A GLOBAL GOVERNANCE APPROACH TO POST-COLONIAL SELF-DETERMINATION

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Abstract

Major changes to the interpretation and application of the law of self-determination have taken place since the era of decolonisation. Notably, because most non-self-governing territories have attained independence, analyses have shifted by looking at the internal application of self-determination. Although competing theories have generally defined internal self-determination as conditions under which human rights, democratic representation and access to the right to development are realised, there is continued uncertainty about how the concept is applied. In this regard, questions emerge about the linkage between internal self-determination and external self-determination within the self-determination continuum and particularly, whether territorial minorities can secede based on claims of oppression arising from state failure to satisfy conditions associated with internal self-determination.

This thesis proposes that a global governance approach is required for understanding and applying post-colonial self-determination. Unlike other analyses, it is argued that the conditions relative to internal self-determination are case-specific. This means that the application of internal self-determination will be influenced by specific legal and extra-legal considerations affecting the parties in the minority-state relationship. Significantly, the actual conditions of internal self-determination may look different in each case, even though a normative process of evaluation is applied. A global governance approach identifies and formulates obligations based on these legal and extra-legal considerations, and a process for territorial minorities to pursue external self-determination if internal self-determination is denied. When considering possible local, regional and international pressures affecting territorial minorities like economic inequalities, human rights abuses, and the adverse effects of globalisation, is important to appreciate that obligations cannot be defined by pre-set criteria, but are derived from multi-party dialogue and the identification of specific rights, roles and responsibilities belonging to territorial minorities, states and the international community.

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Abbreviations

AJIL	American Journal of International Law
Am Soc of Intl L	American Society of International Law
Anglo-Am LR	Anglo-American Law Review
Annals Fac L Belgrade Intl Ed	Annals of the Faculty of Law in Belgrade - International Edition
Annual Survey of Intl and Comp	Annual Survey of International and Comparative Law
ASEAN	Association of Southeast Asian Nations
Asia-Pacific J on Human Rights L	Asia-Pacific Journal on Human Rights Law
AUP	Aberdeen University Press
BC Intl & Comp L Rev	Boston College International & Comparative Law Review
Brook J Intl L	Brooklyn Journal of International Law
BYIL	British Yearbook of International Law
Can J of Pol Science	Canadian Journal of Political Science
Canadian J of Philosophy	Canadian Journal of Philosophy
Case W Res J Intl L	Case Western Reserve Journal of International Law
Chinese JIL	Chinese Journal of International Law
Colum J Transnatl L	Columbia Journal of Transnational Law
Comp Political Studies	Comparative Political Studies
Conn J of Intl L	Connecticut Journal of International Law
CUP	Cambridge University Press
Den J Intl L & Poly	Denver Journal of International Law and Policy
EJIL	European Journal of International Law
EL Rev	European Law Review
Ethics and Intl Affairs	Ethics and Intl Affairs
FDINLJ	Fordham International Law Journal
Finnish Yrbk, of Intl L	Finnish Yearbook of International L
GaJICL	Georgia Journal of International and Comparative Law
GAOR	General Assembly Official Records
GWILR	George Washington International Law Review
Harv Hum Rts J	Harvard Human Rights Journal
HRC	Human Rights Council
HRLR	Human Rights Law Review
Hous J Intl L	Houston Journal of International Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILM	International Legal Materials
ILSA J Intl & Comp L	ILSA Journal of International & Comparative Law
IMF	International Monetary Fund
INJGLS	Indiana Journal of Global Legal Studies

Intl J Group Rts	International Journal on Group Rights
Intl J of the Sociology of Language	International Journal of the Sociology of Language
Intl J on Minority & Group Rts	International Journal on Minority & Group Rights
Intl Studies Quarterly	International Studies Quarterly
J Applied Phil	Journal of Applied Philosophy
J Electoral Studies	Journal of Electoral Studies
J of Conflict Resol	Journal of Conflict Resolution
King's Student L Rev	King's Student Law Review
L & St	Law and State
LJIL	Leiden Journal of International Law
Mich J Intl L	Michigan Journal of International Law
Minn J Intl L	Minnesota Journal of International Law
MLSJ	Macquarie Law Students' Journal
NATO	North Atlantic Treaty Organization
New Eur L Rev	New Europe Law Review
NILR	Netherlands International Law Review
NTDLR	Notre Dame Law Review
Nw UJ Intl Hum Rts	Northwestern University Journal of International Human Rights
NYUJILP	New York University Journal of International Law
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
OUP	Oxford University Press
PISG	Provisional Institutions of Self-Government
SCR	Supreme Court Reports (Canada)
SC Res	Security Council Resolution (UN)
STJIL	Stanford Journal of International Law
Tex Intl L J	Texas International Law Journal
TWQ	Third World Quarterly
UN	United Nations
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo
VaJIL	Virginia Journal of International Law
Vand J Transnatl L	Vanderbilt Journal of Transnational Law
Vill L Rev	Villanova Law Review
Wash U Jurisprudence Rev	Washington University Jurisprudence Review
Wis Intl L J	Wisconsin International Law Journal
WTO	World Trade Organization
Yale J Intl L	Yale Journal of Intl L

Chapter One: Introduction to Post-Colonial Self-Determination

1.0 Introduction

> The drive for self-determination has been one of the major causes of the world's humanitarian crises in the post-Cold War era. The dilution of the international system's bipolar rigidity, global interdependence, intensified economic-technological cooperation, and real-time communication have added a crucial challenge to traditional existing problems between communities and central authorities.[1]

Conflicts between territorial minorities and states in the Ukraine, Nagorno-Karabakh, Western Sahara, Aceh, Tibet, Mindanao, Palestine, Chechnya, Karen State, Somaliland, Abkhazia, and Bougainville, represent some of the eighty active secessionist movements around the world.[2] While there are different motives for seeking secession,[3] many conflicts are prolonged and exacerbated because post-colonial[4] self-determination is ambiguous[5] and poorly defined.[6] It will be argued throughout this thesis that one of the most important causes of ambiguity is associated with the meaning and application of internal self-determination, and its uncertain connexion to external self-determination.

Post-colonial perspectives on self-determination are generally distinguished between

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[1] W Danspeckgruber, 'Introduction' in W Danspeckgruber (ed), *The Self-Determination of Peoples:*
[2] M Weller, 'Settling Self-determination Conflicts: Recent Developments' (2009) 20(1) EJIL 111, 112.
[3] *See, e.g.,* M Moore, 'Introduction: The Self-Determination Principle and Ethics of Secession' in M Moore (ed), *National Self-Determination and Secession* (OUP, Oxford 1998) 1, 6; E Jenne, 'National Self-Determination: A Deadly Mobilizing Device' in H Hannum and EF Babbitt (eds), *Negotiating Self-Determination* (Lexington Books, Lanham MD 2006) 15-25; P Collier and A Hoeffler, 'The Political Economy of Secession' in H Hannum and EF Babbitt (eds), *Negotiating Self-Determination* (Lexington Books, Lanham MD 2006) 37, 41.
[4] The term post-colonial will be the preferred term used throughout this thesis to refer to the period of self-determination following decolonisation. Comparable terms include: *Postmodern* used by Franck to signify the transformation in international law away from the prevalent issues of between 1945 and 1990. TM Franck, *Fairness in International Law and Institutions* (OUP, Oxford 1995) 140; *Post-decolonisation* used by Bissell to describe the shift in African international relations away from achieving independence to economic, political and cultural development. RE Bissell, 'An Introduction to the New Africa' in RE Bissell and MS Radu (eds), *Africa in the Post-Decolonization Era* (Foreign Policy Research Institute, Philadelphia 1984) 1, 1-4.
[5] R Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford 1994) 111; J Crawford, 'The Right to Self-Determination in International Law: Its Development and Future' in P Alston (ed), *Peoples' Rights* (IX/2 OUP, Oxford 2001) 10.
[6] F Raday, 'Self-Determination and Minority Rights' (2003) 26 FDINLJ 453, 460.

external and internal applications within a common self-determination spectrum or continuum.[7] External self-determination emerged as a distinct concept during decolonisation.[8] Its application was intended to support colonial and non-self-governing peoples to achieve independence[9] or freedom from foreign and alien rule.[10] It confers a right for peoples to exercise decisions affecting territorial boundaries,[11] and allows them to choose[12] what form of territorial sovereignty or external political status[13] they wish to create.[14]

Comparatively, internal self-determination is concerned with the exercise of popular sovereignty that is free of oppression or authoritarian interference,[15] within independent states.[16] It represents a relationship between states and individuals, groups, minorities and peoples,[17] and confers a constant entitlement[18] for these groups to continually re-create their own political, economic, social, and cultural conditions[19] in accordance with

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[7] D Raič, *Statehood and the Law of Self-determination* (Kluwer Law International, The Netherlands 2002) 227; A Rosas, 'Internal Self-determination' in C Tomuschat (ed), *Modern Law of Self-determination* (Martinus Nijhoff Publishers, Dordrecht 1993) 225, 228.

[8] Castellino alludes to Van Langenhove's observation that colonisation could be interpreted as the European subjugation of non-European peoples, and decolonisation as the process of European states ceding their dominance over these peoples. F Van Langenhove, *The Question of Aborigines Before the United Nations: The Belgian Thesis* (Royal Colonial Institute of Belgium, Section of Social and Political Sciences, Brussels 1954) cited in J Castellino, 'Territorial Integrity and the 'Right' to Self-Determination: An Examination of the Conceptual Tools' (2008) 33(2) Brook J Intl L 499, 512; Quane suggests that the end of decolonisation coincided with the handover of Hong Kong to China in 1997. H Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 ICLQ 537, 551; Anghie suggests that decolonisation ended at the same time as the Cold War. A Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) Third World Quarterly 739, 749.

[9] M Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff Publishers, The Hague 1982) 25.

[10] P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 ICLQ 867, 869.

[11] Quane (n 8) 551; A Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' (1992) 43 ICLQ 99, 110-111; Higgins (n 5) 115-16.

[12] H Beran, 'A Democratic Theory of Self-Determination for a New World Order' in PB Lehning, (ed), *Theories of Secession*, (Routledge, 1998) 32, 35.

[13] *Conference on Security and Cooperation in Europe, Final Act,* (Helsinki, August 1, 1975) Pt 1, VIII.

[14] Kolodner uses the examples of the non-self-governing territories of Ifnii and the Mariana Islands to demonstrate different applications of external self-determination. In 1965, Ifnii chose to incorporate within Morocco while the Mariana Islands chose to have a 'free association' with the United States. E Kolodner, 'The Future of the Right to Self-Determination' (1994) 10 Conn J of Intl L 153, 160.

[15] A Michalska, 'Right of Peoples and Human Rights in International Law' in W Twining (ed), *Issues of Self-Determination* (AUP, Aberdeen 1991) 71, 83.

[16] TD Musgrave, *Self-determination and National Minorities* (OUP, Oxford, 1997) 152.

[17] Raič (n 7) 284.

[18] Higgins (n 5) 119-120.

[19] *See, e.g.,* General Recommendation No. 21: Right to self-determination: 08/23/1996 Forty-eighth session, 1996 Committee on the Elimination of Racial Discrimination [4]; K Ryan, 'Rights, Intervention, and Self-Determination' (1991) 20(1) Den J Intl L & Poly 55, 65; Rosas (n 7) 225, 234; G Pentassuglia, 'State Sovereignty, Minorities and Self-determination: A Comprehensive Legal View' (2002) 9 Intl J on Minority & Group Rts 303, 305; O Kimminich, 'A 'Federal' Right of Self-determination?' in C

Article 1 of both the *International Covenant on Civil and Political Rights*[20] and the *International Covenant on Economic, Social and Cultural Rights*.[21]

Although both internal and external self-determination are interdependent,[22] their distinct applications have challenged a coherent understanding of how this interdependency works. It will be argued that external self-determination is justified only when internal self-determination is denied. In other words, if internal self-determination is frustrated, then territorial minorities can legitimately pursue external self-determination possibilities like greater territorial autonomy or secession. In introducing a global governance approach to post-colonial self-determination as a method for bridging these concepts, this thesis will endeavour to also better define internal self-determination.

1.1 Defining a Global Governance Approach

In this thesis, a global governance approach will be distinguished from other prominent self-determination theories and described primarily through the process of analysing relevant contemporary self-determination issues like internal self-determination and oppression. It is a procedural method for identifying conditions unique to each minority-state relationship, forming the basis of internal self-determination responsibilities and obligations.[23] It is modelled on the belief that case-specific assessments should be deployed to better understand the real issues in disputes between territorial minorities and states.[24] This understanding is distinguishable from other scholarly theories on self-determination, which will be addressed in this thesis as either

Tomuschat (ed), *Modern Law of Self-determination* (Martinus Nijhoff Publishers, Dordrecht 1993) 83, 89.

[20] Hereafter 'ICCPR', International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[21] Hereafter 'ICESCR', International Covenant on Economic, Social and Cultural Rights (adopted 19 December 1966, entered into force January 3, 1976) 993 UNTS 3.

[22] Raič (n 7) 332.

[23] To clarify, 'responsibilities' will be used to describe duties that states and significantly, territorial minorities and the international community *should* adopt as part of a global governance approach. Comparatively, 'obligations' will be used to describe duties that states (and arguably the international community and territorial minorities) already *have* with respect to upholding existing peremptory international norms. *See, e.g., Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) [62]-[66].

[24] Separate Opinion of Judge AA Cançado Trindade, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 22 July 2010 [12], [51].

remedial or liberal-nationalist theories. Both remedial and liberal-nationalist theories have tended to apply positional-based approaches that support the position of states or territorial minorities during secessionist movements.[25]

According to remedial theories, secession is a responsive mechanism to oppression and illicit state activity against groups.[26] While there is considerable variance in scholarly opinion as to what should constitute an appropriate remedy, these theories share the perspective that territorial minorities are not entitled to exercise unilateral external self-determination. Comparatively, theories encompassing liberal and nationalist perspectives tend to favour minority interpretations of self-determination by suggesting that secession and the formation of new political entities should be independent of state interference and premised on voluntary or ascriptive political associations that enable groups to make unilateral decisions.[27]

It should be emphasised that the decision to categorise the various self-determination theories into remedial or liberal-nationalist schools is intended to highlight the key challenges that these theories generally fail to address when evaluating the linkage between internal and external self-determination, and further, to show how a global governance approach can be deployed as an effective means for addressing these challenges and formulating new interpretations of self-determination responsibilities and obligations.

A global governance approach is premised upon responsibilities and obligations that are drawn from a variety of legal and extra-legal considerations, including existing human

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[25] *See generally* A Varshney, 'Ethnic Conflict and Civil Society: India and Beyond' (2001) 53(3) World Politics 362.

[26] *See, e.g.,* LC Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, New Haven 1978); L Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (1991) 16 Yale J Intl L 199; A Buchanan, 'Theories of Secession' (1997) 26(1) Philosophy and Public Affairs 31; Raday 'Self-Determination and Minority Rights' (n 6) 453; EM Brewer, 'To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion' (2012) 45 Vand J Transnatl L 245.

[27] *See, e.g.,* R Dahl, *After the Revolution* (Yale University Press, New Haven 1970); H Beran, 'A Liberal Theory of Secession' (1984) 32(1) Political Studies 21; T Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103(1) Ethics 48; J Fishkin, 'Towards a New Social Contract' (1992) 24(2) Noûs 217; D Gauthier, 'Breaking Up: An Essay on Secession' (1994) 24(3) Canadian J of Philosophy 357; D Philpott, 'In Defense of Self-Determination' (1995) 105(2) Ethics 352; M Moore 'The Territorial Dimension of Self-Determination' in, M Moore, (ed), *National Self-Determination and Secession* (OUP, Oxford 1998) 134; K Nielsen, 'Liberal Nationalism and Secession', in M Moore, (ed), *National Self-Determination and Secession* (OUP, Oxford 1998) 103.

rights treaties,[28] access to political representation,[29] and available opportunities to access the right to development.[30] Additionally, sources of responsibility and obligation can come from having to protect against, *inter alia*, oppression, the adverse effects of globalisation,[31] poverty and economic inequalities, or the repudiation of autonomy arrangements.[32] These considerations promote a merits-based assessment of self-determination claims and significantly draw upon a variety of principles that are necessary for establishing an alternative approach that is not limited to the exclusive perspectives of states or territorial minorities. Importantly, because each minority-state relationship is different, not every application of internal self-determination under a global governance approach will generate the same responsibilities and obligations.[33] For example, based on contemporary conditions, Canada would likely not have a legal or moral duty to extend greater access to self-government to the citizens of Québec above what is already constitutionally guaranteed,[34] yet comparably, greater access to self-government was identified as a key Israeli responsibility towards the Palestinian people at the 1993 *Oslo Accords*.[35] In this example, different contextual circumstances shape the unique obligations and responsibilities necessary to define internal self-determination. A global governance approach also seeks to strengthen the international community's role in this process by ensuring that contextual circumstances are appropriately identified and respected as the components of internal self-determination obligations. Specifically, there may be situations when, for example, humanitarian and

[28] Buchanan proposes that human rights can provide the 'core of a justice-based moral theory of international law'. A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP, Oxford 2004) 119.
[29] *See, e.g.,* TM Franck, 'The Emerging Right to Democratic Governance' (1992) 86(1) AJIL 46; J Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) 10(2) HRLR 239-268.
[30] *See, The Declaration of the Right to Development* UN Doc. AIRES/41/128 (1987); SE Allgood. 'United Nations Human Rights "Entitlements": The Right to Development Analyzed Within the Application of the Right of Self-determination' (2002-2003) 31 GaJICL 321; ME Salomon and A Sengupta, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples* (Minority Rights Group International, London 2003).
[31] *See, e.g.,* M Guibernau, *Nations Without States: Political Communities in a Global Age (*Polity Press, 1999) 23; A Chua, *World on Fire: How exporting free market democracy breeds ethnic hatred and global instability*, (Doubleday, New York 2004); S Olzak, 'Does Globalization Breed Ethnic Discontent?' (2011) 55(1) J of Conflict Resol 3.
[32] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 355-359.
[33] This parallels Sengupta's observation in the context of the right to development that it is not necessary for all rights to be realised to satisfy human dignity, suggesting that there will invariably be an exercise in prioritising needs. A Sengupta, 'On the Theory and Practice of the Right to Development', in A Sengupta, A Negi and M Basu, (eds), *Reflections on the Right to Development* (Sage Publications, 2005) 61, 80-89.
[34] *Reference re Secession of Québec* [1998] 2 SCR 217 [136], [138].
[35] *Declaration of Principles on Interim Self-Government Arrangements* (September 13, 1993) cited in Raday 'Self-Determination and Minority Rights' (n 6) 467.

other moral considerations demand international support for external self-determination over the principle of non-intervention.[36] Thus, the key argument in this thesis is to demonstrate that a global governance approach is needed to apply and provide definition to internal self-determination, thereby enabling the substantiation of territorial minority claims to external self-determination. This proposal further demonstrates that both internal and external self-determination are causally connected and represent a post-colonial continuum of self-determination.

It is further argued that a global governance approach defines internal self-determination as a reflection of developing customary law, which incurs specific responsibilities and obligations[37] upon states, territorial minorities and the international community. Internal self-determination is also process-driven, suggesting that obligations may be based on considerations unique to specific minority-state relationships rather than derived from an outcome-driven legal framework.[38] It highlights that post-colonial self-determination includes a need to understand how internal self-determination should be applied relative to specific conditions while appreciating that there are a variety of historical and contemporary considerations that can be used to identify and establish obligations and ultimately substantiate specific claims of failed internal self-determination or the pursuit of external self-determination.

Opportunities to apply a global governance approach have been historically limited, with Bangladesh and more recently, Kosovo, illustrating perhaps the best examples of international intervention in response to failed systems of internal self-determination. By looking at the Kosovo crisis through a global governance lens, it can be said that the oppression suffered by the ethnic Albanian territorial minority provided legitimacy for the repudiation of Belgrade's sovereignty over Kosovo. While the circumstances of Kosovo's eventual declaration of independence remain contentious, Kosovar independence importantly demonstrates that failed systems of internal self-determination may be used to justify when external self-determination is permissible.

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[36] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 430, citing the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, (International Development Research Centre, Ottawa, December 2001) xi and 32-34.

[37] *See, e.g.,* M Saul, 'The Normative Status of Self-determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 HRLR 609, 640.

[38] *See, e.g.,* Franck, *Fairness in International Law and Institutions* (n 4) 351; D Thürer, 'The Right of Self-Determination of Peoples' (1987) 35 L & St 22.

Importantly, when examining failed internal self-determination, it is evident that there are key differences between global governance, remedial and liberal-nationalist approaches. In this regard, it is contended that a global governance approach not only provides the best model for linking internal self-determination to external self-determination, but also provides a basis for understanding oppression as an indicator of when internal self-determination fails. While oppression is not a legal principle, it is a descriptive term that has been invoked to justify the repudiation of state sovereignty during decolonisation,[39] as well as in Kosovo,[40] and even more recently by Russian separatists in the Eastern Ukraine.[41] A global governance approach gives oppression necessary meaning, which significantly includes minority perspectives in addition to more conventional opinions of oppression linked to egregious humanitarian abuses.

In each of the following chapters a global governance approach will be clarified and supported with reference to a number of important themes and analyses. Particularly, these will include consideration for the legacy of decolonisation upon self-determination, the legal ambiguities associated with self-determination as evidenced recently by events in Kosovo, the expanded interpretation of internal self-determination and oppression, and the challenges posed by existing theories on self-determination and secession. While each of these themes involve considerable analysis, cumulatively they illustrate a need to adopt a new way of understanding minority-state relations and a more process-driven approach for resolving self-determination disputes.

1.2 Literature Review

The amount of scholarly research devoted to internal self-determination significantly increased following the era of decolonisation.[42] Yet, despite this increase, there is little clarity in definition and application. Importantly, scholarly interest has tended to focus

[39] *Reference re Secession of Québec* (n 34) [134]–[135].
[40] *See, e.g.,* Separate Opinion of Judge AA Cançado Trindade (n 24) [173]-[176], [186]-[188].
[41] *See* 'Pro-Russian separatists declare another region of Ukraine independent in echoes of Crimea annexation', National Post, April 7, 2014 <http://news.nationalpost.com/2014/04/07/another-region-of-ukraine-declares-independence-and-says-it-wants-to-join-russia/?__federated=1> accessed 29 June 2014.
[42] *See* M Weller, B Metzger and N Johnston, *Settling Self-Determination Conflicts Through Complex Power Sharing Agreements* (Martinus Nijhoff Publishers, Leiden 2008).

on the legality of external self-determination outside of colonialism[43] rather than the legal obligations and implications of internal self-determination. This has detracted from efforts to define internal self-determination relative to external self-determination.[44] A key reason for this may be explained by the absence of explicit legal doctrine on internal self-determination.[45] For instance, a right to internal self-determination is supported by scholarly opinion, regional documents like the *Lund Recommendations of Effective Participation of National Minorities in Public Life*,[46] national judicial decisions like the Supreme Court of Canada's *Reference re Secession of Québec*,[47] and implicitly drawn from the ICCPR and ICESR.[48] In comparison, United Nations General Assembly Resolutions 1514 (XV),[49] 1541 (XV),[50] 2625 (XXV)[51] clearly link external self-determination to the process of decolonisation.[52] This difference is crucial for understanding ambiguities in the contemporary application of self-determination. Whereas scholars like Raič,[53] Rosas[54] and Saul[55] have argued that internal self-determination represents of a number of rights[56] and possibilities,[57] much of the current debate still concerns questions about whether external self-determination has application outside of conditions associated with ending European colonisation.[58]

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[43] *See* Raič (n 7) 226.
[44] L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Co, Helsinki 1988) 357.
[45] ibid.
[46] *Lund Recommendations of Effective Participation of National Minorities in Public Life*, (Netherlands, OSCE, High Commissioner for National Minorities 1999).
[47] *Reference re Secession of Québec* (n 34) [138].
[48] Higgins (n 5) 119-120.
[49] UNGA Res 1514 (XV) 14 December 1960, *The Declaration on the Granting of Independence to Colonial Countries and Peoples*.
[50] UNGA Res 1541 (XV) 15 December 1960, *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter*.
[51] UNGA Res 2625 (XXV) 24 October 1970, *The Declaration on Principles of International Law Concerning Friendly Relations*.
[52] JJ Summers, 'The Rhetoric and Practice of Self-Determination: A Right of Peoples or Political Institutions?' (2004) 73(3) Nordic Journal of International Law 325, 328.
[53] *See* Raič (n 7).
[54] Rosas (n 7) 225.
[55] Saul (n 37).
[56] ibid 640.
[57] *See, e.g.,* Rosas (n 7) 243.
[58] *See, e.g.,* UNGA Res 50/6, 9 November 1995, *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*. The wording of the *Declaration* adopts the language of the UN General Assembly resolutions ending colonial conditions and reaffirms a commitment to self-determination for non-self-governing peoples (colonial peoples);
Castellino (n 8) 512.

As part of the current debate, two further issues require critical analysis. These include determining whether internal self-determination invokes obligations distinct from the application of external self-determination, and secondly, determining whether the broader right to self-determination should be reflexive in order to capture the continuous evolutionary changes in the interpretation of international laws.[59]

Significantly, opportunities to compare and evaluate international legal doctrine associated with self-determination are rare. Amongst others, Arp,[60] Burri,[61] Cerone,[62] Jovancović,[63] Muharremi[64] and Pippan[65] recently commented on the International Court of Justice's[66] 2010 *Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*,[67] and were critical of both the Court's role and findings in relation to how it constructively separated the act of independence from the right to self-determination. Had the ICJ pursued a mixed fact and law interpretation of Kosovo's 2008 unilateral declaration of independence, it is possible that the concept of internal self-determination would have benefited from greater clarity and understanding.[68] The commentaries of these scholars could, therefore, be considered important contributions to the main argument in this thesis as they expose key ambiguities and uncertainties within post-colonial self-determination theory.

A review of the scholarly opinions on the subject of self-determination following decolonisation will show that it is extensive and diverse. There are both theoretical

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[59] Saul (n 37) 643.
[60] B Arp, 'The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and International Protection of Minorities' (2010) 8 German Law Journal 847.
[61] T Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links' (2010) 8 German Law Journal 881.
[62] J Cerone, 'The International Court of Justice and the Question of Kosovo's Independence' (2010-2011) 17 ILSA J Intl & Comp L 335.
[63] MA Jovancović, 'After the ICJ's Advisory Opinion on Kosovo: The Future of Self-determination Conflicts' (2012) Annals Fac L Belgrade Intl Ed 292.
[64] R Muharremi, 'Note on the ICJ Advisory Opinion on Kosovo' (2010) 11 German Law Journal 867.
[65] C Pippan, 'The International Court of Justice's Opinion on Kosovo's Declaration of Independence' (2010) 3(3-4) Europäisches Jounral für Minderheitenfragen 145.
[66] Hereafter referred to as 'ICJ'
[67] *Advisory Opinion of 22 July 2010 - Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010. (Kosovo Advisory Opinion).
[68] Saul (n 37) 615; Separate Opinion of Judge Yusaf, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 22 July 2010 [11].

divisions relating to the actual definition and application of internal self-determination, as well as differences in opinion pertaining to the rights, roles and responsibilities of states, territorial minorities and the international community. Finally, with a scarcity of doctrinal authorities on internal self-determination, it should be appreciated that its meaning and definition is largely derived from extra-legal considerations. As remarked, this trend leaves scholars with little choice but to pursue purposeful moral arguments about self-determination and capture, as best as they can, contemporary attitudes that were not necessarily evident or relevant during decolonisation.

1.3 Research Questions

In support of the broader argument about how internal self-determination can be used to substantiate or evaluate the merits of specific territorial minority claims to external self-determination, this thesis will address the following questions:

1. What is the scope of internal self-determination and how is this scope influenced by oppression?

2. How can a global governance approach clarify the responsibilities and obligations of states, territorial minorities and the international community within processes of internal self-determination, whilst also providing a means to substantiate territorial minority claims to external self-determination?

1.4 Methodological Approach and Analytical Considerations

1.4.1 Importance to Contemporary Self-Determination Debate

According to the laws of the Medes and Persians referred to in the Book of Daniel, no royal decree or edict could be changed.[69] Although modern opinion tends to reject the notion of timeless laws and unchanging legal interpretations, the effects of decolonisation have been to create a static idea of self-determination that continues to

[69] The Committee on Bible Translation (trs), *The Holy Bible*, New International Version (Zondervan, Grand Rapids Michigan 2011) Book of Daniel 6:15.

influence post-colonial notions of the right.[70] Invariably, this means that the extant laws of self-determination are contextually specific to the era of decolonisation.[71] It also means that there is a need to review older ideas and interpretations. Contemporary post-colonial self-determination needs to be appreciated as a broader continuum of self-determination that includes not only the internal and external concepts, but also important topical concerns such as oppression, secession and territorial sovereignty that affect states, territorial minorities and the international community.

Given that much of the current debate about self-determination is premised upon the legacy of decolonisation, the willingness of states and the international community to engage in dialogue on issues like internal self-determination will be dependent upon coherent, consistent arguments about why it is still important and how it can be applied and enforced.[72]

A mix of legal and extra-legal considerations will be presented throughout this thesis. International treaties and resolutions remain critical for understanding the doctrinal challenges faced by scholars when attempting to advance post-colonial arguments on self-determination. At the same time, extra-legal considerations should not be downplayed as they reflect a vast array of important political, philosophical and moral arguments that are necessary for understanding these interpretations.

1.4.2 The Self-Determination Continuum: Internal and External Self-Determination

Throughout this thesis a number of arguments will be presented that look at the relationship between internal and external self-determination. A specific study of this relationship is integral for understanding what is included within the broader right to self-determination. There are, however, two distinct viewpoints about this relationship. On one hand, there is the argument that internal self-determination represents a strict

[70] *See, e.g.,* N Berman, 'Sovereignty in Abeyance: Self-Determination and International Law' (1988) 7 Wis Intl L J 51, 64-65; *See also* R White, 'Self-determination: A Time for a Re-assessment?' (1981) 28(2) NILR 147, 159.
[71] *Statement by Burmese Representative to the United Nations on General Assembly Resolution 2625*, UN Doc. A/AC.125/SR.68, 4 Dec. 1967, 8.
[72] This consideration mirrors what Franck has proposed to improve engagement on broader changes to international law. Franck, *Fairness in International Law and Institutions* (n 4) 372; Y Dinstein, 'Is There a Right to Secede' (2005) 27 Hous J Intl L 253, 307.

internal or domestic application with little connexion to external self-determination.[73] Raič argues that internal self-determination 'does *not* [sic] lead to the change of external or international boundaries of the State as it does in the case of external self-determination.'[74] This begs the question about whether one application can lead to the other.[75] Support for separation is premised upon internal self-determination having little legal authority to justify territorial changes,[76] unlike external self-determination, which has specific doctrine created during decolonisation. Higgins, the former President of the ICJ, seems to agree, but is pragmatic in suggesting that when there are no legal prohibitions, minorities are able to advance credible political and moral claims.[77]

Comparatively, the arguments of Buchanan, Oklopcic[78] and Skordas[79] suggest that the justification for any minority challenges against the territorial integrity of states depends on the treatment of the minority by the state. In this context, the cause and effect relationship between internal and external self-determination is clear. If the conduct of states towards territorial minorities contravenes state obligations to internal self-determination, then territorial minorities would be entitled to pursue specific external self-determination options like secession.

It will be demonstrated that an integrated perspective is more suitable for examining post-colonial self-determination compared to perspectives that tend to separate internal and external self-determination. A key reason is because an integrated approach addresses contemporary phenomena affecting territorial minorities and articulates that there are justified outcomes to inappropriate behaviour or adverse conditions even if not expressly identified in legal doctrine. Ultimately, however, part of the challenge in this thesis is the identification of considerations that will support the formulation or creation

[73] *See, e.g.,* S Senese, 'External and Internal Self-Determination' (1989) 16(1) Social Justice 19, 19.
[74] Raiç (n 7) 239.
[75] ibid 332.
[76] AS Åkermark, *Justification of Minority Protection in International Law*, (Kluwer Law International, The Hague 1997) 29-32; A Eide, 'In Search of Constructive Alternatives to Secession' in C Tomuschat (ed) *Modern Law of Self*-Determination, (Martinus Nijhoff Publishers, Dordrecht 1993) 139-176; Franck, 'The Emerging Right to Democratic Governance' (n 29) 46; Rosas (n 7) 225-251.
[77] Higgins (n 5) 124.
[78] *See* Z Oklopcic, 'Populus Interruptus: Self-determination, the Independence of Kosovo, and the Vocabulary of Peoplehood' (2009) 22(4) LJIL 677.
[79] *See* A Skordas, 'Self-Determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance' in N. Tsagourias (ed), *Transnational Constitutionalism. International and European Perspectives* (CUP, Cambridge 2007) 207.

of internal self-determination responsibilities and obligations. Required is an objective approach that includes the review and assessment of subjective criteria unique to minority-state relationships.

1.4.3 Territorial Minorities as Research Subjects

The key groups that are the focus of this thesis are territorial minorities or those communities with its synonymic meaning, such as national minorities or nations in defined territorial units. In other words, territorial minorities can be defined as majority populations with a common background or purpose that are distinct from other populations by claiming and occupying 'readily severable' territorial areas.[80] Although similar language was proposed and ultimately rejected during the drafting of UN General Assembly Resolution 2625 (XXV),[81] the definition adopted in this thesis provides appropriate parameters for looking at which groups are most active in contemporary self-determination conflicts.

While research on minorities tends to make common reference to ethnic minorities, temporary migrants or residents, and indigenous peoples,[82] there should be caution when using these terms interchangeably. Different research areas have adopted different definitions for various subject groups. For example, an anthropological approach to self-determination may define a 'minority people' as a culturally distinct population like Turkish immigrants to Germany, while 'national peoples' could include regionally concentrated populations like Tibetans in the Peoples' Republic of China, trans-state peoples like Hungarians in Slovakia, or indigenous peoples specific to pre-conquest habitation in certain territories.[83] Comparatively, international law has applied a stricter definition and thereby distinguishes, for example, peoples and minorities according to specific doctrinal rights and entitlements.[84] In the self-determination context, this difference is evident when questioning whether self-determining peoples,

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[80] White (n 70) 162; Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (n 26) 192.
[81] *See discussion in* A Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP, Cambridge 1995) 115-116.
[82] I Brownlie, 'The Rights of Peoples in Modern International Law' in J Crawford, (ed), *The Rights of Peoples* (Clarendon Press, Oxford 2001) 5.
[83] R Gurr, 'The Ethnic Basis of Political Action in the 1980s and 1990s', in R Gurr (ed), *Peoples Versus States: Minorities at Risk in the New Century* (United States Institute of Peace Press, Washington 2000) 17.
[84] *See Åaland Islands Case* (1920) League of Nations Official Journal Spec Supp 3, 3-4.

pursuant to UN General Assembly Resolutions 1514 (XV) and 2625 (XXV), was intended to include minorities.[85] Crawford highlights an important angle to consider when addressing this question. A minority may qualify as a people if the extent of its rights is limited to the application of internal self-determination, but it could be disqualified as a people if it pursues territorial claims in the same context of colonial peoples.[86]

Further notable differences in definition exist when looking at the rights of minorities and indigenous peoples.[87] Under the ICCPR, members of minorities have specific language and cultural rights.[88] These rights apply to individuals or collections of individuals, but not to groups or community entities.[89] In comparison, indigenous peoples receive formal international recognition as group entities[90] because of unique historical links to territories.[91] The significance of this arises in situations where territorial minorities are denied territorial rights because they are not recognised as distinct group-based entities like indigenous peoples. As a corollary, there may be little incentive for territorial minorities to engage states in meaningful dialogue to resolve territorial conflicts since issues of recognition and identity would remain contentious and unresolved.

Although minority rights are essential for promoting and protecting group members, this thesis attempts to show that existing minority rights associated with, for example, the rights of specific minority members under Article 27 of the ICCPR are different from the important group-based identity rights[92] that would be applicable for ensuring the 'autonomy or sovereignty of a group.'[93]

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[85] *See discussion in* Higgins (n 5) 121-130.
[86] *See discussion in* Crawford, 'The Right to Self-Determination in International Law' (n 5) 58-64.
[87] B Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92(3) AJIL 414, 437 and 450; *See also* B Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International Law' (2001) 34 NYUJILP 189.
[88] *See* Article 27, ICCPR (n 20)
[89] *See, e.g.,* Salomon and Sengupta (n 30) 10.
[90] *See, e.g.,* International Labour Organization Convention on Indigenous and Tribal Peoples in Independent States, No. 169 1989, Article 1(2); UNGA Res 61/295, 13 September 2007, *United Nations Declaration on the Rights of Indigenous Peoples* Articles 25-26.
[91] M Shaw, 'The Definition of Minorities in International Law', in Y Dinstein, & M Tabory (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Boston 1992) 16; SJ Anaya, *Indigenous Peoples in International Law*, (OUP, Oxford 1996) 86.
[92] *See, e.g.,* R Coomaraswamy, 'Identity Within: Cultural Relativism, Minority rights and the Empowerment of Women' (2002-2003) 34 GWILR 483, 483.
[93] *See, e.g.,* Salomon and Sengupta (n 30) 10.

The processes of marginalisation and minoritisation are also relevant to the identification of territorial minorities in the context of self-determination as they describe how groups become vulnerable to the loss of identity and specific community characteristics like culture and language.[94] Although territorial control does not necessarily guarantee that these characteristics will be preserved, it does support the notion that greater group autonomies help address specific challenges.[95] As such, a minority group that lacks community organisation or is sparsely populated will have different challenges, interests and needs compared to, for example, the Kurds in Northern Iraq, Northern Syria and Southern Turkey, the Catalans in Spain and the Québecois in Canada who represent majority populations in their respective regional territories.[96]

Expanding the focus of this thesis beyond territorial minorities to other community groups, sparsely populated minorities, or transient ethno-cultural groups with few claims to specific territories, challenges what may be possible for a practical and coherent approach that links internal self-determination to territoriality and external self-determination. Thus, the scope of analysis will be shaped by an independent definition of territorial minorities that illustrates the respective position of common territorial populations within a self-determination continuum that includes guaranteed rights to internal self-determination and conditional rights to external self-determination.

From another perspective, a global governance approach to internal self-determination can assist in the assessment of oppression and substantiate the merits of secessionist claims, which is not currently possible in existing international legal doctrine.[97] As such, minority-state relations should be analysed with an understanding that territorial

[94] I Léglise and S Alby, 'Minoritization and the Process of (De)minoritization: The Case of Kali'na in French Guiana' (2006) 182 Intl J of the Sociology of Language 67, 72-73.
[95] *See* Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (n 87) 437.
[96] W Kymlicka, 'Is Federalism a Viable Alternative to Secession?' PB Lehning (ed), *Theories of Secession* (Routledge, 1998) 134.
[97] *See, e.g.,* Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 466-468.

minorities have needs and interests that can only be effectively addressed through an inclusive framework of internal self-determination.[98]

1.4.4 Identifying Contemporary Sources of Oppression

The Oxford English Dictionary defines oppression as a prolonged cruel or unjust treatment or exercise of authority, control, power, tyranny or exploitation.[99] In reference to international law, the term is generally used to identify circumstances when states, peoples and minorities are illicitly denied certain rights or 'human dignity.'[100] In these instances, the 'repression of minorities'[101] would allow these groups to challenge the continued sovereignty of states over their territories.[102]

In the historic context of self-determination, oppression has been used to refer to two types of injustices; colonial oppression, and oppression suffered by territorial minorities after the decolonisation movement, sometimes called 'neo-colonialism or internal-colonialism'.[103]

During decolonisation, oppression was used to describe the conditions suffered by non-self-governing peoples under colonialism, alien domination and foreign occupation.[104] The denial of self-governance was seen as discriminatory and a threat to world peace,[105] and therefore provided justification for non-self-governing peoples to pursue external self-determination.

More recently, the Supreme Court of Canada referred to oppression during its review of the constitutionality of Québec's attempt to secede in 1995 by describing oppression as the denial or frustration of internal self-determination.[106] Importantly, the Court

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[98] J Gilbert and J Castellino, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 MLSJ 155.
[99] Oxford Dictionary of English 2nd Ed, (OUP, Oxford 2003).
[100] A Brysk, 'From Above and Below: Social Movements, the International System, and Human Rights in Argentina' (1993) 26 Comp Political Studies 259, 281.
[101] K Annan, *Interventions: A Life in War and* Peace, (Penguin Books, New York 2012) 97.
[102] M Sterio, 'On the Right of External Self-determination: "Selfistans," Secession, and the Great Powers' Rule' (2010) 19(1) Minn J Intl L 137, 169.
[103] H Hannum, 'Introduction' in H Hannum and EF Babbitt (eds), *Negotiating Self-determination* (Lexington Books, Lanham MD 2006) 1, 1.
[104] UNGA Res 1514 (XV) (n 49)
[105] ibid.
[106] *Reference re Secession of Québec* (n 34) [134].

expressed that these 'circumstances' could be interpreted as supplementary criteria to the colonial conditions of alien domination and foreign occupation.[107]

While the Court's reference supports the notion of injustice derived from neo-colonial or internal-colonial conditions, it is not entirely clear what particular considerations the Court was contemplating in its brief review. Some insight was provided when it reasoned that the people of Québec were not victims of oppression because they had not suffered attacks against their physical existence or integrity, or massive violations to their fundamental rights.[108] However, in later remarks the Court seems to have adopted a broader approach by linking oppression to the denial of meaningful access to government.[109]

By looking at oppression from a global governance perspective, it is argued that oppression can emerge from a variety of sources. For instance, it is conceivable that territorial minorities experience oppression when they are unable to achieve political representation in democratic systems of government because of majoritarian principles.[110] The very nature of the democratic process could create conditions that prevent the territorial minority from accessing government and therefore leave it exposed to the 'will of the majority.'[111] In another context, Nielsen used the example of Québec's pursuit of independence to suggest that threats to the self-identity and culture of its citizens by the English-speaking majority in Canada would substantiate a right to secession.[112] His example resembles the lesser-known term of 'ethnocide' to describe the effects of 'destruction of culture and other conditions essential for the continued distinctive existence of a group.'[113] While these considerations do not necessarily mean that all unfavourable conditions can be considered oppressive,[114] they do highlight that

[107] ibid [134]-[135].
[108] ibid [135]-[136].
[109] ibid [136], [138], [154].
[110] *See, e.g.,* S Wheatley, 'Minority Rights and Political Accommodation in The 'New' Europe' (1997) 22 EL Rev (Human Rights Survey) 30; GJ Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age' (1996) 32 STJIL 255, 279.
[111] Musgrave (n 16) 153.
[112] K Nielsen, 'Secession: The Case of Quebec' (1993) 10(1) J Applied Phil 29.
[113] P Thornberry, 'Is There a Phoenix in the Ashes? International Law and Minority Rights' (1980) 15 Tex Intl L J 421, 444;
See also Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International Law' (n 87) 195.
[114] An interesting research subject in this regard could include case studies of territorial minorities as non-state actors in international trade. Could a lack of decision-making relating to trade agreements signal

oppression or perceptions of oppression have to be assessed based on the specific circumstances of each minority-state relationship.

1.4.5 Extra-Legal Considerations

Reference to extra-legal considerations in this thesis is used to describe distinct factors from doctrine or formal sources of legal authority like treaties and legislation. They reflect a variety of scholarly, judicial and sociological perspectives relevant for understanding contemporary oppression and are intended to support a mixed legal and moral appreciation of internal self-determination.

Extant international legal doctrine, such as the UN General Assembly Resolutions 1514 (XV), 1541 (XV), and 2625 (XXV), which were developed at the height of decolonisation, should not be relied upon to provide full meaning to a contemporary or post-colonial understanding of self-determination. Formal laws only go so far to protect and promote minority rights and do not necessarily capture broader political, economic and social issues that may prevent minorities from fully accessing and contributing to systems of law and government.[115] Supporting this view, Franck argues that rules and norms in international law must be based on a community of shared values that represent the views and extra-legal considerations of non-dominant groups in society like minorities.[116] Only when these views are fully incorporated can a fair and just system of rules be established.[117]

Although there is no intention to approach the study of post-colonial self-determination from a specific legal positivist or legal naturalist position, it is argued that extra-legal considerations can create responsibilities and obligations that are *sui generis* or not necessarily derived from formal laws.[118] As will be demonstrated, moral arguments are

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conditions of oppression by virtue of economic disadvantage? During Québec's pursuit of greater sovereignty in the 1990s, the leaders of the sovereignty movement often cited economic factors as a necessary reason for independence. *See, e.g.,* M Cornellier, *The Bloc* (Lorimer, Toronto 1995) 108.

[115] *See, e.g.,* Gurr (n 83) 150-177.

[116] Franck, *Fairness in International Law and Institutions* (n 4) 10.

[117] Ibid 477.

[118] *See, e.g.,* Hill's analysis of Kantian 'imperfect duties' in TE Hill, 'Dignity and Practical Reason' *in Kant's Moral Theory* (Cornell University Press, Ithaca 1992) 149; For a critique of the Kantian position *see also* R Meerbote, 'Kant on Nondeterminate Character of Human Actions', in WA Harper and R Meerbote (eds), *Kant on Causality, Freedom, and Objectivity* (University of Minnesota Press 1984) 153.

prevalent throughout scholarly debate on post-colonial self-determination. Both remedial and liberal-nationalist self-determination theories advance arguments that describe self-determination based on principles not necessarily outlined under, for example, UN doctrine or existing international instruments. For instance, remedial theories can be interpreted as moral responses to various kinds of state behaviour, and therefore, argue that states and the international community have moral obligations that go beyond legal doctrine.[119]

Likewise, liberal-nationalist theories rely upon moral principles associated with libertarianism to suggest that groups have territorial rights that supersede state sovereignty.[120] Both theory schools argue that studying self-determination from a legal absolutist perspective based on legal doctrine from the era of decolonisation does not capture contemporary self-determination realities.[121] However, they also fall short of articulating how moral arguments link internal self-determination to external self-determination. This thesis advances the position that a global governance approach establishes this link by demonstrating that moral and legal obligations based on specific facts are relevant for evaluating the legitimacy of specific self-determination claims.

1.4.6 Secession as a Focus of Self-Determination Research

Secession is often described as a specific application of external self-determination, despite uncertainty as to whether it is a distinct international legal right.[122] In fact, uncertainty surrounding the legality of secession in post-colonial self-determination theory is one of the main issues dividing scholarly opinion.[123]

Secession has been defined as the withdrawal of 'persons, land and other economic assets from the jurisdiction of states.'[124] Although there are many reasons why a

[119] *See, e.g.,* Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 456-467.
[120] *See, e.g.,* Philpott (n 27) 358.
[121] *See, e.g.,* Beran 'A Democratic Theory' (n 12) 42-43; Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 455-459.
[122] *See, e.g.,* D Murswiek, 'The Issue of a Right of Secession – Reconsidered', in C Tomuschat, (ed), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Dordrecht 1993) 25; P Scharf, 'Earned Sovereignty: Judicial Underpinnings' (2003) 31 Den J Intl L & Poly 373, 381.
[123] Higgins (n 5) 120-125.
[124] M Freeman, 'The Priority of Function over Structure: A New Approach to Secession', in PB Lehning, (ed), *Theories of Secession*, (Routledge, London 1998) 13, 20.

territorial minority may seek to secede,[125] it would be problematic to believe that every territorial minority has secessionist motives.[126] When territorial minorities advance claims for greater powers within existing states, their claims are based on case-specific conditions associated with their relationship to the state.[127] In this context, the underlining problem of post-colonial self-determination lies in understanding its content and how it should be applied so that disputes between states and territorial minorities can be addressed in an objective and transparent manner.

1.5 Thesis Outline

One of the questions faced by scholars is whether oppression and conversely, internal self-determination, should be defined by specific criteria. While specific criteria, based on persistent and severe forms of humanitarian abuse would accurately capture direct forms of discrimination and oppression, it would overshadow important considerations like economic, social and political considerations that may be necessary to meet the needs of territorial minorities. Rigid criteria would also prevent flexibility and make it difficult to devise specific measures like poverty reduction programmes and policies necessary to address territorial minority needs and expectations within internal self-determination processes.[128] This is important, as it suggests that internal self-determination is as much a product of historic circumstances as a legal doctrine established during the era of decolonisation.

[125] Moore 'Introduction: The Self-Determination Principle and Ethics of Secession' (n 3) 6; Jenne (n 3) 15-25; Collier and Hoeffler (n 3) 37, 41.
[126] Howse and Knop suggest that groups may seek greater autonomy or federal powers rather than secession, but argue that efforts to gain greater autonomy based on nationalist principles can lead to a desire to be 'internally predominant.' R Howse and K Knop, 'Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective' (1992-1993) 1 New Eur L Rev 269, 272; *See also* R Lapidoth, 'Autonomy: Potential and Limitations' (1994) 1 Intl J Group Rts 269.
[127] Lapidoth (n 126) 277.
[128] Interestingly, Åkermark explores the misalignment of expectations by suggesting that internal self-determination represents individual human rights rather than group or collective rights. Åkermark (n 76).

1.5.1 The Evolution of Self-Determination and Legacy of Decolonisation: Interpretive Challenges Facing Territorial Minorities and Post-Colonial Self-Determination

Chapter two explores why the history and evolution of self-determination continues to challenge a coherent understanding of self-determination today. Particular focus, in this regard, will look at how the era of decolonisation has created a stranglehold on post-colonial interpretations of peoples and minorities. In many ways, the era of decolonisation has set the stage for understanding why there is a need for a global governance approach. The reasons why this period is so important to self-determination will be discussed throughout, but essentially decolonisation represents a culmination of historical ideas and perspectives that have contributed to a somewhat static understanding of international law[129] and self-determination particularly. Arguably, because of the overwhelming focus on ending colonial conditions, internal self-determination has not attracted as much attention and credibility as external self-determination in the facilitation of non-self-governing territories becoming newly independent states.[130]

Chapter two also identifies the ongoing arguments relating to identity rights and the identification of who is entitled to external self-determination.[131] While some would limit external self-determination to colonial peoples,[132] chapter two outlines the argument that if territorial minority rights under internal self-determination are suppressed, then groups would have rights to pursue external self-determination. In other words, because internal and external self-determination are presented as two interconnected concepts, the rights of minorities can carry over from one limb to the other based on specific conditions.

[129] *See, e.g.,* Franck, *Fairness in International Law and Institutions* (n 4) 140.
[130] *See, e.g.,* White (n 70) 159.
[131] Coomaraswamy believes that group-based identities are a fundamental minority right and go to the 'core of our sense of self and our desire for dignity.' Coomaraswamy (n 92) 484.
[132] Higgins (n 5) 121-124.

1.5.2 Understanding the Post-Colonial Status Quo: The Advisory Opinion on Kosovo and *Lex Obscura*

As part of a global governance approach, the international community has a significant role to play as a distinct intervener in self-determination conflicts. Particularly, it has a necessary supporting role in the minority-state relationship to monitor conditions and evaluate what would constitute oppression in the circumstances.

To date, the international community's position has been unclear vis-à-vis internal self-determination and oppression, with Judge Cançado Trindade, who was a member of the bench during the ICJ's *Advisory Opinion on Kosovo*, representing a lone voice in the argument that state sovereignty cannot act as a presumption against secession based on oppressive conditions. The analyses in chapter three of Judge Cançado Trindade and his peers, looking at the events prompting international intervention in Kosovo, as well as the merits of Kosovo's unilateral declaration of independence, provides a unique opportunity to illustrate how the ICJ and the international community more generally remain divided on issues relating to post-colonial self-determination. As the *Advisory Opinion on Kosovo* further illustrates, ambiguities relating to post-colonial self-determination need clarification to achieve long-term resolutions to conflicts. In this regard, it is proposed that a global governance approach looking at the specific circumstances of the conflict and the respective merits of Belgrade and Pristina's claims would have been an appropriate model to provide clarity.

1.5.3 Global Governance Considerations on the Scope of Internal Self-Determination

Whereas under decolonisation the international community focussed on remedying colonial oppression based on alien domination and foreign occupation,[133] chapter four looks at internal forms of oppression associated with the denial of human rights, the denial of political representation, and the denial of a territorial minority's ability to exercise its right to development. Although internal self-determination should not be defined or limited by these rights alone, it is argued that they flow from the common

[133] UNGA Res 1514 (XV) (n 49).

Article 1 of the ICCPR and ICESCR and have been referenced by both remedial and liberal-nationalist scholars as important considerations for satisfying self-determination responsibilities and obligations.

