SCOTLAND/UK SECESSION: INTERNATIONAL LEGAL CONSIDERATIONS

1 TABLE OF CONTENTS

2 INTRODUCTION

"It's a long way to the top if you want to rock 'n' roll…" ~ Bon Scott, AC/DC

The current constitutional climate in the UK is in jeopardy: the devolved powers to Scotland, Wales and Northern Ireland have not abated the threat of regional territorial secession, as had been conceived by the Labour Government in the planning stage of the devolution acts. However, the reality exists that Scotland, a territorial region of the UK, has been mustering support for independence for some time, conceived after the Acts of Union in 1707 that ended the sovereign state of Scotland. Now, three hundred years later, the desire for an independent, sovereign Scottish state by the Scottish people will be put to the test, as the SNP-majority Scottish Government has stated the intent to hold an independence referendum in the autumn of 2014. While this timetable is two years away, both the separatists and the unionists have undertaken their campaigns to sway the Scottish people into voting. The methodology of the referendum itself poses interesting questions as to the appropriateness of such a vote.

While there may be a number of political circumstances that could bring about constitutional changes in the devolution formula, the scope focused upon here is the effect of international law on the principles and process involved in conducting the referendum scheduled for 2014. The goal of an independent Scottish territory is considered in relation to the acquisition of the greatest international legal personality: statehood. Furthermore, it will be examined how this process of secession can inform other states' opinions as to the likelihood of recognising the emergent territorial entity as a state, particularly where the process is seen as legitimate and in line with recognised legal practices for determining political will. It is acknowledged that effecting the will of the population shares a common theoretical heritage with the international legal principle of self-determination, but that the leap from self-determination to the existence of a right to secession is subject to the safeguards respecting the state's enjoyment of territorial integrity. These evaluations are construed as being representative of the current international community's position regarding necessary qualitative characterizations of the *Montevideo Convention* formal requirements of a state.

The theoretical basis for constructing a legally-compliant independence strategy at the earliest stages of any secession effort may lend itself to third-party states readiness to accept the factual separation and subsequently permit the successive state access to the rights and privileges resting with this personality. In addition, certain developments in the succession of states in respect to treaties and obligations may suggest that emerging states' sovereign independence is constrained when ascribing minimum guarantees for certain human rights and humanitarian standards set out in treaties previously concluded by the parent state. Ultimately though, where the group is currently within the territory of a state that adheres to its international obligations, particularly where they accommodate the exercise of self-determination internally, secession as a mode of implementing the will of 'a peoples' is not an outcome that is provided by the international system. Secession in these circumstances is considered as a political negotiation between the group and its national authority, where the separation of territory is *prima facie* the least desirable outcome, with regional autonomy or federalism as being the internal maximum possible resolution.

In relation to the upcoming independence referendum being pursued by the Scottish Government, a factual survey of the current status of the eligibility of possible statehood criteria as evidence of pre-existing conditions is undertaken as evaluating the progress that has been achieved, both towards the establishment of viable Scottish identity and institutions, as well as acknowledging internal self-determination efforts on the part of the UK Government in Westminster. If shades of independence may be inferred as legitimating potential grounds of statehood, it must also correspond that the UK does, in permitting such transfers of authority and identity, fulfill its international obligations regarding self-determination as a principle of international law. In this light, a struggle emerges between acknowledging the Scottish factual elements capable of attaining statehood and accommodation by the UK as reducing the acceptability of secession as a justifiable injury to its territory. The judgment of this struggle embodies the debate consider here, and the difference in opinion may be varied

between the other states. However, the recent ICJ advisory opinion[1] regarding the absence of an international legal prohibition regarding the unilateral declaration of independence by the autonomous Kosovo region of Serbia[2] identifies the disconnect that can exist between declarations of legal opinion and the intervening realpolitik of recognition.

Approaching the referendum as a legitimating public exercise for evidencing the will of the Scottish people to pursue independence from the UK, four elements are discussed – the power to ask, the question, the franchise of voters, and acceptable thresholds for results – with the premise that, in aggregate, these points bolster the factual aspect of political will as a quantifiable measure of support for such an outcome to become reality. It will also be considered what effect the outcomes of other referendums have on establishing the international expectations placed upon the Scottish referendum, and what future actions may be validated by referendum support. While there may be resulting implications for the UK post-referendum from a constitutional law perspective, such considerations are outside the scope of this document, and best elucidated in a dedicated domestic legal paper.[3] However, in the present context, interpretation and application of certain key aspects of international legal mechanisms and principles, contrasted with political discretion and sovereign states' practice, are considered to be informative and instructive if the undertakings of the Scottish and UK Parliaments are to achieve their purposes, whether it is secession or autonomy within the Union.

[1] Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, ICJ General List No 141 (22 July 2010).

[2] Although 91 Member States of the United Nations ('UN') have taken steps to recognise the effect of the UDI by Kosovo, this still only consists of approximately 47% of the Membership, and those states facing their own domestic independence movements, such as Israel (in relation to the Palestinian peoples), have been reluctant to recognise Kosovo as a state. It may be considered in reverse that Kosovo is recognised as a part of Serbia by 53% of the Membership. The most notable objectors, and arguably deleterious to any independence claim, have been the Russian Federation (facing secession of Chechnya) and China (facing secession of Taiwan – discussed later), both Permanent Members who are likely to veto UN membership bids by Kosovo. See generally, CJ Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*, (2008) ASIL 12(2), esp. Section 4.

[3] The work of the Constitution Unit at University College London has produced a number of primary sources and research output regarding devolution and Scottish Independence. For more information, see UCL Constitution Unit, 'Devolution Monitoring Programme 2006-09', School of Public Policy, retrieved from < http://www.ucl.ac.uk/constitution-unit/research/research-archive/archive-projects/devolution-monitoring06-09> on 5 September 2012.

3 LEGAL THEORY REGARDING SECESSION FROM A STATE

The international law governing the secession of people and territory from a State is anything but clear or universal. Unlike the relative clarity involved in most other international practices, the phenomenon of secession movements straddles the otherwise distinct separation between international affairs and internal domestic affairs, often inviting controversy regarding the appropriate treatment and resolution to such disputes. The varied factual circumstances of secessionary situations have been approached on a case-by-case basis that does not necessarily lend itself to the identification and consistent application of general rules. However, amongst the international and domestic case law on such matters, as well as the academic position of various scholars, there does exist certain parameters for discerning *some* guidelines for determining how and if a secession movement attains legitimacy and legality regarding their method of gaining independence.

Secession requires a definition in order to evaluate whether any particular movement constitutes this classification as opposed to other forms of sovereign territorial acquisition. This itself presents particular challenges, as some scholars dispute the specific definitional requirements necessary to elucidate a workable understanding of secession. While a broad interpretation may include any transfer of territory and people from a pre-existing state, i.e. externally partitioning population and land as part of a marriage dowry[4], the modern international legal order delimits such activity as being contrary to the contemporary responsibilities of states to respect certain rights of their citizens.[5] Increasingly, secession is contemplated, as stated by J Dahlitz, as arising:

> "[W]henever a significant proportion of the population of a given territory, being part of a State, expresses the wish by word or by deed to become a sovereign State in itself or to join with and become part of another sovereign State."[6]

Secession exists amongst five possible means of transferring sovereignty over territory from one state to another, characterized by the common occurrence of a "disruption of legal continuity"[7]. However, unlike decolonisation or dismemberment in which states emerge from subjugation by a foreign power, secession can be seen as creating a new state from within a pre-existing state. This acquisition of statehood is a vital aspect behind understanding the operation of legal theories of secession.

3.1 STATEHOOD: MOTIVATING FACTORS FOR SECESSION

The ultimate goal of any secession movement is to realise the expression of a collective political will as an independent and separate legal personality – a state. However, within the international sphere, the personality of states is a status that is privileged unlike any other subject of international law. By understanding this underlying context, the importance of statehood necessarily influences the permissiveness or objections that can be raised when considering the position of secession.

