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**The Republic of Quebec:  
How International Law Might Affect Quebec's Claim to Independence**

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# **THE REPUBLIC OF QUEBEC:**

How International Law Might Affect Quebec's Claim to Independence

David DesBaillets

Graduate program in law

Submitted in partial fulfillment  
of the requirements for the degree  
in Masters of Law

Faculty of Graduate Studies  
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**Canada**

In 1998 the Supreme Court of Canada was asked by the federal government to give its opinion on a matter that goes to the very heart of the Canadian constitution. In short: does Quebec have the right, both in terms of international and domestic law, to secede from Canada? The answer would have implications not only for the Canadian constitution but international law as well.

In the event that these questions were resolved by a sovereigntist government in Quebec and that government assumed a mandate to pursue secession from the rest of Canada, **to what extent under international law is the question of secession now regulated by international legal norms?** In the process of researching this thesis, I came across the work of jurists who vehemently dispute the Supreme Court's contention that the legitimacy of the process of secession is a pre-condition for international recognition nor is it an established norm of international law, as was suggested by the court in its judgment. They maintain that there are a number of cases that contradict the Court. Whether these cases are relevant to the Canadian question of secession, is open to debate. However, it seems clear that, far from being well-established international law, these issues continue to be extremely problematic. But it does seem clear that the question of secession and recognition in the international system are now, to some extent, subject to certain legal criteria, some of which (e.g. self-determination) are raised by the court in the context of the Reference and must now be regarded as applying to the case of Quebec at least.

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## Introduction

In 1998 the Supreme Court of Canada was asked by the federal government to give an opinion on a matter that goes to the very heart of the Canadian confederation. In short: does Quebec have the right, both in terms of international and domestic law, to secede from Canada? It is very difficult to imagine the court ever in its history having been faced with a more grave or thorny legal question. The decision it reached would not only affect the Canadian constitution, but might also have implications for the international legal system. And therein lies the focus of my thesis.

It is worth noting how the decision was received by the many parties involved, including, of course, the two main camps namely: Federalists and Separatists. It is hardly surprising that after the court reached a verdict, both sides were eager to claim victory, but I intend to demonstrate that these claims are, more or less, political and have little to do with the law, whether international or otherwise. Furthermore, the complex and somewhat ambiguous nature of the opinion lends itself to manipulation on both sides of the debate. The interpretation of the questions raised in this controversial case were inevitably going to lead to controversial answers. Indeed, some of the points made by the court raise even more questions than they answered.

In the process of researching this proposal, I came across the work of several pre-eminent international legal jurists who vehemently dispute the Supreme Court's contention that the legitimacy of the process of secession is a pre-condition for international recognition nor do they accept that it is an established norm of international

law, as was suggested by the court in its judgment. Furthermore, in support of their argument, they cite the examples of Croatia (a former member of the Yugoslavian federation) whose secession was a violation of the Yugoslavian constitution. Nevertheless, this did not prevent third party states from recognizing the new state which ultimately helped Croatia to gain legitimacy in the eyes of the world. Whether this case is relevant to the Canadian question of secession, is open to debate. However, it seems clear that, far from being well-established international law, as was claimed by the Supreme Court of Canada, these issues continue to be extremely problematic. This is evidenced by the ambiguous status of Kosovo, a state that was recognized only recently by the Canadian government, albeit with a fair amount of ambivalence. Therefore, in the event that this question were resolved by a separatist government in Quebec and that government assumed a mandate to pursue secession unilaterally from the rest of Canada to what extent are other countries obliged not to recognize the new country? **It is the central aim of this thesis to determine to what extent the question of secession is now regulated by international legal norms.**

First of all, the scope of this paper is understandably quite broad given that it will touch on aspects of both international and domestic law. That having been said, the case's origins can be found, of course, in domestic Canadian law, specifically the Reference re: Quebec Secession . This will be the starting point of my thesis and will provide the legal framework for my thesis question. The crux of the reference deals with the Court's assertion that in Canadian law there exists a duty for the Quebec government that pursues secession from Canada, that requires that government to enter into negotiations with the latter, in good faith, and with the intention of respecting the constitutional rules to which

they are subject. This, therefore, by definition, rules out the possibility of a unilateral declaration of independence (henceforth to be referred to by the acronym UDI). Moreover, according to this argument, if the Quebec government does not engage in this process, the state which emerges from its attempted secession will necessarily be illegitimate in international law, and will, therefore, not be granted recognition by any members of international community. Conversely, the *amicus curiae*, which essentially made the case for Quebec government's right to secede from Canada, argued that in international law, particularly in view of the legal doctrine of effectivity, regardless of the Supreme courts judgment, the conditions it imposed on the government of Quebec were not binding in international law and that ultimate recognition of an independent Quebec would depend largely on a question of facts rather than law.

The first chapter will consist of a kind of meta-analysis of the underlying jurisprudential and philosophical paradigms being used by the parties to the case. For instance, a strong element of *realpolitik* can be found in the *amicus*' position with regards to the question of recognition in international relations, in the sense that it claims an independent Quebec's ultimate recognition does not so much depend on the legal factors that the Supreme Court defined, but rather it depends more on political factors and the effectiveness of the entity in question within the international system. This conception of international law has, as its basis, a traditional positivist and realist conception of international law, as opposed to the implicit idealist/ constructivist arguments made by the Supreme Court that recognition of Quebec sovereignty hinges on its conformity with the international norms and rules that are espoused by the members of the international community. This will be explained in greater detail in chapter one of my thesis.

In the second chapter, I will start with a thorough examination of the concept of recognition in international law. This will naturally involve an in-depth analysis of Hersch Lauterpacht's monumental study of this field and the responses to it by both his admirers and detractors. In section 2.2. I will examine the case studies (Rhodesia, Croatia , etc.) and will conclude with section 2.3 which explains the findings of the Supreme Court with respect to the question of recognition as well as the reactions to those findings by the critics and proponents of the Court.

Chapter 3 is concerned mainly with effectivity. Effective control doctrine is a rather complex concept that, as we shall see, is not strictly speaking a legal argument. Rather it is largely a political argument, which denies the importance of the law in matters of recognition. Furthermore, it was the basis of much of the *Amicus'* case for the right of Quebec to secede unilaterally from Canada, at least in an international legal context. The first section will look at effectivity and its related issues such as territoriality and the *uti possidetis doctrine*. In the second section I will look at the State practice in this regard. Finally, we will see, what the Supreme Court and others who had an interest in the outcome of the case had to say on the subject.

All of the parties to the case dealt with the question of the right to self-determination that peoples enjoy in international law. Indeed the principle is the subject of considerable debate in the academic world, and the Reference case was no exception. The difference between external and internal self-determination was particularly critical and I will shed some light on this issue, among others, throughout chapter 4. However, we shall see that no study of this aspect of international law is complete, without touching on the related matters of secession, UDI and territorial integrity. The main case study

chosen for this chapter is that of the Socialist Former Republics Yugoslavia(SFRY), specifically the Badinter opinions on the break-up of the SFRY, which have subsequently become, for better or worse, hugely influential and indeed were central in the debate that surrounded the Reference case.

This task will require that I explore all of the issues in international law already mentioned. My hope is that my research will enable me to determine, to some extent, how the International community would react in the hypothetical event of the Quebec government exercising a UDI and failing to respect the criteria for lawful secession laid down by the Court. It must, however, be stressed that this is a largely hypothetical exercise in many respects, and that, as a result, I do not expect to reach any definite conclusions about Quebec independence or the relevant international law questions. I would be remiss if I were to claim that I could predict with any great accuracy what the international community would actually do in the scenarios described in my thesis.

## **Chapter 1: Comparing and contrasting the different underlying theoretical conceptions of international relations involved in the Reference case**

The theory of realism in international relations is one of the oldest and most time-honored in all of political philosophy. I shall not be able to begin my study of it with an examination of its historical evolution or impact. I must, however, attempt to give a very brief summary of its core principles in the context of modern international relations as well as examining its rival and antithetical school of thought: the idealist/constructivist paradigm of international relations with the aim that later in this thesis I might revisit these theories in the context of the Reference re Secession of Quebec.

### Section 1.1: Terminology

Since this thesis is not primarily concerned with theories of international relations as such, I will not be engaging in an in-depth analysis of realism and its many variants. Suffice it to say, that they all share more or less the same philosophical foundation. For example, political realists have often focused on the behaviour of nation-states on the international stage. "...Nation-states are also rational in the sense that their responses to international events are based 'upon...cool and clearheaded means-end calculation(s)' designed to maximize self-interest."<sup>1</sup> Therefore, in order to understand the nature of a given nation-state one must be able to determine what its particular national interest might be. This, more often than not, is defined by realists in terms of power politics. "...realist theories traditionally employ the strong simplifying assumption that one goal

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<sup>1</sup> Annette Freyberg-Inan, *What Moves Man: The Realist Theory of International Relations and Its Judgment of Human Nature*, (Albany: State University of New York Press, 2004) at 2.

all states strive to maximize at all times is their own power. In defense of this assumption, realists commonly point out that power is a necessary means, needed to achieve all other possible goals a state might have.”<sup>2</sup>

Since the realist world view holds that international relations are a zero sum game, a nation does not only seek more power for itself but also tries to gain power relative to other states in the international system. Survival is thus the ultimate purpose of all state behavior. Power helps ensure state survival and thus is the primary means of achieving this fundamental goal. “ This is how it becomes reasonable to view power not merely as a means to other ends but rather as the end itself and thus the most important motive driving state behavior.”<sup>3</sup> Accordingly, the main means for achieving this has traditionally been military power. Generally realists share a rather bleak view of the international order, essentially characterizing it as a constant struggle for power between competing states in a lawless international system.

Regardless of how one feels about the many forms of realism, one cannot deny there central place in the theoretical and philosophical aspects of modern international relations. “ Immediately after the second world war, realist interpretations of the events of political history were widely viewed as invaluable to an appropriate understanding of the contemporary state of the international system.”<sup>4</sup>

The theory of realism in international relations in many ways complimented the classical legal positivism of the 19<sup>th</sup> century. The latter emphasized the importance of sovereign states in the international legal order, almost to the exclusion of all non-state actors. “ They alone were the ‘subjects of international law and were to be contrasted

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<sup>2</sup> *Ibid.* at 3

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at 66

with the status of non-independent states and individuals as ‘objects’ of international law. They alone created the law and restrictions upon their independence could not be presumed.”<sup>5</sup> It also reflected realist thinking in its antipathy toward bringing any kind of value judgment to bear upon the analysis of the law. Rather, it favored the application of the scientific method and an empirical approach to the understanding of international law. In its traditional form (i.e. 19<sup>th</sup> century international law) Positivists advocated recognition as being the primary means by which an entity could achieve statehood “...the effect of which was that the formation, and even the existence of States was a matter outside the then accepted scope of international law.”<sup>6</sup> This theory of statehood contained five key elements: Firstly, that international law only existed between civilized nations. Secondly, that this was an exclusive club of nation states, consisting mainly of Western countries. “States as such were not therefore necessarily members of the Society of Nations. Recognition, express or implied, solely created their membership and bound them to obey international law.”<sup>7</sup> Thirdly, only states had legal personality and therefore individuals or non-governmental organizations were not subject to international law.<sup>8</sup> The international laws were binding only insofar as they were derived from the process that states went through in order to be accepted by the so-called “civilized nations” of the world.<sup>9</sup> Finally, the process by which an entity transformed itself into a state was of no consequence in international law. “Accordingly how a state became a state was a matter of no importance to traditional international law, which concentrated on recognition as

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<sup>5</sup> Malcom Shaw N., *International law*, 5ed.(Cambridge: Cambridge University Press, 2003) at. 44

<sup>6</sup> *Ibid.* at 13

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* at 14

the agency of admission into ‘civilized society’”<sup>10</sup> One of the consequences of all of this was to put a great deal of emphasis on recognition in the statehood process, as being its defining element.<sup>11</sup>

Positivism, however, was not a stagnant philosophy, and it continued to evolve in the modern era of international law through the work of such jurists as Hans Kelsen and HLA Hart. Many regard Hans Kelsen’s book Pure Theory of the Law to represent the apogee of this particular version of positivism. In it “Kelsen defined law solely in terms of itself and eschewed any element of justice, which was rather to be considered within the discipline of political science.”<sup>12</sup> Kelsen conceived of the law in hierarchical terms with a normative structure that gives legitimacy to all the rules in a particular legal system. “...consisting of rules which lay down patterns of behaviour. Such rules, or norms, depend for their legal validity on a prior norm and this process continues until one reaches what is termed the basic norm of the whole system. This basic norm is the foundation of the legal edifice,...”<sup>13</sup> According to this view, international law is a less developed form of legal system than the municipal law of states because it lacks the enforcement mechanisms that states possess. However, as in a domestic legal system, if the rules of international law are derived from a basic law then they are equally valid. International law, during Kelsen’s lifetime at least, “...does not establish special organs for the creation and application of its norms. It is still in a state of far-reaching decentralization. It is only at the beginning of a development which national law has

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 16

<sup>12</sup> *Ibid.* at 48

<sup>13</sup> *Ibid.* at 48-49

already completed.”<sup>14</sup> One example of this, cited by Kelsen, is a prime rule known as *pacta sunt servanda*. This principle of international law requires parties to act in good faith. “ It authorizes the state as the subjects of the international community to regulate by treaty their mutual behavior of their own organs and subjects in relation to the organs and subjects of other states”<sup>15</sup> This type of arrangement consists of three levels. Firstly, the prime rule which establishes the basis of the agreement. Secondly, the normative content of the agreement or treaty. The third or last element of this type of system is the legal bodies that are established by these treaties.

Another modern positivist, and contemporary of Kelsen’s, was the British jurist H.L.A Hart. He expanded on the principles of positivism and added a sociological element to its conception of law.<sup>16</sup> In his work, Hart defined law as a system of rules, basically divided into primary and secondary categories. The former, essentially, identify norms of behaviour while the latter provide the means for identifying and defining them and establishing the legal procedures for change in a given legal system. International law failed to meet this basic criteria for a valid legal system because it “...not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying ‘source’ of law and providing general criteria for the identification of its rules.”<sup>17</sup>

He also addressed the question of international law’s status. His conclusion as to its qualification as a legal system in the positivist sense was highly skeptical. Owing to its lack of legislative and judicial elements as well as it not having a centralized authority

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<sup>14</sup> Hans Kelsen, *Pure Theory of Law*, trans. By Max Knight (Berkeley: University of California Press, 1970) at 323

<sup>15</sup> *Ibid.*

<sup>16</sup> Shaw, *supra*. note 5 at 50

<sup>17</sup> HLA Hart, *The Concept of Law*, (Oxford: Oxford University Press, 1961) at 209.

with a monopoly on power, international law seemed to Hart to be a somewhat primitive legal system. “ The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligations, which, when we find it among societies of individuals, we are accustomed to contrast with advanced legal systems.”<sup>18</sup> Accordingly, international law does not yet constitute a legal system *per se*. Although he characterized international law as being a “set of rules”<sup>19</sup> this did not preclude the possibility of it being transformed into a legal system at some point in the future. Reflecting the influence of Kelsen, he cited the example of the principle of *pacta sunt servanda*.

There have always been challenges to the realist school of thought in international relations. Some have been relatively successful and , as a result, have thrived and become viable alternative interpretations of State behaviour towards each other. One such conception of international relations that is antithetical to realism has emerged in recent years and has been gaining some currency, at least among scholars of international relations theory. It is known as constructivism.

In her book, a critical analysis of the realist theory in the context of international relations, Annette Freyburg-Inan characterizes constructivist thinkers as being fundamentally idealistic in nature “...because they stress the impact of ideas and norms on the behaviour of decision makers as well as on the ways in which these decision makers define their own needs.”<sup>20</sup> This approach emphasizes the importance of understanding the motives and behaviour of individual or a group of policy makers, when deconstructing the foreign policy of a particular state. In stark contrast to realists who

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<sup>18</sup> *Ibid.* at 209

<sup>19</sup> *Ibid.* at 231.

<sup>20</sup> *supra* note 1 at 164

“...sidestepped or denied the issue by assuming a common motivations for all states.”<sup>21</sup> Constructivists rely on decision-making theory in order to explain the often complex motives of those who formulate foreign policy and, by extension, the impact that their ideas or behaviour might have on relations between states. “To be more useful in this respect, idealists approaches generally draw on decision-making theory, which, as we have seen, naturally emphasizes the importance of decision makers’ ideas and norms for their subsequent behaviour.”<sup>22</sup> Constructivism looks at the processes by which norms are formed in international relations that ultimately are adopted by certain states and integrated into their foreign policy maker’s decisions and institutions. “Constructivists conclude that the realist argument that morality plays no legitimate role in international politics fails because it ignores, first that states are embedded within systems of rules and, second, that interests and ideas are interrelated.” that is to say, that the latter cannot be divorced entirely from the former and *vice versa*. Ideas and norms inform the decisions of decision makers who in turn define national interests and formulate state policy. Thus it is important to understand the values of that person or group of persons in order to analyze the policy a given state will ultimately adopt and why that state has chosen such a course of action.

Leading minds in this school of thought, such as Alexander Wendt, author of the seminal study of Constructivism (Social Theory of International Politics), are also very interested in human behaviour in the sense that “...the fundamental structures of international politics are social, rather than merely material. These structures not only

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

constrain the behaviour of individuals, but they are directly involved in shaping individual's identities and interests.”<sup>23</sup>

The constructivist worldview can essentially be described as optimistic or idealistic in nature. It believes in a kind of self-fulfilling prophesy in international relations, where people's attitudes and perceptions about the rest of the world can actually effect changes in the way in which the international system operates. They advocate multilateral institutions, such as the International Court of Justice, as the main means of resolving disputes between states and also as the most effective rebuttal to the realist notion of an anarchic international order.

Sociological institutionalism has much in common with the constructivist perspective. In particular, this paradigm of international relations, stresses the need to analyze the impact of global culture, which its proponents maintain “ ‘ shape and define the preferences of actors in ways not related to internal conditions, characteristics, or functional needs ‘”<sup>24</sup> This leads to a universalization of certain norms and rules that are accepted by certain groups of states that will subsequently incorporate them into their own national identity and use them to create norms of appropriate behavior amongst states that share these principles. According to this logic, foreign policy makers seeking approval or recognition by the international community will attempt to conform to its established norms of behavior.

A well known, albeit somewhat flawed, example of this is the criteria laid down by the Yugoslav Arbitration Committee (also known as the Badinter Commission) in 1991 for the collective recognition by the European Community of the new states that

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<sup>23</sup> *Ibid.* at 165

<sup>24</sup> *Ibid.* at 166

emerged from the chaotic dissolution of Yugoslavia. Amongst the norms that had to be respected were the following: respect for established territorial boundaries; constitutional guarantees on the protection of ethnic minorities; the ratification of nuclear non-proliferation treaties; commitment to the arbitration process for the settling of disputes; etc. As we shall see in a later chapter, these criteria proved difficult to enforce and were never fully accepted by the applicant states who, in some cases, were able to gain recognition from the EC nonetheless. Nevertheless, this is a case in point of a situation where a group of states attempted to impose certain norms of international law on new states that were seeking approval and legitimacy from the international community. “...as indicated by the Badinter Commission...international law may be said to impose on a party seeking to secede an obligation to accede to the international norms regarding democracy and the protection of human rights, including minority rights.”<sup>25</sup>

Constructivists are very concerned with what one might call a state’s self-image. The role that its identity and its identification with the international community to which it aspires to belong, plays an important part in determining in its foreign policy decisions. “They stress a third motive behind foreign policy decisions: the desire for ‘honor,’ or, in modern terms, the need to be recognized and accepted by one’s community.”<sup>26</sup> This essentially replaces the cynical central realist motive of state power with the more idealistic motive of state affiliation.<sup>27</sup> As we shall see in the next chapter, this notion of international relations is a thread which reoccurs, albeit only implicitly, through much of the Courts findings in the *Reference*.

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<sup>25</sup> Anne Bayefsky, ed., *Self-determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000) at 81.

<sup>26</sup> Freyburg-Inan, *Supra* see note 1 at 166.

<sup>27</sup> *Ibid.*

## Chapter 2: Recognition

Up until this point, I have discussed the case mainly in abstract terms. In the following chapter, I will begin my analysis of the very essence of my thesis: namely the concept of recognition. At the genesis of this Masters thesis was a single quotation attributed to jurist Patrick Dumberry that sums up his objection to one of the conclusions of in the *Reference*. "...recognition has always been and remains today essentially a discretionary political act, which is not conditioned by any 'precondition' or 'legal norm,'..."<sup>28</sup> This statement, in my view, greatly overstates the political aspect of recognition in international law. It will hopefully be demonstrated by the end of this thesis, that such arguments are rather old fashioned and need to be re-evaluated in light of the growing trend towards an establishment of international legal standards that need to be met by aspiring states.

In section 2.1 we will continue in the abstract vein with an analysis of Hersch Lauterpacht's landmark work on the subject of recognition in international law. Although Recognition In International Law has become dated in some respects (it was published in 1947) and has been the subject of a great deal of criticism and debate amongst international jurists, it nevertheless occupies a central place in the legal literature on recognition. The major criticisms of his work, mainly from a contemporary perspective, will be discussed as well. This will hopefully serve to shed some light on the evolution of such international legal concepts as constitutive vs. declaratory theory. Thus the ultimate

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<sup>28</sup> Patrick Dumberry, "Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada" in Marcelo Kohen ed., *International Law Perspectives* (Cambridge, Cambridge University Press, 2006) 416 at 438.

aim of the exercise being to demonstrate how these concepts have influenced the Supreme Court of Canada in its advisory opinion. More to the point, how the court was able to engage in a delicate balancing act: on the one hand admitting that, to a certain extent, international recognition was a political matter and thus beyond its jurisdiction. While, on the other, claiming that this act was now regulated to some extent by international legal norms which, if not met by a secessionist government in Quebec, would severely undermine its claim to independence.

In section 2.2, I shall examine four case studies that are particularly relevant to the question of recognition in the context of the Supreme Court of Canada's judgment. Firstly I look at the case of the short-lived rogue state of Rhodesia, an analysis which deals with the question of non-recognition, albeit in the collective recognition context, and illegal secession by means of a unilateral declaration of independence (UDI). Secondly, there is the well known case of Croatia and the disintegration of the former Yugoslavia, which was particularly crucial in both the Court's and the *amicus*' interpretation of recognition in international relations. Specifically with respect to the issues of illegal secessions, premature recognition, as well as UDI. Lastly, I shall then look at the case of Bosnia Herzegovina which demonstrates the evolving nature of collective recognition, particularly where the U.N. is concerned.

In section 2.3, I will look at the way in which the question of recognition in international law is addressed by the parties in the context of Reference re: Secession of Quebec. I shall examine the position of the government of Canada, with its myriad influences and proponents (e.g. James Crawford), then the position of the *amicus*, specifically the origins of its arguments (e.g. Committee To Examine Matters Relating To

The Accession Of Quebec To Sovereignty), its collaborators (e.g George Abi-Saab), and its modern day champions (e.g. Patrick Dumberry).

### Section 2.1: Main theories, doctrines and principles relating the concept of recognition

Of all the international jurists who tackled the question of recognition in international law, perhaps the most famous and influential was Cambridge Scholar Hersch Lauterpacht. In his masterpiece, Recognition in International Law, Lauterpacht attempted to do what had never been done before, namely, to define and create a legal doctrine of recognition in international law that would engender some kind of uniform practice amongst states. Lauterpacht lamented the lack of consistency in this area of international law, which he attributed mainly to the arbitrariness of individual state policy, which has traditionally been based on political calculations rather than legal duties, and the vagaries of international relations between states. In his view, this could only be resolved through the establishment of a legal doctrine, universally accepted, and having the force of binding law. “ In all these cases the view that recognition is not a function consisting in the fulfillment of an international duty but an act of national policy independent of binding legal principle, has the further result of divorcing recognition from the scientific bases of fact on which all law must ultimately rest.”<sup>29</sup>

With these “scientific bases” in mind, Lauterpacht set out to develop a legal principle of recognition that he hoped would one day govern all state policy regarding the recognition of new states. But was he successful in his endeavor? In order to understand

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<sup>29</sup> Hersch Lauterpacht, *The Legal Nature of Recognition* ( Cambridge: Cambridge University Press, 1947) at 4.

this complex theory, we must briefly touch on his views of the debate between constitutive and declaratory theories of recognition.