From a remedial theory perspective, human rights and access to political representation are fundamentally linked to moral and legal obligations that states must respect. These theories outline arguments interpreting self-determination and state sovereignty as being built upon existing international human rights and humanitarian laws.[134] From a liberal theory perspective, the denial of self-governance is a direct challenge to the idea that states should represent multiple interests[135] and the ability of specific territorial minorities to pursue economic, social, cultural, and political objectives relevant to what groups have self-identified as being integral to their 'well-being'.[136]

Any attempt to define internal self-determination in a vacuum would be problematic as it is necessary to appreciate that the considerations relating to human rights, political representation and the right to development identified above are subject to different interpretations and applications depending on the specific circumstances of the minority-state relationship.

Chapter four articulates that post-colonial self-determination includes both internal self-determination and external self-determination as causally connected concepts linked through the application case-specific considerations identified based on global governance analyses. Fundamentally, this means that internal self-determination acts as a qualifying factor for external self-determination. If internal self-determination is denied, territorial minorities may advance claims against the territorial sovereignty of the state. By presenting post-colonial self-determination as a continuum in which both internal and external self-determination are connected, greater clarity is provided in terms of understanding what options are available to address disputes.

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[134] *See, e.g.,* Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 432.
[135] Franck, *Fairness in International Law and Institutions* (n 4) 482.
[136] *See, e.g.,* Raič (n 7) 271; A Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession', in H Hannum and E Babbit (eds), *Negotiating Self-Determination* (Oxford, Lexington Books 2006) 83; See also 'Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples', UNGA Res 1514 (XV) (n 49).

1.5.4 Oppression and Secession: Post-Colonial Perspectives

Chapter five distinguishes different theoretical perspectives and opinions on the subject of oppression. This chapter contributes to the overall arguments in this thesis by illustrating that the concept of oppression has expanded the expectations surrounding post-colonial self-determination. A global governance assessment supports the notion that oppression is a subjective claim of victimisation or marginalisation supported by objective facts, and dependent on the application of internal self-determination to give it full meaning. It is a reflexive concept that both describes the conditions of what internal self-determination should *not* be and substantiates whether territorial minorities have a legitimate claim to pursue external self-determination.

1.5.5 Positional-Based Approaches to Internal Self-Determination

One lesson from the study of post-colonial self-determination is that even contemporary scholars disagree on the application of internal self-determination in relation to the broader right to self-determination. Particularly, there are fundamental theoretical differences as to what internal self-determination represents, to whom and how it should be applied. Chapter six critically explores these differences using comparisons between theories and by introducing specific legal and extra-legal considerations that are relevant to contemporary self-determination issues. Ultimately, the analyses in this chapter will show that the dominant theories on self-determination serve to entrench existing territorial minority and state perspectives rather than broker an understanding of alternative perspectives, interests, and needs.

What is evident is that there are significant theoretical differences between how remedial and liberal-nationalist theories interpret the right to self-determination. These differences reveal tendencies by scholars to adopt positional interests that favour or champion the perspectives of either states[137] or territorial minorities.[138]

Partisan differences are not simply related to the identification of an acceptable threshold or standard of oppression, but include a series of issues relevant to group

[137] *See, e.g.,* A Etzioni, 'The Evils of Self-Determination' (1992-1993) 89 Foreign Policy 21.
[138] *See, e.g.,* R McGee, 'A Third Liberal Theory of Secession' (1992) 14(1) Liverpool L R 45.

choices and sovereignty. For instance, there are liberal-nationalist theories that promote unilateral secession with or without evidence of oppression,[139] while Buchanan, a remedial theorist, believes that *bad* government vis-à-vis the treatment of minorities should not undermine any specific territorial claims that the state may have.[140] There is a need for a long-term solution to strengthen engagement between parties at the risk of exacerbating conditions.[141]

1.5.6 Applying a Global Governance Approach to Internal Self-Determination

Chapter seven presents a global governance approach that illustrates how internal self-determination should be applied in relation to external self-determination. Unlike other theories, a global governance approach calls for case-specific analyses of minority-state relationships in order to identify internal self-determination responsibilities and obligations and ensure that the 'special features of each case' are taken into account.[142] In doing this, the necessary considerations to determine if a state has committed oppression or whether a territorial minority is advancing a valid self-determination claim are outlined.

When considering that there are specific local, regional and international legal and extra-legal considerations associated with, for example, the adverse affects of globalisation, economic inequalities and human rights abuses, which affect territorial minorities, it is important to appreciate that these conditions cannot be defined by pre-set criteria, but identified and addressed through multi-party dialogue and factual based analyses.[143]

Chapter seven proposes two recommendations designed to support how a global governance approach should be applied. Firstly, it outlines that territorial minorities are able to exploit 'intermediary constructs' of power-influence or a normative meaning of the *pouvoir constituant* to attract recognition as group-based entities with abilities to

[139] C Wellman, 'A Defense of Secession and Political Self-Determination' (1995) 24(2) Philosophy and Public Affairs 142, 149.
[140] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 354-355.
[141] *See, e.g.,* Kymlicka, 'Is Federalism a Viable Alternative to Secession?' (n 96) 132.
[142] *See generally* Thürer (n 38); LC Chen, 'Self-Determination and World Public Order' (1990-1991) NDLR 66, 1287, 1297.
[143] Separate Opinion of Judge AA Cançado Trindade (n 24) [184].

advance specific territorial claims.[144] For example, a group's actual possession of specific lands could be one source of power, while other sources could include specific international treaty obligations that confer economic and exploitation rights for groups over specific territories and resources. Chapter seven also argues that both legal and extra-legal considerations are necessary for formulating specific responsibilities and obligations that become the substantive content of internal self-determination processes enjoyed by minorities and states. The formulation of responsibilities and obligations would either provide the basis for continued union between the territory and the state or provide legitimate grounds for pursuing external self-determination possibilities like secession if the responsibilities and obligations are breached.

1.5.7 Towards a New Approach to Post-Colonial Self-Determination

Chapter eight closes this thesis by proposing a method for how the international community can play an important role in the monitoring, reporting and enforcement of internal self-determination responsibilities and obligations. Particularly, it is proposed that the international community can substantiate territorial minority claims of oppression and failed processes of internal self-determination by providing support to the pursuit of external self-determination. As an added role, and in extreme situations of humanitarian suffering like in Kosovo during the 1990s and Bangladesh during the early 1970s, the international community could intervene based on just war principles.[145] Such a decision would invariably substantiate a finding of oppression, but more importantly, pave the way for the future independence of certain territories.

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[144] Although the concept of *pouvoir constituant* is derived from the French verb *constituer* and signifies a distinct meaning within constitutional theory to describe legitimate or de-facto sources of authority and power, its reference in this thesis has a normative meaning used to understand what can be referred to as the "building blocks" of minority power recognition under intermediary or pre-constitutional conditions. From this perspective, its normative meaning focuses on the relevance of self-amassed power during self-determination movements rather than conferred power from legal or constitutional sources. In other words, the *pouvoir constituant* within the self-determination context represents the accrual of actual power-influence that territorial minorities are able to leverage in their relations with states. *See, e.g.,* Rosas (n 7) 225; Skordas (n 79) 207; Oklopcic (n 78) 690.

[145] *See, e.g.,* Annan (n 101) 83-86.

1.6 Conclusion

Providing clarity to internal self-determination is critical for understanding the connexion between internal and external self-determination. The denial of internal self-determination would represent a pre-condition for a territorial minority to pursue external self-determination. However, before concluding that internal self-determination has been denied, it would be critical to outline specific circumstances from which oppression could be substantiated.

Significantly, because no two minority-state relationships are the same, should state responsibilities and obligations arise, it is essential for them to be explicitly clear and created to capture the concerns of specific legal and extra-legal considerations associated with human rights, political representation and the right to development. A global governance approach is reflexive to these changes and includes the understanding that not every territorial minority complaint or concern will be readily appreciable as a responsibility or obligation to be imposed on the state. As such, internal self-determination should be regarded as an objective process that may generate specific responsibilities unique to individual minority-state relationships.

Chapter Two: The Evolution of Self-Determination and Legacy of Decolonisation: Interpretive Challenges Facing Territorial Minorities and Post-Colonial Self-Determination

2.0 Introduction

In the history of self-determination, no other period has had such a profound influence on its interpretation and application as the era of decolonisation.[146] While nascent philosophical ideas on self-government and self-determination emerged during the seventeenth and eighteenth centuries, it was only after the signing of the *Treaty of Versailles* in 1919[147] that self-determination became a governing principle of international law.[148] However, with decolonisation under the stewardship of the UN system, important 'legal limitations' were created that reduced the scope of the external application of self-determination to colonial or non-self-governing peoples.[149] Since the beginning of the decolonisation process, eighty former non-self-governing territories have achieved independence[150] compared to only a handful of territories under post-colonial conditions.[151] From this perspective, decolonisation has limited self-determination to a 'once-for-all'[152] application that has continued to influence contemporary post-colonial perspectives. The extent of the influence upon post-colonial self-determination is illustrated by the debate concerning whether minorities are entitled to exercise external self-determination,[153] whether state territorial sovereignty should be

[146] *See generally* A Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2001-2002) 34 NYUJ Intl L & Pol 513.
[147] *Reprinted* 13 AJIL Supp. 151 (1919).
[148] A Cobban, *The Nation State and National Self-Determination* (Crowell, New York 1970) 39.
[149] *See, e.g.,* H Osterland, 'National Self-Determination and Secession: The Slovak Model' (1993) 25(3) Case W Res J Intl L 667-669.
[150] *See, e.g.,* 'The United Nations and Decolonization: History' (United Nations, 2013) <www.un.org/en/decolonization/history.shtml> accessed 22 December 2013.
[151] Arguable examples of a post-colonial application of secession include Bangladesh and Kosovo. The specific history of Eritrea and East Timor indicates that these territories had a continuing right to external self-determination under proxy colonial conditions following their absorption by Ethiopia and Indonesia respectively. *See* Musgrave (n 16) 242-243; DC Turack, 'Towards Freedom: Human Rights and Self-Determination in East Timor' (2000) 1(2) Asia-Pacific J on Human Rights L 55, 58; Crawford, 'The Right to Self-Determination in International Law' (n 5) 20.
[152] ibid.
[153] V Van Dyke, 'Self-Determination and Minority Rights' (1969) 14(3) Intl Studies Quarterly 223, 223.

conditional[154] and whether oppression under internal self-determination should be treated as a form of neo-colonialism.[155]

This chapter presents a critical analysis of the different contemporary issues facing post-colonisation, beginning with an historical overview showing how self-determination emerged as a specific principle of popular sovereignty and self-government during the seventeenth and eighteenth centuries. In underlining the historical evolution, it will be demonstrated that by the late nineteenth century to the creation of the UN in 1945, self-determination had evolved to become a representation of liberal and nationalist ideas on territorial sovereignty. Importantly, the decolonisation process created a strict legal framework diverging considerably from earlier ideas on self-determination. With UN involvement came the creation of laws and rules restricting the application of self-determination from territorial minorities. As such, it can be said that self-determination became far more exclusive to what was originally conceived by earlier thinkers. The original ideas, associated with political sovereignty and self-government for distinct territorial populations, were somehow lost in the face of the desire to achieve greater international stability and order.[156] And yet, as the case of Bengali independence demonstrates, secession is sometimes necessary to achieve stability and order.[157] Although the point of this thesis is not to argue for the re-adoption of every early idea on political sovereignty and self-government, it is important to appreciate that in certain cases comparisons can be made between the conditions faced by colonial peoples and the conditions faced by territorial minorities under neo-colonialism. Besides human rights abuses, many of the original ideas associated with group identity and the ability for territorial minorities to exploit the lands on which they reside were lost to the forces of decolonisation.

This chapter also demonstrates that external self-determination was deployed as a vehicle of decolonisation for transferring sovereignty from metropolitan states[158] to colonial territories. It represented a right for colonial peoples, but was exhausted once

[154] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 337.
[155] Hannum 'Introduction' (n 103) 1.
[156] *See, e.g.,* Anaya (n 91) 42.
[157] J Rehman, 'Reviewing the Right of Self-Determination: Lessons from the Experience of the Indian Sub-Continent' (2000) 29(4) Anglo-Am LR 454, 465-468.
[158] Term used by Crawford to seemingly describe imperial and mandate trustee states. *See, e.g.,* J Crawford, 'The Rights of Peoples: 'Peoples' or 'Governments'?' in J Crawford (ed), *The Right of Peoples* (Clarendon Press, Oxford 2001) 58.

independence had been achieved. In other words, it was limited to pre-existing colonial territories and not available to the various territorial minorities inhabiting those territories. Thus, the process of decolonisation had both direct and indirect implications upon the meaning of colonial peoples, as well as the identities and identity rights of populations within colonies. Importantly, the process did not prescribe how the exercise self-government should occur after independence.[159] As such, a the transition between decolonisation and post-colonial conditions calls for a review of the earlier historical ideas about the recognition of minority groups and their relations with states.

2.1 Historical Origins of Self-Determination

2.1.1 Enlightened Philosophical Perspectives on Political Sovereignty

Early notions of self-determination emerged throughout Europe and the Americas in the seventeenth and eighteenth centuries when disaffected populations sought to create their own systems of governance and legal authority. In England, the Glorious Revolution of 1688[160] signified a radical shift in state governance and political association as the principles of parliamentary sovereignty, individual liberty, and constitutionalism inspired a national consciousness based on the common good of the people.[161] Key to this transformation was the belief that the 'common good' resides with the nation[162] and the people and the state treated as an indivisible whole. The idea that sovereignty should be derived from the people was a revolutionary shift in perspective,[163] which set the stage for the evolution of later self-determination theory.[164]

English political ideas spread to France where new ideas on political sovereignty were redefined and reapplied in the latter part of the eighteenth century. Specifically, the Genevan philosopher, Rousseau, believed that the state 'must have a universal and

[159] This was a key complaint advanced by East Pakistan against Pakistan to support its claim that the right to self-determination had never been fulfilled. *See* Rehman (n 157) 465-468.
[160] In what has is also known as the Bloodless Revolution, the English Parliament effectively established a new constitutional association between the monarchy and parliament.
[161] *See generally* M Ashley, *The Golden Century* (Praeger, 1969).
[162] J Locke, *Two Treatises of Government* (P Laslett ed, CUP, Cambridge 1970) 384, 385.
[163] For a further discussion, *see* Crawford, 'The Right to Self-Determination in International Law' (n 5) 12.
[164] R Emerson, 'Self-Determination' (1971) 65 AJIL 459, 463;
R Sureda, *The Evolution of the Right to Self-Determination: A Study of United Nations Practice* (AW Sijthoff, Leiden, The Netherlands 1973) 105-106.

compelling power to move and dispose of each part in whatever manner is beneficial to the whole'.[165] He believed that *de jure* sovereignty was a product of 'popular self-expression'[166] manifested by the 'general will'.[167] The influence of Rousseau upon his contemporaries was profound, as his ideas 'prepared the ground for the French Revolution'[168] and became the cornerstone of Jacobin views on social order in revolutionary France.

Sieyès and Robespierre, who adhered to Rousseau's philosophical ideas, whilst governing France at the height of the Revolution, believed that private interests threatened the strength of sovereign expression and were appropriate only for 'partial societies' or those communities weak in political sovereignty.[169] While rejecting the idea that the state could have 'sectional associations' comprised of private interests, they called for a homogenous expression of popular sovereignty derived from what Talmon referred to as the sacrifice of personal interest to the general good[170] and 'French nationhood'.[171] Talmon describes Robespierre as being particularly uncompromising in the pursuit of a homogenous state demanding that the citizen 'bring to the common pool the part of public force and of the people's sovereignty which he holds'.[172] The all-absorbing commitment to 'popular enthusiasm'[173] and ill-regard towards minorities as 'perverse groups'[174] would be highly influential in the formulation of political sovereignty and 'impact' upon minorities[175] over the next two centuries.

New ways of thinking about sovereignty and self-governance were taking root on both sides of the Atlantic. Thomas Jefferson, who served as the American ambassador to France during its Revolution, drew inspiration from both Gallic and Anglo influences when asserting that independence was a right of people, and that political legitimacy

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[165] JJ Rousseau, *The Social Contract* (M Cranston tr, Penguin Books, Harmondsworth 1968) 74.
[166] JL Talmon, *The Origins of Totalitarian Democracy* (Praeger Publishers, New York 1960) 6 and 43.
[167] Rousseau (n 165) 66, 76.
[168] Talmon (n 166) 19.
[169] Rousseau (n 165) 66, 76; Talmon (n 166) 75.
[170] Rousseau (n 165) 72-73, 83.
[171] ibid 113.
[172] ibid 83.
[173] ibid 6.
[174] ibid 201.
[175] Musgrave (n 16) 2-3.

was authorised by the 'laws of nature and of nature's God'.[176] Jefferson and his fellow drafters of the American Constitution reasoned that they had a moral right to independence from the British Crown based on the will of the people.[177]

Like Rousseau, Jefferson's notion of sovereign authority was closely linked to the idea of *patrie* or affection for one's home territory.[178] There was a belief during the eighteenth century that territories could be identified by the common characteristics of their inhabitants.[179] The German idealist philosophers, Schelling and Fichte, also drew from these principles when reasoning that inner self-realisation or an individual's self-determination was naturally bound to culture and the social realities of the nation.[180] Their ideas were premised upon there being a fusion between public and private sentiments and that the individual's moral expression is derived from community ethics.[181]

2.1.2 Liberal-Nationalist Perspectives on Self-Government and Self-Determination

Revolutionary ideas on political sovereignty formed the basis of nationalist theories on early self-determination in the nineteenth century. These theories advocate that territorial sovereignty should be based on the identity of minority members.[182] Thus, group membership is premised upon residency[183] or common ethnic, cultural or linguistic factors.[184] The Italian revolutionary, Giuseppe Mazzini and the English political philosopher, John Stuart Mill, were proponents of territorial sovereignty based

[176] V Van Dyke, 'The Individual, the State, and Ethnic Communities in Political Theory' in W Kymlicka, (ed), *The Rights of Minority Cultures* (OUP, Oxford 1995) 45.
[177] GJ Bereciartu, *Decline of the Nation State* (University of Nevada Press, Reno 1994) 162.
[178] *See, e.g.,* M Viroli, *For Love of Country: An Essay on Patriotism and Nationalism* (OUP, Oxford 1995) 77.
[179] Van Dyke 'The Individual, the State, and Ethnic Communities in Political Theory' (n 176) 44.
[180] *See, e.g.,* D Sturma, 'Politics and the New Mythology: The Turn to Late Romanticism' in K Ameriks (ed), *German Idealism* (CUP, Cambridge 2000) 219, 233*; See also* H Kohn, 'The Paradox of Fichte's Nationalism' (1949) 10(3) Journal on the History of Ideas 319.
[181] *See, e.g.,* Sturma (n 180) 233*; See also* H Kohn (n 180) 319.
[182] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 83; Note that the majoritarian or plebiscitary theory and nationalist or ascriptivist theory are identified as belonging to a general liberal-nationalist school of self-determination theory discussed in subsequent chapters.
[183] ibid.
[184] Summers, 'The Rhetoric and Practice of Self-Determination' (n 52) 338.

on mono-national characteristics.[185] Both reasoned that states would be more likely to endure political instabilities and guarantee the rights and interests of their citizens if they share the same nationality or ethnic identity.[186]

While nationalist ideas would continue to evolve in the nineteenth century, liberal ideas on self-government were concurrently developing. Liberal, majoritarian or plebiscitary theories on self-government and self-determination prescribe that the source of sovereign authority should be based on individual freedoms and representative government. They outline that if a majority of the population in a given territory chooses to secede from a state, then there becomes a unilateral right vested in that decision[187] similar to the provisions in the *Declaration of Independence* of the American Thirteen Colonies.[188] Liberal perspectives promote the idea that the emergence of new communities occupying distinct lands can become self-identifying peoples for the purpose of exercising self-determination.[189]

With the dissolution of the Ottoman and Austrian-Hungarian Empires following the First World War, a plethora of national-groups and minorities sought a place on the new European map. Under the administration of the victorious Entente powers at the Versailles Conference, many new states in Eastern Europe were created and the concept of self-determination became synonymous with disparate forms of self-government and 'free states.'[190] Franck attributes the impetus for state creation at Versailles to the imagination of the American and French revolutionaries and notion of the 'inherent "rights of man" as adumbrated by the Scottish Enlightenment and Immanuel Kant'.[191] According to US President Wilson, attaining statehood formed part of the legitimate

[185] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 89-90; *See also* JS Mill *Considerations on Representative Government* (Prometheus Books, New York 1991).
[186] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 89-90; *See also* Mill (n 185).
[187] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 83.
[188] *See* S Tierney, 'The Search for a New Normativity: Thomas Franck, Post-modern Neo-tribalism and the Law of Self-determination' 13(4) EJIL 941, 947.
[189] Philpott (n 27) 353.
[190] A Cassese, *Human Rights in a Changing World* (Polity Press, Cambridge 1990) 158.
[191] Franck, *Fairness in International Law and Institutions* (n 4) 149.

rights of small nations and their claims to 'autonomous development.'[192] He stated prior to leaving for the Versailles Conference that:

> Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed by their own consent. Self-determination is not a mere phrase, it is an imperative principle of action which statesman will henceforth ignore at their peril.[193]

Valentine suggests that Wilson's notion of self-determination was a reflection that the 'boundaries of the nation and the state should coincide.'[194] Beran remarks that this idea was not based on a specific liberal or nationalist perspective of self-determination, but to be applied 'only to peoples and territories unsettled by the war.'[195] When looking at the Versailles Conference and ensuing nation-building process in Eastern Europe, Beran's remarks seem accurate, as the method for applying self-determination was unclear or ad hoc and was not available to all groups.[196]

In MacMillan's opinion, the ad hoc approach to nation-building meant that groups that were poorly represented at the Versailles Conference, such as the Slovaks, Armenians and Slovenians, achieved few if any desired political gains, whilst the Czechs and Greeks who were represented respectively by the influential figures of Tomás Garrigue Masaryk and Elefthérios Kyriákou Venizélos, achieved far-reaching political and territorial concessions.[197] For these reasons, early Wilsonian self-determination lacked an objective process and coherent theoretical appreciation to enable universal application.[198]

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[192] M MacMillan, *Paris 1919* (Random House, New York 2001) 11.
[193] H Temperley, *A History of the Peace Conference of Paris, Vol. I and IV* (OUP, London 1920 and 1921) 180 cited in Musgrave (n 16) 24.
[194] JR Valentine, 'Toward a Definition of National Minority' (2004) 25 Den J Intl L & Poly 445, 449.
[195] Beran, 'A Democratic Theory' (n 12) 33.
[196] *See, e.g.,* MacMillan (n 192) 11, 486-487.
[197] ibid 229-242, 347-365.
[198] Pomerance (n 9) 1.

2.1.3 Towards Universality and a Governing Principle of International Law

The creation of the League of Nations' Mandate System[199] represented a significant step in the evolution of self-determination. In Cobban's opinion, the inter-war period following the Versailles Conference transformed self-determination from a series of ideas to a legal principle shared between League of Nations members.[200] The international community, for the first time, agreed to a formula specifying how territorial populations could become independent self-governing peoples.[201]

Although the Mandate System facilitated the transition of sovereignty from territories to states, the process was rudimentary. Generally, self-governance was achieved only after territories could satisfy certain social, political, and economic conditions 'thought necessary to support a functioning nation-state'.[202] In practise, this meant that the considerations used to evaluate the capacity for self-government often reflected economic rather than democratic or political considerations.[203] For instance, territories were classified according to their levels of economic maturity, seemingly based on a territory's contemporary contribution to world commerce and trade.[204] Consequently, the nature of the Mandate System could be said to reflect relationships of patronage between trustee states like the United Kingdom and Belgium and territories like Mesopotamia and Ruanda-Urundi.

The classification of territorial maturity illustrates the first relatively uniform approach taken by the international community to apply self-determination. Significantly, however, the Mandate System excluded the interests and views of mandate populations and did not define specific formulae for the self-governance of the territories, but was merely concerned about their transition to independent states. In other words, there was little thought about the interests of territorial minorities within these territories or how these territories would exercise self-governance after independence. Franck makes a convincing argument that the transition to statehood was a reflection of the international

[199] *See* Anghie, 'Colonialism and the Birth of International Institutions' (n 146).
[200] *See, e.g.,* Cobban (n 148) 39.
[201] Crawford, 'The Right to Self-Determination in International Law' (n 5) 12.
[202] Anghie, 'Colonialism and the Birth of International Institutions' (n 146) 515.
[203] ibid 513.
[204] ibid 586.

community's commitment to order and stability[205] over specific minority arguments for 'justice and change', which would continue to challenge minority-state relations after decolonisation.[206]

When the UN succeeded the League of Nations following the Second World War, the principles of self-governance for mandate peoples was extended to all non-self-governing territories.[207] Chapters XI and XII of the *Charter of the United Nations*[208] provide that states are to take measures for developing self-government in both mandates and all non-self-governing territories. Although the term self-determination is not mentioned in either chapter, Pentassuglia argues that they have the same meaning as self-determination outlined under Articles 1(2) and 55 of the *Charter*.[209] In this sense, reference to self-governance in Chapters XI and XII are *pari materia* with Articles 1(2) and 55, and therefore oblige states to justify their continued administration over non-self-governing territories.[210] Pentassuglia's interpretation is consistent with attitudes that began emerging during the decolonisation process linking broader territorial sovereignty to internal forms of decision-making.[211]

Indeed, new attitudes linking the decolonisation process to questions about internal self-governance were expressed in the ICJ's *Namibia* advisory opinion.[212] The ICJ emphasised that the administration of trust territories needed to be conducted according to the interests of the indigenous population and with a spirit of tutelage to foster

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[205] Franck cites the ICJ *Preah Vihear* case to illustrate the international community's desire to ensure the stability and finality of territorial boundaries. *Case concerning the Temple of Preah Vihear (Cambodia* v *Thailand), Merits,* Judgment of June 15, 1962: ICJ Reports 1962, 6, para. 34. Cited in Franck, *Fairness in International Law and Institutions* (n 4) 153.

[206] ibid.

[207] Article 22, *Covenant of the League of Nations,* 28 June 1919.

[208] Chapter XI aims to 'promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence.' Chapter XII expands the aim of Chapter XI by providing that the trusteeship system may also apply to territories held under mandate, territories, which may be separated from Axis Power states following the Second World War, and territories voluntarily placed under the trust system by states responsible for their administration. *Charter of the United Nations* (adopted 26 June 1945, entered into force on October 24) 59 Stat 1031, UNTS 993.

[209] Pentassuglia (n 19) 305; *see also* DW Bowett, 'Problems of Self-Determination and Political Rights in Developing Countries' (1966) 60 Am Soc of Intl L 129, 134.

[210] EA Laing, 'The Norm of Self-Determination, 1941-1991' (1991-1992) 22 Cal W Intl LJ 209, 211-212.

[211] *See* Franck, *Fairness in International Law and Institutions* (n 4) 154-169.

[212] *Advisory Opinion of 21 June 1971 - Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, ICJ Reports 1971,
16 <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=a7&case=53&code=nam&p3=0> accessed 6 October 2008. (Namibia Advisory Opinion).

independent standing.[213] More specifically, the Court stated that South Africa had failed to respect its 'sacred trust' as a trustee over the mandate of South West Africa that had been annexed from Germany.[214] The ICJ concluded that because South Africa had denied the inhabitants of South West Africa opportunities to exercise free choice and political decision-making, South Africa had lost its authority to exercise jurisdiction over the territory. Fundamentally, the ICJ's findings could be said to resemble a key argument made throughout this thesis relating to internal self-determination. Namely, when internal self-determination is denied or there are no internal means for territorial minorities to exercise social, economic and cultural decisions, then state sovereignty may be revoked.

2.2 Self-Determination at the Height of Decolonisation

By 1960, the continued colonial administration of non-self-governing territories was fast losing credibility in the face of international desire to end colonialism.[215] However, unlike the ad hoc application of self-determination after the Versailles Conference,[216] the process under decolonisation followed a strict method of conferring the right to self-determination on territories with pre-existing colonial boundaries.[217] In this sense, self-determination emerged as the primary mechanism for securing existing colonial boundaries. Indeed, the discussion below will show that issues of territoriality would be fundamental for understanding the limits to external self-determination, as well as for identifying challenges that emerged when decolonisation was 'virtually accomplished'.[218]

The link between self-determination and territorial integrity is based on the principle of

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[213] Article 22, *Covenant of the League of Nations,* 28 June 1919.
[214] *Namibia Advisory Opinion* (n 212).
[215] RKM Smith, *International Human Rights* (OUP, Oxford 2003) 271.
[216] *See* MacMillan (n 192).
[217] *See* Van Dyke 'The Individual, the State, and Ethnic Communities in Political Theory' (n 176) 44; Musgrave (n 16) 150; Exceptions include Palestine and Ruanda-Urundi. *See,* Parts A and B, UNGA Res 181(II), 29 November 1947, *The Future Government of Palestine/Palestine Mandate*; UNGA Res 1746 (XVI), 27 June 1962, *The Future of Ruanda-Urundi*.
[218] Franck, *Fairness in International Law and Institutions* (n 4) 140; *see also* Opinions 1 to 11 of the *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia* (1992) 31(6) ILM 1488, 1494-1587. During the break-up of the former Yugoslavia, the Badinter Arbitration Committee found that the predominance of Serbian minorities in certain areas of Croatia and Bosnia-Herzegovina did not restrict the right of Serbs in these new states to self-determination, but limited their application of the right to the boundaries of the new states.

uti possidetis juris, which was first applied to former Spanish colonies in Latin America[219] and became a defining factor of the decolonisation process. *Uti possidetis juris* provides that when a state transfers its sovereignty to a colony, the colonial boundaries must be respected.[220] It aims to provide for the protection of new states by rebutting claims against *terra nullius* in unsettled areas and by minimising the possibility of conflict between colonial successors.[221] The ICJ also provided reference to the principle in the context of African decolonisation by stating its purpose was 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.'[222] While the doctrine has provided political and economic stability to new states,[223] it has also been contentious because of its rigidity in upholding territorial permanence in the face of historic rights to land[224] and specific grievances between territorial minorities and states during decolonisation.[225]

UN General Assembly Resolution 1514 (XV) stresses that territorial integrity is a superseding right in international law with the aim to protect state boundaries. When interpreted in the context of decolonisation and external self-determination specifically, this implies that only peoples who 'inhabit a territorial continuum'[226] are entitled to exercise the right.[227] The ICJ has upheld this position on a number of occasions,[228] as

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[219] Higgins (n 5) 122-123.
[220] J Castellino, *International Law and Self-Determination* (Martinus Nijhoff Publishers, The Hague 2000) 41.
[221] *Case Concerning the Frontier Dispute (Burkina Faso / Republic of Mali)*, Separate Opinion of Judge Abi-Saab, 661, 111, [13] <http://www.icjcij.org/docket/index.php?p1=3&p2=3&case=69&code=hvm&p3=4> accessed 6 October 2008; *see also* Castellino (n 8) 506-507.
[222] *Case Concerning the Frontier Dispute (Burkina Faso / Republic of Mali)*, Frontier Dispute, Judgment, ICJ Reports 1986, 554 <http://www.icjcij.org/docket/index.php?p1=3&p2=3&case=69&code=hvm&p3=4> accessed 6 October 2008.
[223] WE Butler, 'Territorial Integrity and Secession: The Dialectics of International Order' in J Dahlitz (ed), *Secession and International Law* (TMC Asser Press, The Hague 2003) 121.
[224] Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International Law' (n 87) 236; *see also* U Umozurike, *Self-Determination at International Law* (Archon Books, Hamden, Connecticut 1972) 236.
[225] ibid.
[226] Raday, 'Self-Determination and Minority Rights' (n 6) 458.
[227] Pentassuglia (n 19) 308.
[228] *See, e.g., Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)*, Judgment of November 12, 1991: [1991] ICJ Report 53 <http://www.icjcij.org/docket/index.php?p1=3&p2=3&code=gbs&case=82&k=73> accessed 16 October 2008.

well as the General Assembly in its penultimate paragraph to Resolution 2625 (XXV), which states that:

> Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent states conducting themselves in compliance with the principle.

In the *Western Sahara* advisory opinion,[229] the ICJ referred to General Assembly Resolution 2625 (XXV)[230] when emphasising that the political choices of a people apply to any political association freely determined by the people.[231] The Court's view was that the choices of a people should reflect a 'human community sharing a common desire to establish an entity capable of functioning to ensure a common future.'[232] However, the arguments of Judge Dillard reveal an underlying paradox between the free political decision-making of groups and territorial integrity. His famous dictum that, 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people',[233] shows not only a commitment to the interests of the inhabitants of territories, but consideration that territorial claims include a degree of sophisticated analysis to substantiate territorial claims.[234]

However, if external self-determination provides the means to end to colonial conditions, what role would it have once all colonial territories have achieved independence?[235] While this issue continues to be an important subject in modern discussion,[236] the Supreme Court of Canada in *Reference re Secession of Québec* reasoned that to restrict the application of external self-determination to colonial

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[229] *Advisory Opinion of 16 October 1975 - Western Sahara*, ICJ Reports 1975 [31]-[32], [121]. <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=69&case=61&code=sa&p3=0> accessed 6 October 2008. (The Western Sahara Case).
[230] UNGA Res 2625 (XXV) (n 51)*; see also* White (n 70).
[231] *The Western Sahara Case* (n 229).
[232] Smith (n 215) 272, citing UN Special Rapporteur and former judge of the Inter-American Court of Human Rights, Héctor Gros Espiell.
[233] Separate Opinion of Judge Dillard, *Advisory Opinion of 16 October 1975 - Western Sahara*, ICJ Reports 1975, 12 [122] <http://www.icjcij.org/docket/index.php?p1=3&p2=4&k=69&case=61&code=sa&p3=4> accessed 6 October 2008.
[234] *The Western Sahara Case* (n 229) [42]-[43].
[235] J Mayall, *Nationalism and International Society* (CUP, Cambridge 1992) 50.
[236] Musgrave (n 16) 188-191.

peoples would undermine the purpose of self-determination as something that was developed for universal application to protect human rights.[237]

2.3 From Decolonisation to Post-Colonial Conditions: Self-Determination and Territorial Minorities

Understanding the transition from decolonisation to a post-colonial application of self-determination involves asking 'how peoples might exercise that right within existing independent states'.[238] It also involves understanding the effects of decolonisation upon territorial minorities and the particular challenges faced by such minorities following decolonisation. As illustrated by the Biafran and East Pakistani wars in the early 1970s, territorial minorities under decolonisation faced specific challenges associated with both identity rights and human rights.[239] An analysis of identity rights will be discussed below when looking at, for example, Article 27 of the ICCPR. However, it should be appreciated that these rights generally encompass issues relating to group recognition and whether territorial minorities should be interpreted as self-determining peoples. The importance of identity rights cannot be understated. Whether a state recognises a territorial minority as a self-determining people can have a significant effect on the peace and stability of minority-state relations.

The discussion on human rights in the following section will be used to draw attention to the subject of neo-colonialism following decolonisation. A brief analysis of this subject will demonstrate that human rights vulnerabilities following independence can be credibly linked to earlier colonial conditions. Looking at neo-colonialism through the lens of human rights and identity rights will be an important bridge into chapter three where there will be an in-depth examination of the scope of internal self-determination and contemporary oppression.

[237] *Reference re Secession of Québec* (n 34) [124].
[238] White (n 70) 159.
[239] Musgrave (n 16) 191, 195-199.

2.3.1 Neo-Colonialism Following Independence

Human rights and identity rights, perhaps better than any other issues have raised the question about what 'form'[240] self-determination should take within independent states following decolonisation. They highlight comparable instances of marginalisation and human suffering comparable to conditions under colonisation.[241] Perhaps more importantly, the term neo-colonialism is used to justify a right to external self-determination following a colony's independence based on comparable conditions. Franck suggests that:

> …it is conceivable that international law will define such repression, prohibited by the Political Covenant, as coming within a somewhat stretched definition of colonialism. Such repression, even by an independent state not normally thought to be "imperial" would then give rise to a right of "decolonization".[242]

Franck's analysis highlights a challenging aspect of post-colonial conditions and expectations. Namely, he uses the example of human rights violations to describe what society must *not* be in the treatment of minorities, rather than describing what it *should* be. In the absence of a clear understanding of internal self-determination, neo-colonialism has almost exclusively been referred to gross human rights abuses sufficient to invoke comparisons to colonialism. The same understanding has also been applied to oppression. However, when looking at contemporary conditions, should oppression be something associated exclusively with colonial conditions? In chapter three this question will be further analysed with the proposal that there are broader legal and extra legal considerations affecting territorial minorities not necessarily confined to human rights. This is important because it distinguishes post-colonial conditions from decolonisation. In other words, an understanding that decolonisation is *lex specialis*[243] rather than representing an absolute authority on the understanding and application of self-determination, will mean that contemporary, as well as earlier historic considerations associated with territorial minority needs, can be better addressed.

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[240] Higgins (n 5) 117.
[241] TM Franck, 'Postmodern Tribalism and the Right to Secession', in CM Brölmann, R Lefebre and MYA Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijoff, Dordrecht 1993) 3, 13-14.
[242] ibid 13-14.
[243] White (n 70) 147, 169.

Like Franck, Raič presents a similar argument suggesting that internal self-determination is the expression of political participation in the decision-making processes of states, which if denied would invoke comparisons to colonial oppression.[244] His argument indicates that the *modus operandi* of internal self-determination is something that begins when the application of external self-determination is complete,[245] inferring that it is up to states to ensure that human rights and other forms of internal decision-making are available once independence has been achieved.

Raič's interpretation presents difficulties because it conceivably creates a situation in which the claim to neo-colonialism is ever-present in the absence of a clear idea of what internal self-determination is supposed to mean besides the right to 'continually' re-create political, economic and social order.[246] In conflicts like East Pakistan and Biafra, comparisons to the worst of colonial conditions were clear, since they included widespread violence and even genocide.[247] However, even during the Biafran War, the international community responded passively to Igbo claims of human rights and humanitarian abuses. The position taken by the African Union captured the sentiments of most states when it expressed that the problems in Biafra were of internal concern and relevant only to Nigeria.[248] Impervious attitudes to human suffering and possible neo-colonial conditions were premised upon the notion that the sanctity of state territorial boundaries takes precedence over human rights and humanitarian considerations.[249] It is uncertain of what can be made of this situation, as calls for humanitarian intervention are still being raised.[250]

Comparisons between colonial and neo-colonial conditions have led to appeals for a balance between the right to internal self-determination and territorial integrity. Nanda suggests the suffering endured by minorities could be treated as a legitimate reason to

[244] Raič (n 7) 237, 326.
[245] Rosas (n 7) 250.
[246] Ryan (n 19) 65; *see also* Rosas (n 7); Pentassuglia (n 19); Kimminich (n 19).
[247] Rehman (n 157) 468.
[248] Musgrave (n 16) 198.
[249] Higgins (n 5) 127; *see also* MG Kaladharan Nayar, 'Self-Determination Beyond the Colonial Context: Biafra in Retrospect' (1975) 10 Tex J Intl L 321.
[250] Annan (n 101) 97.

pursue external self-determination after independence,[251] while Buchheit recognised that at a certain point, the 'severity of a State's treatment of its minorities becomes of international concern', which could justify remedial secession.[252] More recently, Judge Cançado Trindade, sitting on the ICJ's *Advisory Opinion on Kosovo*, argued that the adverse treatment of the people of Kosovo by the Federal Republic of Yugoslavia was a clear example of the violation of their right to self-determination.[253] Other commentators have argued that in cases where states deny minorities political representation based on race, creed or colour, the states would be in contravention of their obligations under General Assembly Resolution 2625 (XXV) and thereby relinquish their rights to territorial integrity.[254] In these instances, human rights abuses are presented as a threshold, which if crossed would substantiate the pursuit of secession.[255]

Neo-colonialism and oppression are important descriptive factors used to better understand internal self-determination and how territorial minorities interpret post-colonial conditions within states. They also serve as a means to articulate reasons as to why pursuing external self-determination and secession may be necessary to protect group rights and interests. Although there are different interpretations as to what oppression or neo-colonialism can be, it is important to appreciate that the effective participation of territorial minorities in economic, social and political decision-making processes is consistent with existing international law. However, as will be discussed below, the manner of how participation is afforded to groups can reveal important considerations relating to the ability of groups to access specific rights and interests.

Even if one accepts the position that human rights abuses can create conditions comparable to colonial oppression, it needs to be asked which groups or peoples, subject to these conditions, would be entitled to external self-determination.[256] In considering this question, it reveals another aspect of the effect of the decolonisation process influencing territorial minorities. That is to say, the exclusion of minorities as

[251] *See, e.g.,* VP Nanda, 'Self-Determination Under International Law: Validity of Claims to Secede' (1981) 13 Case W Res J Intl L 257, 278.
[252] Buchheit (n 26).
[253] Separate Opinion of Judge AA Cançado Trindade (n 24) [184].
[254] Pomerance (n 9) 39; H Hannum, *Autonomy, Sovereignty and Self-Determination; The Accommodation of Conflicting Rights* (Univ. of Pennsylvania Press, Philadelphia 1990) 473.
[255] Musgrave (n 16) 191.
[256] Higgins (n 5) 124.

right-holders to self-determination can force these groups to pursue measures to satisfy their political, economic and social needs that no longer include state involvement. As the discussion below will demonstrate, relying exclusively on minority rights to discharge internal self-determination obligations is problematic and fails to appreciate the broader scope of issues and considerations that may be relevant to fully realise a satisfactory process of internal self-determination. Understanding these issues in the context of existing minority rights mechanisms will be fundamental for extrapolating a global governance approach and demonstrating a need for a more inclusive approach when looking at minority issues.

2.4 Identity Rights and Territorial Minorities

2.4.1 The Scope of Minority Rights

Immediately following the Second World War, there was very little mention of minority protections in international legal and political discourse. For instance, the United Nations' *Universal Declaration of Human Rights* does not directly refer to minorities, but clearly prescribes certain protections for peoples subject to discrimination.[257] One explanation for the absence of direct reference to minorities may be attributed to the destructive forces of nationalism and tribalism that were prevalent during the War.[258] At the same time however, the experiences of persecuted groups like the Jews and Roma, meant that specific legal measures were required to address further acts of systematic discrimination.

The major treaties designed to protect minority rights were created primarily during the years of decolonisation. These included the ICCPR as mentioned above, the *Declaration on the Elimination of All Forms of Racial Discrimination*,[259] the *Convention on the Prevention and Punishment of the Crime of Genocide*,[260] the *Declaration on the Rights of Persons Belonging to National or Ethnic Religious and*

[257] Articles 2 & 7 detail that everyone is entitled to equality without discrimination as to race, sex, language and religion, UNGA Res 217 A (III), 10 December 1948, *United Nations Universal Declaration of Human Rights 1948*.
[258] Franck, *Fairness in International Law and Institutions* (n 4) 143-146.
[259] UNGA Res 1904 (XVIII), 20 November 1963, *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*.
[260] UNGA Res 260 (III) (A-C), 78 UNTS 277 (adopted 9 December 1948, entered into force 12 January 1951) *Convention on the Prevention and Punishment of the Crime of Genocide.*

Linguistic Minorities,[261] the United Nations Educational, Scientific and Cultural Organization's *Convention Against Discrimination in Education*,[262] and more recently the Council of Europe's *Framework Convention for the Protection of National Minorities*.[263] Of these, the ICCPR and the *Declaration on the Elimination of All Forms of Racial Discrimination* are the two instruments with the greatest number of parties and signatories.

With the emergence of international treaties in the midst of the decolonisation process, minorities were generally regarded as objects of international law rather than as legal subjects.[264] They, as well as indigenous peoples, were denied opportunities to be active subjects in the development and expression of sovereignty and self-determination. Instead, they were treated in the same context as natural resources or intangible assets belonging to states.[265] Because this treatment was generally exercised in accordance with the aforementioned treaties and instruments, it has to be asked what significance they have in connexion to oppression and neo-colonialism? In other words, are minority rights flowing from, for example, Article 27 of the ICCPR sufficient to satisfy territorial minority needs and their expectations for internal self-determination? This question goes to the heart of the methodological considerations in this chapter and looks at territorial minorities within the existing framework of minority rights protections developed largely during decolonisation.

In looking at this issue, a number of interrelated themes will be explored in the following sections. It will be demonstrated that these instruments are insufficient on their own to address some of the considerations that are relevant to internal self-determination. Indeed, as this thesis continues, further discussion will show that some of the threats posed to territorial minorities go far beyond the protections provided by minority treaties and instruments and require far greater inclusivity within processes of internal self-determination.

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[261] UNGA Res 47/135, 18 December 1992, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.
[262] General Conference of UNESCO at its eleventh session, Paris, 14 December 1960.
[263] *Framework Convention for the Protection of National Minorities*, Strasbourg, 1995 (ETS No. 157) (adopted February 1995, entered into force 2 January 1998).
[264] LS Bishai, 'Sovereignty and Minority Rights: Interrelations and Implications' (1998) 4 Global Governance 157, 171.
[265] *See generally* RL Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law?' (1994) 7 Harv Hum Rts J 33.

Kingsbury has argued that the common ubiquity of minorities in almost every newly independent state makes it unlikely that the international community can develop a 'normative program' of common understanding for minorities comparable to indigenous peoples.[266] As such, support for the notion that a minority has a right to identity is countered by arguments that minorities are only entitled to be free from discrimination.[267] This perspective reflects Crawford's argument that Article 27 of the ICCPR is a 'completely negative right, a right pregnant with limitations' insofar as it seeks to protect individuals rather than groups.[268] Despite these limitations, a normative programme of minority group recognition could be developed through an approach that enables territorial minorities to articulate and pursue their own needs within the context of internal self-determination.

2.4.2 Limitations in Minority Identification

The antonymical meaning of a minority is a majority. Yet, the extra-legal and legal considerations associated with the two terms negate practical usage. In public international law, minority terminology is often used interchangeably with 'nationalities,' 'peoples,' 'national-groups,' 'groups,' 'residents,' 'temporary migrants,' and 'indigenous peoples.' Brownlie has remarked that this common usage encompasses the 'same idea.'[269] However, substituting 'minorities' or 'peoples' for other legal entities, or in reference to self-determination, erroneously assumes that the subjects are uniform and legally interchangeable.[270]

Efforts to formulate a standard definition have met with little success, as it is difficult to apply the term in different contexts.[271] The difficulty reflects the fact that minority identification undergoes 'a continuous process of transformation.'[272] For instance,

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[266] B Kingsbury, '"Indigenous Peoples" in International law' (n 87) 450; *see also* S Trifunovska, 'One Theme in Two Variations – Self Determination for Minorities and Indigenous Peoples' (1997) 5(2) Intl J on Minority and Group Rts 175,185-189.
[267] P Thornberry, *International Law and the Rights of Minorities* (OUP, New York 1991) 132.
[268] Crawford, 'The Right to Self-Determination in International Law' (n 5) 23.
[269] Brownlie (n 82) 5.
[270] HH Lentner, *Power and Politics in Globalization* (Routledge, London 2004) 158.
[271] Shaw, 'The Definition of Minorities in International Law' (n 91) 1.
[272] K Hailbronner, 'The Legal Status of Population Groups in A Multinational State Under Public International Law' in Y Dinstein & M Tabory (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Boston 1992) 135.

when looking at the population of Indonesia, it is entirely comprised of ethnic minorities since no single group has numbers amounting to over half of the state's population.[273] There is also the argument that a minority is not dependent on numbers, but is associated with vulnerability, as in the case of the majority black population in South Africa during Apartheid.[274]

Two significant indicators related to minority identification, require that groups must have a 'sufficient number of persons to sustain their traditional characteristics'[275] and that a group must 'possess the will to maintain its distinctiveness.'[276] Both indicate that a group must be able to represent a particular kind of community distinguishable from the predominate group.[277] Thus, a minority must be a significant social entity and have a significant non-dominant status within the state.[278] Further arguments suggest that if a minority population is so small that it would create a disproportionate burden upon the resources of the state to recognise it as a minority, then it would unlikely trigger legal obligations.[279] From this perspective, it would seem that the definition of the minority group would be dependent upon programme and policy-makers responsible for state fiscal management.

During the 1990s, the Human Rights Committee encouraged a process of minority identification based almost exclusively on Article 27 of the ICCPR.[280] Article 27 details ethnicity, religion and language as the primary factors for the identification of minorities. According to the *traveaux préparatoires* of the ICCPR, the term 'ethnicity' is interpreted as including such characteristics as 'race', 'colour', 'descent', and 'national.'[281] Race is commonly associated with the physical characteristics that

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[273] *See, e.g.,* L Suryadinata, E Nurvidya Arifin and A Ananta, *Indonesia's Population: Ethnicity and Religion in a Changing Landscape* (Institute of Southeast Asian Studies, Singapore 2003) 7.
[274] White (n 70) 156; *Minority Rights: International Standards and Guidance for Implementation* (OHCHR 2010) HR/Pub/10/3, 2-3.
<http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf > accessed 23 October 2013.
[275] Shaw, 'The Definition of Minorities in International Law' (n 91) 25.
[276] Musgrave (n 16) 154.
[277] Thornberry *International Law and the Rights of Minorities* (n 267) 164.
[278] Shaw, 'The Definition of Minorities in International Law' (n 91) 25.
[279] ibid.
[280] United Nations Human Rights Committee, General Comment No. 23 (50) (Article 27) (adopted by 6 April 1994) UN Doc. CCPR/C/21/Rev.1/Add.5 [5.1] (1994), reprinted in UN Doc. HRI/GEN/1/ Rev.1 38 (1994).
[281] Special Rapporteur Capotorti [Capotorti Report] *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (28 June 1977) UN Doc. E/CN.4/Sub.2/119 [31]; Add. 2 [120].

distinguish populations, whilst ethnicity denotes the cultural existence of a group. The latter identification is broader than either 'racial' or 'national', and in theory should cover a much wider application.[282]

Under Article 27 and the 1990 *Copenhagen Document*, which codifies human rights between European states,[283] the identification of minorities does not depend upon official state recognition.[284] This is something that was first articulated during the *Greco-Bulgarian Communities* case[285] heard before the Permanent Court of International Justice. In practise, however, the inclusion of the word 'exist' in Article 27 ICCPR indicates that some populations may be deprived of minority status depending on state recognition.[286] Article 27 states:

> In those States in which ethnic, religious or linguistic minorities *exist*,[287] persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 27 is crouched in a prohibitive terminology that enables the state to identify whether groups exist.[288] This can mean the difference between having entrenched constitutional rights with official political powers or on the other extreme, be denied identity rights and be persecuted as outsiders. Significantly, it should be appreciated that the ICCPR definition runs counter to the prescribed recommendation that a minority's existence is not dependent on official state recognition.[289]

Comparatively, Article 2(1) of the ICCPR has no restrictions like Article 27 in terms of empowering states to recognise minorities. Article 2(1) identifies grounds for discrimination, but does not require states to first recognise the existence of populations

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[282] Thornberry *International Law and the Rights of Minorities* (n 267) 150.
[283] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, (29 June 1990) <www.osce.org/documents/odihr/1990/06/13992_en.pdf> accessed 27 October 2008.
[284] Capotorti Report (n 281) [31]; Add. 2 [41].
[285] *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration* (Greco-Bulgarian Communities) (Advisory Opinion) (1930) PCIJ Ser B No 17, 34.
[286] Crawford, 'The Right to Self-Determination in International Law' (n 5) 23.
[287] Article 27, ICCPR (n 20) (emphasis added).
[288] Crawford, 'The Right to Self-Determination in International Law' (n 5) 23.
[289] Thornberry *International Law and the Rights of Minorities* (n 267) 157.

that may qualify as victims of discrimination.[290] Although this may only demonstrate that states find it easier to enforce a negative form of protection, rather than proactively reinforcing group rights, it also provides an interesting analysis for identifying discrimination without necessarily having the group or victim of discrimination recognised by the state.