[4] The Habsburg royal dynasty in Europe effected transfers of territory through strategic marriages, the result of which could be seen in the domain of the Austro-Hungarian Empire. *See generally* RJW Evans, *Austria, Hungary, and the Habsburgs: Essays on Central Europe, C.1683-1867*, (Oxford University Press: New York 2006).

[5] "[N]o territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State." A Cassese, *Self-determination of peoples: A legal reappraisal*, (Cambridge University Press: Cambridge 1995), p 287; See also Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 129.

[6] J Dahlitz, Introduction, from *Secession and International Law*, by J Dahlitz (ed), (UN: New York, 2003), p xviii.

[7] T Hillier, *Sourcebook on Public International Law* , (Cavendish: London 1998), p 196.

3.1.1 CLASSICAL STATEHOOD

The classical criteria of a state can be found in Article 1 of the Montevideo Convention, wherein "The state as a person of international law should possess the following qualifications:

(a) a permanent population;
(b) a defined territory;
(c) government; and
(d) capacity to enter into relations with the other states."[8]

These guidelines have been understood as a codification of customary international law, and therefore are applicable beyond the signatories to the Convention. Evidence of such can be shown in the same guidelines being similarly repeated as terms of membership in such international bodies as the European Union[9]. Given its customary law nature, the Montevideo criteria belie the membership requirements of Chapter II of the UN Charter[10] in conjunction with its Purposes[11] and Principles[12].

3.1.2 EFFECTIVENESS OF CRITERIA[13]

While the *Montevideo* criteria appear to be straightforward, the quality of these characteristics has become subject to scrutiny, with effectiveness being a corollary to each requirement. The requirement of a permanent population does not denote how many people are sufficient, nor whether those people ought to have similar nationality or ethnicity. Territorial requirements may vary in size (contrast the Russian Federation to the Principality of Monaco) or continuity (i.e., the Indonesian archipelago). Certainly, the capacity for foreign relations does not require a state to engage the international community, just that, should it desire, such practice is possible. Indeed, the requirement of government may take on many diverse forms, from socialism to communism to dictatorship. Each may equally be considered as a system of government, despite their extreme qualitative differences.

3.1.3 INDEPENDENCE

The final *Montevideo* criteria ('capacity to enter into foreign relations') is best understood as a requirement of independence. While the term independence is conjoined to sovereignty in many discussions of secession, as a matter of legal consequence, the two are conceptually different. As stated by JR Crawford, "Since the two meanings are distinct, it is better to use the term 'independence' to denote the prerequisite for statehood and 'sovereignty' the legal incident."[14] Independence denotes the exclusive competence vested in an authority to determine its actions domestically. Such independence, however, is still subject to perception regarding its effectiveness. While the aforementioned definition can be seen as formal independence, "it may be necessary to enquire further as to the actual or effective independence of the putative State. Actual independence is relative." [15] Certainly, foreign intervention or domination can significantly degrade a declaration of

[8] Article 1, *Montevideo Convention* (1933).
[9] In relation to the breakup of the Former Yugoslavia, these opinions were delivered by the Arbitration Commission of the Peace Conference on Yugoslavia. See A Pellet, *The Opinions of the Badinter Arbitration Committee - A Second Breath for the Self-Determination of Peoples*, (1992) 3 EJIL 1, pp 178-185, and D Türk, *Recognition of States: A Comment*, (1993) 4 EJIL 1, pp 66-91.
[10] Arts 3-6, *UN Charter*.
[11] Art 1(1), *ibid*.
[12] Art 2(3), *ibid.*
[13] T Christakis, "The State as a 'primary fact': some thoughts on the principle of effectiveness", from MG Kohen (ed), *Secession: International Law Perspectives*, (Cambridge University Press: Cambridge 2006), pp 138-169.
[14] JR Crawford, 'States', in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008-, online edition, [www.mpepil.com], visited on 13 August 2012, at para 40.
[15] *ibid*, para 31.

independence, and result in a negation of statehood under international law.[16] In order to have any analytical value in determining whether a State is independent, formal and actual independence is the most desired scenario: even when certain foreign control may be construed, there ought to be a certain minimum degree of autonomous independence attributable to the authorities within the territory. It is clear, however, that this requirement be sufficiently evident, supported by the presence of the other *Montevideo* criteria, for any territory to attain statehood.

3.1.4 Non-Classical Extended Criteria for Statehood

However, emerging trends regarding statehood identify other criteria that exist outside the effectiveness arguments underpinning *Montevideo,* and that these have become increasingly important when conducting such an evaluation of a potential state on the grounds of *legitimacy* and *legality*.[17] The former depends strongly on factual analysis, while the latter is a perception of these facts in light of rights and responsibilities owed by virtue of international law. In regards to effective government, the perception of its legitimacy could now be considered as requiring a democratic element to justify the stewardship of the nation by its chosen system of government.[18] Many of the principles for identifying a potential state as possessing the legal personality of statehood operate in a distinct manner, such as the presence of an (effective) government is necessary to the status of statehood, but the same cannot be said to be *sufficient* as evidence of statehood. What can be taken from these developments is that, while *Montevideo* identifies the *des minimus* attributes necessary for statehood, subsequent state practice and institutional developments have contributed to a qualifying sub-text to these requirements.

3.1.5 Recognition of Statehood

Ultimately, the acquisition of statehood is not merely dependent on fulfilling a 'checklist' and thus the acceptance by other states (the *declaratory theory* of recognition). The actual point in time of acquiring statehood is questionable, therefore, and the true test of whether an entity is a State rests more in the manner in which other States consider it as such – the act of recognition under the *constitutive theory*. While similarities appear between recognition of states and governments, the latter act has been questionable, as can be seen by the policies of some states[19] not to recognise foreign governments as a matter of non-intervention. However, regarding the act of recognising states, I Brownlie identifies:

> "In this context of state *conduct* there is a duty to accept and apply certain fundamental rules of international law: there is a legal duty to 'recognize' for certain purposes at least, but no duty to make an express, public, and political determination of the question or to declare readiness to enter into diplomatic relations by means of recognition. This latter type of recognition remains political and discretionary. Even recognition is not determinant of diplomatic relations, and absence of diplomatic relations is not in itself non-recognition of the state."[20]

That other States may have a duty to accept a State as such, having met all the criteria for statehood, it is imperative that secession movements seek to effectively attain as many criteria as possible and that such criteria

[16] Certain interventions that are contrary to international law, however, do not result in a depreciation of statehood, particularly under an illegal use of force. *Ibid,* para 32; *See also* Art 2(4), *UN Charter*.
[17] fn 14, at para 14.
[18] *See* A Xanthaki, *Indigenous Rights and United Nations Standards*, (Cambridge University Press: Cambridge 2007), p 160.
[19] These states include the United Kingdom, Australia, Belgium, Canada, France, and Switzerland. *See* MJ Peterson, *Recognition of Governments: Legal Doctrine and State Practice* 1815-1995, (MacMillan: Basingstoke 1997), p 88. See also *Estrada Doctrine of Recognition*, (1931) 25 AJIL 4, Supplement: Official Documents, p 203; Regarding the current UK position, see 408 HL Deb., cols. 1121-2, 28 April 1980.
[20] I Brownlie, *Principles of Public International Law* 3rd ed., (Clarendon Press: Oxford 1979), p 95.

are legal and legitimate. However, the success of acquiring statehood, as a matter of pragmatism, still maintains a de facto externally-determined necessity of recognition, a determination that is considered political and subject to sovereign independent positions of the remainder of the international community.

