Is Kosovo a Precedent?", *supra* note 46 ("[o]n balance, it appears that Resolution 1244 neither promotes nor prevents Kosovo's secession. Although operative paragraph 1 of Resolution 1244 states that a political solution shall be based on the principles of the annexes, those annexes are silent as to the governmental form of the final status of Kosovo. The annexes only state that, pending a final settlement, an "interim political framework" shall afford substantial self-governance for Kosovo and take into account the territorial integrity of the Federal Republic of Yugoslavia. Moreover, the references to the territorial integrity of Serbia are only in the preambular language and not in the operational language. The document is therefore silent as to what form the final status of Kosovo takes. Much of the debate thus grapples with the broader issues of self-determination and secession under international law" at 3).

⁶¹⁰ See Oeter, "Dissolution of Yugoslavia", *supra* note 50 at para 82.

⁶¹¹ See *Azemi v Serbia*, No 11209/09 at para 22, [2013] EHCR 1314.

⁶¹² *Advisory Opinion on Kosovo*, *supra* note 145.

4.2.3. Legality of NATO's military intervention in Kosovo

The legality of NATO's intervention has remained a discordant issue of debate in legal, political and academic circles.⁶¹³ The debate can be summarized through the following two questions: (1) whether NATO's intervention was legal under international law, and subsequently, (2) whether the 'human catastrophe' in Kosovo permitted the violation of the 'inviolable' principle of territorial sovereignty, and consequently, affirmed the independence of Kosovo as a sovereign state in 1999. The objective of this section will be to answer these questions by assessing whether a) Kosovo possessed the right to a UNC secession, and b) whether the human rights abuses experienced in Kosovo reached the level of *in extremis*, which prompted NATO's military intervention. Through this analysis, it will be shown that, through a historico-legal analysis, a case exists for supporting Kosovo's right to a UNC secession and consequently, NATO's intervention as well.

After the NATO intervention in Kosovo in 1999, the late Cassese famously wrote that, although the use of force by NATO was in clear violation of contemporary international law, the missing parameters for the use of force in the case of a humanitarian catastrophe (coupled with the invocation of the right to self-determination) were factors that could have *potentially* legitimized its actions.⁶¹⁴ In other words, had there been an effort to legitimize the use of force outside of the auspices of the UNSC, the NATO intervention could have been considered legitimate. Nearly twenty years later, this effort has not yielded such a result, with Cassese's words continuing to prove to be correct. Nevertheless, in answering the first question of whether the NATO intervention was legal under international law, it can be concluded that the answer is in the negative. An explanation is provided below.

Several authors have pronounced themselves on the illegality of NATO's

⁶¹³ Dovile Morkyte, "International Law as a Legal Basis for Unilateral Humanitarian Intervention" (2011) 24:7 Hague YB Intl L 121 at 131.

⁶¹⁴ Cassese, "ex iniuria ius oritur", *supra* note 501 at 25.

intervention. In some cases, scholars have accused NATO of not only violating the international law on the use of force, but also violating international humanitarian law given the civilian casualties and infrastructure damage caused by the disproportionate aerial bombardments.⁶¹⁵ Additionally, opponents of the intervention have argued that the situation in Kosovo was a domestic matter as affirmed and reaffirmed in subsequent UNSC Resolutions, which the NATO military intervention seemingly ignored.⁶¹⁶ Furthermore, it has been claimed that NATO violated its own founding treaty⁶¹⁷ in bypassing the UNSC and by authorizing the aerial bombardments.⁶¹⁸ The last claim has cause for merit given that, admittedly, certain NATO states have acknowledged the illegality of their actions under international law.⁶¹⁹ Moreover, NATO's actions could have violated several other international treaties, including the 1976 Convention on the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques,⁶²⁰ the 1977 Protocol I Additional to the Geneva Conventions,⁶²¹ the 1985

⁶¹⁵ See Cohn, *supra* note 392 (“NATO’s humanitarian bombs killed between 500 and 1800 civilians and wounded thousands more. They hit not only military forces and facilities, but also destroyed Yugoslavia’s entire public infrastructure, inflicting an estimated \$ 4 Billion of damage on bridges, highways, railroads, civilian airports, oil refineries, factories, construction equipment, media centers, hospitals, schools, apartment buildings, houses, buses, electrical plants, and hundreds of acres of forest” at 137). See also Wheatley, *supra* note 586 at 478-81; Rosaline Higgins, “International Law in a Changing International System” (1999) 58 Cambridge L J 78 at 95.

⁶¹⁶ See *Security Council resolution 1160*, *supra* note 576 at preamble; *Security Council resolution 1199*, *supra* note 576 at preamble.

⁶¹⁷ *The North Atlantic Treaty*, 4 April 1949, 34 UNTS 241 [*NATO Treaty*].

⁶¹⁸ See *ibid* (“[t]he Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations” at art 1). See also *ibid* (“This Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security” at art 7). As the use of force was inconsistent with the UN Charter given the violation of arts 2(4)-(7), 33, 37, 39, 51, 103, there is little justification for the legitimacy of NATO’s actions.

⁶¹⁹ Julie Hyland, “British parliamentary committee admits NATO bombing of Yugoslavia was illegal”, *World Socialist Web Site* (14 June 2000), online: <www.wsws.org>.

⁶²⁰ *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 18 May 1977, 1108 UNTS 152 (entered into force 5 October 1978).

⁶²¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, 1125 UNTS 3 (entered into force 7 December 1978).

Vienna Convention for the Protection of the Ozone Layer,⁶²² the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,⁶²³ and the 1992 United Nations Framework Convention on Climate Change⁶²⁴.⁶²⁵ As can be deduced from some of these accusations, the illegality of NATO's intervention is clear due to the violation of several treaties, including the UN Charter's prohibition on the use of force. This brings this sub-section to consider the other side of the debate: whether the intervention, albeit illegal, was *legitimate* under the guise of a UNC secession experiencing human rights abuses deemed as *in extremis*.

A large number of scholars have pronounced their support for NATO's intervention, prompting a consideration of whether the debate on the existence, *vel non*, on the use of force outside of the current parameters. In general, several categories of justifications for NATO's intervention can be identified. This is explained by Tesón as relating to the large spectrum of scholars who believed in the growing need to establish a right to humanitarian intervention in international law:

Reactions from legal scholars [on NATO's intervention] varied. Of those who believed the intervention had been unlawful, many also expressed the belief that the intervention was morally or politically wrong. Others thought the intervention was unlawful, but that institutional structures should be reformed to be more responsive to humanitarian crises. Another group believed that the intervention had been illegal in a technical sense, but so morally appropriate as to be otherwise justified. Yet others saw Kosovo as an instance of legitimate humanitarian intervention. Finally, some opined that the Kosovo incident itself marked a move toward the formation of a customary rule of humanitarian intervention. It was, for them, a case that expanded, rather than breached, the law, similar to the Truman proclamation about the continental shelf. Scholars other than legal academics, however, by and large found the intervention justified.⁶²⁶

⁶²² *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1988).

⁶²³ *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989).

⁶²⁴ *United Nations Framework Convention on Climate Change*, 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1992).

⁶²⁵ See G Thomas, *supra* note 498.

⁶²⁶ Fernando R Tesón, "Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention" (2009) 1:2 *Amsterdam L Forum* 42 at 43, online: <www.amsterdamlawforum.org> [Tesón, "Kosovo"].

Tesón's analysis demonstrates that legal, political and philosophical scholarship varies on the legality of the intervention; however, a point can be made that NATO's actions derived their legality from existing international law. For example, certain scholars⁶²⁷ have attempted to put forward a validation with strong legal elements in an attempt to justify the intervention through customary international law. In general, they point to three major explanations.⁶²⁸ First, it is argued that humanitarian intervention is an acceptable concept in accordance with the general purposes and principles of the United Nations.⁶²⁹ Next, humanitarian intervention finds support in the following international legal instruments: the *Genocide Convention* of 1948,⁶³⁰ the *Universal Declaration of Human Rights* of 1948,⁶³¹ and the *Geneva Conventions* of 1949.⁶³² Lastly, the argument is made that human rights transcend domestic matters, and become international issues

⁶²⁷ See generally, Leslie A Burton, "To bomb or not to bomb? The legality of the question" (2001) 7:1 *Ann Surv Intl & Comp L* 49; Julie Mertus, "Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo" (2000) 41:5 *Wm & Mary L Rev* 1743; Laura Geissler, "The Law of Humanitarian Intervention and the Kosovo Crisis" (2000) 23 *Hamline L Rev* 323; Ian Brownlie, "Kosovo Crisis Inquiry: Memorandum on the International Law Aspects" (2000) 49:4 *ICLQ* 878; Jordan J Paust, "NATO's Use of Force in Yugoslavia" (1999) 33:9 *UN L Rep* 114.

⁶²⁸ Burton, *supra* note 627 at 54.

⁶²⁹ *Ibid* ([g]eneral purposes and principles of the United Nations under "Article 1 of the United Nations Charter which include the preservation of peace, security, self-determination of peoples, and respect for and observance of human rights...under Articles 55 and 56 because all member states are required to take joint and separate action for the universal respect for and observance of human rights... [including to] prevent and punish... [genocide]" at 55).

⁶³⁰ *Ibid* ("[t]he Genocide Convention in particular calls upon the United Nations to take such action as appropriate for "the prevention and suppression of acts of genocide. 'Acts of genocide include killing, or inflicting serious harm, on members of an ethnic group with an intent to destroy that group. The crime of genocide transcends the inviolability of states, and using force to prevent it is legal. The crime of genocide was occurring in Kosovo. Because NATO intervened to prevent it, NATO's action was legal" at 56). See also *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) [Genocide Convention].

⁶³¹ The Universal Declaration of Human Rights condemns the unlawful taking of life, and the Geneva Conventions prohibits the murder of civilians. These agreements encourage signatories to take action when a state violates the agreements' provisions. See e.g. Burton, *supra* note 627 at 57. See also *Universal Declaration of Human Rights*, General Assembly Resolution 217 (III), 1948 [UNDHR].

⁶³² See generally *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (entered into force 20 October 1950) [*Geneva Convention I*]; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (entered into force 20 October 1950) [*Geneva Convention II*]; *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 20 October 1950) [*Geneva Convention III*]; *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 20 October 1950) [*Geneva Convention IV*] [hereinafter 1949 Geneva Conventions].

when they become subject to *in extremis* abuse.⁶³³ These arguments point to a dilemma between the influence of human rights in public international law, a debate that tends to use legal theory when explaining its legal status.⁶³⁴

Through this debate, one inevitably faces the challenge of explaining public international law beyond the codified law and clearly-established norms and practices. As the Kosovo example has demonstrated, certain scholars vehemently continue to defend NATO's intervention as an appropriate action given the fact that the international legal system would have otherwise been unable to act due to a paralyzed UNSC and the overall prohibition on the use of force.⁶³⁵ For example, Smith claims that the only negative aspect to the intervention was the fact that NATO member states refused to clarify their *recto intentio* to the rest of the world:

NATO's justification for intervention in Kosovo was tortured and disingenuous. Instead of dancing on the head of a pin about whether Resolution 1199 authorized the use of force, the Alliance should have argued from the beginning that intervention as justified because: Yugoslavia illegally withdrew Kosovo's autonomy, it denied the Albanian majority in Kosovo its fundamental right to self-determination; and it continued to trample on numerous other basic human rights guaranteed under the UN Charter. In so doing, Yugoslavia forfeited its right to Kosovo. These egregious Yugoslav violations of international law gave NATO sufficient legal grounds for using force to assist the KLA in its fight for an independent Kosovo.⁶³⁶

Indeed, a reliance on self-determination could have justified the intervention and consequently, created a precedent for an emerging international law norm. Such an approach is suggested as part of this thesis' legal analysis of the Kosovo case study. Through the lens of self-determination, it becomes evident that NATO's intervention,

⁶³³ Burton, *supra* note 627 (“[a]s human rights have gained acceptance, the notion of state sovereignty has lost ground” at 60).

⁶³⁴ Fernando R Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd ed (Netherlands: Brill, 2005) at 122.

⁶³⁵ Teson, “Kosovo”, *supra* note 626 (‘Positivist international law’ is further expanded on by Tesón: “Most critics of humanitarian intervention are positivists. For them, state practice, and only state practice, is the touchstone of international law. Their opposition to humanitarian intervention results, in part, from their hostility to philosophy or any other technique that introduces values into the ascertainment of international law” at 4).

⁶³⁶ Smith, *supra* note 571 at 21.

although illegal due to its violation of the prohibition on the use of force, was justified through the fact that Kosovars had a right to a UNC secession, and that the human rights abuses being perpetrated on Kosovo's territory reached levels of *in extremis*. With respect to the first point, it remains to confirm how it became established that Kosovo possessed that right. This will be done below through a brief analysis of the contemporary status of the Kosovar peoples, as well as of the territory of Kosovo.

4.2.4. Kosovo's right to UNC Secession

Over the last three decades, the concept of humanitarian intervention has been examined mostly using the principle of non-intervention⁶³⁷ in international law; however, NATO's intervention in Kosovo reopened an opportunity to analyze the concept under the strengthening role of the principle of self-determination.⁶³⁸ Consequently, it is necessary to determine whether Kosovars constituted a 'peoples' to invoke their right to self-determination, and subsequently, whether the territory of Kosovo fulfills the criteria for statehood. As a result, it will become evident whether the situation in Kosovo in 1999 should be treated as a case of self-determination denial coupled with human rights abuses deemed as *in extremis*. Should the threshold for this condition be met, Kosovo's status as an entity possessing the right to a UNC secession will become justified.

The first question to consider is whether the Kosovars constituted a "peoples" under international law. According to Borgen, "...the Kosovars are a people, inasmuch as they are of the same ethnicity, perceive of themselves as a group, and have inhabited Kosovo for centuries."⁶³⁹ This claim has also been reaffirmed by a number of scholars

⁶³⁷ For more on the influence of the principle of non-intervention see Jasmeet Gulati & Ivan Khosa, "Humanitarian Intervention: To Protect State Sovereignty" (2013) 41:3 Denv J Intl L & Poly 397 at 400-3.

⁶³⁸ *Ibid* at 398.