Further, Article 27's restrictive phraseology raises the question about how international law facilitates the recognition of new minorities.[291] Some have speculated that 'exist' under Article 27 limits the recognition of new populations as minorities to those who have been transferred 'en bloc', either from direct conflict or general oppression.[292] Yet, even in these cases, the recognition of new populations is dependent upon the host state.[293] In context, Jennings' observation that it is ridiculous to let the people decide their future without first determining who the people are[294] adds to this challenge because the entity with the power to identify groups is the state. As such, the processes of identification expose a wide margin of state appreciation in the determination of which groups qualify as minorities. This 'methodological error'[295] can only serve to elevate the position of 'historic minorities' whilst exposing tensions between official and unofficial minorities in shared territories,[296] or increasing the likelihood of 'ethnopolitical' action and secessionist conflict.[297]

2.4.3 Challenges Relating to Group Recognition Under the ICCPR

Article 1 ICCPR identifies peoples as having a right to self-determination and is supported by the *travaux préparatoires* of Article 1(2) of the UN *Charter*, which outlines that the term 'peoples' was intended to apply to all the inhabitants of non-self-governing territories.[298] Comparatively, Article 27 only refers to an individual's

[290] Musgrave (n 16) 143.
[291] P Leuprecht, 'Minority Rights Revisited: New Glimpses of an Old Issue' in P Alston (ed), *Peoples' Rights* (IX/2, OUP, Oxford 2001) 111, 121.
[292] Thornberry *International Law and the Rights of Minorities* (n 267) 154.
[293] ibid 156.
[294] I Jennings, *Approach to Self-government* (CUP, New York 1956) 56.
[295] W Ofuatey-Kodjoe, *The Principle of Self-determination in International Law* (Nellen Publishing Company, New York 1977) 9.
[296] Leuprecht (n 291) 111, 121.
[297] *See, e.g.,* Gurr (n 83) 3, 6.
[298] Summary Report of 6th Meeting of Committee I/1 (United Nations Conference on International Organization) (1945) 6 UNCIO 296.

membership to certain community-based rights. These include minority rights for members to enjoy their own culture, to profess and practise their own religion, or to use their own language. This means that both articles are markedly different in terms of how they are applied.

It should be asked if Article 27 represents 'a mere extrapolation from the individual rights of members of a minority group, and being a genuinely 'collective' right.'[299] Since, Article 27 is extended to 'persons belonging to such minorities', instead of simply to 'minorities', this implies that membership is qualified in terms of the individual's association and identification with a group.[300] In other words, a person must first prove that they are part of a minority before protection is extended.[301] Thus, groups receive no automatic group recognition unless specifically provided for by the state. While some states like Malaysia have reasoned that they are able to fulfil their internal self-determination obligations by recognising individuals as belonging to minorities,[302] it is contended that in terms of group-based needs associated with political, economic and social decision-making, measures such as these do not satisfy even a bare minimum of some of the contemporary or post-colonial expectations associated with internal self-determination.

The 'deliberately negative formulation'[303] of recognising individuals rather than groups separates the individual's standing as a member of a minority from the group's independent status.[304] Moreover, it serves as an excuse to reduce minority protection to an indeterminable process.[305] Salomon and Sengupta suggest that collective and group rights should be reviewed, so as to be more inclusive to the considerations and needs of

[299] Crawford, 'The Rights of Peoples: 'Peoples' or 'Governments'?' (n 158) 60.
[300] UN Doc E/CN.4/Sub.2/112 in Thornberry *International Law and the Rights of Minorities* (n 267) 149; *see also* A Addis, 'Individualism, Communitarianism, and the Rights of Ethnic Minorities' (1991) 66 NTDLR 1219, 1242.
[301] *See Lovelace* v. *Canada*, No. 24/1977 (1984) UN Doc. CCPR/C/OP/1, 10; *see also* AF Bayefsky, 'The Human Rights Committee and the Case of Sandra Lovelace' (1982) 20 Canadian Yearbook of International Law 244.
[302] *Summary of the 22nd Meeting* (Third Committee, Forty-Eighth Session) A/C.3/48/SR.22, 30 November 1993, [16].
[303] Crawford, 'The Right to Self-Determination in International Law' (n 5) 23.
[304] ibid.
[305] Hailbronner (n 272) 134.

groups and their communities.[306] Illustrating the difference between group-based rights and the limitations of Article 27, they state:

> Collective rights, exemplified by Article 27 of the ICCPR, if defined just as individual rights of persons belonging to minorities as exercised in community with other members of their group, would provide little more than, for example, the right to freedom of thought, conscience and religion provided in Article 18 of the ICCPR.[307]

From this perspective, the protection of minorities is premised upon a double negative construed as a duty to *not deny* an individual's minority rights.[308] Thus, the relationship between the state and the minority may never extend beyond recognising the group as a collection of individual interests. Moreover, it would suggest that the question of minority rights protection is more aligned to toleration than promotion.[309] This is unfortunate as it renders it impossible to implement specific policies and programmes necessary to support group rights and needs. More specifically, it suggests that Article 27 may only be relevant for keeping a culture alive instead of providing it the means to chart its own course.

Finally, both Articles 2(1) and 26 of the ICCPR espouse equality before the law without distinctions of 'any kind,' based on 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These two articles are characteristically expressed in individualistic terms by prohibiting oppressive government conduct.[310] Significantly, however, the ability to 'enjoy ones culture'[311] means that the state may not impede minority rights, but at the same time need not assist in any overt way.[312] In this respect, there is a pronounced difference between how individual rights and group rights serve specific groups. Many claims for

[306] Salomon and Sengupta (n 30) 9.
[307] ibid.
[308] This simply corresponds to Article 5(1) and the prohibition against any action aimed at the destruction of the rights in the Covenant.
[309] SJ Roth, 'Toward a Minority Convention: Its Need and Content', in Y Dinstein, & M Tabory (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Boston 1992) 90.
[310] HJ Steiner and P Alston (eds), *International Human Rights in Context* (OUP, Oxford 1996) 993.
[311] Crawford, 'The Right to Self-Determination in International Law' (n 5) 23.
[312] ibid.

the right to cultural existence in reference to group-based rights are ignored.[313] Not only is this position unfortunate, but also appears to neglect the fact that cultural traditions and institutions 'can be maintained only on a collective basis'.[314] From the analysis above, it is evident in the present situation that minority protections under the ICCPR are limited to the extent that they can only go so far to protect general descriptions of minority interests seemingly identified by states. In the section below, group-based considerations will be explored in the context of internal self-determination.

2.4.4 Self-Determination and its Relevance to Minority Group Interests and Needs

Salomon and Sengupta have claimed that because the right to self-determination embodies a number of other rights that are only appreciable by groups, it would be a problematic to interpret existing international laws like Article 27 of the ICCPR as limiting self-determination to states.[315] They advance a convincing argument that because of contemporary complexities relating to 'national development' the distribution of internal self-determination rights must include individuals, groups and states.[316]

From another perspective, Falk has argued that internal self-determination requires positive actions on the part of states to ensure 'a reliable social contract that defines autonomous spheres of activity.'[317] Positive actions would thus refute the idea that states only have responsibilities and obligations to tolerate groups. Falk also cites that recognition for the internal diversity in states leads to a measurable promotion and participation in decision-making for all groups in society.[318]

Suksi reasons that the practise of recognising minorities and extending greater decision-making powers to groups can occur at a constitutional level.[319] Particularly, he states that once a minority's needs and interests are identified and recognised, it 'can be

[313] Thornberry *International Law and the Rights of Minorities* (n 267) 141.
[314] Hailbronner (n 272) 133.
[315] *See, e.g.,* Salomon and Sengupta (n 30) 10-11, 35.
[316] ibid.
[317] R Falk, *Predatory Globalization: A Critique* (Polity Press, 1999) 24.
[318] ibid.
[319] M Suksi, 'On the Entrenchment of Autonomy', in M Suksi (ed), *Autonomy; Applications and Implications* (Kluwer Law International, The Hague 1998) 152.

understood to be protected under the principle of self-determination,'[320] Welhengama approaches this issue from another angle when looking at the concept of autonomy. He argues that autonomous arrangements could serve as a means to ensure that the 'rights emanating from internal self-determination [are] meaningfully exercised.'[321] He notes:

> Self-determination in the post-colonial era can be further developed to accommodate minorities' demands for participation in the political and economic process or to find solutions for ethnic conflicts. Thus, the continuing evolution of the development of the most progressive concept in international law in the post-world-war era, that is, internal self-determination, may depend on the extent to which new ideas and concepts such as autonomy can be absorbed by it.[322]

Hannum echoes this position when stating that minorities can have 'meaningful internal self-determination' by exercising their own affairs in the ways that they prefer.[323] These perspectives premise internal self-determination as a way to meaningfully exercise minority rights relevant to groups, but also to enhance the overall application of self-determination within states.[324]

In 1991, Liechtenstein's representative to the UN warned against the continued exclusion of minorities in self-determination discourse by outlining:

> The concept of self-determination, namely the attainment of independence by peoples under colonial domination, has virtually been completed. Since then, the concept of self-determination has evolved with minorities seeking greater autonomy within the nation State in which they resided. Many conflicts occurred because there were no channels in the parent State through which minorities could assert their distinctive identities [and that] the realization by minorities of

[320] ibid 164.
[321] G Welhengama, 'The Legitimacy of Minorities' Claim for Autonomy through the Right to Self-Determination' (1999) 68 Nordic Journal of International Law 413, 432.
[322] ibid 438.
[323] Hannum, *Autonomy, Sovereignty and Self-Determination* (n 254) 473-474.
[324] Welhengama (n 321) 432.

> some degree of self-determination was crucial to the maintenance of international peace and security.[325]

Liechtenstein's remarks were made at the beginning of the Bosnian conflict and demonstrated the genuine desire to move away from conventional interpretations of group rights in international law, which during decolonisation and in the application of external self-determination tended to exclude minorities. Sengupta and Salomon further examined this position and stated:

> It would seem that the desire to avoid giving minority groups the capacity to vindicate their rights before a competent international body, by providing the group with international legal personality, and to limit any potential claim to secession, has underpinned the rationale for distinguishing individual/collective rights from group rights at international law.[326]

In contrast, the concept of internal self-determination provides a means for territorial minorities to exercise collective choices and participate in decision-making processes relevant to their territories. This is important, as group recognition implies legal personality, even if expressed collectively.[327] In this sense, Article 27 is still important for providing meaning to internal self-determination, but it would have a broad complimentary effect on the other articles in the ICCPR, which more explicitly cover group rights.[328]

Identifying the subjects of the self-determination is critical for prescribing what responsibilities and obligations arise.[329] At the same time, internal self-determination also facilitates the self-expression of groups, arguably, in a manner similar to that contemplated by the eighteenth century thinkers. Thus, minority identification and

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[325] 'The Liechtenstein Draft Convention on Self-Determination through Self-Administration' in W Danspeckgruber (ed), *The Self-Determination of Peoples: Community, Nation, and State in an Interdependent World* (Lynne Reinner, Boulder 2002) 382-392.
[326] Salomon and Sengupta (n 30) 9.
[327] F Capotorti, 'Are Minorities Entitled to Collective International Rights?' in Y Dinstein & M Talbory (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Boston 1992) 507.
[328] Y Dinstein, 'Freedom of Religion and the Protection of Religious Minorities' in Y Dinstein & M Tabory (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Boston 1992) 157.
[329] Rehman (n 157) 469.

internal self-determination represent complimentary processes, whereby each is dependent upon the other to give it meaning. Additionally, group recognition and promoting the idea of self-identification, provides greater possibilities for groups to express their needs compared to what is permitted when looking at minorities as collections of individuals.

2.5 Conclusion

The exclusion of territorial minorities from meaningful forms of decision-making must be understood within the historic context of decolonisation. Under decolonisation, UN General Assembly Resolutions 1514 (XV), 1541 (XV) and 2625 (XXV) established a relatively uniform understanding of self-determination in which territorial minorities were part of a broader process of colony-to-state transition emphasised by the application of external self-determination.[330] The place of minorities in this process was limited to internal self-determination, which tended to exclude recognition that minorities had group-based rights[331] and access to external self-determination.

Today, colonialism is ostensibly over, raising interest in self-determination as something that can be claimed by non-colonial peoples outside colonial conditions. In some states, like in the Federal Republic of Yugoslavia during the 1990s, the conditions faced by territorial minorities were similar to those faced by colonial peoples under decolonisation, as there were widespread human rights violations based on race, ethnicity, language and religion. Applying an earlier understanding of post-colonial external self-determination to these conditions would have no force or practical effect.[332]

In the following chapter, an analysis of the Kosovo crisis will illustrate that the existing ambiguities associated with the right to self-determination continue to play an important role in minority-state relations. While the Kosovo crisis was an ideal opportunity to look at the conflict between Belgrade and Pristina through a global governance lens, it has become known more as a missed opportunity in terms of clarifying post-colonial

[330] Pentassuglia (n 19) 313.
[331] Salomon and Sengupta (n 30) 10-11.
[332] *See discussion in* Musgrave (n 16) xvii-xxi.

self-determination. While chapter three will focus on Kosovo as an appropriate example as to why a global governance approach is needed to better evaluate post-colonial self-determination, it also introduces several themes outlined in later chapters describing how internal self-determination has emerged as the most important aspect of contemporary self-determination and describes how oppression has increasingly influenced this understanding.

Chapter Three: Understanding the Post-Colonial Status Quo: The *Advisory Opinion on Kosovo* and *Lex Obscura*

3.0 Introduction

> The principle of self-determination has survived decolonization, only to face nowadays new and violent manifestations of systematic oppression of peoples.[333]

On 22 July 2010, by a vote of ten to four, the ICJ delivered its *Advisory Opinion on Kosovo* that 'general international law contains no applicable prohibition of declarations of independence' and that Kosovo's 'declaration of independence of 17 February 2008 did not violate general international law.'[334] The ICJ's opinion was issued in response to the General Assembly's question, 'Is the unilateral declaration by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'[335] Although the ICJ's response appears fairly conclusive, it has been heavily criticised for failing to consider the effects of the events leading-up to the unilateral declaration associated with broader legal issues associated with internal self-determination, oppression and secession.[336]

The ICJ's *Advisory Opinion on Kosovo* supports this thesis by illustrating the current uncertainties facing the interpretation and application of post-colonial self-determination. In the preceding chapter, violations of human rights and identity rights were discussed in the historic context of neo-colonialism and references to modern oppression as a legacy of decolonisation. However, there have been very few opportunities to assess these subjects in detail. In the following chapter, the *Advisory Opinion on Kosovo* will be presented as a missed opportunity to explore these subjects. Importantly, it will also highlight some of the crucial differences in judicial opinion on the issues of oppression and secession. This will be important to generate questions for further analysis later in this thesis in relation to understanding internal self-

[333] Separate Opinion of Judge AA Cançado Trindade (n 24) [175].
[334] Kosovo Advisory Opinion (n 67) [84]-[85].
[335] ibid [51].
[336] Jovancović (n 63) 293-294.

determination. Although Kosovar independence was a representation of many different post-colonial self-determination issues like oppression or the denial of internal self-determination, and secession or external self-determination, the manner in which the Court ignored these issues was problematic and has emphasised the need for a more comprehensive and inclusive global governance approach on post-colonial self-determination.

This chapter begins with a review of the Kosovo conflict and circumstances that have fuelled discussion pertaining to the legal merits of the unilateral declaration of independence. A review of the ICJ's reasoning will further show that its attempt to separate fact from law has further complicated an already complicated subject.

Following an assessment of the Court's opinion and the facts relating to the Kosovo conflict, the views of Judge Cançado Trindade will be reviewed to underline why violations of human rights and humanitarian laws should have been treated with greater weight by the ICJ when looking at the legal substance of Kosovo's unilateral declaration of independence. Judge Cançado Trindade's views lend support to the notion that when rights are violated there must be remedies. In this regard, his analysis of the breakdown of the rule of law, widespread discrimination and humanitarian suffering in Kosovo during the 1990s supports a need for global approach to better understand the totality of issues involved within self-determination conflicts. Particularly, it will be argued that Judge Cançado Trindade's analysis of oppression is important because it sheds light on internal self-determination and reveals how competing claims during self-determination conflicts need to be reviewed based on their merits and specific circumstances. In this respect, it is suggested that Judge Cançado Trindade wanted the ICJ to condone Kosovar independence as a response to the denial of internal self-determination.

Ultimately, this chapter concludes by looking at the Court's other separate and dissenting opinions. An analysis of these opinions will reveal differences in the interpretation of the 'factual complex'[337] of the circumstances surrounding the unilateral declaration of independence. Specifically, this chapter will demonstrate that that there is

[337] Separate Opinion of Judge AA Cançado Trindade (n 24) [11].

a need to deploy a more integrated or global governance approach when looking at self-determination issues.

3.1 Background of the Conflict

The conflict in Kosovo attracted UN General Assembly attention as early as 1994 when it passed a resolution highlighting the grave 'situation of human rights in Kosovo.'[338] At that time, the General Assembly's condemnation was exclusively reserved for the Federal Republic of Yugoslavia, which it saw as the perpetrator for the 'various discriminatory measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests perpetrated against ethnic Albanians in Kosovo'.[339] However, the conflict continued with escalating violence precipitating the Security Council to eventually condemn both the Yugoslav authorities and the Kosovo Liberation Army in 1998 for the 'violation of human rights and international humanitarian law'.[340] By this time it was clear that the situation in Kosovo was a case of failed internal self-determination[341] and that the people of Kosovo wanted to secede from the Federal Republic of Yugoslavia. The question relevant to the parties, and indeed relevant to this thesis, was determining if there was a legal mechanism for doing this, bearing in mind the circumstances of the conflict and the need for a just and sustainable outcome.

Events deteriorated in Kosovo throughout 1999. In January of that year, the world witnessed the Račak massacre[342] and the lengths to which Slobodan Milošević, the former Yugoslav President, was willing to go to suppress Kosovar autonomy. In response to the visible signs of humanitarian and human rights abuses, the international community prepared a draft peace agreement known as the *Rambouillet Accords*, which proposed a restoration of Kosovo's former autonomous powers that it once had when the territory was called the Socialist Autonomous Province of Kosovo under the 1974

[338] UNGA Res 49/204, 23 December 1994, *Situation of Human Rights in Kosovo.*
[339] ibid.
[340] *See* SC Res 1160, 31 March 1998; SC Res 1199, 23 September 1998.
[341] Separate Opinion of Judge AA Cançado Trindade (n 24) [145].
[342] *See* B Neeley, *Serbs rewrite history of Racak massacre*, The Independent, 23 January 1999, *available at* <http://www.independent.co.uk/news/serbs-rewrite-history-of-racak-massacre-1075680.html> accessed 15 December 2010.

Yugoslav constitution.[343] The Federal Republic of Yugoslavia's rejection of that proposal prompted NATO intervention to expel Yugoslav forces from the territory.[344] This included a prolonged campaign of NATO bombings over both Kosovo and Serbia until June 10, 1999, when the UN Security Council passed resolution 1244 (1999)[345] establishing the United Nations Interim Administration Mission in Kosovo (UNMIK). UNMIK was established primarily to oversee the establishment of peace and order within the territory on an interim basis.[346] At that point, the intention of the international community, and the Security Council particularly, was to end the violence and quell inter-regional ethnic violence that had plagued the Balkans throughout the decade. Considering the aims of the Security Council, one can infer that international intervention represented a limitation against any activities or objectives supporting or creating a long-term political outcome in the territory.[347]

Significantly, however, UNMIK sponsored Kosovo's first constitution and government in 2001 through the creation of the Provisional Institutions of Self-Government (PISG). This key move ostensibly provided the answer to the above-noted question about how the international community would respond to the failed system of internal self-determination in Kosovo.[348] The establishment of PISG, which included an elected assembly and an office of the Prime Minister, would prove to be contentious because it appeared that UNMIK, under the mandate of the Security Council, had provided Kosovo with the means to exert its independence from the Federal Republic of Yugoslavia. A bold move, which, according to Brewer, looked like Kosovo would be the first clear example of secession based on oppression since Bangladesh.[349] Nine years after the creation of PISG and following Serbia's appeal to the General Assembly, the ICJ released its advisory opinion.

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[343] *Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo*, S/1999/648, Selected Documents of the United Nations Security Council concerning Kosovo (Federal Republic of Yugoslavia) *available at* http://www.un.org/peace/kosovo/sc_kosovo.htm accessed December 15, 2010.
[344] For an extensive criticism of NATO intervention being illegal, *see* J Holzegrefe, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP, New York 2003).
[345] SC Res 1244, 10 June 1999.
<http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1244(1999)> accessed 15 December 2010.
[346] ibid [10].
[347] *See* Dissenting Opinion of Judge Koroma, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 22 July 2010.
[348] Brewer (n 26) 273.
[349] ibid.

3.2 The Implications of the International Court of Justice's *Advisory Opinion on Kosovo*

The ICJ's analysis of Kosovo's unilateral declaration of independence was seen as controversial and legally flawed.[350] The primary criticism focused on the Court's assessment of the international legality of whether a territory could declare independence[351] without considering if the broader circumstances and events preceding Kosovo's declaration were legally relevant to the eventual outcome.[352] Particularly, the ICJ appeared to have developed its opinion in a legal vacuum and constructively ignored[353] the important causal linkages relating to internal past events like the breakdown of the rule of law and civil society, and humanitarian violations, which contributed to a desire for separation from Belgrade. As will be discussed below, the ICJ's attempt to address the question of legality by distinguishing past events from the actual act of declaring independence raised many questions.

A key frustration was the ICJ's distinction of the internal conditions within the territory of Kosovo, including claims of oppression and the revocation of Kosovar autonomy, and the 'effect of secession.'[354] The Court stated that the suffering endured by the inhabitants of the territory had been historically addressed and remedied by the Security Council by virtue of the establishment of UNMIK.[355] In other words, the Court declined to discuss the possible legal ramifications associated with oppression or the denial of internal self-determination, and instead reasoned that the issues pertaining to self-determination had been satisfactorily addressed by political means.[356] Although the Court stated that it would address legal questions that included political aspects,[357] it is unclear how it was able to dissect all the seemingly overlapping legal and factual issues and incidents associated with the conflict.

While Crawford suggests that an act of secession generally excludes international

[350] Jovancović (n 63) 294.
[351] Kosovo Advisory Opinion (n 67) [83].
[352] *See* Dissenting Opinion of Judge Koroma (n 348).
[353] *See* Muharremi (n 64); Jovancović (n 63).
[354] Kosovo Advisory Opinion (n 67) [56].
[355] ibid [81], [89].
[356] Significantly, the ICJ did not advance any opinion as to whether political decisions had indeed satisfied particular legal considerations.
[357] Kosovo Advisory Opinion (n 67) [27], [28].

involvement,[358] some exceptions include threats to international peace and stability and violations to international law of a *jus cogens* nature. This is important, because it supports the argument that Kosovo separation could be premised upon the denial of internal self-determination, which Cassese argues, is part of a 'whole cluster' of *jus cogens* norms belonging to the right to self-determination.[359] While it is possible that the ICJ could have been satisfied that a political solution to the problem in Kosovo absolved any outstanding concerns relating to *jus cogens* violations, Judge Cançado Trindade was seemingly unconvinced outlining that clear cases of oppression have to be taken into account as parts of a modern understanding of self-determination.[360] The ICJ's refusal to look at this issue highlights a fundamental uncertainty at the international-level about how internal self-determination should be approached and analysed in the context of territorial separation and secessionist movements. In other words, if oppression, evidenced by the denial of internal self-determination, provides territorial minorities with the means to elicit international intervention, and thereby challenge the sovereignty of states, then should international law recognise subsequent secessionist actions?[361]

3.3 The Opinion of Judge Cançado Trindade

According to Judge Cançado Trindade, the ICJ's opinion was flawed because it failed to exercise its jurisdiction over interconnected events of an international legal character. In his separate opinion, Judge Cançado Trindade sought to fill the 'void' left by the Court and highlight the causal connexion between the 'grave humanitarian crisis in Kosovo[,]…the adoption of Security Council resolution 1244 (1999)…[and] one decade later, [the unilateral declaration of independence] of 17 February 2008.'[362] He reasoned that the ICJ should have acknowledged that the 'systematic oppression…beyond the

[358] Crawford highlights that 'A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community'. *Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010* ICJ Oral Statements: CR 2009/32 [47].
[359] Cassese, *Self-Determination of Peoples* (n 81) 140; McCorquodale advances the arguement that the *jus cogens* status self-determination can be separated and applied strictly to its external component as a legal entitlement to colonial and non-self-governing territories. R McCorquodale 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1995) 66 BYIL 283, 326.
[360] *See, e.g.,* Separate Opinion of Judge AA Cançado Trindade (n 24) [173]-[176], [186]-[188].
[361] Brewer (n 26) 273.
[362] Separate Opinion of Judge AA Cançado Trindade (n 24) [201] (brackets added).

traditional confines of the historical process of decolonisation;', created a clear right for the population to choose a destiny of its own free will.[363] Referring to the remarks of Cassese, Thornberry, Tomuschat, Rosas and Salmon,[364] Judge Cançado Trindade went on to say, '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…[and] is no longer insensitive to patterns of systematic oppression and subjugation'.[365] Qualifying his arguments and echoing Judge Dillard from *Western Sahara* case[366], Judge Cançado Trindade suggested that there is a 'fundamental limit to the scope of territorial integrity', which may preclude a state's right to claim sovereignty over its territory.[367] He justified this position by referring to the *Universal Declaration of Human Rights*[368] and UN *Charter* as creating obligations *jus gentium*:

> Grave breaches of fundamental human rights (such as mass killings, the practice of torture, forced disappearance of persons, ethnic cleansing, systematic discrimination) are in breach of the *corpus juris gentium*, as set forth in the UN Charter and the Universal Declaration (which stand above the resolutions of the United Nations political organs), and are condemned by the universal juridical conscience. Any State which systematically perpetrates those grave breaches acts criminally, loses its legitimacy, and ceases to be a State for the victimized population, as it thereby incurs into a gross and flagrant reversal of the humane ends of the State.[369]

Considering the ICJ's specific refusal to delve into the legal merits of 'remedial

[363] ibid [184].
[364] *See, e.g.,* Cassese, *Self-Determination of Peoples* (n 81); P Thornberry, 'The Principle of Self-Determination', in V Lowe and C Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of M. Akehurst* (Routledge, London 1994) 175; C. Tomuschat, 'Self-Determination in a Post-Colonial World' in C Tomuschat (ed), *Modern Law of Self-Determination*, (Kluwer Academic Publishers, The Netherlands 1993) 1; Rosas (n 7) 225; J Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?' in J Crawford (ed), *The Rights of Peoples* (Clarendon Press, Oxford 1988) 253.
[365] Separate Opinion of Judge AA Cançado Trindade (n 24) [184].
[366] *The Western Sahara Case* (n 229) [122].
[367] Separate Opinion of Judge AA Cançado Trindade (n 24) [177]-[181];
Comparatively, Judge Koroma, in his dissenting opinion, reasoned that it would be an error in law to say that a clear legal norm, such as territorial integrity, could be limited within express consent. *See* Dissenting Opinion of Judge Koroma (n 348) [21], [22].
[368] UN General Assembly, *Universal Declaration of Human Rights* (n 257).
[369] Separate Opinion of Judge AA Cançado Trindade (n 24) [205];
See also [206] for expanded discussion on *jus gentium* obligations.

secession',[370] Judge Cançado Trindade felt that this undermined the Court's ability to convincingly conclude that unilateral declarations of independence lack legality. In this regard, he remarked:

> In the present stage of evolution of the law of nations (*le droit des gens*), it is unsustainable that a people should be forced to live under oppression, or that control of territory could be used as a means for conducting State-planned and perpetrated oppression. *That would amount to a gross and flagrant reversal of the ends of the State, as a promoter of the common good*.[371]

Acknowledging oppression as a means to justify secession or unilateral declarations of independence makes sense. It underlines the intrinsic responsibility of states to promote what Judge Cançado Trindade called the 'common good,'[372] and which is presented in this thesis as processes of internal self-determination based on protecting and promoting human rights, providing territorial minorities access to political representation, and providing access to developmental opportunities.

3.3.1 Analysis of Judge Cançado Trindade's Opinion on Oppression and Internal Self-Determination

Although Judge Cançado Trindade's 'common good' may denote a general prohibition against oppression, it does not reveal when it is uncommon or not good. In this respect, it may be possible to interpret the common good as something similar to 'well-being' in UN General Assembly Resolution 1514 (XV) or more recently from Buchanan's reference to well-being[373] and the 'decent life'[374] to denote inclusive conditions of minority-state relations within states. These references represent abstract ideals of social inclusion. In other words, Judge Cançado Trindade suggests that the common good is something that can be found in societies where there are no violations to existing human rights and humanitarian laws.

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[370] Kosovo Advisory Opinion (n 67) [82]-[83].
[371] Separate Opinion of Judge AA Cançado Trindade (n 24) [137] (emphasis added).
[372] ibid [185].
[373] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 134.
[374] ibid 129.

Significantly, when referencing East Timor and Kosovo, Judge Cançado Trindade distanced himself from any specific theoretical camp on self-determination. He stated, 'it is immaterial whether, in the framework of these new experiments [secession in response to oppression], self-determination is given the qualification of 'remedial' or another qualification.'[375] It is not clear why he made this remark or why a particular theoretical approach for understanding oppression would be immaterial. As will be discussed later in this thesis, different theoretical perspectives support unique interpretations of oppression and ultimately reasons for secession. For example, Judge Cançado Trindade did not suggest a method for how the ICJ should have linked the Federal Republic of Yugoslavia's failure to respect Kosovo's right of internal self-determination and its unilateral declaration of independence. Without this link, it is difficult to pinpoint specifically how Judge Cançado Trindade would have wanted the ICJ to interpret the relevant events.

If Judge Cançado Trindade wanted the ICJ to consider the suffering of the people of Kosovo in order to answer the General Assembly's question, then it must be asked how he would have defined oppression? In this respect, oppression conjures different interpretations, as evidenced by the discussion of neo-colonialism or oppression based on the denial of political representation and human rights abuses in the preceding chapter. Furthermore, if Judge Cançado Trindade was thinking of a form of oppression akin to extreme humanitarian suffering that would substantiate secession,[376] then arguably it may have been technically difficult for the people of Kosovo to prove oppression prior to the latter stages of the conflict when the 'rapid deterioration' of the 'humanitarian situation in Kosovo' provoked international intervention.[377]

Additionally, it is not clear from Judge Cançado Trindade's separate opinion how international law should assess incidents of historic oppression following years of peace and stability. At paragraph 51 of his separate opinion, Judge Cançado Trindade stated, 'it is precisely the *humanitarian catastrophe* in Kosovo that led to the adoption of Security Council resolution 1244 (1999), and the subsequent events, that culminated in

[375] Separate Opinion of Judge AA Cançado Trindade (n 24) [175].
[376] *See, e.g.,* M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, New York 1977) 78-101.
[377] SC Res 1160, 31 March 1998 [Preamble], [10], [14].

the declaration of independence of 17 February 2008 by Kosovo's authorities'.[378] Interestingly, this suggests that the systematic oppression suffered by the people of Kosovo in 1998 and 1999 continued post-conflict. Of course, one could argue that a return to Yugoslav rule would likely have invited further oppression, but this does not appear to be the essence of Judge Cançado Trindade's reasoning.

To highlight why this is an important issue, it is useful to recall Brilmayer's remarks made during the early 1990s during the initial stages of the breakup of the Federal Republic of Yugoslavia. At that time she stated, 'the further in the past the historical wrong occurred, the more likely that it is better now to let things remain as they are'.[379] According to Brilmayer, if a period of peace and stability follows a conflict, the *raison d'être* for seeking a remedy based on oppression is weakened.[380] Theoretically, in the context of Kosovo, this could mean that the peaceful interim autonomy arrangement established by Security Council resolution 1244 (1999), would weaken an oppression claim, and thereby support the continuation of UNMIK or even the possibility of the territory returning to Serbian control.[381] Judge Cançado Trindade's post-conflict interpretation of oppression does, however, have support. Brewer qualifies historical wrongs by the nature of their severity. He states, 'the temporal nature of the abuse would affect its egregiousness: active violations would be of greater severity than past violations, though past violations may be sufficiently egregious to meet this [remedial right to secession] criterion'.[382] This is logical, and suggests that the specific facts associated with the conflict would have to be understood and evaluated prior to validating secession. As will be discussed below, this reasoning actually mirrors the theoretical underpinnings of a global governance approach, but does little to clarify what basic values are necessary to suggest that continued sovereignty would be unfair, unjust or oppressive to the parties.[383]

Finally, it is evident from the ICJ's opinion that there are still many questions relating to the place of oppression within the self-determination continuum. In looking at the ICJ's

[378] Separate Opinion of Judge AA Cançado Trindade (n 24) [51].
[379] Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (n 26) 199.
[380] ibid.
[381] *See* Dissenting Opinion of Judge Bennouna, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 22 July 2010 [56].
[382] Brewer (n 26) 279.
[383] Franck, *Fairness in International Law and Institutions* (n 4) 15.

opinion, one may say that the concept of oppression is uncertain because it was considered by the ICJ to be irrelevant to the ultimate act of declaring independence.

3.4 The ICJ's Position: Political Solutions to Address Legal Wrongs

Since the Security Council had not prohibited the possibility of Kosovo pursuing independence, the ICJ took the position that it was not necessary to consider the legality of oppression or secession. This is an incredibly narrow scope of review when it is conceivable that the Security Council could have made an omission or failed to consider it relevant when addressing issues associated with interim Kosovo autonomy.[384] The ICJ made explicit reference to the fact that the Security Council had never prohibited Kosovo from declaring independence,[385] but had condemned past declarations of independence when secessionist groups had orchestrated humanitarian law violations.[386]

Particularly, the Security Council's prohibition against the independence of the Republic of Srpska in 1992[387] indicates that humanitarian principles have an influential effect upon the legality of declaring independence. However, these principles, whether violated by states or territorial minorities, do not amount to something akin to a formal substantiation of oppression. Arguably, this suggests that in the absence of violence orchestrated by a territorial minority, secession is a permissible political outcome. In this context, there is debate about whether the permissibility of secession has any legal basis. Some have viewed it strictly as a political construct.[388] Yet, the reasoning of the ICJ indicates that Security Council prohibitions against secessionist groups committing humanitarian atrocities like the Republic of Srpska, carry some legal implications, even if they are uncertain.

It is difficult to assess what recourse mechanisms territorial minorities may have against states, if the subject of internal self-determination and oppression is not considered as

[384] Jovancović (n 63) 293.
[385] Kosovo Advisory Opinion (n 67) [81].
[386] ibid [112].
[387] SC Res 787, 16 November 1992.
[388] *See* Higgins (n 5) 125; *see also* Oliver, who remarks 'the identification of legal rules 'in their broadest sense' does not determine the subsequent justiciability of the many divisive issues which would be likely to arise.' P Oliver, 'Canada's Two Solicitudes: Constitutional and International Law in *Reference re Secession of Québec*', in S Tierney (ed), *Accommodating National Identity: New Approaches in International and Domestic Law* (Kluwer Law International, The Hague 2000) 65, 83.

relevant to the review of a unilateral declaration of independence. Judge Yusaf, in his separate opinion at the ICJ stated, 'under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context.'[389]

The ICJ's *Advisory Opinion on Kosovo* reveals that the international community spurned its opportunity to look at the subject of post-colonial self-determination in more detail and thereby 'ease the debate about the meaning of the legal norm.'[390] Indeed, it can be said that the Court turned a 'blind eye' to the situation.[391] As discussed, the Court's narrow opinion omitted key legal considerations associated with oppression and internal self-determination, which if considered, may have changed the ultimate opinion as to the legality of unilateral declarations of independence. In the analyses below, we will see the full extent of this oversight and what type of approach is required to support normative applications.

3.5 The Achilles Heel of Post-Colonial Self-Determination: Uncertainty in Application

Although the separate opinion of Judge Cançado Trindade suggests that the international community should have accepted Kosovo's unilateral declaration of independence as being supported by oppression,[392] the ICJ's *Advisory Opinion* failed to endorse this interpretation. Instead, the Court focused solely on the General Assembly's specific question[393] and thereby cast an element of uncertainty into the meaning of post-colonial self-determination. In this section it will be argued that the ICJ's cursory response to the plethora of self-determination issues relevant to the Kosovo crisis was problematic, since it did very little to clarify why these issues did not fall within the scope of their analysis of the General Assembly's question.

[389] Separate Opinion of Judge Yusaf (n 68) [11].
[390] Saul (n 37) 615.
[391] Separate Opinion of Judge Yusaf (n 68) [11].
[392] *See* Separate Opinion of Judge AA Cançado Trindade (n 24) [173]-[176].
[393] Kosovo Advisory Opinion (n 67) [55].

Furthermore, by focusing on the ICJ's separate and dissenting opinions, it will be shown that there is no common international approach for applying internal self-determination in cases like Kosovo where there are important legal considerations associated with oppression. In other words, jurist attempts to fill the legal vacuum left by the ICJ demonstrate that there is uncertain normative application. This is significant, as it highlights fundamental vulnerabilities and inconsistencies in how post-colonial self-determination is understood and applied, as well as possible short-sightedness in understanding specific pressures faced by territorial minorities. This is the Achilles heel of modern self-determination theory.

While the dissenting opinions emphasise a need to look at the facts, it is apparent that not all facts are interpreted through the same lens. Whereas Judge Cançado Trindade advocated that the Court should have considered oppression and a right to internal self-determination as essential, Judge Koroma interpreted the wording of Security Council resolution 1244 (1999) and the actions of the PISG as being more important and relevant to the validity of the final opinion. It is not clear, in this regard, how the facts should be assessed in the absence of a standard approach. In the following section, this issue will be explored in greater detail using a global governance approach to highlight the enormity of the gaps in theory and process[394]. As part of this approach, it will be argued that unilateral declaration of independence cannot be assessed in a vacuum, but like secession, must be qualified by the broader circumstances relevant to the minority-state relationship. Only in this way, can a normative approach be applied.

The ICJ's reluctance to explore the broader facts of the case in more detail suggests that the Court was attempting to differentiate what it perceived as historical political issues from questions of law and thereby limit the scope of its review. This is challenging and problematic as it encourages the compartmentalisation of issues that by their nature are of mixed fact and law. To clarify, the ICJ's approach implies that the circumstances associated with Kosovo's humanitarian plight in the 1990s can be legally distinguished from the territory's eventual unilateral declaration of independence. It also implies that

[394] Judge Cançado Trindade referred to the ICJ's separation of interdependent issues as a legal "void" and lost opportunity to clarify some of the concepts associated with self-determination. Separate Opinion of Judge AA Cançado Trindade (n 24) [201].

political outcomes to legal issues can be treated as *sui generis* or special cases,[395] which neither condemn nor condone territorial minorities from seceding, unless the seceding group violates specific international legal obligations.[396] Müllerson summarised this scenario as follows:

> The recognition of the independence of Kosovo by a number of States and the recognition of Abkhazia and South Ossetia by Russia were described by recognizing States as being so unique, so *sui generis* that they could not serve as precedents….The uniqueness, or parallels for that matter, is usually in the eye of the beholder. Whether certain situations, facts or acts serve as precedents depends to a great extent on whether one is interested in seeing them as precedents or not.[397]

Müllerson's assessment is telling of the uncertainty and ambiguity surrounding this issue. Moreover, the dissenting opinions of judges Koroma and Bennouna are significant because they criticise the Court's methodology for its lack of analysis about how international law should be applied. Although their opinions do not per se elaborate how post-colonial self-determination should be interpreted, they do provide a more concrete assessment about how the Court should have considered certain issues preceding the unilateral declaration of independence. This approach is largely illustrative of how a global governance approach should be applied as it draws on a number of legal and extra-legal considerations to create meaning. Yet, as will be shown, judges Koroma and Bennouna did not address all of the relevant issues or promote this approach for self-determination purposes.

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[395] R Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (2009) 8(1) Chinese JIL 2, 2.

[396] Specifically, Muharremi identifies there may be a point when the seceding group attracts recognition as a self-determining people and thereby must qualify as a traditional non-self-governing people as under decolonisation. Particularly, he states: 'It is interesting to observe that the ICJ applies the Lotus-Presumption to the declaration of independence by representatives of a people (liberty to act unless prohibited by international law), while, on the other hand, it affirms that a people may only exercise its right to independence, i.e. to effect independence, provided it is entitled to do so under the principle of self-determination (taking action only if permitted by international law).' Muharremi (n 64) 879-880; Others have argued that this has to be assessed based strictly on UNGA Res 1514 (XV) (n 49). A Sengupta and S Parmar, 'Critical Analysis of the Legality of Unilateral Declaration of Independence in the Light of the Right to Self-Determination' (2011-2012) 3 King's Student L Rev 189, 202.

[397] Müllerson (n 396) 2.

Although the Court acknowledged that the oppression of the people of Kosovo was a motivating factor behind the actual unilateral declaration of independence, the Court concluded that the interim autonomy arrangement[398] established by Security Council resolution 1244 (1999), made it unnecessary to consider this issue as a legal factor relevant to the declaration.[399]

It is difficult to accept that a unilateral declaration of independence can be distinguished as a political issue from other overlapping international legal issues sharing a common source.[400] Even by accepting the Court's position that Security Council Resolution 1244 (1999) did not expressly limit certain outcomes following the interim autonomy arrangement, it is unclear how the legality of the interim arrangement became an exclusively political matter. After all, when looking at the ICJ's reference at paragraph 88, which states that the Security Council Resolution 1244 (1999) possessed 'international legal character, one cannot help but ask when this character dissipated or became a purely political matter.[401] From the perspectives of Koroma and Bennouna, and certainly the perspective of Serbia,[402] the internationally sponsored autonomy arrangement produced, rather than legally substantiated Kosovo's independence.[403] Indeed, Muharremi argues that in separating the legal from the political, the ICJ was attempting to distinguish the legality of declaring independence from the legality of effecting statehood. He states:

> The ICJ's distinction between declaring and effecting independence implies that there are different rules of international law governing separately a declaration of independence and effecting statehood. While the ICJ concludes that there appears to be no rule of international law prohibiting an entity to declare independence, it implies that whether Kosovo has indeed achieved statehood, or

[398] Significantly, it may be argued that SC Res 1244 (n 346) does not represent a special autonomy regime by virtue of the lack of treaty agreement with Serbia. Dinstein argues that, 'General international law does not impose an obligation on any State to create an autonomy regime anywhere within its territory. The establishment of an autonomy regime – like that of federalism – is derived from the internal constitution or legislation of the State concerned.' Y Dinstein, 'Autonomy Regimes and International Law' (2011-2012) 56 Vill L Rev 437, 438.
[399] Kosovo Advisory Opinion (n 67) [101], [105].
[400] Recalling Higgins' observation that when the 'permanence [of a state] can be shown, [it] will in due course be recognised by the international community.' Higgins (n 5) 125.
[401] Kosovo Advisory Opinion (n 67) [88].
[402] Serbia proposed a draft resolution to the General Assembly condemning Kosovo's unilateral secession; R Muharremi (n 64) 870.
[403] *See* Dissenting Opinion of Judge Koroma (n 348) [19].

> not, is to be measured against the criteria set by general international law, leaving it in the discretion of individual states to accord recognition to Kosovo based on such assessment.[404]

Why did the ICJ take such a narrow view in responding to the General Assembly's question when all the parties involved anticipated an opinion that would respond to the legality of secession at international law?[405] Muharremi notes that the ICJ should have exercised its judicial authority to 'interpret the question asked by the General Assembly more profoundly'.[406] He states:

> Considering that a declaration of independence cannot be treated in isolation from the process of effecting statehood, because it is an integral element of such a process, it is not surprising that the ICJ cannot find a rule in international law, which prohibits making a declaration of independence.[407]

Therefore, despite the ICJ's willingness to acknowledge in *obiter dicta* certain post-colonial self-determination considerations, including oppression, internal self-determination, and the implications of the earlier Canadian Supreme Court *Reference re Secession of Québec*,[408] it unconvincingly cast these considerations aside because of a constructive interpretation of the question posed by the General Assembly.[409] Had the General Assembly's question been worded differently, would the outcome have been the same?[410] From this perspective, and acknowledging that internal self-determination

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[404] Muharremi (n 64) 874.
[405] ibid.
[406] ibid.
[407] ibid.
[408] *See* Kosovo Advisory Opinion (n 67) [82]-[83].
[409] ibid [81].
[410] Possibly, considering that the ICJ acknowledged that the Security Council has on several occasions condemned unilateral declarations of independence because of 'unlawful use of force or other egregious violations of norms of international law' committed by secessionist groups. These include Security Council resolutions 216, 12 November 1965; 217, 20 November 1965; 541, 18 November 1983; and 787, 16 November 1992; *see also* ibid.

has recognised legal character,[411] it is apparent that the Court and its members were unclear as to how it should have been applied.[412]

At issue for both judges Koroma and Bennouna was the symbolic representation of a unilateral declaration of independence in international law and its specific implications with regards to territorial integrity and self-determination. By challenging the majority position that international law is silent on the issue of unilateral declarations of independence, the two judges provided important insight into how international law is positioned to address or adjudicate conflicts between territorial minorities and states. This insight is not only relevant to Serbia, the Security Council, Kosovo and the other parties involved in the creation of PISG, but it also exposes significant failings in how international law can be applied to future self-determination claims and how it responds to various political, cultural and economic pressures.

In other words, although self-determination is referred to as having normative application in customary international law[413] it actually lacks a consolidated approach for effective normative application. Judge Simma, who provided a separate opinion for the majority, expressed concern about the ICJ's legal analysis. According to Judge Simma, the absence of any explicit rule on secession or a territory's declaration of independence cannot amount to an affirmation of legality or even a neutral position.[414] Unfortunately, Judge Simma did not consider it appropriate to go into detail on this point, but he did state:

> The Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this

[411] Summers contests that the 'legal character' may be derived from its political importance at the international level rather than its "true" position in international law. JJ Summers, 'The Status of Self-determination in International Law: A Question of Legal Significance or Political Importance' (2003) 14 Finnish Yrbk, of Intl L 271, 292.
[412] Some of the challenges for implicating judicial application could be related to the continued debate relating to the definition of peoples, which would influence the identification of the right-holders to internal self-determination. In the case of Kosovo and applicable generally to territorial minorities, it is argued that the interpretation of peoples should include groups based on their collective self-identification and motivation for political mobilisation in a given territory. This is somewhat broader than a definition based on the 'strength of ethnic cohesion or accounts of historical sovereignty'. Anaya (n 91) 77.
[413] S Allen, 'Recreating 'One China': Internal Self-Determination, Autonomy and the Future of Taiwan' (2003) 1 Asia-Pacific Journal on Human Rights and the Law 21, 42-44.
[414] Separate Opinion of Judge Simma, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 22 July, 2010 [8].

> approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from "tolerated" to "permissible" to "desirable". Under these circumstances, even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court's answer in the slightest.[415]

Where Judge Simma's analysis stopped, Judge Koroma's began. For the latter, a lack of consistency in reviewing the broader circumstances leading to Kosovo's independence was of central importance. In this respect, he stressed the need for the ICJ to appreciate the context and reasoning as to why certain territories declare independence.

3.6 Understanding the Entire *Factual Complex* of Independence

In Judge Koroma's dissenting opinion, he highlighted that the motives and intent of the PISG were directly related to the unilateral declaration of independence and relevant to the question asked by the General Assembly:

> It is also question-begging to identify the authors of the unilateral declaration of independence on the basis of their perceived intent, for it predetermines the very answer the Court is trying to develop: there can be no question that the authors wish to be perceived as the legitimate, democratically elected leaders of the newly-independent Kosovo, but their subjective intent does not make it so. Relying on such intent leads to absurd results, as any given group — secessionists, insurgents — could circumvent international norms specifically targeting them by claiming to have reorganized themselves under another name. Under an intentoriented [*sic*] approach, such groups merely have to show that they intended to be someone else when carrying out a given act, and that act would no longer be subject to international law specifically developed to prevent it.[416]

According to Judge Koroma, the intent of parties should have been considered as a

[415] ibid.
[416] Dissenting Opinion Judge Koroma (n 348) [5].

primary factor when responding to the General Assembly's question. His position suggests that it was difficult to separate the internationally mandated autonomy arrangement of PISG from the unilateral declaration of independence. This criticism has been supported elsewhere with the observation that:

> It is well known that, on the face of things, the resolution [1244] upholds the territorial integrity of Serbia, although, at the same time, it cannot be doubted that the establishment of UNMIK and the attendant loss of Serbian sovereignty over Kosovo (however temporarily in theory) *created an unstoppable momentum towards independence*.[417]

While the Court pointed out that the authors of independence could have performed both roles,[418] it would be illogical to say they were not serving the PISG when they actually declared independence.[419] In fact, Judge Koroma suggested that the logic of the Court implied that the authors of independence would merely have been required to show that they 'intended to be someone else' to avoid the limited norms applied to the autonomy arrangement.[420] He indicated that the intent of the PISG would otherwise have had significant bearing on the legality of a unilateral declaration if it had been reviewed.[421]

Judge Koroma reasoned that the legality of declarations of independence must be 'assessed on a broad set of factual circumstances surrounding the declaration',[422] otherwise the interpretation of specific events and evidence can be flawed. This echoes Judge Cançado Trindade's reference to the importance of looking at the entire 'factual complex' of the case in order to determine the substance of issues.[423] Short of this factual analysis, there would be a risk of decisions being made in a vacuum.[424] This is

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[417] C Ryngaert and C Griffioen, 'The Relevance of the Right to Self-determination in the Kosovo Matter: 'In Partial Response to the Agora Papers' (2009) 8(3) Chinese JIL 8(3) 573, 586 (emphasis added).
[418] Kosovo Advisory Opinion (n 67) [107]-[109].
[419] Cerone (n 62) 352.
[420] Dissenting Opinion of Judge Koroma (n 348) [5].
[421] ibid [18]-[24].
[422] Brewer (n 26) 270.
[423] 'Friendly settlement efforts, in my view, cannot thus be approached in a "technical", isolated way, detached from the causes of the conflict. It is thus important, as already pointed out, to have clearly in mind the whole context and factual background of the question put to the ICJ by the General Assembly for the present Advisory Opinion.' Separate Opinion of Judge AA Cançado Trindade (n 24) [12], [51].
[424] ibid [12], [51].

important in the context of understanding internal self-determination within what will later be presented as a global governance approach. Given that a global governance approach to internal self-determination seeks to validate claims of oppression based on case-specific facts and circumstances, both judicial views are relevant. Still, caution should be exercised in the review of facts as they can be manipulated; secessionist groups have regularly advanced factual-based claims portraying themselves as victims of injustice to achieve certain ends.[425]

Judge Koroma's specific concern was that the membership of the PISG, as an institution created and sanctioned by the international community through the Security Council, was essentially the same as the authors of independence. According to him, the declaration was indistinguishable from a unilateral act of secession, contrary to the spirit and intent of the Security Council, and directly connected to the secessionist plans of the PISG.[426] On the other hand, Judge Cançado Trindade reasoned that the oppressive conditions in Kosovo throughout the 1990s opened the door to a legally valid act of secession.[427]

Although both judges undertook a broad assessment of the facts, Judge Cançado Trindade interpreted the facts to show that the Federal Republic of Yugoslavia was primarily responsible for the oppressive conditions created in Kosovo. He reasoned that the Federal Republic of Yugoslavia's conduct gave rise to the principle of *ex injuria jus non oritur,*[428] which, if applied, would have prevented Belgrade from profiting from wrongful acts or justifying its egregious behaviour in the defence of its territorial integrity. He states, 'according to a well-established general principle of international law, a wrongful act cannot become a source of advantages, benefits or rights for the wrongdoer'.[429] However, because he acknowledged that the Kosovo Liberation Army was also responsible for violations to general international law, it is unclear how he

[425] Wellman (n 139) 142, 147
[426] Dissenting Opinion of Judge Koroma (n 348) [20].
[427] Separate Opinion of Judge AA Cançado Trindade (n 24) [205].
[428] *See* principle *ex injuria jus non oritur* P Guggenheim, 'La validité et la nullité des actes juridiques internationaux' (1949) 74 *Recueil des cours de l'Académie de droit international de La Haye* 223, 226-227.
[429] Separate Opinion of Judge AA Cançado Trindade (n 24) [132].

reconciled this fact against the act of independence.[430] Would this have permitted, for instance, a right to secede? Although Judge Koroma did not defend the Federal Republic of Yugoslavia's conduct, he did insist that the totality of facts made it illegal for the authors of Kosovar independence to secede.[431]

Pursuing his review of the totality of facts, Judge Koroma expanded his analysis to look at Security Council resolution 1244 (1999), which he underlined as a mandate to promote peace and stability in Kosovo until such time as a final settlement could be established between the Federal Republic of Yugoslavia and the PISG.[432] Under the Resolution, the Security Council was empowered to determine the nature of the international civil presence in Kosovo including the territory's autonomous composition pending final settlement.[433] For Judge Koroma, the reference to a final settlement excluded the possibility of the territory making a unilateral declaration of independence:

> The reference to a future "settlement" of the conflict, in my view, excludes the making of the unilateral declaration of independence. By definition, "settlement" in this context contemplates a resolution brought about by negotiation. This interpretation of resolution 1244 (1999) is supported by the positions taken by various States.[434]

Judge Koroma further referred to remarks made by France at the Security Council, which read:

> The Assembly in particular must renounce those initiatives that are contrary to resolution 1244 (1999) of the Constitutional Framework . . . No progress can be achieved in Kosovo on the basis of unilateral action that is contrary to resolution 1244 (1999).[435]

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[430] He states '*injuriae* [was] committed everywhere in the region as a whole, coming from a variety of sources (State and non-State alike).' Separate Opinion of Judge AA Cançado Trindade (n 24) [133] (brackets added).
[431] Dissenting Opinion of Judge Koroma (n 348) [18]-[24].
[432] ibid [16].
[433] SC Res 1244 (n 346).
[434] Dissenting Opinion of Judge Koroma (n 348) [16].
[435] Citing France's observation (United Nations, Official Records of the Security Council, Fifty-eighth year, 4770th Meeting, UN doc. S/PV.4770, p. 5; Dissenting Opinion of Judge Koroma (n 348) [16].