3.1.6 Consequences of the Questions over Recognition and Statehood

As statehood consists of both legal and political facets, it can be difficult to make assumptions regarding guarantees that a secession movement, even one under the most amicable of circumstances, can reasonably expect that the successor state will be recognised as such for the purposes of being a viable and contributory member of the international community. As has been considered, the formal criteria under the *Montevideo* regime are understood as being subject to deeper qualification, a development that mirrors the demise of the declaratory theory of recognition. This constitutive theory position, while not absent of defects[21], emphasizes the political nature of recognition as a matter of pragmatism, furthering the debate as to how and if an entity may manifest the international legal personality of a state. Evident from considerations of regional and international associations of states, groups such as the European Union may be construed as meeting the formative requirements of statehood, despite the membership states maintaining degrees of sovereign independence. As MN Shaw identifies:

> "Whether or not [associations of states] constitute international persons or indeed states or merely part of some other international person is a matter for careful consideration in the light of the circumstances of the case, in particular the claims made by the entity in question, the facts on the ground, especially with regard to third-party control and the degree of administrative effectiveness manifested, and the reaction of other international persons. The importance here of recognition, acquiescence and estoppel is self-evident."[22]

Indeed, consideration of these elements regarding the European Union ('EU') can be seen as a complex macrocosm of the same deliberations experienced by an emerging territorial entity. The underlying motivations of other states in recognizing or withholding recognition has, more often than not, been employed as a 'carrot-and-stick' mechanism of foreign policies rather than an acknowledgement of possessing legal criteria necessary to be considered a state. In the *Rhodesia* and *Western Sahara* cases, the withholding of recognition, despite these territorial entities fulfilling *Montevideo* criteria, was seen to give effect to objections by other states regarding domestic violations of aspects of international law previously inconsequential to statehood. The emergence of states following the collapse of the Soviet Union and Yugoslavia (SFRY) in the early 1990s exemplified the distance travelled in the legal theories of statehood since *Montevideo*, particularly with the European Community Guidelines, noting with importance adherence to peaceful settlement of disputes, robust minority rights protection, disarmament and nuclear non-proliferation, and *inter alia* the provisions of the UN Charter especially with respect to the rule of law, democracy and human rights.[23] However, while of significant influence over the debate, the EC Guidelines represent a particular European formulation, and does not restrict other states' discretion regarding their independent decision-taking to recognise an emergent state.

Given that the conditions for statehood have developed over the last eighty years since *Montevideo*, leading to greater ambiguity rather than steadfast clarity regarding acquiescence and recognition, the statehood regime that exists today suggests a complex interplay of legal obligations and political considerations. As such, however, it remains that, for any successful secession movement, the central criteria necessary to create a state are (actual) formal independence and a likelihood of recognition by other states. The major forces towards securing these attributes rely greatly upon the legitimacy and legality surrounding the methodology of the group seeking to achieve the ultimate international legal personality – the independent sovereign state.

---

[21] A Kaczorowska, *Public International Law*, (Old Bailey Press: London 2002), p 75.
[22] MN Shaw, *International Law* (6th ed.), (Cambridge University Press: Cambridge 2008), p 242.
[23] fn 9.

3.2 A LEGAL RIGHT TO SECEDE? – BALANCING COMPETING INTERESTS

The rights associated with secession movements exists as a balancing act between the rights of a group and the rights of the state. The nature of this balance rests upon the developing respect given for the modern concept of a state – the sovereign authority exercised as an expression of the will of the constitutive peoples – acting in concert with the legal duties and obligations afforded towards states for the purposes of peace and security. As secession is best seen as an internal challenge towards the state's interests, a simplistic approach would consider the two positions to be incompatible and incapable of compromise. However, while the stability of the international system depends on the consistency of distinct territorial jurisdiction, the operation of group rights is not entirely antithetical to the maintenance of international public order.

3.2.1 SELF-DETERMINATION

The recognition of self-determination as a principle of international law was espoused in the UN Charter, wherein it states :

> "[The Purposes of the United Nations are:] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[24]

This right of 'peoples' was further developed in the General Assembly Resolution 1514 (XV)[25], wherein this right was determined to exist beyond the colonial context and applied to all dependent peoples. Furthermore, as I Brownlie notes: "Moreover, it is not a 'recommendation' but is expressed in the form of an authoritative interpretation of the Charter."[26] This emerging principle received further pride-of-place as Article 1(1) of both International Covenants on Human Rights ('*ICCPR*' & '*ICESCR*'; adopted by the General Assembly), the text of each stating: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[27] These positions were mirrored in a number of GA resolutions[28], as well as the jurisprudence emanating from the International Court of Justice affirming self-determination in the *Western Sahara*[29], *Namibia*[30] and *East Timor*[31] cases.

In regards to the operation of the principle of self-determination and secession movements beyond the decolonisation regime[32], it should be noted that in no way does self-determination automatically give right to secession. In understanding this position, recognition of the existence of the principle in general has not

[24] Article 1(2), *UN Charter*; This operates in correlation to Articles 55 and 56 under Chapter IX of the *Charter*.
[25] *Declaration on Granting of Independence to Colonial Countries and Peoples*, A/RES/1514 (14 December 1960).
[26] I Brownlie, *The Rule of Law in International Affairs*, (Martinus Nijhoff: The Hague 1998), p 41; *See also* CHM Waldock, *Recueil des cours*, Vol 106 (1962-II), p 33.
[27] Article 1(1), *International Covenant on Civil and Political Rights* (1966); Article 1(1), *International Covenant on Economic, Social and Cultural Rights* (1966).
[28] See also *Programme of Action for the Full Implementation of the Declaration on Granting of Independence to Colonial Countries and Peoples*, A/RES/2621 (12 October 1970); Annex, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/2625 (24 October 1970).
[29] Advisory Opinion, 16 October 1975, ICJ Reports 1975, p 12 at pp 31-33, paras 54-59.
[30] Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), ICJ Reports 1971, p 16 at pp 31-32, paras 52-53.
[31] Judgment, *Case concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, p 90 at p 102, para 29. See also Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ Reports 2004 (I), pp. 171-172, para. 88.
[32] Note, however, that certain academic authorities have disagreed with self-determination existing beyond decolonisation; See MN Shaw, *Title to Territory in Africa*, (Clarendon Press: Oxford 1986), pp 59-144; R Higgins, *Problems and Process*, (Clarendon Press: Oxford 1994), pp 111-128.

consistently been implemented by states. Before addressing procedural concerns over the justification of self-determination in practice, it must first be contemplated that the use of the term 'peoples' has presented interpretive obstacles as to whom may exercise self-determination.

3.2.1.1 What is a 'Peoples' for the purposes of Self-Determination

'Peoples' as possessors of a right to self-determine continues to be ambiguous and subject to external recognition, a process similar to the practice of the recognition of statehood. No regime currently exists under international law denoting the precise criteria for identifying what attributes constitute a 'peoples'. Despite this lack of formality, the collective recognition of the United Nations, perhaps appropriately[33], has shown a willingness on the part of member states to provide identification of particular groups, notably under the trust territories supervision of the UN and in the colonial context. Whereas in certain circumstances states' recognition of a group constituting a 'peoples' has been relatively simple[34], the Supreme Court of Canada in the *Quebec Reference* considered:

> "a right to secession only arises under the principle of self-determination of people at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part."[35]

However, the recent *Kosovo* advisory opinion noted that outside these circumstances, "[t]here were, however, also instances of declarations of independence outside this context."[36] These extra-colonial instances can be interpreted as a variation that has emerged given the varied contextual natures of modern self-determination situations, with legitimacy being recognised to apply to an expanded scope of potential 'peoples'.