⁶³⁹ Borgen, "Is Kosovo a Precedent?", *supra* note 46 at 5; For similar views see generally Gerd Seidel, *A New Dimension of the Right of Self-Determination in Kosovo*, in Christian Tomuschat, ed., *Kosovo and the International Community: A Legal Assessment* (Hague: Kluwer Law International, 2003) at 205; Kokott *supra* note 557 at 6; Stanislav V Chernichenko & Vladimir S Kodiar, *Ongoing Global Legal Debate on Self-determination and Secession: Main Trends*, in Julie Dahlitz ed., *Secession and International Law: Conflict Avoidance – Regional Appraisals* (New York: Cambridge University Press, 2003) at 75.

including Gerd Siedel and former European Court of Justice Advocate General Julianne Kokott.⁶⁴⁰ In other words, it can be presumed that the Kosovars constituted a peoples under international law and possessed the right to a UNC secession long before such a concept became part of the legal framework for self-determination.⁶⁴¹

With respect to whether Kosovo fulfilled the *Montevideo* criteria for statehood, it had a permanent population, a defined territory, a government and a limited capacity to enter into relations with other states. Although the population was separated politically through ethnic alliances to Albania, Croatia and Serbia proper, regardless of the Kosovar Albanian and Serb displacements throughout the 20th century, a permanent population continued to reside on the territory of Kosovo consistently between 1980 and 2008,⁶⁴² satisfying the first criterion for statehood. Further, the 1974 Yugoslavian Constitution allowed Kosovo to “have its own identity and territory and [have acknowledgment] in the field of international relations.”⁶⁴³ Thus, it can be suggested that as well as having a permanent population, Kosovo had a defined territory and even a *limited* capacity to enter into relations with other states as an ‘autonomous province’ as part of the Yugoslavian Federative model.⁶⁴⁴ Although Kosovo’s capacity to enter into relations with other states was limited, as interpreted by Crawford, the effectiveness of this criterion depends largely on an entity’s independence and *ability* to enter into relations with other states.⁶⁴⁵ Therefore, although Kosovo’s capacity to enter into relations with other states was limited due to its status under the Yugoslav constitution, its *ability* to do so post-1999 allows for it to meet the requirements of this criterion. Finally, apart from the time of NATO’s

⁶⁴⁰ See generally, Kokott, *supra* note 557 at 6-7; Seidel, *supra* note 639 at 205-6.

⁶⁴¹ For a more detailed illustration of the multiethnic makeup of Kosovo, see Britannica, “Kosovo”, *supra* note 559 (“[Kosovar] Serbs are concentrated in northern Kosovo, particularly in Mitrovicë (Mitrovica), as well as around Shtërpçë (Štrpce), on the Macedonian border.” The ethnic composition of Kosovo in 2011 was the following: 92.9% Albanian, 1.5%, Serb and 5.9% Other (Turkic, Croat, Roma etc...) respectively”).

⁶⁴² Seidel, *supra* note 639 at 205.

⁶⁴³ Hajredin Kuci, “The Legal and Political Grounds for, and the Influence of the Actual Situation on the demand of the Albanians of Kosovo for independence” (2005) 80:1 Chi Kent L Rev 331 at 341; See also, *Constitution of Socialist Federal Socialist Republic of Yugoslavia* at preamble & arts 1, 5 224,225,226, online: <<http://mojustav.rs/wp-content/uploads/2013/04/Ustav-SFRJ-iz-1974.pdf>>.

⁶⁴⁴ *Ibid* at 342.

⁶⁴⁵ Crawford, “The Creation of States”, *supra* note 22 at 62.

military intervention, Kosovo had a functioning government.⁶⁴⁶ After the intervention, government functions were taken over as part of UNMIK in accordance with UNSC Resolution 1244.⁶⁴⁷ On the basis of these facts, it is necessary to briefly explain how UNSC Resolution 1244 further granted independence to Kosovo.⁶⁴⁸ Resolution 1244 “...codified a number of principles which were to guide the allocation of sovereignty among the FRY (Federal Republic of Yugoslavia), Kosovo and the international community.”⁶⁴⁹ As per Williams, the Resolution remains an integral piece of jurisprudence with regards to the independent status of Kosovo:

The substance of Resolution 1244 focused on: 1) displacing FRY sovereignty from Kosovo; 2) replacing it with interim U.N. and NATO sovereign responsibilities; 3) establishing substantial autonomy and democratic self governance; 4) ‘facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords,’ and 5) preparing in the final stage to oversee “the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.”⁶⁵⁰

In essence, the Resolution “...altered sovereign control over Kosovo...by displacing Yugoslav sovereign control and replacing it with an interim U.N. administration mandated to build independent Kosovar institutions capable of providing for democratic self-government.”⁶⁵¹ Although much contention exists with regards to the question of

⁶⁴⁶ Kuci, *supra* note 643 at 342.

⁶⁴⁷ See *Security Council resolution 1244 [on the deployment of international civil and security presences in Kosovo]*, SC Res 1244, UNSCOR, 54th Sess, UN Doc S/Res/1244 (1999) at para 10 [Resolution 1244].

⁶⁴⁸ It should be noted that alternative viewpoints exist that claim Kosovo as not having fulfilled the criteria for statehood. In most cases, this is based on an interpretation of historical and political events that occurred in Kosovo over the past three decades. See e.g. Milena Sterio, “Creating and Building A “State”: International Law and Kosovo” (2010) 104 *Am Socy Intl L Proc* 361 (“First, Kosovo's territory is heavily disputed by Serbia, which claims that Kosovo is part of Serbia and that historically, Kosovo has always been Serbian land. Second, Kosovo does not have a permanent population, because of the heavy flows of both Serbian and Albanian refugees that have moved in and out of Kosovo. Third, Kosovo does have a government, but its stability depends on protection ensured first by the United Nations, and now by the European Union. Finally, Kosovo can only enter into international relations because of the international community's involvement with it. In other words, Kosovo has been administered by the United Nations and its internal security has been secured by international forces, which ensure that Kosovo has access to the outside world, that it can trade, import and export goods, and that its political leaders can travel abroad” at 364).

⁶⁴⁹ Williams, *supra* note 216 at 406.

⁶⁵⁰ *Ibid* at 406. See also *Resolution 1244*, *supra* note 647 at paras 3-4, 9, 5-11, 17.

⁶⁵¹ Williams, *supra* note 216 at 407.

whether Resolution 1244 granted Kosovo territorial independence from Serbia,⁶⁵² it should be noted that much of that contentiousness stems from different interpretations of Kosovar history, and consequently, the political decisions that led to the breakout of the ethnic conflict.⁶⁵³ Examples include such factors as the competing territorial claims for Kosovo as part of a ‘Greater Serbia’ or a ‘Greater Albania,’⁶⁵⁴ as well as the nature of NATO’s intentions in Kosovo as originating from wanting to impose the ‘American world order’ in Eastern Europe.⁶⁵⁵ Nevertheless, the determining factor can be suggested as being stated in Resolution 1244, which granted Kosovo the right to an inclusive autonomous government, a right that was denied to them by the Serb-led Yugoslav authorities before 1999. It should be noted here that, as mentioned in Chapter 2, an effective government as part of a justified UNC secession must only demonstrate the *ability* and not the *capacity* to enter into relations with other states as part of its ‘actual independence’. Additionally, in the case of a UNC secession experiencing human rights abuses deemed as *in extremis*, the formal part of independence can occur post-intervention, as was the case in Kosovo. Conclusively, it can be determined that - regardless of political decisions made by Kosovo, the EU, the United States and Serbia *ex post facto*; Kosovo’s status as an independent state must be acknowledged as having derived from Resolution 1244.⁶⁵⁶

⁶⁵² See e.g. Alexander Orakhelashvili, “Kosovo: The Post-Advisory Opinion Stage” (2015) 22 Intl J on minority and group rights 486 [Orakhelashvili, “Kosovo”] (“the Admissibility Decision of the European Court of Human Rights in *Ali Azemi v. Serbia* (2013) dealing with the claims as to the compliance with Article 6 of the European Convention on Human Rights in the context of the enforcement of decisions of courts operating under the Kosovo Albanian authority. The Court acknowledged that 89 States had recognised Kosovo’s independence, including 22 out of 27 European Union Member-States, as well as steps taken by the Kosovo government and International Steering Group to end Kosovo’s “supervised independence” Yet the Court frames its own reasoning in terms of Serbia’s continuing territorial sovereignty over Kosovo that, due to various circumstances, cannot be factually exercised on the ground” at 491). See also, *Azemi v Serbia*, *supra* note 611.

⁶⁵³ Sterio, *supra* note 647 at 364.

⁶⁵⁴ Orakhelashvili, “Kosovo”, *supra* note 652 at 487.

⁶⁵⁵ Cohn, *supra* note 392 at 138.

⁶⁵⁶ The evidence of human rights abuses committed against the Kosovars was presented in detail as part of the previous sub-section. It should be noted that the actions of Yugoslav forces in general towards non-Serb and non-Orthodox Christian minorities in the former Yugoslavia can be used as an additional factor of analyzing the reasons for which a military intervention was required in Kosovo. Although the deaths of Kosovars at the hands of Yugoslav-supported military in Kosovo may not meet the threshold of a genocide, similar actions by Yugoslav and Serb-supported factions in Bosnia

Now that the cases of military interventions in Bangladesh and Kosovo have been summarized, it is necessary to look at a third military intervention which will demonstrate the drastic difference between a justified and a non-justified violation of the prohibition on the use of force. The next section of this Chapter will analyze Russia's military intervention in South Ossetia and Abkhazia in the Republic of Georgia in 2008, establishing the tenets around the illegal intervention, as well as the false claims of a justified right to external self-determination by the two entities, which consequently prompts a denial of their claims to independence.

4.3. South Ossetia & Abkhazia

Long-time Caucasus' scholar Donald Rayfield recently wrote that "[t]he origins of the Georgian peoples, their ethno-genesis, like that of most nations, precedes documentary evidence."⁶⁵⁷ In fact, geographically, Georgia's diverse and rich ethno-history allowed its historical boundaries to reach "far into today's Turkey, Azerbaijan and Armenia,"⁶⁵⁸ although the contemporary Republic of Georgia⁶⁵⁹ is much smaller than the original federative state of a once flourishing Georgian Empire. Inside its contemporary international boundaries, two *de facto* republics of South Ossetia and Abkhazia, which represent approximately 18-20% of the internationally-recognized Georgian land mass, remain under foreign occupation since 2008.⁶⁶⁰

This sub-section will consist of a short historical summary of both entities' histories in order to establish the ethno-historic tensions that resulted in their emergence. Subsequently, an analysis of Russia's military intervention to secure the entities'

(Srebrenica) for example provide additional evidence of a systematic persecution of minorities that ended with NATO's military intervention in 1999. For more on the intricacies of the ethno-inspired persecutions in Yugoslavia, see Rogel, *supra* note 558.

⁶⁵⁷ Donald Rayfield, *Edge of Empires: A History of Georgia* (London: Reaktion Books Ltd, 2012) at 11.

⁶⁵⁸ *Ibid* at 7.

⁶⁵⁹ Georgians do not refer to their country as the 'Georgia', rather, they use the term *Sakartvelo* which stands for the 'land of the kartvelians.' The Kartvelians ethnos' are generally said to be made up of Georgians, Mingrelians, Laz and Svans.

⁶⁶⁰ See Robert E Hamilton, "NATO In the South Caucasus: Present for Duty or Missing in Action? – Analysis" *The Eurasia Review* (23 June 2017) online: < www.eurasiareview.com/23062017-nato-in-the-south-caucasus-present-for-duty-or-missing-in-action-analysis/>.

independence will be completed in order to demonstrate its staunch differences with the military interventions in Kosovo and Bangladesh. The self-determination cases of South Ossetia and Abkhazia, although representing two distinct and separate regions within the internationally-recognized borders of the Republic of Georgia, will be analyzed collectively as they secured their *de facto* independence in a similar manner and at approximately the same time.⁶⁶¹ However, before delving into their chronological histories, it is necessary to indicate two important factors with respect to their relationship with Russia. First, from a geopolitical perspective, it is necessary to note that

...Russia's recent approach to geopolitical strategy capitalizes on the challenging ambiguity surrounding the right of self-determination and its enforcement in international law. This ambiguity is allowing Russia to take advantage of uncertainties and move forward with its own geopolitical objectives in Transnistria, Crimea, Eastern Ukraine, Abkhazia, and South Ossetia.⁶⁶²

Second, it is important to acknowledge the multi-ethnic and multi-religious makeup of the Caucasus region, to which both breakaway 'republics'⁶⁶³ belong. Although the heterogenous makeup of the region has been the cause of other regional and territorial conflicts in the past,⁶⁶⁴ the South-Ossetian and Abkhaz conflicts, which were primarily rooted in the breakup of the Soviet Union, "followed years of simmering tensions and

⁶⁶¹ Russia recognized the independence of South Ossetia and Abkhazia by presidential decree on August 26, 2008. See Clifford J Levy, "Russia Backs Independence of Georgian Enclaves", *The New York Times* (26 August 2008) online:<www.nytimes.com>.

⁶⁶² Adam Sorenson, "South Ossetia and Russia: The Treaty, the Takeover, the Future" (2016) 42 NCJ Intl L 223 at 224. For a more succinct legal analysis of Russia's interpretation of international law, see Milena Sterio, "Self-Determination and Secession Under International Law: The New Framework" (2015) 21 ILSA J Intl & Comp L 293.

⁶⁶³ For the purposes of avoiding any confusion, the term 'republics' may identify South Ossetia and Abkhazia in this Chapter. This will be done in order to dispel any confusion between using the term 'region' to define each republic and the geographic Caucasus region to which they belong to. The use of the term 'republic' does not take away from their status under international law as *de facto* breakaway regions.

⁶⁶⁴ Territorial conflicts around the borders of the Russian Federation are plentiful. Some examples include Nagorno-Karabakh, a *de facto* republic and a point of armed conflict between Azerbaijan and Armenia. Another example is Chechnya, an autonomous republic within the Russian Federation, whose independence movement caused a number of bloody armed conflicts in the 1990's. For more on the conflict in Chechnya, see Jonathan Charney, "Self-Determination: Chechnya, Kosovo, and East Timor, 34 Vand J Transnat'l L 455. For more on the conflict in Nagorno-Karabakh see Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia, A Legal Appraisal* (Boston: Kluwer Law Publications, 2001).

sporadic hostilities in the region.”⁶⁶⁵ To summarize, outside of the legal ambit of analysis for this case study, it is important to keep in mind that Russia’s involvement in the Caucasus region certainly possesses historical and political influences, which cannot be ignored when attempting to understand its actions sine 1992.