Lauterpacht defines the constitutive school of recognition as follows: “The first is that, prior to recognition, the community in question possesses neither the rights nor the obligations which international law associates with full statehood; the second (Declaratory) is that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the community concerned.”<sup>30</sup> The constitutive theory holds that it is the act of recognition by other states that creates a new state and provides it with a legal personality and not the process by which it actually obtained independence. This theory has two main disadvantages: firstly, a state that is unrecognized is not subject to international law. Secondly, if a state were recognized by some but not other states, the result would be an ambiguous status in the international order. The declaratory theory adopts the opposite position and is often described as being the more realistic of the two. It holds that recognition is merely an acceptance by states of an already existing situation. “A new state will acquire capacity in international relations not by virtue of the consent of others but by virtue of a particular factual situation.”<sup>31</sup> This theory reinforces the traditional positivist emphasis on the supremacy of state actors in international relations and the realist position on recognition that maintains that there is no legal solution in this matter and that *de facto* statehood will generally prevail in the end.

Both of these theories were problematic in the opinion of Lauterpacht, as they failed to acknowledge that recognition should be a matter of legal duty between states.

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<sup>30</sup> *Ibid.* at 2

<sup>31</sup> *Ibid.*

This state of affairs was due in part to the popularity of positivism amongst the legal scholars of the 19<sup>th</sup> century, the central tenet of which held that only states could create binding law, and that international law, therefore, was based simply on the consent of those states to enter into agreements or treaties with each other. “ If, in conformity with the positivist teaching, the will of the state is the sole source of its obligations, then it is impossible to concede that the existing states can have fresh duties thrust upon them as a result of the emergence of a politically organized community which they are henceforth bound to recognize as a state.”<sup>32</sup> This he explained, was the primary flaw with the Constitutive school of thought.

The declaratory school had a serious problem as well, according to Lauterpacht. “To say therefore, that the granting of recognition to a new government is a matter of discretion unfettered by legal principles is to maintain that, also in this matter, the line dividing law and arbitrariness is altogether illusory.”<sup>33</sup>

Lauterpacht proposed a doctrine that would essentially reconcile the two competing theories and combine elements of both into a unified whole. In his book, he expounds these key elements: “Existing states are under the duty to grant recognition. In the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfill that function in their capacity as organs of international law.”<sup>34</sup> Although this means that the act of recognition is essentially declaratory, it does not follow that states can exercise this right in an altogether subjective manner, without consideration for international legal norms of statehood. “Recognition is thus declaratory of an existing

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<sup>32</sup> *Ibid.* at 2.

<sup>33</sup> *Ibid.* at 5.

<sup>34</sup> *Ibid.*

fact, such declaration, made in impartial fulfillment of a legal duty, is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood.”<sup>35</sup> These norms only exist and are influential insofar as they comprise the bedrock principles of international law expressly agreed upon by the international community or by the entity seeking recognition. “These principles are believed to have been accepted by the preponderant practice of States. They are also considered to represent rules of conduct most consistent with the fundamental requirements of international law conceived as a system of law.”<sup>36</sup>

As important as this doctrine was in its implications for international law and relations between states Lauterpacht’s dream of it becoming universal and binding on all states, was never fully realized, and subsequent conceptions of the law of recognition have, in many cases, abandoned it in favour of less ambitious doctrines. Although Malcolm Shaw praised the doctrine as “an ingenious bid to reconcile the legal elements in a coherent theory.”<sup>37</sup>, he also criticizes it for failing to take into account the often realist nature of international relations. “It ignores the political aspects and functions of recognition, that is, its use as a method of demonstrating or withholding support from a particular government or new community.”<sup>38</sup> Shaw asks the question: If there is a duty to recognize a new state, as Lauterpacht envisages, would the new state in question have a right to demand such recognition from states that were, for whatever reason, reluctant to grant them this?<sup>39</sup> Clearly, as history has shown us on countless occasions, states have rarely adopted this approach and will often refuse or grant recognition based on their

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<sup>35</sup> *Ibid.* at 6.

<sup>36</sup> *Ibid.*

<sup>37</sup> Shaw, *supra* note 5 at 373.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

national interests rather than any legal obligation. This view is supported by contemporary jurists John Dugard and David Raic in their critique of Lauterpacht's theory. "States do not regard themselves as being under a legal duty to recognize entities as states once they comply with the requirements of statehood."<sup>40</sup>

Lauterpacht goes into considerable detail regarding the declaratory vs. constitutive debate. Although not the first jurist to do so, his attempts to shed light on the nuances of these competing positions are, for the most part, very useful and still, to some extent, inform the ongoing debate between scholars as to which one best reflects the reality of recognition in international relations. Lauterpacht examines the history and evolution of both schools, and comes to several conclusions about them. As regards the constitutive school, he sees it as being intimately connected to the positivist paradigm of international law. "It was natural that the view commended itself to those wedded to the conception of international law as a loose 'law of coordination' based on agreements as distinguished from the overriding command of superior law."<sup>41</sup> This is contradicted by the declaratory theory, which holds that the state exists independently whether or not it has been recognized by the international community. In Lauterpacht's definition "A State exists as a subject of international law...as soon as it 'exists' as a fact, i.e. as soon as it fulfills the conditions of statehood as laid down in international law. Recognition merely declares the existence of this fact."<sup>42</sup> The theory is riddled with contradictions and flaws, according to Lauterpacht's analysis, not the least of which is its total incompatibility with the actual practice of courts and governments. Consider this example given by him to

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<sup>40</sup> John Dugard & David Raic, "The role of recognition in the law and practice of secession", Marcelo Kohen ed., *Secession: International Perspectives* (Cambridge, Cambridge University Press, 2006) at 98.

<sup>41</sup> Lauterpacht, *supra* see note 29 at 38.

<sup>42</sup> *Ibid.* at 41

illustrate this disconnect between theory and reality in the declaratory contention that the courts treat States prior to recognition, the same way they treat them afterward. This is patently false, as he points out “English and American courts have been consistent in this attitude to the point not only of refusing to admit the validity of acts of unrecognized States, but also of continuing to apply the law of the parent state...”<sup>43</sup>. There are many cases that support this claim. One such case is the Fijian land claims decisions of the late 19<sup>th</sup> century British Courts. This colorful and extremely obscure case involved an illegitimate government being set up in the Islands of Fiji by rogue British colonists. The ostensible head of state was a native king named Thakombau, who was in reality simply a pawn of the colonists. Despite the Kingdom’s claim to be a sovereign nation, the British Law officers declared that “...the British subjects in question should not be accepted as subjects of the new State, not yet duly recognize, and that ‘Her majesty’s government may interfere with the acts and engagements of British subjects within Fiji and may declare certain acts and engagements to be legal or illegal in the case of British subjects within Fiji.”<sup>44</sup>

Furthermore, Lauterpacht maintains that the sovereignty of the parent state will continue to be respected by the courts so long as it remains possible for it to exercise that sovereignty over the secessionist entity in question. He then gives several examples of states that were recognized prematurely, that is to say before they were ready for statehood (the Confederacy during the American Civil war), or because they lacked some of the major elements of statehood ( e.g. the puppet state of Manchukuo). “ The question is: Did it (Manchukuo) exist as a state independent of other states? It is unhelpful to say

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<sup>43</sup> *Ibid.* at 44

<sup>44</sup> *Ibid.* as quoted in Lauterpacht, at 49

that Manchukuo existed as a state independently of recognition. For the prior question must be answered, whether it 'existed' as a state in the meaning of international law."<sup>45</sup>

In his judgment, the more convincing of the two schools of thought by far is the Constitutive. "...the constitutive view is here considered to be in accordance with the practice of States and sound legal principles"<sup>46</sup> However, his support for the theory is qualified in a few significant ways. He outlines all the key criticisms of the theory: for example, there is the seemingly arbitrary nature of the constitutive position. It has been noted that without any consensus on what should legally constitute a state and under what circumstances that state should receive recognition, the decision is often made by a particular state on the basis of their national interest or some political consideration. He is quite aware that allowing states to determine such matters will almost always produce mixed results, and that the ideal would be some kind of a neutral international organization with the authority to impose its judgment on the international community. However, in the absence of such an organization, the function must be performed by individual states. The only solution, in his view, is to encourage the adoption of legal standards by all members of the international community so that their behavior *vis-a-vis* new states can become more consistent. "...once recognition is conceived not as a subject to the vicissitudes of political bargaining and concession but as an impartial ascertainment of facts in accordance with the international law, the likelihood of diverging findings is substantially diminished."<sup>47</sup>

In the final analysis, Lauterpacht is convinced that the Constitutive theory will prevail over the Declaratory that he harshly dismisses as "oversimplified and devoid of

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<sup>45</sup> *Ibid.* at 47

<sup>46</sup> *Ibid.* at 52

<sup>47</sup> *Ibid.* at 58

usefulness, and that its criticism of the constitutive view prove, on analysis, to be without foundation.”<sup>48</sup> But he is not altogether taken with the orthodox Constitutive theory either. He sees that the doctrine can be abused and manipulated by states “so long as it is felt that recognition is an act of mere policy, a bargain, or a concession of grace on the part of the recognizing State.”<sup>49</sup> What he proposes is that states abandon this *ad hoc* approach to the question of recognition that, he claims, leads to a highly subjective and nationalistic formulation of policy on recognizing states. Instead he favours a universal legal duty that all states would perform in more or less the same way and would be based on certain legal principles that would serve as the basis of their recognition. “Once we have assimilated the idea that recognition is not primarily a manifestation of national policy but the fulfillment of an international duty, we shall have removed the principal objection to the acceptance of the view that recognition marks the rise of international rights and duties of the state.”<sup>50</sup> Here his thinking represents a radical departure from the consensus on the subject amongst the jurists of his day, a fact that he himself acknowledges in his book in which he states: “The majority, though not a large one, of writers deny the legal nature of the act of recognition of States.”<sup>51</sup>

If Lauterpacht’s views were controversial amongst his contemporaries, they are arguably even more controversial today. In one of his books, James Crawford provides a good critique of Lauterpacht’s doctrine, in particular his support of Constitutive theory, albeit a unique version of it. He praises Lauterpacht for his attempts to separate constitutive theory from positivism. “Lauterpacht, who was not a positivist, was one of

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<sup>48</sup> *Ibid.* at 61

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* at 63

<sup>51</sup> *Ibid.*

the more subtle and persuasive proponents of a form of the constitutive position today.”<sup>52</sup> However, he then goes on to say that such an argument is not particularly relevant in the context of modern international law. This is the case for several reasons. Firstly “it could not be contended that the views of particular States as to such matters are ‘constitutive’ or conclusive.”<sup>53</sup> Secondly, Crawford points out that, if one accepts the logic of the constitutive doctrine, it is difficult to imagine a case of recognition that would be, for whatever reason, invalid. Evidently, Lauterpacht himself was not able to resolve this discrepancy. “Lauterpacht himself, in at least one place, allowed the possibility of an invalid act of recognition.”<sup>54</sup> Thirdly, on a more philosophical note, there is the element of relativism in the constitutivist’s position. As the great positivist Hans Kelsen said “the legal existence of the state...has a relative character. A state exists legally only in relation to other states, there is no such thing as an absolute existence.”<sup>55</sup> Lauterpacht addressed this issue in his work, and was in agreement as to its undesirability, but was unable in the end to overcome it. As Crawford argues in his book “if, a central feature of the constitutive position is open to such criticism, the position itself must be regarded as questionable.”<sup>56</sup> Finally, Crawford says that the doctrine being advocated by Lauterpacht is supposedly based on the reality of State practice with respect to recognition, but this is simply not the case. “State practice demonstrates neither acceptance of a duty to recognize, nor a consistent constitutive view of recognition.”<sup>57</sup> Crawford’s conclusion is just the opposite of Lauterpacht’s. He feels that the declaratory

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<sup>52</sup> James Crawford, *Creation of States in International Law* (New York, Oxford University Press, 2006) at 17

<sup>53</sup> *Ibid.* at 18

<sup>54</sup> *Ibid.* at 19

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* at 19-20

<sup>57</sup> *Ibid.* at 20

theory is now the dominant school of thought in international relations. “ Recognition is increasingly intended and taken as an act, if not of political approval, at least of political accommodation.”<sup>58</sup> Although he declares the strict constitutive position to be irrelevant he also has reservations about the declaratory theory that denies the importance of recognition in the process of becoming a state and he cautions that this preference for the declaratory theory is not by any means the final word on the subject. “The tentative conclusion is that the international status of a State ‘subject to international law’ is, in principle, independent of recognition”<sup>59</sup> This is based on the assumption that there exists in international law some norms as to what constitutes statehood. If these norms did not exist then Crawford would be forced to accept that States are the ultimate arbiter of the question. “If there are no such criteria,...then recognition must be in practice discretionary, as well as determinative, and the constitutive position will have returned, as it were, by the back door.”<sup>60</sup>

Lauterpacht’s dream was to one day see what he referred to as the “collectivization” of recognition, so that the matter would no longer be decided by states on an *ad hoc* basis. He felt this was the only means to effectively eliminate the subjective element in the act of recognition and the constitutive paradox. “The solution (would be)...transferring that function to an international organ not impeded by a conflict between interest and duty. An innovation of this nature would also abolish the glaring anomaly of a community existing as a State in relation to some but not to other states.”<sup>61</sup> However, he realized that the success of such an enterprise presupposed a level of

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<sup>58</sup> *Ibid.* at 23

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Lauterpacht, *supra* note 29 at 67.

international co-operation and integration which never materialized in his lifetime and arguably, still hasn't been achieved today. He wrote that the collectivization of recognition "would be possible only if the international organization were both universal and compulsory, i.e. if it were an organization to which, by a sovereign act of international legislation, all States would be made to adhere and from which there could be neither withdrawal nor expulsion."<sup>62</sup> Although Lauterpacht was aware, of course, of the U.N., but he dismissed its capacity to provide such a mechanism, based on the fact that there was no such provision in its charter for this purpose. Indeed, Shaw notes in his study of recognition that membership in the U.N. may give an entity a great degree of credibility as a state, but that ultimately the matter of recognition is still left to individual member states to decide.

However, there are those who disagree with Shaw's dismissal of the U.N.'s attempts to create a consensus amongst its members on the question of recognition. Among them is jurist David Lloyd, who proposes that, even though no law of recognition exists *per se*, "a consensus of state practice has started to emerge. Statehood and the ideals of the U.N. Charter are beginning to re-emerge as the basis for U.N. decisions to recognize and to admit states."<sup>63</sup> He stresses that the U.N. recognition is by far the most important kind of recognition in the international community. According to Lloyd's theory, the end of the Cold War has ushered in a new era of international relations which has, to some extent, seen the imposing of the norms enshrined in the U.N. Charter on emerging states. These norms, which must be met in order for an entity seeking membership to the U.N. to be accepted, are the following: 1) The applicant must be a

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<sup>62</sup> *Ibid.* at 68.

<sup>63</sup> David Lloyd, "Succession, and State Membership in the United Nations" (1993-94) 26 N.Y.U. J. Int'l. & Pol. 761 at 763.

state; 2) the applicant must be peaceful; 3) the applicant must respect the obligations of the Charter; 4) Be able to fulfill those obligations; 5) they must possess the will to discharge these obligations. That having been said, Lloyd argues that, in effect, there are only two criteria that matter: “in practice there are only two criteria for admission to the United Nations: a prospective member (1) must be a state; and (2) must abide by the U.N. Charter.”<sup>64</sup> Since the end of the Cold War, legal norms concerned with human rights and self-determination have gained currency in the international system and, at least as far as U.N. membership is concerned, take precedence over political considerations in many cases. “The near-universal applicability of the Charter’s criteria is an indication of an emerging rule of international law. In fact, legal criteria are now seen as necessary conditions for the recognition of both secessionist and successionist entities by the United Nations.”<sup>65</sup> Furthermore, in the case of “secessionist entities”(I use the term preferred by Lloyd himself) the recognition of the U.N. is absolutely vital to their acceptance by the international community. “a successful struggle for independence is crowned with recognition by the membership in the United Nations for the new states, even if some individual states refuses to recognize its existence.”<sup>66</sup>

But other forms of collective recognition have been established by other organizations and have been applied to certain cases with some success. The prime example of this (and one I will be examining in greater detail later in this chapter) is the common position on recognition with respect to the new states of the former Yugoslavia adopted by the European Community. In 1991 the E.C adopted a declaration on Yugoslavia “in which the Community and its members states agreed to recognize the

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<sup>64</sup> *Ibid.* at 771.

<sup>65</sup> *Ibid.* at 774.

<sup>66</sup> *Ibid.* at 784.

Yugoslav republics fulfilling certain conditions.”<sup>67</sup> As we shall see, these conditions weren’t necessarily respected by the new states applying for recognition. Nor, ironically, for that matter, were they respected by the member states of the E.C. entirely. The results of this attempt at collective recognition, therefore, were rather mixed.

### Section 2.2: Case studies in recognition

In this section I look at the case studies that are most relevant to the question secession. The cases are all quite different in terms of their facts and outcomes, but they all share at least one thing in common: they were all studied by the Supreme Court of Canada, either directly in their judgment, or indirectly as part of the preliminary research made by the various scholars who helped prepare the submissions made by the parties to the case. These cases were all useful to the court in some way, whether it because they were similar to the hypothetical scenario of a unilateral declaration of independence by Quebec or because they could be contrasted with such a scenario. I begin this detailed study of the case of Rhodesia, which deals with the issues UDI, and collective non-recognition. I end this section with a look at the dissolution of the former Yugoslavia, including: Croatia, Bosnia Herzegovina and Macedonia. All of these cases deal with the issues of UDI, premature recognition and collective recognition.

In the history of collective non-recognition, no case is more infamous than that of the ill-fated Republic of Rhodesia. In his book on the subject of the recognition policies of the U.N., jurist John Dugard describes the evolution and eventual demise of this illegal state, from the perspective of the U.N. To give a brief summary of events: on November 1965 the minority white Government of Southern Rhodesia, under Ian Smith made a UDI

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<sup>67</sup> *Ibid.* at 375.

to the effect that it was an independent state. There was never any question as to the effectivity of the rogue state as “Rhodesia satisfied the traditional requirements of statehood contained in the Montevideo Convention of 1933, namely a permanent population, a defined territory, an effective government and the capacity to enter into relations with other states.”<sup>68</sup> Yet, remarkably, Rhodesia never received the recognition of any state in the international community. Not even South Africa, despite having a similarly racist regime in power at the time, formally recognized Rhodesia. This was owing to the extraordinarily effective campaign undertaken by the U.N. to isolate the rogue state and, consequently, bring about its collapse. It accomplished its objective by a variety of means including resolutions passed by the General Assembly and the Security Council. For instance, the General Assembly called upon “ all States...not to recognize any government in Southern Rhodesia which is not representative of the majority of the people.”<sup>69</sup> In 1970 the Security Council, in another resolution, demanded that all member states refrain from recognizing the Smith regime and reminded states of their legal obligation (Article 25 of the Charter) to respect the decisions of the Security Council. “ It is therefore clear that by 1970, if not earlier, Member States of the United Nations were legally obliged not to recognize either the state of Rhodesia or its government.”<sup>70</sup>

The support of the United Kingdom proved critical in the U.N. campaign. The U.N. had maintained throughout the crisis that Southern Rhodesia remained a British colony and was therefore subject to British law. The United Kingdom had been part of the international boycott from the beginning and its official position on Rhodesia was the following: “ Her Majesty’s government in the United Kingdom does not recognize

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<sup>68</sup> John Dugard, *Recognition And The United Nations* ( Cambridge: Grotius Publication Limited, 1987)at 90

<sup>69</sup> *Ibid.* at 92.

<sup>70</sup> *Ibid.* at 95.

Southern Rhodesia or Rhodesia as a State either *de facto* or *de jure*”.<sup>71</sup> This policy of withholding of recognition seems to have been based on the illegality of the government’s actions. The U.N.’s policy, however, was based on something altogether different. In a Resolution 1514(xv)<sup>72</sup>, which preceded the UDI made by the Rhodesian government, the U.N. outlined its vision for an independent Rhodesia. “ the General Assembly had spelt out its goals for the future of the non-self-governing territory of Southern Rhodesia: independence, on the basis of universal franchise, and the abolition of racial discrimination.”<sup>73</sup> Clearly, Ian Smith and his rogue regime had frustrated these goals. Hence, Rhodesia represents a watershed in the history of collective non-recognition at the U.N. which has subsequently been used as a precedent in other situations. “ Rhodesia established a clear precedent for the non-recognition as a state of an entity brought into being in violation of the norms contained in Resolution 1514(xv).”

<sup>74</sup> Some international jurists, such as James Crawford, have suggested that this example could also be interpreted as being a case that established a new norm of international law that has become a standard for recognition of new states. Crawford claims that “ It appears then that a new rule has come into existence, prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self-determination.”<sup>75</sup>

This view is echoed by jurist C.F. Fawcett when he contended that the traditional criteria for the recognition of a new state have changed. Recognition is increasingly based on such factors as respect for human rights and mass participation in the decision-making process through some form of democratic institution. The case of Rhodesia, demonstrates

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<sup>71</sup> *Ibid.*

<sup>72</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res1514(xv), UNGAOR, 16<sup>TH</sup> Sess., Suppl. No.16, UN Doc. A/4684 (1960).

<sup>73</sup> Dugard, *supra* note 68 at 96.

<sup>74</sup> *Ibid.* at 98.

<sup>75</sup> Crawford, *supra* note 52 at 106.

this to be true as it showed, in Fawcett's words: "This principle was affirmed in the case of Rhodesia by the virtually unanimous condemnation of the unilateral declaration of independence by the world community, and by the universal withholding of recognition of the new regime which was a consequence."<sup>76</sup> What these two jurists have in common, among other things, is an underlying idealistic interpretation of the Rhodesian crisis. As was demonstrated earlier (section 1.1), the Constructivist/idealist school of international relations emphasizes the processes by which norms are formed in international relations that are ultimately adopted by certain states and incorporated into their foreign policy maker's decisions and government institutions. This type of thinking, seems to underpin the argument made by both Crawford and Fawcett regarding the significance of the Rhodesian case.

Professor George Abi-Saab wrote a report for the *amicus* on the question of effectivity in international law, that touched briefly on the case of Rhodesia. On the one hand, he acknowledged that *jus cogens* principles can have some bearing on the matter of recognition of new states if for instance, as Rhodesia, a state is created by a process which discriminates systematically against the majority or an element of the population. "In these cases, third states, as well as international organizations, are under an obligation not to recognize the new state or enter into relations with it that involve such recognition or reinforce the continuation of its illegal existence."<sup>77</sup> On the other hand, Abi-Saab qualifies this by saying that the law can neither prevent nor enable the processes which lead to the creation of a state, although it can try to influence these processes using

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<sup>76</sup> *Ibid.* at 104.

<sup>77</sup> George Abi-Saab, "The effectivity required of an entity that declares its independence in order for it to be considered a state in international law" Anne Bayefsky ed., *Self Determination in International Law: Quebec and Lessons Learned.* (The Hague, Kluwer Law International, 1999) 69 at 71.

various means “of inducement or dissuasion, as for example, in encouraging the creation of an independent state in Namibia or in discouraging the existence of a racist state in Rhodesia”<sup>78</sup> In a subsequent article in a similar vein, Abi-Saab elaborates on this point. He hypothesizes that Rhodesia did in fact exist as a state, at least in a *de facto* sense, but that this was not in the end sufficient to compensate for the blatant illegality of its existence, and thus its demise was caused in part by its lack of legitimacy in the eyes of the international community.<sup>79</sup> Nevertheless, Abi-Saab claims that Rhodesia represents the exception to the rule in that it is a rare example where the international community took into account the lack of legitimacy of the new state when making a decision on whether to recognize or not. According to him, the general rule is that determining whether to recognize the existence of a state is a question of fact, rather than one of law. The law simply acknowledges, or doesn’t, the reality after the fact has materialized. Although Abi-Saab is willing to concede that in the event that the birth of a new state comes about in a democratic fashion then “the democratic character of that process may be a positive factor later on, conferring greater political legitimacy on the new State and thus reinforcing its legal existence and facilitating its rapid recognition by other States.”

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Examples of successful UDI that have been accepted by the international community are few and far between in the modern era and are a testament to the extraordinary difficulty of such a proposition under international law. One of the best known cases is that of Croatia. This was a complex case that involved a multiplicity of issues, including: collective recognition, premature recognition, and illegal secession.

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<sup>78</sup> *Ibid.* at 70.

<sup>79</sup> Saab, *supra* note 77 at 472.

<sup>80</sup> *Ibid.* at 473.