3.2.1.2 Remedial Rights Theory versus Primary Rights Theory

In essence, the pursuit of secession is the exercising of a right to secede "to sever the [existing] government's control over [a] portion of [their] territory."[37] The nature of the governmental control over territory is crucial, not only in accounting for the development of the principle of self-determination, but also for justifying the outcome of exercising the right. Historically, the context of foreign domination acted to support the normative quality of self-determination as a corollary for decolonisation.[38] However, the events demarcating the end of the Cold War introduced an expansive interpretation for self-determination, and challenged the legitimacy of the principle to act as a catalyst for independent statehood (secession). The major concern lay as to whether self-determination could be promoted without posing a significant threat to territorial integrity (considered below).

---

[33] Given that the aforementioned major developments of self-determination have relied upon the *Charter, ICCPR, ICESCR* and other GA Resolutions, as well as the ICJ as the judicial organ of the UN.

[34] Notably, those in Zimbabwe, Namibia, Angola, Mozambique and Guinea-Bissau, as well as the Palestinians, are considered a 'peoples' for the purposes of identifying the principle of self-determination by virtue of a GA Resolution. See Preamble and Article 1, *Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights,* A/RES/2787 (6 December 1971).

[35] Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 154.

[36] fn 1, para 79.

[37] A Buchanan, *Theories of Secession*, (1997) Philosophy & Public Affairs 26(1), pp 31-61, p 35.

[38] This 'foreign domination' terminology, however, continues to receive support from some nations. *cf* India's reservations to the ICCPR, "Reservations, Declarations, Objections and Derogations: CCPR – India", retrieved from <http://www.bayefsky.com/html/india_t2_ccpr.php> on 31 August 2012.

Various academic works have noted this contextual variation[39], and identified a normative framework of two distinct rights theories – *remedial* and *primary* rights – that lead to different consequences, and thus maintain the legitimating aspect of self-determination. Under *remedial rights theory*, self-determination is conceived as operating to liberate a people from adverse or foreign domination, and thus "restrict the right to secede to cases in which the most serious and widely recognized sorts of moral wrongs have been perpetrated against a group, namely violations of human rights and the unjust conquest of a sovereign state."[40] However, certain theorists[41] postulate that any ("encompassing") group is entitled to secession, even from a just state, and that all that is necessary is a collective political will to justify the legal continuity disruption. This *primary rights theory* envisages that states (and their subsequent rights) are dangerously susceptible to the possibility of groups exercising self-determination rights with the intention of secession. Given that secession has historically been employed as a corrective measure against persistent rights violations, it is impossible to accept, as a matter of policy and international law and in the absence of the adverse group conditions under *remedial rights theory*, that a state should endure such a threat. This is even more so where the state in question adheres to international obligations with regard to self-determination and human rights, especially in that governmental participation is open to all groups. The operative principle that acts as a counterbalance against the adoption of *primary rights theory* is that of territorial integrity.

3.2.2 Territorial Integrity

The protection afforded to territorial integrity is evident from the text of the *UN Charter*, noting a prohibition against threats *inter alia* inconsistent with the Purposes of the *Charter.*[42] While this principle has enjoyed normative support for varied reasons throughout modern international law, its effect in relation to self-determination is of greatest interest in the present discourse. Where the principle of self-determination is announced in the relevant 1960 and 1970 Declarations, the "safeguard clauses"[43] note:

"Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[44]

…and…

"Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any state or country."[45]

---

[39] fn 37, pp 31-61; LC Buchheit, *Secession, The Legitimacy of Self-Determination* (Yale University Press: New Haven 1978); C Tomuschat, 'Secession and self-determination' from *Secession: International Law Perspectives*, MG Kohen (ed) (Cambridge University Press: Cambridge 2006), pp 23-45.
[40] fn 37, p 55.
[41] A Margalit and J Raz, *National Self-Determination*, (1990) Journal of Philosophy 87(9), pp 439-461; H Beran, *The Consent Theory of Political Obligation*, (Routledge: London 1987), p42; CH Wellman, *A Defense of Secession and Political Self-Determination*, (1995) Philosophy & Public Affairs 24(2), pp 142-171.
[42] Article 2(4), *UN Charter*.
[43] RCA White, *Self-determination: Time for a Re-Assessment?*, (1981) Netherlands Int'l Law Rev 28(2), pp 147-170, at p 159.
[44] Art 6, fn *25*.
[45] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UNGA Resolution 2625 (XXV), A/RES/2625 (XXV) (24 October 1970).

3.2.3 STRIKING A BALANCE: IMPLEMENTATION OF SELF-DETERMINATION IN LIGHT OF TERRITORIAL INTEGRITY

A criticism often leveled at states' reliance upon the protection of territorial integrity to prevent secession is that it is an illegitimate self-preserving right working to maintain the territorial status quo. This superficial analysis does not consider the purpose of territorial integrity as crucial to the stability of the state from forces without (prevention of territorial incursions) and within (the necessity for legal certainty of jurisdiction). To introduce a principle of international law capable of overriding territorial integrity, and then to endow it with relative ease-of-access, would radically erode the concept of a state, and, consequently, devalue the international legal personality that external self-determination seeks to provide.

Given the parameters limiting the effect of self-determination in relation to the territorial integrity of a state, it would suggest that self-determination fails to provide any support whatsoever for legitimizing secession from an existing state. State practice (particularly in the colonial context) has shown otherwise, that territorial integrity has been perceived as conditional[46] upon the state being in compliance with its international rights obligations, especially with regard to non-discrimination and human rights. Some may observe from this that secession is not *impossible* despite the safeguard of territorial integrity, suggesting that, as a state's compliance with its international rights obligations rises, it could be construed that the legitimacy of secession as an effect of self-determination decreases in legitimacy.

However, in the collaborative *Québec Reference* opinion by T Franck, R Higgins, A Pellet, MN Shaw and C Tomuschat, these leading international legal authors suggest a better approach for understanding how apparent self-determination may lead to secession without violating the sanctity of territorial integrity.[47] A *remedial rights theory*-based secession does not, in law, recognise the emergence of the non-self-governing entity as impacting the territorial integrity of the oppressive state, and attribution of self-determination to secession as the legal explanation is, in fact, a mistake. The emergent territory in a colonial situation is not considered to be legitimately protected as part of the colonizing state's territorial integrity[48], and therefore, not subject to the prohibited threat found in the Declarations[49]. Simply put, "the right to self-determination does not confer the right to independence."[50]

The 'stigma' often attached to secession may be unfounded[51], as in most cases, self-determination from within the 'just' state may result in internal negotiations and redistribution of powers towards regional autonomy, while maintaining the sovereign authority as it already stands (*internal self-determination)*. This is most compatible within the framework suggested by the *Québec Reference* opinion.[52] However, while international law may not provide a right of secession or independence through the exercise of self-determination rights, there is no specific prohibition of a territory to secede from a state. What has been discussed points to a disjoin

[46] Although outside the scope of this dissertation, these considerations, in conjunction with adherence to international humanitarian laws, may also inform on the proposal of a conditional sovereignty present in the operation of humanitarian interventions, esp. the Responsibility to Protect doctrine. See Final Document, *2005 World Summit Outcome*, UN Doc A/RES/60/1 (24 October 2005), paras 138-139; generally, Report, *The Responsibility to Protect*, International Commission on Intervention and State Sovereignty (December 2001).
[47] Expert Opinion prepared in 1992 by TM Franck, R Higgins, A Pellet, MN Shaw and C Tomuschat, "The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty" from AF Bayefsky (ed), *Self-determination in International Law: Quebec and Lessons Learned,* (Kluwer Law: The Hague 2000), pp 241-303.
[48] *ibid*, p 283 at §3.14.
[49] fn 44.; fn 45.
[50] fn 47, p 285 at §3.15.
[51] D Thurer and T Burri, 'Secession', in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008-, online edition, [www.mpepil.com], visited on 13 August 2012, at para 11.
[52] fn 47, p 284 at §3.14 (i)-(v).

between exercising self-determination in a 'just' state and a perceived international claim of right to independence – self-determination in a rights-compliant state enjoys no international legal support. "Secession […] appears to be 'a political fact from which international law is content to draw conclusions when it leads to the establishment of effective and stable State authorities'".[53]

Therefore, if secession is not justified by an extra-colonial claim of the international legal principle of self-determination, secession as a factual possibility is not extinguished either. If independence is gained despite a lack of oppressive conditions, there must also be lessons drawn as to what effect the international community has on the success of secession despite the absence of prohibition. Third-states in judgment of the legitimacy of non-colonial secession movements, while possibly violating the principle of non-intervention, still hold the key to recognition of the emergent territory as an independent state. This extraterritorial recognition element to successful secession is still a matter of political discretion, yet there exist legal means of evidencing legitimacy that are capable of influencing a third-state's decision whether to bestow recognition where the secession is perceived as being legitimate, and consequently, recognising the creation of a new state as an outcome of aggregated legal conformity.