4.3.1. Abkhazia – a brief chronological history⁶⁶⁶

The history of Abkhazia is complex in that, similar to other territorial disputes, it had been the subject of conquests, invasions and multiple waves of imperialism over the past three millennia. Nevertheless, it is important to note that the Abkhaz culture and language had existed in Georgia since its inception as a functioning society,⁶⁶⁷ and other Georgian ethnos’ such as the Svans, Laz and Mingrelians have lived side by side with Abkhaz peoples since Georgia became a federative state in the 10th century AD.⁶⁶⁸ In any case, as was written by ecclesiastical lawyer Giorgi Merchule over one thousand years ago, in the 10th century, “...Georgia was defined as anywhere where the Mass was said in

⁶⁶⁵ Philip Leach, “South Ossetia” in Elizabeth Wilmhurst ed, *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012) at 317.

⁶⁶⁶ It is important to note that a large part of this sub-section will cite the following publication: Dugard & Raic, *supra* note 528. This publication’s excerpt on the history of Abkhazia is a combination of multiple original historical sources. See generally, Potier, *supra* note 664; A Khachikian, “Multilateral Mediation in Intrastate Conflicts: Russia, the United Nations, and the War in Abkhazia” in M C Greenberg, J H Barton & M E McGuinness, eds., *Words Over War, Mediation and Arbitration to Prevent Deadly Conflict* (Oxford: Rowman & Littlefield Publishers, 2000) at 15; S N MacFarlane, “Conflict Resolution in Georgia” in H G Ehrhart & A Schnabel, eds., *The Southeast European Challenge: Ethnic Conflict and the International Response* (Hamburg: Nomos Verlagsgesellschaft, 1999) at 117; Raic, *supra* note 13 at 379–86.

⁶⁶⁷ See Rayfield, *supra* note 657 (London: Reaktion Books Ltd, 2012) (“[w]hen Georgia emerged from legend into history, it did so as two possible three, distinct entities. One is the core of the future unified state, Iberia (today’s Kartli and Kakhetia). The second is Colchis, the Black Sea coast region that at its greatest stretched from east of Trebizond to north of today’s Sukhumi [modern-day capital of Abkhazia]...The third is Svanetia, ancient Suania, which two or three thousand years ago was more extensive than today’s landlocked highlands...Colchis is mentioned as a kingdom long before Iberia...” at 12).

⁶⁶⁸ See George Hewitt, “Abkhazia and Georgia: Time for a Reassessment” (2008) 15 *Brown J World Aff* 183 (“Passing through the Caucasus in 1404, the cleric Johannes de Galonifontibus has left a brilliantly succinct description of the sequence of countries he visited. His text translates: “Beyond these [Circassians] is Abkhazia, a small hilly country...They have their own language...To the east of them, in the direction of Georgia, lies the country called Mingrelia...They have their own language... Georgia is to the east of this country. Georgia is not an integral whole...They have their own language” at 184).

Georgian”⁶⁶⁹ – Abkhazia included.

Abkhazia’s early history as a functioning society can be traced back to the 9th century BC, where until the 6th Century BC, its territory belonged to the ancient kingdom of Colchis (Kolkha).⁶⁷⁰ Subsequently, an influx of Milesian Greeks established themselves on the territory in around the 5th Century BC and in 1 AD, the region was invaded and conquered by the Byzantine Roman Empire. In the centuries that followed, the Kingdom would be the subject of multiple conquests; however, the strength of the Georgian, and predominantly Christian-Orthodox population, allowed for its culture and language to survive nonetheless.⁶⁷¹ In 978 AD, *Abkhazeti* (Abkhazia in Georgian) was absorbed into a feudal Georgian state ruled by King Bagrat III. Upon its absorption into the Georgian state, the Abkhaz lived in proximity and married into other Georgian ethnoses, with many important figures of the Georgian monarchy having direct Abkhaz lineage or ancestry.⁶⁷²

Through countless invasions by first the Sassanids, the Mongols, the Timurs, and finally the Ottoman Turks, the Georgian state ultimately fragmented into smaller principalities under the yoke of foreign conquest. Eventually, Abkhazia broke into its own independent principality in the 17th century while under the Ottoman Empire, but through Russia’s conquest of the North Caucasus⁶⁷³ became a part of the Russian Empire via official annexation in 1864.⁶⁷⁴ Fearing revolts by the Abkhaz against further imperial

⁶⁶⁹ Rayfield, *supra* note 657 at 7.

⁶⁷⁰ David Braund, *Georgia in Antiquity: A History of Colchis and Transcaucasian Iberia* (Oxford: Clarendon Press, 1995) at 359.

⁶⁷¹ Rayfield, *supra* note 657 at 18-47, 55.

⁶⁷² It is important to note Abkhazia’s role as part of the unified Georgian federal state. See Hewitt, *supra* note 668 (“[t]he first king of this unified state, Bagrat’ III, in 978 inherited from his Abkhazian mother, Gurandukht’, the Kingdom of Abkhazia, which included both Abkhazia proper and most of today’s west Georgian provinces, which Abkhazian prince Leon II had added to his domains in the late 8th century. By the time of his death in 1014, Bagrat’ had inherited all remaining Georgian-speaking regions, and, as his 36 -year reign ended, the Georgian chronicler ascribed to him the title *apxazta da kartvelta mepe*: “Sovereign of the Abkhazians and the Georgians. However, this unified polity was bound to fragment after the depredations of the Mongols, who first appeared in the Caucasus during the reign of Tamar’s daughter, Rusudan, in the 1270’s” at 184).

⁶⁷³ It is also important to note that the Russian Empire annexed and conquered most of Georgia by the early 1800’s.

⁶⁷⁴ Dugard & Raic, *supra* note 528 at 113.

rule, the Russian Empire authorities proceeded to deport Muslim Abkhazians to the Ottoman Empire. Consider this summary of the historical developments in 18th century Abkhazia by George Hewitt, which clearly underline the Russian Empire's relationship with the Caucasus region:

As Tsarist Russia pushed south in the late eighteenth century following the 1783 Treaty of Georgievsk between Catherine the Great and Erekle II, king of the central and eastern Georgian kingdoms of Kartli and K'akheti, resistance grew across virtually the whole North Caucasus. During the nineteenth century Caucasian War, the Abkhazians were the only people resident south of the mountains to join it. Abkhazia came under Russian "protection" in 1810 but continued to administer its own affairs until 1864. This was the year when the Caucasian War ended with the surrender of the North-West Caucasian alliance at Krasnaja Poljana, inland from Sochi. Following their defeat, all the Ubykhs and most Circassians and Abkhazians chose to abandon their ancestral lands to resettle in the Ottoman Empire. As a result, most Abkhazians and Circassians today live in the Near East, predominantly in Turkey. A further outflow took place after the 1877-1878 Russo-Turkish War. It was after these migrations, known as *maxadzhirstvo*, "Great Exile," that non-Abkhazians first started to populate the denuded areas... With the departure of at least 120,000 Abkhazians, mostly during the *maxadzhirstvo*, and the beginning of an inflow of non-Abkhazians, Abkhazian territory was subjected to different administrative divisions and arrangements up to the time of the Russian Revolution (1917).⁶⁷⁵

Evidently, the Abkhaz peoples underwent a broad range of ethnic discrimination under the rule of the Russian Empire. This prompted them to seek more autonomy and freedom, especially as communism began to slowly dismember the power of the Russian monarchy. After the October Revolution in 1917 and the rise of the Bolsheviks, the Abkhaz Socialist Republic was finally given official republican status within the Soviet Union in 1921. Nearly one decade later, under pressure from the Soviet Union central government, the autonomy originally granted to the Abkhaz began to slowly disappear.⁶⁷⁶ Raic and Dugard explain that what happened next set the stage for the isolationism that the Abkhaz peoples felt throughout the 20th century:

On 4 March 1921, the Abkhazian Soviet Republic was formed, which possessed full republican status in the Soviet Union. In December 1921, under pressure from the central government of the Soviet Union, a special

⁶⁷⁵ Hewitt, *supra* note 668 at 185.

⁶⁷⁶ Dugard & Raic, *supra* note 528 at 113.

‘contract of alliance’ was signed between Abkhazia and Georgia, by which Abkhazia became part of the Georgian Soviet Socialist Republic while it retained its status as Union republic. On 1 April 1925, the Abkhazian Constitution was adopted which enshrined its republican status with treaty ties to Georgia. However, under Stalin, the status of Abkhazia was reduced to an autonomous republic within Georgia. In the course of the 1930s, large numbers of Georgians were resettled in the region... Under Stalin’s rule, a period of ‘Georgianisation’ took place in the late 1940s and early 1950s. The Abkhazian language was banned from administration and publication and the Abkhazian alphabet was changed to a Georgian base. In 1953, following the death of Stalin, this policy changed and the Abkhazians were rehabilitated and compensated with over-representation in local offices. In 1978, the Abkhaz launched a campaign to separate the Autonomous Republic of Abkhazia from the Georgian Soviet Socialist Republic and to incorporate it in the Russian Federative Socialist Republic. Although rejected by Russia, this resulted in significant concessions to the Abkhaz, including disproportionate representation in the Supreme Soviet of Abkhazia.⁶⁷⁷

As can be established from this extract, the Abkhaz incurred forms of self-determination denial and discrimination in the early 20th century by both the Russians and the Georgians; however, this would gradually change as the Soviet Union adopted a more balanced activism of self-determination rights on the international stage.⁶⁷⁸ Ultimately, Abkhazia’s exhaustive requests for autonomy from Georgia were met with concessions from the Soviet Union’s central government, which granted ethnic Abkhaz supremacy in their autonomous parliament; a move that would create discord and significantly impact relations with ethnic Georgians living on the territory of Abkhazia in the coming years.

In the 1980s, a rise in Georgian nationalism led to renewed fears of ‘Georgianisation’ in Abkhazia, prompting tensions to boil over on August 25, 1990 when “...the Abkhazian Supreme Soviet, in the absence of its Georgian deputies, voted in favour of independence, and like virtually all autonomous republics of the former Soviet Union, declared the state sovereignty of the Abkhazian Autonomous Soviet Republic (ASR).”⁶⁷⁹ Although the declaration was subsequently disregarded and proclaimed as

⁶⁷⁷ *Ibid.*

⁶⁷⁸ See sub-section on “Leninist Self-Determination” in Chapter 2.

⁶⁷⁹ Dugard & Raic, *supra* note 528 at 114.

invalid by Georgia, the Abkhaz authorities made legitimate efforts twice (in 1990 and 1992) to begin discussions on including Abkhazia into Georgia as part of the federal structure of an independent Georgian federative state. Unfortunately, both times the proposals were ignored and, following a *coup d'état* in 1991, "...the Georgian Military Council reinstated Georgia's 1921 constitution which did not recognise Abkhazia's status as a separate entity within Georgia."⁶⁸⁰ In response to this, Abkhazia declared its independence, naming itself the 'Republic of Abkhazia'; however not 'officially' proclaiming its independence as a state from Georgia.⁶⁸¹

Without a consensus in place, a civil war broke out between the Georgian National Guard and the Abkhaz militia as early as 1991, with the primary reason for the Georgian intervention being the growing Abkhaz secessionist movement in the country. By the end of June 1993, Abkhaz militias had overpowered the Georgian military, capturing Sukhumi (the capital of Abkhazia) a few months after. Once a cease-fire was agreed upon on December 1, 1993, Georgia conceded to previous Abkhaz demands by offering proposals for extensive autonomy, which were subsequently rejected by the Abkhaz authorities.⁶⁸² One year later, the UN attempted to hold talks between the two sides; however, an insistence on recognising the territorial integrity of Georgia prompted the Abkhaz authorities to reject any declarations or propositions by the Georgian side. The primary issue for the Abkhaz was that they wanted to return to a confederal structure of Georgia (Abkhazia as an autonomous republic with the same rights and status as Georgia, but within the Georgian *de jure* territory); however, the Georgians were prepared only to offer autonomy to Abkhazia under a Georgian federative state.⁶⁸³ In any case, upon learning of the Abkhazian authorities' refusals, negotiations ceased and

⁶⁸⁰ *Ibid* at 115.

⁶⁸¹ *Ibid*.

⁶⁸² *Ibid* at 116.

⁶⁸³ It is necessary to note that although Georgia had sought to offer this option to the Abkhaz authorities, it was not done with much enthusiasm and was most likely a result of international pressure to solve the civil conflict.

Abkhazia continued its path to *de facto* statehood by holding elections in 1996.⁶⁸⁴

Indeed, it is the time period after the 1996 elections from which much of the opposition to Abkhazia's *de facto* independence is derived. The civil conflict in Abkhazia had caused nearly 300,000 ethnic Georgians to flee from Abkhazia into Georgia proper. Their return, which was fervently advocated by the international community and by Georgia, became a point of contention between the Abkhaz and the Georgian authorities. In large part, this was due to the fact that the return of Georgian refugees (which slowly began in 1997), was claimed by Abkhazia to be a way of destabilizing "the delicate politico-military balance in the area."⁶⁸⁵ After nearly 30,000 returned refugees were forcibly expelled from Abkhazia in 1998, calls about a potential ethnic cleansing by the Abkhaz authorities began to shape the nature of the Abkhaz-Georgian conflict.⁶⁸⁶ Ignoring the international pressure to solve the refugee situation, Abkhazia held an independence referendum in 1999, the results of which overwhelmingly called for an independent Republic of Abkhazia. However, by that point, it had become clear that the majority of ethnic Georgians in Abkhazia had not participated in the voting due to forced exile and intimidation. The international community's response reflected this fact, with the referendum and the subsequent 'declaration of independence' later that month being declared as illegal.⁶⁸⁷ As rightly summarized by Raic and Dugard:

The international (in particular the United Nations) stance towards the conflict is characterised by (a) consistent support for the preservation of the territorial integrity of Georgia, (b) a rejection of secession by Abkhazia, and (c) an insistence on the grant of extensive autonomy to the Abkhazians within the Republic of Georgia.⁶⁸⁸

⁶⁸⁴ The elections results were rejected by the majority of the international community and pronounced as illegal by the UNSC and the European Parliament. See e.g. *Security Council Resolution 1096 on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)*, SC Res 1096, UNSCOR, 52nd Sess, S/Res/1096, (1997) at para 3 [Security Council Resolution 1096]; *Security Council Resolution 1065, Resolution on the Situation in Abkhazia*, SC Res 1065, UNSCOR, S/Res/1065 (1996) at paras 3-4. See also Dugard & Raic, *supra* note 528 at 116.

⁶⁸⁵ *Ibid* at 116-7.