Without going into a detailed history of the events that culminated in the independence of Croatia, I shall look at some of the key events. Croatia first declared independence from Yugoslavia on the 25<sup>th</sup> of June 1991. In response, the central government, then under the control of an ultra nationalist Serbian party, ordered the army to quell the rebellion. At this time the European Community decided to intervene in the conflict. It offered to mediate the dispute in order to reach a peaceful settlement. As a result the Brioni accord was signed by the parties and, consequently, a moratorium on the declarations of independence was established thus allowing the parties time to negotiate an amended constitution with the aim of reforming the Yugoslavian state structure. However, it became clear that the parties were not adhering to the terms of the accord, and that Serbia and Montenegro, in particular were employing the national army and paramilitary groups to wage a campaign of ethnic cleansing against non-Serbs in Croatia. Because of this, Croatia revived its declaration of independence on the 8<sup>th</sup> of October 1991. Yet Croatia was not officially recognized as a state until 1992. What accounts for this delay? Dugard and Raic suspect that it was the rapidly changing situation in the U.S.S.R at the time, which the E.C. was monitoring closely. When the U.S.S.R. recognized the independence of the Baltic States, this was interpreted by many member states as the green light for the E.C. There was a consensus amongst the member states that some form of collective recognition mechanism was required. To that end, the E.C. published two declarations regarding a common recognition policy for member states. The first dealt with the end of the Cold War in Eastern Europe and the collapse of the Soviet Union. The second, dealt with the collapse of Yugoslavia. The Declaration on Yugoslavia<sup>81</sup> laid out the conditions for recognition that specified that the aspiring state

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<sup>81</sup> See the Declaration of Yugoslavia, *Documents of Summit Meetings in the past* ( July 7,1992), online: The

make its intentions known and that they accepted the Carrington convention that had been drafted during the Yugoslavian peace conference. The latter was a U.N. document which identified certain norms of international law and human rights, as being crucial preconditions to the recognition of any state by the E.C. It was also decided that the requests for recognition would be handled by the Badinter Arbitration Commission, a body that was set up initially with the mandate of drawing up a new constitution for Yugoslavia, but which ultimately evolved into a forum for the adjudication of disputes between various parties in the civil war in Yugoslavia. "the issue of recognition...was vital since with a commission set in place it would inevitably have to provide the lead on whether the new republics could be recognized as sovereign independent states and, based on this recognition, the entire nature of the conflict would be altered."<sup>82</sup>

The creation of a commission to handle the applications of aspiring states had the potential advantage of leading to the implementation of a common recognition policy. As we shall see, however, consensus amongst E.C. member states proved elusive. In the end, it is fair to say that, partly as a result of the pressure put on it by one of its most powerful members, the E.C. adopted a policy of recognition that diverged with that of the Arbitration Commission in a few key ways. This is best illustrated by the cases of Macedonia and Croatia. "(the)Commission advised that Croatia should first fulfill certain conditions concerning human and minority rights, amend its constitution accordingly, and respect these in practice. Regarding Macedonia...the Commission recommended its recognition. The E.C. did the opposite, clearly guided by political and not legal

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Ministry of Foreign Affairs of

Japan<[http://www.mofa.go.jp/policy/economy/summit/2000/past\\_summit/18/e18-c.html](http://www.mofa.go.jp/policy/economy/summit/2000/past_summit/18/e18-c.html)>.

<sup>82</sup> Joshua Castellino, Steve Allen, *Title To Territory In International Law: A Temporal Analysis* (Aldershot: Dartmouth Publishing Company, 2003) at 161.

considerations.”<sup>83</sup> This situation begs the question: what accounts for this tension between the Commission and the E.C.? The main obstacle to a common policy on the former Yugoslavian republics, seems to have been Germany’s sympathy towards the Croatian cause and, conversely, its antipathy towards the Serbian one. The German government was in favor of a quick recognition of Croatia to combat what it perceived as an expansionist and aggressive Serbian controlled central government. This however, was strongly opposed by the head of the Commission, Lord Carrington, who felt that such an action would undermine the fragile peace process it was struggling to foster amongst the parties, and result in the sabotage of any chance for a peaceful negotiated solution to the crisis in the Balkans. The actions of the German government had, in effect, deprived the Commission of one of its most effective bargaining chips in its negotiations: the granting of recognition by the E.C. Without this incentive, Croatia would have no reason to participate in a reformed Yugoslavian state.<sup>84</sup> Germany had not only upset those member states still supporting the Commission, but had also effectively reneged on its own promise to withhold recognition until the Commission had had a chance to broker some kind of settlement between the belligerents. Ironically, the German government seems to have been encouraged by the opinions of the Badinter Commission itself. In its first opinion, the Badinter Commission declared the Former Yugoslavia to be in the process of dissolution, rather than, as was asserted by the government of Yugoslavia, the illegal secession from the state by certain sub-national governments.<sup>85</sup> If Germany accepted the latter claim, then it would have been engaging in a clear violation of Yugoslavian

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<sup>83</sup> Melanie C. Greenburg, John Barton, Margaret McGuinness, eds., *Words Over War: Mediation and Arbitration to Prevent Deadly Conflict*.(Oxford, Rowman & Littlefield Publishers, INC.,2000) at 91.

<sup>84</sup> *Ibid.*

<sup>85</sup> See the verbatim reprint of the Commissions opinions in Castellino for more information. p.171.

sovereignty. If, however, it accepted the former claim, then the Yugoslavian state had ceased to exist and, therefore, its objections were immaterial.

On December 16, 1991, under pressure from the German government, the E.C. Foreign ministers met with the intention of laying down guidelines to be met by seceding entities in order to obtain recognition. The applicants were all invited to submit their applications before the deadline so as to give the Commission time to assess their claims and then decide whether to recognize them or not. However, Germany became impatient with the process and decided to go ahead with its plan to recognize Croatia and Slovenia unilaterally. In spite of this hasty recognition, the Commission found that Croatia had failed to meet the standards for statehood which the E.C. had imposed. In opinion number five it stated “Croatia did not meet fully the conditions for recognition laid down in the European Community Guidelines...since the Constitutional Act adopted by Croatia did not fully incorporate that required guarantees relating to human rights and minority rights.”<sup>86</sup> Nevertheless, the German government refused to repudiate its act of recognition on the grounds that the opinions of the Commission were not legally binding on member states of the E.C. The foreign minister issued a statement on the policy of his government, which stated, “Concurrent with the issuance of the Badinter Commission opinion regarding Croatia, proclaimed that it did not legally have a binding effect for EC member states, because it was device of arbitration and not international law.”<sup>87</sup>

In the case of Croatia, the recognition by the E.C. and its member states was arguably premature in many ways. This, however, did not prevent states from exercising their right of recognition. Shaw believes that the former Yugoslavian republics represent

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<sup>86</sup> Shaw, *supra* note 5 at 383.

<sup>87</sup> Greenburg, *supra* note 84 at 104

more of the exception to the general prohibition on premature recognition, rather than a legal norm. He maintains that the international community in this case, “was prepared to accept a loosening of the traditional criteria of statehood, so that essentially international recognition compensated for a lack of effectivity.”<sup>88</sup> However, other writers attach greater importance to this precedent. Patrick Dumberry, for instance, draws an analogy with an hypothetical independent Quebec that has achieved this through a UDI. He dismisses the jurists who claim that other states would be reluctant to recognize an independent Quebec. Citing the Yugoslavian example, he says that it “has shown, on the contrary, that third states have indeed recognized seceding entities prior to their recognition by the parent State.”<sup>89</sup> Similarly, he is skeptical about the argument that recognition of an independent Quebec prior to some sort of reconciliation with Canada, would somehow be a violation of the latter country’s sovereignty and territorial integrity. After all, the recognition of the former Yugoslavian republics was arguably premature “but this has not resulted in any claim by the Federal Republic of Yugoslavia against third states.”<sup>90</sup> Although one wonders how exactly a state that ceased to exist owing to its dissolution, would manage to make a claim against third party states that may have violated its sovereignty. What Dumberry’s fails to appreciate in his analysis is the distinction between dissolution and secession in the context of the former Yugoslavia and what implications this might have for a secessionist Quebec. This is a distinction that will be examined more thoroughly in chapter four.

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<sup>88</sup> Shaw, *supra* note 5 at 384.

<sup>89</sup> Patrick Dumberry, “Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada”, in Marcelo Kohen, ed., *Secession: International Law Perspectives* (Cambridge, Cambridge University Press, 2006) 416 at 442.

<sup>90</sup> *Ibid.*

As far as the U.N.'s position on the former Yugoslavian republics' attempts to gain independence is concerned, it was similar to that of the E.C. in that it emphasized certain norms of international law such as human rights and democracy. The case of Bosnia-Herzegovina illustrates this point perfectly. Again, this is not the place to discuss the historical details of the disintegration of the former Yugoslavia ,but, some historical context is necessary in order to understand the decision of the U.N. and E.C. regarding the status of Bosnia. The E.C. judgment did have an impact on the situation in Bosnia. "Upon recognition of Croatia's independence by the European Community , Bosnia faced a stark choice: either remain in Serb-dominated Yugoslavia or declare independence." <sup>91</sup> Some would argue that this was hardly a choice given the growing hostility and aggressiveness of the Serbian controlled army and its collaborators in Bosnia. Matters were, of course, aggravated greatly by the presence of a significant Serbian element in Bosnia (representing 33% of the population at the time) who the Bosnian Muslims and Croats feared would conspire with the central government against an independent Bosnia and give Milosevic the pretext he was looking for to invade the country. Sure enough, when matters came to a head, the Bosnian Serb members of the government, resigned in protest over the proposal to hold a referendum on independence for Bosnia. When the referendum finally materialized, the Serbian community organized a boycott, but a majority (64.4%) of Bosnian voters participated, and of these, the overwhelming majority (99.7%) expressed their support for independence.

In his book on self-determination in international law, jurist Antonio Cassese analyses the case of the former Yugoslavia and comes to the conclusion that it differed in

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<sup>91</sup> Marie Joelle Zahar, "Republic Srpska", in Tozun Bachel, Barry Bartmann & Henry Srebrnik, eds., *De-facto States: The Quest for Sovereignty* (London, Routledge, 2004) 32 at 34.

a number of significant ways from other cases of self-determination and secession in international law. One such difference was the insistence of the E.C. on the use of referendums as a means of consulting the population and legitimizing the pursuit of independence internationally. Furthermore, the E.C. was adamant that this referendum process must meet international legal standards for democratic participation and respect for the rule of law. It follows that the results of a plebiscite held by the in 1991 which had asked the people whether they wanted to form a Serbian republic that would secede from Bosnia-Herzegovina and the subsequent attempt to declare independence on the basis of this flawed referendum mandate, were rejected by the Badinter Commission on the grounds that “the will of the populations of Bosnia-Herzegovina as a sovereign and independent State could be regarded as fully established.”<sup>92</sup> According to Cassese, this demonstrates that the referendum has become established as a new criteria for international recognition that entities aspiring to statehood can use in order to achieve their goal. “the Arbitration Committee regarded the holding of an internationally monitored referendum involving the whole population as an indispensable element for the granting of international recognition”<sup>93</sup>

In his article on the subject of U.N. recognition, Professor David Lloyd looks at the cases of Bosnian and Macedonian secession in order to establish his thesis that increasingly within the U.N. there is a legal basis for recognition that is predicated on two main criteria: “they must be ‘states’ and they must be willing to abide by the U.N. Charter.”<sup>94</sup> He contends that other members of the Yugoslavian federation gained acceptance more easily because most of the traditional elements of statehood, particularly

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Lloyd, *supra* note 63 at 791.

that of effective government, were already in place at the time of recognition. Whereas “There were serious doubts as to the effectiveness of Bosnia-Hersogovina’s government, one of the essential elements of statehood.”<sup>95</sup> Despite the lack of support from the Yugoslavian Arbitration Committee, and a lack of clearly defined borders, the U.N. recognized Bosnia and granted it membership in 1992. There were two main reasons for this decision: firstly, Bosnia controlled some of its territory, and there was no requirement that a state control all of its territory as a condition for recognition. Secondly, the Security Council considered recognition to be the best way of dealing with the deteriorating human rights situation in the region.<sup>96</sup> “The principles of the U.N. Charter, particularly those relating to human rights and non-aggression, were seen as best served by recognizing Bosnian independence. Bosnia had promised to respect those principles, and needed protection from those who had not.”<sup>97</sup>

In the case of Macedonia, by contrast, the Arbitration Commission found that the criteria for statehood had been satisfied and recommended its recognition by the E.C.<sup>98</sup> However, objections from Greece, prevented this from happening. But the U.N. had no such compunction about recognition. “After examining all the evidence and specifically finding that Macedonia fulfilled the criteria laid down in the Charter, the Security Council recommended the country’s admittance to the United Nations.”<sup>99</sup> This represents, in Lloyd’s words “...a triumph of international law...”<sup>100</sup> In light of this decision and similar examples, he claims that it is now possible to speak of the emergence of standard legal criteria for recognition by the United Nations, namely: “both

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<sup>95</sup> *Ibid.* at 789.

<sup>96</sup> *Ibid.* at 790.

<sup>97</sup> *Ibid.*

<sup>98</sup> Metta Spencer ed., *The Lessons of Yugoslavia*. (New York, Elsevier Science Inc., 2000) at 398.

<sup>99</sup> Lloyd, *supra* note 117 at 791.

<sup>100</sup> *Ibid.*

the new state and the recognition of that state must be consistent with the principles of the Charter.”<sup>101</sup>

This stressing of certain norms of international law, the reader may recall from my discussion in chapter 1, is one of the central elements of the Constructivist/idealist school of thought. If one reads Lloyd’s words carefully, it is not difficult to detect elements of constructivist theory and a tacit rejection of the realist paradigm in his argument about the new eligibility criteria for secessionist states. For instance, Lloyd states near the beginning of the article that “most analysts feel that decisions to recognize emerging states are entirely political in nature, governed by pragmatism rather than law...this note draws a contrary conclusion.”<sup>102</sup> Although, he does not explicitly characterize the position as a realist one, it is an obvious inference for a reader familiar with the principles of realism to draw. As we saw earlier in chapter 1, one of the fundamental precepts of the realist school, is the notion that the international system is not governed by law, but rather it is governed by states. Thus, by extension, recognition of new states is not a matter of law, but simply a question of national interest to be defined by each individual state. If, on the other hand, I examine Lloyd’s views on the role played by the U.N. in matters of recognition, I can find in the subtext a preference for the Constructivist theory of international relations. Consider this statement made by him “Given the importance of U.N. membership, it is appropriate that the dawn of a new internationalism and the reappearance of an effective United Nations has begun to manifest itself in the re-emergence...of effective criteria for recognition decision.”<sup>103</sup>

The reader may recall that in an earlier chapter (1.1), in my study of Constructivism, I

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<sup>101</sup> *Ibid.* at 795.

<sup>102</sup> *Ibid.* at 761.

<sup>103</sup> *Ibid.* at 796.

observed that one of its key tenets is its faith in the ability of multilateral institutions (e.g. U.N.) to provide the mechanisms for conflict resolution between states. Indeed, this is their solution to the problem posed by the realists regarding the anarchic nature of international relations. Furthermore, the leadership, especially of a secessionist entity, will often conform to what they are told are the established norms of state behavior if they believe this will lead ultimately to the approval and recognition they are seeking. Therefore, it could be said, and Lloyd would no doubt agree, that this was certainly the case for both case studies raised in Lloyd's article pertaining to the U.N. recognition policy in the Yugoslavian context.

### Section 2.3: recognition in the context of the Supreme Court Reference: re Secession of Quebec

In its landmark advisory opinion on the right of Quebec to secede from Canada, the Supreme Court of Canada put considerable emphasis on the question of recognition in international law. To such an extent that it seemed to allow that ultimately, in the event of a UDI by Quebec, recognition by third party states might be the deciding factor. "The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition."<sup>104</sup> Reflected in this statement, is the influence of the Constitutive theory of recognition with its claim that states will acquire legal personality through their interactions with other states rather than achieving their legitimacy through the process by which it effected secession.

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<sup>104</sup> *Reference Re: Secession of Quebec*, 1998 S.C.J. 61, [1998] 2 S.C.R. 217. at para. 106.

But the Supreme Court also recognized that although recognition is, from a strictly theoretical point of view, not essential to the legitimacy of an aspiring state, the viability of the state in question would always be in doubt if no form of recognition were ever granted by the international community. The Court was not content to merely leave the question open to interpretation as to what would happen internationally in the event of Quebec separating. It also attempted to demonstrate how the events, both political and legal, of a UDI might influence world opinion with regards to an independent Quebec, and how that might ultimately determine the way in which foreign governments would react to this hypothetical situation. To this end, it employed arguments made by jurists both before and after the Reference. Similarly, the *amicus* constructed an argument based mainly on the work of academic writers, some that actually worked on the case and others who did not.

In one of the Court's more controversial findings, it was stated that the duty to negotiate, (a new legal principle based on a fairly creative reading of the Canadian constitution by the Court,) would oblige a secessionist government in Quebec to undertake negotiations with the federal government of Canada in order to hammer out an equitable settlement to any outstanding grievances the two parties might have, as well as to ensure a peaceful transition from province to statehood. A failure to do this on the part of a sovereign Quebec would "...undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community... In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane."<sup>105</sup> However, the Court acknowledged that the *amicus*' position, especially as regards the principle of effectivity (see chapter 3), was not

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<sup>105</sup> *Ibid* at para. 103.

without legal merit. And as far as the question of international recognition is concerned, the Court was forced to admit that the matter was not only beyond the scope of this case but was also beyond the power of the government of Canada to resolve. “this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by international community.”<sup>106</sup> This was only a partial concession to the *Amicus*, as the Court made it clear that it favored a very legalistic conception of international relations in terms of the right of third party states to grant recognition. According to the Court’s interpretation of international law, recognition was now subject to certain legal norms. These norms have been enumerated in such legal documents as the European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, and include such things as the legitimacy of the process by which the statehood is being achieved as well as customary international legal principles, such as the right to self-determination. “foreign states may also take into account their view as to the existence of a right self-determination on the part of the population of the putative state”<sup>107</sup>, as well as the domestic legal framework from which the new state has emerged. “a counterpart domestic evaluation, namely, an examination of the legality of the secession according to the law of state from which the territorial unit purports to have seceded.”<sup>108</sup> If a violation of these norms were established, then the entity in question would significantly reduce its chances of obtaining recognition. Conversely, if that entity were to comply with these

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<sup>106</sup> *Ibid.* at para. 106.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

norms, its chance of successfully becoming a recognized member of the international community would greatly improve.

Therefore, it is fair to say that according to the Court and its supporters at least, recognition in international law has evolved a great deal since the early 20<sup>th</sup> century when Lauterpacht first attempted to frame the concept in legal terms. Whereas Lauterpacht could only dream of collective recognition policies such as the UN boycott of Rhodesia and the E.C.'s collective response to the civil war in the former Yugoslavia, these examples demonstrate that many of the ideas that he advocated have come to pass since his time. Although it is true, as the *amicus* and, indeed, the Supreme Court have shown, that recognition is still subject to the political and realist considerations of states and that this may, in some cases, result in an illegal secession being legally recognized after the fact, it is simply not true to claim that international law plays no role in the process of recognizing new states. In fact, recognition seems to be increasingly regulated by international legal norms such as self-determination and respect for the rule of law.

### **Chapter 3: Effectivity**

In the last chapter I examined the concept of recognition in the theoretical context (relying mainly on the definition provided by the founder of the study of recognition in international law, Hersch Lauterpacht) and in the practical applications in the real world. I then looked at the way the concept influenced the judgment of the Supreme Court of Canada. It was at that point in the thesis that I first saw the way in which the concept relates to that of effectivity and how this relationship served as the basis of much of the *amicus*' argument in the Reference. But in order to understand the way in which the concept was used in the context of Quebec secession and, in particular, how it relates to

our discussion of recognition, I must first understand what effectivity means, in both a theoretical and practical sense, in the context of international law more generally.

In this first section I shall examine the theories, doctrines and legal principles that relate to effectivity in a theoretical sense. Firstly, I shall briefly discuss territorial sovereignty, followed by a detailed look at the related concept of title. Secondly, I shall study the complex relationship between territoriality as regards boundary disputes between states (e.g. *Burkina Faso v. Mali*) and within states (e.g. *Yugoslavia*), and the international legal doctrine of *uti possidetis*.

In the second section, I shall examine the principle in effectivity as it has actually been in applied in the context of State practice and the courts (e.g. *Rhodesia*). I will examine in some detail the ancient concept of *uti possidetis* and how it has been applied in the context of modern international law, particularly in the case of the former *Yugoslavia*. The latter will be the focus of much analysis as it provided a controversial precedent, in the form of the “Badinter principle”, which subsequently influenced the Supreme Court in the *Reference*. Finally, I will look at the matter of effective government with a brief look at the history and relevance of this concept (e.g. *Tinoco arbitration*).

In the final section, I shall begin by discussing the studies (i.e. government commissions) that preceded the reference on secession and provided material for the cases made by both sides, and in particular by the *amicus*. Then I shall discuss the submissions made to both the *amicus* and the Attorney General by a variety of international legal experts and concerned parties, in the period leading up to the hearing. We will then analyze the questions and answers given during the actual proceedings by

the concerned parties. Finally, I shall conclude our discussion on *uti possidetis* by examining the findings of the Court as well as looking at the criticism of those findings.

It will be demonstrated through the discussion of the theory, case studies and opinions of the legal experts who contributed to the *Reference* that the case for effectivity, while strong in some respects, does not provide a basis for the exercise of a UDI by Quebec in international law. Furthermore, it will not guarantee that Quebec, should it separate from Canada in this manner, will receive the recognition of the international community. The argument of effectivity is, to a large extent, counter acted by the evolving normative criteria for the recognition of states in international law. I will show that the way in which the *amicus* and its collaborators conceived of effectivity is, in some ways, a reflection of their tacit support of the realist and declaratory perspectives on the question of the relevance of international law and, therefore, is contrary to the trend towards a more idealistic/constructivist approach in international relations generally, and recognition in particular.

### Section 3.1: The main theories doctrines and principles relating to the concept of effectivity

In his comprehensive study of international law, Malcolm Shaw defines territorial sovereignty in the following terms: “territorial sovereignty in terms of the existence of rights over territory rather than the independence of the state itself or the relation of persons to persons.”<sup>109</sup> According to Shaw’s definition the concept contains both positive and negative aspects. In the former category is the notion of a state possessing exclusive

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<sup>109</sup> Shaw, *supra* note 5 at 411.

sovereignty over its own territory. In the case of the latter, there is the notion that states must respect the territorial sovereignty of other states in the international system.

Central to the concept of territorial sovereignty is the question of title. “ This term relates to both factual and legal conditions under which territory is deemed to belong to one particular authority or another.”<sup>110</sup> More often than not, this title will have to deal with competing titles from other states and, therefore, is not as straightforward as a dispute involving title might be in domestic law. However, title in international law is rarely absolute, and generally will trump other claims to the territory in question, if it is, relatively speaking, the strongest claim made. These claims take many forms in international law. Firstly, they may be over the status of a country. Secondly, they may be disputes concerning borders between states. Thirdly, they may be based on the traditional grounds of occupation or prescription. Fourthly, we have a more recent category of claims such as those that involve self-determination, contiguity, historical grievances, or economic matters<sup>111</sup> (many of these types of claims will be examined in greater detail later in the chapter).

In Shaw’s overview of the topic, he divides the exercise of effective control into two broad categories: occupation and prescription. The former is a method of acquiring territory that applies only to *terra nullius* (territory that can not be claimed by any state under international law, e.g. the high seas) and was extensively employed in cases involving disputes between rival colonizers. “ Occupation, both in the normal sense of

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<sup>110</sup> *Ibid.* at 412.

<sup>111</sup> *Ibid.* at 413.

the word and in its legal meaning, was often preceded by the discovery, that is the realization of the existence of a particular piece of land.”<sup>112</sup>

The second element of effectivity is prescription, and is defined by Shaw the following way: “Prescription is a mode of establishing title to territory which is not *terra nullius* and which has been obtained either unlawfully or in circumstances wherein the legality of the acquisition cannot be demonstrated.”<sup>113</sup> Prescription differs from occupation in one significant way: it applies only to a territory that has previously belonged to another state. However, Shaw points out that in reality this distinction is often immaterial “since sovereignty over an area may lapse and give rise to doubts whether an abandonment has taken place, rendering the territory *terra nullius*.”<sup>114</sup> This is evidenced by decisions made by international courts and tribunals on disputes involving opposing claims made by certain countries with respect to the same territory.<sup>115</sup> In such cases “judgment was given not on the basis of clearly defined categories of occupation or prescription, but rather in light of the balance of competing state activities.”<sup>116</sup> The essential point for present purposes here, in any case, is that the possession of the territory in the case of prescription, must involve at least the implied consent of the former sovereign. “necessity for the possession to be peaceful and uninterrupted, and reflects the vital point that prescription rests upon the implied consent of the former sovereign to the new state of affairs. This means that protests by the dispossessed sovereign may completely block any prescriptive claim.”<sup>117</sup>

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<sup>112</sup> *Ibid.* at 412-13.