3.3 Proving a Nation's Worth: Conclusions as to Secession and Recognition

At this point, five conclusions may be drawn out that may apply to any non-*remedial rights* situation of separation of territory and people. Firstly, states are the quintessential primary actors in the international sphere, and as such, are the sole entities capable of creating international law. The corollary to this is that, as states, these actors enjoy supremacy amongst rights-holders of international protections. The attainment of statehood therefore now consists of criteria exceeding the *Montevideo Convention* formulation. Secondly, under the constitutive theory of state recognition, states act as legitimizers of independence efforts by virtue of the approval or refusal to recognise a territorial entity as a state.

Third, the exercise of the international principle of self-determination entails a consideration of context in order to evaluate whether there may be recognition of the putative state. Under *remedial rights theory*, groups suffering rights oppression may be entitled to form their own state. However, self-determination outside this context does not give rise to a right of secession. Fourth, secession threatens the state right to territorial integrity, though evidence exists for the creation of a state from within another. Territorial entities subject to colonisation, rights violations and absent or meaningless political participation are not legally recognised as part of the dominating state's territorial integrity protections, and their subsequent emergence ascribed to self-determination is not in violation of territorial integrity. Outside this context, territorial integrity rights prevent self-determination and secession as legitimate aspirations for groups existing within 'just' states. Finally, as no right to secession from 'just' states can be afforded, secessionary groups must consider the effect of recognition by other states as the only international consideration of departure. In order to achieve this end, actions must be taken by the group to fulfill the various elements that shall be considered by other states in exercising their political discretion regarding recognition of the legality and legitimacy of a putative independent state.

[53] fn 47, p 284 at §3.14(iv).

4 SCOTTISH INDEPENDENCE AND THE PROPOSED 2014 REFERENDUM: ESTABLISHING FACTUAL CONSIDERATIONS FOR RECOGNITION OF STATEHOOD

Following the 2011 Scottish Parliamentary General Election of a majority Scottish National Party ('SNP') government, Scotland currently is in the process of public consultation and political negotiations to conduct a referendum on whether the population of Scotland supports the pursuit of independence. The intended timetable, at present, sees this plebiscite scheduled for the autumn of 2014. Considerations have abounded as to whether this extended period of political uncertainty is detrimental, not only in Scotland specifically, but also for the UK in general, or whether this may permit a necessary time to educate and campaign effectively. The nature of the situation being heavily political, most of the controversies that exist presently are beyond the scope of this analysis.

What is squarely within the parameters of examination is the effect of international legal considerations that, while ultimately critical only after a referendum result in support of independence, draw the attention of the international community presently and weigh significantly in the future possibility of Scotland emerging as an independent and sovereign state within the community of nations. Having evaluated the present state of international law giving effect to the principle of self-determination, it has been shown that, in the context of the United Kingdom as a 'just' state adhering to the international rights obligations of states and democratic principles in a European context, the possibility of external self-determination fails to garner any legal support. As the nature of the Union between Scotland and the remainder of the United Kingdom cannot be reasonably construed as 'colonisation', any Scottish exercise of self-determination may, as a legal possibility, rely only on an internal solution that at most may provide full autonomy for the region (the so-called 'Devo Max' option).

This chapter seeks to (dis)prove the presumptions and considerations present in the following hypothesis:

1. If…
   (a) …there does not exist an international right to secession as an outcome of exercising self-determination; and…
   (b) …the current (SNP-majority) Scottish Parliament is intent on holding a referendum testing the public will for independence; then…
2. …any action taken to this end, from an international legal perspective, will necessarily consider the legitimacy and legality of these actions as indicators of the likelihood of other states to afford a separate, independent Scotland the recognition of the legal personality of statehood.

As a matter of reflection on the political realism facing the present scenario, even in the event that Scotland is not able to fulfill the conclusions drawn here, it is not contemplated that a future Scottish state is impossible. Rather, what impact international legal consideration may achieve is simply the extent to which the current paradigm of international legal principles and rights involved provide any legal foundation upon which the post-independent Scottish territory may reasonably invest a hope for recognition.

4.1 A BRIEF HISTORY OF SCOTLAND AND UNION

"Fareweel to a'our Scottish fame,
Fareweel our ancient glory;
Fareweel ev'n to the Scottish name,
Sae famed in martial story!"[54]

[54] R Burns, *Such a Parcel of Rogues in a Nation*, (Song XXXVI) from J Hogg, The Jacobite Relics of Scotland: being the songs, airs and legends of the Adherents to the House of Stuart,(Vol 1, Oliver & Boyd: Edinburgh 1819), pg 56.

On 1 May 1707, the sovereign and independent nation of Scotland ceased to exist. After a disastrous attempt at establishing itself as a colonial power in Panama (the failed 'Darien Venture')[55], the Scottish Parliament entered into negotiations with England regarding the terms of union between the two kingdoms, ceding sovereign authority to the Westminster Parliament. Though Scotland ceased to exist, the Scottish population as an identifiable group continued beyond the merger, and historical rancor between the Scots and the English became a sub-text to the narrative of the United Kingdom.

Attempts to repatriate powers back to Edinburgh enjoyed popular support as early as the 19th century, with calls for devolution of legislative authority dominating the debate over the future of the Union:

> "Between 1889 and 1914 Scottish home rule was debated 15 times in Parliament, including the introduction of four bills. In 1913 a Home Rule Bill passed its second reading. World War I then intervened and the idea was dropped but support for home rule had been on the wane in any case, as campaigning for it meant associating with the more outspoken Irish home rule activists."[56]

The Labour victory in the 1997 UK General Election led to a referendum being held, supporting devolution of certain powers to a new 'Scottish Parliament'. However, support for a fully independent and sovereign Scottish nation at the time stood at near 29%[57], and this number has supposedly continued to rise[58]. The advent of devolution came two years after the Québec referendum on independence from Canada, a narrow loss that highlighted the conflicted relationship between the English-speaking majority outside 'La belle province' and the Francophone minority living within.

While the SNP has maintained a broad manifesto based along socialist-democratic lines, the centrepiece of their campaigning throughout its history has been the ultimate goal of an independent and sovereign Scotland. This policy has garnered a significant base of support, being a cause celebré for people such as Sir Sean Connery and other Scottish cultural icons.[59] However portrayed, either negatively or positively, Scottish independence is now at the forefront of Scottish politics.

4.2 Existing Evidence of Statehood Criteria

For the purpose of evaluating the hypothesis as stated, it ought to be considered whether certain formal criteria may already be satisfied, and if so, whether they fulfill the constitutive theory of statehood. It shall be considered whether, given the current constitutional arrangements of devolution, Scotland's Parliament can be perceived

---

[55] M Ibeji, 'The Darien Venture', BBC History, retrieved from <http://www.bbc.co.uk/history/british/civil_war_revolution/scotland_darien_01.shtml> on 3 September 2012.