⁶⁸⁶ *Ibid* at 116, n 69. See specifically, *OSCE Istanbul Summit Declaration*, OSCE Doc. SUM.Doc/2/99 (1999) at para 17 ("In 1996, the European Parliament labelled the treatment of the refugees and displaced Georgians from Abkhazia as 'ethnic cleansing'").

⁶⁸⁷ *Ibid* at 117.

⁶⁸⁸ *Ibid*.

Indeed, the UNSC, as well as the European Union and Council of Europe, all agreed that Abkhazia's independence infringed on Georgia's territorial integrity under international law.⁶⁸⁹ Further, the Abkhaz authorities, who initially began negotiations in the early 1990's with discussions of Abkhazia as existing under a Georgian federative structure, rejected every proposal offered to them either by Georgia, or international mediators once some form of governmental stability returned to Georgia in 1996.⁶⁹⁰

Between the years 2000 and 2008, the situation in Abkhazia remained tense but stable, characterized as a 'frozen conflict zone' with both Russia and Georgia attempting to scrounge support in the region. For example, after 2000, Russia began issuing Abkhaz citizens with Russian passports as a means of travel and protection.⁶⁹¹ Additionally, the election of pro-'West' President Mikhail Saakashvili as part of the Rose Revolution in 2004 further strained relations between the separatist republic and Georgia. Specifically, this was due to the fact that Saakashvili "made Georgian territorial unity and control of the country's separatist regions—Abkhazia among them—a political priority."⁶⁹² Moreover, a 'nationalist turn' related to the election of Saakashvili further provoked the severity of the secessionist crisis, rekindling Abkhaz memories of previous 'Georginasion' movements in the past. As explained by Hewitt, the argument that the reality of a nationalist government in Georgia was of concern to the Abkhaz authorities should be accepted:

The advent of a new Georgian president might have been the moment to manifest a sense of realism vis-a-vis Abkhazia and South Ossetia. However,

⁶⁸⁹ See *Security Council Resolution 1287*, SC Res 1287, UNSCOR, S/Res/1287 (2000) at para 5; *Security Council Resolution 896*, SC Res 896, UNSCOR, S/Res/896 (1994) at para 5; *Resolution on the Situation in Abkhazia*, SC Res 1065, UNSCOR, S/Res/1065 (1996) at paras 2-3; Council of Europe, PA, 1997 Ordinary Sess (10th Sitting), *Resolution 1119 on the conflicts in Transcaucasia*, Debates, vol 1 (1997).

⁶⁹⁰ The Georgian government was unstable in the years after declaring independence from the Soviet Union on May 26, 1992. Mired by civil and ethnic conflicts, as well as a destabilized government system, the earlier rejections of Abkhaz proposals in 1990 and 1992 should be disregarded due to the instability of the Georgian government at that time. In fact, even the UNSC criticized Abkhazia on its 'uncompromising stance' towards negotiations with Georgia once negotiations began in 1996. For more on this see *Security Council Resolution 1096*, *supra* note 684 cited in Dugard & Raic, *supra* note 528 at 118, n 75.

⁶⁹¹ See Mark Mackinnon, "Russian passports anger Georgia" *The Globe and Mail* (2 May 2002), online: <www.theglobeandmail.com/news/world/russian-passports-anger-georgia/article4137259/>.

⁶⁹² "Abkhazia" in *Britannica Academic, Encyclopedia Britannica*, online: <www.academic.eb.com>.

any such opportunity was squandered yet again, as Saak'ashvili set himself the nationalist goals of regaining the lost territories, including the Muslim-Georgian region of Ach'ara in the southwest during his first presidential term, offering Abkhazians the same old "maximal autonomy" until early 2008, when the offer, 19 years too late, became a special federal arrangement. After peacefully regaining Ach'ara in May 2004, Saak'ashvili turned his attention to South Ossetia. As for Abkhazia, troops, allegedly mere policemen that were needed to restore order entered the Upper K'odor Valley in the spring of 2006, Abkhazia's only region that Georgia has historical claims to still under Tbilisi's control. They were quickly joined by the so-called "Abkhazian Government in-exile." This provocation, which saw tourist numbers plummet in the expectation of renewed fighting, produced no immediate Abkhazian response other than to halt the negotiations.⁶⁹³

Thus, under the pretence of halted negotiations, it was only a matter of time before tensions spilled over into an armed conflict in August of 2008. Prior to delving into the developments that caused the Russian military intervention in 2008, it is necessary to present a similar historical summary of South Ossetia to identify the comparable differences between the two separatist entities, as well as the similarities which equally affect their current status' under international law.

4.3.2. South Ossetia – A brief chronological history

South Ossetia can be found within the territorial boundaries of the north-eastern region of the Republic of Georgia, separated by the Caucasus mountain range with North Ossetia-Alania, an autonomous federal republic within the territorial boundaries of Russia.⁶⁹⁴ The Ossetian peoples are considered to be of "Iranian origin and are viewed by Georgians as a non-native group living in its territory."⁶⁹⁵ Unlike Abkhazia, which had its

⁶⁹³ Hewitt, *supra* note 668 at 192.

⁶⁹⁴ Sorenson, *supra* note 661 at 228.

⁶⁹⁵ Noelle Higgins & Kieran O'Rielly, "The Use of Force, Wars of National Liberation and the Right to Self-Determination in the South Ossetian Conflict" (2009) 9 Intl Crim L Rev 567 at 568. It should be noted that finding historical summaries of South Ossetia is fairly challenging as the number of publications on the subject either in Russian or in English is limited. The following authors have summarized South Ossetia's complex historiography. Many of the sources used in their publication require mentioning as part of this source which will be used extensively in this sub-section: *Georgia: Avoiding War in South Ossetia*, International Crisis Group Report 159, Brussels/Tbilisi, 2004; Charles King, "The Benefits of Ethnic War: Understanding Eurasia's Unrecognized States" (2001) 53 World

origins and language engrained into the etymological history of Georgia, Ossetians, believed to have derived from a Sarmatian Iranian tribe known as the Alans, only began to migrate into Georgia en masse sometime in the 17th century.⁶⁹⁶ Hence, the historiography of the Ossetian peoples can begin at this juncture of Georgia's long and rich history.

Once South Ossetia became part of the Russian Empire through the annexation of Georgia in 1801, "...the Ossetians retained their identity and did not join other groups in the North Caucasus putting up fierce resistance to the expansion of the Russian empire."⁶⁹⁷ Furthermore, Ossetian migration continued into Georgia throughout the 19th century, and while 'Russification' was more prevalent in North Ossetia, the ethnic tensions between Georgians and Ossetians persisted due to in large part, linguistic and cultural differences, as well as a strong support of Russia by the Ossetians.⁶⁹⁸ Following the Russian Revolution, a Menshevik government was elected in what came to be known as the "First Georgian Republic" (1918-1921);⁶⁹⁹ however, as described by Noelle Higgins and Kieran O'Rielly, the ethno-historical issues that to-date bordered on linguistic and cultural differences, began to take a more 'separatist' undertone:

The First Georgian Republic's Menshevik government faced many problems, including war (with Armenia and White Russian forces), economic chaos and hyperinflation." The Mensheviks turned to Georgian nationalism as they tried to bolster support for the state. This led to minorities, including Ossetians, feeling isolated within the state, and Georgians began to regard them as a potential fifth column which could collaborate with forces outside of Georgia to undermine the Georgian government. Following the defeat of the Mensheviks, the incorporation of Georgia into the Soviet Union in 1921 was followed by the establishment of an autonomous oblast of South Ossetia within the Georgian Soviet Socialist Republic.' Unhappy with the division of Ossetia into two units in separate Soviet republics, through the 1920s and 1930s North and South

Politics 534; Svante E Cornell, *Small Nations and Great Powers: A study of Ethnopolitical Conflict in the Caucasus* (London: Curzon Caucasus World, 2001).

⁶⁹⁶ Rayfield, *supra* note 657 at 231.

⁶⁹⁷ Sorenson, *supra* note 661 at 229.

⁶⁹⁸ Roland Topchishvili, "Georgian-Ossetian Ethno-Historical Review" (2011) National Library of Georgia at 23.

⁶⁹⁹ Higgins & O'Rielly, *supra* note 695 at 569. See Cornell, *supra* note 695 at 148.

Ossetian leaders sought a united Ossetia within the Soviet Union and petitioned the Soviet Union leadership for this. However their request was denied.⁷⁰⁰

After the Second World War, Joseph Stalin (himself an ethnic Georgian), ceded both Abkhazia and South Ossetia to the Georgian Socialist Soviet Republic.⁷⁰¹ Throughout the post-war Soviet period, ethnic tensions were low, only beginning to rise towards the end of the 1980s in response to the multiple South Ossetian requests "...to have its status upgraded from that of an autonomous oblast to an autonomous republic."⁷⁰² In fact, it was only in 1989, where a final request by the South Ossetians for extensive autonomy was met with violence, that the Georgian-Ossetian ethnic divide reached similar levels to the ongoing conflict in Abkhazia:

In the summer of 1990 regional parties were banned from Georgian elections, effectively prohibiting any South Ossetian party from participating. In response, in September, South Ossetia declared full sovereignty within the Soviet Union. Georgia in turn abolished South Ossetia's autonomous oblast status completely.' The Soviet Union did not accept South Ossetia's declaration of sovereignty or Georgia's abolition of South Ossetia's autonomous status.' In 1989 "two-thirds of the population of South Ossetia was ethnic Ossetian," and the main catalyst for conflict was the publication of articles in the Georgian media stating that the government was considering making Georgian the only official state language, and the subsequent declaration to that effect following Georgia's independence in 1991 - when at the time only 14% of South Ossetians could function in Georgian.' Cornell states that there was a total lack of will to compromise on both sides. Georgians regarded Ossetians as immigrants and a tool of Russian attempts to block Georgia's moves toward independence. Ossetians and other minorities were reacting against growing Georgian nationalism and chauvinism and attempts at Georgianization and Christianization of Georgia.⁷⁰³

⁷⁰⁰ *Ibid* at 569-70.

⁷⁰¹ William R Slomanson, "Legitimacy of the Kosovo, South Ossetia and Abkhazia secessions: Violations in search of a rule" (2009) 6:2 *Miskolc J Intl L* 1 at 5.

⁷⁰² Higgins & O'Rielly, *supra* note 695 at 570.

⁷⁰³ The South Ossetian fears of a potential return of 'Georgianization' were warranted during the rule of the first Georgian president, Zviad Gamsakhurdia who publicly declared that Ossetians should return to their true home in North Ossetia. For more on this see Higgins & O'Rielly, *supra* note 695 ("A 1993 survey illustrated that three of every four Georgians held a negative view of South Ossetians, and two-thirds rejected any compromise that would give South Ossetia significant autonomy while remaining in Georgia" at 570). See also, Darrell Slider, "Democratization in Georgia"

Following the first breakout of violence, and as the Georgian declaration of independence in 1990 recused all former autonomous boundaries, the situation between South Ossetian and Georgian authorities deteriorated completely. Inevitably, Georgia's bid for independence left South Ossetia as simply another region within Georgia, losing its former status as an autonomous 'oblast' and crushing any hope for an autonomous republic or an independent state.⁷⁰⁴ Armed conflict eventually broke out, and although a peace agreement (Sochi Agreement) between Russia and Georgia was signed in 1992, by then, South Ossetia had become a *de facto* state controlled by armed militias who were supported and trained by the Russian military.⁷⁰⁵ Additionally, it should be noted that the Sochi Agreement "and its provisions did not lead to a settlement of the situation, but rather the region entered a 'frozen' conflict phase, similar to others in the former Soviet Union (in Abkhazia, Nagorno-Karabakh and Transdniester), in that, while violence ended, no lasting peace was achieved."⁷⁰⁶ As summarized by Higgins and O'Rielly, after 1992,

South Ossetia began to operate as a *de facto* state, outside of the control of Georgia despite being a part of Georgian territory. The coming to power of Georgian President Saakashvili [in 2004] marked a major change in relations between Georgia and the area of South Ossetia. Tensions had been low in the region for many years, especially in comparison with other frozen conflicts such as Abkhazia and Nagorno-Karabakh. However, there were attempts by the Saakashvili government to regain control of the region, including the closing of local markets that had facilitated cross-border trading. From being the most tranquil of the frozen conflicts in the former Soviet Union, the South Ossetian became the most volatile. This coincided with a general deterioration of relations between Russia and Georgia. In 2005 North and South Ossetia released an agreement stating their wish for unification.⁷⁰⁷

After the declaration for Ossetian unification in 2005, tensions began to rise again as it became more and more likely that South Ossetian separatism would not accept anything

in Kiren Dawisha & Bruce Parrott eds., *Cleavage and Change in Central Asia and the Caucasus* (Cambridge: Cambridge University Press, 1997) at 173-80.

⁷⁰⁴ Cornell, *supra* note 695 at 164-6 cited in Higgins & O'Rielly, *supra* note 695 at 571, n 23.

⁷⁰⁵ Sorenson, *supra* note 661 at 229.

⁷⁰⁶ Higgins & O'Rielly, *supra* note 695 at 571.

⁷⁰⁷ *Ibid* at 571.

less than full independence from the Georgian state. Additionally, as a major promise of Saakashvili's platform included 'unifying' Georgia, a Georgian-proposed referendum for autonomy was rejected by South Ossetian and Abkhaz voters in 2006. At this point, tensions began to point towards a potential for an all-out armed conflict, with South Ossetian militias becoming more organized and better-trained, largely through funding and support by the Russian authorities.⁷⁰⁸ After the 2006 referenda in Abkhazia and South Ossetia, negotiations ceased and relations deteriorated between Georgia on one side, and South Ossetia, Abkhazia and Russia on the other. The next sub-section will explore the series of events that followed the 2006 referenda in detail, defining the illegality of Russia's military intervention in 2008 and rejecting the claim of external self-determination for both South Ossetia and Abkhazia.

4.3.3. Legality of Russia's military intervention

As demonstrated in the previous sub-sections, Russia's involvement in the Caucasus should not be surprising given its historical and geopolitical ties to the region. Outside of these ties, Russia's support for territorial disputes and secessionist conflicts around its borders are certainly a cause for concern, although the intervention and subsequent invasion of Georgia in 2008 was the first instance of a direct Russian military invasion since the end of the Cold War.⁷⁰⁹ This sub-section will provide a brief chronological summary of Russia's military intervention in Georgia in 2008, and will aim to firmly establish how, notwithstanding all other factors, the intervention and subsequent invasion of Georgia was executed on false legal precedents that do not conform to the

⁷⁰⁸ See e.g. Nicolas Landru, "Two Referendums and Two "Presidents" in South Ossetia" *Caucas Europe News*, (20 November 2006) online:

<https://web.archive.org/web/20061128064202/http://www.caucas.com/home_eng/breve_contentu.php?id=279>; Liz Fuller, "Georgia: South Ossetia Seeks To Contain Opposition Challenge" *RadioFreeEurope/RadioLiberty* (10 November, 2006), online: < www.rferl.org/a/1072652.html>.