Importantly for Judge Koroma, Security Council resolution 1244 (1999) was not rescinded by Kosovo's actions or altered to provide the possible scope for a unilateral declaration of independence to succeed.[436] He specifically indicated that the absence of rescission or express power to separate means that the norms of self-determination continued to have effect.[437] Elaborating on this point, he states, 'the conclusion is therefore inescapable that resolution 1244 (1999) does not allow for a unilateral declaration of independence or for the secession of Kosovo from the Federal Republic of Yugoslavia (Serbia) without the latter's consent.'[438] This argument implies that any act beyond the parameters of Security Council resolution 1244 (1999) and the provisional administration of the territory under PISG, would be *ultra vires*.[439] In this light, the ICJ's attempt to distinguish the PISG as a creation of the Security Council[440] was regarded as unconvincing and contrary to what would have been concluded had the ICJ exercised a global review of the facts and circumstances.[441]

What does this demonstrate in terms of understanding and applying self-determination? In support of the opinions of Judge Koroma, Judge Bennouna suggested that by not following Security Council resolution 1244 (1999), the international system and specifically the Security Council and UN *Charter*, lost credibility by exposing the parties to an unclear process.[442] In this regard, Bennouna warned that this would allow the parties to 'face off against each other,'[443] which hypothetically, could have buttressed Serbia's right to exercise 'full and effective sovereignty over Kosovo in defence of the integrity of its territory'.[444] From this perspective, the ambiguity of the analysis considerably undermined the legal integrity of relevant self-determination issues.

In light of the preceding, the *Advisory Opinion on Kosovo* is significant because it

[436] Dissenting Opinion of Judge Koroma (n 348) [17]; Dissenting Opinion of Judge Bennouna (n 382) [57].
[437] Dissenting Opinion of Judge Koroma (n 348) [18].
[438] ibid.
[439] MG Kohen and K Del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law'?' (2011) 24 LJIL 109.
[440] Kosovo Advisory Opinion (n 67) [109]; The authors of the declaration were representatives of the people of Kosovo and not agents of the Security.
[441] Notably, the authors of the Declaration were the same individuals who served on the Provisional Institutions of Self-Government. *See* Dissenting Opinion of Judge Koroma (n 348) [19].
[442] Dissenting Opinion of Judge Bennouna (n 382) [56].
[443] ibid.
[444] ibid.

exposed a very important gap in international law. When considering Judge Koroma's concerns vis-à-vis the intentions of the PISG, Brewer noted that there was no express provision within Security Council resolution 1244 (1999) that outlined what type of outcome would follow UNMIK; 'Resolution 1244 did not prescribe the mechanism of Kosovo's status settlement, beyond compliance with the *Rambouillet Accords*, then [the] 1999 agreement to provide for peace, security, and an interim government in Kosovo.'[445] Although there is merit in the observation that the settlement had the effect of forbidding any resolution lacking Serbia's consent,[446] it is significant that there were no provisions articulating what and how the situation would end.[447]

3.7 Underlining the Uncertainty: Alternative Interpretations to the Facts-Based Approach

Weller indicates that the adoption of interim autonomy arrangements similar to the PISG can produce legitimate mixed expectations, with ultimate outcomes based on continued unity or independence stemming from the preliminary terms of the interim arrangement.[448] Could this have been the reason for the Security Council's reluctance to engage in long-term planning? Regardless of whether the Security Council avoided long-term implications associated with UNMIK, or comparatively, genuinely failed to anticipate long-term outcomes such as independence, the ultimate declaration turned out to be contentious. Weller adds that Martti Ahtisaari, the UN Special Envoy for the future status process for Kosovo and the former President of Finland,[449] proposed that steps should have been taken to afford Kosovo with a framework for objective

[445] Brewer (n 26) 274, citing SC Res 1244, 10 June 1999 [11(e)] (emphasis added).
[446] Dissenting Opinion of Judge Koroma (n 348) [18].
[447] Note, that the 1998 Canadian Supreme Court articulated a potential method for possible resolution, which was built-in to the 'settlement'; *Reference re Secession of Québec* (n 31) [84].
Brewer also notes that although the Federal Republic of Yugoslavia did not sign the *Rambouillet Accords*, no new state has been admitted to the United Nations against the wishes of its parent state. Brewer (n 26) 274.
[448] Weller (n 2) 162.
[449] Hereafter 'The Ahtisaari proposal'. Report of the Special Envoy of the Secretary-General on Kosovo's future status, United Nations doc. S/2007/168, 26 March 2007) ¶¶ 3 and 5. 'It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse… The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.'

statehood from the onset.[450] The *Ahtisaari Proposal* essentially would have provided a viable framework for justifying eventual independence, and perhaps more importantly, for demonstrating what would have effectively have been a global governance approach in the evaluation of the specific allegations and claims advanced by both Belgrade and Pristina.[451] However, the Security Council's reluctance to pursue anything beyond the stabilisation of peace meant that Kosovo's status would be locked in a state of limbo.[452] Weller summarised this initial period of post-conflict peace as follows:

> It was left to the organized international community to determine the consequences of these facts and form a view on statehood. It was hoped that this would be done collectively, through a decision of the UN Security Council, which would at the same time establish original limitations on Kosovo's sovereignty and 'supervised independence'. As there was no Security Council resolution embracing this solution, another route had to be found to legally anchor this case of supervised independence. Kosovo unilaterally accepted original limitations on its sovereignty in its declaration of independence, along with the exercise of certain international supervisory powers for a period. Due to the deadlock in the [Security] Council, the UNMIK operation continued as something of a shell, within which the new EULEX mission will unfold.[453]

Without anchoring Kosovo's political status to legal questions, it can be concluded that the ICJ's opinion revealed a significant void in analysis by omitting important facts relating to internal self-determination.[454] Additionally, it is contended that the dissenting opinions of judges Koroma and Bennouna revealed that there are gaps from another perspective. Despite advocating a facts-based approach, the criticisms of the two judges suggest that the legality of unilateral declarations of independence could have been determined by looking at Security Council resolutions rather than conditions associated with post-colonial self-determination.

This sparks the general question about how the different judges approached the problem

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[450] ibid.
[451] ibid.
[452] Weller (n 2) 162.
[453] ibid.
[454] Separate Opinion of Judge AA Cançado Trindade (n 24) [201].

faced by the Court. It would seem that judges Koroma and Bennouna looked at the facts from a state-centric perspective, remembering that only states are bound by international obligations pertaining to territoriality and territorial powers.[455] On the other hand, Judge Cançado Trindade identified that this would be unhelpful when attempting to resolve conflicts and would do little to address the historic wrongs committed by states. Orakhelashvili supports Judge Cançado Trindade's concern by stating:

> Should this be true, then the principle of self-determination of peoples would become irrelevant, because the units genuinely deserving self-determination and independence, for instance those under colonial domination, alien domination or foreign occupation, would have no rights on their own but their status would merely depend on the views of other States.[456]

It is clear that a strict review of the facts can produce vastly different perspectives. As we have seen from the viewpoints of judges Bennouna, Cançado Trindade, Koroma, and Simma, the conflict in Kosovo did indeed produce a number of relevant legal considerations that the ICJ should have considered when formulating its final opinion. However, as will be discussed later when elaborating the global governance approach, these considerations need to be looked at together in a global manner. Since the various judges of the Court criticised the ICJ for different reasons whilst referring to different facts, begs the question as to whether they took all the facts into consideration. One reason that this is important is because by looking at the facts, it then becomes possible to determine legal primacy.

If judges Bennouna and Koroma did not look at oppression as an important legal consideration, is it because they did not generally view humanitarian laws as being relevant to secession, or is it because they viewed oppression as a secondary consideration to the legal principles and implications arising from Security Council resolution 1244 (1999)? Comparatively, Judge Cançado Trindade's opinion suggests that oppression needs to be considered as a paramount consideration when addressing

[455] Article 7 of the ILC Draft Articles on State Responsibility (Part 1) (ILC Year Book, 1980, vol II, Part 2) 30.
[456] A Orakhelashvili, 'Kosovo and the Pitfalls of over-theorizing International Law: Observations on Hilpold's Rejoinder', (2009) 8(3) Chinese JIL 589, 591.

the legality of unilateral declarations of independence and secession. Yet, when we look at the facts in any given minority-state relationship, none will likely be the same. In this sense, Judge Cançado Trindade's *factual complex* is limited if it only looks at humanitarian atrocities committed by the Federal Republic of Yugoslavia. If oppression can substantiate secession, then there needs to be a more comprehensive and global review of the facts.

3.8 Conclusion

Under a system of international law that is based on state hegemony,[457] but which must also contend with broader social and political phenomena like poverty, globalisation, and domestic conflicts, it is crucial that there be a process to evaluate the positional-interests of territorial minorities, states and the international community. Typically, when a territorial minority claims oppression with a view to justifying an attempt to secede, it would likely face a contrary argument from the state suggesting that oppression has not occurred. This gap highlights many of the necessary considerations needed to address particular self-determination conflicts.

Opportunities to assess positional-based interests at the heart of understanding internal self-determination have generally suffered from sluggish international oversight,[458] with the ICJ's *Advisory Opinion on Kosovo* producing widespread disappointment and concern for its failure to address the legality of secession.[459] Refusal to look at the broader issues is frustrating, because it provides little direction about how to understand and address the many self-determination conflicts around the world. Rather than engage in discussion, states and the international community have seemingly preferred avoidance on self-determination issues.[460]

To illustrate the extent of this problem, it has been suggested that the ICJ's *Advisory Opinion on Kosovo* complicated already existing uncertainties involving internal self-

[457] Henkin reasons that it would be naïve to expect total objectivity in a system where the power and geo-political rules are designed primarily by states for states. L Henkin, 'International Law: Politics, Values and Functions' in *Collected Courses of The Hague Academy of International Law* (Martinus Nijhoff Publishers, Dordrecht 1990) vol iv, 214-215.
[458] *See* Jovancović (n 63).
[459] ibid. 294 citing: Pippan (n 65) 145; Burri (n 61); Arp (n 60).
[460] Saul (n 37) 642.

determination, oppression and secession. Arguably, by not looking at the legal implications of a unilateral independence in the broader context of self-determination conflict, the ICJ may have inadvertently undermined the desire for territorial minorities and states to engage the international community on self-determination issues.[461] This is not a viable outcome for the international community or how we should understand international law.

Without an approach that allows territorial minorities the opportunity to articulate their needs and improve conditions within minority-state relationships, the application or practise of internal self-determination will remain *lex obscura.*[462]

In the next chapter, it will be argued that human rights, political representation and the right to development have emerged as key expectations associated with the application of internal self-determination. Their importance is underlined by the fact that they are used to illustrate the realisation of internal self-determination, or in their absence, oppressive conditions precipitating calls for external self-determination as in Kosovo. In this respect, they represent important legal and extra legal considerations linking internal self-determination to external self-determination based on global governance approach looking at the case-specific circumstances of various self-determination claims. As such, the analyses in chapter four suggest that expectations associated with human rights, political representation and the right to development create state responsibilities and obligations, which if denied could be used as a basis to pursue external self-determination.

[461] Dinstein, 'Autonomy Regimes and International Law' (n 399) 444; *see also* Jovancović (n 63) 295.
[462] Crawford suggests that it is *lex obscura* by virtue of the fact that outside the colonial context it is unclear what it means. Crawford, 'The Right to Self-Determination in International Law' (n 5) 17.

Chapter Four: Global Governance Considerations Relating to the Scope of Internal Self-Determination

4.0 Introduction

The application of external self-determination during decolonisation witnessed the transfer of sovereignty from metropolitan states to colonies, like the Netherlands to the Dutch East Indies in 1949, the United Kingdom to the Gold Coast in 1957, and France to Algeria in 1962. While Biafra and East Pakistan raised concerns about the plight of territorial minorities under neo-colonialism or proxy colonial conditions, further questions were raised about how the right to self-determination and particularly internal self-determination should be exercised.[463]

Internal self-determination has generally been referred to as the representation of peoples and groups within states,[464] a 'mode of implementation of political self-determination,'[465] or a right to 'continually' re-create political, economic and social order.[466] Critics of internal self-determination have hinted that a lack of substance[467] and lack of state application[468] of these principles has undermined it as an international norm.[469] However, it is argued that existing international treaties and instruments already lay the foundation for what may be identified as important considerations to support its definition.

Principle VIII of the Organization for Security and Co-operation in Europe's *Helsinki Final Act*[470] is explicit in its reference to internal self-determination as a right of all

[463] ibid 8; M Bennet, 'Indigeneity as Self-Determination' (2005) 4 Indigenous Law Journal 71, 92.
[464] J Gareau, 'Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory' (2005) 18 LJIL 489, 505.
[465] Raič (n 7) 237.
[466] Ryan (n 19) 65; Rosas (n 7); Pentassuglia (n 19); Kimminich (n 19).
[467] J Salo, 'Self-Determination: An Overview of History and Present State with Emphasis on the CSCE Process' (1991) 2 Finnish Yrbk, of Intl L 268, 309.
[468] Hannikainen (n 44).
[469] *See* Crawford, 'The Right to Self-Determination in International Law' (n 5) 8; However, uncertainty has not stopped the European Community from identifying incidents of infringement and instituting guidelines for recognising new states based on the respect for internal self-determination. *See EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union* (1993) 4 EJIL 72 taken from McCorquodale, 'Self-determination: A Human Rights Approach' (1994) 43 ICLQ 857, 865.
[470] *Conference on Security and Cooperation in Europe, Final Act* (Helsinki, August 1, 1975) (n 13).

peoples to determine 'when and as they wish, their internal and external political status, without interference, and to pursue as they wish their political, economic, social and cultural development'.[471] Additionally, paragraph 7 of UN General Assembly Resolution 2625 (XXV), both the ICCPR and ICESCR, the UN's *Vienna Declaration,*[472] the *Declaration on the Rights of Indigenous Peoples*,[473] the *African Charter on Human and Peoples' Rights*,[474] and the Organization on Security and Co-operation in Europe's *Charter of Paris for a New Europe*[475] reference various political, economic and social rights applicable to internal application within states. Cassese suggests that reference to democratic principles and human rights has broken new ground by reaffirming the relevancy of self-determination outside decolonisation.[476]

This chapter draws upon these references by arguing that internal self-determination should be understood as a process incorporating human rights, access to political representation and the right to development. Although not exhaustive, the legal and extra-legal considerations drawn from these rights are consistent with scholarly opinion and represent, when realised, what can be best described as a 'decent life'[477] for territorial minorities under post-colonial conditions. It will also be necessary to define internal self-determination in relation to external self-determination. It is proposed that by describing the denial of internal self-determination within the context of oppression, there emerges a clear understanding of the connexion between the two self-determination concepts. Thus, if oppression is used to justify the pursuit of secession, it is on the basis that a territorial minority has been denied key considerations associated with their human rights, access to political representation and access to development opportunities. Although Crawford has stated, with reference to oppression, that it would be 'strange if self-determination was defined only by its denial,'[478] this can actually be an effective means to describe internal self-determination. In fact, it is suggested that by promoting an idea of internal self-determination that reflects a variety

[471] ibid [Pt 1, VIII].
[472] *See* Part 1(2), UNGA Res 157/23, 12 July 1993, *Vienna Declaration and Programme of Action.*
[473] *See* Articles 3-5, UNGA Res 61/295 (n 106).
[474] *See* Article 20, *African Charter on Human and Peoples' Rights* ('Banjul Charter'), 27 June 1981 (entered into force 21 October 1986), CAB/LEG/67/2 rev. 5, 21 I.L.M. 58 1982.
[475] *See* 'Human Dimension', *Charter of Paris for a New Europe*, Organisation for Security and Cooperation in Europe (Paris, November 1990). For in-depth review, *see* Thornberry, 'Self-determination, Minorities, Human Rights' (n 10) 867.
[476] Cassese, *Self-Determination of Peoples* (n 81) 286.
[477] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 129.
[478] Crawford, 'The Right to Self-Determination in International Law' (n 5) 38.

of 'positive' and 'negative' considerations, is a good example of the global governance approach and new way of looking at all the various party-specific rights, needs and interests associated with post-colonial self-determination.

4.1 Chapter Outline: Legal and Extra-Legal Considerations Concerning Human Rights, Access to Political Representation and the Right to Development

The first part of the chapter will look at various considerations associated with human rights as a fundamental component of internal self-determination. As part of this analysis, further comparisons will be drawn between remedial and liberal-nationalist theories. Additionally, focus will look at both civil and political rights and economic, social and cultural rights. A broad analysis of the differing sets of rights will be used to demonstrate that they are both relevant for establishing internal self-determination responsibilities and obligations under a global governance approach.

The second part of this chapter will examine a right to representative government as referenced in UN General Assembly 2625 (XXV) and other instruments to show that internal self-determination includes important considerations relating to political representation for territorial minorities. Political representation has been referred to as an emerging international norm supporting democratic governance,[479] while others have distanced political representation from democratic principles by suggesting that representation does not *per se* invoke obligations to have democratic systems of government.[480] These differences are key to understanding the scope of possible considerations that territorial minorities have come to expect from the right to self-determination, and particularly the types of constitutional and federal mechanisms that may form a part of specific internal self-determination processes.

The examination of the right to development is necessary to illustrate that the idea of self-determination now includes broader responsibilities and obligations that capture needs to have mechanisms to ensure human rights like political, economic and social rights are realised.[481] In other words, looking at the right to development as an intrinsic

[479] Franck, *Fairness in International Law and Institutions* (n 4) 91.
[480] Vidmar (n 29) 268.
[481] *See generally* Salomon and Sengupta (n 30).

part of internal self-determination requires that internal self-determination be treated as a process from which many different human rights and fundamental freedoms relevant to the well-being of territorial minorities are realised.[482] Furthermore, looking at internal self-determination as a process to support the choices of groups to determine their own development or political, economic and social status invariably means that each process will reveal different needs and priorities. This is a key point and a fundamental theme throughout this thesis.

To facilitate this examination and highlight the fact that claims of oppression need to include consideration for the key issues affecting particular territorial minorities relating to the aforementioned considerations, the following questions will be addressed: How is the subject of oppression relevant to understanding the scope of internal self-determination and how are specific claims assessed?; how do other self-determination theories interpret internal self-determination?; and how can a global governance approach support the link between internal and external self-determination?

4.2 Internal self-determination: 'justice anchored in a conception of basic human rights'[483]

Higgins has argued that there is 'no reason of principle why an entitlement held by a group cannot be termed a human right.'[484] Her remarks were used in the context of describing why economic, social and cultural rights can be as much of a human need as civil and political rights commonly associated with freedom from maltreatment.[485] She suggests that human rights must be treated equally even if their implementation requires 'positive rather than negative abstinence.'[486] When considering Higgins' remarks, it is evident that this same outlook has not necessarily been followed in the context of self-determination. Specifically, in the analysis presented below, there is a distinct idea of a hierarchy of rights used to justify, what Buchanan has called, a 'morally defensible and practical legal response to self-determination [secessionist claims]'.[487] For example,

[482] ibid 17.
[483] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 70.
[484] Higgins (n 5) 102.
[485] ibid 99-102.
[486] Ibid 100.
[487] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81 (brackets added).

when recalling the analyses of Nanda, [488] Buchheit[489] and Judge Cançado Trindade,[490] who looked at possible reasons for justifying secession, they describe oppression as comparable to colonial conditions. In other words, they infer that the harm of staying in the state outweighs any possible harm caused by separation.

Buchanan has suggested that internal self-determination should specifically reflect those human rights commonly referred to as being the most integral to the decent life of peoples and international peace and stability.[491] These, he reasons, would include as a minimum the protection of the 'basic human rights' of minorities.[492] Underlining Buchanan's assessment is a belief that minority-state relations rely on morally defensive human rights standards.[493] This means that states must include the promotion and respect for human rights.[494] Sharing this perspective, Crawford believes that the human rights obligations should identify when secession could be invoked as a last resort to address possible violations.[495]

For remedial theorists like Buchanan, the promotion and protection of certain human rights within a framework of minority-state relations or internal self-determination would serve as evidence to rebut unfounded secessionist claims. As alluded to, Buchanan identifies 'basic human rights' as being those rights that if denied would pose the most serious threat to decent human life, such as the right to life.[496] Other remedial theorists prescribe narrower[497] or more expansive[498] criteria of human rights to illustrate what would be acceptable conditions of internal self-determination or rather, acceptable measures to rebut secessionism. In calling for specific criteria, most remedial theorists advocate that a consistent and universal approach should be applied. However, the emphasis placed on the universal application of human rights may overlook the fact that

[488] *See, e.g.,* Nanda (n 251) 278.
[489] Buchheit (n 26) 222.
[490] Separate Opinion of Judge AA Cançado Trindade (n 24) [184].
[491] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 129.
[492] ibid.
[493] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81.
[494] *See generally* Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28).
[495] Crawford, 'The Right to Self-Determination in International Law' (n 5) 61.
[496] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 129.
[497] *See, e.g.,* Walzer (n 377); W Timmermann, 'Self-Determination Beyond the Decolonisation Context: The Case for a Right of Suppressed Peoples to Secession' in K Koufa (ed), *Multiculturalism and International* Law (Sakkoulas, Athens 2007) 368.
[498] Raday, 'Self-Determination and Minority Rights' (n 6).

certain territorial minorities regard internal self-determination as requiring greater analysis than what is contained in a core list of certain human rights.[499] In other words, if only some human rights are regarded as being necessary for states to respect in order to satisfy their internal self-determination obligations, then it ignores differences in how human rights are protected and interpreted from state to state and culture to culture.

4.2.1 Article 27 of the ICCPR and Its 'Negative Formulation'[500]

In looking at the ICCPR, it can be recalled from chapter two that Article 27 is restrictive by not recognising group-based entities. Although it requires states to use objective criteria[501] when identifying minorities, states are only required to interpret 'persons belonging to such minorities,'[502] as having legal personality. The exclusion of group-based entities from the scope of Article 27 extends to the Human Rights Committee, which will not hear complaints on suspected Article 27 violations from groups.[503] Thus, minority recognition is qualified by an individual's membership with a group rather than recognition for an actual group.[504] This deliberative 'negative formulation'[505] of Article 27 enables states to overlook minorities within public spheres of society and government.[506] It also has the effect of marginalising territorial minorities since the framework of minority protection is largely conducted from the perspective of the state and in a manner that only recognises individuals as rights

[499] Sen suggests that there is a need to address the 'interconnectivity' of rights in order to ensure that the actual contextual needs of groups are addressed and rationally linked to a variety of needs aimed at specific outcomes. *See generally* A Sen, 'The Right Not to Be Hungry' in P Alston and K Tomasevski (eds), *The Right to Food* (SIM, The Netherlands 1984).
[500] Thornberry, *International Law and the Rights of Minorities* (n 267) 149.
[501] The Human Rights Commission has detailed that 'The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.' Human Rights Committee, General Comment 23, art 27 (Fiftieth session 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev1, 38 (1994) para 5.2.
[502] Significantly, this also affects the 'community of territorial minorities' as the Human Rights Commission's decision in *Ballantyne, Davidson, McIntyre* v. *Canada* provides that, 'minorities referred to in Article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of Article 27. English speaking citizens of Canada cannot be considered a linguistic minority.' *Ballantyne, Davidson, McIntyre* v. *Canada* (359/1989 and 385/1989/Rev 1), CCPR/C/47/D/359/1989 and 385/1989/Rev1 (5 May 1993). Para 11.2.
[503] Salomon and Sengupta (n 30) 9; *see also, Lubicon Lake Band* v. *Canada* UNDOC A/42/40 (1984).
[504] Thornberry, *International Law and the Rights of Minorities* (n 267) 149.
[505] Crawford, 'The Right to Self-Determination in International Law' (n 5) 23.
[506] *See, e.g.,* Hailbronner (n 272) 134.

holders.[507] More broadly, it also has the effect of lowering the threshold in terms of what responsibilities and obligations states would have to extend to territorial minorities within processes of internal self-determination, since states would only have a negative obligation to protect minority rights rather than proactively recognise groups.[508]

The general interpretation of minority rights in the ICCPR means that although states are prohibited from impeding the rights of individual citizens from enjoying their culture,[509] there are no positive obligations in that instrument recognising group identities in a manner that ensures full meaningful and continuous access to the decisions that affect groups.[510] So what does this mean in terms of identifying possible legal and extra legal considerations that would be necessary for groups to exercise internal self-determination? The minimum criteria of minority rights protections in the ICCPR do little to convince that a minority-state relationship could be sustained on reliance on Article 27 alone. There are too many transient global influences, like disparities in wealth and health that require consideration for group-based entities, as well as individual members of groups.

Implicit to the philosophy of Buchanan and other remedial theorists is that the ICCPR forms the core of the human rights responsibilities and obligations that would be expected within internal self-determination processes. In other words, human rights principles under the ICCPR form the basis of what remedial theorists generally view as being integral for satisfying a decent human life for individuals and groups. Particularly, Buchanan identifies these rights to be:

> The right to life (the right not to be unjustly killed, that is, without due process of law or in violation of the moral constraints on armed conflict); the right to the security of the person, which includes the right to bodily integrity; the right against torture; the right not to be subject to arbitrary arrest, detention, or imprisonment; the right against enslavement and involuntary servitude; the right

[507] *See generally* Salomon and Sengupta (n 30).
[508] This corresponds to Article 5(1) and the prohibition against any action aimed at the destruction of the rights in the Covenant. Furthermore, Articles 2(1) and 26 of the ICCPR add weight to this argument by stressing that governments have a duty to uphold equality before the law without distinctions of "any kind", based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Steiner and Alston (n 302) 993.
[509] Crawford, 'The Right to Self-Determination in International Law' (n 5) 23.
[510] ibid.

> to resources for subsistence; the most fundamental rights of due process and equality before the law; the right to freedom from religious persecution and against at least the more damaging and systematic forms of religious discrimination; the right to freedom of expression; the right to association (including the right to marry and have children, but also to associate for political purposes, etc.); and the right against prosecution against at least the more damaging and systematic forms of discrimination on grounds of ethnicity, race, gender, or sexual preference.[511]

It is important to recognise that Buchanan's range of basic human rights tends to exclude the rights requiring positive steps to be undertaken by states[512] as found within the ICESCR.[513] This is problematic, especially when considering that both civil and political rights, and economic, social and cultural rights share many of the same attributes that make them fundamental legal and moral principles.[514] Although the ICESCR does not expressly mention minority rights, it is nonetheless relevant due to the importance of the great environmental, economic and demographic challenges affecting the ability of individuals and groups to benefit from a decent human life in the twentieth-first century. Arguably, the exclusion of economic, social and cultural rights from Buchanan's notion implies that he finds these rights unnecessary for a decent human life and possibly irrelevant for assessing claims of oppression.[515] This is surprising when considering that many minority vulnerabilities are connected to broader economic and social issues relating to, for example, globalisation and poverty.[516]

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[511] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 129.
[512] Or rights generally framed as requiring positive steps as opposed to "negative rights", which are generally prohibitive and require little affirmative actions.
[513] ICESCR (n 21).
[514] 'Certain acts which were classified in the past as 'inhuman and degrading treatment', as opposed to 'torture', could be classified different in the future.' *Selmouni* v. *France* ECHR, Application No. 25803/94 (July 28, 1999) para 3; *see also* Higgins (n 5) 112.
[515] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 129; In defense of Buchanan's perspective, it should be appreciated that the ICCPR and ICESCR have important distinctions. For instance, under both Article 4(1) ICCPR and Article 4 ICESCR states are able to derogate from their obligations based on distinct justifications. However, whereas Article 4(1) ICCPR only permits states in times of emergency to derogate from their obligations, Article 4 ICESCR specifies that states may justify limitations if there exist laws and social programmes to promote 'general welfare' or according to Article 2(1), states have exhausted the 'maximum availability of their resources.' Although differences between how these obligations may be credited to the differences between interpreting prohibitive and promotional rights, there is sufficient difference between the two to note that the ICESCR imposes far fewer responsibilities and obligations upon states.
[516] United Nations Committee on Economic, Social and Cultural Rights (CESCR), *Report of the UN Committee on Economic, Social and Cultural Rights, Eighteenth and Nineteenth Sessions (27 April - 15*

4.2.2 Internal Self-Determination Comprised of ICESCR and ICCPR Rights

In comparison to Buchanan's approach, Raday views the ICCPR and ICESCR as equally important for creating sustainable minority-state relations and rebutting secessionism. These rights, as identified under Article 27, ICCPR are rights to:

> Life; Protection against torture or cruel, inhuman, or degrading treatment; Protection from slavery; Protection against arbitrary expulsion; Liberty and freedom from arbitrary arrest or detention; Liberty or movement; A fair and public hearing and protection from retroactive criminal liability; Privacy, freedom of thought and conscience; Enjoyment of own culture; Freedom of religion; Use of own language and freedom of expression; Peaceful assembly and freedom of association; Marriage and founding of a family; and Protection of minors and equal protection of the law without discrimination;

And under the ICESCR the rights to:

> Work and enjoyment of just and favourable working conditions; Formation of trade unions; Protection of the family; An adequate standard of living; and the highest attainable standard of health and education.[517]

Raday proposes a more inclusive and diverse approach in his idea of internal self-determination than Buchanan. He seems to acknowledge that political, economic, social and cultural rights are equal to civil and political rights for meeting group needs. Yet, Raday's expansive look at such items as a right to language, privacy, economic rights and an adequate standard of living is difficult to grasp without appreciating what conditions they would be applied to. One way to better understand which rights are essential to a minority's needs and sense of group identity[518] is to ask whether the absence of any of these rights would threaten the protection and survival of a particular group. In this respect, greater investigation and analysis is necessary to identify which

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May 1998, 16 November - 4 December 1998), 31 May 1999, E/1999/22; E/C.12/1998/26; chap VI, sect A [5].

[517] Raday, 'Self-Determination and Minority Rights' (n 6) 476-477.

[518] Ryan (n 19) 60-61.

rights and how they are applied are relevant for protecting groups and ensuring, in Buchanan's words, that a decent life is realised.

4.2.3 A High Threshold of Oppression to Describe Internal Self-Determination

Walzer offers a third remedial perspective on what possible human rights criteria could be included within internal self-determination. Unlike Buchanan and Raday, Walzer argues that only the most egregious forms of human rights abuse, such as 'bloody repression,'[519] which would 'shock the moral conscience of mankind', should justify international humanitarian intervention to aid specific minority groups.[520] This perspective represents a remedial extreme in terms of what would qualify as a legitimate ground for exercising international intervention[521] and external self-determination. Indeed, Walzer seems to support a notion that minorities should tolerate seemingly unfavourable conditions of state control over minorities in the belief that multinational states are the best guardians to protect minority interests and advance the benefits of what should be a broader cultural purpose and benefit from living in multinational states.[522]

Walzer's narrow view would permit forms of violence just below what may be identified as genocide before a territorial minority could claim oppression and pursue secession.[523] Opposing Walzer's view, Buchanan argues that a system that warrants extraordinary protections would undermine a broader cultural purpose for achieving harmonious co-existence between territorial minorities and states, since meaningful social justice would be frustrated.[524]

Importantly, although there is a difference between what is required to exercise internal self-determination and what forms of treatment can justify oppression, it is argued that the two concepts are causally connected. For example, government funding cuts to language programmes could be viewed as a fundamental cultural right necessary for the

[519] Walzer (n 377) 88.
[520] ibid 107.
[521] *See generally* G Doppelt, 'Statism without Foundations' (1980) 9(4) Philosophy and Public Affairs 398-403; C Beitz, 'Nonintervention and Communal Integrity' (1980) 10 Philosophy and Public Affairs 385-91.
[522] Walzer (n 377) 78–101.
[523] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 176–177.
[524] ibid.

future survival of the group. Cuts to the programme could therefore constitute a form of oppression and proceeding calls for greater autonomy or secession. At the same time, it should be appreciated that not every interaction or act between states and territorial minorities should be identified as oppression. Fundamentally, most minority-state relations are peaceful. The point of this thesis is to focus on those relations that include contentious issues relating to the needs and interests of territorial minorities. In another light, whether human rights are respected or violated can make the difference between functional and dysfunctional processes of internal self-determination and minority-state relations.

4.2.4 Protecting Identity, Culture and Ensuring Participation in Government: Separation as the Means for Protecting Rights

More often than not, specific human rights are not fully articulated in terms of generating internal self-determination responsibilities and obligations. Crawford, Pentassuglia and Higgins allude to the possibility of secession arising from cases where basic human rights have been deprived, but rarely detail which types of rights they mean.[525] One of the possible explanations for this may be due to a desire to promote and apply universal human rights standards. It is contended below that this type of outlook can prove to be problematic. It does not enable the prioritisation of needs[526] and shifts focus away from the inherent issues and influences affecting specific territorial minorities and states.

When examining the global governance approach, it is worth considering the position of Hannum. He points out that 'the burden on those seeking separatist self-determination is to demonstrate that only separation will be able to meet the internationally sanctioned goals of protecting identity and culture and ensuring effective participation in government.'[527] Despite being somewhat uncertain in terms of identifying specific

[525] Crawford, 'The Right to Self-Determination in International Law' (n 5) 41;
Pentassuglia refers to state obligations under the 1993 *Vienna Declaration*, but goes on to say that 'remedial secession' could be a possibility in circumstances of egregious discrimination. Pentassuglia (n 19) 303, 311-313; Importantly, Higgins explores this notion from outside the legal context and therefore distances herself from any connexion between oppression and a legal right to secession. Higgins (n 5) 125.
[526] Sengupta (n 33) 80-89.
[527] H Hannum 'Self-determination in the Twenty-First Century' in H Hannum and EF Babbitt (eds), *Negotiating Self-determination* (Lexington Books, Lanham MD 2006) 61, 77.

human rights considerations,[528] Hannum's argument is important for its implication that the international community, as stated previously, would have to address self-determination claims on a case-by-case basis.[529] This is fundamentally different from Buchanan's case-by-case approach, which looks less into the context of the oppression claim, but more into the steps that states should take to ensure effective decisions are made in separation processes. Hannum suggests that states should:

> Support secessionists who are victims of clear and persisting injustices; pressure states to protect the initial rights of minority members to reduce the possibility that secessionist claims will arise; help ensure that the views of minority groups are effectively represented in public deliberations; support intrastate autonomy regimes; and provide assistance such as non-binding arbitration between states and permanent minorities.[530]

Hannum's case-by-case approach allows territorial minorities to identify specific contextual factors associated with a denial of meaningful internal self-determination that affects their abilities to enjoy a decent life. Critics of this approach would allude to the possible inconsistencies that could emerge if human rights are not universally approached in the same manner and therefore undermine the inherent value of the rule of law.[531] However, the freedom of thought, conscience and religion under Article 18 of the ICCPR may not be valued in the same manner in Sub-Saharan Africa as it is in Europe. This is because, in Sub-Saharan Africa, the effects of poverty and need for mechanisms to secure economic rights may be more important to the current issues affecting groups. In this sense, a case-by-case approach looking at the needs of groups and the specific claims of oppression would provide much greater insight into what is a meaningful expression of internal self-determination.

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[528] Hannum once suggested that secession could be permitted if there was evidence of discrimination pertaining to UNGA Res 2625 (XXV) (n 48) based on race, creed or colour. Hannum, *Autonomy Sovereignty and Self-Determination* (n 254) 473.

[529] Hannum 'Self-determination in the Twenty-First Century' (n 528) 61, 77; Hannum's remark also has the effect of looking at the subject of basic human rights being denied due to an inability to exercise democratic self-government. *See* Scharf (n 122) 384.

[530] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 363.

[531] For an overview of some of the primary challenges and controversies, *see* MA Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' 2 Nw UJ Intl Hum Rts 5.

4.2.5 The Challenge of formulating Specific Legal and Extra-Legal Considerations

Although this thesis argues that the identification of specific considerations relating to human rights is fundamental for creating meaningful processes of internal self-determination and identifying instances of oppression in the case of frustration, there are many challenges that prevent agreement on which human rights should be considered relevant to establishing internal self-determination responsibilities and obligations between states and territorial minorities.

The considerations proposed by Walzer are greatly different from those proposed by Raday. The latter favours a framework of minority-state relations in which indicators can be identified for triggering a valid secessionist claim. Although Raday's reference to trade unions may not seem like a strong enough reason to pursue secession, it underlines the complexity and diversity of specific approaches looking into post-colonial self-determination.

When approaching internal self-determination, oppression and secession using a 'remedial lens', the methodological focus looks at what human rights should be guaranteed in order to rebut secessionist claims. This forces theorists to identify core criteria that can be universally applied at the expense of case-by-case analyses. This is risky, since the preferences of some of the remedial theorists mentioned above suggests that economic, social and cultural rights would be excluded from internal self-determination processes.

4.3 Political Representation: 'It is for the people to determine the destiny of the territory and not the territory the destiny of the people'[532]

When we look at the various considerations relevant for defining and applying internal self-determination, they should be viewed with an appreciation for emerging trends in global governance like access to resources and democratic governance that have become important issues since the end of the era of decolonisation. Judge Dillard's famous dictum in the *Western Sahara* case that 'it is for the people to determine the

[532] *The Western Sahara Case* (n 229).

destiny of the territory and not the territory the destiny of the people',[533] provides an important basis for understanding how internal self-determination is viewed today. For instance, since the *Western Sahara* case, there has been a significant increase in the number of analyses looking at internal self-determination, its possible composition, and the implications that a denial of internal self-determination will have upon territoriality.[534]

4.3.1 A Right to Political Representation

It is proposed that democratic forms of governance should be interpreted as the 'core meaning'[535] to the references of political representation identified in the various international treaties and instruments identified above. For example, liberal theorists, such as Franck, state that self-determination has a special connexion to democratic representation, as it represents 'the historic root from which the democratic entitlement grew.'[536] His observation not only alludes to the importance of self-determination in advancing democratic ideals, but also presents self-determination as a vehicle in which new ways of looking at democracy may be viewed in a post-colonial era.[537] Significantly, Franck does not fully detail how this happens, but alludes to contemporary expectations that would permit a framework for democracy to be realised. His views on fairness in international law capture his ideas:

> The fairness of international law, as any other legal system, will be judged, first by the degree to which the rules satisfy the participant's expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as a right process.[538]

Franck's view concerning participation in decision-making as a key element of internal self-determination is intended to convince sceptics that principles of justice are

[533] ibid.
[534] *See, e.g.,* Hannum, 'Self-determination in the Twenty-First Century' (n 528) 61.
[535] *See* HLA Hart, *The Concept of Law* (Clarendon Press, Oxford 1961) 121-144.
[536] Franck, *Fairness in International Law and Institutions* (n 4) 91.
[537] ibid 155; Significantly Pentassuglia even refers to internal self-determination as 'Internal (Democratic) Self-Determination.' Pentassuglia (n 19) 312.
[538] Franck, *Fairness in International Law and Institutions* (n 4) 7.

invariably linked to normative ways of looking at rules and relations between states and minorities.[539] In this sense, Franck would interpret the exclusion of a territorial minority from decision-making processes as a significant deciding factor as to whether there would emerge a qualified right to secede in international law.[540] This is important, since by looking at the relationship between internal self-determination and external self-determination, it is possible to see that there is an important causal relationship linking the two concepts.

Particularly, if there is sufficient evidence of what Franck calls 'fairness' or a 'justifiable distribution of costs and benefits'[541] found within the application of internal self-determination, then secession could not be advanced in the context of international law. Of course, this perspective needs to be distinguished from that of other theories, since the guarantees of democratic decision-making do not fully address the same concerns posed by remedial theorists in wanting support for intra-state autonomy regimes.[542] In another light, it is not certain what kind of system of decision-making would be required to rebut secessionist claims.[543] This is because 'effective' decision-making would invariably depend upon a case-specific assessment of the relationship between the territorial minority and the state. For the moment, this consideration need not be fully explored. However, when reviewing remedial and liberal-nationalist theories in chapter six, it will be demonstrated that a standard approach should be process-driven rather than outcomes-based. A process-driven approach reflects the different concerns affecting minorities and states and is adaptable to evolving needs and changes.

In light of the above, in the context of political representation, a key feature for supporting a standard approach to internal self-determination would be a need for continuous involvement in decision-making processes. Internal self-determination concerns the relationship between governments and peoples, and confers a right on individuals, groups and peoples to continually re-create their political, economic and

[539] *See* Tierney, 'The Search for a New Normativity' (n 188) 941.
[540] Franck, *Fairness in International Law and Institutions* (n 4) 168-169.
[541] ibid 7.
[542] *See* Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 436.
[543] *See generally* Franck, *Fairness in International Law and Institutions* (n 4); Franck, 'The Emerging Right to Democratic Governance' (n 29).

social order.[544] In this sense, self-determination is both a means and an end to sovereign expression. In 1984, the British representative to the General Assembly underlined this sentiment when speaking in the context of the oppressive conditions in apartheid South Africa:

> Self-determination is not a one-off exercise. It cannot be achieved for any people by one revolution or one election. It is a continuous process. It requires that peoples be given continuing opportunities to choose their governments and social systems, and to change them when they so choose.[545]

Musgrave adds to this by underlining that the internal concept should be viewed as a periodic exercise of popular sovereignty within states,[546] whereas Allgood identifies that 'each state has an obligation to its residents to provide adequate channels through which their *will* can be expressed.'[547] As a result, a full realisation of political representation would see people and groups making political decisions on a recurring basis within specific territories where the periodic exercise of popular sovereignty may be applied.[548]

This is significant, as it links internal self-determination to political decision-making and more broadly to popular decision-making. UN General Assembly Resolution 2625 (XXV) emphasises that self-determination incorporates 'a government representing the whole people belonging to the territory without distinction as to race, creed or colour,'[549] while the preamble of Security Council Resolution 556 (1984) referred to the oppressed majority population of South Africa as having 'the full exercise of the right to self-determination and the establishment of a non-racial democratic society in an unfragmented South Africa.'[550] Accordingly, the UN has identified that self-determination should represent a range of voluntary choices within the context of self-

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[544] Ryan (n 19) 65; *see also* Rosas (n 7) 234; Pentassuglia (n 19) 305; Kimminich (n 19) 83, 89.
[545] *Statement by the UK representative to the Third Committee of the General Assembly*, 12 October 1984 (1984) 55 BYIL 432.
[546] Musgrave (n 16) 152.
[547] Allgood (n 30) 330.
[548] Musgrave (n 16) 152.
[549] UNGA Res 2625 (XXV) (n 48), Session Supp 28, 121.
[550] SC Res 556, 23 October 1984; Allen (n 414) 42-44. These resolutions, in support of Article 1(2) of the UN Charter, add to the argument that self-determination has come to represent customary international law for the conferment of political participation to all peoples.

government and that there is no single application of internal self-determination or a 'one-size-fits-all' entitlement of how decisions should be made.[551] Saul accurately identifies this as requiring significantly more dialogue at the UN and within the international community to better understand the parameters of self-determination in the post-colonial context.[552]

Of course, it should be appreciated that a traditional application of Western liberal forms of democracy may not satisfy what certain groups within the state would regard as being a fair and just application of internal self-determination. Often, for territorial minorities, political decision-making must be adapted to avoid political marginalisation associated with losing to the 'will of the majority', or the inability to wield political, legal and social authority because of political processes favouring the majority.[553] For example, electoral boundaries and voting based on proportional representation can have serious drawbacks for the expression of groups wishing to achieve collective political outcomes in which there are specific federal or regional interests.[554] Thus, the right to vote may be insignificant without broader representational support that recognises groups in addition to individuals.[555] This does not necessarily imply that in large states there will be less liberty, but it does indicate that the ability to establish a form of 'special interest status' or the ability to identify a threshold approach of internal self-determination may require extraordinary political reform and adaptation.

Adapting democratic processes to suit the needs and wishes of territorial minorities denotes a special interest political relationship between territorial minorities and states. Since the representation of groups is the key element, it follows that both states and their minorities must both recognise and accept these considerations as being fundamental to the particular relationship.

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[551] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 82, 342; Interestingly, the UN is less clear on what should happen if self-governance is denied outright. Its legal documents tend to focus on the issue of self-governance in the context of decolonisation. Saul (n 37) 642.
[552] Saul (n 37) 641-643.
[553] Musgrave (n 16) 153.
[554] McCorquodale 'Self-determination: A Human Rights Approach' (n 470) 865; Further, where political participation recognises the individual as the right-holder, territorial minorities and other groups are ultimately disadvantaged when desiring to exercise collective or group voice. M Nowak, 'The Right to Self-Determination and Protection of Minorities in Central and Eastern Europe in Light of the Case-law of the Human Rights Committee' (1993) 1 Intl J Group Rts 7, 10.
[555] Crawford, 'The Right to Self-Determination in International Law' (n 5) 26.

However, each of the schools of self-determination theory look at rights to political representation in slightly different ways. Within liberal-nationalist theories, self-determination can be interpreted as a commitment to liberalism and individual freedom whereby minorities see democracy as the voluntary means to remain or separate from states.[556] According to remedial theorists, democracy is interpreted more in terms of outcomes as to whether territorial minorities are denied representation or have been denied core civil and political human rights that are integral to human dignity.[557] Democracy within global governance theories may be framed by asking what systems of governance are states extending to minorities and are these systems working to the betterment of justice?[558] Although we can see important differences in how democratic governance or political representation is interpreted as a key consideration of internal self-determination, all identify it as being intrinsic to how groups are able to express themselves and ensure a secure existence where other human rights are protected.

4.3.2 A Global Lens to Representation: Pluralism and Case-Specificity

Exploring this in more detail, it should be noted that for territorial minorities the 'traditional view of pluralist democracy [may be]…inappropriate in a multi-ethnic state [if it does not] allow the national minority the freedom to compete for resources in the face of a majority able to outvote and outbid it.'[559] Global governance theorists, and to a lesser extent remedial theorists, would therefore argue that the promotion of political representation should reflect a state's internal diversity that creates 'a reliable social contract that defines autonomous spheres of activity'.[560] Of significance, in most de-centralised states, the influence of American federalism has fostered the idea that territorial sub-units can only be created from an 'indivisible whole'[561] in order to achieve successful models of internal self-determination.[562] This notion does not have any special features for politically accommodating territorial minorities, but instead

[556] Beran, 'A Liberal Theory of Secession' (n 27) 24.
[557] *See generally* Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28)
[558] *See, e.g.,* Oklopcic (n 78) 677.
[559] *See generally* Wheatley (n 110).
[560] Falk (n 317) 24.
[561] R Maiz, 'Democracy, Federalism and Nationalism in Multinational States' in W Safran and R Maiz (eds), *Identity and Territorial Autonomy in Plural Societies* (Franck Cass Publishers, 2000) 37.
[562] This belief has spread around the world as being the only viable form of 'mature' democratic federalism. Kymlicka, 'Is Federalism a Viable Alternative to Secession?' (n 96) 131.

works when groups are demographically fragmented and dispersed.[563] In states that have not undergone the same replication of federalism as in the US, this standard approach may appear inadequate for addressing the democratic expectations of territorial minorities, and more specifically for recognising the distinctions between groups.[564] This means that the 'quality of representation' that groups enjoy should be a key extra-legal consideration when looking at policies and programmes that states can create to strengthen political representation.[565]

From this perspective, it is debatable whether a 'coffee for everyone'[566] approach to political representation can fully contribute to a meaningful expression of internal self-determination.[567] This point certainly resonates with liberal-nationalist theorists who would see that the legitimacy of any federal model as requiring endorsement from its territorial minorities. Additionally, from the perspective of remedial theorists, meaningful political representation implies that any asymmetrical models of federalism like consocational democracy must ensure that power sharing arrangements benefit national, regional and individual interests in an equitable manner.[568]

When looking at the two features of continuity in decision-making and asymmetrical models of decision-making that were addressed in this section, it is apparent that any successful process of internal self-determination should reflect these considerations as a 'foundational element'[569] of post-colonial self-determination, which best captures the most important issues affecting territorial minorities in the context of democratic governance and representation. Therefore, looking at the different schools of self-

[563] Although the U.S. does in fact have autonomous regions – such as Guam and Puerto Rico, these territories should not be confused with America's federal states as they do not have the same political status and are recognised outside the federal system.
[564] Kymlicka, 'Is Federalism a Viable Alternative to Secession?' (n 96) 132.
[565] A Margalit and J Raz, 'National Self-Determination' in W Kymlicka (ed), *The Rights of Minority Cultures* (OUP, Oxford 1995) 80.
[566] Guibernau, *Nations Without States: Political Communities in a Global Age* (n 31) 43.
[567] Beran, 'A Democratic Theory' (n 12) 32.
[568] *See* D Horowitz, 'A Right to Secede' in S Macedo and A Buchanan, *Secession and Self*-Determination (New York University Press, New York 2003) 71; Kymlicka, 'Is Federalism a Viable Alternative to Secession?' (n 96) 134.
[569] Franck, *Fairness in International Law and Institutions* (n 4) 84; *contra,* self-determination and democracy in the human rights covenants attract distinct obligations. For instance, the idea of democracy is expressed under Article 25 ICCPR with the right to take part in public affairs and the right to vote and be elected, whilst self-determination under Article 1 of the Covenants confers the right that a people can freely determine its sovereign status without outside interference. Whereas the former contains specific measures about how a people may participate in self-government, the latter protects the integrity of popular choice without qualifying how choices are made. Rosas (n 7) 228.

determination theory we better see which particular schools are best able to support this element in a manner that incorporates the considerations of continuity and asymmetry as integral parts to a threshold approach to internal self-determination.

4.4 'The right to development as an 'internal' right be enforced by the people living within the state'[570]

The right to development is a significant and growing part of the self-determination discussion[571] At its heart lies the desire that development should be a fair and equitable exercise for all groups and communities that would otherwise benefit from its realisation.[572] Bradlow argues that contemporary perspectives of international development law have to include not only economic considerations, but environmental and human rights principles supported by international treaties[573] like the *Stockholm Declaration*[574] and the *Rio Declaration on Environment and Development*.[575] Unlike discussions relating to human rights, and more particularly civil and political rights as advocated by Buchanan, and political participation, the right to development has often suffered from an over-focus on outcomes rather than processes. This is evident when considering the hyper-inflated terminology associated with the Millennium Development Goals and aims to eliminate world poverty.[576] The Goals primarily focus on outcomes, implying that the right to development may have a common look and understanding. In reality, this is not the case, and as Sen illustrates, the right to development requires that 'development stakeholders' focus on processes rather than outcomes to achieve fair and equitable ends.[577] This is an altogether different paradigm in terms of planning that challenges how many people think about the realisation of rights and internal self-determination. These challenges will be explored, but it is worth mentioning that as a process, development *per se* will forever be an ongoing aim, and

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[570] Allgood (n 30) 350.
[571] *See* Salomon and Sengupta (n 30) 35.
[572] *See generally* A Sen, *Poverty and Famines. An Essay on Entitlement and Deprivation* (Oxford, 1981).
[573] D Bradlow, 'Development Decision-Making and the Content of International Development Law' (2004) 27(2) BC Intl & Comp L Rev 195, 211.
[574] *Declaration of the UN Conference on the Human Environment* 16 June 1972, UN DOC. A/Conf. 48/14.
[575] *The Rio Declaration on Environment and Development* 14 June 1992, UN Conference on Environment and Development, DOC. A/CONF.151/5/Rev. 1.
[576] *See* UN Millennium Project 2005 'Investing in Development: A Practical Plan to Achieve the Millennium Development Goals' (New York 2005) 1.
[577] A Sen, *Development as Freedom* (OUP, Oxford 1999).

that self-determination theorists should focus on its importance as a procedural requirement rather than a specific outcome associated with, for example, a ranking on an economic or development index.