<sup>113</sup> *Ibid.* at 426.

<sup>114</sup> *Ibid.*

<sup>115</sup> *The Minquiers and Ecrehos Case*( United Kingdom v. France) “ Pleadings, Oral arguments , documents” ( 27 November, 1951) [1953] I.C.J. Pleadings (Vol.1) 14.

<sup>116</sup> Shaw, *supra* note 5 at 428.

<sup>117</sup> *Ibid.*, at 427.

Effectivity is often based on the ability of a state to prove that it has exercised sovereign activities over a particular territory. As Shaw maintains in his study of the doctrine “the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterion of territorial sovereignty.”<sup>118</sup> However, the exercise of effective control is not necessarily based only on the possession and occupation of the territory being claimed.<sup>119</sup> Proving that it has absolute title to the territory in question can be very difficult indeed for a state and often will involve establishing its claim to a disputed territory to which other states have credible claims as well. In the landmark case of the *Island of Palmas*, both the U.S. and the Netherlands agreed to submit to the judgment of an arbitrator (Max Huber) with respect to which country had a better claim to a disputed island in the Pacific.<sup>120</sup> In the end, the decision of the arbitrator was based on effectivity. “the American claims derived from the Spanish discovery were not effective to found title. Huber declared that the Netherlands possessed sovereignty on the basis of ‘the actual continuous and peaceful display of state functions’”<sup>121</sup> The relationship between legal title to territory and effectivity is a complex one. Shaw maintains that title will trump effectivity in cases where the former contradicts the latter. “*effectivites* then play an essential role in showing how the title is interpreted in practice. Accordingly, examples of state practice may confirm or complete but not contradict legal title established, for example, by boundary treaties.”<sup>122</sup>

Jurist James Crawford has written a monumental work on the creation of states. Therefore, when the federal government of Canada required expert opinion in order to

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<sup>118</sup> *Ibid.*, at 432.

<sup>119</sup> *Ibid.*

<sup>120</sup> see *Island of Las Palmas Case(or Miangas)*(1928), (Permanent Court Arbitration), (Arbitrator: Max Huber).

<sup>121</sup> Shaw, *supra* note 5 at 433.

<sup>122</sup> *Ibid.* at 436.

make its case to the Supreme Court, it turned to him for advice. Much of Crawford's previous work was to prove extremely useful in his writings about Quebec secession. In his book, for example, Crawford examines the traditional criteria for statehood and finds that it ultimately rests on the question of effectivity. "It has been seen that the traditional criteria for statehood were based entirely on the principle of effectiveness."<sup>123</sup> This, he believes, is an outdated notion not consistent with the practice of states in modern international law. He cites the examples of Rhodesia (case study in section 3.2) and Taiwan as proof of this claim. "separate entities have existed which have, universally, been agreed not to be states...non-effective entities have also been generally regarded as being, or continuing to be, States..."<sup>124</sup>

Another argument that Crawford addresses in his book, is the realist notion that the law will become irrelevant if it challenges the validity of effective states. According to Crawford, just the opposite is true. In the case of Rhodesia, for example, "international law risks being ineffective precisely if it does not challenge effective but illegal situations."<sup>125</sup> Moreover, he maintains that "non-recognition is...both obligatory and a result of lack of the status of the entity in question."<sup>126</sup> In a similar vein, proponents of the principle of effectivity, often make the realist argument that this would result in a situation where effective states would exist in a kind of legal limbo, and that international law would thus not apply to them. This does not impress Crawford, who points out that international law applies equally to *de facto* illegal entities. "The argument that no such

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<sup>123</sup> Crawford, *supra* note 52 at 77.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.* at 78.

<sup>126</sup> *Ibid.*

rules apply smacks of the old view that international law can only apply to States.”<sup>127</sup> Crawford believes that *jus cogens* norms of international law, as defined by article 53 of the Vienna Convention<sup>128</sup>, which was primarily concerned with treaties, have gone beyond treaty law and now extend to other areas of international law, including Statehood. This gives rise to an important question of international law: is it conceivable that a violation of international law, or even domestic law, by an entity claiming statehood is so grave that other states may refuse to recognize it on these grounds and treat it as a pariah? Crawford, has his doubts that this question can be answered in the affirmative at this stage of international law’s evolution. However, he diminishes the significance of effectivity saying, “ No doubt the principle of effectiveness remains the dominant criterion, but practice does not support the view that it is the only one.”<sup>129</sup> While he admits that the Vienna Convention on the Law of Treaties(VCLT) was never intended to apply to the creation of states, he nonetheless believes that it represents a kind of legal norm with regards to *jus cogens* principles that may indirectly influence the way in which new states are created. “ In the context of statehood, what is necessary is not reliance upon the provisions of the VCLT, but an examination of rules specifically adapted to the context.”<sup>130</sup> Reflected in this statement we can detect an implicit preference for the constructivist/idealist philosophy of international law, according to which international law now embodies and promotes certain norms such those that are found in the VCLT, that are universal in their application and provide a common legal value system which, to a growing degree, regulates international relations.

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<sup>127</sup> *Ibid* at 79.

<sup>128</sup> Malcom Evans, ed., *Blackstones International Law Documents 6<sup>th</sup> ed.* (Oxford, Oxford University Press, 2003.) at 123.

<sup>129</sup> *Ibid.* at 84.

<sup>130</sup> *Ibid.*

### Section 3.2: Case Studies in Effectivity

As we have already seen in a previous chapter (2.2) the international community's decision whether to recognize entities seeking statehood and legitimacy depends on a myriad of factors. One such factor is the effectiveness of the government in question. If effectivity can be established then this will certainly go a long way towards giving the aspiring State in question the legitimacy it desires. This is by no means guaranteed, however, and sometimes the effective exercise of sovereignty by a particular entity claiming statehood will be deemed insufficient for that claim to be accepted. The most notorious such case is one that I have already discussed, namely the apartheid Rhodesian state that declared independence from Britain in 1965. The effectivity of the illegal Rhodesian state was never in doubt. Nevertheless, it was never recognized by any state or the by the U.N.

In his study of the principle of effectivity, Theodore Christakis begins by arguing that the case for statehood based on effectivity, essentially boils down to what he calls the theory of "ultimate success"<sup>131</sup>, which he strongly disapproves of on the grounds that it is a recipe for violence. His research has led him to the conclusion that in modern international law, at least, a new state, that has achieved this sovereignty through secession, will not be granted recognition simply on the grounds that it has somehow managed to gain effective control over its territory. "Thus, secession is not only a question of 'fact', but also a question of 'law', and the traditional factual criteria for

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<sup>131</sup> Theodore Christakis, "The State as a 'primary fact': Some Thoughts on the Principle of Effectiveness" in Marcelo Kohen ed., *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 138 at 138.

statehood need to be complemented by some legal ones.”<sup>132</sup> Nowhere is this conclusion more evident, than in his analysis of the case of Rhodesia.

In his study of the principle of effectivity Christakis touches on the unusual case of Madzimbamuto v. Lardner-Burke & Phillip George. For the purposes of the present theoretical discussion the facts of the case are irrelevant. Suffice it to say that it raised the question of the effectivity of the Rhodesian government. As Christakis sees it, the court refused to recognize the acts promulgated by Rhodesia as legally valid because its claim to sovereignty was legally dubious. “le Privy Council Britannique a refusé en 1968, dans l’affaire...de reconnaître toute valeur juridique aux décisions adoptées par le gouvernement rhodésien, parce que, selon lui, l’ultimate success’ de la secession n’était pas établi.”<sup>133</sup> The problem, according to the Privy Council, was that the British government, which had a legitimate claim to being the lawful sovereign, had not relinquished its claim to Rhodesia at the time. “ ‘the British government acting as the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed.’”<sup>134</sup> This case demonstrates that a secession will only be regarded as successful once it has been established beyond any reasonable doubt that the former sovereign has repudiated its own claim to sovereignty over the entity in question. “ Une sécession ne doit être considérée comme aboutie qu’à condition que l’ancien régime n’adopte plus de mesures pour contester la validité de la sécession ou, au moins, s’il est établi avec certitude qu’il ne peut plus réussir à restaurer son autorité.”<sup>135</sup> If that sovereign power fails to do this, either because it is unable or unwilling to, and yet still refuses recognition

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<sup>132</sup> *Ibid.* at 139.

<sup>133</sup> *Ibid.* at 147.

<sup>134</sup> *Madzimbamuto v. Lardner-Burke and Another*, (1968), [1969] A.C. 645 (UKPC).

<sup>135</sup> Christakis, *supra* note 132 at 148.

of the secession, then the courts will be far more likely to recognize the legal authority of the new state's actions. In Christakis' view, this case proves that the law remains hostile towards secession, even though it does not dismiss it altogether.

Although the idea being expounded by Christakis may seem novel, its origins are in fact very old. The notion that a person should never benefit from an act that is contrary to law can be found in both common and civil law traditions. Indeed the principle has been enshrined, albeit not explicitly, in the conventions of the U.N. In the Vienna Convention on Succession of States in Respect of Treaties (1978), article 6 lays down the criteria for a successful secession, defined as applying "only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations."<sup>136</sup> According to Christakis' analysis of this clause " Cette clause s'inspire du principe *ex iniuria ius non oritur* et souhaite mettre l'accent sur le fait qu'une succession illicite (y compris une sécession) ne peut provoquer des droits en faveur de son auteur, quelle que soit son effectivité."<sup>137</sup> In this case a norm (i.e. the principle of self-determination) of international law and the U.N. Charter were blatantly violated by an entity claiming statehood, a claim which was then rejected on the grounds that to do otherwise would have condoned such behaviour. The debate was framed in terms of human rights and international law rather than being merely a question of non-recognition. " les organes des Nations Unies ont placé le débat sur le plan de l'illicéité, de la non-validité et de la nullité

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<sup>136</sup> Evans, *supra* note 129 at 187.

<sup>137</sup> Christakis, *supra* note 132 at 166.

plutôt que sur celui de la simple non-reconnaissance d'une situation 'objectivement' opposable."<sup>138</sup>

As I discussed earlier, the case of Rhodesia was examined by James Crawford in the context of the Supreme Court *Reference*. In his book, Creation of States in International Law, Crawford comes to the conclusion that the outcome of the Rhodesian affair must be interpreted in one of three ways: 1) that Rhodesia was in fact a state and thus all of the sanctions against it were a violation of its rights. 2) that recognition is constitutive and thus Rhodesia was never a legitimate state. 3) finally that the principle of self-determination supercedes that of effectivity and therefore prevented the effective government from ever receiving recognition.<sup>139</sup> It is the third position that Crawford finds the most compelling. Therefore, he is in agreement with Christakis. Again we see a tacit acknowledgment of the influence of the idealist/constructivist position in the conclusions of these two jurists. If self-determination represents a new universal norm that, in this case took precedence over the principle of effectivity, then this is another attempt by the international community to regulate the behaviour of its members *vis-à-vis* the question of recognition.

Neither the *amicus* nor its collaborators were able to defeat the argument made by Crawford and Christakis as regards the norms of international law in the context of Rhodesia. However, they did attempt to diminish its importance by suggesting that it was the exception that proved the rule; the rule being that international law does not address the question of how a state comes into existence and it is only concerned with whether the state in question does legally exist. International jurist George Abi-Sabb put it this

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<sup>138</sup> *Ibid.* at 167.

<sup>139</sup> Crawford, *supra* note 352 at 104.

way “ the State is considered a ‘primary fact’ to be acknowledged by international law, once that fact has materialized, regardless of the process by which it came into being.”<sup>140</sup> According to Abi-Sabb, the case of Rhodesia represents an aberration, and is, therefore, of limited relevance to the actual debate about secession in international law. “ It is only in such cases, where a new state is created having at its foundation a violation of a basic principle of contemporary international law, that the process whereby a new State comes into being is to be taken into account”<sup>141</sup> That having been said, Abi-Saab does not define exactly what the term “basic principle of contemporary international law” might mean in the context of the Quebec question. Clearly this question is highly relevant in the hypothetical case of a UDI by Quebec, seeing as there are many who have argued that this would constitute a violation of Canada’s territorial integrity.

Hersch Lauterpacht, the originator of the study of recognition in international law, considered the question of effectivity of government to be of the utmost importance in deciding whether or not to recognize a state or not. This requirement was second only to that of the total independence of the state in question. “The second essential requirement of statehood is a sufficient degree of internal stability as expressed in the functioning of a government enjoying the habitual obedience of the bulk of the population.”<sup>142</sup> In his view, if an entity were lacking this critical element, its status as a state would always be in doubt. One of the earliest cases in international law that addressed the subject was the Aaland Island crisis of 1917, which involved a disputed

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<sup>140</sup> Abi-Sabb, “Conclusion”, in Marcelo Kohen, ed., *Secession: International law perspectives* (Cambridge, Cambridge University Press, 2006) at 473.

<sup>141</sup> *Ibid.*

<sup>142</sup> Lauterpacht, *supra* note 29 at 28.

island off the coast of Finland, predominantly populated by Swedes.<sup>143</sup> Lauterpacht finds the argument made by the League in this case, which recognized Finnish sovereignty over the Island, quite compelling. “the authoritative Committee of Jurists in the controversy concerning the Aaland Islands decided that Finland, notwithstanding its recognition by a number of States, was not a State at the crucial date, because of the absence of effective governmental control, is instructive.”<sup>144</sup>

Crawford essentially agrees with Lauterpacht’s assertion that effective government is one of the fundamental elements of statehood, perhaps even going further than Lauterpacht did. “There is thus a strong case for regarding government as the most important single criterion of Statehood, since all others depend upon it.”<sup>145</sup> In the Tinoco Arbitration case, the question of effective government was raised. The judge who presided over the case, Taft C.J., regarded the effectivity exercised by the Costa Rican government as proof that it was legitimate, despite the refusal of several governments to recognize it. “such non-recognition for any reason...cannot outweigh the evidence disclosed...as to the *de facto* character of Tinoco’s government, according to the standard set by international law.”<sup>146</sup> Crawford argues that this is a precedent that favours the declaratory school of international relations, since it regards the effectiveness of the government as being more important legally than recognition by the international community. But he also qualifies this by saying “this was a case of recognition of governments, and it is arguable that, whilst recognition of governments might be

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<sup>143</sup> See *Decision of the Council of The League of Nations on The Aaland Islands Including Sweden’s Protest* (1921), Advisory Opinion, P.C.I.J.(Ser. A/B) No. 697

<sup>144</sup> Lauterpacht, *supra* note 29 at 50.

<sup>145</sup> Crawford, *supra* note 52 at 42.

<sup>146</sup> *Ibid.* at 21.

declaratory in effect, recognition of new States is not.”<sup>147</sup> In any case, international law does make a distinction between a change in the government of a state and a change in the nature of the state itself. “ States continue to exist , with concomitant rights and obligations, despite revolutionary changes in government, or despite a period in which there is no...effective government.”<sup>148</sup>

Malcolm Shaw’s interpretation of the Tinoco arbitration is slightly different. He sees judge Taft’s opinion as being an attempt to combine declaratory and constitutive elements “in that recognition can become constitutive where the factual conditions ( i.e. the presence or the absence of effective control) are in dispute, but otherwise is purely declaratory or evidential.”<sup>149</sup> Although the effective control doctrine, according to Shaw, is the most widely accepted basis for recognizing governments, there are alternative theories, such as the doctrine of legitimacy. This theory holds that “governments which came into power by extra-constitutional means should not be recognized, at least until the change had been accepted by the people.”<sup>150</sup> In light of the Supreme Court’s condition that a “clear majority”<sup>151</sup> of people in Quebec would have to agree to secession and that if this condition were satisfied it would then give rise to the so called “duty to negotiate” in the context of an attempted secession by Quebec, the relevance of this theory should be quite obvious.

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<sup>147</sup> *Ibid.* at 23

<sup>148</sup> *Ibid.* at 28.

<sup>149</sup> Shaw, *supra* note 5 at 378.

<sup>150</sup> *Ibid.* at 379.

<sup>151</sup> Reference, *supra* note 105 at para. 92.

### Section 3.3: Effectivity in the context of the Supreme Court Reference re Secession of Quebec

In this final section I will analyse the positions of the various parties concerned with the Quebec reference on secession, with particular regard to that of the *amicus* and of the federal government (represented by the Attorney General in the case). I will look at the way in which they evolved both before and during the case. Finally I will briefly examine the application of the doctrine of *uti possidetis* in the context of a hypothetical Quebec secession.

As I have already established, the position of the *Amicus* with respect to Quebec's right to secede relied heavily on the principle of effective control in international law. The notion that effectivity might be the decisive factor in a scenario in which Quebec has achieved independence without the consent of the federal government pre-dates the Supreme Court case and has been advocated by some legal experts for a quite a long time. Indeed in a 1992 draft report produced by the Committee to examine Matters Relating to the Accession of Quebec to Sovereignty, two of the legal consultants (Daniel Turp and Jacques Yvan Morin) stated that, in the event that Quebec were to secede, "Two political factors would, ultimately, take precedence over legal considerations: the determination of the Quebec people to secede and the ability of Quebec authorities to exercise a monopoly over public authority in Quebec."<sup>152</sup> Once again, this must be viewed with extreme skepticism, given that it did not anticipate the judgment of the Supreme Court on the question of effectivity.

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<sup>152</sup> Secretariat of the Committee to examine Matters Relating to the Accession of Quebec to Sovereignty, *Draft Report*, (Quebec: Bibliotheque nationale du Quebec, 1992) at 65

That same year, another report was released entitled *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty*, in which one legal expert<sup>153</sup> was quoted as saying “ Secession is a political fact and international law is content merely to accept the consequences when it brings about the installation of effective and stable State authorities controlling the territory and the population established on it.”<sup>154</sup> The report also favoured the declaratory school of thought, although it conceded that in certain “extreme cases” the role of third parties might be critical in terms of establishing the legitimacy of the new state. Even so, “ in a non-colonial context, the attainment of sovereignty by a territory is merely a question of fact...the new state is considered as such if its existence is effective. The recognition by a third-party (and by the State from which the territory concerned was severed) is a test of this effectiveness.”<sup>155</sup> In other words, international recognition is secondary to the principle of effectiveness in the process of Statehood.

These findings were the source of some inspiration to the subsequent research and conclusions reached by the jurists who contributed to the *factum* of the *amicus*. For instance, George Abi-Saab in his report to the *Amicus*, emphasized that the crucial element in assessing an entity’s claim to sovereignty is the whether that entity has an effective government or not. Abi-Saab believes that this bodes well for an independent Quebec’s chances for success, because “effective government will also be found to have been achieved, by the very fact that there is already a government in place, one which

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<sup>153</sup> CF. José Woehrling, *Éléments d’analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec*, Commission on the Political and Constitutional Future of Québec, working document No.2, pp.58-59.

<sup>154</sup> T.M. Franck *et al.*, “The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty” in Anne Bayefsky, ed., *Self –Determination in International Law: Quebec and lessons learned* (the Hague, Kluwer International Press, 2000) 241 at 269.

<sup>155</sup> *Ibid.* at 294.

exercises the powers of a provincial government”<sup>156</sup> Although he concedes that this process would be complicated by attempts by the federal government to undermine Quebec’s claim internationally, he believes this to be a purely political question and not a legal one. This does not prevent him from speculating that if Quebec were to become independent through democratic means this might “ facilitate the recognition of the new state by third parties in the face of possible pressures exerted by the federal government.”<sup>157</sup> In retrospect, it would be difficult to agree with Abi-Saab’s statement about recognition by the international community of a UDI made by Quebec being a wholly political rather than a legal question, in light of the fact that the Supreme Court specifically ruled out the legality of such an action.

In a similar vein, Thomas M. Franck argued that international law maintains neutrality towards the secessionist impulse but recognizes it when it succeeds. In other words, where there is establishment of some sort of effective government in the entity in question.<sup>158</sup> He does qualify this assertion, however, by stating that, in certain rare instances of illegality (e.g. Rhodesia), this will not be sufficient grounds for recognition by the international community. “ the propensity of international law remain neutral and adapt to changing reality is suspended, exceptionally, due to the illegal conditions...by which the change in realities was effected.”<sup>159</sup>

Professor Alain Pellet of the University of Paris, writing for the *Amicus*, reinforces the concept of “successful secession”, essentially saying that, at best, international law allows for secession by virtue of the fact that it does not prohibit it. At

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<sup>156</sup> *Ibid.* at 74.

<sup>157</sup> *Ibid.*

<sup>158</sup> Thomas Franck, “Opinion Directed at Question 2 of the Reference”, in Anne Bayefsky ed., *Self – Determination in International Law: Quebec and lessons learned* (the Hague, Kluwer International Press, 2000) 75 at 83.

<sup>159</sup> *Ibid.*

worst, international law remains neutral in questions of secession. As for the possibility of Canada objecting or affirming the creation of an independent Quebec, this would be, in either case, immaterial in the legal sense. “if there is consent, that consent is not the legal condition for the legitimacy of the creation of the state resulting from the secession, and it remains merely a factor of the new state’s effectiveness.”<sup>160</sup> Pellet spends a great deal of time discussing the question of self-determination, and of whether this right would be relevant in the context of Quebec secession. Finally, he concludes that it would not provide a legal justification but rather that “ creation would be justified in law by the principle of effectiveness if such a state came to be created, with or without the consent of Canada”<sup>161</sup>

We are already quite familiar with the views held by Malcolm Shaw with respect to the question of effectivity in the abstract, but he was also asked by the *amicus* to comment on the principle as it relates to the case of Quebec secession. With regards to the traditional criteria for statehood, Shaw believes that government can be easily equated with the principle of effective control. “ for this has been interpreted to mean the assertion of effective control throughout the territory of the claimant in question.”<sup>162</sup> However, this is not an essential requirement for States seeking validation, as the case of the former Yugoslavian republics, namely Bosnia and Croatia, demonstrates. These states received recognition and acceptance by both states and intergovernmental organizations, despite a lack of sovereignty in certain regions of their territory “Accordingly, it cannot be said as a rule of international law that an emerging entity in

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<sup>160</sup> *Ibid.* at 119.

<sup>161</sup> *Ibid.* at 122.

<sup>162</sup> Shaw, *supra* note 5 at 141.

order to successfully defend a claim to statehood must effectively control all of the territory claimed as part of the new state.”<sup>163</sup>

He also touches on the question of consent from the parent state, in this case Canada, and agrees with Pellet in that this consent, while desirable, does not determine whether the outcome of a secession will be recognized by the international community. Rather, effectivity would take precedence in such circumstances, although, if this consent were given, that would certainly settle the matter conclusively.

Of all the experts consulted by the federal government, none were more influential in terms of determining its final position than Professor James Crawford. After reviewing state practice since the post-war period, Crawford found no basis in international law that could be used by Quebec to exercise a UDI in its efforts to separate from Canada. His conclusion was based on many factors, including, of course, the principle of effectivity. Paradoxically, his interpretation both converges and diverges in several respects with that of the *amicus* and its collaborators. For instance, on the question of the legal implications of a central government exercises jurisdiction in overlapping areas with an entity that is attempting secession, he suggests that this would call into question the effectivity of the latter. “What is critical to the test is the element of exclusion of the central government...that exclusion must be effective and give reasonable assurances of permanence.”<sup>164</sup> Although he concedes that, potentially, effectivity plays a crucial role in the establishment of a State within international law, this is tempered by the international community’s desire to uphold international legal norms

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<sup>163</sup> *Ibid.* at 141.

<sup>164</sup> James Crawford, “Response to Experts Reports of the Amicus Curiae” in Anne Bayefsky, ed., *Self-Determination in International Law: Quebec and Lessons Learned*, (the Hague, Kluwer International Press, 2000) 153 at 160.

and customary rules. But Crawford attempts to draw a clear distinction between the right to secede and the end result of a successful secession. “The question of the eventual effectiveness of an attempted secession is quite different from the question whether an entity has a right to independence.”<sup>165</sup> Crawford finds that the principle of effectivity is problematic in a number of ways: firstly, in the case of Rhodesia, an effective regime was denied legitimacy on the grounds that it violated another principle of international law, namely self-determination. As noted by Crawford “The right to self-determination has been applied precisely in opposition to effective regimes”<sup>166</sup> Secondly, the issue of effectiveness can only be determined at the end of the secession process. Moreover, there are cases such as those of Croatia and Bosnia, for example, where a lack of effectivity were not considered an obstacle to recognition by third party States or IGO’s.<sup>167</sup> Finally, international law gives the parent state a right to oppose secession by any means available, provided they are legal and appropriate.<sup>168</sup>

These criticisms were answered by Alain Pellet in one of his responses to Crawford. Pellet is able to resolve what would appear to be an inherent contradiction in the principle of effectivity by identifying the main cause in all of the situations that Crawford described. The thread that ties them together is the following: “another legal rule paralyzes the principle of *effectivité* and prevents it from producing its effect.”<sup>169</sup> In the case of illegitimate regimes (e.g. Rhodesia) a *jus cogens* norm was being breached and therefore took precedence over the principle of effectivity. In the case of Bosnia and

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<sup>165</sup> *Ibid.* at 158.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.* at 163.