⁷⁰⁹ Russia's numerous alleged violations of international law related to the secessionist movements include the support of 'insurgencies' in Moldova (Transnistria), Ukraine (Donetsk & Lugansk), South Ossetia (Georgia) and Abkhazia (Georgia). For a detailed summary and legal analysis of said violations, see Marissa Mastroianni, "Russia Running Rogue? How the Legal Justifications for Russian Intervention in Georgia and Ukraine Relate to the U.N Legal Order" (2015) 46 *Seton Hall L Rev* 599.

international legal norms for the use of force in UNC secessionist conflicts.⁷¹⁰

South Ossetia and Abkhazia were subject to multiple civil armed conflicts prior to 2008, which primarily consisted of the Georgian National Guard facing off against Abkhaz or South Ossetian militias. Although the military skirmishes did not permanently cease, and both republics' territorial boundaries became labeled as 'frozen conflict zones',⁷¹¹ the events which took place in 2008 overshadowed any attempts to find a negotiated solution to the territorial conflicts.⁷¹² Therefore, prior to investigating the legality of the military intervention, it is necessary to briefly summarize the events that occurred right before and after the military intervention in 2008.

As previously mentioned, the events that led to Russia's military intervention in August of 2008, known as the 'Russo-Georgian five-day war', started much earlier in the year. As early as April 2008, "Russia moved to formalize its relations with both South Ossetia and Abkhazia as President Putin signed a decree instructing the government to open political, economic and social relations with the regions."⁷¹³ A string of military clashes between the South Ossetian and Georgian militaries followed. After a bout of Russian military exercises in neighbouring North Ossetia in July of the same year, clashes and Georgian shelling of the South Ossetian capital Tskhinvali commenced sometime during the first week of August. Although the series of events that took place

⁷¹⁰ It should be noted that it cannot be ignored that independence negotiations between Russia and South Ossetia and Abkhazia occurred more frequently following the declaration of independence by Kosovo on February 12, 2008. Russia's political and strategic motivations behind holding these negotiations was most likely motivated by the declaration and subsequent recognitions of Kosovo by the international community. Multiple authors have supported this conclusion. See e.g. Levan Alexidze, "Kosovo and South Ossetia: Similar or Different? Consequences for International Law" (2012) 12 *Baltic YB. Intl L* 75; Sorenson, *supra* note 661; Borgen, "Is Kosovo a Precedent?", *supra* note 46; R Thomas, *supra* note 560 at 1991; Kreuger, *supra* note 566; Adam Sucur, "Observing the Question of Secession in the Wake of Recent Events in Kosovo, Abkhazia, South Ossetia and Crimea" (2015) 3 *Zagrebačka Pravna Revija [Zagreb Law Review]* 273 at 294-7.

⁷¹¹ See e.g. Alejandro Sanchez, "The "Frozen" Southeast: How the Moldova-Transnistria Question has Become a European Geo-Security Issue" (2009) 22 *J Slavic Mil Stud* 153 at 155; Christopher Borgen, "Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts" (2007) 9 *Orlando Rev Intl L* 477 at 497-9; Leach, *supra* note 665 at 334.

⁷¹¹ Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 82.

⁷¹² *Ibid.*

⁷¹³ Higgins & O'Rielly, *supra* note 695 at 571.

during the first days of August remains unclear, it is well established that the Georgian military attacked the capital Tskhinvali on August 7th through an air and ground assault, capturing the capital on August 8.⁷¹⁴ This prompted Russia to respond with a comprehensive military intervention, including 300 combat aircraft, a naval blockade of Georgia's ports and the deployment of nearly 9,000 troops into South Ossetia and Abkhazia.⁷¹⁵ The military intervention lasted nearly two weeks, with Russian troops supporting South Ossetian and Abkhaz militias to repel the Georgian military to outside the boundaries of their respective republic boundaries. However, instead of ceasing hostilities once the Georgian military retreated, Russia proceeded to send its troops into Georgia proper, coming within miles of the Georgian capital, Tbilisi, while undeniably attacking Georgian military on "undisputed Georgian territory."⁷¹⁶ Additionally, in Abkhazia, Russian and Abkhaz forces attacked the Georgian military stationed in the upper Kodori Valley, while forcibly expelling the majority of the ethnic Georgian population from Abkhazia proper.⁷¹⁷ These developments prove crucial to the understanding of why the international reaction to Russia's military intervention rejected the notion that it was executed under the pretences of a pre-emptive 'humanitarian' cause based on the Abkhaz and South Ossetian peoples' right to self-determination.

Russia's military intervention and subsequent invasion of Georgia ended with a brokered ceasefire by French President Nicolas Sarkozy on August 12, 2008. Although the Russian military forces withdrew from the areas considered to be Georgia proper, they maintained their military presence inside both South Ossetia and Abkhazia.⁷¹⁸ In

⁷¹⁴ Mastroianni, *supra* note 709 at 631.

⁷¹⁵ Roy Allison, 'Russia resurgent? Moscow's Campaign to "coerce Georgia to peace"' (2008) 84:6 *International Affairs J* at 1157 cited in Higgins & O'Rielly, *supra* note 695 at 572.

⁷¹⁶ Mastroianni, *supra* note 709 at 631-2.

⁷¹⁷ *Ibid.* On the specific details of the conflict mentioned in this excerpt, see e.g. Christopher Borgen, "The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia" 10 *Chicago J Intl L* 1 at 9-13; T Thomas, "The Bear Went Through the Mountain: Russia Appraises its Five-Day War in South Ossetia" (2009) 22 *J Slavic Mil Stud* at 31-40; "Road to War in Georgia: The Chronicle of a Caucasian Tragedy" *Der Spiegel* (25 Aug 2008) online: <www.spiegel.de>; Michael Toomey, "The August 2008 Battle of South Ossetia: Does Russia Have a Legal Argument for Intervention?" (2009) 23 *Temp Intl & Comp L J* 443 at 464-74.

⁷¹⁸ Mastroianni, *supra* note 709 at 632.

response to the international community's condemnation of Russia's intervention and subsequent invasion of Georgia, a number of 'legal arguments' were put forward by the Russian authorities to justify Russia's actions under international law. One of those points, made by Russian President Dmitry Medvedev and reiterated by then-Prime Minister Vladimir Putin, was that the Russian military intervention was executed "...upon the finding that South Ossetians and Abkhazians faced an extreme amount of peril at the hands of the Georgian state right before Russia intervened."⁷¹⁹ Additionally, Putin made an unsubstantiated claim that a 'genocide' had been committed by Georgia in South Ossetia, in reference to the figure of 1,500–2,000 dead civilians as part of the Georgian military operation.⁷²⁰ Lastly, a comparison was made between the situation in Kosovo and the situations in South Ossetia and Abkhazia, with Russia insisting that both peoples were the targets of ethnic cleansing and discrimination, which prompted an obligation for pre-emptive and reactive military intervention.⁷²¹

In the context of this thesis, it is necessary to validate only the arguments that pertain to whether the Abkhaz and South Ossetian peoples possessed the right of self-determination, as well as whether the human rights abuses they suffered at the hands of the Georgian military could be considered as *in extremis*. Should these factors not meet the threshold set by the two aforementioned case studies for a direct third-state military intervention, the actions of the state become that of an aggressor and should be analyzed from a perspective of their violations with respect to international law.

Concerning the case of Abkhazian peoples, the answer to whether they had a right to seek external self-determination lies in assessing two separate claims. First, the lack of international recognition for Abkhaz peoples' right for external self-determination, and second, the lack of evidence that atrocities were committed by Georgians against the

⁷¹⁹ *Ibid* at 639.

⁷²⁰ Higgins & O'Rielly, *supra* note 695 at 573.

⁷²¹ It should be noted that Russia also used other excuses to justify its military intervention, such as the doctrine of self-defence with regards to the Russian citizens living in Abkhazia and South Ossetia that required protection, as well as the 'privileged interests doctrine' which seeks to justify the military support of friendly states in precarious civil situations. See Mastroianni, *supra* note 709 at 633, 635, 639.

Abkhazian people. As expanded on by Anderson, both claims have serious legitimacy issues:

[The lack of international] recognition stems from the fact that Abkhazia's UNC secession did not conform with the customary law right of peoples to external self-determination. In the period prior to the declaration of independence, Abkhazian citizens were not subject to deliberate, sustained, and systematic human rights abuses *in extremis* at the hands of Georgia. As such, Abkhazia's UNC secession violated the peremptory norm of the right of peoples to self-determination, which in turn ensured that Abkhazia's statehood failed to crystallize.⁷²²

This claim is echoed by Raic and Dugard who state that

...There is no doubt that the Abkhazians qualify as a people for the purpose of self-determination. This was acknowledged by the Soviet Union when it conferred a special status on Abkhazia...This does not, however, seem to be the main obstacle in the way of recognition of Abkhazia's bid for independence. *Instead the answer is to be found in Abkhazia's intransigence at the negotiating table and the absence of serious violations of the Abkhazian people's human rights by Georgia.* The Abkhazians have become more and more unwilling to enter into good faith negotiations on the future political status of Abkhazia within Georgia, whereas the Georgian government has been willing to grant a substantial amount of political autonomy since the end of 1993. The consistent rejection by the Abkhazians of Georgia's proposals for political and territorial autonomy within a federal arrangement, and of the appeals of the international community for such a settlement, suggests that the Abkhazians are not prepared to exhaust effective and peaceful remedies before claiming secession. Moreover, there is no evidence of widespread and serious violations of the fundamental rights of the Abkhazians by Georgia. On the contrary, the Abkhazians are themselves accused of violating the fundamental rights of Georgians resident in, or previously resident in, Abkhazia. Therefore, the conclusion must be that the Abkhazians do not, under the prevailing circumstances, possess a right of unilateral secession and, consequently, that the proclamation of independence is in violation of the law of self-determination.⁷²³

Although certain human rights violations were committed as part of the on-going civil conflict between the ethnic-Georgian citizens and the ethnic-Abkhaz citizens, no evidence points to perpetrated human rights abuses that can be designated as *in extremis*.

⁷²² Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 81.

⁷²³ Dugard & Raic, *supra* note 528 at 119 [emphasis added]. For more scholars who support this view, see Alexidze, *supra* note 710 at 82-5; Raic, *supra* note 13 at 384-5; Slomanson, *supra* note 701 at 19.

Furthermore, the exile of ethnic-Georgian citizens from Abkhazia throughout the late 1990s, as well as after the war in 2008 (which continues to present day), provides evidence of the fact that the Abkhazian peoples' right to external self-determination infringed on the rights of a Georgian ethnic minority which lived on its territory, through abusive and discriminatory practices.⁷²⁴ Similarly, with regards to South Ossetia, Anderson writes that

Whilst it is obvious that Georgians and South Ossetians experienced a prolonged breakdown of relations and intermittent hostilities during the period 1989-2008, it must be asked whether South Ossetia's UNC secession conformed with the customary law right of peoples to external self-determination. More pointedly, it must be asked whether South Ossetians experienced sustained and systematic human rights abuses *in extremis* at the hands of Georgians, with no prospect for peaceful resolution of the conflict. It would seem most likely that the answer is no, as prospects for a political solution stopping short of UNC secession were possible, particularly under Shevardnadze's more moderate influence...It would seem then that South Ossetia's statehood has failed to crystallize, owing principally to the fact that its UNC secession was not in conformity with the peremptory norm of the right of peoples to self-determination.⁷²⁵

Therefore, if the right of self-determination is applied to the cases of South Ossetian and Abkhazian peoples prior to Russia's military intervention in 2008, it becomes evident that, factually, a lack of *dolus specificus* with respect to the purported human rights abuses committed against them by the Georgian state prevents the invocation of any right of external self-determination. Additionally, the plethora of attempts by the Georgian

⁷²⁴ For evidence of the on-going treatment of refugees and internally displaced persons who fled Abkhazia, see *Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia*, GA Res 71/290, UNGAOR, 71st Sess, UN Doc 11919 (2017) and "Human Rights Council hears oral updates on Ukraine and Georgia under its technical assistance and capacity building agenda item" (21 June 2017) online: < www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21786&LangID=E>.

⁷²⁵ Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 84. This view is echoed by a number of other scholars, see e.g. Alexidze, *supra* note 710 at 86-7; R Thomas, *supra* note 560 at 2042; Higgins & O'Rielly, *supra* note 695 at 581; Kreuger, *supra* note 566 at 136; Leach, *supra* note 665 at 350-1; Angelika NuBberger, "The War between Russia and Georgia - Consequences and Unresolved Questions" Goettingen (2009) 1:2 J Intl L 341 at 360; Toomey, *supra* note 717 at 476; Dubinsky, *supra* note 340 at 241, 255-6; Tancredi, *supra* note 315 at 52; Boshko Stankovski "Implications of Kosovo Independence for the Doctrine of Constitutional Self-Determination." (2011) 10 European YB of Minority Issues 91 at 132-3.

state to include Abkhazia and South Ossetia as part of a federative autonomous state structure both under a less-nationalist and moderate nationalist government, further alienates any justification of that right. Lastly, Russia's direct military intervention which supported the *de facto* independence of both republics, violated the prohibition on the use of force through its invasion of Georgia proper, which cannot be used as a pretense for a justification of independence, as it was determined that both peoples' in question did not possess the right to external self-determination.⁷²⁶

In sum, this sub-section can be summarized by three conclusions with respect to the status of the two breakaway republics of South Ossetia and Abkhazia: i) one of Russia's primary and official reasons for military intervention into South Ossetia and Abkhazia was that it responded to confirmed acts of 'genocide' and 'ethnic cleansing' (both of which could be considered as fulfilling the criteria of human rights abuses *in extremis* if factually accurate), ii) no evidence of ethnic cleansing or genocide have surfaced to date for either entity, iii) at most, South Ossetians and Abkhazians have the right to invoke their right of internal self-determination (i.e. request for more autonomy), an opportunity which they were presented with numerous times by Georgian and international negotiators and systematically rejected. Collectively, these conclusions allow for the confirmation that, even if a legal justification existed for Russia's military intervention with regards to Georgia's attack on South Ossetia due to the death of Russian peacekeepers in the initial Georgian military attack on Tskhinvali,⁷²⁷ the subsequent military invasion which reached deep into Georgian territory blatantly violated peremptory norms of international law and thus invalidate any invocation or execution of the right of South Ossetian and Abkhazian peoples to external self-

⁷²⁶ Scholarly opinion and state practice extensively support the notion that compliance with peremptory norms is a primary requirement of a UNC secession. See e.g. Anderson, "Unilateral Non-Colonial Secession", *supra* note 7 at 87-8 n 325; Raic, *supra* note 13 at 156; Crawford, "The Creation of States", *supra* note 22 at 107.