4.4.1 The Intersectionality of the Right to Self-Determination and the Right to Development

Many of the substantive issues relating to the right to development as an inherent component of internal self-determination[578] focus on how the right should be interpreted. Key issues in this regard relate not only to its substance, but also to its connexion with other themes like human rights and democracy, and the implications for what happens when the right is denied. This latter point is important because the right's denial may illustrate situations of oppression. The following analyses should therefore highlight these challenges and provide a better understanding of what criteria of the right to development could be fundamental to a particular internal self-determination dispute.

Firstly, and to draw a general connexion between the right to development and self-determination, Salomon and Sengupta emphasise that the right to development and self-determination are interdependent and allow minorities or indigenous communities to 'meaningfully participate as groups and thus influence any decisions that affect them or the regions in which they live.'[579] Bedjaoui supports this notion by stating 'there is little sense in recognising self-determination as a superior and inviolable principle if one does not recognise at the same time a "right to development".' [580] More explicitly, the right to development denotes permanent sovereignty over natural resources within the context of the self-development of states and peoples.[581] From this position, we can see that the right to development and the right to self-determination are in many respects similar concepts that share common broad principles linked to decision-making and participation.

[578] *See generally* Salomon and Sengupta (n 30) 35,36.
[579] ibid.
[580] M Bedjaoui, 'The Right to Development' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, 1991) 1184.
[581] Salomon and Sengupta (n 30) 35.

Article 1(1) and (2) of the *Declaration of the Right to Development* outlines that:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised;
2. The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subjects to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over al their natural wealth and resources.[582]

The *Declaration* recognises that all rights are indivisible and interdependent[583] and recognises the failure to observe both civil and political rights, and economic, social and cultural rights is an impediment to development.[584] When serving as the Independent Expert on the Right to Development, Sengupta emphasised the importance of the 'process of development'[585] by referring to both sets of rights as forming part of an integrated whole, rather than the aggregated sum of existing rights.[586] When applying the *Declaration* in the context of self-determination, we can see that this application has an important role for empowering territorial minorities to realise other key rights.[587]

In particular, it has been noted that 'it is important to bear in mind the dualistic nature of the right of self-determination as a right available internally to individual groups within a country and as a right available to a country,'[588] since the effective implementation of the right to development is dependent upon a collective strategy of implementing the right of self-determination.[589] Looking at this from a different angle, if it is accepted

[582] The Declaration of the Right to Development, U.N. Doc. AIRES/41/128 (1987) (DRD).
[583] ibid Article 6(2).
[584] ibid Article 6(3).
[585] ibid preamble [13].
[586] A Sengupta, *Fourth Report of the Independent Expert on the Right to Development*, UN Doc. E/CN.4/2002/WG.18/4, [2].
[587] 'A Series of UN world conferences in the first half of the 1990s has helped to create the understanding that democracy, human rights, and sustainable development are interdependent. The demand linking human rights and development policy was put forward especially at the World Conference on Human Rights (1993) in Vienna, the World Conference on Women (1995) in Beijing, and the World Summit for Social Development (1995) in Copenhagen.' BI Hamm 'A Human Rights Approach to Development' (2001) 23 HRQ 1005, 1007.
[588] Allgood (n 30) 337-8.
[589] ibid.

that self-determination has progressed from decolonisation, then it is rational to expect that there will be emergent trends, such as democracy, development and human rights, which can contribute to the meaning and interpretation of self-determination.[590]

As a second analysis, the right to development requires an examination of the risks associated with excluding development considerations from internal self-determination. The United Nations Development Program has emphasised that there is a strong connexion between irregular or inequitable development and marginalised communities within states.[591] For example, the following points outlined by Hettne highlight the effects of what happens when territorial minorities and other groups are excluded from development processes:

> Uneven long-term trends such as modernisation;[592] internal competition for the control of scarce natural resources; major infrastructural and industrial projects affecting local ecological systems; differential effects of development strategies on majority and minority groups; and uneven distribution of public goods amongst culturally defined groups.[593]

Significantly, and to add another point to Hettne's analysis, the failure to extend the right to development to territorial minorities often leads to wide-scale poverty and the downward spiral towards civil conflict.[594] In fact, Collier argues that 'the key root cause of conflict is the failure of economic development.[595] To counter these effects, 'ethnodevelopment'[596] is used to describe the need for integrated planning involving territorial minorities and states. Particularly, Hettne identifies four key extra-legal considerations that need to be achieved to address long-term sustainability and the realisation of equitable development for both states and territorial minorities:

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[590] ibid 334.
[591] *Marginalised Minorities in Development Programming: A Resource Guide and Toolkit,* (UNDP, Democratic Governance Group Bureau for Development Policy, New York, May 25 2011).
[592] In other words, uneven trends in modernisation create uneven development processes resulting in equitable extremes between groups and communities.
[593] B Hettne, 'Ethnicity and Development: An Elusive Relationship' in D Dwyer and D Drakakis-Smith (eds), *Ethnicity and Development: Geographical Perspectives* (John Wiley, Chichester 1996) 22-24.
[594] P Collier, *Breaking the Conflict Trap: Civil War and Development Policy*, (World Bank and OUP, Washington 2003) 53. For a comparison, *see* DG Evans. 'Human Rights and State Fragility: Conceptual Foundations and Strategic Directions for State-Building' (2009) 1(2) J Human Rights Practice 181, 196.
[595] Collier, *Breaking the Conflict Trap* (n 595) 53.
[596] *See* G Clarke, 'From Ethnocide to Ethnodevelopment? Ethnic Minorities and Indigenous Peoples in Southeast Asia' (2001) 22(3) Third World Quarterly 413-436.

1. Territorialism: the spatial concentration of ethnic groups, such that decisions about 'development' are made within a particular territory based on the resources of that particular area;
2. *Internal Self-determination*: the ability for a particular ethnic group to control collectively its destiny within the context of a nation-state;
3. Cultural Pluralism: the existence of and mutual respect for a number of cultures within one society; and
4. Ecological Sustainability: development should progress with no significant destruction of the natural environment which would threaten future livelihoods.[597]

As can be seen from these criteria, and especially from the point on internal self-determination, the aim is to distribute power to existing identifiable groups within the state in a manner that leaves the decision-making to those who can best understand the implications of any development initiative. In the absence of any redress mechanisms at the international-level,[598] group-based empowerments are a positive step. Hamm refers to the Office of the High Commissioner for Human Rights' 'human rights approach to development'[599] as the best means to achieve this since it encompasses in development planning a number of relevant considerations for groups like economic and social rights.[600]

4.4.2 A Human Rights Approach is Integral to Development and Internal Self-Determination

A human rights approach to development provides a realistic means for ensuring that the right to development is taken seriously and realised. Furthermore, this approach ensures that all human rights are valued as integral parts of the processes and objectives of development; a consideration that goes to the heart of many of the minority concerns relating to self-determination today.

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[597] *See* Hettne (n 594) 22-24 (emphasis added).
[598] *See, e.g.,* M Bedjaoui, 'Some Unorthodox Reflections on "Right to Development"' in F Snyder and P Slinn, (eds), *International Law and Development* (Professional Books, Abington 1987) 87, 102.
[599] *See, e.g., Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* United Nations, Office of the High Commissioner for Human Rights, 2002.
[600] Hamm (n 588) 1006.

At the same time, a human rights approach to development also exposes a number of potential concerns of theorists about the right to development and internal self-determination. For instance, liberal-nationalist theorists would look upon development as a logical extension of the primary right of groups to identify their own interests and needs, and therefore hold that any discussion on the inclusion or exclusion economic or social rights from self-determination be treated as a moot or unnecessary consideration.[601] For Philpott, the essential nature of the liberal claims is that territorial minorities have control over the decisions that affect them. This means that oppression could be simply identified by a finding that the group has not been able to exercise this control.[602]

In comparison, a global governance approach would examine this issue by looking at the merits of both states and minorities in terms of how development issues are raised and argued, and ultimately, would consider the right to development as a significant principle of internal self-determination.[603] This means that for theorists like Hannum and Skordas, there would be a need for case-by-case analyses of the conditions affecting groups to determine whether the right to internal self-determination has been realised. In application, this may imply that certain processes of development offer a very wide scope of human rights to ensure a meaningful measure of participation for the group. In other cases, the scope may be much narrower and limited by a state's relative capacity to support the development processes.

Significantly, it would seem that remedial theories are the least inclusive of the three schools when considering the right to development as being relevant to internal self-determination. One reason for this can be summarised by the favouring of traditional civil and political rights and less positive views towards the economic, social and cultural rights as they relate to ensuring a decent life for groups.[604] Another reason, may also relate to the challenge of having to reconcile the right to development as

[601] *See generally* Philpott (n 27) 352; and arguments made by Wellman (n 139) 142.
[602] Philpott (n 27) 352.
[603] Skordas (n 79) 207.
[604] In comparison, Falk hints that despite identifying a core set of human rights as a means to rebut a right to secede, the principle of self-determination would need to adapt to changes in international law. Falk (n 317).

having no fixed criteria and applicable as a human right equally as a process and an outcome.[605]

Since remedial theorists view universality as the primary means to ensure that an appropriate standard of internal self-determination is applied, and use this standard to identify the existence of injustice or oppression, the entire notion of a case-by-case approach seems to threaten the universality objective of their arguments.[606] This is unfortunate, since as one can see in Raday's analysis above, certain economic, social and cultural rights related to the right to development are of crucial value to different groups at different times. Successfully pinpointing the right time would require nothing less than a case-by-case assessment of the conditions affecting both the group and the state.

From this perspective, the right to development should be defined as a human right that individuals and groups can expect to be realised in processes and outcomes.[607] The implication is that the exercise of the right as a process would provide the primary means for territorial minorities to achieve a measure of meaningful decision-making that best represents their interests. In this sense, national gross domestic product indexes and demographic reports looking at the relative wealth of communities within states should be treated simply as tools to the continual processes of development and not as indicators to say whether the right to internal self-determination is satisfied.

Additionally, and in further reference to the substance of the right to development, Salomon and Sengupta identify that the right to development gives rise to reasonable expectations that it is an inalienable right and reflects existing international legal principles, such as the control over natural resources.[608] Additionally, both argue that minority and indigenous rights should be accepted as constitutive criteria of the right to development as a means to ensure that outcomes are achieved using similar considerations as detailed by Hettne above.[609] In practice, this can mean that territorial minorities and states engage in dialogue on real issues facing the well-being of groups.

[605] Sengupta '*Fourth Report'* (n 587).
[606] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 363.
[607] Sen, *Development as Freedom* (n 578) 3.
[608] Salomon and Sengupta (n 30) 27.
[609] ibid 7.

UN-sponsored poverty reduction strategies involving both minorities and states,[610] and public-focused working groups to support the right to food in India[611] and the right to health in South Africa,[612] are good examples. The relevance is that minorities have a key role in the participation, design and implementation of a sustainable system of development and its guiding policies.[613]

When considering this position, an important question to ask is who has defined development and how have minorities been included in the process?[614] Ultimately, this enquiry requires development policies to be looked at subjectively in order to better understand and capture the perspectives of all parties. As such, it is foreseeable that depending on the interests of specific territorial minorities, development may entail non-economic or quantitative considerations that incorporate qualitative dimensions.[615] For example, Judge Weeramantry, the former Vice-President of the International Court of Justice, defined development as being broader than economics and stated that it has 'value in creating the sum total of human happiness and welfare.'[616] A case-specific approach looking at development policies reflects the need to understand oppression claims based on their respective merits.

Finally, it should be emphasised that the realisation of the right to development, as a subjective analysis, would vary from case-to-case just as the political representation of territorial minorities would be different from one state to another. The important consideration would focus on whether territorial minorities have access to development decision-making processes and whether these decisions result in meaningful outcomes that reflect a fair and equitable application of development and internal self-determination.[617]

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[610] *See generally*, *Achieving the Millennium Development Goals (MDGs) for Minorities: A Review of MDG Country Reports and Poverty Reduction Strategies* (Report of the independent expert on minority issues, Gay McDougall) A/HRC/4/9/Add.1 2 March 2007.
[611] *See, e.g., PUCL* v. *Union of India and others,* Writ Petition [Civil] 196 of 2001.
[612] *See, e.g., Treatment Action Campaign and Others* v. *Minister of Health and Others* Case no 21182/2001 TPD CCT 8/02 5 July 2002 [125]-[133].
[613] Salomon and Sengupta (n 30) 18.
[614] K Willis, *Theories and Practices of Development* (Routledge, London 2005) 2.
[615] ibid 3, 13.
[616] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary* v. *Slovakia)* (1998) 37 ILM 162, 206 (Separate Opinion of Vice President Weeramantry).
[617] *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (n 589) [71].

Consequently, when looking at the right to development as a relevant component of internal self-determination, we should view it as requiring specific procedural obligations that bind states to decision-making processes that are inclusive and which affirm the broader recognition of the right to development as a human right.[618] From this interpretation, it can be seen that the right to development goes some way towards expanding the criteria of human rights from mere civil and political rights to economic, social and cultural rights, while also challenging our thinking about how human rights are realised through processes. It also provides meaning and substance to internal self-determination and illustrates possible scenarios in which the denial of certain developmental considerations could be treated or interpreted as harmful or oppressive.

4.5 Conclusion

With changes to the meaning and application of post-colonial self-determination, it can no longer be interpreted as an exercise of securing independence for non-self-governing territories. It has come to mean much more than that. A viable self-determination theory must incorporate modern attitudes towards human rights, access to political representation and the right to development. These components include many important legal and extra-legal considerations integral for establishing viable processes of internal self-determination and sustaining relations between territorial minorities and states. A denial or frustration of specific considerations could lead to a claim of oppression and enable the territorial minority to explore specific external self-determination options like secession. However, it is necessary to identify when states have satisfied requisite responsibilities and obligations pertaining to internal self-determination. Crucially, these requisite obligations may not necessarily represent outcomes, but can be approached as procedures and processes as demonstrated by the challenges associated with the right to development.

In chapter five, an attempt to define oppression will be made by drawing upon the legal and extra-legal considerations discussed in this chapter. A global governance assessment reveals that oppression is a subjective claim of failed internal self-determination supported by objective facts. In this sense, it is a reflexive concept that

[618] A Sengupta, *Second Report of the Independent Expert on the Right to Development*, UN Doc. E/CN.4/2000/WG.18/CPR.1 [10].

both describes the conditions of what internal self-determination should *not* be and substantiates whether territorial minorities have legitimate claims to pursue external self-determination. Clarification of the legal and extra legal considerations presented in this chapter will enable a better identification of the pressures affecting territorial minorities in chapter five, and therefore, provide a basis for objective scrutiny of oppression claims.

Chapter Five: Oppression and Secession: Post-Colonial Perspectives

5.0 Introduction

> ..the oppressed are allowed once every few years to decide which particular representatives of the oppressing class shall represent and repress them in parliament.[619]

The subject of oppression is a fundamental aspect of post-colonial self-determination. Oppression can be described as 'prolonged adversity or systematic repression, beyond the traditional confines of the historical process of decolonisation.'[620] In this context, oppression is descriptive in validating the denial of internal self-determination and substantiating secessionist claims. For example, if a territorial minority has been denied human rights, access to political representation or access to development opportunities, it may be justified in challenging the state's sovereignty over its territory.[621]

A look at a selection of different remedial and liberal-nationalist scholarly opinions in this chapter will reveal that oppression is sometimes used in reference to neo-colonial conditions associated with egregious state behaviour and widespread human rights abuses comparable colonial conditions. Comparatively, oppression is emerging as something more closely associated with modern phenomenon derived from global influences affecting culture,[622] traditional group identities,[623] poverty[624] and tendencies towards limiting democracy to reduce domestic pressures on the state.[625] A global governance approach recognises that these considerations may form legitimate grievances against states. It also recognises that in order to identify legitimate grievances, there is a need for sustained engagement amongst territorial minorities, states and the international community.

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[619] Lenin quoting Marx in VI Lenin, *Selected Works in One Volume* (International Publishers, New York 1971) 326-327.
[620] Separate Opinion of Judge AA Cançado Trindade (n 24) [184].
[621] *See, e.g.,* Pentassuglia (n 19) 311.
[622] *See generally* Nielsen 'Secession: The Case of Quebec' (n 112).
[623] WH Mott IV, *Globalization, Peoples, Perspectives and Progress* (Praeger Publishers, 2004) 182.
[624] JA Sholte, *Globalization: A Critical Introduction* (Palgrave, 2000) 164-168.
[625] L Panitch, 'Globalization and the State' in L Panitch and others (eds), *The Globalization Decade* (Merlin Press, London 2004) 9, 21.

It is proposed that by describing oppression as the denial of internal self-determination, there emerges a clear understanding of the connexion between the two self-determination concepts. Thus, if oppression is used to substantiate a claim to secede, it is on the basis that a territorial minority has been denied key considerations associated with, but not necessarily limited to human rights, access to political representation, or access to development opportunities. To highlight the fact that claims of oppression need to include consideration for these key issues, the following questions will be used as part of this analysis: How is the subject of oppression approached within the study of self-determination; how is the subject of oppression relevant to understanding secession; and how are specific claims to be addressed?

5.1 The Transition from Secession as a Prohibited Act to a Legally Neutral Act

Early responses to secessionist claims in the nineteenth century, and particularly during the era of the American Civil War, were supportive of territorial permanence.[626] In the American Supreme Court case of *Texas* v. *White*,[627] the Court was asked to determine whether the federal state of Texas was entitled to recover state-owned securities as a member of the Confederacy Government. The key issue was determining whether Texas' claim was valid as an entity that was part of a seceding group of southern federal states.

The Court reasoned that the right to secede was and always would be constitutionally prohibited since it was contrary to the initial 'perpetual choice' of the original [Thirteen] colonies.[628] While this reasoning was not supported by any explicit term in the US Constitution or derived from any specific principle in customary international law, the Court reasoned that Texas had never lost its standing as a member of the American state and did not have a positive right to alter the original covenant of the American union even though it did not exist at the time of the creation of the United States of America.[629] In other words, in the absence of any positive constitutional mechanisms to support secession, the Court was willing to conclude that secession was a prohibited act. What is remarkable about this case is that the Supreme Court

[626] Mayall (n 235) 63.
[627] 74 US (7 Wall) 700, 725 (1869).
[628] ibid (brackets added).
[629] ibid.

determined that secession was a prohibited act not because of the language in the US Constitution, but because of prevailing statist attitudes that favoured continued union. In other words, the Supreme Court chose to apply positive meaning to what was otherwise neutral language on the matter of secession. Over a century later in 1952, political interpretations of law were still prevalent when the US Representative to the United Nations, Eleanor Roosevelt, argued against the legal validity of a minority's right to secede because it could create international instability.[630]

Since Bangladesh and more recently, Kosovo, attitudes on secession have changed to include considerations relating to permissibility, but not absolute legality. The ICJ's *Advisory Opinion on Kosovo* detailed that there is 'no applicable prohibition of declaration of independence' at general international law.[631] Although the ICJ declared that the subject of 'remedial secession' was beyond the scope of the question put to it by the General Assembly,[632] it nonetheless inferred that a unilateral declaration of independence and secession are two sides to the same coin. In other words, a unilateral declaration of independence is a secessionist act regardless of whether the justifications for the act stem from *bona fide* claims of oppression or a remedial right to secede. It is worth remembering that there are no legal prohibitions against secession[633] and that there is no legal instrument that compels states to deny state recognition to a successful secession.[634] In this context, the current debate is whether oppression can be invoked to create a legally valid act of secession.[635]

5.2 Questions on the Scope of Oppression

UN General Assembly Resolutions 1514 (XV), 1541 (XV), 2625 (XXV) and a number of regional documents, such as Article 20(3) of the *African Charter*, sanction territorial sovereignty under three express conditions associated with colonial oppression; colonisation, alien domination, and foreign occupation.[636] Similarly, comparisons to

[630] (1952) Department of State Bulletin 917 'US', 919.
[631] Kosovo Advisory Opinion (n 67) [84].
[632] ibid [83].
[633] Higgins (n 5) 125.
[634] Franck, *Fairness in International Law and Institutions* (n 4) 158.
[635] *See, e.g.,* Higgins (n 5) 117, 125.
[636] Reaffirmed as recent as 1995 at the UN with its *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, UNGA Res 50/6 (n 55); Comparatively, the dissolution of the USSR and the Former Yugoslavia have traditionally been attributed as falling outside these three criteria since

oppressive conditions from the era of decolonisation have been adopted today to justify secession. As discussed, in the previous chapter, neo-colonialism is a term that has been used to draw direct links between the era of decolonisation and abusive state governments. It attempts to describe the plight of territorial minorities as something comparable to colonial peoples.

Indeed, the Supreme Court of Canada referred to this type of oppression as a possible additional criterion to alien domination, and foreign occupation that could be considered in substantiating a claim to secession.[637] In this sense, oppression would be premised as a prevailing harm that threatens the identity and rights of a group, necessitating the pursuit of secession. However, there are a number of key issues that need to be addressed before positioning oppression in this light.

Firstly, it needs to be asked more generally what happens to territorial minorities if certain human rights are violated or the effective participation in decision-making processes is only periodically denied? For instance, if a group does not achieve a desired cultural or political outcome within the state, such as certain language rights, is its right to internal self-determination violated and can the group then claim oppression as a means to justify secession? As will be demonstrated in the subsequent chapters, a standardised global governance approach to internal self-determination will ultimately provide greater insight into how this issue should be properly addressed; in the absence of a standard approach, the possibilities of grievance would be endless and continually ill-defined.

Secondly, and in a similar vein to the issue above, when looking at oppression in reference to the right to development, Allgood suggests that, 'if a person living in a state where economic, social, cultural and political development is hindered due to the sub-standard conditions within the state, this can be construed as the justification for threatening secession.'[638] Allgood's use of hindrance as a justification for threatening

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both states dissolved without being able to maintain their status as states. By accepting the dissolution argument, the international community has been able to recognise these states without reference to international law and self-determination. It is debatable whether Slovenia or Croatia actually did secede in the initial stages of the Yugoslav break-up, or whether they simply participated in the process of dissolution. *See* Musgrave (n 16).

[637] *Reference re Secession of Québec* (n 34) [134-135].

[638] Allgood (n 30) 346.

secession seems to suggest that she favours a low standard or threshold for defining oppression, and a conversely high standard of internal self-determination for states to meet.

Of relevance, and to better position Allgood's argument, Higgins points out that international law does not prohibit secession and therefore there is no obligation on minorities to 'stay part of a unit that maltreats them and in which they feel unrepresented.'[639] Thus, the conclusion would be that territorial minorities could formulate their own understanding of oppression and pursue political or military means to resolve the threat with little consideration to international legal principles.

5.3 Oppression has to be Relative to Specific Conditions

Pentassuglia argues explicitly that oppression triggers a remedial recourse for territorial minorities. He cites the 1993 *Vienna Declaration*[640] as allowing, 'a minority group that is egregiously discriminated against and thus denied meaningful access to government, causing the latter to lose the entitlement to the protection of its territorial integrity.'[641] Buchanan uses similar language to describe oppressive conditions, when explaining that evidence of 'severe and persisting injustices'[642] can trigger recourse to secession. The emergence of new entities from violent oppressive conditions, such as Bangladesh,[643] Kosovo and South Sudan are possible examples of this type of neo-colonial oppression. However, as a trigger for secession, it is important to recall Brilmayer's earlier observation that a period of peace following conflict could undermine any credible argument for there being a persistent need to secede.[644]

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[639] Higgins (n 5) 125.
[640] UNGA Res 157/23 (n 473).
[641] Pentassuglia (n 19) 311.
[642] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 332.
[643] Higgins argues that Bangladesh's independence did not involve a legal right to secession, but was *ex injuria non oritur* or outside international law. Higgins (n 5) 126; In comparison, Shaw suggests that Bangladesh may represent the only example of sanctioned secession under international law. MN Shaw, 'The Role of Recognition and Non-Recognition with Respect to Secession: Notes on Some Relevant Issues, in J Dahlitz, (ed), *Secession and International Law* (TMC Asser Press, The Hague 2003) 243, 246; Castellino suggests that Bangladesh's separation was both in contravention and conformity of a number of international norms. Castellino (n 220) 150.
[644] Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (n 26) 199.

When looking at these different perspectives, it evident that the meaning of oppression can range from neo-colonial conditions involving egregious discrimination or other forms of deprivation and adversity not necessarily based on overt racism or military subjugation. As such, when looking at oppression in the context of internal self-determination and the broader continuum of self-determination that includes the possibility of secession, there is a need for greater clarification of what territorial minorities mean when claiming oppression. This, it is argued, is something that should be derived from the relevant concerns and considerations raised within minority-state relationships.

Controversial differences in oppression are likely to be derived from various sources. Besides differences between territorial minorities and states, oppression is something that can be contended because of the specific economic conditions of groups. Variances in economic maturity between, for example, Canada and Sudan would make it difficult to develop a transferable notion of oppression, since a minority from Canada would be infinitely better-off than a minority in the Sudan. Yet, in reference to a legal justification to secede, a possible claim of oppression in Canada should not be undermined by a comparison with a minority in Sudan. Instead, claims of oppression need to be supported by facts and drawn from whatever legal and extra-legal considerations are challenging, for example, aspects of the human rights, political representation and development of territorial minorities. From another angle, oppression serves as a descriptive model to test the legitimacy of any given secessionist claim, and invites review of the particular conditions of the minority-state relationship.

5.4 Remedial Perspectives on Oppression as a Justification for Secession

5.4.1 Theoretical Scope

Remedial theories argue that territorial minorities should be able to exercise certain justifiable responses against oppressive state behaviour and that these responses should be supported by the international community.[645] A remedial theory, as evidenced by its name, is reactionary to culpable state behaviour primarily relating to 'severe' human

[645] *See* discussion on SC Res 1973 and 1975 in Chapter 3, where the Council decided it was justifiable to challenge the sovereignty of states for the protection of civilians.

rights and humanitarian violations.[646] At the same time, it should be appreciated that these theories seek to prescribe standards for how territorial minorities and states can avoid situations of humanitarian abuse and the pursuit of secession. Specifically, remedial theories generally compare the degree of severity of alleged oppressive behaviour against the observance of other international legal principles, such as territorial integrity and state sovereignty.[647] In other words, they compare legal principles to determine which may justifiably affect or supersede others.[648] According to Buchanan, remedial responses like secession cannot be unilateral or unqualified, but must be based on serious injustices like the denial of human rights, genocide, severe discrimination or a revocation of intrastate autonomy arrangements perpetrated by a state against a portion of its population.[649]

An interpretation of oppression typically includes what may be perceived as extreme acts requiring international recognition or involvement.[650] However, in the colonial and post-colonial contexts, oppression has generally required independent verification[651] to attract international support. This has been and continues to be a real challenge, and which Buchanan summarised as a blind acceptance of states to label secessionist minorities as terrorists rather than attempting to understand whether:

> ..the secessionists are justified in attempting to achieve independence without the consent of the state and hence in using force against the state's attempt to block independence (the analog of the just war question: Is it morally justifiable to go to war in these circumstances?)[652]

Remedies must have a prescribed application that is accepted by all parties and without prejudice in order to alleviate or remove an existing oppressive practise that is

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[646] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 332.
[647] *See* Higgins (n 5) 125-127; *see also* Musgrave (n 16) 192.
[648] *See* A Maguire, 'Law Protecting Rights: Restoring the Law of Self-determination in the Neo-colonial World' (2008) 12 Law Text Culture 31.
[649] *See generally* Oklopcic (n 78).
[650] *See, e.g.,* Buchheit (n 26) 222.
[651] *See generally* M Kapila and D Lewis, *Against a Tide of Evil: How One Man Became the Whistleblower to the First Mass Murder of the Twenty-First Century* (Mainstream Publishing, London 2013).
[652] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 11.

recognised as being contrary to the purpose and principles of the full exercise of self-determination.[653]

As an example, when the Security Council passed its resolution condemning the South African Government's oppression of its non-white population in 1984[654] the Council sought to define a form of reprehensible state behaviour it considered en par with colonisation,[655] as well as to send a unified international message to the South African Government that it must improve its relations and exercise of authority over its subject groups. If post-colonial notions of oppression are interpreted and accepted as comparable to colonialism,[656] this would represent a significant moral and legal check against contemporary reprehensible state behaviour while concurrently illustrating what states should be doing to satisfy the right of self-determination for their subjects. Additionally, this interpretation would compel states to continuously evaluate their laws, policies, and practises for forms of direct or indirect forms of adverse discrimination targeted against minorities with the knowledge that a finding of discrimination could be construed as oppression.

5.4.2 The Neo-Colonial Interpretation

There are two key points associated with the comparison between colonial and neo-colonial conditions that should be appreciated and which illustrate the underlining moral positions associated with remedial theories. Firstly, if the concept of oppression includes aspects of neo-colonialism comparable to alien domination and foreign occupation, it may implicate greater international involvement in domestic disputes between states and their territorial minorities.[657] There would be a requirement for territorial minorities to demonstrate that they have suffered actual oppression before implicating international support. A comparable example can be drawn from *Katangese Peoples' Congress* v. *Zaire*[658] when the African Commission on Human and Peoples'

[653] SC Res 556, 23 October 1984 (n 551).
[654] ibid Preamble.
[655] Allen (n 414) 42-44.
[656] Crawford suggests like the Supreme Court of Canada, that a modern view of oppression could be interpreted as a supplementary ground of oppression to trigger external self-determination (e.g., colonialism, alien domination and foreign occupation). Crawford, 'The Right to Self-Determination in International Law' (n 5) 61.
[657] Of note, Article 20(3) of the *African Charter* (n 475).
[658] *Katangese Peoples' Congress* v *Zaire*, African Commission on Human and Peoples' Rights, Comm.

Rights reasoned that secession could be permissible in situations where there is:

> ..concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question' or if there would be 'evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13 (1) of the African Charter.[659]

Outside the judicial context, the recent international interventions sanctioned by the UN Security Council to protect civilians from state violence in Libya and the Ivory Coast are arguably comparable examples of the international community's willingness to recognise certain forms of state-sponsored contemporary oppression.[660]

Secondly, when describing a viable process of internal self-determination, there is an implication that states have a duty to protect pre-existing human rights obligations, promote means to ensure all peoples are represented in accordance with, for example, the *Vienna Declaration*, and ensure territorial minorities have meaningful decision-making powers over their natural resources and economic, social and cultural rights. At the same time, because remedial theories place the burden of proving oppression upon territorial minorities, there emerges a unique if not challenging process for identifying and demonstrating oppression.[661]

Consequently, territorial minorities are left to argue that they experience oppression, of which the severity of suffering requires international intervention.[662] This implies that remedial theories permit a degree of illicit state behaviour, which may not satisfy their 'oppression threshold'.[663] Therefore, how are the two seemingly conflicting concepts reconciled? Interestingly, Buchanan identified this problem as the 'statist paradigm'[664] and cited Henkin in an effort to demonstrate the difficulties of advancing remedial theories in the face of the state-dominated international law:

No. 75/92 (1995).
[659] ibid [6].
[660] *See* discussion on SC Res 1973 and 1975 in Chapter 3, where the Council decided it was justifiable to challenge the sovereignty of states for the protection of civilians.
[661] Recalling the hidden genocide in Dafur. *See* Kapila and Lewis (n 652).
[662] Buchheit (n 26) 222.
[663] This concept was identified in *Reference re Secession of Québec* (n 34) [135].
[664] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 55.

> The United Nations Charter, a vehicle of radical political legal change in several aspects, did not claim authority for the new human rights commitment it projected other than the present consent of states…In fact, to help justify the radical penetration of the State monolith [in the name of protecting human rights], the Charter in effect justifies human rights as a State value by linking it to peace [among states] and security.[665]

Buchanan acknowledges that this 'national interest thesis'[666] disadvantages non-state actors and suggests that significant changes in moral perspectives at the international-level must be adopted to ensure that a fair justice-based theory of international law is established.[667] However, unlike Buchanan, Henkin is more pessimistic in his appraisal of the international framework and its capacity to shift from its state-centric foundation: 'International law, true to its name, was law only between States, governing only relations between States on the State level. What a State did inside its borders in relation to its own nationals remained its own affair, an element of its autonomy, a matter of its 'domestic jurisdiction'.'[668] In light of these remarks, one can appreciate how challenging it is to identify oppression in an objective and impartial manner when the methodological approach for identification rests with states and the state-driven system of international law.

Bucking this trend, the Canadian Supreme Court reasoned that contemporary oppression, in the specific context of internal self-determination, could be equated as alien domination and foreign occupation.[669] Remedial theorists have reasoned that this implies there would need to be a degree of hardship imposed upon territorial minorities equivalent to the evils of colonisation, alien domination and foreign occupation as articulated under the UN General Assembly resolutions 1514 (XV), 1541 (XV), 2625 (XXV).[670] A finding of oppression matching this description would, theoretically bolster an argument for international support to break from the oppressive conditions.

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[665] ibid 58, citing Henkin, volume iv (n 458) 214-215.
[666] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 107.
[667] ibid 116-117.
[668] Henkin (n 458) 208.
[669] *Reference re Secession of Québec* (n 34) [135].
[670] *See* Pentassuglia (n 19) 311.

Furthermore, the Court noted that there are contemporary arguments supporting the position that 'when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession' and that because the *Vienna Declaration* requires governments to represent 'the whole people belonging to the territory without distinction of any kind', incidents of oppression could give rise to a right of secession.[671]

However, the Court emphasised that because of the Canadian constitutional aim to maintain order and stability, even if there were a clear and resolute decision by the province of Québec to separate from Canada, there would still be a requirement for a 'principled negotiation' between the province of Québec and Canada.[672] Remedial theorists who regard unilateral secession as being contrary to distributive justice generally support this position.[673] They back the Court's assertion that regardless of whether there is a clear democratic decision taken by a territorial minority to secede from its parent state, unilateral secession is not a favourable option at international law[674] and further, view unilateral secessionist actions as something that does not guarantee the advancement of democratic principles.[675] This illustrates one of the main differences between remedial theories and liberal-nationalist theories. Whereas the former upholds a notion of state sovereignty and territorial integrity during self-determination conflict as a means to strengthen international peace and stability, the latter attempts to reduce the role and oversight of states in the self-determination process as being unnecessarily intrusive and disadvantageous within the spheres of sub-state communities.

5.4.3 Denial of Meaningful Representation

Significantly, however, remedial theories argue that when groups are denied meaningful representation because of a revocation of autonomy arrangements, there may be the possibility for territorial minorities to secede.[676] The inference is that oppression may

[671] *Reference re Secession of Québec* (n 34) [134].
[672] Note, the Court was not explicit whether this process would still be required if oppression was identified and demonstrated; ibid [104], [149].
[673] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 388.
[674] *Reference re Secession of Québec* (n 34) [149].
[675] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 388.
[676] ibid 357.

occur by the denial of a fundamental power-sharing or constitutional provision that binds the minority-state relationship and conditions of internal self-determination.[677] Historically, autonomy arrangements have varied in significance and form, but have generally signified constitutional arrangements that allow regional entities to contribute to the expression of broader state unity while concurrently maintaining unique social and political distinctions.[678] Buchanan notes that the revocation of intrastate autonomy agreements, like Yugoslav President Milošević's repudiation of the autonomous powers of the Socialist Autonomous Province of Kosovo in 1989, amounts to a denial of group rights and the isolation of the historic contribution of the regional entity to the union.[679]

Buchanan further indicates that remedial theories do not suggest that there should be an absolute right to secession following the repudiation of intrastate autonomy. Rather, he suggests that a determination as to whether the minority or the state is responsible for triggering the initial violation of the autonomous agreement will influence the validity of an oppression claim and subsequent demand for secession.[680]

This is important, because unlike the arguments associated with the liberal-national theories, and global governance theories, remedial theories support a notion that requires 'secessionists to bear the burden of arguments by establishing a grievance against the state.'[681] In other words, remedial theories essential hold that states are presumed to hold a 'valid claim to territory' and only through serious injustices can this claim be rebutted in favour of secessionist action.[682] Of course, this does not mean that remedial theories favour this option, but it illustrates the extent to which they are prepared to permit territorial minorities to exercise autonomous decision-making in the context of the revocation of intrastate autonomy agreements.

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[677] ibid.
[677] ibid; *see also* Pentassuglia (n 19).
[678] Bereciartu (n 177) 162.
[679] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 84; Comparatively, some suggest that the formation of new states following the collapse of the USSR and former Yugoslavia were the result of state dissolution rather than the actual secession of states; *see* TW Waters, 'Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination' (2004) 29 Yale J Intl L 423, 443.
[680] Oklopcic (n 78) 688.
[681] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 371.
[682] ibid 372.

The preferred alternative is generally a renewal of the original aims that gave rise to the agreement. In this sense, and as Buchanan outlines, remedial theories would prefer to see the international community monitor and intervene during instances of revocation in order to avoid territorial minority claims of oppression. Buchanan even suggests that the international community could help broker agreements, monitor the compliance of agreements, hold the parties to account for the fulfilment of their obligations, and finally to provide an impartial international tribunal for adjudicating disputes arising from the agreement.[683] Wellman argues that this approach avoids the fearful proposition that territorial minorities must always suffer otherwise egregious losses and political injustices prior to reacting.[684] Importantly, the proposed adjudication framework does not address all the relevant issues associated with the causes of conflict, such as economic, social, cultural and political pressures.[685]

Furthermore, since remedial theories are responsive devices to be applied during self-determination conflict, they are unclear when addressing situations that fall short of clear oppression. Specifically, for groups wanting to secede, but are unable to demonstrate oppression, how are their interests interpreted and assessed after a failed claim? It would be incorrect to assume that all secessionist claims that fail to establish oppression are reflections of nationalistic or tribal motivations, because many claims may have been advanced simply as responses to various forms of egregious state activity.[686]

An approach that seeks to guard against state fragmentation, due to the revocation of autonomy agreements, will be dependent upon international impartiality. This is a considerable challenge and as Pavković reasons, there is the obstacle of overcoming political inequalities that are a product of the state domination within self-determination dialogue.[687]

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[683] ibid 358.
[684] Wellman (n 139) 149.
[685] ibid 149.
[686] PB Lehning, 'An Introduction', in PB Lehning (ed), *Theories of Secession* (Routledge, 1998) 2.
[687] A Pavković, 'Self-Determination, National Minorities and the Liberal Principle of Equality' in I Primoratz and A Pavković (eds), *Identity, Self-Determination and Secession* (Ashgate, Aldershot 2006) 129.

5.5 Oppression Beyond a Singular Event

Since Kosovo's independence occurred nine years after the height of its conflict with the Federal Republic of Yugoslavia, the question arises whether claims of oppression maintain their validity in supporting secessionist claims.[688] In this respect, could a valid claim of oppression based on a 'history of ethnic cleansing and crimes against civilians' endure for nine years?[689] Since Kosovo enjoyed a period of relative autonomy as a unique international autonomous unit[690] protected from Serbian aggression, it is difficult to demonstrate how a historic pattern of human rights abuses could validate a claim of oppression during times of peace. Possibly, the threat of oppression could be a valid consideration, but this seems too imprecise and uncertain to warrant a secessionist claim.[691]

Comparatively, Judge Cançado Trindade argued that the effects of the systematic oppression in Kosovo in 1998 and 1999 did in fact contribute to an ongoing harm over many years.[692] His analysis raises the possibility that the broader affects of mass-violence cannot easily be healed. Brewer supports Judge Cançado Trindade's reasoning on historic forms of oppression, but takes a different approach believing that states, during war, may try to manipulate events to avoid culpability. He states:

> By 2008, the abuses might no longer constitute egregious violations of fundamental rights such that secession is necessary. A delay, however, should not per se invalidate a claim, as creating a bright line rule in this regard would facilitate manipulation by abusing states.[693]

Although oppression was cited as a justification for Kosovo's eventual separation, which includes remarks made by former US Secretary of State, Condoleezza Rice,[694] there is no 'red line' that defines when the people of Kosovo would have been entitled

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[688] *See* Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (n 26) 199.
[689] Oklopcic (n 78) 688.
[690] SC Res 1244 (n 346).
[691] Oklopcic (n 78) 688.
[692] Separate Opinion of Judge AA Cançado Trindade (n 24) [51].
[693] Brewer (n 26) 265-266.
[694] Oklopcic (n 78) 688.

to separate from the Federal Republic of Yugoslavia.[695] Importantly, with few exceptions, remedial theories do not provide a context as to when threats may become systematic or a reflection of a persistent denial of certain human rights.[696] This means that territorial minorities seeking to secede must essentially react to a serious event or threat before attracting the necessary moral and legal support to justify a secessionist claim.

Since remedial theories consider secession to be a measure of last resort against oppressive state activities, the decision of the ICJ in the context of unilateral declarations of independence exposes the latent fear that remedial theorists have for tribalism and unilateral secession in the absence of a state rebuttal and international oversight. They also seek to guard against any activities that encroach upon international peace and stability and the specific legal and political principles of territorial integrity. As such, it is argued that oppression should be redefined in a manner that provides context and substance self-determination. However, even amongst remedial theorists it is not clear where the 'oppression threshold' lies. Differences between egregious forms of human rights violations and 'gross violations,[697] are more than semantics. For instance, Ryan has suggested that if groups are able to express their concerns they likely have not suffered from gross violations:[698]

> ..gross violations of rights occurs if state action directly prevents the exercise of an individual's core rights. In other words, gross violations are so severe as to deny fully to some or all people within a territory the effective exercise of core rights. Partial limitations on rights are *not* gross violations, no matter how permanent those limitations may be, so long as some room is left for the exercise of the right to question [emphasis added].[699]

Seen from this vantage, it would be impossible to convincingly exhaust what some would view as core aspects of internal self-determination, especially when taking into account such things as economy and culture.

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[695] ibid.
[696] *See, e.g.,* Brewer (n 26) 287.
[697] Ryan (n 19) 60.
[698] ibid.
[699] ibid.

Franck observes that it is very difficult to accurately say what a qualified approach to secession should be.[700] He identifies a general position that the international community and states do not want to see the concept emerge as something any more formal than a response to illicit state behaviour against territorial minorities:

> Post-colonial international law is still seeking to define its rules in this respect and is but dimly discernible from state practice, a few non-binding texts, and even fewer treaties. It appears not to take sides; rather, modestly it tries only to regulate and mitigate in a humanitarian fashion the more deleterious effects of rampant postmodern tribalism.[701]

His general outlook underlines the key difference between remedial theories and liberal-nationalist theories on the subject of secession. Namely, remedial theories generally link the moral foundations for international stability to states rather than territorial minorities.[702] This implies, therefore, that remedial theories consider territorial integrity and the sovereignty of states as paramount concepts, which are subject to few exceptions based on a narrowly defined moral criteria used to identify instances of oppression and injustice.[703]

It follows that remedial theories look to the legacy of decolonisation as setting the parameters for their moral justifications about when secession may occur by broadly articulating oppressive conduct.[704] They adopt the position that unilateral secession is an attempt to assail the 'sanctity of the state as the basic unit of the international system, and so the international community places major hurdles and inhibitions in the way of

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[700] Franck, *Fairness in International Law and Institutions* (n 4) 158.
[701] ibid.
[702] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 371, and Part 2 generally; Buchanan reasons that the state is the practical guarantor of international peace and stability and with other states has the legitimacy to define a moral international framework.
[703] This position is largely based on reference to geopolitical realities evidenced during decolonisation. For instance, the African Union's officially declaration in their 1964 *Resolution on Border Disputes* states that once African territories gain independence their territorial integrity consists of a 'tangible reality'. Cairo Assembly Resolution AHG/Res 17(1) July 17-21, 1964; Significantly, it is unclear how adaptable remedial theories would be to accept broader political changes, such as Kosovar independence based on unilateral declaration.
[704] *See, e.g.,* Pentassuglia (n 19) 311.

those claiming a right to secede.'[705] This is challenging, as it means that the moral responses to oppression are ostensibly derived from the same moral authority responsible for the oppressive conduct.[706]

Furthermore, remedial theories view a number of international instruments as supporting a restrictionist interpretation of secession. This position is not necessarily in spite of the above-mentioned implications of the ICJ's *Advisory Opinion on Kosovo*, which would infer that secession like unilateral declarations of independence are legally neutral concepts, but it does infer that remedial theories do interpret international instruments differently from other theories. For example, under the heading, 'the principle of equal rights and self-determination of peoples,' within the UN General Assembly Resolution 2625 (XXV) and Article 8, paragraph 4 of the 1992 UN *Declaration on the Rights of Persons Belonging to National Ethnic, Religious and Linguistic Minorities*[707] secession appears to be a possibility for certain groups within states which fail to represent the whole of its peoples or are culpable for gross human rights abuses.[708] UN General Assembly Resolution 2625 (XXV) identifies that:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in elaboration of the present principle of their right to self-determination and freedom of 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 support in accordance with purposes and principles of the Charter.[709]

While the *Declaration on the Rights of Persons Belonging to National Ethnic, Religious and Linguistic Minorities* more directly identifies that state sovereignty and territorial integrity is not absolute in the face of illicit activities against groups:

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[705] White (n 70) 160.
[706] *See, e.g.,* W Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (OUP, Oxford 2001) 53.
[707] UNGA Res 47/135 (n 261).
[708] Pentassuglia (n 19) 310.
[709] The principle of equal rights and self-determination of peoples, UNGA Res 2625 (XXV) (n 51).

> Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.[710]

In 1971, India's intervention and support for the secession of East Pakistan from the Pakistan due to extreme military oppression served as an example of secession based on a remedial response. Although it is unclear to what extent India's involvement in the conflict was based on expansive interpretations of UN legal instruments like those identified above, White suggests that the incident represents a rebuttal to arguments that secession lacks international legitimacy.[711] This conclusion has merit despite the ICJ's *Advisory Opinion on Kosovo*. Ultimately, however, because the opinion was only non-binding, territorial minorities can continue to draw upon existing international instruments to support their own conclusions on the permissibility of secession.

5.6 Liberal-Nationalist Interpretations on Secession Relative to Oppression

Liberal-nationalist theories are generally causative and argue that self-determination should reflect Rawlsian liberal notions[712] of free choice and fairness for territorial minorities compared to the state. From this perspective, oppression represents only an indication of whether internal self-determination has been denied or frustrated; it does not serve as the primary justification or trigger for secession. Instead, liberal-nationalist theories underline the importance of a territorial minority's self-choice and primary expression to justify claims and acts of secession.[713]

During the first decades of the twentieth-century, liberal self-determination theories were emerging throughout Europe[714] and were directly influenced by the democratic, suffrage and liberal movements.[715] Jenne explains that minority autonomy, in this respect, was a 'logical out-growth' of the principle of democracy and the expansion of

[710] Article 8, UNGA Res 47/135 (n 261).
[711] White (n 70) 162.
[712] *See generally* J Rawls, *A Theory of Justice*, (Harvard University Press, 1999).
[713] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 382.
[714] Significantly, these ideas typically led to the creation of specific minority associations to better advocate and promote significant state interests; E.g., the Association of the German Racial Groups in Europe, the Warsaw Congress in Riga, and the Association of National Minorities in Germany. Jenne (n 3) 7, 12.
[715] ibid 7, 10.

the voting franchise throughout the world.[716] Accordingly, democracy became a key concept supporting the political mobilisation of groups: 'If one accepts that all individuals have the right to self-determination, and if one presumes that nations, like humans, are natural units, it follows that nations have the same right to self-determination as humans.'[717] It is important to note, that this reasoning distinguishes *liberalism* as a philosophical concept from the application of liberal self-determination theories, which are unique arguments made by theorists and territorial minorities to justify greater autonomous powers within states.

At a very general level, liberalism addresses a number of issues associated with moral philosophy like the exercise of freedom and democratic life, the notion of equality of opportunity, the promotion of minority rights, and legal protections for disadvantaged and vulnerable citizens.[718] Rawls identifies these issues as being anchored in distributive justice, which holds that the freedom of one should not disproportionately encroach upon the freedoms of others: 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others'.[719] His basic position is reflected in liberal self-determination theories as it applies to groups and collections of individuals. For instance, Philpott emphasises that 'self-determination is a unique kind of democratic institution, a legal arrangement that promotes participation and representation, the political activities of an autonomous person'.[720] However, these theories advocate that certain groups are entitled to specific recognitions and rights independent of state influence. This begs the question about whether the rejection by liberal self-determination theories of state influence is a break from Rawlsian notions of proportionality and distributive justice that requires cooperation and comparison between different entities within an integrated process. After all, you cannot promote egalitarianism and equal opportunities without a measurable source or benchmark from which to compare.[721] In this sense, when territorial minorities adopt the language of Rawls, they fundamentally omit the need for comparison and dialogue with other actors, like states and neighbouring territorial minorities.

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[716] ibid.
[717] ibid.
[718] *See generally* Rawls (n 713).
For a comparison to Rawls and an understanding of agnostic liberalism and the belief in progress-neutral liberalism, *see* J Gray, *Liberalism 2nd Ed.*, (Minnesota University Press, 1995).
[719] Rawls (n 713) 53.
[720] Philpott (n 27) 358.
[721] *See* Rawls' Second Principle of Justice. Rawls (n 713) 47.

Bizarrely, liberal self-determination theorists do not see this rather linear approach to group hegemony as compromising general liberal democratic principles. Philpott's views, like the arguments of other liberal self-determination theorists, make important suppositions about right-holders and identities. Particularly, by advocating that minorities are entitled to distinct group rights and constitutional powers unfettered by state influence (should the group choose not to secede), there emerges an important question about how groups evaluate internal self-determination and what measures can be applied to qualify oppression.

Tierney addresses this by noting that minority interests are a natural development in liberal-democratic states, which often encourage pluralistic constitutional conditions.[722] He states that, 'sub-state nationalist movements which are themselves liberal and democratic, [seek a]…new set of constitutional arrangements...which can properly accommodate more than one national society within the same polity'.[723] For Tierney, existing liberal-democratic conditions encourage minorities to question how they are politically and constitutionally accommodated. However, what needs to be appreciated is that this questioning from both liberal and national self-determination perspectives typically invokes general biases and partisan assumptions about the qualities and interests of specific groups. This means, therefore, that the member of a territorial minority 'has the tendency to make judgements about the qualities of her own country [or minority group or nation] in a way quite different from that in which she makes judgements about others, but she is unable within her patriotism to admit to this tendency.'[724] In other words, this individualistic outlook encourages inward looking evaluations.

5.7 Conclusion

While states recognise that significant destabilisation could occur if territorial minorities were able to react to various forms of oppression, Franck remarks that modern secessionist movements are all different and that there is no uniform claim to self-

[722] S Tierney, *Constitutional Law and National Pluralism* (OUP, Oxford 2006) 99.
[723] ibid.
[724] S Keller, 'Patriotism as Bad Faith', in in I Primoratz and A Pavković (eds), *Identity, Self-Determination and Secession* (Ashgate, Aldershot 2006) 88.

determination.[725] In this context, territorial minorities that advocate liberal-nationalist theories commonly look at how liberal principles are relevant to their own conditions in isolation of broader regional and international interests. This would appear to be a one-dimensional or tribal[726] understanding of an application of liberalism and democratic principles and which Franck further identifies as being 'framed in terms of a well established existing right, perhaps even a peremptory norm: that of self-determination.'[727] This means that for minorities that demand greater freedoms with a view to attainting distinct political ends, there appears to be a significant lack of contextual awareness or care for the positional interests of other entities and how they would envision an internal self-determination standard.[728]

Comparatively, remedial theories seem to superimpose for high standards of what they perceive as oppression. The main finding is that territorial minorities would have to suffer severe human rights abuses before pursuing secession. These theories premise oppression as a failed obligation rather than an absolute dethronement of territorial sovereignty. In other words, only the most extreme cases of oppression are considered as justifying secession. In this context, it is conceivable that violations to economic, social and cultural rights would unlikely to be considered oppressive or amounting to the denial of internal self-determination from a state-based perspective.