<sup>168</sup> *Ibid.* at 154.

<sup>169</sup> Allan Pellet, “Legal Opinion Certain Questions of International Law Raised by the Reference” *Self-Determination in International Law: Quebec and Lessons Learned*, (the Hague, Kluwer International Press, 2000) 85 at 207

Croatia, it was again a norm of international law (e.g. the prohibition against the use of force) that played a decisive part in the decision to recognize the new states. The third situation described can be explained, according to Pellet, by the fact that the right to secession and the entitlement of a state to its territorial integrity, are of equal value in international law, and therefore are “both subject to the same higher principle, which is precisely that of effectivité.”<sup>170</sup>

As far as the final submissions to the Court by both the Attorney General and the *amicus* are concerned, they were both rather strong cases based on solid research and effective lines of reasoning. Although they were essentially concerned with the same issues, they naturally differed a great deal in their argumentation, with the Attorney general largely basing its position on the question of self-determination, whereas the *amicus* focused largely on the principle of effectivity.

Therefore, logically, we shall begin our study with the latter’s main *factum*. “A secession will be legal if it is an effective political fact. Anything that is not prohibited by a legal system, whether international law or Canadian law, is authorized, although norms other than legal norms may apply.”<sup>171</sup> Citing the claims made by Abi-Saab the *Amicus* asserts that the state in international law is a primary fact. Which means, in effect, that international law simply acknowledges (or doesn’t) its existence, thus conferring on it a certain legal status. “However, the law has no direct authority over the conduct of the process leading to its birth.”<sup>172</sup> It then portrays effectivity as an established legal norm of international law, which has been used in some cases to establish the sovereignty of a

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<sup>170</sup> *Ibid.* at 208.

<sup>171</sup> “Factum of the Amicus Curiae” in Anne Bayefsky ed., *Self-Determination in International Law: Quebec and Lessons Learned*, (the Hague, Kluwer International Press, 2000) 333 at 334.

<sup>172</sup> *Ibid.* at 336.

State over a certain territory. The *Amicus* subsequently cited the precedent in the Island of Palma case (see chapter 3.1.) as proof of this claim. It maintained that, ultimately, in the event of a secession, it would be this principle, more than anything else, that would entitle Quebec to its recognition, by the international community and even the Canadian community, that Quebec was a sovereign state.<sup>173</sup> However, such an action by Quebec would only be successful if “effectivity is achieved it will be based on democratic legitimacy.”<sup>174</sup> In hindsight, we can safely say that this assertion was probably premature, given that the Supreme Court has established, in no uncertain terms, that a UDI would not be recognized by the Canadian government, regardless of whether the process that led to it was democratic or not. “Democratic legitimacy” would no doubt be a factor in favour of recognizing an independent Quebec, at least from the international community’s standpoint, but, at any rate, it would not guarantee that any acknowledgement from the parent state would be granted.

In its response, the Attorney General of Canada addresses the premise of the *amicus*’ argument in the following way: “The fact that international law does not prohibit the secession of groups within existing states is a necessary consequences of the fact that international law generally does not address the conduct of entities that are not subjects of international law.”<sup>175</sup> It then attempts to discredit the notion that effectivity could somehow serve as a legal basis for Quebec’s claim to sovereignty. This, it contended, was incorrect in the sense that made it seem like effectivity would give Quebec an *a priori* right to secede. “ While international law may ultimately take into account of a *fait*

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<sup>173</sup> *Ibid.* at 342.

<sup>174</sup> *Ibid.* at 338.

<sup>175</sup> “Reply of the Attorney General of Canada”, Anne Bayefsky ed., *Self–Determination in International Law: Quebec and Lessons Learned* (the Hague, Kluwer International Press, 2000) 309 at 373 .

*accompli*, this is not the same thing as authorizing or approving the act before it becomes a *fait accompli*.”<sup>176</sup> As for the claim that a UDI might result in a successful secession, the Federal government was not ready to accept this either. “Thus, the requirement of effective control demonstrates that a ‘unilateral declaration of independence’, by itself, has no legal effect.”<sup>177</sup> Indeed, the principle of effectivity, according to this interpretation, might actually serve as safeguard for the territorial integrity of the State. “[effectivity] operates to protect the territorial integrity of established states against unfounded claims purporting to be based on self-determination and to discourage the premature recognition of unilateral claimants whose aspirations have not been realized in practice.”<sup>178</sup> Furthermore, the provincial government institutions would not exercise effective control in Quebec were it to declare its independence, as they derive their sovereignty from the Canadian Constitution, which has little bearing on international law. That is to say nothing of the fact that these institutions are not granted the powers of a sovereign State by the Constitution such as: defense, foreign policy, etc.<sup>179</sup>

The *amicus* could not have disagreed more with the assertion by the federal government that effectivity is not a source of legal rights in international law. In its response to this point, the *amicus* reiterates effectivity’s status as a legal norm and that it produces effects in two significant ways: Firstly, “ ‘the origin and existence of a State are political facts’...and second, the law characterizes this fact and establishes the legal consequences...which is precisely the consequence of the principle of effectivity.”<sup>180</sup> Moreover, effectivity is such a fundamental principle of international law, that it has

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<sup>176</sup> *Ibid.* at 374.

<sup>177</sup> *Ibid.* at 374.

<sup>178</sup> *Ibid.* at 375.

<sup>179</sup> *Ibid.*

<sup>180</sup> “Reply of the Amicus Curiae”, in *Self-Determination in International Law: Quebec and Lessons Learned*, (the Hague, Kluwer International Press, 2000) 379 at 382.

proven itself superior to the norm of territorial integrity in many cases. This is evidenced by the fact that, despite upholding the territorial integrity of States in Europe, the Helsinki Final Act<sup>181</sup> has not prevented the birth nor the recognition of all the European States which have come about since. “ The emergence of new States on that continent may be explained in legal terms by the principle of effectivity, and the fact that it takes precedence over the principle of territorial integrity.”<sup>182</sup>

In the Quebec Secession Reference, the Supreme Court of Canada, in the course of its hearings, posed several questions to the two main parties to the cases: the Attorney General of Canada and the *Amicus Curiae* which were subsequently answered by both during the actual proceedings as well as in written responses submitted shortly after the fact. It is instructive, for present purposes, to analyze these answers.

The *amicus* reiterated their position on the relation between effectivity and territorial integrity, namely that the former trumped the latter in the event of a conflict between the two. Citing the 1992 expert’s report on the subject produced by a Committee that was commissioned by the National Assembly of Quebec. “ ‘Canada can oppose the principle of territorial integrity to other states (as an independent Quebec could in turn oppose it to Canada), but this offers no guarantee for the purpose of opposing to Quebec’s secession should it become effective in the future.’”<sup>183</sup>

The Court was faced with the thorny legal issue of effectivity. First of all, it held that the principle would have no bearing on the question of whether Quebec could exercise a UDI, as “a distinction must be drawn between the right of a people to act, and

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<sup>181</sup> *Conference on Security and Co-operation in Europe Final Act*, 1 August 1975, 14 I.L.M 1292.

<sup>182</sup> Reply of the Attorney General of Canada, *supra* note 177 at 382.

<sup>183</sup> “Written Response of the Amicus Curiae to the Questions from the Supreme Court of Canada”, in Anne Bayefsky, ed., *Self-Determination in International Law: Quebec and Lessons Learned*, ( the Hague, Kluwer International Press, 2000) at 427.

their power to do so.”<sup>184</sup> In other words, legally speaking, no such right exists in Canadian or international law, although this does not, as the Court concedes, settle the matter. “...this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community.”<sup>185</sup> However, the Court simply denied the legality of such an action under Canadian law or international law. “ the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an *ex ante* explanation or justification for an act.”<sup>186</sup> Moreover, it stated that if such an argument were recognized, then it would essentially be allowing the Quebec government to act outside the rule of law. As for the point made by the *amicus* and its supporters that the matter was a question of fact and not of law, and that, regardless of its legality, international law will eventually recognize a political reality, the Court was not impressed with this either. “it should first be noted that the existence of a positive legal entitlement is quite different from a prediction that the law will respond after the fact to a then existing political reality.”<sup>187</sup> However, it acknowledged that international law sometimes does “adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation.”<sup>188</sup>, but added that it was not in the business of speculating on the outcome of such a hypothetical endeavor, nor the way in which the international community might respond to it. In spite of this assertion, the Court proceeded to examine the international law and practice of States in order to clarify its reasoning about effectivity. As we have

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<sup>184</sup> Reference, *supra* note 105 at para 106.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.* at para 107.

<sup>187</sup> *Ibid.* at para 110.

<sup>188</sup> *Ibid.* at para 141.

seen before the Court has said the viability of a *de facto* secession would depend to a large extent on recognition by third party States. However, such recognition is not necessarily constitutive and does not justify the application of the principle of effectivity in the first place. “ it necessarily means that legality follows and does not precede the successful revolution.”<sup>189</sup>

At one point in its opinion, the Court felt compelled to go off on somewhat of a tangent with respect to the analogy drawn between the principle of effectivity in this context and one of the previous judgments it made in the case of Re Manitoba Language Rights .<sup>190</sup> In that case, the Court found the laws enacted by the provincial government to be unconstitutional in that they failed to meet the language requirement of bilingualism (they were only in English) and, therefore, were declared invalid. However, in light of the potential chaos such a ruling might cause, the Court refrained from striking down the laws so as to permit the government enough time to translate them in accordance with the Constitution. “ In so doing, we recognized that the rule of law is a constitutional principle which permits the court to address the practical consequences of their actions, particularly in constitutional cases.”<sup>191</sup> The parallel, it was argued unsuccessfully by the *Amicus*, was on the philosophical level. If the law could take into account the harmful implications of creating a “legal vacuum” in that case, then surely it could recognize the effectivity of a sovereign Quebec following a UDI? The Court rejected the analogy, however, on the grounds that “The principle of effectivity operates very differently. It

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<sup>189</sup> *Ibid.* at para 144.

<sup>190</sup> See *Re Manitoba Language Rights*, 1985 SCC 32, [1985] 1 S.C.R. 721.

<sup>191</sup> Reference, *supra* note 105 at para. 145.

proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane.”<sup>192</sup>

As was already established, the Supreme Court Reference is one of the few instances where the Badinter principle applied in the former Yugoslavia had been studied and endorsed by another judicial body, albeit only in a hypothetical sense. In a report prepared by five experts on international law (including Thomas Franck, who worked for the *Amicus*) on the territorial integrity of an independent Quebec, the Badinter Commission’s ideas were put forth as proof of the international customary law status of *uti possedetis*. The report suggested that, in the event of a Quebec secession, Quebec’s current borders would automatically become its international borders. This interpretation was, naturally, echoed by the *amicus* in giving its opinion on the question of applying *uti possedetis* to an independent Quebec. However, the Attorney General refused to subscribe to this theory. It maintained that there was a clear distinction between the dissolution of the former Yugoslavia and the hypothetical secession of Quebec from Canada. As a result, only in the former case would the Badinter principle apply to Quebec.

In the end, of course, it was the Supreme Court which had the final say in the matter. On the question of the territorial boundaries, the opinion of the Court did in fact echo that of the Badinter Commission in a few key respects. In a roundabout way, that is to say without expressly mentioning the principle of *uti possedetis* or the Badinter principle, the Court did tacitly promote the Badinter principle by stating that Quebec “is entitled to maintain its territorial integrity under international law and to have that

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<sup>192</sup> *Ibid.* at para 146.

territorial integrity recognized by other states.”<sup>193</sup> By Contrast, in their book on territoriality in international law, Joshua Castellino and Steve Allen, conclude that the implications for a sovereign Quebec are quite different than they were for the Balkans. For example, if the territorial boundaries were to somehow adversely affect those of other Canadian, provinces or of the First Nations peoples residing in Quebec “secession within the existing boundary would suggest that the Cree nation of indigenous peoples that exists within Quebec would also have to be part of the secession from Canada.”<sup>194</sup> The Court alluded to both of these matters at several points in its opinion, emphasizing the obligation Quebec’s government would be under to negotiate in good faith with the rest of Canada, as well as with its own aboriginal communities. “Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.”<sup>195</sup> Perhaps most importantly, from the their point of view at least, was the Courts agreement with the application of the Badinter principle to the situation in Quebec, despite its original context being a case of dissolution rather than secession. A critical mistake in their view, as it obscures the distinction between the two concepts. To illustrate this point, let us return to the opinions of the Badinter Commission.<sup>196</sup> In opinions 9 and 10, the Commission addressed the differences between dissolution and secession. The latter was the position of Serbia-Montenegro, who maintained that Yugoslavia continued to function as state despite the secession of a few of its components. However, the former was the conclusion reached by the Badinter

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<sup>193</sup>Reference, *supra* note 105 at para. 8.

<sup>194</sup> Joshua Castellino, Steve Allen, *Title To Territory In International Law: A Temporal Analysis* (Aldershot: Dartmouth Publishing Company, 2003) at 184.

<sup>195</sup> Reference, *supra* see not 105 at para. 151.

<sup>196</sup> *The Opinions of the Badinter Arbitration Committee*(20 November 1991), Online: The European Journal of International Law < <http://www.ejil.org/journal/Vol3/No1/art13.html> >

Committee, which based this judgment on the fact that the loss of the majority of the population and territory had seriously compromised the ability of the central government to exercise its sovereignty over its territory and people. Thus, *ipso facto*, Yugoslavia was no more. In his article on the subject of unilateral declarations of independence, Jeremy Webber touches on the crisis in the Balkans and comes to the same conclusion. “ The more challenging Yugoslavian cases analyzed as a case of dissolution, where the predecessor state ceased to function in fact, leaving its components free to go their own ways.”<sup>197</sup>

In the introduction to this chapter, it was submitted that the principle of effectivity, as it was employed by the *amicus*, though not without merit, was not entirely persuasive in the context of Quebec secession. I have shown in chapter 2 how in the case of Rhodesia, the effectivity of the state was never enough to ensure its recognition. In the context of the dissolution of Yugoslavia, I discussed at the case of Macedonia, a state in all but name, which had to wait for its recognition by the E.C. , despite its effectivity, owing to political reasons. Furthermore, we touched briefly upon the case of the Tinoco Arbitration , which would seem to reinforce the *amicus* position in the sense that it supports the declaratory School of thought’s emphasis on the effective sovereignty of a given state, as opposed to that states legitimacy, or the lack thereof, in the eyes of the international community. Moreover, the international community’s grudging acceptance of this reality would also seem to be an argument in favour of realism in international relations. Ultimately, however, it is the Supreme Court that, in this author’s opinion, made the most compelling case that effectivity does not justify the hypothetical unilateral

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<sup>197</sup> Jeremy Webber, “ The legality of a Unilateral Declaration of Independence” (1997) 42 McGill L.J. 281 at 39.

secession of Quebec. The Court, to put it simply, may have recognized that, in certain instances, effectivity played a decisive role in securing the recognition of a seceding entity, but felt that these were cases of *ex post facto* acceptance of a certain reality by the international community. Whereas the *amicus* and some of its supporters, seemed to be saying that effectivity would provide the legal basis for a unilateral secession from Canada in the first place. But this, as was established by the Court, is essentially a political argument not a legal one. Similarly, the question of recognition by the international community, is also essentially a political question and not a legal one. Therefore, the Court could not predict with any certainty what the outcome of UDI would be in this particular case.

#### **Chapter 4: Self-determination**

Up until this point in this thesis, I have relied heavily on the work of Hersch Lauterpacht on the questions of recognition and effectivity in international law, as a starting point for my analysis. However, in this chapter I shall deal with the principle of self-determination as it relates to recognition and on this matter Lauterpacht is of little use. This is because Lauterpacht's study of international law more or less ends with WWII. Since that time, of course, the principle has become one of great importance and thus no study of international law regarding statehood would be complete without some mention of it.

In this first section of this chapter, I shall examine the theories, doctrines and elements that together constitute the principle self-determination in international law. However, it is not sufficient to analyze self-determination by itself, we must also look at all the other principles with which it is inter-related. Namely: secession, unilateral declarations of independence (UDI), the principle of territorial integrity. The focus will be on the theoretical and legislative framework, which is found mainly in treaties (e.g. Helsinki Final Act) but also in the findings of judicial and quasi-judicial bodies (e.g. Badinter Commission), of international law, which the Court and its collaborators researched and ultimately reached their conclusions in the matter.

In the second section I shall describe the state practice in the area of self-determination. Specifically, I shall examine the case of the Socialist Former Yugoslavian Republics (SFRY), which will hopefully shed some light as to how the principle of self-determination and its related concepts have been applied in the past and whether that has any relevance in the Quebec context. I shall demonstrate how the influence of the Badinter opinions manifested itself in the reasoning of the Court as well as the plethora of legal experts who worked on the case and the other legal reports which may have borrowed some of their ideas from this international legal precedent.

In the final section of this chapter, I shall examine the principle of self-determination in the context of the *Reference*. I shall begin by analyzing some of the Commission reports (e.g. Bélanger-Campeau) that served as the basis for so many of the arguments made by the *Amicus* and the federal government. I shall then look at the various reports submitted by jurists working for all the parties to the case. This will lead to my study of the actual cases made by the two main parties involved, mainly in the

form of their factums. Finally, I shall look at the way in which the opinion of the Supreme Court in the *Reference* has been reinforced or undermined by subsequent analyses of the case by various legal scholars.

Through this exercise it will be demonstrated that a kind of consensus has emerged amongst mainstream international jurists with respect to the application of the principle of self-determination. Especially in the matter of its external form, which, with the exception of decolonization, seems to only be available to an aspiring state in very limited circumstances that certainly have no relevance in the Quebec context.

#### Section 4.1: Main theories, principles and doctrines relating the concept of self-determination

Malcolm Shaw, in his comprehensive study of international law, supports the idea that self-determination has become increasingly important in the post-war era of international law by suggesting that the traditional criteria for statehood have become qualified by the norm of self-determination. “In addition to modifying the traditional principle with regard to the effectiveness of government in certain circumstances, the principle of self-determination may also be relevant as an additional criterion of statehood.”<sup>198</sup> However, he cautions the reader not to jump to the conclusion that the violation of this principle, as was the case in Rhodesia, does not necessarily result in the entity in question being denied recognition and statehood by the international community. Instead Shaw advocates a more pragmatic approach. “in the case of an entity seeking to become a state and accepted by the international community as being entitled to exercise the right of self-determination, it may well be necessary to demonstrate that the internal

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<sup>198</sup> Shaw, *supra* note 5 at 185.

requirements of the principle have not been offended.”<sup>199</sup> Indeed, the precise implications of the norm of self-determination, in terms of the domestic affairs of a given state, are not fully established at this point in time. As the Badinter Commission noted in opinion number two. One thing is certain however: the norm does apply to all states, whether they recognize it or not. Moreover, to some extent, this implies that states are accountable if they violate this principle of international law, even if it is not prohibited by the domestic law of the State in question.

James Crawford shares Shaw’s reluctance to characterize the norm of self-determination as being a strict legal condition for the acceptance of an entity as a state in international law, but he attempts to demonstrate that it is now an important legal criterion for statehood nonetheless. “It will be argued here that self-determination, to the limited extent to which it operates as a legal right in modern international law, is a criterion of statehood.”<sup>200</sup> Moreover, Crawford reinforces the distinction between self-determination prior to WWII and the principle as it has evolved by dividing his study of the concept into pre-war and post-war periods. Since the latter began, the tension between self-determination of peoples and the sovereignty of the state has remained of great concern to international jurists, including Crawford who says that “the question whether there exists a legal right or principle of self-determination of peoples. Self-determination as a legal principle would represent a significant erosion of the principle of sovereignty.”

<sup>201</sup> In this discussion we can see, to some extent, a reflection of the philosophical debate between realists, with their emphasis on state supremacy, on the one hand and

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<sup>199</sup> *Ibid.*

<sup>200</sup> Crawford, *supra* note 52 at 84.

<sup>201</sup> *Ibid.* at 85.

idealists/constructivists, with their emphasis on the significance of human rights and universal norms of state behaviour, on the other.

Crawford draws another distinction that is critical. He maintains that there must be a distinction made between self-determination as a political principle, and, on the other hand, the legal right of self-determination, which is relatively recent in its development and only applies to limited and very specific kinds of cases in international law.<sup>202</sup> “ In practice since 1945 there has been a considerable elaboration of the legal consequences of the principle of self-determination for particular territories; the question of the ambit of self-determination, the territories to which it applies, has at least arguably remained as much a matter of politics as law.”<sup>203</sup>

In terms of the codification and the promotion of the principle of self-determination, no international body has done more than the United Nations. In fact it can be argued, as does Cassese, that self-determination as a legal principle has its basis in UN legislation as individual state practice is very rare and thus virtually immaterial on the subject. “ ‘State practice’ in this matter takes place primarily within the UN that is to say, it chiefly manifests itself in statements made, positions taken, and resolution voted by states in one or other of the UN bodies.”<sup>204</sup> In particular the Charter of the UN, which makes express reference to the principle twice: In article 1(2) that states: “ To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”<sup>205</sup>, and again in a subsequent provision which deals with economic and social factors (Article 55), which states: “ With a view to the creation of

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<sup>202</sup> *Ibid.* at 87-88.

<sup>203</sup> *Ibid.* at 88.

<sup>204</sup> Antonio Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge, Cambridge University Press, 1995) at 102.

<sup>205</sup> Evans, *supra* note 129 at 8.

conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for principle of equal rights and self-determination of peoples”<sup>206</sup>

The Charter isn't the only place where one finds references to self-determination in UN law, it has also been the subject of a number of General Assembly resolutions, including one that was discussed in an earlier chapter that was concerned with the situation in Rhodesia<sup>207</sup> and condemned the actions of the rogue state as constituting a violation of the Charter. However, Crawford clarifies that the term self-determination can mean one of two distinct legal concepts in the context of UN legislation. First it can signify “the right of a State to choose its own form of government without intervention. It can also mean the right of a specific territory (‘people’) to choose its own form of government irrespective of the wishes of the rest of the State of which that territory is a part. Traditional international law recognized the first but not the second of these, from which it is said that it did not recognize the right of self-determination.”<sup>208</sup>

The question remains, however: is self-determination sufficiently well established in state practice so as to be regarded as being part of international customary law today? The International Court of Justice has, in a few of its decisions, applied the principle and thus reinforced its status as being a part of international customary law. For instance, in the Western Sahara case<sup>209</sup> the opinion reached by the Court “strongly affirmed the right of the people of the territory to determine their future political status, notwithstanding

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<sup>206</sup> *Ibid.* at 17.

<sup>207</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res1514(xv), UNGAOR, 16<sup>TH</sup> Sess., Suppl. No.16, UN Doc. A/4684 (1960).

<sup>208</sup> Crawford, *supra* note 52 at 90-91.

<sup>209</sup> See *Western Sahara Case (Spain v. Morocco)*, Advisory Opinion, [1975] I.C.J. Rep. 12.

claims to revindication on the part of Morocco and Mauritania.”<sup>210</sup> In another landmark decision, the Namibia case, the court found that, with regards to non-self governing territories, the principle of self-determination was the crucial element in their claims to statehood. In the East Timor case the case for self-determination being a rule of customary international law<sup>211</sup> principle of international law, received further support when the court emphasized that it was “one of the essential principles of contemporary international law.”<sup>212</sup>

Crawford is convinced that self-determination can now legitimately be considered part of the body of customary international law. However, he recognizes that, at least in a theoretical sense, there are still a few obstacles to be overcome for it to be accepted as such. Crawford, claims that there are essentially a few categories of cases where the right may be a legal factor: the first is fairly obvious to the student of international law, namely it applies to colonies or non-self governing territories.<sup>213</sup> The second, is one that is particularly relevant to the Quebec question, that is to say it applies to existing states. “In this case, the principle of self-determination takes the well-known form of the rule preventing intervention in the internal affairs of states.”<sup>214</sup> This second category is commonly known as remedial secession and is rather controversial. Crawford can think of only one case in which it has been applied: that of Bangladesh. This is the sole example of a government having behaved in such a way as to create the legal and political conditions in which the right to external self-determination arises. The

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<sup>210</sup> Crawford, *supra* note 52 at 96.

<sup>211</sup> Cassese defines self-determination as “...they regard the principle of self-determination as a fundamental and universal in international relations;(iii) they consequently may be assumed to consider self-determination as a non-derogable on the part of States.” *supra* note 9 at 140.