⁷²⁷ There is evidence that Russia's military response was lawful in response to the death of its peacekeepers allegedly by the Georgian Armed Forces. See especially, Heidi Tagliavini, *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, (Volume II, 2009) online: <http://echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf> at 23-5. Additionally, for a breakdown of the legal justification for self-defence that can be applied by Russia in this particular instance, see Mastroianni, *supra* note 709 at 641.

determination.

Now that all three case studies have been presented, it is necessary to conclude this Chapter by combining the factors which identified the justifications behind the right to both a UNC secession and a military intervention, into a legal framework. This framework, which will be presented in the next section, will establish a platform through which a third-state military intervention can be analyzed and consequently, determined to be justifiable and legitimate.

4.4. The Analysis Framework of Third-State Military Interventions

Although evidence of state practice with regards to a qualified right to a third-state military intervention under international law has been presented in the preceding Chapters, it is necessary to identify the elements which strengthen its legal justification. This sub-section will do this by establishing a framework consisting of four requirements through which such elements can become more easily identifiable. Once identified, such elements can subsequently be applied to situations of military interventions in similar circumstances, and consequently, assist in determining their legitimacy under international law.

Prior to delving into the factors that justify the violation of the prohibition on the use of force, it is necessary to briefly mention the critical difference between an ‘excuse’ and a ‘justification’ in international law. Vidmar presents an excellent definition of the two terms, which can be adopted as part of this thesis’ legal analysis:

Justifications are legally-warranted exceptions to the general prohibition. As such, they are a way out of illegality. Excuses, on the other hand, are *not a way out of illegality, but act as mitigating circumstances that preclude responsibility for an otherwise illegal conduct.*⁷²⁸

As can be deduced from Vidmar’s definition, the difference between the two concepts is central to understanding the criticism leveled against international law and the use of

⁷²⁸ Jure Vidmar, “Excusing Illegal Use of Force: From Illegal but Legitimate to Legal Because it is Legitimate?” (14 April 2017) online: < www.ejiltalk.org/excusing-illegal-use-of-force-from-illegal-but-legitimate-to-legal-because-it-is-legitimate/ > [emphasis added] [“Vidmar, “Excusing Illegal Use of Force”].

force in general. For example, the previous sub-sections in this Chapter have demonstrated that Russia's military intervention into Georgia proper in 2008 and NATO's military intervention in Kosovo in 1999, have been 'justified' through official statements that purport to provide a 'legal justification' for the states' actions. When analyzing the veracity of such statements, especially in the legal sense, it is crucial to identify and differentiate the 'excusatory' statement from the 'justificatory' one. In other words, as international law relies heavily on states to provide justifications for their actions in order to formulate custom⁷²⁹ (this assumes of course that the action is not found in codified treaties), the threshold for identifying whether a states' response to that action meets the standard for a legal justification or not must be established. In the context of the use of force, defining the asymmetry of the two concepts is challenging as in part "[i]nternational law does recognize defenses for states that breach their international obligations, but it does not clarify which defenses are justifications and which are excuses."⁷³⁰ Although the debate on international state responsibility is an extensive subject and beyond the scope of this thesis,⁷³¹ it is nonetheless important to consider the juristic difference between an 'excuse' and a 'justification' in international law. Further, Vidmar makes an excellent point of identifying that in providing a threshold or a guideline for what constitutes a 'justification', a norm prohibiting the act which requires justification can be eased or relaxed, thereby ensuring that its violators can become easily identifiable.⁷³² This is an important suggestion, which if applied to the case of third-state military interventions, reaffirms the existence of a more 'relaxed'

⁷²⁹ Curtis A Bradley, *International Law in the U.S. Legal System*, 2nd ed (Oxford: Oxford University Press, 2015) in at 139.

⁷³⁰ Arthur Kutoroff, "Emerging Voices: Excuse in International Law" (12 August 2015), *Opinio Juris* (blog), online: < <http://opiniojuris.org/2015/08/12/emerging-voices-excuse-in-international-law/>>.

⁷³¹ The debate over state responsibility and the difference between a justification and an excuse is extensive. For example, international legal human rights scholars argue that states should be held responsible for breaching any of their international legal obligations. On the other hand, another group of scholars argues that a state has a right to determine the necessity of breaching its international obligations in conformity with its responsibility to protect itself and its citizens. For an excellent review of both sides of the argument, see Frederica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (Cambridge: Cambridge University Press, 2017). See also Roman Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct" (2000) 3:1 Yale Human Rights and Dev J 1.

⁷³² Vidmar, "Excusing Illegal Use of Force", *supra* note 728 [emphasis added].

interpretation of the prohibition on the use of force as being *restrictively qualified* and not obligatory.

Now that the difference between an excuse and a justification of a violation of international law has been established, it is necessary to present the four requirements which makeup the framework through which a third-state military intervention can be properly analyzed. The first requirement which determines whether a right to third-state military intervention exists or not, mandates two necessary criteria: i) that a ‘peoples’ within an established state are the subject of systematic abuses of human rights deemed as *in extremis*, with no possibility of a negotiated solution between them and the state authorities,⁷³³ and (ii) that such ‘peoples’ be eligible to invoke a right to a UNC secession under international law.⁷³⁴ In this context, the term ‘peoples’ should be construed openly, so as to not limit the right of self-determination to certain descriptive or ascriptive features that can create discord in multinational states. A good example of considering an ‘open’ definition of the term ‘peoples’ is presented in the following manner by Anderson:

Although there is no definitive legal definition of “peoples,” three propositions can be reasonably inferred from relevant UN instruments: first, that “peoples” are not restricted to the colonial context; second, that more than one “people” can inhabit a non-self-governing territory and sovereign state; and third, that “peoples” should have what might be loosely termed “national overtones,” in the sense that they should have some common group identity. The latter point, however, should not be interpreted narrowly: “psychological perceptions and not tangible attributes” should form the primary basis of peoplehood. The corollary of the foregoing points

⁷³³ It is important to note that in order to reach the threshold of ‘no possibility of a negotiated solution’, numerous attempts at a negotiated solution should be attempted and subsequently fail.

⁷³⁴ This element can be determined by putting the peoples’ in question through the ‘implied requirements test’ as suggested by Anderson. According to him, the four implied requirements of a right to a UNC secession are: I) The discrimination against the peoples’ in question must be deliberate and sustained, II) The discrimination must be contemporary, meaning that the attempted UNC secession must be based on contemporary events which do not surpass 10 years *ex post facto*, III) UNC entity must agree to protect and uphold the rights of other minorities within its territorial claim, especially any minorities of the offending state, IV) the entity must abide by all laws of statehood in international law, meaning that it will not be granted legitimacy should its UNC secession come about as a result of a violation of peremptory norms of international law. For a more in-depth analysis of this test, see Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1218-20.

is that there are *no* reasonable grounds to argue that the definition of “peoples” in anyway precludes UNC secessionist self-determination.⁷³⁵

It is therefore suggested that, for the purposes of this framework, the term ‘peoples’ be interpreted as such; however, it is also necessary to point out that, in considering the applicability of the term, a consideration for the extent of the discrimination they face must equally be applied. In other words, it must be determined that, outside of the applicability of whether the homogenous group can be attributed the term ‘peoples’, an equal amount of weight must be given to whether such a group has suffered a systematic and persistent discrimination that warrants a third-state military intervention. In order to identify this, a more precise definition must be established of what constitutes such a level of discrimination, which in turn can be termed as human rights abuses deemed as *in extremis*. With regards to determining what is meant by ‘discrimination of peoples’, it is necessary to point to Paragraph 7 of the *Friendly Relations Declaration* which stipulates that:

...States conducting themselves in compliance with the principle 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*.⁷³⁶

The final sentence of this citation, which mentions race, creed and color, has been the cause of an extensive debate surrounding its meaning in the context of UNC secessions.⁷³⁷ This is important as, unfortunately, “the Declaration's *travaux preparatoires and proces verbaux* provide little or no guidance [to their definition, meaning that], it has been left to eminent scholars to formulate their own definitions.”⁷³⁸ For example, Anderson suggests that Cassese’s interpretation of the meaning of race and creed creates a pleonasm if interpreted through Article 2 of the *Universal Declaration of*

⁷³⁵ *Ibid* at 1203-4. For relevant evidence as part of UN instruments that defend each of these points, see *ibid* at nn 78-81.

⁷³⁶ See *Friendly Relations Declaration*, *supra* note 144, para 7 [emphasis added].

⁷³⁷ Anderson, “A Post-Millennial Inquiry”, *supra* note 13 at 1204.

⁷³⁸ Anderson, “Declaratory GA Resolutions”, *supra* note 68 at 355.

Human Rights.⁷³⁹ He explains this further by stating that:

Cassese strictly construes "race" as only connoting physical somatic differences, explicitly rejecting any definition that encompasses factors such as language or culture. He further postulates that the meaning of "creed" is restricted to "religious beliefs, rather than the broader definition provided by the Oxford English Dictionary: "a set of opinions on any subject." Cassese arrives at this conclusion by arguing that if "creed" encompassed the broader Oxford definition, "a set of opinions on any subject," a government not representing the opinions of a people, even if democratically elected, could be interpreted as violating that people's right to self-determination. He therefore concludes that the right to UNC secession contained in paragraph 7 is activated only on the grounds of racial or religious discrimination against a people.⁷⁴⁰

First, with respect to the terms 'race' and 'colour', it is challenging to not accept Cassese's analysis given that "...it is difficult, if not impossible, to imagine a situation where two or more peoples may be of a different colour, whilst at the same time not also constituting a different race."⁷⁴¹ Second, as can be understood through Anderson's reasoning, Cassese's narrow definition of 'race', "...which is confined to physical somatic differences,"⁷⁴² fails to account for cultural and linguistic ties that are important factors when considering the notion of racial discrimination. In fact, Anderson concludes his argument by pointing to the synonymy of the terms 'race' and 'nation' as being crucial to the understanding of how discrimination in the context of UNC secessions must be interpreted. By pointing to the *Oxford Dictionary's* definition of 'race', which can be construed as being more diverse and expansive than Cassese's,⁷⁴³ Anderson clarifies what was meant by the Declaration on the threshold of discrimination of peoples:

⁷³⁹ See UNDHR, *supra* note 631 ("[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty" at art 2). See also, Cassese, "Self-Determination of Peoples", *supra* note 6 at 112, cited in Anderson, "Declaratory GA Resolutions", *supra* note 68 at 356, n 50.

⁷⁴⁰ *Ibid.*

⁷⁴¹ Anderson, "Declaratory GA Resolutions", *supra* note 68 at 356.

⁷⁴² *Ibid.*

⁷⁴³ See *Oxford English Dictionary*, *sub verbo*. "Race" Online:

<<https://en.oxforddictionaries.com/definition/race>>. "Each of the major divisions of humankind,

The synonymy between "races" and "peoples" evident above is important, as the Charter's *travaux* also reveals that the word "peoples" captures the concept of "nations."...Further evidence of the synonymy between "races" and "nations" is provided by the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, Article 1 of which contains the most widely accepted definition of "racial discrimination"...It follows that the notion of racial discrimination encompasses distinction or exclusion based upon and related to "national or ethnic origin." It may be reasonably inferred then that the term "race" not only connotes physical somatic differences, *but also other factors associated with nationality and ethnicity, such as language, culture and customs.*⁷⁴⁴

Therefore, if one is to adopt Anderson's interpretation of the Convention, the term 'peoples' can be construed as encompassing factors outside of physical somatic differences. Indeed, it can be suggested that in a world that is becoming more multiethnic and multicultural, it is difficult to argue that a homogenous group of 'peoples' can only be determined on the basis of ascriptive features. Therefore, for the purposes of this framework, the definition of 'peoples' mentioned above can be considered side-by-side with their purported discrimination, which can be understood as being based on physical somatic differences *and* such factors as language, culture, customs, religion or ethnicity.

Concerning the level of discrimination, it is important to reiterate the difference between human rights abuses deemed as *in extremis* and human rights abuses deemed as *in moderato*. Human rights abuses considered to be *in extremis* "...must be of a deliberate, sustained, and systematic nature, with 'the exclusion of any likelihood for a possible peaceful solution within the existing state structure'."⁷⁴⁵ Example of these types of human rights abuses can include such acts as genocide and systemic ethnic cleansing, as well as actions considered genocidal (such as the case in Bangladesh, which may have not met the threshold of a 'genocide' from the perspective of international law, but was termed as 'genocidal' nevertheless).⁷⁴⁶ Alternatively, human rights abuses considered as

having distinct physical characteristics...'*people of all races, colours, and creeds*'... *A group of people sharing the same culture, history, language, etc.; an ethnic group.*

⁷⁴⁴ Anderson, "Declaratory GA Resolutions", *supra* note 68 at 357.

⁷⁴⁵ Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1218. See also Cassese, "Self-Determination of Peoples", *supra* note 6 at 119-20.

⁷⁴⁶ On the term 'genocidal' in relation to the Bangladesh conflict, see *supra* note 533.

in moderato can be understood to mean political, cultural, or racial discrimination, which can include acts such as suppressing a peoples' political, linguistic and cultural rights, as well as repressing their official representation in government. The discrepancy in the definition and the level of discrimination by the existing state's government is expanded on by Anderson in the following manner:

This means that a government must knowingly and intentionally inflict discrimination against a people. Mere *de minimis* or unknowing instances of discrimination will not do. Something more is required, namely, governmental behavior which evidences *dolus*, or intentional malice, towards a people. Additionally, there must be a fundamental loss of rapport between the parties to the dispute, precluding the likelihood of a harmonious resolution.⁷⁴⁷

In the cases of Bangladesh and Kosovo, a systematic and deliberate attempt to extinct the Bengalis and the Kosovars by their respective state authorities through a mass campaign of atrocities, provides a clear example of the level of discrimination as reaching *in extremis* levels. Additionally, both case studies effectively demonstrated that, insofar as a diplomatic solution was available, there was no opportunity for a 'harmonious resolution' to the territorial conflicts. On the other hand, political and linguistic repressions of the Abkhaz peoples in Abkhazia and the Ossetian peoples in South Ossetia, although deplorable and denounceable, fail to meet the necessary threshold of *dolus* and hence, can be considered as human rights abuses *in moderato*.