[56] BBC Online, 'Scotland Referendum – Briefing History', retrieved from <http://www.bbc.co.uk/news/special/politics97/devolution/scotland/briefing/history.shtml> on 3 September 2012.

[57] Ipsos MORI, *Scottish support for Independence/Devolution 1978-95*, Retrieved from <http://www.ipsos-mori.com/researchpublications/researcharchive/2781/Scottish-support-for-IndependenceDevolution-197895.aspx?view=wide> on 21 June 2012.

[58] However, following a TNS-BMRB poll following the election of the SNP into Scottish Government in 2011, there exists a correlation between a decline in support as there is an increase in age groupings. "The latest poll showed 51% of voters under 24 support independence with 36% against. Those aged 25-34 were in favour by 40%, with 36% against, and 38% of the 35-44 age bracket were in favour, with 36% against. Over the age of 65, the figure is 57% against to 28% in favour.", R Dinwoodie, *Support for Independence Growing*, The Herald Scotland, 9 June 2011, retrieved from <http://www.heraldscotland.com/politics/political-news/support-for-independence-is-growing-exclusive-support-for-independence-growing.13986498>.

[59] P Kane, *Scotland's independence referendum will see a Scotterati recruitment drive*, The Guardian, 20 May 2011, retrieved from <http://www.guardian.co.uk/commentisfree/2011/may/20/scotland-independence-referendum-pat-kane> on 15 August 2012.

as an effective government. Secondly, the question of population shall be examined as to its ability to fulfill what minimal (if any) measure of "a peoples" is, as considered by the principle of self-determination, minority rights and indigenous groups. Finally, it will be presented that the issue of a definite territory applies to Scotland, and that this element may be the least controversial aspect in regards to a future consideration of Scotland as a potential candidate for statehood.

4.2.1 GOVERNMENT

The internal drive for Scottish home rule has existed virtually ever since the Act of Union. As a political fact, recalling these efforts is important to the backdrop leading up to the current constitutional arrangements of devolution within the United Kingdom. In the lead up to the 1997 UK general election, the Labour Party included in its manifesto a platform to introduce national assemblies and regional parliaments to Scotland, Wales and Northern Ireland. Therein, the bold statement was made that "Our proposal is for devolution not federation. A sovereign Westminster Parliament will devolve power to Scotland and Wales. The Union will be strengthened and the threat of separatism removed."[60] It is not beyond contemplation that devolution was seen to be directly responding to the self-determination of Scotland and Wales, and that, politically, the possibility of secession became a catalyst for the constitutional change. The passing of the Scotland Act in 1998 led to the sitting of the new Scottish government the next year.

In convening the first meeting on 12 May 1999, the prominent SNP icon Dr Winnie Ewing stated "I want to start with the words that I have always wanted either to say or to hear someone else say - the Scottish Parliament, which adjourned on March 25, 1707, is hereby reconvened."[61] Alas, as a matter of law, the devolved Scottish Parliament ('Holyrood') cannot be perceived as the continuation of the sovereign independent Parliament that ceased to exist in 1707. The constitutional arrangement that devolution created was to permit, akin to the EU principle of subsidiarity[62], certain regional autonomy for Scotland over a specific set of competencies. However, the UK principle of Parliamentary supremacy maintains not only the authority to legislate in other areas, but also continues to exist as the sovereign international legal personality representing the interests of Scotland abroad.

Under Section 29 (*Legislative competence*) of the 1998 Scotland Act[63], "[a]n Act of Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament."[64] In comparison, the Westminster Parliament experiences no such limitation of competence, enjoying a continued ability to legislate over or in relation to Scotland, even over devolved subject matters.[65] This reflection highlights a persistence of Parliamentary hierarchy favouring Westminster, and as such, reinforces the legitimacy of the UK as a state under the statehood criterion of effective governmental control. In reality, Westminster reserved a great many powers under Schedule 5 of the *Scotland Act*, and particularly, for the present purposes, in regard to international relations.[66] Furthermore, where the Secretary of State for the UK (the 'Home Secretary') observes the need to bring Scotland into compliance with or prevent a breach of the UK's international obligations, they are possessed of the power to intervene to this effect.[67]

---

[60] UK Labour Party, *1997 Labour Party Manifesto*, Retrieved from <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> on 10 July 2012.

[61] BBC Democracy Live, "12 May 1999: Winnie Ewing reconvenes the Scottish Parliament", retrieved from <http://news.bbc.co.uk/democracylive/hi/historic_moments/newsid_8187000/8187312.stm> on 22 August 2012.

[62] Scott, Peterson and Millar, *Subsidiarity: a Europe of the regions v the British constitution,* (1994) JCMS 47, at p 54.

[63] *Scotland Act* 1998, c 46.

[64] Section 29(1), *ibid*.

[65] Section 28(7), *ibid*.

[66] Section 7, Part I, Schedule 5, *ibid*.

[67] Section 35(1)(a) & 58, *ibid*.

Alterations to the powers of the Scottish Parliament by Westminster are also provided for, with the means requiring an Order in Council made by Her Majesty the Queen, on the advice of her Ministers under the constitutional convention of the UK.[68] The same procedure is employed to give effect to UN Security Council resolutions under Art 41 of the *Charter*.[69]

While there may be statutory avenues through which Westminster *may* supersede Holyrood, evaluating the legal effectiveness of the Scottish Parliament means characterizing the degree of autonomy *actually* enjoyed, as well as how frequently Westminster *does* intervene. As Ross and Crespo note, "during the first three years of its existence the Scottish Parliament has consented to using this procedure known as 'the Sewel convention' almost as often as it has enacted bills [and that] there is a strong opinion that Westminster may be legislating too frequently for Scotland using the convention."[70] The intergovernmental relationship that exists in Holyrood is one of subordination to Westminster, and the transfer of limited competencies is non-exclusive in Scotland. Despite W Ewing's aspirations, the term missing from her statement – 'sovereign' – is exactly the quality lacking from the devolved Parliament itself. As observed by CT Reid,

> "[T]he concentration on politics in Edinburgh should not mask the true significance of the powers being exercised in London, not just on the obvious "national" issues affecting income tax and foreign affairs, but on many more detailed aspects of [the Scottish] administration. The UK government makes more law for Scotland than the Scottish Executive does. Furthermore, this legislative activity in London does on occasions extend into areas that are devolved matters."[71]

Westminster's powers to enforce compliance with international obligations, combined with their exclusive competence regarding consent to the same, in effect maintain that, from the perspective of other states, Westminster is the effective government over the Scottish territory with regard to foreign relations. However, the legal reality that Westminster also retains the right to legislate over all domestic matters, particularly the power to repeal the *Scotland Act,* dilutes any possibility of considering the effectiveness of the Scottish Parliament as constitutionally similar to national governments of existing states. In order to achieve the 'government' criteria of statehood, the jurisdictional competence of the Scottish Parliament must be perceived as exclusive, autonomous and capable of being the ultimate representative authority of the Scottish people. The need for further action suggests a negative against claims that the 1998 devolution was the beginning of the end of Union. It may have been, however, a constitutional 'Pandora's Box', where full autonomy can be seen as the logical conclusion to the devolution process.