Liberal-nationalist, remedial and global governance theories share the same objective in attempting to justify when territorial minorities can pursue external self-determination. However, as will be discussed in chapter six, liberal-nationalist and remedial theories present challenges linked to this process as they tend to advocate positions that either favour the perspective of states or territorial minorities during self-determination conflicts. The result is that it becomes extremely difficult to evaluate specific claims associated with internal self-determination responsibilities and obligations. Chapter six exposes these difficulties and reinforces the argument that internal self-determination is a 'bundle of rights,'[729] reflecting legal and extra-legal considerations important to both territorial minorities and states. This means that when presenting a standard approach

[725] Franck, *Fairness in International Law and Institutions* (n 4) 144.
[726] ibid 140-144.
[727] ibid 144.
[728] ibid. Franck refers to this as a neo-apartheid agenda.
[729] White (n 70) 168.

to internal self-determination, it must not be inflexible to the specific needs of actual conditions.

Chapter 6: The Remedial and Liberal-Nationalist Schools of Self-Determination Theory: A Critical Analysis of Positional-Based Approaches to Internal Self-Determination

6.0 Introduction

Positional interests associated with self-determination have the tendency to reduce international law to a mere geopolitical or diplomatic tool for powerful states to leverage specific political ends.[730] In this respect, a standard of internal self-determination that promotes democratic governance, human rights and the right to development, should be inclusive so as to incorporate the different interests and interpretations of internal self-determination held by territorial minorities, states and the international community. In this sense, a standard approach to the subject, in many respects, would provide the legitimacy needed to ensure that moral arguments and legal principles associated with internal self-determination are contemplated in each case.

Since both remedial and liberal-nationalist theories approach the subject of internal self-determination from different moral and legal perspectives, it is difficult to determine how territorial minorities, states and the international community should evaluate their respective positions relative to a specific standard. Unlike global governance theories, remedial and liberal-nationalist theories occupy distinct positions within the self-determination debate, as they distinguish between states and minorities as the primary-rights holders for exercising internal self-determination. This is significant, because it challenges how we interpret the criteria and application of internal self-determination as identified in chapter four.

6.1 Chapter Aim and Scope

Remedial theories generally support a position that if internal self-determination is denied based on oppression, then territorial minorities are entitled to consider secession or other forms of recourse associated with greater autonomy, and thus, re-establish their

[730] Buchanan cites as an example, US President George Bush's justification to invade Iraq in 2003. Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) vi, vii, 12, 473.

inherent rights. In this sense, remedial theories represent moral arguments in response to 'immoral' activities like oppression.[731] They rely on the critical assumption that there is a common or universal moral position supported by the international community against certain forms of civil conflict.[732] This moral response, therefore, suggests that there is an appropriate approach for identifying when states satisfy their internal self-determination obligations pertaining to various legal and extra-legal considerations with respect to human rights, access to political representation and the right to development and when territorial minorities may justifiably challenge state sovereignty. In another sense, remedial theories look at how states fail to satisfy internal self-determination in order to define how minorities may appropriately respond.

Comparatively, liberal-nationalist theories rely on various legal and political sources of authority to justify secessionist, territorial or constitutional claims associated with minority group autonomy. They tend to argue that international law has an influential, but not necessary role, in validating minority claims associated with autonomy and secession. Additionally, these theories view democracy and group autonomy as being interchangeable moral concepts,[733] which are influenced by specific group identities and origins.[734] In this regard, liberal-nationalist theories are said to draw upon both legal and moral considerations associated with specific minority interests to support political decision-making either before or after the outbreak of disputes between groups and states.[735] It follows therefore, that whereas remedial theories are responsive to oppressive activities and require minorities to meet the onus of demonstrating illicit state behaviour, liberal-nationalist theories tend to reverse this onus by requiring states to demonstrate why they should maintain sovereignty over specific groups. In other words, these theories view minorities as the primary right-holders to self-determination and draw upon distinct considerations from remedial theories to define when groups may challenge state authority.[736]

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[731] *See* ibid.
[732] ibid.
[733] Philpott (n 27) 356.
[734] Collier and Hoeffler (n 3) 40.
[735] A Martinenko, 'The Right of Secession as a Human Right' (1996) 3(1) Survey of Intl and Comp Law 19, 25.
[736] *See* Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28).

The differences between remedial and liberal-nationalist theories exist despite a general acceptance that internal self-determination should be comprised of human rights, access to political representation and the right to development. It follows therefore, that if legal and extra-legal considerations associated with human rights, access to political representation and the right to development are extended to territorial minorities, then theoretically, the right to secede would be weakened or have less of a basis for justification. In this context, the key issue to be investigated will be how the standards are applied and whether the interests of all relevant stakeholders are considered.

As part of this, one has to ask how much weight should be allocated to the merits and moral principles of specific self-determination claims. For instance, by prioritising the interests of minorities over states, or vice-versa, there would emerge a risk of polarising certain issues or legal considerations at the expense of others.[737] This is important, as specific positional interests in which both moral and legal principles are advanced, require broad analyses to determine whether, for example, a minority's secessionist claim should supersede a state's right to territorial integrity.[738]

6.2 Theoretical Foundations: Different Standards with Common Considerations

By comparing the two main schools of self-determination one can see how they have evolved to represent diametrically opposite theoretical positions in self-determination discourse. Yet, at the height of the decolonisation process it would have been difficult to pinpoint a single self-determination school, as most debate was directed at the identification of non-self-governing peoples and external self-determination. This, however, changed following the independence of Bangladesh and end of the decolonisation process when a number of issues emerged, such as claims of neo-colonialism challenging the notion of 'salt-water colonialism'[739] or the ability to obtain independence because of geographical separation from the metropolitan state.[740]

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[737] This includes possible differences between how minorities and states interpret internal self-determination and the possibility that the extra-ordinary weight is allocated to specific sub-issues like territorial integrity. *See* M Shaw, *Title to Territory in Africa: International Legal Issues* (Clarendon, Oxford 1986) 91.
[738] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 74-117.
[739] L Brilmayer, 'Secession and Self-determination: One Decade Later' (2000) 25 Yale J Intl L 283, 283; Crawford, 'The Right to Self-Determination in International Law' (n 5) 20.
[740] Sterio (n 102) 143.

With growing concern towards oppression and secession, there began a renewed interest in self-determination theory, prompting legal theorists to explain how a post-colonial notion of self-determination could be applied within states.[741] As a result, when Buchanan assessed the implications of the break-ups of the Soviet Union and the former Yugoslavia in the early 1990s, he was no longer interested in exploring issues of sovereignty and the identification of peoples, but wanted to better understand the concept of oppression and secession as normative concepts within the law of self-determination and to better explain the post-colonial relevancy of the subject.[742]

At the same time, the 1990s also witnessed the emergence of the phenomenon of 'postmodern neo-tribalism', which encompassed a number of liberal and nationalist notions associated with territorial minority self-determination.[743] Despite there being significant differences between liberal and nationalist philosophies, both hold that territorial minorities should be treated as the primary right-holders in self-determination theory.[744] When Philpott explains that secession should not be limited as a responsive or remedial mechanism to egregious state behaviour, his argument applies equally to groups that define themselves as nationally homogenous or by virtue of a shared liberal philosophy on group self-determination.[745]

6.2.1 Divisive Evolutionary Paths

Remedial and liberal-nationalist theories approach, from different angles, oppression and secession in the application of internal self-determination. It can be seen how post-colonial self-determination theory is largely defined by how these considerations of internal self-determination are applied, and in this way, appreciate that oppression and secession are significant factors that influence the various approaches.

This outlook forces us to analyse the linkages between theory and practise, and evaluate the viability of the different schools as concepts that could be universally adopted.

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[741] P Radan, 'Secession: Can it be a Legal Act?' in I Primoratz and A Pavković (eds), *Identity, Self-Determination and Secession* (Ashgate, Aldershot 2006) 155.
[742] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 55.
[743] Franck, *Fairness in International Law and Institutions* (n 4) 141.
[744] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81-84.
[745] Philpott (n 27) 352.

According to the Minorities at Risk Dataset, minorities in various kinds of self-determination conflict typically cite one of the following justifications to support their actions:

> They [the group] suffer discrimination relative to other groups in the state; they are disadvantaged from past discrimination; they are an advanced minority that is challenged; and/or they are mobilised in political advocacy organisations.[746]

Although these considerations are not exhaustive, they do at least show a connexion between the actual interests and concerns of territorial minorities and the arguments advocated by the different self-determination schools. For instance, we can see that remedial theories tend to view evidence of discrimination or disadvantage suffered by territorial minorities as a crucial factor supporting a group's claims. Comparatively, liberal-nationalist theories tend to view territorial minorities as having an inherent interest in political decision-making, and as such attach greater importance to the third and fourth considerations rather than whether groups can demonstrate that they have suffered historic or continued instances of human rights-related discrimination.[747]

Looking at this further, the Dataset findings support the notion that the two schools are distinct, with remedial theories favouring a model of internal self-determination that says that minorities must demonstrate oppression, whilst liberal-nationalist theories argue that territorial minorities have an *a priori* position relative to the exercise of group rights independent of state influence. Whereas remedial theories require evidence of oppression prior to validating a secessionist claim, liberal-nationalist theories see internal self-determination as a political relationship requiring states to empower territorial minorities with the means to freely exercise their rights and interests.

Although both remedial and liberal-nationalist theories recognise the integral nature of democratic governance, human rights and the right to development, it is evident that

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[746] Jenne (n 3) 7, 15 [brackets added]; Interestingly, other data analyses show that in multinational states where the largest ethnic group comprises between 45 and 90 percent of the population, the risk of civil war is approximately doubled due to potential decreases in bargaining leverage and increases in instances of discrimination and disadvantage. Collier and Hoeffler (n 3) 41.

[747] For example, according to the Minorities at Risk dataset, if a minority possessed and subsequently lost a measure of political choice, control or autonomy, the group would have a 250 percent greater likelihood of making secessionist claims compared to other minorities. Jenne (n 3) 7, 25.

liberal-nationalist theories attach extra importance to political representation because it represents the most direct means for territorial minorities to exercise community self-expression.[748] The result is that states would be required to meet a very high standard or threshold of internal self-determination that includes democratic participation and sub-state decision-making, and which places the burden on satisfying the requirement upon states. This is a fundamental difference between the two schools and shows how the interpretation of internal self-determination is influenced by how democratic governance, human rights and the right to development are applied.

6.3 Positional Interests In Doctrine: The Challenge of Reconciling Remedial and Liberal-Nationalist Theories Against State Roles In International Law

Liberal and nationalist self-determination theories advocate that territorial minorities, but not states, should be the primary decision-makers relevant to a group's economic, social, cultural and political wellbeing.[749] They believe the territory 'is a site where the right of national self-government takes place,'[750] and challenge any restrictions on their right to self-government short of oppression.[751] Essentially, both courses of theory strive for the same objective to qualify minorities as primary right-holders, despite there being important differences in the understanding of group membership and identity.

According to Buchanan, liberal theories 'assert that any territory has the unilateral right to secede if a majority of persons residing in it choose to do so, regardless of whether they share any characteristics other than the desire for independence.'[752] In other words, groups that support liberal theories believe that membership is based strictly on voluntary associations rather than national or cultural ties.[753]

It is important to appreciate that this does not demonstrate that liberal theories are necessarily congruent with minority democratic expectations in internal self-determination, even if a particular territory votes to secede based on a majority

[748] Philpott (n 27) 352.
[749] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 83.
[750] Oklopcic (n 78) 687.
[751] White (n 70) 162.
[752] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81, 83.
[753] ibid.

referendum.[754] As will be discussed below, democratic considerations in the context of internal self-determination can include much more than just majoritarian voting.

Liberal theories, at their heart are concerned with 'personal identities' or voluntary forms of identity, such as political and sporting associations, which do not readily represent homogenous membership.[755] In contrast, group associations based on collective identities, such as race, culture, religion tend to regard personal identities as being insufficient to protect the collective identities.[756] Moore provides a detailed analysis distinguishing the two concepts:

> The ascriptive aspect of many identities is relevant to requirements of the state that bear on people's identities. There are at least two bases for describing identities as nonvoluntary: one is whether they are hard-wired or biologically based; the second is whether they are ratified by others, regardless of whether or not the person identifies with them…A racial or gender identity may be more ascriptive, but may not be as closely bound up with the normative commitments of the self. On the other hand, because they are rooted in some biological facts about the person, they may be experienced by the person as central to his or her sense of self, as closely bound up with his or her integrity. Although these considerations do not correspond neatly to each other, they are the kinds of reasons we have for thinking that identity-related claims should be taken seriously, and to help explain the normative force of particular identity claims.[757]

From this perspective, it can be appreciated that, nationalist theories rely on ascriptive associations between individuals to identify minority membership. Buchanan highlights that these types of theories are ascriptive because, 'they are ascribed to individuals independently of their choice.'[758] Ascriptive characteristics may include belonging to the same ethnic group or being a distinct people based on observable traits.

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[754] ibid 87.
[755] M Moore, 'Identity Claims and Identity Politics: A Limited Defence' in I Primoratz and A Pavković (eds), *Identity, Self-Determination and Secession* (Ashgate, Aldershot 2006) 30.
[756] ibid 30.
[757] ibid 29-30.
[758] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81, 83.

However, whereas liberal theories attempt to link the freedoms bestowed on citizens in democratic states to groups, nationalist theories have their origins rooted in nationalism and the 'language of political struggle.'[759] Kymlicka argues that these distinctions between the liberal and nationalist limbs are due in part to a greater desire for a more 'tolerant, inclusive and democratic society,'[760] which has led to divergent views on the ideal political society.

6.4 Theoretical Perspectives on Self-Identity

Minorities that advocate distinctiveness based on ethnicity, culture, language or race, tend to define themselves and their national attachment by opposition to a majority.[761] This is a distinctly 'romantic or *rousseauesque* approach,'[762] that seeks to reinforce differences between other minorities and identify common elements within groups that are 'more fundamental' than democratic association.[763]

Tierney notes that this self-identification process may be the 'result of a complex fusion of objective and subjective characteristics over time…which vary from case to case.'[764] Moreover, this may include a self-identity derived from a unique cultural and historical unity.[765] This ascriptive process therefore concerns itself with identifying elements of exclusion, dominance, and elements associated with being the 'other' as internal representatives of a marginalised group. [766]

Fundamentally, group identity is a significant issue simply because if groups are recognised as having certain rights in international law, it means that they should also respect other subject-specific rights like those of states. Attitudes towards self-determination during decolonisation did not generally reflect liberal-nationalist theories,

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[759] M Koskenniemi, 'National Self-Determination Today: Problems of Legal theory and Practice' (1994) 43 ICLQ 241, 261.
[760] W Kymlicka, 'Liberalism and Minority Rights: An Interview' (1999) 12(2) *Ratio Juris* 133, 139.
[761] CAJ Coady, 'Nationalism and Identity' in I Primoratz and A Pavković (eds), *Identity, Self-Determination and Secession* (Ashgate, Aldershot 2006) 62.
[762] Koskenniemi (n 760) 250.
[763] ibid.
[764] Tierney, *Constitutional Law and National Pluralism* (n 723) 34.
[765] I Primoratz and A Pavković, 'Introduction', in I Primoratz and A Pavković (eds), *Identity, Self-Determination and Secession* (Ashgate, Aldershot 2006) 8.
[766] Coady (n 762) 62.

primarily due to the outstanding dispute about how minorities, peoples and non-self-governing peoples should be qualified in international law (e.g., minorities as individuals rather than peoples as per Article 27 of the ICCPR. The British representative to the UN Commission on Human Rights summarised the interpretation at that time as follows: 'As the Charter and the two International Covenants expressly declare, [self-determination is] a right of peoples. Not States. Not countries. Not governments. Peoples.'[767]

More recent views have accepted that the interpretation of peoples may extend to specific groups apart from the entirety of a colony, non-self-governing territory, or state population: 'Since 1960 not one of the major international instruments which have dealt with the right of self-determination has limited the application of the right to colonial situations.'[768] With no concrete definition of minority or nation, it is plausible that some groups saw this as a positive affirmation that a territorial minority could qualify as a self-determining people.[769] Another reason may simply relate to how groups attempted to define themselves within the parameters of post-colonial self-determination. Yet, from another angle, Gutmann suggests that modern group identity was influenced by the basic principle of individual freedom of association:

> Identity groups are an inevitable by-product of affording individuals freedom of association. As long as individuals are free to associate, identity groups of many kinds will exist. This is because free people mutually identify in many politically relevant ways, and a society that prevents identity groups from forming is a tyranny.[770]

Accepting Gutmann's position affirms that territorial minorities can exercise self-determination rights as self-determining peoples. A global governance approach would position this as an empowerment to pursue external self-determination if international self-determination was denied. The discussion below will show different pathways from this interpretation, revealing that both remedial and liberal-nationalist theories

[767] Statement by the UK Representative to the UN Commission on Human Rights (Mr. H Steel), 9 Feb 1988, (1988) 59 BYIL 441.
[768] McCorquodale, 'Self-determination: A Human Rights Approach' (n 470) 860.
[769] Tierney, *Constitutional Law and National Pluralism* (n 723) 34.
[770] A Gutmann, *Identity in Democracy* (Princeton University Press, Princeton NJ 2003) 4.

adopt partisan positions in determining the moral and legal legitimacy of the positions of the parties in self-determination conflicts.

6.4.1 Collective Aspirations for Self-Determination: Motivating Factors

Liberal theorists espouse a *prima facie* right to secede if it is morally and practically possible.[771] Permissibility, in this sense reflects the idea that groups are able to exercise self-determination as an extension of the right to freedom of association[772] and UN doctrine supporting the free association of peoples based on 'informed and democratic processes.'[773] Thus, certain theorists believe that this premise grants minorities an independent choice to determine their futures.[774] Although this disregards the distinctions between peoples, minorities and other groups, its logic corresponds to the position that if the free choice of a group within society is consensually expressed, then there are only a few justifiable limitations that can prevent secession.

Importantly, this unfettered desire for self-determination may have roots in a genuine collective or group desire to use self-determination claims as a source of pride and respect against general disadvantage,[775] but may also derive from societal or cultural distinctions and the potential for self-government.[776] In the nineteenth century, JS Mill presented a similar theory:

> Where the sentiment of nationality exists in any force, there is a *prima facie* case for uniting all members of the nationality under the same government, and a government to themselves apart. This is merely saying that the question of government ought to be decided by the governed. One hardly knows what any division of the human race should be free to do if not to determine with which of the various collective bodies of human beings they choose to associate themselves.[777]

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[771] Tierney, 'The Search for a New Normativity' (n 188) 947.
[772] Beran, 'A Democratic Theory' (n 12).
[773] UNGA Res 1541 (XV) (n 50) Principle VII(a).
[774] J Brossard, *L'acession a la souverainete et le cas du Québec* (Les Presses de l'Universite de Montreal, 1976) 191.
[775] A Margalit and J Raz, 'National Self-Determination' (1990) 87 Journal of Philosophy 447-54.
[776] Tierney, *Constitutional Law and National Pluralism* (n 723) 34.
[777] JS Mill, *Utilitarianism. On Liberty. Considerations on Representative Government* (ed), (HB Acton, London: JM Dent & Sons, 1972) 360-1.

Nationalist theorists argue that there is a strong connexion between social disadvantage and a lack of national homogeny. They argue that the political and national unit should be independent of outside or foreign influence.[778]

In multicultural states, this idea may have less resonance simply because of a strong promotion of secular aims. However, where there is less secular relevance, citizens tend to associate the pronoun 'my' as an indicator of different ethnic and national associations.[779] Coady remarks that this could create serious identity challenges and ultimately lead to 'a Hegelian glorification and aspiration of the nation state.'[780] This indicates that perhaps not all groups wishing to promote their interests are motivated by disadvantage, as there are other important factors.[781] Although the motivating factors behind secessionist movements are not the primary focus of this analysis, it is worth pointing out that the following conditions have been identified as motivating specific secessionist groups and which can be distinguished from the Dataset above:

> The type of relationship the group has with other groups in the context of competition for the same rewards and resources; the size of the group from a competitive economic and developmental perspective; the linguistic proficiency of the group from a protectionist perspective against the in-migration of the majority and other groups; the relative economic wealth of the group from a reactive ethnic perspective; and the macro relative economic growth or decline by incorporating all the above perspectives.[782]

Understanding that challenges to state sovereignty are not limited to abject poverty and oppression is important and provides a contextual backdrop for evaluating the two

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[778] E Gellner, *Nations and Nationalism* (Cornell University Press, Ithica 1983) 7.
[779] Coady (n 762) 66-7.
[780] ibid.
[781] At a broad level and to draw a distinction from the findings in the Minorities at Risk dataset, Wright looked at the relative economic and political advantage of certain minorities over their majorities and the minority relationship to the 'centre' as being a key motivating factor. TP Wright, 'Center-Periphery Relations and Ethnic Conflict in Pakistan: Sindhis, Muhajirs and Punjabis' (1991) 23 No 3 Comparative Politics 299.
[782] R Taras, 'From Matrioshka Nationalism to National Interests' in E Bremmer and R Taras, (eds), *New States, New Politics: Building the Post-Soviet Nations* (CUP, Cambridge 1997) 685, 688-689;
See also, N McEwen, 'Does the Recognition of National Minorities Undermine the Welfare State?' in K Banting and W Kymlicka (eds), *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (OUP, Oxford 2006) 247.

theory schools in the context of international self-determination. In another light, if a territorial minority is prepared to challenge the sovereignty of a state and threaten its territorial integrity, it is crucial that all the relevant motivating factors behind the challenge are understood in order to arrive at a fair and transparent conclusion.

With this in mind and whatever the motivating factor, liberal-nationalist theorists advocate that a territorial minority's choice to secede or negotiate alternative autonomy arrangements can be justified based on the free choice of the group. In other words, 'any group with a particular identity that desires a separate government is entitled to a *prima facie* right to self-determination.'[783] Complimenting this belief, the language of the Unrepresented Nations and Peoples Organisation emphasises that choice is a core self-determination concept:

> The right to self-determination is the right of a people to determine its own destiny. In particular, the principle allows a people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. The importance lies in the right of choice, so that the outcome of a people's choice should not affect the existence of the right to make a choice.[784]

Nationalist theorists argue that secular democratic freedoms, including western notions of justice and equality, 'cannot be adequately addressed within the plurinational state without an appreciation that the state possesses a dominant national society which conditions the way in which these values are applied in practise; an argument which has made significant progress within mainstream liberal thought.'[785] The subject of minority membership in this regard is significant, because it has the effect of restricting outside influence in the choices and decisions that groups make. Both nationalist and liberal theories reflect a primary-rights position that there is a unilateral right to secede based exclusively on group choice.[786] Unlike remedial and global governance theories

[783] Philpott (n 27) 361.
[784] UNPO Principles on Self-Determination <http://www.unpo.org/section/2/2> accessed February 2009.
[785] Tierney, *Constitutional Law and National Pluralism* (n 723) 327.
[786] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 89.

that are concerned with determining whether injustices have occurred as a necessary condition to secede, liberal-nationalist theories focus on identity as a more significant self-determination consideration.[787]

In this context, Buchanan warns that by focusing on identity it would be 'hard to know what the practical implications of this qualified ascriptivist view might be.'[788] This is especially true when one considers that collective rights are not specific to groups, and that collective associations based on individuals exercising their freedom of association have no objective *raison d'être* beyond a specific function or purpose.[789]

Another way of looking at this is by reiterating the distinction between collective associations, or the sum of personal interests corresponding to minority membership under Article 27 of the ICCPR, and group entities like indigenous peoples. Salomon and Sengupta explain:

> While groups themselves are collective entities (made of individuals), group rights may be said to reflect the rights of 'units and not simply aggregations of individuals'. This, it seems, would apply equally to the preservation of a minority language as to the sovereignty over national resources, suggesting therefore that the insistence on the distinction between collective and group rights, and minority and indigenous rights, which is perpetuated by the language of, *inter alia*, ICCPR Article 27, is factitious. Is the maintenance of the legal fiction that frames minority rights only as individual rights (exercised collectively), and not as group rights, actually harmful to their protection?[790]

In lieu of these ambiguities, both liberal-nationalist and remedial theories extend important group recognitions to territorial minorities. In fact, some of the concerns articulated by proponents of liberal-nationalist self-determination theories in many respects resemble those made in remedial self-determination theories. For instance, one important common characteristic is a concern for the protection and preservation of minority rights. There are two specific considerations in this regard that should be

[787] ibid 81, 83.
[788] ibid 89.
[789] Salomon and Sengupta (n 30) 10.
[790] ibid 10-12.

highlighted. Firstly, self-determination would protect a group from destruction or threats to its distinct [mononational] culture, and secondly, self-determination could provide the institutional mechanisms and resources necessary to satisfy a group's own internal expectations.[791] Similar to the global governance theories articulated within this thesis, these considerations are framed to legitimately respond to specific cultural threats to groups.

From this perspective, whether a group is able to legitimately claim secession would depend upon determining whether the state has advanced a model of internal self-determination that promotes the rights and interests of specific groups that define themselves either by proxy to the state or by virtue of their own common characteristics. Argumentatively, if these rights are satisfied, it could be said that the state has satisfied its requirements for establishing an effective model and application of internal self-determination. Koskenniemi suggests that this would be a good way for states to explain the basis of their authority and their limitations:

> National self-determination…supports statehood by providing a connecting explanation for why we should honour existing *de facto* boundaries and the acts of the state's power-holders as something other than gunman's orders. On the other hand, it explains that statehood *per se* embodies no particular virtue that even as it is useful as a presumption about the authority of a particular territorial rule, that presumption may be overruled or its consequences modified in favour of a group or unit finding itself excluded from those positions of authority in which the substance of the rule is determined.[792]

This raises an interesting point. Based on how the group is defined proximate to the state, it seems conceivable that the relationship between the group and the state will always play a key role in defining the group. As such, one wonders whether territorial minorities within states benefit from the same degree of access to democratic governance, human rights, and the right to development as groups that have attained independence. In certain cases, it has been argued that 'protecting a group's culture

[791] *See generally* D Miller, *On Nationality* (Clarendon Press, New York 1995).
[792] Koskenniemi (n 760) 249.

through limited restrictions on choice is consistent with autonomy'[793] and that a full promotion of liberalism could be harmful to certain cultures and groups, like the traditional community and family-centric systems of some indigenous peoples.[794] This point is of paramount importance as it exposes a number of weaknesses associated with minority-state relations like federalism and consocational democracy.

Simpson observes that it is doubtful that the guaranteed protection of certain minority rights within a federal model would be enough to safeguard the state's continued unfettered governance over minorities.[795] He notes that the legal relevance of self-determination depends on an 'expansive redefinition' whereby secession could be relevant to address boarder concerns and particularly certain issues like national and international security, and even democratic governance.[796] Taken to an extreme, it may negate efforts made by liberal-democratic states to satisfy internal self-determination obligations. At the same time, however, the negation of efforts made by states to promote liberal values and democracy has the effect of diminishing the state's role in crafting a framework for all territorial minorities to express their interests.[797]

To expand on this, with regard to the promotion of certain values associated with democracy, inclusiveness and multiculturalism, 'at a fundamental level such a vision still possesses homogenising tendencies which serve to undermine the alternative nation-building processes and national visions which are central to the existence of sub-state national societies.'[798] Although opponents would argue that internal self-determination places the onus on states to accommodate all groups, the liberal-nationalist position challenges whether 'justice can simply be defined in terms of difference-blind rules or institutions.'[799] To reiterate, liberal-nationalist reasoning tends to distance states from direct participation in evaluating the conditions of internal self-

[793] W Kymlicka, *Liberalism, Community and Culture* (Clarendon, Oxford 1991) 166-169.
[794] ME Turpel, 'Indigenous Peoples' Rights of Political Participation and Self-determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 23 Cornell International Law Journal 579, 594.
[795] Simpson (n 110) 285-286.
[796] ibid; G Robertson, *Crimes Against Humanity* (Penguin Books, 1999) 435.
[797] D Weinstock, 'Is 'Identity' a Danger to Democracy?' in I Primoratz and A Pavković (eds), *Identity, Self-Determination and Secession* (Ashgate, Aldershot 2006) 25.
[798] Tierney, *Constitutional Law and National Pluralism* (n 723) 327.
[799] ibid.

determination and thereby attribute less importance to secularising efforts of democratic promotions, human rights protection and access to the right to development.

At the same time, it should be appreciated that this problem is not necessarily uniform. If states incorporate the specific interests of territorial minorities (short of unilateral secession) within their constitutional laws to ensure that their interests and positions are satisfied, it would be possible for an internal self-determination standard to exist under which states must respect the agreed to conditions of minority interests.[800] This implies that any constitutional reforms that are made to prevent groups from seceding, may actually be recognised as the substantive parts to an internal self-determination standard, which if violated would permit minorities to exercise other external self-determination options like secession. Of course, any standard of internal self-determination threshold that is premised upon states having to satisfy specific territorial minority demands implies that the machinery of government would have to share entirely similar views to the group with regards to the constitution and any relevant autonomy arrangements that articulate how powers are distributed.[801]

6.5 The Effectiveness of Remedial and Liberal-Nationalist Theories

Liberal-nationalist theories advance the notion that secessionist claims automatically include a notional right to the territory occupied by the minority.[802] How does the international community reconcile this position in the face of broader considerations relevant to territorial integrity? Unfortunately, liberal-nationalists offer no plausible answer to this or how to address the prospect of continued state fragmentation.[803] In other words, the narrowly defined focus of liberal-nationalist theories only benefits secessionist groups who would not otherwise generally have an interest in participating in a regulated framework of internal self-determination. Notionally, the only limitations that liberal-nationalist theories have are with regards to a few geographical considerations, whether the territorial minority has expressed a majority interest in a decision, and finally whether this interest disproportionately threatens the meaningful

[800] ibid 329.
[801] ibid 101.
[802] Philpott (n 27) 370.
[803] *See* concerns relating to state fragmentation and international instability raised in Burkina Faso / Republic of Mali (n 215) Separate Opinion of Judge Abi-Saab, 661, 111, (n 221) [13].

existence of other groups within the host state.[804]

By overlooking a possible role for the international community, there are serious challenges in understanding how liberal-nationalist theories can be realistically supported without producing renegade unrecognised states. Both liberal and nationalist concepts expand on philosophical considerations traditionally associated with the free choice of peoples, but ignore the fact that the international community has actively pushed for outcomes to secessionist conflicts that 'fall short of full independence to avoid dangerous instability or to accommodate similar claims by other groups to the same territory.'[805] According to Raič, the major concerns for territorial minorities participating within the scope of internal self-determination primarily focus upon the need to protect, preserve and strengthen the distinct cultural character of their communities.[806] By interpreting self-determination from a liberal-nationalist perspective, these groups risk creating further isolation and marginalisation.

Comparatively, remedial theories suggest that territorial minorities must justify changes to state boundaries as a necessary condition to secession and self-government.[807] The question that should be asked in this respect, is how a minority would achieve this when the states would be responsible for defining oppression? From this view, states could argue that a framework for the protection of minorities already exists at international law, and that it would be unnecessary to extend any more powers to territorial minorities beyond what is available. The theories of Buchanan, Raday, Walzer and Ryan indicate that oppression may be identified by the failure to satisfy certain internal self-determination obligations. Each theory is unique in its identification of oppression, but all share a common theme that recognises states as primary-right holders. Therefore, it would be reasonable to conclude that the parameters of internal self-determination would include no real ability or incentive to identify real disadvantages suffered by groups.[808]

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[804] Philpott (n 27) 369.
[805] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81, 89.
[806] Raič (n 7) 238.
[807] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81
[808] Pavković, 'Self-Determination, National Minorities and the Liberal Principle of Equality' (n 688) 130.

Remedial theories propose that if oppression occurs, then secession may be permissible as a valid remedial response. Further, in the cases of Kosovo, Bangladesh and Eritrea, there was a common understanding of oppression connected to gross violations of human rights and extreme injustices. In none of the theories presented by Buchanan, Raday, Walzer and Ryan was oppression qualified if groups were deprived of control over their lands, resources, and methods of development.[809] This is significant and exposes remedial theories as being somewhat archaic in the context of the diverse pressures facing territorial minorities at present. Hannum suggests the international community must attempt to better understand the different kinds of pressures facing groups,[810] and even advanced the notion that 'minorities should enjoy the greatest degree of self-government that is compatible with their particular situation.'[811] What this suggests is that remedial theories lack contemporary relevance and fail to provide states with a credible means to resolve disputes and address contemporary pressures. This is because they provide no means for appreciating group pressures and the relevancy of these pressures to the minority-state relationship.

The problem with remedial theories, in this regard, is that they seek to use a uniform test of 'deserved necessity'[812] to identify when serious violations against groups have occurred. In doing this, they ignore a number of pertinent considerations about how territorial minorities protect and promote their own cultures[813] and define oppression in relation to their circumstances. This same critique can be applied to power-sharing arrangements that are designed by the state and only offer residual means for group self-expression.[814] Of the historical examples, few have been successful in extending effective political participation to territorial minorities.[815] In fact, most cases can be compared to the Yugoslavia Constitution of 1974, which included specific state-specified provisions for the legitimate constitutional secession of the various internal republics,[816] with emphasis placed on ensuring stability rather than minority rights.

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[809] *See* Allgood (n 30); Salomon and Sengupta (n 30).
[810] *See Lund Recommendations* (n 46).
[811] Hannum, 'Self-determination in the Twenty-First Century' (n 528) 61, 73.
[812] Pavković, 'Self-Determination, National Minorities and the Liberal Principle of Equality' (n 688) 133.
[813] ibid 137.
[814] *See, e.g.,* Kymlicka, 'Is Federalism a Viable Alternative to Secession?' (n 96) 128-131.
[815] D Wippman, 'Practical and Legal Constraints on Internal Power Sharing', in D Wippman (ed), *International Law and Ethnic Conflict* (Ithica 1998) 230.
[816] *See* Radan (n 742) 158-160. Radan contends that the constitutional limitations on secession imposed by the Former Yugoslavia on Croatia, Slovenia, etc., had the effect of extending significant political and constitutional meaning to the subject of secession. This was also evident in the United States in *Williams*

6.6 Critical Analysis Of The Proposed Solutions For A Normative Application Of Internal Self-Determination

6.6.1 Challenges reconciling the protection of group rights under internal self-determination against territorial legitimacy

As discussed previously, self-determination is inextricably linked to the principle of territorial integrity. This general linkage applies both to its application during decolonisation as it does today in the context of internal self-determination. This should not be surprising, since the principle has long since been upheld as an important international law, from its early foundations in the doctrine of *uti possidetis* to its appendage to self-determination during decolonisation during the post-1945 era.[817] Moreover, territorial integrity clarifies the parameters of debate during self-determination conflicts even if it is accepted that it is the people who determine a territory and not vice-versa.[818] The principle of territorial integrity superimposes conditions on which both remedial and liberal-nationalist theories must address before looking at how it may yield to secession.[819] A territorial minority cannot advocate for specific remedies or make secessionist claims without acknowledging that the boundaries of the territory 'belong' to the state. This is a challenge that both remedial and liberal-nationalist self-determination theories seek to address in different ways by offering considerations and exceptions to the territorial integrity rule. As will be discussed, the manner in which these considerations are applied varies greatly.

To legitimately challenge the territorial integrity of a state, remedial theories advance the general notion that there should at least be a violation of the basic human rights of a territorial minority. Raday observes that 'states, which fail to provide adequate minority rights, may lose their right to claim territorial integrity in response to a demand for self-determination.'[820] This observation can be deduced by the remarks made by the

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v. *Bluffy*, 96 US 176 at 186 (1877) and in Canada in the Supreme Court case *Reference re Secession of Québec* (n 31) where the court held that a 'clear expression' to secede by the Province of Québec would trigger constitutional negotiations to determine Québec's right to external self-determination.

[817] Franck, *Fairness in International Law and Institutions* (n 4) 147.

[818] *The Western Sahara Case* (n 229) 122.

[819] J Crawford, *The Creation of States in International Law,* (OUP, Oxford 1979) 269.

[820] Raday, 'Self-Determination and Minority Rights' (n 6) 458.

Canadian Supreme Court in the *Reference re Secession of Québec* decision, when it stated that:

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.[821]

The corollary is that states, which do not adequately represent the whole population, may lose their automatic right to territorial integrity. In context, the denial of a group's ability to exercise case specific considerations relating to internal self-determination would serve to rebut the sanctity of territorial boundaries and enable a minority to secede.[822] Secession would therefore be permitted only as a last resort to protect the full exercise of internal self-determination following an exhaustive attempt to internally address the conflict between the state and the territorial minority.[823]

Buchanan argues that a standard of internal self-determination, which remedial theories espouse, would provide states and minorities with a clear understanding of legitimacy under international law to address issues involving territorial sovereignty.[824] He adds that this understanding would also provide states with serious incentives to protect their territorial integrity by acting more justly towards minorities and limiting instances of oppression.[825]

Buchanan's proposed solution is the creation of 'remedial devices' or intrastate autonomy arrangements that respect the continued territorial integrity of the state.[826] Whether this is enough to capture the broader contextual challenges facing groups is unclear. Buchanan's proposal depends on an assumption that power sharing will appease the 'systematic and persisting failure on the part of the state to uphold certain

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[821] *Reference re Secession of Québec* (n 34) [130].
[822] *See* Nanda (n 251).
[823] *See* Simpson (n 110) 283; White (n 70) 147.
[824] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81, 85.
[825] ibid.
[826] ibid 81, 95.

national minority rights.'[827] Yet, satisfying different territorial minority demands through a 'coffee for everyone'[828] formula of political power distribution within multinational states is both complex and potentially aggravating. For instance, even if boundaries and constitutional powers can be established to accommodate territorial minorities, it is highly improbable that all groups would be satisfied by how powers are distributed.[829]

Pavković observes that 'national minority movements in modern liberal democratic states…while avoiding the demand for secession…still claim the right to establish state-like institutions within which their group would have unchallenged control.'[830] This implies that even where constitutional arrangements and 'commitments to democratic governance' have been established, this cannot guarantee that groups would be protected from secular decision-making.[831]

This scenario also raises the question about how aggrieved groups, whom have suffered oppression, can look to the future without prejudice and accept or acquiesce to a power sharing arrangement with the state. While there are cases of reconciliation, such as in South Africa following apartheid, there are also cases where historic grievances persist from generation to generation as evidenced in Burma. So how do remedial theorists reconcile dissidence in the face of territorial integrity? Kymlicka indicates that the influence of American federalism has heavily influenced self-determination theory in this regard.[832] American federalism views that only federal units without any specific cultural or ethnic associations can secure viable forms of 'mature' federalism and that all states should aspire to this end.[833] Unlike asymmetric models of federalism, such as in Spain, which extends power to national-minority communities, the American model does not promote minorities in any specific way. As such, Kymlicka indicates that although American federalism would lessen the relevance of nationalism and

[827] ibid 81, 94.
[828] M Guibernau, 'Nations Without States: Political Communities in the Global Age' (2003-2004) 25 Mich J Intl L 1251.
[829] Kymlicka, 'Is Federalism a Viable Alternative to Secession?' (n 96) 128.
[830] Pavković, 'Self-Determination, National Minorities and the Liberal Principle of Equality' (n 688) 123.
[831] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 88.
[832] Kymlicka 'Is Federalism a Viable Alternative to Secession?' (n 96) 131.
[833] ibid.

divisiveness in the long-term, it could exacerbate minority-state relations on the back of recent oppression and conflict.[834]

In order to appreciate some of the limitations of intrastate autonomy agreements as advanced by remedial theorists, it is necessary to understand that the viability of shared sovereignty can only be measured by assessing the quality of internal self-determination as enjoyed by each territorial minority.[835] This implies that in states where intrastate autonomy agreements have been devised by the state, it is not certain whether the powers of the minority address any of the underlining concerns associated with securing meaningful access to internal self-determination.[836] In other words, power-sharing arrangements do not necessarily provide the means to measure whether the conditions of internal self-determination are satisfied. This highlights an important theoretical gap evidenced in most remedial theories covered in this analysis. Namely, although remedial theories seek to define oppression at international law, the solutions they present fall short of answering whether the oppressive conditions have been removed. Thus, if a territorial minority identifies that it suffers from oppression because of the denial of political representation, then without a tailored intrastate autonomy arrangement that addresses this key issue, it is debatable whether the state has exercised objectivity and a right of consent to properly establish mechanisms that will last.[837]

For example, one difficulty with the remedial theory favoured by Buchanan is that it ignores the significance of cultural and national identity in modern international relations, 'which is not just about securing human rights and liberal legitimacy.'[838] Indeed, for multinational states there is an underlying reliance on minorities to have a common vision, identity and moral foundation for how society should function and interact with others.[839] In this respect, if a territorial minority is not convinced of the state's vision, processes of governance and international engagement, then there could be real difficulties in terms of a shared future.

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[834] ibid 132.
[835] Margalit and Raz, 'National Self-Determination' (n 556) 80.
[836] The assumption is that by extending powers to groups, any liabilities and accountabilities associated with oppressive conduct will be absorbed by the leadership of the territorial minority.
[837] *See* Beran, 'A Democratic Theory' (n 12) 32.
[838] Moore, 'The Territorial Dimension of Self-Determination' (n 27) 7.
[839] D Miller, 'Secession and the Principle of Nationality', in, M Moore, (ed), *National Self-Determination and Secession* (OUP, Oxford 1998) 63.

Likewise, if a territorial minority receives special autonomous powers, which are distinct from other units in the state, it may be considered contentious and cause for other groups to question the model of internal self-determination that the state has promoted. Kymlicka suggests that a strong system of federal asymmetry should correspond to the reduction of power of minorities at the national-level and not the opposite.[840] However, the argument that minority groups should accept reduced powers at the national-level is tenuous, because inevitable questions will arise about why they should remain within the federation at all if their national-level influence and representation is marginalised or reduced.[841]

Another way of looking at this is by assessing the prolonged or long-term validity of autonomy agreements for minorities who have been granted autonomous powers, but who no longer want to remain part of the state for various reasons. Significantly, remedial theories do not address this issue, and in such cases where autonomous regions exist it would be difficult for territorial minorities to prove oppression without overt aggressive state actions directed against the group and territory. From this perspective, it would take a significant visible incident of oppression to undermine the credibility of the autonomous arrangement, rather than protracted claims that the arrangement is eroding the inherent rights and interests of the minority. In this respect, one has to wonder how remedial theories identify and address oppression in perpetuity and why future generations should accept historic and antiquated autonomy arrangements?[842] Constitutionally guaranteeing autonomous powers that do not address underlying political representation, human rights and developmental problems can be as significant to the minority as direct egregious acts of aggression perpetrated by the state. Consider, after all, that many indigenous communities in the West have historic constitutional powers and autonomy agreements, but suffer continued poverty and cultural erosion. Although these groups 'enjoy' some measure of political representation, human rights protections and partial access to certain resources, their autonomy arrangements typically are provisional and limited.[843]

[840] Kymlicka, 'Is Federalism a Viable Alternative to Secession?' (n 96) 134.
[841] ibid 136.
[842] Crawford, 'The Right to Self-Determination in International Law' (n 5) 21.
[843] Turpel (n 795) 579.

In comparison, liberal-nationalist theories interpret territorial integrity as something that cannot and should not be defended without the free expression of those groups to whom the principle applies. In this sense, these theories critique the original boundary-setting of states made during the colonial era when subject groups had little or no say in the direction of their social and political futures. Instead, liberal-nationalist theories emphasise that the foundation of political community should be defined by the 'territorial continuity' of specific groups and based on the premise that 'a majority of any territorially concentrated group acquires the right to secede from the host state, provided that this decision is reached through democratic procedure (such as referendum)'.[844] Philpott refers to Rawls when he suggests that groups should be geographically uniform.[845] He reasons that since 'self-determination is exercised in groups…an American citizen living in Cambridge, Massachusetts, may not declare allegiance to Sweden, while a region like Alaska or the disjoined sections of Malaysia or Indonesia may share statehood with a region that is not geographically adjacent.'[846] The approach taken by Philpott and his fellow theorists is based on assumptions about community continuum and territorial connectivity to the community. Yet, how relevant are geographical considerations to how groups should define themselves?

In practise, geographic considerations serve as a necessary and practical limitation to territorial fragmentation and open-ended unilateral right of secession for groups with widely dispersed memberships. Significantly, however, liberal theories attach less importance in their arguments to the subject of territoriality as they do to minority membership. This is because liberal-nationalist theorists advocate group rights with a presumption that there already are natural identity markers pertaining to specific territories. As such, territoriality can be summarised as only a secondary concern and something that liberal theorists approach from the perspective of Judge Dillard in the *Western Sahara* case when he stated that, 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people.'[847] Therefore, according to liberal theorists, the issue of territoriality is only a subsidiary consideration dependent upon the identification of specific groups and their expression of self-determination:

[844] Primoratz and Pavković (n 766) 8.
[845] Philpott (n 27) 369.
[846] ibid.
[847] *The Western Sahara Case* (n 229) 122.

> A candidate territory is that region which the proclaimers of self-determination desire to place under a new (or more local) government. Simply put, we evaluate that claim which self-determination's explicit advocates put forth…In the case of the dissenters, who occupy a homogeneous minority-less candidate territory but are divided over whether to separate, the operative principle must be majoritarianism.[848]

The problem with this approach is that it appears to lack a methodological foundation. Why for instance, is majoritarianism used as the benchmark? As we have seen previously, minority rights typically incur a need for protection against conventional majoritarian democratic decision-making, which can have an eroding effect on cultures, identities and group expression. This is because possible state concessions to aggrieved territorial minorities, such as rights to participate in national elections, may actually have detrimental effects upon minorities and groups favouring specific federal or regional outcomes below the national-level.[849] Furthermore, to whom is the majoritarian principle applied and to what geographical units? Without a specific methodology to link groups to territories, this would appear to be a fundamental gap in liberal theories. This is a serious weakness to their overall credibility in advocating a normative approach for understanding the relationship between territorial minorities and states in the context of self-determination.

Without a verifiable reason as to why majoritarianism should be the method used to evaluate the self-identification and expression of a given group in a specific territory, the process appears arbitrary and without credible foundation. To demonstrate one of the challenges, it is asked how theorists reconcile minorities within minorities? There have always been difficulties delineating territorial claims, especially when considering the principle of *uti possedetis* and the tendency to only respect the existing internal administrative boundaries of states. But if a specific territorial group within a larger territory becomes politically active, would this scenario not invoke an equivalent right to internal self-determination distinguishable from the larger minority population? Theoretically, a distinction of this kind could include the people of the West Bank advocating interests and needs distinct from the rest of the Palestinian territories.

[848] Philpott (n 27) 379.
[849] McCorquodale, 'Self-determination: A Human Rights Approach' (n 470) 865.

Equally it could include groups within the West Bank distinguished from other groups. Therefore, it would seem that for small territorial minorities, liberal-nationalist theories impose overly complicated and somewhat arbitrary qualifications for accessing self-determination and a right to secession.[850]

One possible explanation for this approach is that liberal-nationalist theories hold that in conditions where internal self-determination is measured only by the rights extended to collections of individuals rather than empirically defined territorial groups, is it impossible to ensure economic, social and cultural protections.[851] Galston critically notes that basic liberal principles in this regard only extend so far as to protect select 'legitimate diversities' or historic groups rather than seemingly limitless political choices for groups.[852] Another perspective is that states can only extend equal opportunities to individuals while leaving groups in the untenable position of protecting their cultures against the pressures imposed by a secular majority.[853] This means that in situations where the state only recognises individuals as having minority rights by virtue of their membership to a collection of individuals, there is a fundamentally imbalanced preference for secularism requiring minorities to: 'participate in politics within the framework of a culture which is alien to them, using a language which is foreign to them…[invest] significantly more energy and time to master the culture and language of politics than members of the majority group.'[854] Where states recognise that groups do suffer disadvantages, typical programs designed to 'equalise' disadvantage tend to have the negative consequence of assimilating minorities, such as through majority language programs, pay equity programs and majority-dominated institutions that fail to look at groups as anything more than a collection of members.[855]

By challenging the view that group rights are necessary, states invariably 'assume that personal identity claims [and therefore the collective] are appropriately handled by liberal rights and rules of justice...[and]...pre-eminent universal rights such as freedom

[850] Crawford, 'The Right to Self-Determination in International Law' (n 5) 50.
[851] Salomon and Sengupta (n 30) 10-12.
[852] WA Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (CUP, Cambridge, 2002) 23.
[853] Pavković, 'Self-Determination, National Minorities and the Liberal Principle of Equality' (n 688) 127.
[854] ibid 129.
[855] ibid 129-130.

of expression and association.'[856] To reinforce this point, if groups are recognised only by their collective membership, states would only have obligations to protect members rather than the collective entity using a standard of protection fundamentally similar to that used to protect minority members.[857]

In seeking to break from the state paradigm, both remedial and liberal-nationalist theories fall into the trap of proposing limitations on right-holders that in many ways reinforce group isolation, vulnerability and marginalisation. Thus, when territorial minorities are forced to accept state primacy in defining oppression (recalling the standards of Buchanan, Raday, Walzer and Ryan) it would appear to undermine the relevancy of internal self-determination and a group's ability to define its needs. After all, remedial theories require territorial minorities to suffer disadvantage by varying degrees before they can hope to claim oppression and contemplate secession. Likewise, in seeking to provide territorial minorities with the right to secede, liberal-nationalist theories appear to superimpose state perspectives on which groups qualify as right-holders. In this context, it is difficult to differentiate how majoritarianism is negative when applied within states, but positive when identifying territorial minorities as a single group. The irony is that the minority within the territorial minority must suffer the same conditions of marginalisation as the bigger group, but without a right to recourse.

6.7 The Problem of Inflexible Positional Interests: Unilateralism as a Threat to Internal Self-Determination

Limitations regarding which types of groups can qualify as territorial minorities tend to overlook the significance of the host state's role in the self-determination process since it is the minority which is regarded as the primary rights holder and decisions are made largely independent of any constitutional provision.[858] In cases where minorities are consensually recognised in constitutional processes, the substance of the group's primary rights remains unchanged, although the specific political outcomes relevant to

[856] Moore, 'Identity Claims and Identity Politics' (n 756) 30-31.
[857] J Wright, 'Minority Groups, Autonomy, and Self-Determination' (1999) 19 Oxford Journal of Legal Studies 605, 624.
[858] Buchanan, 'Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession' (n 136) 81, 82.

particular groups may shift from secessionist aims to greater plurinationalism within states.[859]

In this situation, an obvious predicament emerges when trying to evaluate the effectiveness of liberal-nationalist theories in otherwise free and liberal societies that extend considerable autonomous powers to territories with dominant minorities. Since these theories emphasise that states should be more or less removed the decision-making processes of self-determining groups, there is little scope to evaluate how a state promotes and protects a continuing right to internal self-determination.[860] What remains is an analysis of the general limitations on unilateral secession identified in these theories. Although an analysis of this kind is not based on a strict look at an internal self-determination standard that states must meet before secession is considered, it nonetheless is informative for looking at the general merits as to whether liberal-nationalist theories should be taken seriously at international law.

Therefore, discussions about the kinds of internal self-determination found in states and particularly, whether states afford minorities sufficient constitutional provisions to exercise self-governance, or ensure that minority rights are respected, are perhaps irrelevant or reduced to a *de minimis* consideration within liberal-nationalist theories. This means that that the issue of self-determination and specifically external manifestations of self-determination, such as secession, are not dependent upon how states treat their minorities. Instead, liberal-nationalist theories seek to refute the state's legitimacy to intervene in all aspects of group decision-making. Philpott summarises this position as follows:

> One does not have the autonomy to restrict another's autonomy simply because she wants to govern the other. The larger state's citizens cannot justly tell the separatists, 'My autonomy has been restricted because, as a member of our common state, I once had a say in how you were governed-in my view, how we were governed-which I no longer enjoy'.[861]

[859] ibid.
[860] Higgins (n 5) 120.
[861] Philpott (n 27) 363.