The second requirement as part of this framework is that two valuable pieces of evidence must be presented as justification for the military intervention. First, there must be evidence, of the UNSC being paralyzed, and unable to act through its enforcement mechanism as evinced under the UN Charter.⁷⁴⁸ It is crucial that evidence of such a paralysis exists, as a violation of the prohibition on the use of force in this context can *only* occur through the existence of this circumstance *prima facie*. More precisely, in accordance with Article 27 of the UN Charter, should a permanent member of the UNSC

⁷⁴⁷ Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1241.

⁷⁴⁸ *Supra* note 396.

invoke the use of the veto⁷⁴⁹ *or* imply that a veto will be used to halt any military action in order to solve the issue at hand,⁷⁵⁰ the process of justifying a right to a military intervention can move forward to the third requirement which, if satisfied, can proceed unabated.⁷⁵¹ Although, as mentioned in Chapter 3, the restrictive school would argue that the prohibition on the use of force is absolute,⁷⁵² and hence, inviolable; the cases of Kosovo and Bangladesh provide evidence that such a violation through a military intervention is justified and permitted under the specific circumstances outlined in the case studies in this Chapter.

The third requirement relates to the concern outlined by the Non-Aligned Movement regarding the true intention of a state or states when conducting a military intervention. For example, if one is to consider the 2011 NATO operation in Libya as being an example of a ‘humanitarian intervention’, the question can be asked, what were the true intentions of NATO states that partook in the military intervention given the state of Libya contemporarily (i.e post-intervention)? In order to alleviate this type of criticism for third-state military interventions in self-determination conflicts, it is important to consider the following course of action, which, if implemented, could alleviate some of the discord for the military action by those states who oppose it: the key actors’ military force must present a plan for an intervention which includes considerations of

⁷⁴⁹ An example of this is Russia’s use of the veto preventing the UNSC on passing a resolution for possible military action or reprisal in the humanitarian crisis in Syria. See Euan Mckirdy, “8 times Russia blocked a UN Security Council resolution on Syria” *CNN* (13 April 2017), online: <www.cnn.com>.

⁷⁵⁰ An alternative example is a permanent member of the UNSC vowing to impose a veto prior to a vote happening. Russia did this with regards to passing a resolution on Syria as well. See Jennifer Peltz, “UN Syria sanctions vote sought next week; Russia vows veto” *CTV News* (24 February 2017) online: <www.ctvnews.ca>.

⁷⁵¹ Although Article 27 does not explicitly mention the implied right to a veto by one of the five permanent members of the UNSC, an implied consensus of voting on substantive matters provides a right for any of the permanent five members to a ‘veto.’ See e.g. *UN Charter*, *supra* note 21, art 27. On the criticism and challenges of the UNSC use of the ‘veto’ see Bardo Fassbender, ed, “Veto” in Max Planck Encyclopedia of Public International Law (Oxford University Press) at paras 9-17, online: <www.opil.oupilaw.com>.

⁷⁵² See section 3.1.2.

proportionality,⁷⁵³ as well as post-intervention withdrawal in order to alleviate the suspicion of an *ex post facto* foreign military occupation.⁷⁵⁴ Such a plan can include political, legal and rebuilding considerations, as the likelihood of an effective and stable government post-intervention is very minimal (as was demonstrated in the cases of Kosovo and Bangladesh). From an international legal perspective, such considerations can also include a post-intervention treaty for cessation of hostilities, as well as an establishment of a provisional government. This treaty could be signed between the former sovereign state, the key actors who performed the intervention and the newly formed state.⁷⁵⁵ Examples of such treaties include the 1995 *Austrian State Treaty*⁷⁵⁶ or the 1979 *Israeli-Egyptian Peace Treaty*.⁷⁵⁷ Although in the instances of Kosovo and Bangladesh, treaties were not needed in order for the key actors' militaries to halt

⁷⁵³ 'Proportionality' in this case refers to the 'principle of proportionality' which can be defined in the substantive sense as a principle which should plan to do more good than harm in relation to a military intervention. See Rodley, *supra* note 456 ("...the point is that the interventionist prescription cures, rather than aggravates, the malady, much less kills the patient" at 791).

⁷⁵⁴ A clear example of this is Russia's military occupation of South Ossetia and Abkhazia. For evidence of the fact that Russia is considered as a 'foreign military occupying force' in South Ossetia and Abkhazia, see "OSCE conference discusses Russian occupation of Georgian territories" *Agenda.Ge* (29 Jun 2017) online: < <http://agenda.ge/news/82452/eng>>. For more on the nature and the definition of foreign military occupation under international law, see Adam Roberts, ed, "Military Termination of Occupation" in Max Planck Encyclopedia of Public International Law (Oxford University Press) online: <www.opil.ouplaw.com> ("The term 'military occupation' is broad, encompassing a wide range of cases in which the armed forces of a State, or of several States, exercise authority, on a temporary basis, over inhabited territory outside the accepted international frontiers of their State. It refers to belligerent occupations, in the classic form of which a belligerent State or alliance controls all or part of an enemy's territory in the course of a war; and it also refers to other instances in which territory is occupied in the absence of hostilities, or in which an occupation continues after hostilities, and even a formal state of belligerency between States, have ended. The 'law on occupations'—ie the body of international law governing military occupations—is part of the law of armed conflict, often referred to as international humanitarian law. Occupations are generally a consequence of international armed conflicts. The main aims of the law on occupations are that certain legitimate needs of the occupant ie occupying power and its armed forces should be met; that disruption to the lives of inhabitants should be kept to a minimum; and that control over territory should be treated as provisional in character until final arrangements are made" at para 3).

⁷⁵⁵ Roberts, *supra* note 754 at paras 21-22.

⁷⁵⁶ *State Treaty for the Re-establishment of an Independent and Democratic Austria*, 15 May 1955, 217 UNTS 223, BGBl Nr 152/1955, UKTS 58. This treaty ended the USSR occupation of Austria and established a newly independent Austrian state.

⁷⁵⁷ *Egypt-Israel Peace Treaty*, Israel and Egypt, 26 March 1979, UNTS 17813. This treaty, among other things, ensured the complete withdrawal of the Israeli military from the Sinai Peninsula. In turn, Egypt agreed to recognize Israel as a state.

operations and withdraw, this consideration could further solidify the intentions of the key actors, as well as avoid accusations of a foreign military occupation.

Lastly, the fourth requirement of this framework looks at the international community's reaction to the intervention, which must *not* include a collective, systematic or consistent condemnation. In other words, the majority of the international community's reaction, which could include such factors as condemnations by regional organizations, can be measured as providing supporting evidence for the legitimacy or illegitimacy of the intervention. A prime example of this has been the condemnation of Russia's military intervention by regional organizations such as the OSCE,⁷⁵⁸ NATO,⁷⁵⁹ and the EU.⁷⁶⁰ Such condemnations can, given the specific circumstances of the intervention, point towards the illegality of the intervention, coupled with other potential violations of international law (as in the case of Russia's intervention in 2008.) More precisely, as suggested by Harold Koh, the international reaction to an act by a state can be defined as "an *ex post* exemption from legal wrongfulness."⁷⁶¹ He explains:

The International Law Commission's Articles on State Responsibility recognize, for example, that extreme circumstances such as distress and necessity would preclude claims of international wrongfulness against an acting state and permit certain forms of countermeasures to stop illegal acts by others. Whether the collective action would ultimately be judged internationally lawful would then depend critically on what happened next, particularly if the Security Council condoned the action after the fact...⁷⁶²

For example, the response to the intervention in Bangladesh, although originally bordering on the negative, quickly gained traction and changed to the positive vis-à-vis its respective recognition and the justifications provided by India to the UNSC. Similarly

⁷⁵⁸ "OSCE Chairman condemns Russia's recognition of South Ossetia, Abkhazia independence" *OSCE* (26 August 2008) online: < www.osce.org/cio/50011 >.

⁷⁵⁹ Helen Womack, "Nato joins US in condemning Russia's response in South Ossetia" *The Guardian* (11 August 2008) online: < www.theguardian.com/world/2008/aug/11/georgia.russia7 >.

⁷⁶⁰ "EU Condemns Russia Over Georgia Action" *VOA News* (1 November 2009) online: < www.voanews.com/a/a-13-2008-09-01-voa52/402144.html >.

⁷⁶¹ Harold Hongju Koh, "Not Illegal: But Now The Hard Part Begins" *Just Security* (7 April 2017), online: < www.justsecurity.org/39695/illegal-hard-part-begins/ >.

⁷⁶² Harold Koh, "The War Powers and Humanitarian Intervention" (2016) 53:5 *Hous J Intl L* 971 at 1010.

in Kosovo, the NATO intervention, although heavily criticized, has been largely accepted as justifiable in the years following its successful execution. Nevertheless, it should be noted that "...what amounts to a breach of international law by a State depends on the actual content of that State's international obligations, and this varies from one State to the next."⁷⁶³ More succinctly, the international reaction towards a violation of international law will not preclude or justify *on its own* the action of the violator.

In conclusion, when analyzing a case of a third-state military intervention in the context of a UNC secession, these four requirements - that, (i) a 'peoples' eligible for a UNC secession within an established state are the subject of systematic abuses of human rights deemed as *in extremis*, with no possibility of a negotiated solution between them and the state authorities, that ii) evidence of UNSC paralysis exists, that (iii) the true intention of the key actors' intervention should be made clear through factors such as proportionality of military operations and post-intervention rebuilding and that, (iv) the international community's collective response to the intervention must not include a systematic or consistent condemnation - can become useful elements when assessing its legality under international law. Nevertheless, it must be noted that, as UNC secessions are often executed differently due to historical, political and regional elements, a legal analysis of a third-state military intervention in such situations requires a certain degree of flexibility. In other words, this framework can only speak to the main elements necessary in a UNC secession, to which the exception of the prohibition on the use of force can be directly applied to. For example, such elements can include the determination of whether the entity can be identified as 'peoples' and, if so, whether their right to self-determination has been systematically denied and repressed. On the other hand, elements such as the unlawful use of force against civilian minority populations by the UNC secessionist entity, or the violation of peremptory norms of international law as part of the statehood process, must be evaluated separately on the basis of the foregoing situation.

⁷⁶³ Crawford, "State", *supra* note 194 at para 2.

Conclusively, this framework can be used as a general guideline, from which determinations of legal or illegal actions can be made on the basis of case-specific elements which will depend entirely on how the intervention has been executed, as well as the circumstances that precede and surround it. Now that this Chapter has come to its conclusion, it is necessary to provide a brief reaffirmation of the primary arguments of this thesis, as well as establish a clear argument on the exception to the prohibition on the use of force in international law.

Chapter 5

Chapter 5: Conclusion

The concept of humanitarian intervention, its meaning and its status under international law, continues to be a topic of contested debate among scholars, lawyers and politicians. As the prohibition on the use of force has crystallized into the ‘most secure’ *jus cogens* norm in international law given its centrality in the UN Charter, it is challenging to assert that its violation can be legitimized in any manner under a ‘particular exception’.⁷⁶⁴ Indeed, the most basic issue with the concept of a humanitarian intervention as having legal standing under international law is that its challenges are not normative, but rather operational.⁷⁶⁵ More precisely, although an extensive list of scholars have attempted to argue for or against the existence of a right to humanitarian intervention, it can be suggested that state practice along with *opinio juris* has predominantly rejected its existence as an ‘absolutist’ concept.⁷⁶⁶

This Chapter is separated into three sub-parts. First, a summary of the preceding four chapters’ primary arguments will demonstrate the interconnectivity of several areas of international law that support the final argument for this thesis. Second, further clarification will be presented on discerning the contemporary doctrine of humanitarian intervention (which embraces the R2P principle). This will be done in order to establish this thesis’ principle viewpoint on the topic of military interventions, which posits that a legal exception to the prohibition on the use of force exists *only* within the context of a UNC secession, coupled with human rights abuses deemed as *in extremis*. Lastly, a final sub-section will offer a number of concluding thoughts with respect to the notion of a right to a third-state military intervention in international law.

⁷⁶⁴ Rodley, *supra* note 456 at 794.

⁷⁶⁵ Thomas G Weiss, *Humanitarian Intervention*, (Hoboken: Polity Press, 2016) at 140.

⁷⁶⁶ Sean Richmond, “Why is humanitarian intervention so divisive? Revisiting the debate over the 1999 Kosovo intervention” (2016) 3:2 J on the Use of Force and Intl L 234 at 255-9.

5.1 Chapter Summaries

Chapter 1 introduced the thesis by establishing the sources of international law used as part of the legal analysis of the subject-matter. Additionally, the Chapter clearly established the objective of the thesis, providing a distinction between the already-established doctrine of the right to a UNC secession, and the primary objective of the thesis which intended to defend its three primary suppositions: i) that the principle of self-determination exists as a legal right under international law, (ii) that the principle of self-determination provides a qualified right of a UNC secession, and lastly, (iii) that in cases where the principle of self-determination is systematically denied (combined with human rights abuses designated as *in extremis*), a legal right may be invoked to a military intervention by a third-state.

Chapter 2 summarized the history of the principle of self-determination, with the intention of drawing a parallel between the principle and the concepts of state recognition, statehood and sovereignty under international law. It began by presenting the history of the principle of self-determination, which was separated between its development prior to and after the 19th century, examining its legal development under classical and contemporary international law. Next, it was demonstrated how the principle became intertwined with the concepts of recognition, statehood and sovereignty throughout the late half of the 19th and early half of the 20th centuries. As the three concepts are often conflated in cases of external self-determination, it was necessary to emphasize how their interrelatedness plays into considering the legitimacy of an UNC Secession. Lastly, Chapter 2 presented an explanation for the existence of a right to a UNC secession under international law, while equally presenting its interrelation with the right to a UC secession. The connection between the two concepts was made in order to demonstrate how colonial oppression can exist outside of the ‘decolonization’ context. Overall, Chapter 2 established how the principle of self-determination is corollary to the existence of a justification for a right to a UNC secession.