4.2.2 Scottish Peoples

There exists, historically, a rich heritage of culture, society and language for the Scots as a group. Indeed, some Scottish identity has transcended into the collective consciousness of the international community, e.g. Auld Lang Syne by Robert Burns at New Year's celebrations. However, from the perspective of exercising self-determination the common usage and understanding of 'a peoples' does not directly correlate to its purpose in international law. In the *Québec Reference* case in Canada, the Supreme Court observed:

> "International law grants the right to self-determination to 'peoples'. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-

[68] Section 30(2-4), fn 63.
[69] Section 56(1)(b), *ibid*; Article 41 of the *Charter*, denoting actions taken by the Security Council not employing the use of force, was given effect by the UK domestic legislation of the *United Nations Act* 1946, c 45.
[70] A Ross and MS Crespo, *The effect of devolution on the implementation of European Community law in Spain and the United Kingdom*, 2003 EL Rev 28(2), pp 210-230, at p 219.
[71] CT Reid, *Who makes Scotland's law? Delegated legislation under the devolution arrangements,* (2002) ~~E~~Edin LR 6(3), pp 380-384, at p 384.

> determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain."[72]

As discussed earlier, the definitional deficit of this unit of self-determination is open to wide interpretation, albeit that certain elements of common purpose are required. In order to consider the point, similarities need to be drawn to other peoples' situations, and whether Scotland's 'peoples' could reach similar acceptance under recognition by the other states.

While use of English is the predominant language within the Scottish territory, Gaelic as a historical language is still commonplace, particularly with signage (border crossings, transport hubs), and media (BBC Alba, BBC Radio nan Gàidheal). However, the 2001 Scottish Census results indicate that only 1.2% of the population of Scotland have some knowledge of Scottish Gaelic, and only half that can read, write and speak the language.[73] In contrast, the usage of French in Québec is 79%, and throughout Canada that figure is 21.8%.[74] Despite these vast differences in proportion, Gaelic in Scotland is recognised as a historical language under the European Charter for Regional or Minority Languages[75], ratified by the UK[76]. The Scottish Parliament gave formal recognition of the Gaelic language in the *Gaelic Language (Scotland) Act* in 2005.[77] In contrast, the only official language recognised in the UK is Welsh, where the percentage of usage is similar to the national Canadian and Québec figures.[78]

Unfortunately, it is uncertain what measure will be taken by other states in their evaluation of this element when considering the legitimacy of the whole Scottish population to be identified as a unit of self-determination, distinguishing any similarity of comparison that may be made with Québec. Ultimately, outside the context of self-determination, the factual reality exists that within the territory of the Scottish region there does exist a permanent population that identify themselves as being Scottish.

---

[72] fn 35, para 123.

[73] Census Results, *2001 Scotland Census*, Scotland's Census Results Online (SCROL), retrieved from <http://www.scrol.gov.uk/scrol/analyser/analyser?topicId=4&tableId=UV12&tableName=Knowledge+of+Gaelic&selectedTopicId=&aggregated=true&subject=&tableNumber=&selectedLevelId=&postcode=&areaText=&RADIOLAYER=&actionName=view-results&clearAreas=&stateData1=&stateData2=&stateData3=&stateData4=&debug=&tempData1=&tempData2=&tempData3=&tempData4=&areaId=01&areaId=02&areaId=03&areaId=04&areaId=06&areaId=08&areaId=09&areaId=10&areaId=11&areaId=12&areaId=13&areaId=14&areaId=32&areaId=15&areaId=16&areaId=17&areaId=18&areaId=19&areaId=20&areaId=21&areaId=22&areaId=23&areaId=24&areaId=25&areaId=26&areaId=05&areaId=27&areaId=28&areaId=29&areaId=30&areaId=07&areaId=31&levelId=1> on 1 September 2012.

[74] Census Results, *2006 Canadian Census*, Statistics Canada (StatsCan), retrieved from <http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/hlt/97-555/T401-eng.cfm?Lang=E&T=401&GH=4&SC=1&S=99&O=A> on 1 September 2012.

[75] *European Charter for Regional or Minority Languages* (1992), CETS No: 148.

[76] Declaration contained in a Note Verbale from the Foreign and Commonwealth Office of the United Kingdom, handed at the time of deposit of the instrument of ratification on 27 March 2001, retrieved from <http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=148&CM=1&DF=&CL=ENG&VL=1> on 1 September 2012.

[77] *Gaelic Language (Scotland) Act* (2005), 2005 asp 7.

[78] See Table 18, Welsh Language Board, *2004 Welsh Language Survey Report*, (Welsh Language Board: Cardiff 2006), at p 46; Also Section 13.7.1, p 49.

4.2.3 TERRITORY

In considering the characteristics of the Scottish region, whether there is a 'Scottish territory' under Article 1(a) of the *Montevideo Convention* deserves (a fairly short) discourse. Historically, the borders and frontiers of Scotland have remained intact since Union in 1707. Even before this, Scotland and England were (somewhat uniquely) physically divided by Hadrian's Wall, erected by the Romans in 122 AD, and recognised as a UNESCO World Heritage Site in 1987.[79] Though there exists little controversy over land-based boundaries, the Scottish territorial claims at sea are subject to scrutiny. The territorial waters of Scotland were delimited domestically by the Scottish Adjacent Waters Boundaries Order (1999)[80], wherein Scottish civil and criminal jurisdiction extended only so far, and the remainder of the sea claims was subject to the jurisdiction of the UK. Below is an illustration of these boundaries provided by the UK Government Explanatory Note[81]:

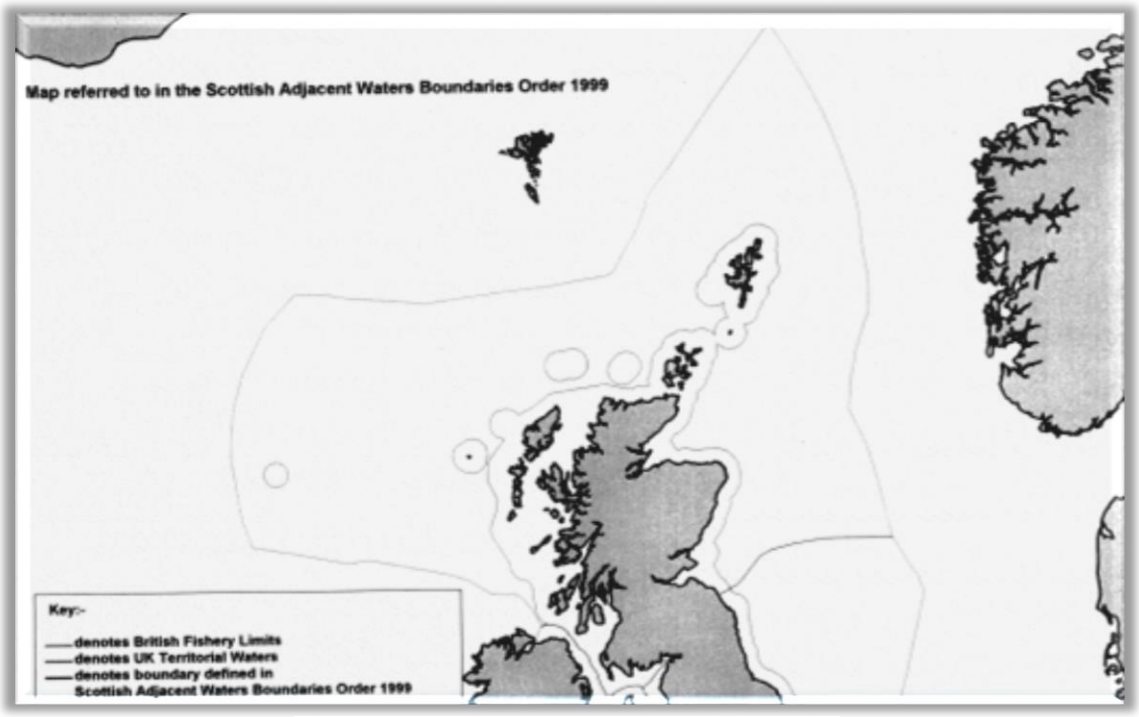

FIGURE 1: MARITIME DELIMITATION OF SCOTTISH WATERS

Scotland has relied heavily upon the natural resources present in her coastal waters, and likely would claim the existing boundaries as the basis for the claim by an independent Scotland. However, following many cases on maritime delimitation in the North Sea, Scotland would most likely be required to honour the findings by the ICJ and the International Tribunal for the Law of the Sea ('ITLOS'). Bearing in mind this caveat, the ability of Scotland to jurisdictionally define its frontiers as a criterion of statehood is perhaps the least troublesome characteristic that currently exists.