Thus, for Philpott and other liberal theorists like Beran, it is unnecessary to ask which traits define a self-determining minority as they can be identified when they make self-determination claims against the state:

> We simply acknowledge, usually without difficulty, that a distinct group wants independence or greater autonomy from a larger state…My point is only that neither ethnicity nor any other objective trait should be the criterion of identification.[862]

Short of a direct unilateral decision to secede, how would these theories benefit international law and offer a normative approach to internal self-determination? Philpott suggests, based upon a distributive theory of justice, minorities should not be able to secede if the act of secession would create a disproportionate amount of harm on others.[863] More specifically, he lists a number of considerations for limiting unilateral secession in the context of potential injustices or oppression that could be suffered by other groups:

> We may posit a general formula: a candidate group is granted a general right to self-determination within a candidate territory when the group's likely potential for justice-that is, its degree of liberalism, majoritarianism, and treatment of minorities - is at least as high as the state from which it is gaining self-determination; its claim is enhanced, and more justifiably takes the form of secession, when it suffers threats and grievances; but if its separation limits the autonomy of the larger state's members, then it must be limited or modified to minimize or compensate for this harm; and, finally, the prospects for war and chaos must be weighted proportionately against the justice of self-determination and any injustice that the group has suffered. Secession, by this formula, truly becomes a last resort; it should be endorsed only when a people would remain exposed to great cruelty if left with a weaker form of self-determination.[864]

Philpott strictly confines his limitations to liberal-democratic states. There is an almost

[862] ibid 365-367.
[863] ibid 363.
[864] ibid 382.

utilitarian comparison in the manner that he assesses whether the choices that minorities make are ultimately more liberal or democratic than what exist within multinational states. This is somewhat confusing when the subject of self-determination and unilateral secession is viewed as an expression of a primary-right. If a minority has the freedom to choose its future, why are contextual comparisons with conditions within states important? Would this not be a moot issue or irrelevant consideration? According to liberal-nationalists, since liberal-democracies struggle to recognise territorial minorities as distinct self-determining entities, and instead only recognise the rights of individuals, it is difficult to reconcile Philpott's limitations as anything other than suggestions to avoid strict illiberal and undemocratic conditions.

One of the principal issues discussed under remedial theories is that minorities can exercise secession as a distinct group or people if certain human rights violations have been committed. In this sense, there is a boundary, or threshold, demarcating what states are expected to achieve in protecting minorities. In comparison, liberal-nationalist theories articulate that groups should acquire the same primary-rights as individuals and be able to make-decisions free of state influence.[865] Not only would this present seemingly limitless opportunities for both plebiscitary and ascriptive groups to make self-determination claims like secession, but it ambiguously fails to demonstrate what responsibilities groups must have if they are treated as primary-rights holders.

Since the notion of free choice is a key objective within liberal-nationalist theories, it should be appreciated that theorists have acknowledged a necessary limitation based on illegitimate and illiberal group claims. Claims must therefore be in conformity with liberal-democratic decision-making. Wellman refers to this as a primary-right of self-determination.[866] If minorities are able to demonstrate that they have made a commitment to democratic principles by ensuring that the free choice of the group is articulated based on majoritarianism, then whatever decision is made should be respected by the state. As a result, democratic decision-making should equip groups to be more cognisant of their own interests as well as empower them to be more

[865] Van Dyke, 'The Individual, the State, and Ethnic Communities in Political Theory' (n 176) 34.
[866] Wellman (n 139) 149.

autonomous in the administration of their own affairs.[867] Beran supports this point by arguing:

> Liberal democratic theory is committed to the permissibility of secession quite independently of its desirability in order to increase the possibility of consent-based political authority. The claim is this: if persons have a right to personal and political self-determination, then secession must be permitted if it is effectively desired by a territorially concentrated group and if it is morally and practically possible.[868]

Accordingly, in looking at this from both the perspectives of minorities and states, if a territorial minority decides to secede from a state based on the consent of its members, it is justified in doing so, but if a state obtains the consent of the majority of members in the specific territory, it is justified in denying the secessionist movement.[869] If, however, the consent of the population is questionable, it would be logical to refute the legitimacy of the claim made by the minority or denial of the claim by the state.

Taken to an extreme, some have argued that the nature of the self-determination claim should be weighed not simply based on majoritarian consent, but based on other democratic considerations that may improve the quality of the group's expression. For example, one argument is that if a group wants to pursue a more direct means of expressing its interests, such as by adopting direct or deliberative democratic systems of representation, then it should be able to do so despite a lack of evidence suggesting that the majority of members want to remain within the state.[870]

Beran presents a number of other factors that may be interpreted as limitations to liberal theories, such as, if a minority is not sufficiently large to assume the responsibilities of statehood; if a minority's attempt to secede would create an enclave; and if a minority occupies an area which is culturally, economically, or militarily key to the to the existing state.[871] The difficulty with Beran's limitations is that, like Philpott's, they do

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[867] Philpott (n 27) 361.
[868] H Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987) 36.
[869] Wellman (n 139) 153.
[870] *See* Primoratz and Pavković (n 766) 8.
[871] Beran (n 859) 42.

not adequately justify how different political factors merit greater importance over the primary choice and liberties of specific groups.[872] Ethnic Armenians living in the enclave of Nagorno-Karabakh within Azerbaijan would rue Beran's argument that they should not qualify as a self-determining people because they are geographically separated from a larger Armenian population in Armenia. What if the inhabitants of Nagorno-Karabakh sought independence distinct from both Azerbaijan and Armenia? Would this change Beran's qualifications? If a territorial minority's ability to articulate specific demands and choices is denied based on prescribed limitations, it would be challenging if not impossible to address instances of oppression or qualify whether the group is able to participate in an effective system of internal self-determination.

Philpott refers to the possibility that liberal-nationalist self-determination claims should be limited if the minorities seeking to separate from states would likely establish illiberal and undemocratic new states.[873] Although he alludes to the impracticality of this limitation, as it would be very difficult to forecast the future outcomes of secessionist movements,[874] it is unclear by what Philpott means by illiberal conditions, and perhaps more importantly, how he and other liberal theorists evaluate different circumstances in which minorities interpret liberalism and democratic principles.

For example, he uses the independence of Bangladesh from Pakistan as an example where the new state was 'no different in character [from Pakistan]', but since the new state did not 'detract from liberalism' its independence was permissible.[875] Essentially, this analysis provides greater possibilities for minorities in undemocratic states to secede than groups living under liberal-democratic conditions. This makes sense as a means to escape oppression, but bizarrely seems no different from a remedial theory, which justifies secession or alternate forms of external self-determination based on illiberal practices like human rights abuses against groups. Furthermore, when we look at the raison d'être of both liberal and nationalist theories, which argue that minorities have a primary right to determine their political conditions, Philpott's limitation deviates from this basic principle by blocking the free choice of minorities living in liberal-democratic states. Although the ultimate basis of his argument seems to be a

[872] Wellman (n 139) 153.
[873] Philpott (n 27) 371-372.
[874] ibid 372.
[875] ibid 372.

genuine desire to improve the conditions of minorities by allowing them opportunities to escape illiberal states and to re-create conditions where other cultural-rights are guaranteed,[876] one has to question the practical value of this proposition as it seems to be a repetition of existing international pressures to promote political representation and guarantee minority rights.

The limitations on unilateral secession within liberal-nationalist theories primarily address territorial considerations and whether minority members have exercised democratic consent. Although some groups may be aggrieved by Philpott and Beran's methodology, ultimately, the limitations are set quite low for territorial minorities wanting to advance their positions on the states, either by making specific internal demands, such as special autonomy arrangements, or by exercising secession. Therefore, there is very little clarity in terms of what an internal self-determination standard could look like as states could theoretically extend extensive powers to groups and still be considered excluded from the self-determination process.

6.8 Conclusion

With increased global interaction and interdependence, territorial minority demands have become more vocal and international. Questions have also arisen in relation divisions of wealth and the viability of international legal principles to address compensation and how groups should exercise control over resources.[877] Franck states that, 'if differentiated claims are to be addressed then normative principles must be applied.'[878] How is this to be accomplished? The failings of the liberal-nationalist and remedial schools more than anything expose gaps in international law on this subject. Every suggested approach to internal self-determination faces considerable challenges in terms of state and international-level acceptance. In this regard, it should be remembered that the principle of non-intervention, as established within Paragraph VIII of UN Resolution 2625 (XXV) and the *Nicaragua* case,[879] means that territorial minorities cannot rely on outside support to further their causes. This further means

[876] ibid 380.
[877] Butler (n 223) 120.
[878] Franck, *Fairness in International Law and Institutions* (n 4) 144.
[879] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *USA)* Merits Judgment, 1986 ICJ 14 [188].

that states must buy-in to the argument that the benefits of order and stability are greater than trying to suppress violent secessionist movements. In this respect, the international community should play a role in stopping injustices before they expand into *jus cogens* offences and threaten international peace and stability. The issue then becomes a question of when or at what point should the international community intervene?

What is needed, as espoused throughout this thesis, is a global approach that looks at disagreements between states and territorial minorities based on the specific considerations identified in each case. In other words, there needs to be a method for understanding and applying internal self-determination, which captures 'a multitude of situations which warrant quite separate consideration, and possibly the application of different standards.'[880] This is significant, since it envisions situations where international adjudication may be required to resolve possible differences between states and territorial minorities and identify when instances of oppression have occurred.

Consequently, the challenge becomes a question about how to apply what Franck referred to as normative principles when looking at specific cases.[881] The primary difficulty with any case-by-case assessment of internal self-determination and oppression is the perceived political intentions of specific groups. Positional interests ultimately colour how we define right and wrong, and impose arbitrary methods for defining concepts. However, the fact that internal self-determination is a political concept as much as a legal principle, provides an opportunity to apply it in pre-emptive or post-facto situations of conflict between states and territorial minorities. In fact, by approaching the subject of internal self-determination in this manner, we may come close to applying what Higgins referred to as the 'new reality' imposed on the legal principle.[882]

Internal self-determination requires an identifiable standard or threshold that determines when secession may be permitted. Therefore, states must be vigilant in satisfying their internal self-determination obligations in order to legitimately counter secessionist

[880] Franck, *Fairness in International Law and Institutions* (n 4) 144.
[881] ibid.
[882] Higgins (n 5) 125.

threats. Although this invariably puts states under the microscope, this would also require states, territorial minorities and the international community to conduct a broader survey of circumstances before deciding whether a particular accusation or claim has merit. Global governance theories on internal self-determination look at the subject of oppression relative to the minority-state relationship. In proceeding in this way, oppression can be qualified not based on a set of objective criteria, but based on the relative accessibility of rights, benefits and resources.

Chapter Seven: Applying a Global Governance Approach to Post-Colonial Self-Determination

7.0 Introduction

Hurst Hannum once remarked that internal self-determination was the most important aspect of the right to self-determination in the late twentieth-century,[883] while others have suggested that its influence upon international relations goes back at least fifty-years.[884] Irrespective of when it emerged, it should be appreciated that the concepts of internal self-determination, and by default oppression, continue to shape minority-state relations relating to how territorial minorities and states identify and describe specific conditions within their relationships.

Traditionally, scholarly debate examining the scope of internal self-determination has largely been dominated by two self-determination schools; as previously mentioned, these are remedial and liberal-nationalist schools of self-determination theory. As discussed in chapter six, theories from these schools provide unique perspectives into the legal permissibility of secession within self-determination theory, but generally overlook the significance of internal self-determination as a prerequisite to external self-determination. In other words, internal self-determination and oppression serve as necessary components within the broader right to self-determination that must be evaluated in order to substantiate secession. However, despite the concept being recognised as fundamental to the broader continuum of the law of self-determination, its content and how it should be applied remain uncertain and thereby increase demand for a new theoretical approach.

In this context, under a system of international law that is based on state hegemony,[885] but which must also contend with broader social and political phenomena like globalisation, it is crucial that a global governance approach be appreciated as a process to evaluate the positional-interests of territorial minorities, states and the international

[883] H Hannum, 'Rethinking Self-Determination' (1993) 34 VaJIL 1, 1.
[884] *See* remarks made by the Netherlands. Kosovo Advisory Opinion (n 67), 2010 ICJ Oral Statements: CR 2009/32, 8-10.
[885] Henkin reasons that it would be naïve to expect total objectivity in a system where the power and geo-political rules are designed primarily by states for states. Henkin (n 458).

community. Thus, when a territorial minority claims oppression with a view to obtaining a specific remedy, it may have to argue against a contrary interpretation that suggests that oppression has not occurred. This gap highlights many of the necessary considerations needed to address particular self-determination conflicts.

7.1 Territorial Minorities in a Globalised World:[886] New Influences and Approaches

Self-determination cannot be 'all things to all men',[887] but it need not be historically confined to the era of decolonisation. Traditionally, commentators, with the exception of liberal-national theorists, have feared that self-determination would be the forbearer to infinite political change and state fragmentation.[888] For example, it could be argued that a static notion of self-determination entrenched in a colonial understanding of the right, has more or less kept the number of independent states in the world to 200. However, if this argument suggests that the rights and expectations associated with self-determination should be frozen, then one need only look to the many civil conflicts around the world, to see how fallible this position is.[889]

Internal self-determination represents a set of responsibilities and obligations within minority-state relationships. A global governance approach provides substance to these in a manner that enables the concept of internal self-determination to keep-up with the period and maintain its relevance as an important international legal concept. This approach is process-driven, which aims to identify and understand the case-specific facts that are relevant to minority-state relationships. It also infers that the international

[886] In 1981, White noted that consolidation trends within the Caribbean and Europe 'may give rise to a growth of regionalism which will itself be an expression of self-determination, and will counteract the effects of undue fragmentation.' In this sense, one way of looking at the consolidation trend at the tail end of decolonisation was an attempt to strengthen horizontal relationships between states in response to global competition. White (n 70) 152.
[887] Higgins (n 5) 122-123, 128.
[888] For instance, as early as 1921 Robert Lansing, the US Secretary of State under President Woodrow Wilson, warned that self-determination would 'create trouble in many lands.' R Lansing, Self-Determination, Saturday Evening Post, 9 April 1921, reprinted in M Pomerance, 'The United States and Self-Determination: Perspectives on the Wilsonian Conception' (1976) 70 AJIL 10; More recently Friedlander warned that self-determination represents 'a two edged concept which can disintegrate as well as unify'. RA Friedlander, 'Self-Determination: A Legal Inquiry' in Y Alexander and RA Friedlander (eds), *Self-Determination: National, Regional, and Global Dimensions* (Westview Press, 1980) 313; Even Franck warned that a lack of normative application of the law of self-determination could lead to a dreary future of '2000 states'. TM Franck, *The Empowered Self: Law and Society in the Age of Individualism* (OUP Oxford, 1999) 21.
[889] Kimminich (n 19) 83, 100.

community is part of the minority-state relationship and has responsibilities to ensure that the requisite needs of the parties are satisfied. Inevitably, however, territorial minority needs will change and for this reason the process of applying a global governance approach needs to be effective when responding to these changes.

Geopolitical influences, such as globalisation and international treaties, will inevitably affect group conditions and alter the historic premises governing minority-state relationships. As the conditions change, so too will the expectations and needs of the parties. Indeed, Jayasuriya argues that globalisation has not only changed traditional state territorial sovereignty, but has effectively 'accelerated the breakdown of the internal structural coherence of the state.'[890] Indeed, in the context of globalisation Orford states that the terms 'progress' and 'development' have too often been used in the developing world as an 'alibi for exploitation.'[891]

From this perspective, whereas Hannum identifies internal self-determination as the most important aspect of the right to self-determination in the late twentieth-century,[892] it is argued that the effects of globalisation are the most important emerging influence upon internal self-determination.[893] Yet, what is globalisation and what are its influences upon territorial minorities? These questions are important because they force analyses into the specific interests and claims of groups, as well as illustrating why the 'coffee for everyone'[894] approach to internal self-determination is ineffective. From another perspective, if global influences are not well understood, it would be very challenging to determine how minority-state relationships should be maintained and nurtured and which conditions should be promoted to protect human rights, political representation and the right to development, as well as to identify oppression when conditions are detrimental to groups.

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[890] K Jayasuriya, 'Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance', (1999) 6 INJGLS 425, 437-439.
[891] A Orford, 'Globalization and the Right to Development' in J Crawford, (ed), *Peoples' Rights* (OUP, Oxford 2001) 127, 179.
[892] Hannum *Rethinking Self-Determination* (n 884) 1.
[893] Guibernau suggests that 'the nationalism of nations without states is closely connected to two interrelated factors: the intensification of globalization processes and the transformations affecting the nation-state.' Guibernau (n 829) 1256; *see also* Falk (n 317) 24, 159; Allgood (n 30) 346-348; Salomon and Sengupta (n 30) 35; also, Franck suggests that changing contemporary identities and loyalties brought on by global influences have contributed to 'an eventual outcome in which the dynamism of growing autonomy engulfs the lingering static forces of racial, cultural, national, linguistic, and religious determinism.' TM Franck, 'Community Based Autonomy' (1997) 36 Colum J Transnatl L 41, 64.
[894] Guibernau (n 829) 1262.

7.1.1 Understanding 'Globalised Oppression'

The Oxford English Dictionary defines *globalisation* as 'the action, process, or fact of making global' or in later use, 'the process by which businesses or other organisations develop international influence or start operating on an international scale, widely considered to be at the expense of national identity.'[895] According to the Dictionary, it was first used in English in 1930 to compare generality and specificity.[896] In the contemporary context, it has been described as an 'accelerated' phenomenon since the volume, speed and diversity of information and materials is vastly different from prior historic global trends.[897] Yet, given that the phenomenon implies greater generalisation, homogenisation and consolidation, how is generality reconciled against a global governance approach that requires case-specific analyses relating to international self-determination? Chan and Scarritt suggest that because globalisation is a 'dialectical rather than cumulative process' it produces different effects and outcomes.[898] Particularly, they argue that globalisation has three central dimensions associated with politics, culture and economics.[899]

Interestingly, these dimensions seem to mirror legal and extra-legal considerations flowing from human rights, access to political representation, and the right to development. Of course, there is no exclusive symmetrical connexion to each, but when we speak of the influences of globalisation upon, for example, the right to economic, social and cultural development in Article 2(1) of the ICESCR, it can reasonably be concluded that these influences affect territorial minority interests and rights associated with trade, natural resources, and development.

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[895] Oxford Dictionary of English, online version: http://www.oed.com.ezproxy3.lib.le.ac.uk/view/Entry/272264?redirectedFrom=globalisation#eid. accessed 12 February 2013.
[896] ibid.
[897] JN Pieterse, *Globalization and Culture*, (Rowan and Littlefield Pub., 2004) 26; *see also* A Hudson, 'Beyond the Borders: Globalisation, Sovereignty and Extra-Territoriality' in D Newman (ed), *Boundaries, Territory and Postmodernity* (Frank Cass, 1999) 89, 89.
[898] S Chan and JR Scarritt 'Globalization, Soft Hegemony, and Democratization' in S Chan and JR Scarritt (eds), *Coping with Globalization* (Frank Cass, 2002) 3.
[899] ibid 2.

At the centre of this issue is the nature and interrelatedness of global influences and their effect upon on the conditions of territorial minorities, who tend to have profited less from economic globalisation.[900] Ultimately, there are several paradigms of influence that globalisation produces, but the effects will look different from group to group. For example, a specific trade policy may benefit certain groups while undermining the rights of others. This is important, as it distinguishes circumstances generally associated with oppression, as highlighted by Judge Cançado Trindade during the *Advisory Opinion on Kosovo*, but also underlines the fact that globalisation has already diminished traditional state powers in the global economy.[901] Pogge, for instance, attributes globalisation as a bi-product of the global order, which unintentionally or otherwise creates extreme conditions of inequality and poverty upon individuals and groups.[902] Particularly, Pogge articulates that disenfranchisement includes conditions of complete marginalisation and victimisation. For instance, he states:

> Given that the present global institutional order is foreseeably associated with such massive incidences of avoidable severe poverty, its (uncompensated) imposition manifests an ongoing human rights violation – arguably the largest such violation ever committed in human history. It is not the gravest human rights violation, in my view, because those who commit it do not intend the death and suffering they inflict either as an end or as a means. They merely act with wilful indifference to the enormous harms they cause in the course of advancing their own ends while going to great lengths to deceive the world (and sometimes themselves) about the impact of their conduct.[903]

Since these global institutions,[904] laws and economies indiscriminately affect an array of disenfranchised individuals and groups, it is argued that territorial minorities are equally

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[900] *See generally*, P Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (OUP, Oxford 2007).
[901] K Ohmae, 'The End of the Nation State' in FJ Lechner and J Boli (eds), *The Globalization Reader* (Blackwell, Malden MA 2000) 207.
[902] T Pogge 'Recognized and Violated by International Law: The Human Rights of the Global Poor' (2005) 18(4) LJIL 717-745.
[903] ibid 741.
[904] Pogge seems to reserve his greatest criticism for the World Trade Organization, the World Bank, the International Monetary Fund, the United Nations, the World Health Organization, the G7/G8, the Organization for Economic Co-operation and Development. *See* Pogge 'Recognized and Violated by International Law' (n 903) 717-45; T Pogge, *World Poverty and Human Rights* (Polity Press, 2009).

vulnerable, but suffer forms of oppression that trigger distinct legal and political obligations upon states and the international community. In fact, it is contested that the influences of globalisation present new ways of understanding the conditions of territorial minorities within internal self-determination processes. In this sense, it can be said that these influences create a 'vector' of rights and responsibilities[905] associated with development processes and consequences.[906]

Although Pogge indicates that oppression is prevalent as a result of the 'globalisation project'[907] he does so without specifically contemplating self-determination. Instead, he focuses his criticisms towards the effects of trade rules associated with asymmetrical protections on intellectual property, tariffs, trade quotas, anti-dumping rules, export credits, and vast subsidies for domestic producers.[908] In essence, Pogge, as well as Willis, refer to the effects of globalisation as diminishing group powers and significantly minimising state responsibilities and powers to ensure group rights are protected. Willis provides a specific example of these detritus effects in Africa following the advent of transnational economic policies:

> The role of the state as guarantor of these rights is crucial. However, given the economic poverty of many countries, how can governments be expected to guarantee these rights, particularly those relating to provision of basic material needs?...Structural adjustment policies have led to declining direct state involvement in African economies, allowing new actors such as TNCs [transnational corporations] and NGOs [non-governmental organisations] greater scope in the fields of economic and social development. However, as rights are conceived, only states are responsible for guaranteeing them, 'even if it is non-state actors (and their neo-liberal policies) that caused those rights to be violated in the first place'…Thus, while the focus on rights may be regarded as important for promoting opportunities for greater well-being and empowerment at the grassroots level, the implementation of such approaches is problematic.[909]

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[905] Third Report of the Independent Expert on the Right to Development, UN Doc E/CN.4/2001/WG.18/2, [27].
[906] Salomon and Sengupta (n 30) 7.
[907] Pogge, 'Recognized and Violated by International Law' (n 903) 735.
[908] T Pogge, *World Poverty and Human Rights* (n 903) 15-20.
[909] Willis (n 615) 206.

If globalisation produces conditions in a manner akin to those identified by Pogge and Willis, then it would be difficult to distinguish the gravity of harm suffered by groups as a result of overt humanitarian violations like those evident in Kosovo in the 1990s, and conditions in which for example, the denial of profits to natural resources result in abject poverty for entire populations.[910] In both cases, the level of impact may be comparable.

7.1.2 Global Forms of Oppression Call for Global Responses

In this context, what are the negative political, cultural and economic effects of globalisation upon territorial minorities and how would a global governance approach apply? Remembering that positional interests and claims of oppression are borne from case-specific circumstances and not standard assumptions, it is helpful to address this question by referring to the political, cultural and economic dimensions presented by Chan and Scarritt.

In terms of the political dimension, it can be said that globalisation can create the ironic effect of isolating groups and denying them decision-making powers at appropriate political fora.[911] One common example relates to political decision-making vis-à-vis the exploitation of natural resources. General Assembly Resolution 1803 (XVII)[912] establishes a number of duty-bearing responsibilities upon states concerning the exploration, development, exploitation, investment and distribution of profits of natural resources. Yet, as discussed previously, depending on the kinds of political representation and constitutional powers within states, political decision-making aimed at improving social conditions, should not be construed as automatically improving specific minority conditions:

> A state may make policy decisions in the best interest of the state that are not necessarily in the best interest of the people of the state. One example of this is the exploitation and use of natural resources of the state. The state may choose to use these resources in a way that it perceives as advantageous to the state's

[910] Allgood (n 30) 333.
[911] Guibernau (n 829) 1256.
[912] UNGA Res 1803 (XVII), 14 December 1962. *Permanent Sovereignty over Natural Resources.*

> economic development, but it may not always reflect the will of all the people within the state.[913]

From this perspective, globalisation represents what Pogge would refer to as an influence that undermines or reveals gaps in existing legal structures. He states that, 'any institutional design is unjust when it foreseeably produces an avoidable human rights deficit.'[914] Willis adds that to achieve effective outcomes to political decision-making, all parties with vested interests in specific aims need to be represented, even if this implies the divesting of powers to the local-level.[915] Interestingly, Willis presents a scenario similar to that experienced by the population of Kosovo during the early 1990s, in which attempts made by local communities to effectively compete with the state on a global scale did little to advance desired outcomes, but in fact, perpetuated David and Goliath-type conditions.[916] She suggests, as an alternative, that groups should focus on identifying specific issues that can be internally or locally advanced, and promote these issues as the subjects of meaningful political dialogue with all relevant stakeholders.[917]

However, in conditions akin to those suffered by the Kosovars in Milošević's Yugoslavia, or groups that still struggle for identity rights and land title recognition like the Rohingya and Kampuchea Krom in Southeast Asia,[918] this type of internal recourse and engagement has inherent risks and weaknesses. Willis' ideal path is to globalise local issues by finding 'solidarity' with other forces that share opposition against threats to local interests.[919] Frustratingly, this approach borders on the abstract and provides no conduit for accountabilities at the local, state or international levels. Although Willis advocates that specific interests and challenges that arise from the influences of globalisation should be highlighted and addressed, she does not concretely state how.[920]

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[913] Allgood (n 30) 333.
[914] Pogge, *World Poverty and Human Rights* (n 903) 25.
[915] Willis suggests that for political decision-makers to effectively respond to global pressure, they should adjust their philosophy to the mantra of 'think and act locally.' Willis (n 615) 113.
[916] ibid.
[917] ibid.
[918] *See, e.g.,* K Chhim, *Indigenous and Tribal Peoples and Poverty Reduction Strategies in Cambodia* (ILO Publications, Phnom Penh 2005) 49; *see also*, *Land Alienation in Indigenous Minority Communities – Ratanakiri Province, Cambodia* (Report - NGO Forum on Cambodia, August 2006).
[919] Willis (n 615) 113.
[920] However, she does indicate that 'by focusing on quantitative measurement, the subjective qualitative dimensions of development are excluded' such as the 'feelings, experiences and opinions of individuals and groups'. Willis (n 615) 13; Interestingly and to draw a comparison, Judge Cançado Trindade failed to advocate which specific humanitarian issues should qualify oppression, but nonetheless criticised the

Comparatively, Allgood suggests that local minority concerns and globalisation pressures can be addressed effectively by looking at self-determination and the right to development at the same time.[921] Particularly, she identifies that the right to development implicates state and international responsibilities by virtue of rights under internal self-determination:

> A group may take the core element of the right of self-determination, the power as a group to be recognised and heard within the country, and apply this power to influencing the implementation of the right to development. As a group right, the power of the right of self-determination lies with its guarantees that all people shall be afforded a voice within their place of residence…the right to self-determination creates a channel for the right to development to be legitimised and cultivated within the framework of individual groups in their respective countries. Using this channel, the right to develop as a universal right can be applied to countries, but on a relative scale with respect to the particular country.[922]

Allgood's reasoning suggests that the deprivation of development opportunities as a result of globalisation is tantamount to a violation of an internal right to self-determination. Specifically, she argues that the right to self-determination is a requisite channel for achieving all the associated 'parts of life' associated with developmental rights and opportunities.[923] This same logic would apply when identifying territorial minority needs in the face of the alienating effects, sometimes referred to as *Americanisation*, *Coca-colonisation*, *McDonaldisation*, *global localisation*, *inter-cultural hybridisation*, and *planetisation*.[924] Unlike, direct forms of discrimination against groups, these trends can develop from multi-faceted or cumulative 'interstitial

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ICJ for not asserting its authority to address violations to international law perpetrated by Yugoslavia, against the population of Kosovo.

[921] Allgood (n 30) 338.

[922] ibid.

[923] ibid 322, 337-8.

[924] Other terms, which relate to specific locations and periods of history associated with the globalisation phenomenon, include *barbiefication* in reference to 'indirect' ethnic cleansing caused by cultural and economic policies, and *disneyification* in reference to the erosion of civilisation and social structures due to global influences. Pieterse (n 898) 49-77; *see also* Leuprecht (n 291) 111, 124.

influences' beyond the control of states.[925]

Broadly speaking, the harm suffered by the deprivation of access to the right to development, or the denial of local decision-making powers, could conceivably provide substance to a claim of oppression. For instance, the homogenising tendencies of globalisation can be interpreted as 'external' forces, which disrupt the domestic economic, political and cultural spheres of the state and its peoples.[926] Therefore, in pursuing their own visions of autonomy and justice, groups like the Zapatistas in Mexico, have argued that external globalisation justifies external self-determination, and that historic civil rights guarantees provided by governments within systems of internal self-determination, are not enough for the protection and preservation of groups.[927]

Other global influences creating vulnerabilities relate to poverty, food and health.[928] Competing with these influences is challenging, but the effects of marginalisation can be turned into positive state and international responsibilities and obligations, in the same was as states having a duty of care towards their citizens. Two recent examples are of court decisions extending the right to food in *PUCL* v. *Union of India and others*,[929] confirming that India has a duty to create poverty reduction strategies, and the right to health in *Treatment Action Campaign and Others* v. *Minister of Health and Others*,[930] confirming that South Africa has obligations to establish HIV and infectious health treatment programmes to address endemic health concerns.

7.1.3 Transforming Influences into Responsibilities

Cultural considerations associated with the influences of globalisation include a number of relevant factors related to rights and responsibilities under internal self-determination. The important point to appreciate, in this regard, is that cultural considerations are relevant to the specific conditions within the particular minority-state

[925] Guibernau (n 829) 1256.
[926] Sholte (n 625) 168.
[927] ibid 164-168.
[928] *See generally* S Lewis, *Race Against Time* (Ananasi, Toronto 2005); J Sachs, *The End of Poverty* (Penguin, New York 2005).
[929] *See, e.g., PUCL* v. *Union of India and others* (n 612).
[930] *See, e.g., Treatment Action Campaign and Others* v. *Minister of Health and Others* (n 613) 125-133.

relationship. This makes sense. If the assessment of conditions is conducted only by looking at macro-level trends or top-down models of influence,[931] then it may be difficult to pinpoint particular inequalities and oppressive conditions affecting groups.[932] Therefore, case-specific analyses are generally needed to capture how, for instance, culture and ethnicity are connected to information about the success of minority representation or the right to development.[933]

A human rights-based approach to self-determination and the right to development is a flexible method for identifying specific territorial minority concerns and changing values in international law.[934] However, questions about how a human rights-base is applied and by whom, have restricted widespread promotion.[935] Particularly, the approach can be likened to another prominent concept in development literature called 'human development,' which has been criticised for creating uncertainty as to whether its success is defined by political, cultural and economic measures relating to processes or outcomes.[936]

Comparatively, a global governance approach attempts to address these questions by linking case-specific issues to party responsibilities. If, for example, the influences of globalisation create negative sociological processes leading to political, cultural or economic alienation, territorial minorities can identify these issues as real concerns to be addressed under internal self-determination. From another point of view, the foundation for protecting group rights is based on the articulation of concerns and the proper apportionment of accountabilities to ensure that concerns are addressed.[937]

A global governance approach will not undermine state sovereignty and lead to infinite state fragmentation. Instead, it provides the means for territorial minorities, states and

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[931] For example, the concept of post-development has been introduced as an alternative means to counter pre-conceived expectations associated with 'Eurocentric' development in developing states. Willis (n 615) 113.
[932] ibid 8.
[933] ibid 113.
[934] McCorquodale, 'Self-determination: A Human Rights Approach' (n 470) 884-885; Salomon and Sengupta (n 30).
[935] *See* LH Piron, *The Right to Development: A Review of the Current State of the Debate for the Department for International Development* (AusAid, April 2002) cited in Salomon and Sengupta (n 30).
[936] ibid.
[937] K Kielsen, 'Liberal Nationalism and Secession' in M Moore, (ed), *National Self-Determination and Secession*, (OUP, Oxford 1998) 106-7.

the international community to establish normative processes to identify and better understand case-specific issues and obligations that can help strengthen social, political and economic relations between communities. Supporting this notion, the Independent Expert on the Right to Development emphasised that understanding relevant rights and interests is dependent upon the 'process of development.'[938] In other words, exploratory and sustained processes of communications are necessary to understand specific party interests and needs. Furthermore, by emphasising that development rights are process-driven, it highlights a commitment to adaptability and change rather than rigidity and situations in which parties make assumptions about the interests of other parties.

The implications of globalisation upon internal self-determination demand that states and the international community re-think their responsibilities and obligations. Central to this idea is the need for emphasis on *process* and an acknowledgement that the facts and circumstances pertaining to minority-state relationships are different. With the broad influences of globalisation, traditional ways of thinking about self-determination are out of place. This implies that state commitments, which simply acknowledge the rights of individual minority members are not enough. The explicit ambiguity in the understanding of self-determination, highlighted in the ICJ's *Advisory Opinion on Kosovo*, gives states a wide discretion to interpret their own obligations under international legal law. Therefore, it should not be surprising that in most instances, the concept reflects the express interests of states. After all, it would be naïve to assume that states would collaborate in the creation of a normative legal framework for self-determination when the outcome could potentially damage their own legitimacy and contol.[939] As such, the intrinsic value of the legal right to self-determination is subject to delegated or derivative forms of recognition and authority that provide the basis for advancing ideal minority-state relations and qualifying conditions under internal self-determination.[940]

[938] Sengupta '*Fourth Report'* (n 587) preamble [3]; *see also* Declaration of the Right to Development, U.N. Doc. AIRES/41/128 (1987).
[939] A Cassese, 'International Law in a Divided World' (Clarendon Press, Oxford 1986) 49.
[940] Van Dyke 'The Individual, the State, and Ethnic Communities in Political Theory' (n 176) 33.

7.2 Applying a Global Governance Approach in the Face of Uncertainty

Understanding a global governance approach as a structured principle for normative application[941] requires that both territorial minorities and states to recognise opposing interests in order to achieve sustainable relationships. In the broader context of international peace and stability, a global governance approach is important for determining the appropriate processes of dialogue and eventual identification of party-specific interests. It provides clarity to the otherwise uncertain process about how the 'political actors' should judge, act and participate in self-determination processes.[942] After all, specific self-determination outcomes like autonomy arrangements or secession will only succeed in satisfying the parties if they are qualified by the recognition of appropriate interests.[943] From this perspective, a global governance approach offers a process-driven method for territorial minorities, states and the international community to engage in transparent and fair dialogue.[944] Franck captures this understanding in his following appraisal of 'fairness' in international law:

> The search for fairness begins with a search for agreement on a few basic values which take the form of shared perceptions as to what is unconditionally *unfair*…. 'Everyone,' in other words, must begin by agreeing on a set of minimal assumptions which will operate in the forthcoming discussion of fairness.[945]

Unlike other theories that advocate for greater multi-party dialogue during self-determination conflicts,[946] this approach stresses that principles of engagement should be applied throughout the self-determination process to capture the unique positional interests of the parties. In other words, a global governance approach represents a process for parties to discuss inclusive and expansive criteria associated with, for example, expectations under internal self-determination, as well as interpretations of

[941] Oklopcic refers to global governance approaches generally as structured principles of self-determination, which contribute to the ideal of global constitutional governance. Oklopcic (n 78) 689.
[942] Oliver (n 389) 65, 83.
[943] Oklopcic (n 78) 689.
[944] Franck's appraisal of fairness in international law requires that the views of non-state actors need to be heard. Franck, *Fairness in International Law and Institutions* (n 4) 484.
[945] ibid 15.
[946] *See, e.g.,* Oklopcic (n 78) 677; A Pavković, 'Political Liberty: A Liberal Answer to Nationalist Demand' (2004) 37(3) Can J of Pol Science 695; Brewer (n 26); Skordas, (n 79) 207.

oppression and obligations at international law. The primary reason for why this is important is because self-determination is an evolving legal concept[947] that affects and influences populations in different ways over time. Whereas under colonialism, non-self-governing peoples struggled to assert a right to self-determination to be free from alien domination or foreign occupation, today territorial minorities see the universal promotion of human rights and political representation, and the right to development in the face of global influences, as encumbering new responsibilities and obligations under self-determination. For it to continue as a relevant legal norm, self-determination must keep pace with global and regional pressures.[948]

This reasoning reflects the fact that the motives, as to why territorial minorities seek to pursue secession, are unique. Caution, therefore, must be exercised so that the relevant conditions of internal self-determination are not assessed in a purely mechanical way. To better understand discord, the conditions should always be assessed based on an analysis of the 'correlations of powers and interests with legal considerations and norms of international law.'[949] This means that participation in discussions has to be meaningful and not pre-defined or contrary to the wishes of the parties. It cannot be expected that parties would be willing to enter into dialogue to discuss rights, roles and responsibilities if the agenda for dialogue and participation is partisan.[950] As participation is viewed as being the root of empowerment in development discourse,[951] so too should it be viewed as necessary to achieving amiable conditions under internal self-determination. To adopt a similar appraisal of justice, a global governance approach would advance reasons for change in existing entitlements, seek the release of wrongs committed by one of the parties, or sacrifice existing expectations in exchange for potential improvement.[952]

In the following section, considerations will be presented to demonstrate how a global governance approach to internal self-determination can be applied. The first consideration relates to its scope and identifies how the parties and their respective

[947] Pentassuglia (n 19) 313.
[948] TM Franck, 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice' (1996) 90 AJIL 359, 359-360.
[949] Martinenko (n 736).
[950] Willis (n 615) 102-107.
[951] ibid.
[952] Franck, *Fairness in International Law and Institutions* (n 4) 477.

interests are identified and defined. The second consideration looks at these interests from the point of party rights, responsibilities, and obligations, and how multi-party dialogue is an intrinsic function to understanding the key issues in self-determination conflict. Finally, the third consideration looks at the substance of these responsibilities and interests, and how geopolitical influences such as globalisation and access to resources and developmental opportunities are redefining territorial minority expectations in the minority-state relationship. This is a significant emergence in contemporary geopolitics as it represents a new secessionist pressure faced by states, also increasingly advocated as a *bona fide* internal self-determination expectation.[953]

7.3 Territorial Minorities within Global Governance Theories: Identifying Intermediary Constructs of Power-Influence

7.3.1 The *Pouvoir Constituant* and External Self-Determination

In their review of the legal and political implications of the Kosovo conflict prior to the ICJ's *Advisory Opinion on Kosovo*, Oklopcic and Skordas adopted the term '*pouvoir constituant*' from constitutional theory to refer to intermediary constructs of power-influence or pre-constitutional sources of power that are advanced as part of self-determination claims.[954] In the self-determination context, the *pouvoir constituant* has a normative meaning representing situations in which minorities strive to obtain recognition as group-based entities by virtue of their informal or de-factor sources of power-influence.[955] From this perspective, an intermediary construct represents a situation in which a territorial minority has amassed sufficient powers to threaten the territorial integrity of the state without having these powers formally or informally recognised by existing mechanisms of state governance. It is a distinct interpretation from constitutional theory and can be likened to other self-determination concepts that reflect transitory political conditions like Thürer's 'factual sovereignty'[956] or Higgins'

[953] *See* J Sorens, 'Globalization, Secession, and Autonomy' (2004) 23 J Electoral Studies 727.
[954] Oklopcic (n 78) 689, 690; Skordas (n 79) 207, 218.
[955] Rosas' earlier definition is somewhat different from that proposed by Skordas and covered by Oklopcic. Rosas defines the *pouvoir constituant* for application in the international legal context as something that is 'consumed' as an element of natural law applicable to internal self-determination. In other words, when a people exercise a political choice the *pouvoir constituant* is created and recognised. Rosas (n 7) 225, 230, 249, 251.
[956] D Thürer, *Das Selbstbestimmungsrecht der Völker. Mit einem Exkurs zur Jurafrage* (Stämpfli, 1976) 49; cited in Kimminich (n 19) 83, 89.

observation that new entities are recognised by virtue of their de-facto political existences.[957]

In recognising that minorities possess certain powers that exist outside state control, Skordas and Oklopcic overcome some of the significant challenges discussed in chapter two relating to which groups should qualify as *peoples* in the context of post-colonial self-determination and international law. They propose that minorities qualify as right-holders by virtue of their intermediary construct or power-influence in the minority-state relationship.[958] In this sense, the power of the territorial minority, together with the external recognition of that power by a third-party,[959] represents an outcome unto itself. Whether or not this power triggers a formal state duty to negotiate terms of sovereignty is unclear at both international and various national levels.[960] However, Weller indicates that once a minority has established control over its territory and population, states typically will attempt to negotiate power-sharing arrangements to retain some vestiges of influence.[961] If this happens, it would enable territorial minorities to better articulate what they seek in terms of self-governance and political control.[962] In this regard, if a state chooses to ignore or downplay a minority's intermediary construct it would be doing little to ebb secessionist desires. Oklopcic uses an abstract formula to define this power-influence by looking at both the claimants to self-determination and the ends that the law of self-determination permits claimants to pursue, such as external self-determination. He states:

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[957] Higgins (n 5) 125.
[958] Oklopcic (n 78) 690.
[959] It is not entirely clear if the third-party has to be a state, a UN body or another minority group.
[960] In *Reference re Secession of Québec* the Canadian Supreme Court outlined that the Canadian Government may have a duty to negotiate with the Province of Québec if there was a 'clear' expression from the population of Québec a desire to secede. *See, Reference re Secession of Québec* (n 34) [87], [100].
[961] Weller warns that this practise rarely produces desired results, with conditions often deteriorating as both sides lobby for power influence. He states, 'the practice of asymmetrical territorial autonomy and of federalization have given rise to a number of problems which go beyond the determination of the precise status of the entity in question. Generally, this will consist of continued rule by the 'war-time' leadership, resisting genuine democratization after the settlement. There may also be a failure to ensure that human rights can be effectively protected throughout the entire state territory, including in the asymmetric entity. 'New minorities' may be generated within that entity and require protection. These vulnerable groups may consist either of members of the state-wide majority, suddenly constituting a local minority within the self-governance unit, or of smaller minority groups suddenly confronted with life under the rule of the former secessionist fighters, rather than the former central state. This, for example, is the case in relation to the Muslim communities in the Tamil North-east of Sri-Lanka. These groups have threatened to launch their own secessionist struggle should they find themselves under Tamil control after a settlement.' Weller (n 2) 161.
[962] ibid.

> The 'self', under this approach, is not the initiator of the process of self-determination, rather it is self-determination's end result. The 'self' of self-determination is a trajectory of two vectors: the pressure exerted from a *pouvoir constituant* (rebel militias, terrorist organizations, radical political parties, masses paralysing the country in a general strike, to name a few), and external recognition that rejects, modifies, qualifies, or, rarely, completely approves the demands of a *pouvoir constituant*.[963]

Rather than qualify the territorial minority as a *peoples* at international law based on, for example, evidence of oppression,[964] Oklopcic and Skordas view self-determination as an inclusive concept that reflects contemporary political realities associated with power distribution and political influence.[965] In other words, an intermediary construct of power-influence, such as militias and rebels, contributes to the identity of territorial minorities and provides substance to their self-determination claims. For this reason, Skordas and Oklopcic adopt a normative meaning of the *pouvoir constituant* to be applied in the international context reflecting what would otherwise be factors outside existing systems of state governance. Therefore, the recognition of these intermediary constructs enables territorial minorities to emerge as rights-holders within the context of self-determination.[966] Oklopcic illustrates that this recognition can achieve significant political ends. He explains that a group can assume 'a role akin to a 'political elevator', elevating - through the results of referendum or a vote in a national assembly - the political status of a designated territory.'[967] This type of minority-state relationship promotes a hybrid political and legal understanding of self-determination and avoids

[963] Oklopcic (n 78) 689.
[964] Recall the arguments advanced chapter six by remedial theorists that minorities can be treated as self-determining peoples after experiencing reprehensible conditions similar to colonialism at the hands of states.
[965] This viewpoint can be compared to a more traditional perspective identified by Pavković, who states, 'in order to reach a singular normative judgment, one needs first to find out whether the would-be secessionist group has the appropriate right-conferring characteristic - for example, nationhood - and, if it does, whether the exercise of that right would face insurmountable obstacles - for example, whether it would cause too much harm to either the secessionists or to any other groups.' Pavković, 'Secession as Defence of a Political Liberty: A Liberal Answer to Nationalist Demand' (2004) 37(3) Can J of Pol Science 695, 710.
[966] Oklopcic (n 78) 690.
[967] ibid.

problematic distinctions between minorities and peoples identified in chapters two.[968] What is the effect of this distinction and how does it differ from remedial and liberal-nationalist theories? In responding to this question, it is helpful to remember that under remedial theories, territorial minorities do not qualify as having a right to self-determination unless they have a 'deserved necessity'[969] based on oppression or the repudiation of former autonomous powers. This means that it is irrelevant for the purpose of defining a self-determining group, if the group possesses sufficient strength to challenge the sovereignty of a state. Rather, for remedial theories, the important identifying characteristic to attract international recognition is group victimisation.

On the other extreme, liberal-nationalist theories often contend that a state-centric understanding of self-determination requires major adjustments. This would ensure that the 'majority-ruled state' accepts the meaningful participation of territorial minorities in society and their right to develop political institutions better aimed at their protection and promotion.[970] The liberal-nationalist perspective associates a right to self-determination with a moral legitimacy borne from the free choice of groups.[971] In this context, Philpott criticises the ethical understanding of self-determination under decolonisation as 'baffling and situational' because its application was inconsistent and rarely achieved the desired aims of securing international peace and stability.[972] He particularly compared the 'bloodbaths' in Eritrea and Bosnia and Herzegovina against the relatively peaceful independence of Slovenia as examples in which the moral reasoning behind self-determination produces dramatically different outcomes.[973]

Interestingly, and in contrast to Philpott, Oklopcic uses the example of Bosnia and Herzegovina to demonstrate how a territorial minority can exercise sovereign decision-

[968] Paust offers and interesting appraisal distinguishing the legal and political concepts, but ultimately shows that they are ultimately linked and that the individual's legal rights are transposed to the political realm: 'The right of self-determination is the right of all peoples to participate freely and fully in the sharing of *all* values (e.g. power, well-being, enlightenment, respect, wealth, skill, rectitude, and affection). The right to political self-determination involves this broader focus but may be summarized as the collective right of people to pursue their own political demands, to share power equally, and as the correlative right of the individual to participate freely and fully in the political process.' JJ Paust, 'Self-Determination: A Definitional Focus', in Y Alexander and RA Friedlander (eds), *Self-Determination: National, Regional, and Global Dimensions* (Westview Press, 1980) 13.
[969] Pavković, 'Self-Determination, National Minorities and the Liberal Principle of Equality' (n 688) 133.
[970] ibid 130.
[971] Philpott (n 27) 381-385.
[972] ibid 381.
[973] ibid.

making as a prelude to a process of separation.[974] Whereas Philpott sees Bosnia and Herzegovina as evidence of ambiguity and moral inconsistency,[975] Oklopcic identifies the tenuous minority-state relationship, international intervention and ensuing independence of Bosnia and Herzegovina as a model of global governance self-determination.[976] However, what is notable is the timing of application. Oklopcic's analysis suggests that a territorial minority's right to self-determination crystallises when conditions have become contentious and confrontational in the minority-state relationship. In other words, he suggests that the legitimacy of Bosnia's claim to statehood only materialised when the conditions in the minority-state relationship deteriorated to an adversarial level.

The application of Oklopcic and Skordas' global governance theory only really materialises when a group exploits its powers in opposition to the state. One way of looking at this is by imagining Oklopcic and Skordas' intermediary construct as being positioned in the middle of an axis between remedial and liberal-nationalist theories pertaining to when groups would be recognised as having self-determining status. There is no requirement for evidence of oppression as advocated by remedial theorists, but there is also no endorsement of unilateral acts of secession as advocated by liberal-nationalist theorists. Yet, having to wait for conditions to deteriorate before a group receives recognition as having self-determining status is counter-productive. If territorial minorities can only claim a right to self-determination when conditions have advanced to the stage when secession becomes a real possibility, it is suggested that Oklopcic and Skordas' theory is limited. This limitation is based on the fact that internal self-determination is a continuous notion[977] and is available to all peoples, groups and individuals[978] at every stage of the minority-state relationship. Their theory also suggests that territorial minorities may never attract international recognition unless they exert some sort of overt pressure against states. As such, there is little incentive for territorial minorities and states to engage in dialogue. After all, a process in which

[974] Oklopcic (n 78) 690.
[975] Philpott (n 27) 381.
[976] Oklopcic (n 78) 690.
[977] Greene notes that there is nothing limiting the exercise of self-determination to a one-time application. K Greene, 'International Responses to Secessionist Conflicts' (1996) 90 Am Soc of Intl L Proceedings 296, 301; Pentassuglia also notes that because of the 'evolving content of self-determination' there is a continuous application in the law's relation to minorities. G Pentassuglia (n 19) 313; *see also* G Gilbert, 'Autonomy and Minority Groups: A Right in International Law?' (2002) 35 Cornell Intl L J 307, 338.
[978] Franck, 'Clan and Superclan' (n 949) 360.

party-specific interests are only advanced when conditions deteriorate or become adversarial overlooks the possibility that both parties may share some of the same concerns vis-à-vis globalisation and extra-state pressures. In this regard, it would seem that Oklopcic seeks to ebb secessionist struggles rather than eradicate the reasons for wanting to secede. For instance, there is no scope of involvement in self-determination disputes for the international community until the interests of specific groups become too threatening to ignore. Specifically, he states:

> The international community detects a *signal* coming from a particular territory that there is a desire for independence by taking notice of the declarations of dominant political elites, and then it acknowledges the prima facie legitimacy of such a desire, but demands that it be tested to see if it has sufficient support in a referendum.[979]

Inasmuch as an intermediary construct of minority power-influence represents a means to strengthen self-determination claims, the detachment of the international community prior to the detection of 'a signal coming from a particular territory' seems to lesson state responsibilities by ensuring that internal self-determination obligations are respected. In this context, Oklopcic and Skordas' *pouvoir constituant* and intermediary construct is less concerned about internal self-determination than it is about identifying when groups can advocate possible external self-determination options like secession.[980] If this is a correct appraisal of Oklopcic and Skordas' theory, one has to wonder what advantages a territorial minority with influence and recognition would see in pursuing a referendum or engaging in negotiations for greater autonomy with its state, if it already has the military or economic power to do what it wants within its territory.[981]

Oklopcic and Skordas do not explain how their approach applies to internal self-determination besides hinting that states should be impartial to possible referendum processes held within territories where power-influences have been identified.[982] If this is all that is required by states, it could hardly be said that the conditions associated

[979] Oklopcic (n 78) 690 [italics added].
[980] ibid 689;
Skordas (n 79) 207, 218.
[981] Pavković,'Self-Determination, National Minorities and the Liberal Principle of Equality' (n 688) 130.
[982] Oklopcic (n 78) 690.

within the minority-state relationship are tantamount to an effective system of internal self-determination.

7.3.2 Recognising Group Powers and Influences in the Context of Internal Self-Determination

In chapter two, the history of self-determination was presented as having both legal and political influences.[983] These influences have coloured the understanding of the principle,[984] but have also contributed to its discussion and interpretation beyond the strict confines of colonialism.[985] Conceivably, therefore, recognising territorial minority powers could also be applied to conditions of internal self-determination rather than limited to when groups pursue external self-determination. This derogates from Oklopcic and Skordas' approach, but since group powers represent a political means to interpret a legal principle, its use could be applied equally to both the internal and external limbs of self-determination. As such, suggesting that Oklopcic and Skordas' intermediary construct of power-influence should be realised under conditions of internal self-determination would imply that there should be a consistent means for territorial minorities to access specific rights prior to conflict or the deterioration of minority-state relations. Yet, how would this recognition of power-influence be applied to internal self-determination, or in other words, how would appropriate groups as right-holders to internal self-determination be identified?

It is contended that adherence to existing international obligations prior to conflict would provide a credible basis for recognising specific groups and formulating dialogue between minorities and states. Significantly, it is argued that states and the international community could look to existing international laws as a platform to identify a non-exhaustive sets of interests, which following diligent efforts of engagement could become part of an effective process of internal self-determination.