<sup>212</sup> *Case Concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90 at 102.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

Bangladeshis “ have been governed in such a way as to make them in effect non-self-governing territories” <sup>215</sup> Crawford discusses briefly the relationship between effectivity and self-determination in his book. He says that, in certain cases, namely those involving decolonization, “self-determination will operate to reinforce the effectiveness of territorial units created with the consent of the former sovereign.” <sup>216</sup> In other cases, where the entity seeking statehood is opposed by the former sovereign, the principle may be used to justify a lowering of standards regarding effectivity “ so that the degree of effectiveness required as a precondition to recognition may be substantially less than in the case of secession within a metropolitan unit.” <sup>217</sup> And, finally, in at least one case, that of Rhodesia, the principle was applied by the international community as a means of preventing an essentially effective entity from gaining the recognition of other states. Although Crawford admits that this case is unique and therefore does not settle the matter entirely.

In the context of decolonization, there is no question that the principle of self-determination is an integral part of international customary law, with many examples to be found in state practice, judicial decisions, and treaty law. However, its status outside the colonial context remains the subject of debate amongst scholars to this day. As Anne Bayefsky put it in the introduction to her collection of materials on the Reference Re: Quebec Secession ,“ What is less certain are a host of other issues, such as which

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<sup>215</sup> *Ibid.* at 100.

<sup>216</sup> *Ibid.* at 102.

<sup>217</sup> *Ibid.*

‘peoples’ or ‘minorities’ are its beneficiaries, and whether this post-colonial right to self-determination still has the potential for validating claims to secession.”<sup>218</sup>

There are certainly a large number of treaties that have enshrined the principle in their provisions. Of these two of the most prominent are the two U.N. human rights Covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic , Social and Cultural Rights.<sup>219</sup> Both of these documents guarantee the right to self-determination for all peoples. They may also be the key to understanding the meaning of the term self-determination in the context of the U.N. Charter .

Another noteworthy piece of UN legislation in terms of its emphasis on the principle of self-determination is the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. This document expounds the principles that are to govern relations between UN member states, including provisions that establish the principle of self-determination as being part of the bedrock of the UN Charter.

Shaw believes that the document sheds some light on important Charter provisions, especially as it was unanimously ratified by the General Assembly.<sup>220</sup> However, we find the standard qualification on the exercise of this right in the form of a statement on the principle of territorial integrity. “ Nothing in the forgoing paragraphs shall be construed as authorizing or encouraging any action which would dismember...the territorial integrity or political unity of sovereign and independent States

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<sup>218</sup> Anne , Bayefsky, ed., *Self-determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000) at 2.

<sup>219</sup> Evans, *supra* note 129 at 95.

<sup>220</sup> Shaw, *supra* note 5 at 228.

conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above”<sup>221</sup> Thus, this resolution perfectly illustrates the source of the tension between the two principles in international law.

In another legal instrument which we have already seen, namely the Helsinki Final Act of 1975, the principle is again a key element. The treaty states, in principle VIII paragraph 2 that “ all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external political interference, and to pursue as they wish their political economic, social and cultural development.”<sup>222</sup> These are but a few of the documents that are concerned with self-determination as a human right. This brings us to the main point of this section: if self-determination is a human right guaranteed by international law, under what circumstances can it be exercised? The U.N. Human Rights Committee is tasked with the role of interpreting the human rights covenants and it has, over the years, clarified the meaning of self-determination in the context of U.N. legislation. The Committee has drawn a critical distinction between external and internal self-determination. The former “ requires a state to take action in its foreign policy consistent with the attainment of self-determination in the remaining areas of colonial or racist occupation.”<sup>223</sup> The latter, however, “is directed to their own peoples...The right of internal self-determination, therefore, provides the overall framework for consideration of the principles relating to democratic governance.”<sup>224</sup> In an earlier General Assembly resolution the criteria for internal self-determination were defined in the following terms: “a government

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<sup>221</sup> Evans, *supra* note 129 at 162.

<sup>222</sup> *Conference on Security and Co-operation in Europe Final Act*, 1 August 1975, 14 I.L.M 1292.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

representing the whole people belonging to the territory without distinction as to race, creed or colour.”<sup>225</sup>

As was demonstrated in a previous chapter (section 3.1) the concept of territory is as the heart of the international law governing statehood. International law is very much concerned with the protection and maintenance of that territory, hence we find that principle of territorial integrity can be found in many international treaties and cases. Examples of this are numerous, but for present purposes, it will be enough to examine the most important: article 2(4) of the U.N. Charter, which provides the following “ All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”<sup>226</sup> But, the relationship between this principle and that of self-determination is often an uneasy one. Sometimes the two principles clash in cases of secession. This has lead, on a number of occasions, to attempts by the U.N., and in particular by the Security Council, to intervene in such conflicts in order to regulate the secession in question. “ ...or if the forcible secessionist attempt is considered as a threat to international peace and security, leading the Security Council to invoke the principle of territorial integrity.”<sup>227</sup> Moreover, it is often the case that the same documents that contain provisions endorsing the self-determination principle will paradoxically include provisions qualifying that endorsement by also enshrining the principle of territorial integrity. Consider this example from the Helsinki Final Act. The document endorses the right to self-determination by stating that “all peoples always have the right, in full freedom, to determine, when and as they wish,

<sup>225</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*. GA Res. 2625(xxv), UN GAOR, 25<sup>th</sup> Sess., Supp No. 10, UN Doc A/8010/ Rev.1(1970) 121.para 7.

<sup>226</sup> Evans, *supra* note 129 at 9.

<sup>227</sup> Marcelo, Kohen, ed., “Secession: International Law Perspectives” (Cambridge, Cambridge University Press, 2006) at 19.

their internal and external political status...”<sup>228</sup> while at the same time limiting the exercise of that right by stipulating that the treaty also requires that it be exercised “...in conformity...with the relevant norms of international law, including those relating to territorial integrity.”<sup>229</sup>

Question 2 of the *Reference* dealt directly with the question of the relationship between self-determination and the exercise of UDI in international law. In Crawford’s work for the Attorney General of Canada, he provided a concise definition of the term which I will use here: “(UDI) is a term commonly used to refer to the unilateral act by which a group declares that it is seceding and forming a new state.”<sup>230</sup> He also asserts that a UDI is by no means a self-fulfilling act. Hence an aspiring state must also have effective control over its territory and recognition by other states in order for it to successfully become a legitimate state. He also indicates that the consent of the parent state on which the secession is occurring is of paramount importance.<sup>231</sup> All of which is to say that “a declaration of independence is a necessary, but not a sufficient, condition for unilateral secession.”<sup>232</sup>

In his study of UDI in international law, Crawford draws a distinction between lawful and unlawful means of achieving independence. The latter has historically been much more commonplace than the former, particularly in the context of decolonization. Crawford finds that entities that have achieved independence, through the use of force for example, do often gain recognition and legitimacy after the fact. This, however, does not mean that international law allows for a UDI generally, nor does it recognize the use of

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<sup>228</sup> *Conference on Security and Co-operation in Europe Final Act*, *supra* note 434.

<sup>229</sup> *Ibid.*

<sup>230</sup> Crawford, *supra* note 166 at 35.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

force in such a case as being legitimate. In fact, on the contrary, Crawford claims that international law overwhelmingly favours the territorial integrity of states, and even allows the parent state to oppose UDIs by any reasonable means that are recognized by international law. Furthermore, according to Crawford, third party states must not intervene in this process, as such an intervention would be regarded as a violation of state sovereignty. This is not to say that international law categorically denies the possibility of a UDI. As Crawford himself points out, in cases where the effectivity of the state in question is established beyond the shadow of a doubt, the realist nature of international relations has resulted in the recognition by the international community of an entity which has employed a UDI. That having been said, in order for the UDI to be lawful outside the colonial context, it would have to be in accordance with the norm of self-determination. However, this is complicated by Crawford's observation that "international law does not confer any right to unilateral secession outside of the colonial context...then the only ways in which an entity can unilaterally secede is either by the traditional means of winning a war of independence..."<sup>233</sup> Alternatively, it could "negotiate its way to independence-if the central government agrees to engage in such negotiations, which is not required by international law to do."<sup>234</sup>

In an article that was published in the anthology Secession: An International Perspective the question of the legitimacy of a UDI arises and is addressed briefly by the authors John Dugard and David Raic. They then define the terms used in the section on unilateral secession (which I will use interchangeably with the term UDI). They recognize that secession is often the most viable means for achieving statehood and that a

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<sup>233</sup> *Ibid.* at 36-37.

<sup>234</sup> *Ibid.* at 37.

unilateral secession occurs when “ the separation of part of the territory of a State which takes place in the absence of the prior consent of the previous sovereign.”<sup>235</sup>

The international legal documents have little to say on the matter of UDI. Indeed Dugard and Raic maintain that it is neither prohibited nor recognized by any major international treaty. It is implicitly addressed by the UN treaty on Friendly Relations which states that the right to self-determination does not “...encourage any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States...”<sup>236</sup> However, it should be noted that paragraph 7 was not without controversy, and that it was only included after an intense debate between the participants in the Special Committee as to whether or not a right to a unilateral secession existed in international law. These discussions shed light on the intentions of those that drafted the treaty. On this basis, the authors claim that “It may therefore be argued that the provision is either neutral with respect to secession or...acknowledges the legitimacy of secession under certain circumstances, including the denial of internal self-determination and/or a serious violation of fundamental human rights. The latter position has been accepted by many scholars.” If such a violation were to occur, then theoretically this would legitimize the secession attempt by bringing the situation to the attention of the international community.<sup>237</sup> This might lead to a lawful intervention by third party states in the form of a recognition of the secession. If we take this line of reasoning to its logical conclusion, it can be said that it supports the idealist/constructivist position in its implications for international relations. “ In effect this means that the justifiability of the attempt at secession by a people is made dependent

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<sup>235</sup> Dugard, *supra* note 40 at 102

<sup>236</sup> Evans, *supra* note 271 at 162.

<sup>237</sup> Dugard, *supra* note 40 at 104.

on the legitimacy and conduct of the government of the parent State”<sup>238</sup> One must be cautious not to jump to the conclusion that a violation of fundamental human rights by a government will necessarily lead to a successful claim to self-determination by the aggrieved entity that suffered the wrong. The success of such a claim depends largely on whether it can be proven that all avenues for internal self-determination have been exhausted, and that external self-determination remains the only viable option. “ Because a right to self-determination will come into existence only if the right of self-determination can not be exercised internally, this line of reasoning suggests that, at a certain point, the right of internal self-determination converts into a right of external self-determination.”<sup>239</sup> Unfortunately, the “certain” point described in this passage is rather ambiguous and Dugard and Raic provide no clue as to the circumstances under which such a point might be reached in international law.

In their study of self-determination, Dugard and Raic analyze an international legal doctrine known as the “ ‘qualified secession doctrine’ ”<sup>240</sup>. This doctrine (also know as remedial secession), they claim, has been supported by judicial opinions of the international court system. Perhaps most famously in a case that we have already seen, namely the Aaland Island dispute that arose in 1921 and was the subject of two reports: the first by an International Commission of Jurists and the second by Committee of Rapporteurs. Both of these legal bodies found against the right of self-determination for the Swedish population that were attempting to secede from Finland, but did not rule out

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<sup>238</sup> *Ibid.* at 104.

<sup>239</sup> *Ibid.* at 105.

<sup>240</sup> *Ibid.*

entirely a right to secession in international law. “<sup>241</sup>(Self-determination)...can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantee.” This and other decisions like it have led jurist David Raic to the assumption that there is now a consensus among legal scholars as to the legal framework in which the doctrine of qualified secession operates. They are defined as being the following:

- a) There must be people which, through forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within a part of the territory of that state.
- b) The State from which the people in question wishes to secede must have exposed that people to serious grievances( *carence de souverainneté*), consisting of either
  - (i) a serious violation or denial of the right to internal self-determination of the peoples concerned (through, for instance, a pattern of discrimination), and/or
  - (ii) serious and widespread violations of fundamental human rights of the members of that people;
- c) There must be no( further) realistic and effective remedies for the peaceful settlement of the conflict. <sup>242</sup>

Dugard and Raic’s conditions for self-determination are rather strict, and they maintain that if they are not met than this would constitute a violation of international law and no recognition of an entity seeking approval from the international community will be forthcoming. While there are certainly cases where recognition was denied on this basis (Rhodesia being the prime example), there are also exists cases which contradict the criteria for the “constitutive parameters for a right to secession”<sup>243</sup> as defined by these

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<sup>241</sup> See *Decision of the Council of The League of Nations on The Aland Islands Including Sweden’s Protest* ( 1921), Advisory Opinion, P.C.I.J.(Ser. A/B) No. 697

<sup>242</sup> Dugard, *supra* note 40 at 109

<sup>243</sup> *Ibid.*

two scholars. Given the harsh reality of international relations, is it possible to accept the statement made by them regarding state practice? Or, for that matter, their assertion that there is “general agreement”<sup>244</sup> amongst states on this particular point? At this point in time, it must be recognized that this remains a normative statement rather than a factual one.

As I have already demonstrated, there exists an unresolved tension in international law between the principle of self-determination and that of territorial integrity. The latter not only imposes an obligation on States to respect each other’s sovereignty but also limits the way in which the right to self-determination can be exercised. This dichotomy is best illustrated by reference to such international legal instruments as the Declaration on the Situation in Yugoslavia<sup>245</sup>. According to Dugard and Raic, this treaty can be interpreted as defining the parameters in international law in which the right of self-determination operates within international law. Among other things, it is limited by the obligation in international law to respect the territorial integrity of the State. Therefore, this “...necessarily excludes the thesis that self-determination includes an absolute right of unilateral secession.”<sup>246</sup> However, in spite of this, Dugard and Raic, as we have seen, can also conceive of a scenario in which external self-determination might be legally carried out despite being in contravention of the territorial integrity of a given state. They argue that this would, in effect, give third party states the right to intervene.

“...that third States would be entitled to support a people which attempts to secede, even if such support would eventually lead to the infringement of the territorial integrity of the target

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<sup>244</sup> *Ibid.*

<sup>245</sup> Declaration of Yugoslavia, *Documents of Summit Meetings in the past* ( July 7,1992), online: The Ministry of Foreign Affairs of Japan<[http://www.mofa.go.jp/policy/economy/summit/2000/past\\_summit/18/e18-c.html](http://www.mofa.go.jp/policy/economy/summit/2000/past_summit/18/e18-c.html)>.

<sup>246</sup> Dugard, *supra* note 40 at 106.

State. But this would only be permissible if the target state does not conduct itself in compliance with the right of self-determination... would have to be in accordance with other principles contained in the Friendly Relations Declaration.”<sup>247</sup>

This interpretation of the nature of the Friendly Relations Declaration is at odds with that of Cassese, who sees the treaty as reinforcing the supremacy of territorial integrity in international law. One conclusion that his analysis yields is that, as regards the right of secession“...is not ruled out but may be permitted only when very stringent requirements have been met.”<sup>248</sup> Moreover, the saving clause in question emphasizes the importance of territorial integrity by putting it “...at the beginning, in order to underscore that territorial integrity should be the paramount value for States to respect. However, since the possibility of impairment of territorial integrity is not totally excluded it is logically admitted.”<sup>249</sup> The threshold established for an oppressed people to gain the right to external self-determination in this treaty is remarkably difficult to attain. A denial of basic self-government would not in itself be sufficient, there would also have to be evidence of “...gross breaches of fundamental human rights and...the exclusion of any likelihood for a possible peaceful solution within the existing State structure.”<sup>250</sup>

Cassese’s interpretation of international law is further reinforced by Antonello Tancredi. In his view, a secession is an internal matter and can not be subject to external interference by other states under any circumstances. Based mainly on his analysis of the SFRY, Tancredi draws the conclusion that there is no recognized right to remedial secession in international law, even in cases where there is strong evidence of oppression of minorities and human rights violations. It does, however, through various means, seek

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<sup>247</sup> *Ibid.*, at 103.

<sup>248</sup> Cassese, *supra* note 207 at 118.

<sup>249</sup> *Ibid.* at 119.

<sup>250</sup> *Ibid.* at 120.

to address such instances and promote the protection of human rights. Although it may be regarded as more or less an internal matter, there is still “a duty to cease the wrongful conduct and, where possible, to restore the *status quo ante* ( which normally is tantamount to creating *ad hoc* mechanisms or institutions to guarantee an indiscriminate representation to the different components of a people.)”<sup>251</sup> Therefore, third party states are obligated not to interfere in what international law deems an internal conflict and must respect the sovereignty and territorial integrity of other states in this regard. But, in the view of Tancredi, this process of secession is complicated by the normative rules (e.g. the EC guidelines for recognition of new states) of international law that are concerned with the way in which an entity makes the transition to statehood. “These rules, considered together, constitute a sort of ‘normative course’ through which secessionist processes are channeled. These rules neither provoke nor prevent the birth of new States; they simply ‘guide’ these processes.”<sup>252</sup> This so called form of “due process” requires that the secession in question conform to certain norms of international law. For instance, it is required that the secession “take place without the direct or indirect military support of foreign States.”<sup>253</sup> Consequently, Tancredi argues that the rules regarding decolonization do not apply to the non-colonial secession context that involves self-determination of peoples. Secondly, “the secessionist attempt must be founded on the consent of a majority of the local population, democratically expressed through plebiscite or referenda.”<sup>254</sup> Finally, the secession must observe the *uti possidetis juris* doctrine. Here he is careful to emphasize a distinction between the role of this doctrine and that of the

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<sup>251</sup> Antonello Tancredi “A Normative ‘Due Process’ in the creation of States through Secession”, in Marcelo Kohen, ed., *Secession: An International Law Perspective* (Cambridge, Cambridge University Press, 2006) 171 at 188.

<sup>252</sup> *Ibid.* at 189.

<sup>253</sup> *Ibid.* at 189-190.

<sup>254</sup> *Ibid.* at 190.

principle of territorial integrity in the process of statehood. “ *Uti possidetis juris* does not operate after the formation of a new State, but during the process of creation. After the birth of a new subject, once a new *stasis* has emerged, the principle to respect is that of State’s territorial integrity.”<sup>255</sup> Furthermore, this normative rule applies equally to both the parent state and the secessionist entity.<sup>256</sup> The last crucial distinction, as far as the *uti possidetis* doctrine is concerned, is between it and the principle of self-determination. Tancredi explains it in the following way: “Self-determination pertains to the *substance* of State creation, providing, in certain situations, for a right to independence. In contrast, *uti possidetis* does not give any title to secede; it simply fixes the boundaries which the new entity will eventually inherit.”<sup>257</sup>

Paradoxically, the principle of territorial integrity is itself subject to international law. That would, of course, include the principle of self-determination which is binding on all states by virtue of its status as customary international law, and which requires states to protect human rights and observe the rules of humanitarian law.<sup>258</sup> The upshot of all this is that the right of self-determination may be exercised by a people but is subject to the restrictions of international law and in conformity with the territorial integrity of the parent state, provided that the latter is fulfilling its obligations under international law with respect to the right of peoples to internal self-determination. In such a case “any act of unilateral secession aimed at the implementation of the right of self-determination

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<sup>255</sup> *Ibid.* at 192.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.* at 193.

<sup>258</sup> *Ibid.*

externally would amount to an abuse of that right and a violation of the law of self-determination.”<sup>259</sup>

In the traditional conception of international law, one that corresponds, to some extent, with the positivist/realist paradigm, it was believed that international law neither creates new states nor has anything to say regarding their recognition. As has been demonstrated in several ways throughout this thesis, however, this notion has been somewhat undermined by developments in international law that have taken place since the end of colonialism (e.g. the right of self-determination). So much so that it has led to the establishment of a theory known as remedial secession, a theory that evidently has many champions amongst legal scholars (i.e. Dugard & Raic). Nevertheless, Antonello Tancredi has certain reservations about it, not the least of which is that this academic support has not, as yet, translated into influencing events in the real world. This, in Tancredi’s opinion, remains the doctrine’s primary weakness. “The theory’s main flaw is the lack of sufficient basis in State practice. Putting aside the Bangladesh case, whose exceptional character has been widely underscored, one can barely cite a case in which the scheme of remedial secession has been correctly applied.”<sup>260</sup> Even in the case of the Socialist Former Yugoslavian Republics, Tancredi has his doubts about the relevance of the remedial secession theory in the policy adopted by E.C. with respect to recognition of the new states. “(the EC)...recognized was not right to create new States exercising secessionist self-determination, but simply the inevitability of a *de facto* process which was already under way and which would have produced the dissolution of the SFRY in

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<sup>259</sup> Dugard, *supra* note 40 at 109

<sup>260</sup> Tancredi, *supra* note 252 at 185.

any case.”<sup>261</sup> This point will be explored in greater detail on this point in section 4.2 of the thesis.

#### Section 4.2: Case studies in self-determination

Case studies in the principle of self-determination are numerous, especially since the end of the World War II. However, for the purposes of this section of my thesis, I have chosen to concentrate almost exclusively on one in particular: the Socialist Former Yugoslavian Republics (SFRY). This is partly due to the fact that, though it is never mentioned by the Supreme Court of Canada explicitly in its opinion, the implications of the disintegration of SFRY for international law, were examined in some detail by the Court and its collaborators. It also has the advantage of being a modern legal and political precedent and, as such, was subject to modern international law. Furthermore, it has been written about extensively in particular by the Badinter Commission, whose many published opinions provide the international legal scholar with a wealth of material and analysis from which to draw inspiration and analogy.

As I have discussed in a previous chapter (section 2.2) the process by which the former Yugoslavian Republics became states was violent and chaotic. I need not re-examine the events that precipitated the death of the SFRY and ushered in a new era in the history of the Balkans here. Suffice it to say that, as Crawford points out in his writing for the Attorney general of Canada, “An assessment of the Yugoslav case is thus central to any study of the issue of self-determination and unilateral secession in modern

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<sup>261</sup> *Ibid.*

international law”<sup>262</sup> By and large, Crawford based his analysis for the report on the situation in the SFRY on the findings of the Badinter Commission. For example, he accepts the Commission’s conclusion that the disintegration of the SFRY was the result of a dissolution rather than the secession of various sub-national governments, as had been claimed by the government of Serbia-Montenegro (see chapter 3). Crawford sees the underlying reasoning for this in the following terms: “in the absence of a reconstituted federal government which represented the population of Yugoslavia as a whole, there was no government which had the authority to seek to prevent the break-away of the constituent republics.”<sup>263</sup> As a result, the E.C. characterized what was happening in the Balkans at the time as a dissolution of the State, and the UN shared this point of view and reinforced it by refusing to recognize any of the new states prior to the ratification of a new constitution by Serbia and Montenegro which, in effect, repudiated its earlier claim that it represented the SFRY.

Interestingly, in its first opinion, the Arbitration Commission never suggested that the principle of self-determination and its legal consequences was the cause of the demise of the SFRY. “Rather its focus was on the breakdown of the federal arrangements for power sharing, arrangements which involved the representation of the constituent republics as such. A further critical factor was the fact that the breakdown of the federal system was accompanied by widespread ethnically motivated violence”<sup>264</sup> But this interpretation is controversial, and Crawford explains that Badinter has its detractors who feel that the Commission’s opinions were never based on a sound understanding of

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<sup>262</sup> James Crawford, “State Practice and International Law in Relation to Unilateral Secession” in Anne Bayefsky, ed., *Self-determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000) 31 at 48.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

international law. “[Badinter] has been criticized for advocating...notions about protection of minorities which go well beyond current international law, and for failing to take into account standard criteria for independence based on effective control of territory.”<sup>265</sup> Moreover, by emphasizing the traditional criteria of statehood (e.g. territory, population, etc.) the Commission “affirmed the dominant theory of recognition in international law, holding recognition to be merely declaratory, rather than constitutive.”<sup>266</sup>

In its second opinion, the Commission finally dealt with the question of self-determination in the context of the SFRY. In the view of Crawford, the Commission was being “restrictive”<sup>267</sup> in its conception of the principle. By this he meant that the Commission effectively created a double standard for federal administrative units (i.e. Croatia) on the one hand, and, on the other hand, ethnic minorities ( i.e. Serb population in Bosnia Herzegovina) living within those units. The former could exercise self-determination by virtue of the dissolution of SFRY. The latter, however, could only exercise internal self-determination.