Chapter 3 focused on examining the international law on the use of force, and subsequently, how that law has been applied to the doctrine of humanitarian intervention and the Responsibility to Protect (R2P) principle. First, a history of the *jus ad bellum* was

presented in order to demonstrate its relationship with the classical just war doctrine and later with the notion of a ‘humanitarian intervention’. Second, the prohibition on the use of force was introduced as part of a general introduction on how international law perceives the use of force by states. Further, the prohibition was analyzed vis-à-vis its applicability to the creation of states in international law. This was done in order to evaluate what constitutes the legality of direct and indirect third-state support in cases of state creation related to UC and UNC secessions. Lastly, a final portion of the Chapter focused on connecting how the concepts of classical natural law, humanitarian intervention and classical just war theory intersect with regards to their theoretical and legal bases. As part of this comparison, a legal analysis of the doctrine of humanitarian intervention was completed, concluding that its legal status under international law remains inchoate and hence, can be considered at most an instrument of soft law.

Finally, Chapter 4 examined three case studies that shared similar variables of being attempted UNC secessions with subsequent military interventions by a third state. The first two case studies, Bangladesh and Kosovo, identified the historical, political and legal developments that led to their unilateral secessions and subsequent military interventions by India and NATO respectively. The intention of the first two case studies was to underline how their UNC secessions, even if supported through a unilateral and collective third-state military intervention, did not violate peremptory norms of international law as part of their statehood creation processes. Additionally, both cases had evidence of systematic and widespread human rights abuses deemed as *in extremis*, which justified the violation of the prohibition on the use of force as part of the third-state military interventions. Alternatively, a third case study was presented in an effort to highlight the difference between a legally-justified and unjustified third-state military intervention on the basis of a UNC secessionist claim. In outlining the historical developments which led to the ‘secession’ of the *de facto* republics of South Ossetia and Abkhazia, a clear line was drawn between what constitutes a legitimate and an illegitimate claim of a right to external self-determination, as well as the threshold for a third-state military intervention through the confirmation of human rights abuses that can be deemed as *in extremis*. The threshold was established on the basis of the following methodology: that (i) a ‘peoples’ invoke their right to internal self-determination which is

rejected by the state, that (ii) the right of external self-determination is invoked on the basis of a right to a qualified UNC secession, which is rejected as well, that iii) the state responds by beginning a systematic campaign of human rights abuses, repressions and killings considered as *in extremis* against the peoples in question, and that iv) a third-state or a collective group of third states invoke their right to a military intervention to cease the human rights abuses and allow for the invocation of the right to external self-determination to proceed. On the basis of this methodology, a set of four requirements was presented which combined the elements identified in the case studies into an analytical framework. The objective of the framework was to create a guideline through which a third-state military intervention executed under similar circumstances can be analyzed from. Overall, the case studies solidified the existence of an accepted state practice with regards to the right of third state military interventions under the circumstances outlined above. Now that the summary of the first four Chapters has been completed, it is necessary to conclude this thesis with a short commentary on the primary issues it addressed.

5.1. The Right to a Military Intervention - Final Comments

As the act of secession continues to be a topic of heated debate in the international legal community, it is important to recognize that the "...the prohibition of the use of force represents, besides the protection of human rights, the major advancement of the international legal order in the 20th century."⁷⁶⁷ Hence, irrespective of its violations, whether through excuse or justification, the prohibition has become the cornerstone of the international legal order with respect to interstate relations and an overall objection to all-out inter-state or collective warfare.⁷⁶⁸ Thus, any 'exceptions' to the prohibition on the use of force require *very strong* evidence in both state practice and *opinio juris* to be considered as legitimate.⁷⁶⁹ More precisely, the general notion of interventionism in the

⁷⁶⁷ Dorr, *supra* note 374 at para 51.

⁷⁶⁸ *Ibid.*

⁷⁶⁹ For more on the impact of NATO's intervention in Kosovo as part of international human rights law, see Yves Dezalay & Bryant Garth "From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights" (2006) 2 Annual R of L and Social Science 231 at 234-46.

last two decades has demonstrated that, through an unregulated international understanding of this concept, a hierarchy of necessity is created by virtue of which a case of human rights abuses must reach *in extremis* levels prior to a consideration of a military intervention. Even more so, this applies to cases of human rights abuses outside the ambit of self-determination, which have seen states choose ‘selectively’ when or when not to militarily intervene in a given conflict.⁷⁷⁰ This notion of human rights ‘selectivism’ is, in the author’s opinion, one of the most divisive issues facing international legal scholars in the present moment. Nevertheless, in combination with all of the evidence presented in the previous four chapters, it is necessary to establish a firm statement with regards to the right of a military intervention *only* in the context of a UNC secession under international law.

To begin, it is important to reiterate that, within the context of military interventions, the qualified right to a military intervention can be interpreted as

The justifiable use of force to protect [a peoples’ right to a UNC secession] ...against so persistent and arbitrary abuse as to go beyond the limit by which the sovereign nation is presumed to act within justice and reasons... [additionally, it can be defined as an act] which recognizes a state’s rights to exercise through military force international control over acts of another states regarding its internal sovereignty when its actions are deemed to contradict the laws of humanity.⁷⁷¹

Although it is undeniable that states should be held responsible for a systematic and egregious abuse of human rights in armed uprisings and independence-related conflicts,⁷⁷² the basis on which an absolute right for a humanitarian intervention can be interpreted as having its weakest legal standing is premised on three crucial

⁷⁷⁰ Nico Kirsch, “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order” 16 *EU J Intl L* 369 at 397-99.

⁷⁷¹ Zaid Ali Zaid, “Humanitarian Intervention in International Law” (2013) 54:2 *Acta Juridica Hungarica* 185 at 187.

⁷⁷² International Human Rights Law is a growing discipline of international law which considers the primacy of human rights jurisprudence in all major spheres of international law. The core of the discipline is governed by the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. See generally, Thomas Buergenthal, ed, “Human Rights” in *Max Planck Encyclopedia of Public International Law* (Oxford University Press) at para 9, online: <www.opil.ouplaw.com>; UNDHR, *supra* note 631; *ICPR*, *supra* note 92; *ICESR*, *supra* note 144.

constraints.⁷⁷³ Respectively, these constraints are, i) the concern evinced by multiple states of the doctrine of humanitarian intervention as becoming a concept of neo-imperialism for powerful states, ii) the continuous promulgation of ‘defensive armed conflicts’, such as the ‘war on terrorism’ under which military interventions by states (such as the US intervention in Iraq in 2003) have become ‘justified’ for ‘humanitarian reasons’, and iii) the notion of human life as being more valuable than the sovereignty of states has lost its popularity through the continued brutal armed conflicts in Yemen,⁷⁷⁴ Syria,⁷⁷⁵ Afghanistan⁷⁷⁶ and Iraq,⁷⁷⁷ to name a few, whereby the systematic death of civilians has resulted in little collective humanitarian military action.⁷⁷⁸ Therefore, it is necessary to conclude that, on the basis of the evidence presented in Chapter 3, the contemporary doctrine of humanitarian intervention which stipulates that a ‘responsibility’ exists on a state or states to militarily intervene on behalf of a systematically oppressed population has *not* crystallized as a norm in international law. At the very least, this vision of ‘humanitarian intervention’ as a norm can be construed as being in its early stages of development, specifically with respect to unilateral or collective military action by states regardless of circumstance (i.e. military intervention to

⁷⁷³ See Weiss, *supra* note 765 (“[t]he NAM – with more than 130 members, and arguably the most representative group of countries outside the UN itself – has publicly rejected “the right of humanitarian intervention,” even if Africans on their own are usually seeking more outside intervention to halt humanitarian disasters and the African Union’s Constitutive Act contains a bullish Article 4(h). Developing countries are not alone in their recalcitrance. For example, American “sovereignists” launched three lines of counterattack: the emerging international legal order is vague and illegitimately intrusive on domestic affairs; the international lawmaking process is unaccountable, and the resulting law unenforceable; and Washington can opt out of international regimes as a matter of power, legal right, and constitutional duty” at 141).

⁷⁷⁴ Rebecca Tan, “The war in Yemen has led to the worst cholera outbreak in the world”, *VOX* (26 June 2017) online: <www.vox.com/world/2017/6/26/15872946/yemen-war-cholera-outbreak-saudi-arabia-us-airstrikes>.

⁷⁷⁵ Julian Borger, “Civilian deaths from US-led strikes on Isis surge under Trump administration”, *The Guardian* (6 June 2017) online: <www.theguardian.com/us-news/2017/jun/06/us-syria-iraq-isis-islamic-state-strikes-death-toll>.

⁷⁷⁶ “Afghan Civilians” *Watson Institute of Public and International Affairs* online: <watson.brown.edu/costsofwar/costs/human/civilians/afghan>.

⁷⁷⁷ “Iraq” *Watson Institute of Public and International Affairs* online: <watson.brown.edu/costsofwar/costs/human/civilians/iraqi>.

⁷⁷⁸ See Weiss, *supra* note 765 at 140-2.

stop systematic human rights abuses against anti-government protesters in Libya)⁷⁷⁹ and outside of UNSC approval (such as the current extremely bloody civil conflict in Syria). More concisely, the R2P principle has become engrained as the leading contemporary interpretation of the doctrine of humanitarian intervention, which purports to obligate military action by states in cases of humanitarian crises.⁷⁸⁰ This obligation has, to date, been unable to earn the necessary normative and operative strength to become an accepted law under the well-accepted sources of international law. In the qualified sense, such operative and normative support exists for a third-state military intervention only through the pretext of the principle of self-determination, and under very particular circumstances which must include a UNC secessionist entity invoking that principle on the basis of its systematic denial.

Nonetheless, the law on the use of force as it stands must continue to progress towards a more relaxed understanding of its operative strength. In fact, one positive aspect that can be noted is that its progression has been noticeable since its inception in 1945. For example, as stated by one jurist on the ever-evolving international law on interventionism:

In 2017, we live and operate in a world order that is distinctly different from that which operated between 1945 and 1989. This is so, even though it might be difficult to pin down the specific moment of change. Unlike the

⁷⁷⁹ UNSC Resolution 1973 authorized the use of ‘all necessary means’ to protect the Libyan civilian population from attacks by the government run by Muammar Gaddafi. Although the military intervention by NATO and other Western allies resulted in the abdication and subsequent death of the Muammar Gaddafi, the intervention was considered by a number of scholars as an example of ‘regime change’. Most such scholars disagree with NATO’s interpretation of the UNSC Resolution as allowing for collective ‘humanitarian’ intervention *sub silentio*. See e.g. Fox, *supra* note 315 at paras 45-52; Lowe & Tzanakopoulos, *supra* note 18 at para 17.

⁷⁸⁰ The notion of an ‘obligation’ in international law holds an extremely high threshold. In essence, an obligation would, as argued by Dr. Halil Basaran, ‘governmentalize’ the process of military action in response to egregious atrocities and abuses of human rights around the world. See Halil Basaran, “Identifying the Responsibility to Protect” (2014) 38 Fletcher Forum of World Affairs 195 (“[u]ltimately, R2P represents a subtle mechanism. It consists of observations, suggestions, and stimulations as epitomized by the 2001 International Commission on Intervention and State Sovereignty, the 2005 UN World Summit Outcome, and by General Assembly and Security Council resolutions. R2P, as a form of knowledge, aims to indirectly and subtly govern states. These subtle procedures of governmentality run counter to positivism...R2P has still not distinguished itself from humanitarian intervention, and these two concepts remain terminologically interwoven” at 196-202). See also *ibid* at 204,208.

dethroning of the post-World War I order by the U.N. system, we cannot point to a precise moment at which the changes can be said conclusively to have occurred, nor can we point to specific texts (or even clear-cut rules) in defining and framing those changes. Nonetheless, that the international system now operates under distinctly different norms-and perhaps objectives and aspirations-are, in my view, beyond cavil.⁷⁸¹

As expounded on in the citation above, a slow, yet steady progress with regards to the contemporary *jus ad bellum* can be noticed if analyzed on the basis of its consistency since its codification in the UN Charter. However, outside of this progress, as this thesis has clearly demonstrated, blatant violations of the prohibition on the use of force in recent history should be seen as exactly what they are perceived to be under international law: blatant violations. Exceptions in international law only exist insofar as they can be supported by a breadth of evidence necessary to confirm their existence. With regards to military interventionism in particular, the emphasis must remain on self-determination as the leading factor behind the strength of its justification *only* in the UNC context. In large part, this is due to the fact that "...self-determination is a progressive force that has challenged the political status quo throughout history"⁷⁸² and, hence, continues to similarly challenge it on the prohibition on the use force if coupled with its systematic denial and human rights abuses deemed as *in extremis*. All things considered, it should also be noted that even as a progressive force, each case of self-determination throughout history requires an aggressive and detailed analysis, in order to determine the elements necessary to confirm the legitimacy behind its claim, specifically with regards to the emergence of new states.

Conclusively, it can be suggested that the *only* right to the use of force outside of the current legal parameters, exists in the context of an UNC secession which meets the criteria for an oppressed 'peoples' on the basis of an external self-determination attempt, and whose secession is coupled with human rights abuses deemed as *in extremis*. It is necessary to underline that the *direct* support of a third state or states in an effort to halt

⁷⁸¹ Maxwell O Chibundu, "International Law and the Legitimation of External Coercive Measures in Aid of Internal Change" (2017) 31 Temp Intl & Comp L J 123 at 131.

⁷⁸² Anderson, "A Post-Millennial Inquiry", *supra* note 13 at 1201.

the human rights abuses will violate the peremptory norm of the illegal use of force⁷⁸³ regardless of circumstance; however, the scope of the military intervention, coupled with the intent, the execution and the adherence to the requirements presented in the analytical framework, *can* provide a justification for the violation of the peremptory norm of the illegal use of force. Ultimately, the combined supremacy of the principle of self-determination, state practice and UN instruments, if considered side-by-side, provide an exception of the prohibition on the use of force under customary international law; the *only* such exception to the prohibition.

⁷⁸³ Anderson, "The Use of Force", *supra* note 9 at 239.

Chapter 6

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Curriculum Vitae

Name: Ilya Berlin

**Post-secondary
Education and
Degrees:** Glendon College, York University
Toronto, Ontario, Canada
2009-2014 B.A. Honours (Bilingual)

Western University
London, Ontario, Canada
2016-2017 M.S.L

Languages: English, French, Russian (Fluent)
Spanish, Bulgarian (Intermediate)
Georgian (Beginner)

Honours & Awards:

Western University Faculty of Law Graduate Scholarship
Sep. 2016

Dr. Robert Lundell Achievement Award
Sep. 2014

Jaswant Singh Randhawa Memorial Award in Political Science
Sep. 2013/14