Recognising international instruments can be an important first step in formulating case-specific obligations in minority-state relationships. For example, paragraph 35 of

[983] Trifunovska (n 266) 178.
[984] Higgins (n 5) 124, 126.
[985] *See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 [118], [122].

the *Copenhagen Document*[986] endorses the principle that states should establish for minorities appropriate 'local or autonomous administrations,' while the *Charter of Paris for a New Europe*[987] provides that 'questions related to national minorities can only be satisfactorily resolved in a democratic political framework.'[988] Furthermore, the *Lund Recommendations of Effective Participation of National Minorities in Public Life*[989] state that the success of minorities in public life require the effective participation of groups at the 'level of the central government,'[990] which may require that these groups obtain territorial self-governance.[991] As discussed, while many legal and extra-legal considerations can contribute to the formation of internal self-determination obligations, existing human rights treaties represent perhaps one of the most important foundational sources for beginning the process.

Recognising international instruments as a substantive or procedural source for developing obligations within processes of internal self-determination means that it would be unnecessary to find exclusive evidence of violent civil conflict to determine whether external self-determination is permissible. In this regard, the intermediary construct would not be defined by the exercise of violent expressions of power, but defined by generally accepted expectations promoting regional autonomy and group-based rights, which depending on the minority-state relationship could evolve to become the substance of specific legal or constitutional systems of governance. For example, Paragraph 35 of the *Copenhagen Document* could lay the foundation for generating autonomous systems of education, taxation and law and order that impose reciprocal responsibilities and obligations on territorial minorities and states. Thus, it is suggested that existing international instruments can help promote the recognition of territorial minorities as right-holders to internal self-determination and enable them to articulate readily identifiable interests and expectations.

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[986] *Copenhagen Meeting on the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe*, Organisation for Security and Cooperation in Europe (Copenhagen, June 1990). For in-depth review, *see* (1990) 11 Hum Rts L J 232.
[987] *Charter of Paris for a New Europe*, Organisation for Security and Cooperation in Europe (Paris, November 1990). For in-depth review *see* Thornberry, 'Self-determination, Minorities, Human Rights' (n 10) 867.
[988] ibid 'Human Dimension'.
[989] *Lund Recommendations* (n 46).
[990] ibid (n 43), *Explanatory Note* [6].
[991] ibid [14], [15].

Unlike Oklopcic and Skordas, it is contended that successful self-determination outcomes begin not at the stage when secession is contemplated as a remedy to a conflict, but under the conditions of internal self-determination or when it is possible to engage in serious dialogue on specific issues prior to conflict.[992] In the following section, this theme will be explored further by emphasising how a global governance approach should be applied. More particularly, it will be argued that multi-party dialogue and an inclusive approach to engagement is fundamental for understanding the various roles and responsibilities of territorial minorities, states and the international community.

7.4 Identifying Obligations in a Global Governance Approach

In the wake of the breakup of the Federal Republic of Yugoslavia and the Soviet Union, the Badinter Arbitration Committee developed guidelines outlining membership requirements for former Yugoslav and Soviet territories to join the European Council.[993] These were significant for two reasons. Firstly, they outlined general internal self-determination commitments necessary for membership into the European Council,[994] and secondly, established a legacy for informal entry requirements to join both the European Council and the European Union.[995] Hannum notes that the effect of these requirements obliged states to ratify the *Copenhagen Document*, the Council of Europe's *European Charter for Regional or Minority Languages*,[996] and the *Framework Convention for the Protection of National Minorities*.[997] While these changes go beyond a minimalist view of state obligations to protect minority rights under Article 27 of the ICCPR and extend to territorial minorities a right to effective participation that is 'often at the heart of the demands for self-determination,'[998] are they enough to create effective conditions of internal self-determination? Alternatively, can an effective system of internal self-determination be supported by the creation of more legal

[992] Anaya notes that 'group challenges to the political structures that engulf them appear to be not so much claims of absolute political autonomy as they are efforts to secure the integrity of the group while rearranging the terms of integration or rerouting its path.' Anaya (n 91) 78-79.
[993] *Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'* (16 December 1991) (1993) 4 EJIL72.
[994] Pentassuglia (n 19) 309;
[995] Hannum, 'Self-determination in the Twenty-First Century' (n 528) 61, 71.
[996] *European Charter for Regional or Minority Languages*, Council of Europe, Strasbourg, 5.XI.1992
[997] *Framework Convention for the Protection of National Minorities*, (n 263).
[998] Hannum, 'Self-determination in the Twenty-First Century' (n 528) 61, 73.

instruments? Pogge's criticism that global legal instruments are ineffective and often at the heart of the problems associated with world poverty and group marginalisation suggests that more legal instruments are not the answer. However, recalling Salomon and Sengupta's observation that, 'the right to development can only be realised if self-determination, an inviolable principle of international law, is realised at the same time,'[999] it is not necessarily the adverse effects of global legal instruments that are the problem, but rather, that international instruments are not being implemented to an extent that creates clear obligations. Fundamentally, party-specific obligations under internal self-determination require reciprocal recognition.

If we take the premise that rights incur responsibilities, then we can postulate that international treaties incur specific responsibilities within systems of internal self-determination. International instruments are, however, not an exhaustive source of responsibilities. Issues relating to minority consciousness, minority membership, group authority, solidarity and representation are all key issues that influence how groups define and articulate their interests. These issues represent complex challenges that require attention and oversight to ensure specific conditions are achieved. The supposition is that without processes aimed at addressing these issues, the exposure of territorial minorities and states to human security concerns will remain significantly high. This implies a need for a global governance approach in which greater decision-making powers are extended to address specific needs and interests.[1000]

The recognition of territorial minority interests within processes of internal self-determination is not recognition of military power or political might, but recognition that a particular territorial minority has its own independent group obligations.[1001] Particularly, this suggests that groups must possess a 'sufficient capacity to respect such rights [human rights for all subject groups] in the future'[1002] or operate as communities

[999] Salomon and Sengupta (n 30) 35.
[1000] Brewer discusses some of the primary issues in relation to minorities seeking greater power within the state. He reasons that groups would have responsibilities associated with the negotiation process, as well as states having obligations to ensure the process and ensuring participation of the group in political decision-making is not premised upon the state requiring the group to agree to extortionate terms. Brewer (n 26) 281-282.
[1001] Rowlands demonstrates that the concept of power for marginalised groups is relative to their conditions and that 'power to', 'power with', 'power within' and 'power over' represent distinct concepts of empowerment. *See* J Rowlands, 'Empowerment Examined' (1995) 5(2) Development in Practice 101-107.
[1002] Brewer (n 26) 282.

to administer basic services and secure the rights of the inhabitants of the territory.[1003] Therefore, it contemplates situations in which secession is the key issue rather than looking at what is required to sustain existing minority-state relationships.

Understanding what are a group's interests and needs can provide a consistent means for extending recognition to territorial minorities within internal self-determination processes, but recognition alone will not ensure that party-specific obligations are developed or respected. After all, if obligations are defined by only what states choose to recognise,[1004] then it is doubtful whether the parties can come to an agreement as to what internal self-determination should include. As Hannum identifies, the *Lund Recommendations* 'support the idea that minorities should enjoy the greatest degree of self-government that is compatible with their particular situation,' but it does not create express legal obligations upon states.[1005] By way of explanation, under the current international framework, states are able to ignore territorial minority interests and continue to apply top-down approaches to define minority interests.

In an attempt to strengthen mechanisms to get states to respect minority power-influences, Oklopcic suggests that the international community should act as a 'global legislator' to arbitrate disputes and intervene in situations of conflict.[1006] He states:

> Global governance necessarily starts with a particular image of an international lawyer - a global 'legislator' - who, committed to the project of international law and its development, as a matter of professional ethos interprets political ruptures, juridical inconsistencies, and lacunae as instances of the troubled, but fundamentally progressive, development of public international law.[1007]

While Oklopcic's proposal that the international community should have greater influence in monitoring minority-state relations is a step in the right direction, it does

[1003] A Kreuter, 'Note, Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession' (2010) 19 Minn J Intl L 363, 395.
[1004] Rowlands (n 1002) 101-107.
[1005] Hannum, 'Self-determination in the Twenty-First Century' (n 528) 61, 73.
[1006] Oklopcic (n 78) 691.
[1007] ibid.

not clarify the role of the state.[1008] Conceivably, the state would retain certain vested powers associated with territorial integrity and the sovereignty, but if these powers can be rebutted in the face of a finding of injustice or oppression by a global legislator, how different would be this approach from those proposed by Buchanan, Brilmayer and the other remedial theorists?

In one sense, if the timing of intervention relates to egregious state behaviour, one can infer that the role of a global legislator would be akin to that of the Security Council and UNMIK during the Kosovo crisis. However, as we have seen, the ensuing period of post-conflict peace in Kosovo left Serbia with only a residual influence over the territory while both sides were locked in hostile posturing and mutual distrust. In fact, it was only through the mediation of the European Union's Foreign Policy Chief, Catherine Ashton that both Kosovo and Serbia recently agreed to certain concessions over sovereignty claims.[1009]

The UN's Human Rights Council, the Office of the High Commissioner for Human Rights,[1010] the UN's Independent Expert on Minority Issues, special rapporteurs and even an expanded UN Special Committee on Decolonisation,[1011] could provide necessary international input to ensure sustainable minority-state relations that respect party-specific interests and rights. However, unlike current UN-program delivery, intervention would have to be tailor-made and specific to the thematic issues at the heart of the minority-state relationship. This means that the UN's Office of the High Commissioner for Human Rights, the Association of Southeast Asian Nations' ASEAN

[1008] Judge Cançado Trindade suggested that the origins of this state-centric powers are historically entrenched: 'International legal doctrine, obsessed, throughout the twentieth century, with the ideas of State sovereignty and territorial integrity (which are not here in question) to the exclusion of others, was oblivious of the most precious constitutive element of statehood: human beings, the "population" or the "people". The study of statehood per se, centered on the State itself without further attention to the people, was carried to extremes by the legal profession.' Separate Opinion of Judge AA Cançado Trindade (n 24) [77].

[1009] For example, Serbian majority enclaves within Kosovo will retain autonomous judicial and enforcement functions of government. *See* 'EU brokers historic Kosovo deal, door opens to Serbia accession', Reuters, April 19, 2013 <http://www.reuters.com/article/2013/04/19/us-serbia-kosovo-eu-idUSBRE93I0IB20130419> accessed 20 April 20.

[1010] *See, e.g.,* <http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx.> accessed 4 December 2011.

[1011] 'C-24' established in 1961 to monitor the implementation of UNGA Res 1514 (XV) (n 46). <http://www.un.org/en/decolonization/specialcommittee.shtml> accessed 20 April 2013.

Intergovernmental Commission on Human Rights,[1012] the African Union's African Commission on Human and Peoples' Rights,[1013] the Council of Europe's Commissioner for Human Rights[1014] or other third-party international guarantors of minority rights[1015] would have to have expanded mandates beyond reporting and the mere promotion of rights.[1016] Instead, they would have to ensure that international law and the roles and responsibilities of the international community are entwined within the conditions of internal self-determination, in a standardised and systematic manner. This idea reflects the outlook of Thürer, who stated:

> Self-determination is not a mechanical formula which can be applied automatically, but something which can only be applied in concrete, real situations, taking account of the characteristics and special features of each case; the most essential requirement is therefore that it should be embedded in a strong and flexible organizational structure.[1017]

This does not mean that, for example, special rapporteurs would apply pressure on states to ensure that territorial minority interests are construed as international rights,[1018] but it does indicate that the international community should have a vested stake in identifying and enforcing obligations prior to civil conflict and the breakdown of internal self-determination.[1019] It also means that conventional minority rights

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[1012] Hereafter 'AICHR', established October 2009 <http://www.asean.org/publications/index.php?option=com_content&view=article&id=5> accessed 4 December 2011.
[1013] Established 2 November 1987 <http://www.achpr.org/about/> accessed 5 March 2013.
[1014] Adopted May 7, 1999 <http://www.coe.int/t/commissioner/Activities/mandate_en.asp> accessed 5 March 2013.
[1015] *See, e.g.,* the various UN charter and treaty-based bodies specialising in human rights: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.
[1016] The current mandates of some of the above-noted offices are grounded in soft diplomacy, with limited scopes to report, promote best-practises, educate states, contribute to research by promoting specific thematic perspectives, etc. *See, e.g.,* the mandate of the UN's Independent Expert on Minority Issues: <http://www.ohchr.org/EN/Issues/Minorities/IExpert/Pages/IEminorityissuesIndex.aspx> accessed 15 October 2012; *OHCHR Management Plan 2012-2013* <http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_mp_2012_2013_web_en/index.html#/part-i-strategic-priorities> accessed 11 January 2013.
[1017] *See generally* Thürer (n 38).
[1018] For example, Eide suggests that in accordance with Article 2.2 of the *Committee on the Elimination of Racial Discrimination*, transitional measures can be established to provide support to groups, but because the measures are transitional, they should not be viewed as establishing separate and distinct rights for different racial groups. Eide (n 76) 139, 164.
[1019] *See, e.g.,* media criticism of AICHR and human rights bodies in general: 'Asean's Toothless Council', The Wall Street Journal, 22 July 2009

approaches associated with Article 27 of the ICCPR, which pose barriers to collective group-based recognition, must be addressed in a manner that is conducive to group-based recognition. There is no value in challenging a group's right to self-determination or a territorial minority's specific need to have group-right protections, if escalating human rights abuses and civil conflict will likely ensue. International roles and responsibilities must be commensurate with the conditions to which they apply. At the same time, international involvement should be recognised as playing an important role in checking instances of abuse and false claims of oppression advanced by territorial minorities. The international community's involvement in this regard would be to validate specific conditions against the existing conditions that form the basis of minority-state relationships. If a global governance approach fails in this regard, it would be because of a lack of ability by one of the parties to either articulate their own needs or recognise the inherent interests and obligations of the other parties.

Historically, successful resolutions to disputes have required positive affirmation to the terms of settlement rather than mere acquiescence.[1020] In other words, state involvement is imperative for advancing viable outcomes. This position recognises that the existing principle of sovereign equality in international law is derived from the Westphalian[1021] tradition and that the backbone of international relations continues to rely on this tradition.[1022] Rightly or wrongly, Westphalianism is the foundation of international law and politics and therefore must continue to be considered when analysing specific minority-state relations.[1023]

According to Judge Mbaye, the former Vice-President of the ICJ, the duty-bearing responsibilities of states to advance and protect the conditions of development and self-

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<http://online.wsj.com/article/SB10001424052970203517304574303592053848748.html> accessed 4 December 2011.

[1020] Wippman observes after all that negotiated outcomes or power-sharing arrangements specifically, logically necessitate that states lose power. Wippman (n 816) 230.

[1021] *Treaty of Westphalia: Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies*, (1648) LXXVI, <http://avalon.law.yale.edu/17th_century/westphal.asp> accessed 23 November 2012; *see also* Krasner who defines Westphalian sovereignty as 'an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures.' SD Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, Princeton NJ 1999) 20.

[1022] S Jodoin, 'International Law and Alterity: The State and the Other', (2008) 21 LJIL 1 12, 9.

[1023] CA Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27(2) Review of International Studies 133.

determination make them equivalent to legal trustees.[1024] As a legal trustee or guarantor, states must respect and reinforce humanitarian conditions and internal self-determination obligations. Failing to do so would undermine the legal trustee role. Judge Cançado Trindade recognised the essential role of the state in this regard when criticising the ICJ for failing to hold Yugoslavia accountable for its treatment of Kosovo.[1025] He reasoned, like Judge Dillard in the *Western Sahara* case,[1026] that state territorial sovereignty is secondary to the humanitarian conditions of the inhabitants.[1027]

Distinct from the views of judges Mbaye and Cançado Trindade, Judge Simma outlined during the *Advisory Opinion on Kosovo* that the international community, as an active party responsible for *jus cogens* international norms, incurs legal obligations over and above the consent of states.[1028] Supporting Judge Simma's views, Brewer notes that the enforcement of these norms would:

> Clearly demonstrate international law's commitment to ending state impunity for egregious human rights abuses committed against minority peoples in its territory. This will help the victimized escape from ongoing oppression while pressuring abusive states to end their campaigns of systematic deprivation.[1029]

Additionally, it has been argued that because of their character, *jus cogens* norms require greater consistency and visible accountability compared to other international laws.[1030] Costelloe specifically states:

> Norms belonging to the *jus cogens* are rules of customary international law that give rise to a particular range of legal consequences. Their peremptory character deprives inconsistent transactions between states of legal validity.[1031]

[1024] K Mbaye, 'Introduction - Part Four: Human Rights and Peoples', in M Bedjaouri (ed), *International Law: Achievements and Prospects* (Martinus Nijoff, 1991) 1041,1049.
[1025] Separate Opinion of Judge AA Cançado Trindade (n 24) [184].
[1026] *The Western Sahara Case* (n 229) [122].
[1027] Separate Opinion of Judge AA Cançado Trindade (n 24) [184].
[1028] Separate Opinion of Judge Simma (n 415) [3].
[1029] Brewer (n 26) 291.
[1030] DG Costelloe, *Political Constructivism and Reasoning about Peremptory Norms of International Law*, (2011-12) 4 Wash U Jurisprudence Rev 1, 7.
[1031] ibid.

Costelloe's observations are significant, as the enforcement of these norms would also demonstrate greater coherency and transparency in internal self-determination processes. Therefore, if a global governance approach relies upon a clear process to identify party obligations in order to substantiate specific party claims, it becomes imperative that pre-existing *jus cogens* norms are respected. Without respect for these basic rights, it would be difficult to envision any broader process involving greater party collaboration. To expand on this point, Franck provides the following analysis suggesting that these norms require transparent acceptance, consistent application and enforcement:

> The legitimacy of a norm depends upon its being formally formulated in determinate, coherent fashion, that is to say, in principled terms which are transparent and intended to be applied consistency. The willingness of states to enter into and carry out the terms of such arrangements depends upon their perceiving the legitimacy of the arrangement and the process by which it was instituted and is applied and enforced.[1032]

Had the ICJ adopted a global governance approach that included outlining the obligations of Yugoslavia and the international community, would its opinion with regards to the unilateral declaration of independence have been different? Arguably, if the ICJ had looked at the concerns of Judge Koroma pertaining to understanding the incentives of the parties; Judge Bennouna pertaining to the implications of Security Council resolution 1244 (1999); Judge Simma pertaining to international obligations to defend *jus cogens* norms; and of course Judge Cançado Trindade pertaining to state obligations under internal self-determination, the Court would have been forced to look at the 2008 declaration in the context of party obligations. In this light, assessing multi-party responsibilities pre and post Security Council resolution would have highlighted several key issues, including the repudiation of Kosovo's constitutional autonomy by Milošević in 1989; the territorial integrity of Yugoslavia; the implications of the principle of *uti possidetis* concerning Kosovo's Serbian administrative enclaves; the systematic oppression of the population of Kosovo during the 1990s; the possible violations of international humanitarian laws by the Kosovo Liberation Army during the

[1032] Franck, *Fairness in International Law and Institutions* (n 4) 372.

conflict; the political intentions of the political wing of the Kosovo Liberation Army; and the international community's responsibility to investigate and prevent *jus cogens* offences.[1033]

Significantly, in looking at these issues, the Court would also have been forced to consider a number of broader themes, such as the identification of oppression from events or general conditions, and whether Belgrade's decision to repudiate Kosovo's autonomy in 1989 deprived the territory of political and economic development rights and opportunities in addition to the loss of civil and political rights. As judges Koroma, Bennouna, Simma and Cançado Trindade all pointed out, the unilateral declaration of independence lacked an integrated analysis of these issues. Whether or not Belgrade, particularly, would have participated in a multi-party process with a view to a negotiated settlement is debatable, however, a global governance approach incorporating the various claims would have at least provided some clarity to map key issues, which could then be used to evaluate the merits of Kosovo's later unilateral declaration of independence. In theory, a failure by one of the parties to participate and rebut specific claims, could add legitimacy to the position of the other party.

The Kosovo crisis highlights a lack of integrated analysis and malaise in terms of a desire to understand the implications of a series of interconnected events related to post-colonial self-determination. Moreover, the ICJ's *Advisory Opinion on Kosovo* illustrates the antithesis to a global governance approach since it isolates the various international legal issues from what would otherwise be important subjects for review in identifying party obligation and the legitimacy of specific party claims.

As mentioned at the beginning of this chapter, internal self-determination has been acknowledged as a legal concept for over five decades.[1034] The key question is how to link it in a formal manner to other topical self-determination concerns like oppression and secession. Progress in formulating a self-determination continuum of relevant issues has been slow; only a handful of judicial opinions have looked at internal self-determination while states have been virtually silent, possibly out of fear of the

[1033] To name a few. The differences in opinion for the majority, as well as the dissenting opinions of judges Koroma and Bennouna indicate that there are many historical differences in interpretation as to the legitimacy of the unilateral declaration of independence.
[1034] Cassese, *Self-Determination of Peoples* (n 81) 24-26.

consequences associated with neglecting obligations.[1035] While general discussion on post-colonial self-determination seems to be limited to the granting of secession based on the protection of *jus cogens* norms, it is argued that internal self-determination needs to be more inclusive to the needs of the parties in order to better address minority-state tensions.[1036] The traditional approach also erroneously suggests that for those parties currently involved in self-determination conflicts, there is a single source of legal authority for establishing and clarifying new and old rules.[1037] Consequently, whereas many legal scholars have argued for a normative application of legal rules,[1038] a global governance approach suggests that a more feasible and beneficial approach would be needed for the parties to respect a normative application of processes from which actual political, economic, social contributions and progress can be made to promote and protect specific rules.

7.5 Conclusion

Post-colonial self-determination is predicated on the need to identify and understand issues, which have the potential to give rise to secessionist conflicts. Modern proposals suggesting ways to curb secessionist conflicts, safeguard state sovereignty, and international peace and security have typically failed to incorporate relevant issues precipitating territorial claims made by minorities. Many theories that champion responsive mechanisms to secessionist conflicts have included international military intervention or the creation of autonomy arrangements within states like PISG. Yet, international military intervention signals that the relevant conditions of internal self-determination no longer exist. Even proposals for autonomy arrangements should be reviewed with caution. Without sustained dialogue and the identification of party-specific values relevant to the application of rights, roles and responsibilities under internal self-determination, interim autonomy may be of little more than a temporal paper tiger.[1039]

[1035] Saul (n 37) 642.
[1036] ibid 641.
[1037] *See* Salo (n 468) 309.
[1038] *See discussion in* Saul (n 37).
[1039] Of the historic examples when states have precipitated the creation of autonomous territories, they include ironically, the creation of the Socialist Autonomous Province of Kosovo based on the Yugoslavia Constitution of 1974. Although the Constitution provided for the legitimate constitutional secession of the various internal republics, it is clear that the interests of the minorities and the state were never openly discussed with a view to creating long-term arrangements. However, Radan contends that the

Remedial and liberal-nationalist theories offer little to convince that the application of these theories can stem secessionist conflicts. Both schools generally focus on the subject of secession without clearly identifying its relationship to internal self-determination and what values and qualifications are necessary to justify its application. Remedial theories argue that secessionist claims can be countered by validating whether oppression has occurred. They adopt a state-centric approach to the identification of issues, which may result in the definition of oppression in the absence of substantive minority input. Although demanding greater state responsibility in the protection of rights, remedial theories look to states as the primary decisions-makers within self-determination processes and thereby undervalue the multi-party dynamic needed for long-term resolutions. On the other hand, liberal-nationalist theories reject overt state influence and advocate that states have duty-bearing responsibilities to satisfy territorial minority self-determination rights. In this sense, these theories infer that territorial minorities should have exclusive primary-right powers to determine a territory's future, provided that certain conditions are met. Accordingly, oppression looks very different depending on the respective theoretical lens used.

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constitutional limitations on secession imposed by the Former Yugoslavia on Croatia, Slovenia, etc., had the effect of extending significant political and constitutional meaning to the subject of secession. This was also addressed in the United States in *Williams* v. *Bluffy*, 96 US 176 (1877) and in Canada in the Supreme Court case *Reference re Secession of Québec* (n 31), where the court held that a 'clear expression' to secede by the Province of Québec would trigger constitutional negotiations to determine Québec's right to external self-determination. *See* Radan 'Secession: Can it be a Legal Act' (n 742) 158-160.

Chapter Eight: Towards a New Approach to Post-Colonial Self-Determination

8.0 Introduction

The objective of this thesis has been to propose a new way of looking at post-colonial self-determination, which permits territorial minorities to pursue external self-determination or secession if they are prevented from exercising internal self-determination. Internal and external self-determination have been discussed as interconnected parts on a continuum of post-colonial self-determination, showing that a failure or violation of the former can trigger access to the latter. Whereas internal self-determination represents a 'bundle of rights'[1040] incurring obligations for territorial minorities, states and the international community, external self-determination enables the creation of new conditions of sovereign association.[1041] Internal self-determination has also been presented as a process, meaning that the parameters of minority-state relations are always evolving and require continuous engagement and commitment to identify and define issues. Because each minority-state relationship or application of internal self-determination is different, it has been suggested that case-specific analyses are necessary to identify and protect essential party rights and interests.[1042]

Unlike remedial self-determination theories, which strictly limit the possibility of secession to a response against humanitarian violations, it has been proposed that internal self-determination should be more inclusive and encompass a variety of legal and extra-legal considerations relevant for sustaining minority-state relations and if necessary, substantiating a territorial minority's pursuit of external self-determination.[1043] Inclusivity is an intrinsic aspect of a global governance approach. It enables territorial minorities and states to articulate what international legal principles and specific domestic considerations are necessary to sustain a process of internal self-determination, or in the words of Buchanan and Franck, a system that promotes

[1040] White (n 70) 168.
[1041] *Conference on Security and Cooperation in Europe, Final Act* (Helsinki, August 1, 1975) (n 13).
[1042] This follows Judge AA Cançado Trindade's reasoning that case-specific analyses are required to identify the real issues in dispute. Separate Opinion of Judge AA Cançado Trindade (n 24) 12], [51]; Chen (n 142) 1287, 1297.
[1043] Buchheit (n 26) 222.

fairness[1044] and the well-being[1045] or decent human life[1046] of groups. Recent ethnic violence in Kenya and South Sudan suggests that minority-state relations can be fractious in the absence of clearly defined interests and mechanisms to protect international norms.[1047] And since secessionist conflicts typically incite greater violence than other civil wars,[1048] there is a clear need to explore processes to strengthen the stability and certainty in minority-state relations.[1049]

8.1 The Need for a Continuous Review of Internal Self-Determination

The scope of the right to self-determination, like other international legal norms, is never static and will continue to change over time.[1050] Contemporary scepticism concerning the meaning and application of post-colonial self-determination is arguably derived from the legacy of decolonisation.[1051] The result is that post-colonial self-determination is reviewed with a belief that the right to territorial integrity is impermeable, with the possible exception of extreme humanitarian abuses. The problem with this outlook is that it does not include a place for territorial minorities in the exchange of ideas and dialogue on important territorial issues in the context of self-determination, and arguably will do little to alleviate existing secessionist activities.[1052]

A global governance approach draws upon legal and extra-legal considerations to formulate obligations within internal self-determination processes. It is argued that

[1044] Franck, *Fairness in International Law and Institutions* (n 4) 7.
[1045] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 134.
[1046] ibid 129.
[1047] *See, e.g.,* G Lynch and DM Andersen, 'Democratization and Ethnic Violence in Kenya: Electoral Cycles and Shifting Identities', in J Bertrand and O Haklai (eds), *Democratization and Ethnic Minorities: Conflict or Compromise?* (Routledge, New York 2014) 83, 100-101; LS Shulika and O Nwabufo, 'Inter-ethnic Conflict in South Sudan: A Challenge to Peace' (2013) 3 Conflict Trends 24, 26-27.
[1048] AH Richard, *Global Apartheid: Refugees, Racism, and the New World Order* (OUP, Toronto 1994) 110; Jenne (n 3) 7.
[1049] Crawford, 'The Right to Self-Determination in International Law' (n 5) 7, 10.
[1050] B Simma and AL Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 302, 207; Saul (n 37) 610.
[1051] *See, e.g.,* White (n 70) 169.
[1052] J Ringelheim, 'Minority Rights in a Time of Multiculturalism - The Evolving Scope of the Framework Convention on the Protection of National Minorities' (2010) 10(1) HRLR 99, 128; Another reason why states should accept multi-party dialogue *pre-conflict* is to avoid the ultimate outcome of losing a territory as experienced by Serbia in 2008; Trachtman advances additional reasons for multi-party dialogue. He suggests that dialogue furnishes opportunities for states to strengthen their reputations vis-à-vis respecting human rights, opportunities for states to affirm certain political *equilibria* or geopolitical influences, or simply to replicate the best practises of other states. JP Trachtman, 'Who Cares about International Human Rights: The Supply and Demand of International Human Rights Law' (2011-2012) 44 NYU J Intl L & Pol 851, 864-865.

these should broadly include the protection and promotion of human rights, access for territorial minorities to meaningfully participate in politics and access for these groups to development opportunities commensurate with the right to development. It has also been demonstrated that each minority-state relationship generates unique priorities,[1053] which depending on the application of policies and programs, may produce different outcomes compared to other minority-state relationships. Allgood suggests that the nature of the relationship and how the parties are able to forge dialogue and trust will have a significant bearing on the ultimate outcomes in the relationship. She states:

> At stake is whether the criteria relied upon to clarify the right of self-determination are to be determined in a top-down manner through the mechanisms of statism and geopolitics or by a bottom-up approach that exhibits the vitality and potency of emergent trends favouring the extension of democratic practices and the deepening of human rights.[1054]

Allgood's 'emergent trends' are a critical feature of a global governance approach and highlight the need to focus on processes rather than outcomes in order to establish specific internal self-determination objectives and obligations.[1055]

Saul suggests that, as part of the need for the international community and states to recognise the continuous evolutionary changes affecting the meaning of self-determination, there needs to be a greater willingness by these parties to 'suggest interpretations' and 'present their views on the scope' of the law.[1056] Brewer agrees, and further adds that the law requires a process of continuous review to distinguish historical trends from emergent expectations:

> For the right to self-determination to remain meaningful, it must adapt to the post-colonial age. The realities of the relationship between states and the peoples that live within them is not the same as it was at the drafting of the UN Charter

[1053] Sengupta (n 33) 80-89.
[1054] Allgood (n 30) 334.
[1055] It can be said that the proposed global governance approach breaks from the standard legal perspective that requires laws to follow general norms of application. *See discussion by* Cassese, *Self-Determination of Peoples* (n 81); McCorquodale 'Negotiating Sovereignty' (n 360) 283; For a more specific appraisal of the application of international legal norms *see* J Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL' (2005) 16(2) EJIL 213.
[1056] Saul (n 37) 643.

> or the issuance of the decolonization advisory opinions. Since that time, international law has increasingly recognized the necessity of protecting oppressed peoples.[1057]

Similarly, Brewer calls for specific analyses into the circumstances of self-determination conflicts to substantiate the respective claims of the parties. While looking at the concept of oppression, he warns that pre-set criteria defining issues associated with oppression would be detrimental to the self-determination process and prevent an assessment of the 'magnitude of abuse.'[1058] He outlines that the right to self-determination should be 'generally applicable without being generally held'[1059] to emphasise that issues like oppression require a full assessment of the facts.[1060]

8.1.1 Internal Self-Determination Incurs a Responsibility to Articulate Needs

A merits-based or case-specific approach does not imply uniform outcomes. The recognition that seeds of internal self-determination obligations are derived from various sources, including existing international instruments, implies that territorial minorities will be able to articulate their respective needs and interests irrespective of the needs of other groups. The fluidity of minority-state relations invariably means that engagement between the parties has to be ongoing and that territorial minorities especially have an onus to articulate any specific concerns within the processes of internal self-determination. Krys alludes to this responsibility by stating:

> The right of the peoples to self-determination is a continuing process. Once a group of people has attempted to fulfil one of the modes [internal or external] of implementing the right to self-determination, it continues to have the prerogative to assert the right.[1061]

The burden to articulate and justify this responsibility infers that any specific claims of

[1057] Brewer (n 26) 291.
[1058] Brewer cites Judge Cançado Trindade at paras 98 and 156, which looked at the International Criminal Tribunal's *Milutinović Judgment* and the determinations of UN organs to assert the perpetration of systematic violations against the people of Kosovo. ibid 279.
[1059] ibid 279, 291.
[1060] ibid.
[1061] R Krys, 'The Right of Peoples to Self-Determination' (1985) 63 Revue de droit international 291, 303.

oppression and a right to external self-determination would have to be objectively assessed. Ultimately, this dismisses the liberal-nationalist approach favouring unilateral secession or states to have an onus demonstrating why the secession of a territory would be more disruptive to order and stability than continued union.[1062] Thus, territorial minorities should carry the onus of articulating their concerns in order to better formulate specific strategies with states and the international community designed to support sustained processes of internal self-determination.

8.1.2 Internal Self-Determination and Oppression: Adapting to Extra-Legal Considerations

The non-static understanding and application of legal norms infers that all the relevant concepts associated with self-determination would be subject to change. Therefore, oppression, like other concepts, must be identified and verified based on specific facts and circumstances, which are themselves borne from a process of dialogue and agreed-to principles that comprise systems of internal self-determination. This mirrors Sen's remark that processes rather than outcomes produce fair and equitable ends.[1063]

By looking at Judge Simma's criticisms of the ICJ in the *Advisory Opinion on Kosovo* with regards to *jus cogens* norms and Judge Cançado Trindade's arguments concerning humanitarian obligations, it is apparent that human rights abuses and oppressive conditions were key motivating factors behind the Security Council's decision to intervene in Kosovo, and essential to the territory's later decision to unilaterally declare independence.[1064] For remedial theorists, Kosovo's separation was legally permissible for two reasons. Firstly, because the conditions were 'sufficiently oppressive that all internal means of exercising self-determination..[were]..precluded,'[1065] and secondly, because there was a finding of fault against the state.[1066] In both instances, oppression and fault were premised upon violence and grave humanitarian injustices. As norms change and global poverty increases,[1067] oppression may be increasingly articulated in

[1062] Philoptt (n 27) 363.
[1063] Sen (n 578) 3.
[1064] Brewer (n 26) 284.
[1065] ibid.
[1066] It is important to emphasise that of the remedial theories outlined in this thesis, none have indicated that a finding of fault is dependent on an ICJ finding.
[1067] *See, e.g.,* Collier, *The Bottom Billion* (n 901).

ways less explicit than humanitarian suffering as a result of direct discrimination or civil war.

To adapt to varying needs and interests, it is proposed that the territorial minorities and states respect a normative process of internal self-determination designed to achieve specific outcomes. The outcomes may look different, but each party should accept that they have inherent roles and responsibilities associated with the process.

Likewise, oppression should be substantiated based on the facts and the merits of a particular claim. It is a fundamental concept that provides substance to better understand internal self-determination. In the modern context, it cannot be defined by pre-set criteria like it was during decolonisation when there were clear, but limited, prohibitions against alien domination and foreign occupation. Furthermore, because oppression is merits-based, there should be greater willingness to accept claims of oppression that do not necessarily involve egregious violations to human rights and humanitarian principles. Since a global governance approach to internal self-determination promotes multi-party dialogue and the establishment of party obligations, oppression has to be treated as a relative and reflexive description of conditions. What is more, the conditions in which obligations are derived need to be diligently reviewed. If internal self-determination is a process in which needs and interests are realised, so too is oppression intrinsically tied to party obligations.

8.2 Recapitulation of Arguments

In this thesis it has been argued that a global governance approach is needed to apply and provide definition to internal self-determination, thereby enabling the substantiation of territorial minority claims to a right to external self-determination. As part of this argument it has been further demonstrated that both internal and external self-determination are causally connected and represent a post-colonial continuum of self-determination.

The first two chapters outline the theoretical and methodological foundations of this thesis. A new interpretation of post-colonial self-determination requires an understanding of the prevalent historical events and theoretical arguments influencing

the evolution of ideas associated with self-governance and self-determination. Today the general assumption is that self-determination is synonymous with secession or the pursuit of an independent territory.[1068] That assumption is largely derived from the highly influential era of decolonisation during which the UN General Assembly propelled self-determination as a universal right to free colonial peoples.

While the UN strove to use self-determination as a tool to achieve a quick end to colonialism,[1069] it left a legacy of restrictive interpretative challenges. Amongst the more important were the uncertainties between internal and external self-determination and whether territorial minorities qualified as legal subjects in the self-determination debate with specific rights to external self-determination. While recognising that territorial minorities were not the intended subjects of UN doctrine during decolonisation, it was argued that territorial minorities have a right to external self-determination and secession if there is oppression or failed processes of internal self-determination.

Chapter three explored the existing uncertainty of post-colonial self-determination by looking at the ICJ's *Advisory Opinion on Kosovo* as a model showcasing the complexities of trying to reconcile mixed fact and law issues associated with a unilateral declaration of independence, internal self-determination, oppression and secession. While commentators have challenged the existence of a post-colonial right to secession based on doctrine from decolonisation,[1070] it has been suggested that post-colonial oppression is a relevant concept that is central to a post-colonial understanding and application of internal self-determination.[1071] Oppression, which was articulated in detail in chapter five, illustrates that conventional minority protections under Article 27 of the ICCPR are insufficient to protect group needs and interests and that the concerns of the international community during decolonisation are no longer topical.

Chapter four introduces internal self-determination as a process that can better address contemporary territorial minority needs and interests. The two most important features

[1068] Higgins (n 5) 111.
[1069] ibid 115.
[1070] ibid 117.
[1071] This suggests that the strict application of self-determination under decolonisation should be treated as *lex specialis*. White (n 70) 169.

in the chapter looked at the connexion between internal and external self-determination and what general considerations should be contemplated when evaluating or substantiating specific processes of internal self-determination.

When looking at the literature, there are few proposals linking internal and external self-determination from a perspective that can be used to substantiate a failing of internal self-determination and to condone the pursuit of secession. By arguing that internal self-determination is a relative process, it means that each application of the process will look different according to the needs and interests of the parties in the minority-state relationship. Importantly, even though these processes may produce different outcomes, a common approach will better enable territorial minorities and states to articulate specific needs and devise ways for ensuring that these needs are protected.

Chapter four also identifies the protection and promotion of human rights, providing territorial minorities with access to political participation, and access to developmental opportunities, as essential legal and extra-legal considerations that are generally needed for formulating obligations within internal self-determination processes. While each general consideration is important, it is conceded that there will invariably be a degree of adaptation and prioritisation[1072] in pursuing certain initiatives to achieve internal self-determination and at the same time, avoiding instances when oppression could be claimed as identified in chapter five.

To better distinguish this thesis from other scholarly research, chapter six looked at the different theories that have come to dominate post-colonial self-determination theory. In reviewing these theories, it was shown that contemporary theoretical opinion does little to link internal self-determination to external self-determination. This trend is surprising, as it suggests that liberal-nationalist and remedial theories focus on the legality or permissibility of secession and external self-determination distinct from any considerations looking at the causal relationship between internal and external self-determination.

[1072] Sengupta (n 33) 80-89.

Both remedial and liberal-nationalist theories tend to adopt positional-based interests that favour states and territorial minorities respectively, while seemingly overlooking the possibility that the exclusion and isolation of one of the parties has the potential to exacerbate conditions.[1073] While this shortcoming limits the identification of an acceptable threshold or standard of oppression, it also exposes a number of issues relevant to group choices and sovereignty. For instance, there are liberal-nationalist theories that promote unilateral secession with or without evidence of oppression,[1074] while Buchanan, a remedial theorist, believes that oppressive governments do not necessarily lose their rights to territory.[1075] Perhaps most surprisingly of all, both theory schools fail to properly clarify the relationship or connexion between internal self-determination and a claim of oppression or the pursuit of secession.

In chapter seven, it was shown that a global governance approach should be applied within a self-determination continuum. Unlike other theories, a global governance approach draws upon the 'special features of each case'[1076] to identify and establish internal self-determination obligations. By calling for a case-specific approach, it is possible to determine if a state is oppressive or whether a territorial minority has substantiated a claim to pursue external self-determination.

More specifically, chapter seven provides three recommendations for applying a global governance approach to internal self-determination. The first recommendation overcomes one of the challenges presented by the legacy of decolonisation by arguing that territorial minorities should be recognised as group right-holders to internal self-determination by virtue of their political reality,[1077] *pouvoir constituant*[1078] or self-amassed power-influence in relation to their territories.

As a second recommendation, it was proposed that the international community, states and territorial minorities should leverage efforts to improve discussions on internal self-determination, with a view to agreeing to obligations derived from mixed legal and

[1073] Kymlicka, 'Is Federalism a Viable Alternative to Secession?' (n 91) 132.
[1074] Wellman (n 139) 149.
[1075] Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 354-355.
[1076] D Thürer, 'The Right of Self-Determination of Peoples' (1987) 35 L & St 22; Chen (n 142) 1287, 1297.
[1077] Higgins (n 5) 125.
[1078] Skordas (n 79) 207.

extra-legal considerations. These obligations would form the basis of the minority-state relationship or in the event of conflict, provide legitimacy to the separation of the territory from the state. The international community has a necessary supporting role in this process to determine what would constitute post-colonial oppression in the circumstances and clarify already existing international responsibilities vis-à-vis treaty-based rights and legal considerations.

As a third recommendation, it is argued that oppression should be appreciated as a necessary concept to qualify the conditions of internal self-determination. Oppression cannot represent pre-set criteria. Instead, it should be appreciated as a relative concept that is intrinsically linked to our understanding of the obligations of the parties and extra-legal considerations like economic inequalities that affect the conditions within minority-state relationships.

8.3 Enhancing the Application of Post-Colonial Self-Determination: International Involvement and Intervention

Rosas once asserted that the international community would face difficulties enforcing internal self-determination, reasoning that it would take considerable efforts for both the international community of states and intergovernmental organisations to 'watch over the observance of the rights of peoples.'[1079] While Rosas accurately describes the complexities of internal self-determination, it should be remembered that organisations like the UN Human Rights Council and interlocutors like UN special rapporteurs already perform some of the monitoring and reporting roles seemingly suitable to what would be needed to promote and protect internal self-determination processes.

Though mechanisms and international instruments do exist, the lack of implementation is a real issue.[1080] Strengthening international mechanisms to oversee a global governance approach would conceivably require three changes to the current UN system of monitoring and reporting on human rights issues.[1081] Firstly, it would require

[1079] Rosas (n 7) 225, 252.
[1080] Pogge, *World Poverty and Human Rights* (n 903) 25.
[1081] Given the complexity as to how responsibilities should be distributed, the following section provides only an overview of possible proposals for application. For a more in-depth analysis of responsibilities, including the different models of distribution pertaining to states and nations, *see* D Miller, 'Distributing

greater thematic collaboration amongst the international community, states and specific territorial minorities. Since internal self-determination is a process that encompasses both legal rights flowing from, for example, treaties like the ICCPR and the ICESCR, as well as extra-legal considerations like state-sponsored development programs and protections for minorities against adverse economic and social policies,[1082] interlocutors would require a degree of familiarity of local issues in addition to knowledge of existing international norms to oversee the application of obligations.

A further proposal is greater involvement by the international community in specific internal self-determination processes. While it is acknowledged that greater involvement would be dependent upon the acceptance by territorial minorities and states,[1083] an increased presence in underdeveloped and historically unstable states would improve the ability of the international community to evaluate claims of oppression and identify key obligations intrinsic for sustaining the minority-state relationship. If the international community has the capabilities to identify which states need to take greater responsibility to respond to specific thematic concerns affecting minorities,[1084] then it would make sense if the UN or the Human Rights Council specifically, increase its footprint in certain regions by taking advantage of standing offers from states to establish special procedures and field offices overseeing thematic human rights issues.[1085] As of December 2012, only forty percent of states had responded to the Office of the High Commissioner for Human Rights' special procedure communications,[1086] indicating that to succeed in addressing self-determination concerns there would have to be greater engagement between states and the

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Responsibilities' (2002) 9(4) Journal of Political Philosophy 453, 453-471; R Pierik, 'Collective Responsibility and National Responsibility' (2008) 11(4) Critical Review of International Social and Political Philosophy 465-483.

[1082] *Achieving the Millennium Development Goals* (n 611) [13].

[1083] Sachs raises this issue directly in relation to the reluctance of powerful states in ceding any authority to the UN. He sees the empowerment of UN specialised agencies as a direct means to support the effort to reduce poverty. Sachs (n 929) 366.

[1084] *See, e.g., Achieving the Millennium Development Goals* (n 611) [17].

[1085] As of December 2012, 92 states had offered standing invitations for the Human Rights Council to pursue a mix of thematic and country and region-specific special procedures. *OHCHR Report 2012,* Human Rights Council and Special Procedures Division 331,332 <http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/24_Human%20Rights_Council_and_Special_Procedures_Division.pdf > accessed 17 November 2013.

[1086] ibid.

international community with an acceptance by states of the benefits of collaboration.[1087]

A third proposal, calls for the empowerment of interlocutors to refer cases of failed internal self-determination to the UN. While both the General Assembly and the Security Council could have effective roles in responding to failed systems of internal self-determination, it is proposed that a key feature of UN involvement would be the sanction of a territorial minority's right to pursue external self-determination and in some cases, the sanction of international intervention[1088] arguably like Kosovo in 1999.[1089] International intervention in the internal affairs of states would be premised upon two distinct applications; recognition of a right to external self-determination for territorial minorities that have been denied internal self-determination, and secondly, international intervention ostensibly enforcing a right to external self-determination while deploying force to prevent the continuation of humanitarian suffering.[1090]

Non-intervention is a principle used to protect sovereignty.[1091] As such, a global governance approach supporting external self-determination and possible international intervention in cases of failed internal self-determination is premised on the notion that non-intervention serves to protect the sovereignty of peoples,[1092] as well as their continuing ability to exercise self-determination.[1093] To reverse the principles of non-intervention established in the ICJ's *Nicaragua* case,[1094] the justification for intervention would have to be based on failed processes of internal self-determination

[1087] Saul (n 37) 641-643.
[1088] Buchanan explores the different possibilities of international intervention based on humanitarian grounds. He suggests reforms to the current system of international law by proposing changes based on custom, and treaty-based changes within or outside the UN system. Buchanan's preference for transparency and inclusivity of UN and state participation in his remedial approach favours UN treaty based changes. Buchanan, *Justice, Legitimacy, and Self-Determination* (n 28) 446-454.
[1089] Recalling that the legality of NATO intervention based on UN SC Res 1244 (n 346) is contested. *See* Holzegrefe (n 345).
[1090] *See, e.g.,* Robertson (n 797) 29-437; M Bazyler, 'Re-examining the Doctrine of Humanitarian Intervention in Light of Atrocities in Kampuchea and Ethiopia' (1987) 23 Stan J Intl L 547.
[1091] *Nicaragua* v. *USA* (n 880) [205].
[1092] R Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (Routledge, London 1994) 90-91.
[1093] SR Ratner, 'The United Nations in Cambodia: A Model for Resolution of Internal Conflicts?' in LF Damrosch (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (Council on Foreign Relations Press, New York 1993) 241, 258 and 267.
[1094] *Nicaragua* v. *USA* (n 880) [202]–[209].

and explicit evidence of humanitarian need.[1095] Indeed, intervention premised on humanitarian suffering seems to be a generally accepted exception to the principle of non-intervention. Tomuschat and Arbour have both advocated that the international community has a responsibility to respond to humanitarian abuses,[1096] indicating that intervention would be in response to conflict.[1097] In cases like Kosovo and possibly Iraq after,[1098] there emerges a belief that states lose their right of consent to govern as a result of escalating violence or threats to international peace and stability.[1099] Arbour even suggests that states, which exercise their UN veto to block humanitarian interventions, are violating their own humanitarian obligations.[1100] Similarly, Oklopcic's global legislator was illustrated as a means for the international community to respond to secessionist conflicts.[1101] However, a global legislator charged with having to intervene and possibly arbitrate disputes would face difficulties in understanding details of the failed internal self-determination process and conceivably, be deployed to areas where relations would have deteriorated beyond repair.

Such situations can be comparable to what Judge Simma in the ICJ's *Advisory Opinion on Kosovo* identified as triggering international obligations to protect *jus cogens* norms.[1102] Significantly, since *jus cogens* offences do not typically occur prior to violence, Simma's position infers that the international community's obligations involve some sort of pre-emptive commitment to prevent humanitarian suffering. While McCorquodale questioned whether internal self-determination was fully established as a *jus cogens* norm,[1103] this thesis supports the position that there are a

[1095] Robertson (n 797) 433; Comparatively, Ryan argues that humanitarian intervention need not be a last resort as long as alternative considerations are taken seriously. He suggests that intervention that is 'likely to lead to a more just society' or 'enhances human autonomy' is morally justified. Ryan (n 19) 69.
[1096] C Tomuschat, 'Democratic Pluralism: The Right to Political Opposition' in A. Rosas and J. Helgesen (eds), *The Strength of Diversity: Human Rights and Pluralist Democracy*, (Nijhoff, Dordrecht 1992) 27, 39; L Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34(3) Review of International Studies 445, 448.
[1097] Kuwali has even suggested that states should agree to pre-defined criteria substantiating international intervention, which although novel, raises the question in the self-determination context as to whether territorial minorities would have a voice in contributing to the criteria. *See* D Kuwali, 'The End of Humanitarian Intervention: Evaluation of the African Union's Right of Intervention' (2009) 9(1) African Journal of Conflict Resolution 41, 41.
[1098] *See* M Hmoud, 'The Use of Force Against Iraq: Occupation and Security Council Resolution 1483' (2003-2004) 36 Cornell Intl L J 435.
[1099] Oklopcic (n 78) 696.
[1100] Arbour (n 1097) 453-454.
[1101] Oklopcic (n 78) 691.
[1102] Separate Opinion of Judge Simma (n 415) [3].
[1103] McCorquodale, 'Negotiating Sovereignty' (n 360) 326.

'whole cluster of legal standards' of *jus cogens* norms that form part of internal self-determination processes.[1104]

8.4 Conclusion

With fewer and fewer non-self-governing territories and colonies,[1105] the objective of post-colonial self-determination has to focus on improving order and stability within states. Having argued that a global governance approach provides a basis for defining internal self-determination and linking it to external self-determination, order and stability have to be groomed through sustained dialogue and engagement between the parties. Through engagement, Dinstein notes, efficient and equitable agreements between the parties can be created.[1106]

On a practical level, addressing eighty secessionist conflicts and preventing many more cannot be reduced to an exercise of creating more OHCHR field offices or promoting standard criteria on internal self-determination. More UN involvement would certainly help, but meaningful progress has to come from the realisation that there are broad thematic and intersecting legal and extra-legal considerations affecting minorities like poverty, humanitarian law violations, political marginalisation and how to exercise control over territorial resources.[1107] These considerations are only appreciable when looking at the specific circumstances of each minority-state relationship.

The extent of change proposed does not support a demand for entirely new laws. In fact, it is contended that international laws and instruments already exist and qualify the parameters of what types of conduct and behaviour can take place within internal self-determination processes. However, because of the evolving nature of the right to self-determination, and indeed global and local influences that affect the lives of minorities, historic interpretations will continue to evolve.

[1104] Cassese, *Self-Determination of Peoples* (n 81) 140; Saul (n 37) 640.
[1105] *See* United Nations list of remaining non-self-governing territories: <http://www.un.org/en/decolonization/nonselfgovterritories.shtml> accessed March 28, 2012.
[1106] Y Dinstein, 'Is There a Right to Secede', (2005) 27 Hous J Intl L 253, 307.
[1107] Butler (n 223) 120.

What is needed to respond to uncertainties is an understanding that party-specific interests and needs are relative to specific conditions and should form the basis of internal self-determination responsibilities and obligations. This means that attitudes have to be flexible and reflexive to incorporate new considerations relevant to internal self-determination and oppression. A normative process is the best means to identify and draw-out party-specific issues and possible sources of oppression. It would not only provide overall substance to the law, but also clarify party roles in a clear and sustained manner. Thus, rather than looking at a global governance approach to internal self-determination as a means to simply promote and protect existing *jus cogens* norms, it represents a process in which normative values can take shape according to specific minority-state relations.[1108]

Having demonstrated that a global governance approach to post-colonial self-determination permits the possibility of external self-determination when specific processes of internal self-determination have been denied or suppressed, territorial minorities, states and the international community must seek to effect better relations and improved conditions between territorial minorities and states. A new focus on the right to self-determination distinct from the prevailing beliefs and attitudes of the decolonisation era would make a real contribution to international stability and order. Looking ahead, the number and intensity of secessionist conflicts during the twenty-first century will likely be dependent upon the creation of global approaches that can be applied to address very complex and specific issues involving territorial minorities and their states.

[1108] Franck, *Fairness in International Law and Institutions* (n 4) 144.

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