For a variety of reasons, Crawford does not believe that, in the final analysis, the opinion of the Commission will provide a valuable and influential legal precedent for other States to follow. He says of the opinions that “They are underpinned by the shallowest of legal reasoning and do not appear destined to assist the international community greatly when addressing the potentially dangerous problem of secession in the future.”<sup>268</sup> He identifies major weakness with the Commissions opinions on various

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<sup>265</sup> *Ibid.* at 50

<sup>266</sup> James Crawford, “International law and Chaos” (1993) 52 Cambridge L.J. 6 at 7

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.* at 9

matters of international law. On the issue of self-determination, for example, he maintains that Badinter's narrow conception is at odds with the claims to self-determination being made around the world by ethnic minorities who may have the misfortune of living within an established federal administrative unit.<sup>269</sup> Furthermore, the Commission relied heavily on the Vienna Conventions in order to support its reasoning on the secession question. Crawford doubts the relevance of these treaties, saying: "...the Commission relied primarily on these Vienna Conventions, despite the fact that they have been widely ignored by states."<sup>270</sup> Finally, on the question of recognition of the new states, the Commission never managed to convince the E.C. member countries that mandated it, let alone the rest of the international community, to follow its advice.<sup>271</sup>

In the context of the right to unilateral secession generally in international law, Crawford believes the opinions of Badinter must be qualified in a number of ways. Firstly, the Commission did state that the dissolution of Yugoslavia was a matter of fact, and that the emergence of new states in its place and their recognition were an inevitable consequence of this development. In a report Crawford produced for the Attorney General of Canada's case in the secession *Reference*, he touches briefly on a distinction that, as we have seen, was crucial in the break up of the former Yugoslavia and also, to a lesser extent, has some relevance to the hypothetical scenario of an independent Quebec that has achieved this through a UDI: Namely the difference between a UDI exercised by a sub-national government and the dissolution of the state to which it belongs. Crawford maintains that " In this latter case there is by definition, no predecessor state continuing

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<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

in existence whose consent to any new arrangements can be sought.”<sup>272</sup> However, Crawford recognizes that in practice this distinction is often blurred in actual cases of secession (e.g. SFRY) where “the dissolution of a state may be initially triggered by the secession or attempted secession of one part of that state.”<sup>273</sup> If the central government is unable to successfully maintain its authority in such a case, then the process may result in a case of dissolution of the state so that the legitimacy of the central government or parent state, is no longer recognized internationally. Nevertheless, Crawford is of the opinion that in principle, at least, the distinction remains clear and that it is only in clear-cut cases of dissolution that “no one party is allowed to veto the process. By contrast where the government of the predecessor state maintains its status, as such assent to secession is necessary, at least unless...the seceding entity has firmly established control beyond all hope of recall.”<sup>274</sup> Secondly, the Commission never conceded a right to self-determination for any of the entities that sought statehood in the wake of the SFRY dissolution. “Commission did not rely on any right of self-determination of the constituent republics, as distinct from the continued proper functioning of federal organs in which those republics were intended to be directly represented.”<sup>275</sup> Thirdly the Commission was strongly influenced by three important factors that set the case of SFRY apart from many other cases involving the principle of self-determination, UDI and secession. “ a substantial majority of the population were trying to break-away...the constitutional order...had completely broken down...Yugoslavia was undergoing large-

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<sup>272</sup> Crawford, *supra* note 263 at 42.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.* At 43

<sup>275</sup> Crawford, *supra* note 263 at 50.

scale and unrelenting ethnic conflict... ”<sup>276</sup> In light of all this, Crawford comes to the conclusion that the Yugoslavian situation “provides no precedent for the extension of any international legal right to secede to the constituent units of federal states.”<sup>277</sup> As was pointed out earlier, Crawford maintains that the former Yugoslavian republics gained their recognition on the grounds that the SFRY had ceased to exist in reality, rather than on the basis of the principle of self-determination. Moreover, the existing criteria in international law for dissolution have rarely been met in practice. “ But there is a strong presumption against dissolution, and the only case of successful separation under these circumstances is that of the constituent republics of the former Yugoslavia.”

This aspect of Crawford’s theory on the disintegration of the SFRY, has drawn criticism from his academic peers. One such criticism, made by Pellet, takes issue with the emphasis Crawford places on the distinction between secession and dissolution. It is not that Pellet denies such a distinction exists in international law, rather he objects to the way in which Crawford uses this argument in order to support his own thesis, which maintains that, in the vast majority of non-colonial cases, the consent of the parent state was given before the international community recognized a state created as a result of secession. Pellet complains that “[Crawford] is attempting to reduce to practically nothing any precedents that might contradict the ‘consensual’ thesis that he is defending, and he is seeking to justify his repeated assertion that ‘there is no case since 1945’ where...( the UN) has admitted a seceding entity to membership against the wishes of the

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<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*

government of the state from which it has purported to secede.”<sup>278</sup> Instead, Pellet proposes that, for the purposes of Crawford’s study, it would be more useful to divide the cases of secession into two categories: A) those secessions that failed due to a lack of consent from the parent state; and B) those cases where the state in question was effectively established despite the opposition of the parent state. Pellet claims that “it does not matter whether or not the state of origin still exists *at the conclusion* of the process; the only question is whether the state of origin did not consent to the secession or to its own disappearance.”<sup>279</sup>

Pellet also manages to use Crawford’s own words against him. He reminds us that Crawford himself admitted that the line that separates dissolution and secession is a fine one, and that the two are often impossible to distinguish in practice. For example, two of the seceding republics (Slovenia & Croatia) of the SFRY declared independence initially without any consent from the central government. On the contrary, the latter fought these secessions tooth and nail, opposing it in every way imaginable. Furthermore, Badinter may have regarded the distinction between the two legal concepts as being of some importance, but did not see their relevance when it came to ascertaining the date of independence. “ the Commission did not rely upon that concept to determine succession dates, which it set differently in each case, on the basis of the date of actual accession of each state to independence.”<sup>280</sup>

In his article on the subject of the way in which international law attempts to regulate the process of statehood, Photini Pazartzis bolsters the argument made by

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<sup>278</sup> Allan Pellet, “Legal Opinion on Certain Questions of International Law Raised by the Reference” in Anne Bayefsky ed., *Self-determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000) 85 at 101.

<sup>279</sup> *Ibid.* at 102.

<sup>280</sup> *Ibid.* at 103.

Crawford that self-determination was not the legal foundation for the recognition of the new states that emerged from the break-up of the SFRY. Furthermore, the Badinter Commission's acknowledgment of the federal component's right to secede, was made in the context of the failure of negotiations between the elements of the SFRY to reach a lasting peaceful solution to the crisis in the Balkans, and after Slovenia and Croatia had unilaterally proclaimed their independence (November and June of 1991 respectively) from the SFRY " Never until that moment --which has been considered by the Arbitration Commission in its Opinion no.11...as the 'critical date' to which Slovenia and Croatia can point as their birth as independent States- had the international community recognized the existence of a right to secede from the SFRY"<sup>281</sup> Moreover, the Commission applied the right to self-determination ( as defined in the two UN 1966 human rights covenants) only insofar as it was exercised in the form of internal self-determination. The Commission stated in opinion no. 2, "That the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including...the right to choose their nationality."<sup>282</sup> But, as Pazartzis points out in his study of the state practice regarding secession in modern Europe, this "...did not signify that they could exercise a collective right of territorial secession."<sup>283</sup> This does, at any rate, represent a break from the traditional interpretation of the relevance of the principle of self-determination in the process of statehood. Whereas previously realists have argued that federal structures and cultural rights were internal matters to be decided by the government of a given country,

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<sup>281</sup> Tancredi, *supra* note 252 at 185.

<sup>282</sup> *Ibid.*

<sup>283</sup> Photini Pazartzis, "International and Domestic Practice", in Marcelo Kohen, ed. *Secession: International Law Perspectives* (Cambridge, Cambridge University Press, 2006) 355 at 366.

the Badinter Commission was essentially advocating the imposition of certain fundamental human rights with respect to the right to self-determination for an ethnic minority or people within a state. This position would seem to have much in common with the Idealist/constructivist paradigm. As Pazartziz's says "It is one of the most significant developments to have emerged from Yugoslavia's collapse...that the principle of self-determination was 'modernised', through the extension of its application to Europe."<sup>284</sup> But this should never be equated with a right to secession, unilaterally or otherwise, for any entity seeking to create an independent state.

In his analysis of the situation of the SFRY jurist Antonio Cassese categorically dismisses the notion that the new states' claim to independence was founded on either international or domestic law. "under international law the six Yugoslav republics had no right to external self-determination. In addition, no such right was proclaimed in the Yugoslavian Constitution."<sup>285</sup> The latter point is too often overlooked by the legal experts involved in the analysis of the Reference as, in light of the Canadian Constitution's lack of any mechanism of bringing about the constitutional secession of a province, it would seem very relevant in that context. Cassese points out that, unlike the constitution of the USSR which did allow for secession (in theory anyway), the Yugoslavian constitution has no such provisions. Furthermore, article 5(4) of said constitution expressly forbids the altering of the borders of the SFRY without the consent of all the republics and autonomous provinces. In light of these facts, Cassese contends that the independence of

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<sup>284</sup> *Ibid.* at 367

<sup>285</sup> Cassese, *supra* note 182 at 207.

the former Republics can be seen as “a revolutionary process that has taken place beyond the regulation of the existing body of laws.”<sup>286</sup>

In an international legal sense, however, Cassese, says that the principle of self-determination, both internal and external, played a significant role in the process of statehood. He finds that this is true, firstly, in indirect or political fashion. By this he means that “self determination has operated at the level of political rhetoric, as a set of political principles legitimizing the secession of national States from central, oppressive State structures.”<sup>287</sup> Secondly, he sees internal self-determination, particularly in the form of referenda, as being a crucial stepping-stone for entities that are in the process of transforming themselves into states. “...*the legal tools for establishing the demands of the seceding peoples* (Italics included in text) to achieve independent statehood: referendums have been held in almost all the breakaway republics in order to verify the will of the populations concerned.”<sup>288</sup> Finally the legal criteria established by the Arbitration Committee which were, to some extent, eventually imposed by the EC in its demands towards the new states that emerged from the SFRY. Given this analysis, Cassese comes to the conclusion that some form of internal self-determination is now an essential step for emerging states seeking recognition from the international community. “indeed respect for it, as well as respect for the rights of minorities, have been raised to the status of *sine qua non* conditions before the endorsement of external self-determination.”<sup>289</sup>

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<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid.* 273.

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

Crawford's interpretation of the right to secession and self-determination in the context of the SFRY is merely one theory among others and is by no means universally accepted by his fellow jurists. In his report, written for the *Amicus*, international legal scholar Thomas Frank has a different take on the implications of the dissolution of the SFYR in international law. While he agrees with Crawford's argument insofar as it denies a right to secession in international law, he also observes that international law does not prohibit secession and thus, *de facto*, permits secession under certain circumstances. For example "people may have a right to secession tenable in law and politics due to their demonstrable inability to achieve established rights of self-determination guaranteed by law."<sup>290</sup> A case in point, for Frank, is a UN Security Council resolution, which recognized the Republic of Bosnia's right to secede, as well as guaranteeing the territorial integrity of the newly independent state against the aggression of the Yugoslavian military. The Council declared "the need to respect the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina."<sup>291</sup> Frank claims that examples like this contradict the notion that UDI are against international law. "it is only with the greatest difficulty that one could assert that international law does not permit, or refuses to recognize, secessions when they occur."<sup>292</sup> He does, however, agree with Crawford's tacit point with respect to the idealist/constructivist trend towards attempting to regulate secessions by means of promoting certain criteria for recognition. The opinions of the Badinter Commission are cited as proof of the validity of this statement. Moreover, Frank implicitly supports the notion of the consent of the parent state, or at least its consultation, being a legal

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<sup>290</sup> Frank, *supra* note 353 at 79.

<sup>291</sup> UN SCOR, 1992, 3106 Mtg., UN DOC S/RES/770 (1992).

<sup>292</sup> Frank, *supra* note 353 at 80.

obligation of the secessionist entity “[the]modern international legal system prescribes in situations of potential conflict a duty to negotiate in good faith, have recourse to meditation and to abstain from the recourse to potentially conflict inducing measures while negotiations are pursued.”<sup>293</sup>

In its factum, the Attorney General of Canada summed up the evidence presented by the jurists it consulted in the following way: “State practice offers no support at international law for a right to unilateral secession from an independent state outside the colonial context.”<sup>294</sup> The Attorney General claims that all other secessions that have occurred in the modern era of international public law (which it defines as post WWII) have come about through some process of negotiation between the concerned parties. However, this is qualified by one non-consensual example of a successful secession: the case of the SFRY, which is explained as being the result of the dissolution of that State. “The one exception was the former Yugoslavia where the constituent republics became independent states upon the total collapse of the former state.”<sup>295</sup> However, as professor Pellet argues in his report for the *amicus*, while this distinction between dissolution and secession may be clear in legal theory, it is anything but in the real world.

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<sup>293</sup> *Ibid.*

<sup>294</sup> “*Factum of the Attorney General of Canada*”, 373 at 323

<sup>295</sup> *Ibid.*

Section 4.3: Self-determination in the context of the Supreme Court Reference Re: Quebec Secession

In this final section I will tackle the issue of self-determination as it relates to the Reference Re: Quebec Secession. This includes the material that came before the case (e.g. Bélanger-Campeau Commission), the material that informed the argumentation of the actual parties (e.g. Factums) to the case as well as the decision of the Court itself. Finally, the *post-mortem* analysis of the case found in books, journals and so on (e.g. Self-Determination in International Law: Quebec and lessons learned). It should come as no surprise to the reader that, this is a contentious subject amongst international jurists and that there is as yet no end in sight to the debate over the conclusions of the Supreme Court.

In 1992, the question of the application of international law to the hypothetical scenario of an independent Quebec was raised by the Bourassa government in the context of the Bélanger-Campeau Commission report. The Commission examined all manner of issues involved in this scenario, including self-determination and secession. Many legal experts were summoned to present to the Commission (including Malcolm Shaw) and one in particular, Geneviève Burdeau, was asked for her expert opinion on the relevance of the principle of self-determination. Burdeau was of the opinion that the right of self-determination can only be exercised by colonial people or those subjugated by an alien occupation. "...puisque le régime juridique relativement favorable reconnu l'État issue d'une décolonisation n'est pas considéré comme transposable en cas de séparation d'État

classique.”<sup>296</sup> However, there are two conditions that need to be satisfied in order for a secession outside of the colonial context to be regarded as legitimate. “...cette sécession correspond au vœu de la population librement exprimé et que, d’autre part, elle se réalise avec le consentement de l’État démembré.”<sup>297</sup> Moreover, that if the legal conditions for a legitimate secession are not met under international law, the secession in question will not be able to rely on the rules regarding self-determination.

In the same vein as the Bélanger-Campeau Commission, there was a report commissioned by the Quebec government in 1992 that addressed, *inter alia*, the relevance of the principle of self-determination in the context of a sovereign Quebec. The experts (including a few who subsequently worked with the *Amicus*) tackled the question that they believed went to the very heart of the matter and was being misinterpreted by both sides of the debate in the sense that “both sides of the debate base their arguments on the-we believe-erroneous assumption that the right to self-determination is the equivalent of, or at least implies, the right to independence.”<sup>298</sup> This misunderstanding has led both the separatist forces and other communities within Quebec (e.g. Aboriginal) to the erroneous conclusion that they have a right to external self-determination, when, in actuality, international law only confers a right to exercise some form of internal self-determination. “that a community has a right to participate in its future, but which, except in colonial situations, is an inadequate basis on which to found the right of a people to achieve independence to the detriment of the state which it is joined.”<sup>299</sup>

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<sup>296</sup> Quebec, Assemblée Nationale, *Commission Accession Du Quebec a la Sovererainete*, 34e Leg. 1er & 2e sess., Nos 1-38 ( 5 Fevrier 1992) at 542.

<sup>297</sup> *Ibid.* at 540.

<sup>298</sup> Franck, *supra* note 160 at 248.

<sup>299</sup> *Ibid.*

Although they maintain that the principle of self-determination is of “limited relevance”<sup>300</sup> to the Quebec scenario, the experts nonetheless examine it and its implications, in some detail. They claim that the principle has achieved the status of a *jus cogens* principle and cite the Badinter Commission’s Opinions to support this claim. They also believe that the application of the principle is highly “context-dependent”<sup>301</sup> and that, consequently, its implications will vary a great deal according to the situation of the entity which claims it as a right. “ The extent of this choice, however, varies according to the circumstances, but because of the necessary reconciliation of the principle of self-determination with that of territorial integrity, it rarely extends so far as to include secession.”<sup>302</sup>

The Report also briefly responds to what might be characterized as the radical school of thought with respect to Quebec’s rights as a people under international law. Some jurists, such as Jacques Brossard, have suggested that Quebecers not only qualify as a people under international law, but that, by virtue of this fact, they automatically enjoy the right to external self-determination. Professor Brossard and others often make the case for sovereignty on the dubious grounds that Quebec is akin to a colonized people and thus is entitled to the legal recourse of the principle of self-determination in all its forms, including independence. Brossard has said that Quebec has “ the right to choose ‘to create a sovereign and independent state’ and to choose ‘to associate or integrate freely with an independent state, or to acquire any other political status as freely decided by its people’ it does indeed appear that the Quebec people meet all the prerequisites for

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<sup>300</sup> *Ibid.* at 277.

<sup>301</sup> *Ibid.* at 279.

<sup>302</sup> *Ibid.* at 277.

this purpose.”<sup>303</sup> Daniel Turp has said the failure to secure Quebec’s ratification of the Constitution and the subsequent failed attempts to negotiate a compromise that would have achieved this (e.g. Meech Lake Accord ) constitute a denial of self-determination in international law.<sup>304</sup> Other legal experts are quick to dismiss such an idea as nonsense. “one cannot reasonably maintain that the Quebec people is a colonial people that is deprived of the right to its own existence within Canada as a whole or to participate in the democratic process.”<sup>305</sup> In the view of the experts who produced the report, and indeed most jurists, Quebec already exercise a great deal internal of self-determination within Canada and cannot seriously claim that they are at present being denied this legal right and, therefore, should have legal recourse to secession. However, the latter eventuality is not ruled out by the experts, who indicated that “this does not prevent it from claiming or obtaining or imposing such right: only, this is purely a question of fact which international law neither supports nor reproves.”<sup>306</sup> Again one may observe an attempt to clearly separate fact from law in the context of Quebec secession. In summarizing their position on self-determination, the experts assert that Quebec cannot found its claim to independence on the principle of self-determination, but, on the other hand, the experts maintain that this situation “would not be precluded on legal grounds from achieving sovereignty. Canada...can assert the principle of its territorial integrity against other States...but this does not protect Canada from the opposability of a possible effective secession of Quebec”<sup>307</sup> When reading this fairly convoluted reasoning, one can’t help but feel that the legal experts are trying to oversimplify the question. After all, if the

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<sup>303</sup> “Factum of the Attorney General of Canada”, in Anne Bayefsky ed., *Self-Determination: Quebec and Lessons Learned*, (the Hague, Kluwer Law, 2000) 309 at 339

<sup>304</sup> *Ibid.*.

<sup>305</sup> Frank, *supra* note 156 at 281.

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.* at 285.

principle of territorial integrity is immaterial in the event of an effective secession, then why bother with an analysis of the international law which relates to this concept? Surely, the effectivity argument and its implications for a Quebec secession are more complicated issues than that.

In preparing for the Reference, both the *Amicus* and the federal government secured the help of various prominent international jurists with respect to building their cases. On the *Amicus* side, there were those who debated, among other things, the relevance of the principle of self-determination in the context of an independent Quebec. One such academic was Alain Pellet. While Pellet agreed that Quebec independence would not be justified by the right to self-determination, but maintained that, alternatively, it could instead be justified on the grounds of effectivity.

In Pellet's analysis for the *Amicus* of question 2 of the Reference, he states that all peoples, including Quebec, are entitled to some form of recognition of their unique identity. However, this is not to say that they necessarily have the right to statehood, as the right to self-determination encompasses both an internal and external element, and Pellet claims that international law merely requires that a people's identity be recognized not that they may automatically pursue independence. "I do not think it possible to give a purely and simply affirmative answer to the second part of the question, and in the case of the Quebec people, to treat its right to self-determination as a subjective right to independence."<sup>308</sup>

In his assessment of the relationship between the principles of territorial integrity and self-determination, Crawford is critical of the "common theme" amongst the experts consulted by the *amicus*, which is that the former does not apply to seceding groups as

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<sup>308</sup> *Ibid* at 211.

they are not subject to international law. Crawford responds to this argument with two key points: “such groups are not subjects of international law at all, in the way that states are. A group does not become a subject of international law simply by expressing its wish to secede”<sup>309</sup>. Secondly, “the principle of territorial integrity ensures to the benefit of the affected state. That state is entitled to resist challenges to its territorial integrity...”<sup>310</sup> Furthermore, Crawford asserts that the state practice and legal principles of international law favour the territorial integrity of the parent state. It does not, however, rule out secession. Nevertheless, it does allow for “very substantial periods of time...for the central government to seek to preserve the territorial integrity of the state.”<sup>311</sup> Although how long these periods of time might last, Crawford does not say. Finally, despite the claims of many experts on the *Amicus* side, Crawford denies that a Quebec in the midst of a unilateral secession from Canada would have its borders guaranteed during this process. “It does not trigger any international legal protection for the ‘territorial integrity of the seceding entity’”<sup>312</sup>

On the question of the tension between territorial integrity and self-determination in international law, Pellet is basically in agreement with Crawford, though not entirely. For example, Crawford does not rule out the possibility of secession simply because it may come into conflict with the principle of self-determination, but he also suggests that there is a critical distinction between peoples and internal groups where secession is concerned. Pellet is not impressed with this reasoning. Firstly he argues that the distinction is essentially academic as “it is hardly imaginable that such a situation would

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<sup>309</sup> Crawford, *supra* note 166 at 157.

<sup>310</sup> *Ibid.* at 158.

<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid.*

occur if the group were not a people within the meaning that international law gives to that word.”<sup>313</sup> Moreover, though he agrees that an internal group seeking independence may not have any status in international law, a people, on the other hand, most certainly do have one. Finally, he strongly objects to Crawford’s point on the hierarchy of norms which supposedly favours territorial integrity over self-determination. In Pellet’s view, neither principle supercedes the other. Instead, they have equal status in the international legal system, and ,therefore, in this case “The Quebec people may(have the right to) affirm its independence, and Canada may( have the right to) seek to preserve its territorial integrity. However, since both parties are subjects of international law, they are obligated to respect the other fundamental principles of contemporary international law.”<sup>314</sup>

The question of the relationship between territorial integrity and self-determination, appeared again in the *facta* of both the *Amicus* and the Attorney General of Canada, with the latter putting particular emphasis on this point. On the matter of external self-determination, not surprisingly, the position of the federal government might be characterized as highly conservative. Its interpretation recognized the right to secession for a people in the colonial context. However, in any other context “ the right of self-determination is the right of the people of the state to determine without external interference, their form of government and international status. This right is exercised fully by all Canadians, including Quebecers”<sup>315</sup> Equally, on the matter of internal self-determination, Quebecers were already exercising their collective rights within Canada. Furthermore, the principle of self-determination does not grant an entity a right to

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<sup>313</sup> Alain Pellet, “Legal Opinion on Certain Questions of International Law Raised by the Reference” in Anne Bayefsky,ed. *Self-Determination in International Law: Quebec and Lessons Learned* (the Hague, Kluwer International Press, 2000) 185 at 209.

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

unilateral secession if it can be established that it is already present in the internal sense of the term. In a response to the radical theory of self-determination which we saw earlier the attorney general made it clear that the right to secession based on self-determination is the exclusive domain of colonized peoples. Since “Quebec in no way constitutes a colony nor is its population in any way subject to alien domination or gross oppression.”<sup>316</sup>, it is clear that it cannot seek independence on this basis.

In the *amicus*' initial factum, self-determination in the context of question 2 of the *Reference* was discussed. Citing the controversial work of legal experts Turp and Jacques Brossard on the matter of self-determination as it relates to Quebec sovereignty, the *amicus* declared that “ some legal experts contend that a people's right to self-determination alone establishes the legality of secession in international law.”<sup>317</sup> As I have already demonstrated, this conception of the principle has little currency amongst the majority of jurists that have examined this question. To argue, as did the *Amicus* at one point, that the Government of Canada did not fulfill its international legal obligations in the sense that it never managed to gain the consent of the government of the Quebec for the repatriation of the constitution and that “the procedure for amending the Constitution Act, 1982 creates so many obstacles that it is in reality a denial of the right to self-determination.”<sup>318</sup> seems to be clutching at straws, to say the least. Indeed, the *amicus* itself subsequently did a complete about face on this point, admitting that Quebec right to self-determination as a people had never been violated by the government of Canada.

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<sup>316</sup> *Ibid.* at 329.

<sup>317</sup> “*Factum of the Amicus Curiae*”, *supra* note 173 at 333.

<sup>318</sup> *Ibid.*, at 384.

The *amicus* then lists all of the international legal instruments that Canada as a country is party to that deal with self-determination, and considers how they might apply to Quebec's situation. Citing the work of professor Pellet, the *amicus* makes the claim that Quebec constitutes a people under international law. Moreover, the *amicus* claims that, by virtue of its ratification of the Covenants, Canada is obligated to promote the self-determination of the Quebec people and that their relationship is directly governed by international law.<sup>319</sup> There is some support for this view amongst jurists. For instance, Paul Joffe in his critique of the decision, asserts, based on his understanding of Canadian case law, that the norms of international law, including self-determination, are incorporated into Canadian law automatically provided they do not clash with Canadian law. "Canadian case law also suggests that norms of customary international law are 'adopted' directly into Canadian domestic law, without any need for incorporation of these standards by statute...This is true as long as there is no conflict with statutory or well-established rules of the common law."<sup>320</sup> At any rate, no one denies that Quebec is entitled to exercise some form of self-determination, although this does not necessarily lead to statehood, as even the *Amicus* admits: "While the right to self-determination may not, strictly speaking be synonymous with the right of secession, the exercise of the former leads to the latter."<sup>321</sup> Notwithstanding this admission, the *amicus* believes that ultimately it is the principle of effectivity, in conjunction with self-determination, which will resolve the matter. "The exercise of the right of self-determination may provide substantial assistance in creating a factual situation which, pursuant to the principle of

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<sup>319</sup> *Ibid*, at 383.

<sup>320</sup> Paul Joffe, "ASSESSING THE DELGAMUUKW PRINCIPLES: NATIONAL IMPLICATIONS AND POTENTIAL EFFECTS IN QUEBEC" (2000) 40 McGill L.J. 155 at 8 (WL).

<sup>321</sup> Factum of the *Amicus Curiae*, *supra* note 173 at 342.

effectivity, will persuade the international community, and even the Canadian community, to acknowledge... State in Quebec.”<sup>322</sup> Again, in light of the conditions laid down by the Supreme Court in the Reference with respect to legal secession, it seems highly dubious that the latter, at least, would be willing to recognize Quebec merely because it has achieved a large degree of effectivity.

This last point was, of course, vehemently disputed by the Attorney General in its reply to the *amicus* factum. It maintained that Quebec enjoyed no right to secession, regardless of whether one were basing it on the principles of effectivity, self-determination, or both. “ If self-determination does not give a right to secede, and neither does ‘effectivité’, they cannot together give such a right. Furthermore, if self-determination does not provide a legal basis for the act of secession itself, it is highly artificial to suggest that it provides a legal basis for all concrete acts leading up to the point of secession.”<sup>323</sup>

The Attorney General also raises the issue of territorial integrity and the way in which it constrains the exercise of self-determination in international law. Referring to the 1970 Declaration on Friendly relations<sup>324</sup> and other international treaties that address Self-determination, the Attorney General claims that they “rule out reliance on self-determination as the basis for any action that would dismember or impair the territorial integrity or political unity of a state acting in conformity with the principles set out”<sup>325</sup>

Now we come to the opinion of the Supreme Court of Canada in the Reference Re: Secession of Quebec. In the section entitled “Secession at International law” , the

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<sup>322</sup> *Ibid.*

<sup>323</sup> “*Reply of the Attorney General of Canada*” , *supra* note 177 at 377.

<sup>324</sup> Evans, *supra* note 271 at 157

<sup>325</sup> “*Reply of the Attorney General of Canada*”, *supra* note 177 at 377

Court begins by supporting the *amicus*' finding on the absence of a specific prohibition or a right in international law with regards to the exercise of a unilateral declaration of independence. However, the Supreme Court did not favour the *Amicus* interpretation on several other key points. Based on its reading of the key international treaties related to self-determination the Court comes to the conclusion that the principle is undeniably a *jus cogens* norm of international customary law. Having said this, the Court also believes that international law does impose certain constraints on its application, such as the principle of territorial integrity “ international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”<sup>326</sup>

The Court then proceeded to define the scope of the right to self-determination. Using the definition of external self-determination found in the Declaration on Friendly Relations<sup>327</sup>, it claimed that the norm in international law is for self-determination to be exercised internally within the framework of an existing state. That external self-determination is engendered by the most extreme cases and is still regulated, to some extent, by international law. In its reading of the provisions concerned with self-determination contained in the Helsinki Final Act the court noted “ a people’s external political status is interpreted to mean the expression of a people’s external political status through the government of the existing state, save in exceptional circumstances”<sup>328</sup> One might be asking oneself at this point: what exactly constitutes “exceptional circumstances”? As established earlier in this thesis (section 4.1.), the decolonization or liberation of a colonized people, is one such circumstance. Another, which is defined by

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<sup>326</sup> Reference, *supra* note 105 para. 122.

<sup>327</sup> Evans, *supra* note 129 at 161.

<sup>328</sup> Reference, *supra* note 105 para. 129.

the Declaration of Friendly Relations, is one where a peoples is oppressed by an alien subjugation, domination or exploitation outside of a colonial context. However, the Court acknowledged that this norm of international law was constantly evolving and that a third category of external self-determination has arguably emerged as a viable alternative to the more traditional criteria. This third category is based on the proposition that “ when a people is blocked from meaningful exercise of its rights to self-determination internally, it is entitled, as a last resort, to exercise secession.”<sup>329</sup> The Court cited the Vienna Declaration’s obligation that a government represents its entire people without discrimination as proof that this norm had gained some support in international law. While this may indeed become a new international legal standard in the future, there are still no grounds , in either treaty or customary international law, which the government of Quebec could use to justify a unilateral secession from Canada. In an allusion to the arguments made by the radical school of international law, the Court categorically dismissed the argument that Quebec has been denied its right to self-determination in any way, shape, or form. “The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination.”<sup>330</sup>

In this use of normative language by the Court to describe the nature of the principle of self-determination, we see a reflection of some of the Constructivist/idealist theories discussed in the first chapter of this thesis. Although the Court makes clear that it subscribes to the more traditional criteria for secession in the case of Quebec. After all, if we can say that Canada has enabled Quebecers as a people to exercise a certain degree

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<sup>329</sup> Reference, *supra* note 105 at para. 134.

<sup>330</sup> *Ibid.* at para. 137.

of internal self-determination and that this consequently reinforces Canada's legitimacy in the event of an attempted secession, then this is tantamount to undermining the realist point of view on the sovereignty and territorial integrity of states. The implication of this line of reasoning is clear: that a state that denies its people their right to internal self-determination would arguably lack the legitimacy to suppress a unilateral secession of the people in question. As the Court stated in its conclusion " 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 principle of self-determination...is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states." <sup>331</sup> Despite not being an international case *per se*, the decision of the Supreme Court of Canada has been analysed *ad infinitum* since 1998, by legal scholars in Canada and abroad. Many, particularly in the field of international public law, see it as a rare precedent, one that provides some answers on to the often vexing question of self-determination. One such jurist is Antonello Tancredi who interprets the judgment of the Court as being an argument in favour of remedial secession. " Even the national courts of some States directly involved in problems of secession, such as Canada and Russia, have made reference to the 'remedial approach'"<sup>332</sup> Tancredi notes that, although the Court ruled out any recourse to such a remedy in Quebec's case, it did acknowledge, albeit in a roundabout fashion, the possibility of such a unilateral secession being legitimate under certain circumstances, namely where a people's right to self-determination has not been respected by the state.

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<sup>331</sup> *Ibid.* at para. 154.

<sup>332</sup> Tancredi, *supra* note 252 at 180.

Another international jurist whom I have already discussed in an earlier chapter, and whose analysis of the Courts opinions was , in some respects, critical, is Patrick Dumberry. For instance, Dumberry denounced the Court's opinion in the matter of recognition of third party states of an entity claiming statehood, as being irrelevant and that the matter would ultimately be decided by political means. On the question of self-determination and its relevance to the Quebec context, however, Dumberry is rather more circumspect. Firstly, he agrees with the Court's finding that self-determination cannot be invoked by Quebec in an attempt to justify secession. Furthermore, Dumberry agrees with the Court's interpretation of the legal criteria in international law which need to be met in order for a secession to be legitimate. Here Dumberry commends the Court for adopting a "traditional approach" to self-determination that supposedly "disregarded several theories put forward in doctrine to enlarge the right to secession to non-colonial situations: the 'liberal theory of secession, the various 'moral theories' as well as those grounded in the concept of legitimacy."<sup>333</sup> Although he does not provide any details about the theories that he claims adopt a more liberal interpretation of self-determination, it seems somewhat of a misrepresentation to characterize the Court's position as traditional. The Court may not have unequivocally endorsed the remedial secession theory, but it did leave the door open for such a secession under certain circumstances. Many traditionalists in the legal world would never even entertain such a notion!

As far as the principle of self-determination is concerned, Dumberry admits that the issue is a highly complex one, as it involves competing claims to self-determination between aboriginal people and Quebec, as well competing claims to territorial integrity between Quebec, Canada, and aboriginal people. Ultimately he cites the analysis of

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<sup>333</sup> Ibid. at 96.

Marcelo Kohen as being the most reasonable argument on the subject. He believes that “it remains doubtful...international opinion will be convinced by the argument that the territorial integrity of Canada can be jeopardized by the secession of Quebec, while the territorial integrity of a new independent Quebec would prevent the external self-determination of the aboriginal peoples.”<sup>334</sup>

Dumberry wasn't the only one to question the logic of the Supreme Court. Patrick Monahan made the case that the Federal government should reject some of the Courts findings, especially with regard to UDI, and adopt concrete measures in order to better define the new duty to negotiate established by the Court. Monahan takes issue with the Courts ambivalence about the potential role that effectivity might play in the event of a unilateral secession. As he sees it, the Court imposed a duty to negotiate on the federal government, and then claimed that should this duty to negotiate not be fulfilled, a separatist government would then, in effect, have the mandate to pursue secession unilaterally. This scenario, if it ever came to pass, might ultimately result in an independent Quebec being recognized by the international community. According to the Court, this would give Quebec “ ‘perceived’ legitimacy on the international level, since other countries would look favourably on the fact that Quebec had pursued good faith negotiations while the other domestic parties had behaved intransigently.”<sup>335</sup> Monahan himself firmly rejects this interpretation of international law and argues that the Court got it wrong in the sense that it seems to have emphasized the importance of effectivity rather than the principle of state sovereignty and territorial integrity. “under international law there is no generalized right to secession. The bedrock principle of international law is

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<sup>334</sup> *Ibid.* at 446.

<sup>335</sup> Patrick J. Monahan, “*The Public Policy Role of the Supreme Court of Canada in the Secession Reference*” (2000) 11 NCJL 65 at 10 (WL).

the territorial integrity of states.”<sup>336</sup> In making this point, Monahan adopts the thesis put forth by James Crawford in his reports for the Attorney General, which maintains that in the post-war period, no state has been recognized by the international community without the consent of the parent state, with the exception of cases that involve decolonization. Therefore, Monahan argues, that there is no evidence in state practice, or otherwise, that “the international community would regard the failure of the Canadian government to enter into secession negotiations following a referendum as justifying a Quebec UDI, much less as providing a basis for international recognition of a Quebec state”<sup>337</sup> According to Monahan, the determining factor in recognition of a new state in the Quebec context, will be whether Canada has recognized the results of the secession attempt by Quebec. The willingness of the Canadian government to be involved in this process or not, will have no bearing on the question of third party recognition. Furthermore, such recognition by third party states would have no domestic legal effects under Canadian law, as the secession would still be unconstitutional. Here Monahan accuses the Court of encouraging the sovereigntists to pursue unilateral secession as a means of circumventing any domestic legal challenges and securing some degree of international recognition. “Thus what the Court seems to be tacitly approving is the issuance of an illegal UDI by Quebec, as long as the UDI is perceived as legitimate by the international community and eventually leads to international recognition.”<sup>338</sup> That having been said, Monahan does compliment the Court on the clarity of its answer in Question 2 ( as opposed to the “vague and tentative character”<sup>339</sup> of its analysis of the

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<sup>336</sup> *Ibid.* at 23.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.* at 17

principle of effectivity in Question 1) with regards to the *Amicus* position on secession in international law. The Court argued that, in the case of Canada, at least, the principle of territorial integrity would trump any claim by Quebec to self-determination “The Court was remarkably frank in making it clear that that the limited exceptions to the territorial integrity principle...simply had no application to Quebec.”<sup>340</sup>

These claims are problematic for a number of reasons. First of all, let us dissect the claim with regards to the illegality of secession under the Canadian Constitution. With all due respect to Professor Monahan, it’s the Supreme Court’s role to interpret the Canadian Constitution. Therefore, if the Court argues that there exists a duty to negotiate which is binding on all parties in the event of an attempted secession and that such a duty would likely influence third party state recognition, then he would be hard pressed to dispute this interpretation. While the Court may be criticized for reading too much into the Constitution or overreaching on this point, its decision must ultimately be accepted as the last word on the matter. Secondly, Crawford’s position on the history of recognition post-1945 and its implications for an independent Quebec has attracted more than its fair share of criticism. Many have pointed out that he conveniently excludes or tries to dismiss certain examples ( i.e. Bangladesh, Croatia, etc.) that are not consistent with his thesis. To suggest that there is no evidence that recognition of an aspiring state, outside the colonial context, has ever occurred without consent by the parent state, as Monahan does in his article, is simply not accurate.

As we have seen, self-determination is a rather complex principle that, while it maybe well-established in international law, is rather unclear as to the specifics of its application. The consensus among authors cited in this thesis, and indeed the Supreme

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<sup>340</sup> *Ibid.*

Court of Canada in the *Reference*, have argued that the principle has evolved to the point where it has moved beyond decolonization and now applies, at least internally, and possibly externally in the case of remedial secession, to certain ethnic, religious or cultural minorities existing within a state. The latter argument is by no means universally accepted and remains, to a large extent, a theoretical point of view with little state practice or *opinio juris* to support it. It can at the least be said that self-determination has some bearing on the Quebec question in that it does provide, in its internal form anyway, for the fact that some measure of self government and recognition of a people's cultural identity must be granted by the state. Yet it does not guarantee the right to external self-determination for a people living in a sovereign democratic state such as Canada, whose cultural rights and political participation are guaranteed by law. In light of this fact, it is little wonder that the *Amicus*, in making its case for Quebec's right to determine its own political and legal fate, did not choose to use self-determination as the legal foundation for its main arguments in the *Reference*. Rather, it opted for the more legally ambiguous concept of effectivity. By contrast, the Attorney General of Canada based much of its main argument on the principle of self-determination and the clear legal distinction between its internal and external forms.

## Conclusion

Extraordinary events in the Balkans that occurred during the writing of my thesis, have demonstrated the timeliness and importance of this topic. Once again this volatile region of the world finds itself at the center of a political and legal firestorm that potentially has significant consequences for international law and, more to the point as far as this thesis is concerned, the legal and political situation in Quebec with respect to the question of secession.

On February 17, 2008, the tiny former province of Kosovo officially declared its independence from Serbia. This immediately caused an uproar amongst the Serbian people and prompted an angry Serbian government to denounce the actions of Kosovo as illegal, both at international law and under Serbia's Constitution. After all, Kosovo had not negotiated a secession with the parent state, nor had it even held a referendum to determine whether its own people were in favour of independence. Moreover, Kosovo had violated UN resolution 1244<sup>341</sup>, which, while recognizing the rights of Kosovars to a measure of autonomy and internal self-determination, did not go as far as granting them permission to secede from Serbia and form a new country. Indeed, the resolution had also reiterated the territorial integrity of Serbia and as a result, to date, the UN Security Council has not yet recognized the declaration of independence made by Kosovo (although three of its permanent members have already done so). Nevertheless, it appears that much of the international community is preparing or already has recognized the new state. Kosovo "will be recognized by most of the world as a nation. The United

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<sup>341</sup> *On the situation relating to Kosovo*, SC Res. 1244(1999), UN SC, 4011<sup>th</sup> mtg., UN Doc. S/Res/1244 (1999).

States, Britain, France and Ireland have already vowed to do so, and at an emergency UN Security Council meeting...only Russia openly opposed the move.”<sup>342</sup> The latter did so on the grounds that the independence of Kosovo violates the UN Charter guarantee of territorial integrity. Despite its initial reluctance, the government of Canada has finally recognized Kosovo as a sovereign state. Its ambivalence in this matter can be attributed, to some extent, to its position on UDI in the Quebec context, which it maintains is illegal according to international and Canadian law. Other countries, such as Spain, that has its own separatist movements, share Canada’s predicament in this respect and have been reluctant to recognize Kosovo’s legitimacy thus far. The Prime Minister of Kosovo has insisted that its independence does not represent a significant new development in international law, but has rather characterized it as the natural progression of the disintegration of the former Yugoslavia. He stated that “Kosovo is the last station of Yugoslavia’s disintegration and it does not pose any precedent for other regions elsewhere in the world.”<sup>343</sup> Any one familiar with the work of James Crawford and other jurists, many of whom I have been discussing throughout this thesis, will understand that the distinction between a secession and a dissolution of a given state, has serious implications in international law, at least in a theoretical sense. If the former is the case, then Serbia is right in claiming that this is an internal matter and that the recognition by third party states would be a violation of its sovereignty. However, if the Kosovar Prime Minister is correct, then Serbia cannot raise any legal objection as the successor state of the former Yugoslavia as the territorial integrity of that state has already been

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<sup>342</sup> Doug Saunders, “Troops arrive as Kosovo declares independence: World leaders brace for a chaotic and possibly catastrophic gestation period” *The Globe & Mail* (18 February 2008) online: *Globe & Mail* <<http://www.theglobeandmail.com>>

<sup>343</sup> *Ibid.*

compromised. It is worth remembering what the Badinter Commission and jurist James Weber had to say regarding the dissolution versus session debate in the context of SFRY(Chapter 3, p.40). Both of them, the reader will recall, maintained that the central government of Yugoslavia existed in name only by the time that Croatia and Slovenia and exercised their respective UDIs. Similarly, it can be assumed that Quebec would not have legitimate recourse to a UDI unless it could prove that the authority of the federal government had diminished to such an extent that, like SFRY, it could no longer maintain order or exercise its duties as a viable government.

Irrespective of its legality, many other secessionist entities have taken heart from the claim Kosovo has made to statehood and intend to follow its example. One such region Abkhazia, is the subject of a recent international incident. Suffice it to say that this region is involved in an ongoing struggle to secede from the Republic of Georgia. Although it has not received any recognition yet, the country has managed to achieve a large degree of effectivity. However, if anything, this region's failure to gain recognition from the international community, undermines one of the *amicus's* key arguments in the *Reference*: that effectivity would be the main factor in Quebec's attempt to become a sovereign country. Having said that, the separatists in Abkhazia have been given a renewed sense of hope by Kosovo's success. One spokesman for the movement was remarked: "International rules that borders are inviolable 'were receding into history'. 'Kosovo's recognition produces a new system of measures that we believe should be applied to all countries'".<sup>344</sup>

Furthermore, The Helsinki Final Act (s.4.1), specifically with regards to respecting the territorial integrity of European States, has been invoked by the Serbian

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<sup>344</sup> *Ibid.*

government, which was enraged by the recognition of Kosovo by the US and other countries. Arguably, then, the recognition of Kosovo by third party states possibly constitutes a violation of the rights of Serbia, who have made the case that this recognition is premature and represents a violation of its sovereignty by third party states.

It did not take long for the analogy by the proponents as well as the detractors of the separatist movement to be drawn between Quebec and Kosovo. Nor did it take long for the *Reference Re: secession of Quebec* to be reexamined in the light of the ongoing drama in the Balkans. In fact, one of the key figures in the reference, André Joli-Coeur, was quick to declare his position vindicated and proclaimed that this new country proved beyond any reasonable doubt what he had argued in 1998: that Quebec's effectivity and its recognition by the international community would ultimately decide the matter, rather than international or Canadian law. "The case of Kosovo clearly demonstrates that essential factors in the creation of a state are the will of the people in the territory concerned and the attitude of the international community...the predecessor state does not necessarily play a decisive role in such matters."<sup>345</sup> He then suggested that this could be cited by a separatist government attempting secession as a useful precedent in order to give their actions legitimacy. By the same token, another jurist, Daniel Turp, who has an unqualified sympathy for the separatist cause in Quebec and is, in fact, the international affairs critic for the *Parti Québécois*, was recently quoted as saying "A people decides to become a country and other countries recognize that fact. And in this case what is special is that Serbia is against [the] independence of one of its component parts , and the United

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<sup>345</sup> Rheal Seguin, "Recognizing Kosovo could backfire for Ottawa, expert says" *The Globe & Mail* (21 February 2008) online: *Globe & Mail* <<http://www.theglobeandmail.com>>

States, France [and] other countries ignore this objection”<sup>346</sup> Quebec, by analogy, therefore, must enjoy the same right to a UDI as Kosovo, according to this logic.

Other separatists were not quite so enthused. Gille Duceppe, the leader of the *Bloc Quebecois* (the federal wing of the separatist political movement) was reluctant to draw parallels with the situation in Quebec. He argued that there should be no comparisons made with Quebec saying “Every case is unique” and that his party continues to support the idea of a referendum providing the impetus for Quebec’s independence. He further opined: “We’ve decided in accordance with our democratic institutions that it will be by referendum, and it’s good that way”<sup>347</sup> This is in stark contrast with the recent developments in Kosovo which saw that government declare its independence without consulting first its people by means of a plebiscite. Therefore, it is possible to read into Duceppe’s comments tacit acknowledgement of the legal conditions which might apply to the process of statehood for Quebec (i.e. democratic legitimacy theory) being made by Mr. Duceppe. In stark contrast with Turp and Joli Coeur, who show a preference for the realist perspective on recognition in international law. Whereas Duceppe, perhaps unwittingly and indirectly, appears to support the idealist/constructivist perspective which maintains that democratic institutions ( in this case referenda) have become part of the normative criteria that the international community now expects the aspiring state to possess in order to be recognized.

On the other side of the argument, editorialist Marcus Gee of the Globe & Mail, cautions the government not to be too hasty in recognizing Kosovo. “When Serbs argue

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<sup>346</sup>Eddy Goldenberg, “No, Kosovo is not on the St. Lawrence” *The Globe and Mail* (1 March 2008) online: *Globe & Mail*<<http://www.theglobeandmail.com>>

<sup>347</sup> Hubert Bauch, “Recognizing Kosovo changes nothing: Duceppe” *The Montreal Gazette*, (20, February 2008) A 12.

that Kosovo's leap to independence has no legal sanction, they have a point. When they say it sets an awful precedent, they have an even better one."<sup>348</sup> Echoing the advice of the Supreme Court of Canada that the secession of Quebec be negotiated by all the concerned parties, Gee argues that countries, including Canada, should approach the situation in Kosovo with extreme caution. "...Kosovo's independence has neither the consent of both parties involved nor the assent of the Security Council (which is deadlocked on the issue)."<sup>349</sup>

This case raises all of the thorny legal issues that have been discussed in my thesis: territorial integrity, UDI, secession, recognition, self-determination and so on. What an extraordinary stroke of good luck, to be able to see the questions that I have been pondering in the abstract, materialize in such a dramatic fashion in the real world! That having been said, one must be careful when trying to draw any conclusions from the situation in Kosovo at this point in time. Clearly the jury is still out as to whether the Kosovars will achieve the viable sovereign state to which they believe they are entitled. It is still quite possible that they might share the fate of other *de facto* states such as Abkhazia and remain in a kind of legal limbo neither fully accepted by the international community but not reconciled with its former parent state Serbia either. As one journalist pointed out, this international legal problem Kosovo poses is not likely to be resolved any time soon. Thus Kosovo could become "a semi independent state sanctioned by the United Nations (the Security Council resolution that ended the Kosovo war gave Kosovo

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<sup>348</sup> Marcus Gee, "Why we shouldn't jump on the Kosovo Bandwagon" *The Globe & Mail* (22 February 2008) online: Globe & Mail <<http://www.theglobeandmail.com>>

<sup>349</sup> *Ibid.*

independent status under UN leadership), but without UN membership or full international acceptance.”<sup>350</sup>

The key distinction between the two cases is to be found in one of the central elements of my thesis regarding self-determination, namely the difference between internal and external self-determination. While the Supreme Court of Canada dismissed the relevance of the latter to the case of Quebec, it did, at the same time, recognize that it might apply in circumstances where a people had suffered severe oppression and a lack of autonomy under a repressive government. In other words, the remedial secession theory, although still very controversial, it must be said, might be the main factor in the decision of so many countries to recognize Kosovo’s independence, a people that suffered undeniably under the tyranny of a Serbian dominated federation. Whereas this same reasoning, when used in the context of a UDI by Quebec, would, conversely, most likely result in that act being denounced as illegal and, therefore, be refused recognition by the many members of the international community.

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<sup>350</sup> Saunders, *supra* note 341.

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