4.3 GAINING INDEPENDENCE: LEGITIMATE ACQUISITION OF THE ESSENTIAL CRITERION

It is clear from analyzing the quality of the first three criteria that much is left wanting by Scotland before it can expect to have itself recognized as an independent sovereign state. No criterion can be considered as more important, however, than the essential presence of independence, both formal and actual in nature. As it currently stands within the UK, independence is limited in scope to the possibility of transfers of more legislative

[79] UNESCO World Heritage List, *Frontiers of the Roman Empire*, UNESCO Online, retrieved from <http://whc.unesco.org/en/list/430/> on 30 August 2012.
[80] The Scottish Adjacent Waters Boundaries Order 1999, 1999 No 1126.
[81] Explanatory Note to The Scottish Adjacent Waters Boundaries Order 1999, 1999 No 1126.

powers from Westminster to Holyrood. The current devolved arrangement represents the continued domination of a unitary centralist UK government, and arguably, future Scottish developments may require a re-examination of the adherence to this structure. Whereas devolution does not transfer any formal exclusivity to the Scottish legislature, certainly there exists the possibility that the *Scotland Act* has introduced an uncertain future for the doctrine of Westminster's Parliamentary supremacy, as noted by G Little:

> "[The UK] Parliament's reiteration of the traditional approach to sovereignty in the Scotland Act represented an attempt to perpetuate a Westminster-centric political culture, which is intrinsically at odds with the decentralisation of power. Viewed in this light, the central place given to parliamentary sovereignty in the Scottish devolution settlement was, at a fundamental level, raw power politics, and an unambiguous statement of political dominance."[82]

This perception of the devolution as lip-service treatment to genuine political desires of Scotland within the UK may account for why its employment to abate secession has failed, and Westminster faces a greater threat from the 2014 Referendum than it did under the non-binding Claim of Right (1989), endorsed by many Scottish Members of the UK Parliament including (the then-future) Prime Minister Gordon Brown. It is not without significance that this plebiscite will be held, and while it offers only evidence of political will, it does not amount to any right of secession under international law should the Independence of Scotland be so endorsed.

4.3.1 Possessing Legal Authority: Who can pose the Question

As constitutional matters are reserved under Schedule 5 Part I of the *Scotland Act*,[83] the ability of Holyrood to legislate to bring about a referendum on independence (as a criterion for statehood) is beyond Scottish Parliament's competence. In the UK Government's Consultation White Paper on Scotland's Constitutional Future, the Secretary of State for Scotland Michael Moore MP noted:

> "The consultation set out our clear view that the Scottish Parliament does not have the legal authority to hold an independence referendum and our firm intention to put that issue beyond doubt. [...] [A] legislative order should be used to give the Scottish Parliament the power to deliver a referendum. [...] [T]he Scottish Government has also agreed with this approach."[84]

Similarly, the Scottish Parliament's Consultation Paper reiterated:

> "The Scottish Government is nevertheless ready to work with the UK Government to remove their doubts about the competence of the Scottish Parliament and put the referendum effectively beyond legal challenge by the UK Government or any other party."[85]

The method of transferring this competence to the Scottish Parliament has been considered as being either as a provision within the *Scotland Bill*, recently enacted as the *Scotland Act* 2012[86], or as an Order in Council, pursuant to Section 30 of the *Scotland Act* 1998. However, given the gravity of the constitutional nature of this transfer, A Tomkins stated: "[...]the future of devolution and independence are 'two entirely separate constitutional issues'. The Scotland Bill is concerned with the former and not with the latter. It would not be in the public interest for

[82] G Little, *Scotland and parliamentary sovereignty*, (2004) Legal Studies 24(4), pp 540-567, at p 552.
[83] "The following aspects of the constitution are reserved matters, that is […] the Union of the Kingdoms of England and Scotland […]", Schedule 5, Part I, Section 1(b), *Scotland Act* (1998), c 46.
[84] Scotland Office of the UK, *Scotland's Constitutional Future*, (White Paper, CM8326, 2012), pg 5.
[85] The Scottish Government, *Your Scotland, Your Referendum*, (Consultation, 2012), pg 5.
[86] *Scotland Act* 2012, c 11.

the two to become confused with one another."[87] The clarity of this transfer by Order in Council would not only highlight the legitimacy of the Scottish Parliament to exercise its authority, but it would have also avoided the issue of Westminster being provided a means of suppressing the referendum by means of defeating the *Scotland Bill* before it came into force. This outcome also may be interpreted as being the most compatible with the international principle of self-determination, with the delegation of such a critical exercise resting with those subject to the effects of the referendum. Much of the political rhetoric currently being disseminated by supporters of secession claims, "[i]ndependence is about Scotland rejoining the family of nations in [its] own right."[88] Independence in this context should be clarified as to its role in the modern international legal criteria for statehood, separate and distinct from the usage of the term *sovereign*.

4.3.2 The Question: Requirements for Legitimacy

> *"That's why we have lawyers. They study a language for three years - and they learn it - and it's a language that if a normal person read it, they'd have a stroke."* [89]

The first step in determining the will of the Scottish people rests with the phrasing of the referendum question as it will be presented on the ballot paper. Following the consultation papers of both the UK and Scottish parliaments, the current incarnation is constructed thusly:

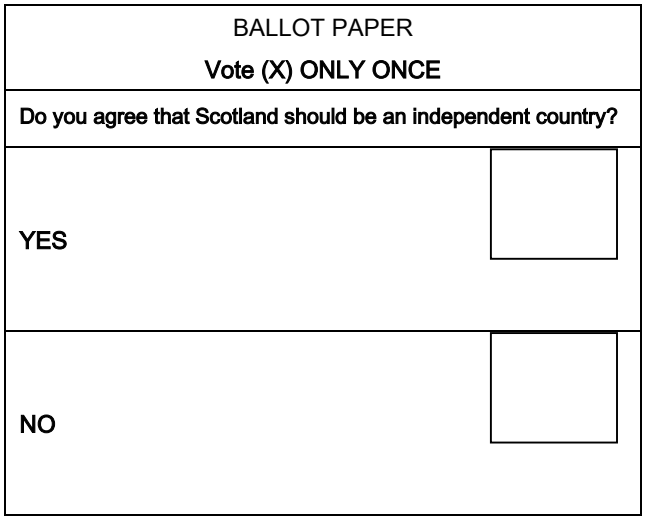

FIGURE 4-2 REPRESENTATION OF THE PROPOSED BALLOT FOR SCOTTISH REFERENDUM IN 2014[90]

In an era of law where emphasis for plain language is encouraged, the above inquiry is, on its face, simple, eloquent and concise. The aim of the *Yes* campaign to clearly establish popular support for secession seems to have equal footing with the *No* campaign – the question is only capable of the most binary of outcomes. However, it is vitally important not only to be concise, but to pose a *precise* question. The issues caused by the ambiguity of potential consequences either way may dilute the effectiveness of the result. In contrast, the question posed in the *Québec Referendum* of 1995 stated: "Acceptez-vous que le Québec devienne souverain, après avoir offert formellement au Canada un nouveau partenariat économique et politique, dans le cadre du projet de loi sur l'avenir du Québec et de l'entente signée le 12 juin 1995?"[91] The parallel question to that

[87] fn 83, at p 10.
[88] A Salmond, *Statement on the Launch of the Referendum Consultation*, Hansard (Scotland) 25 January 2012, at 5607.
[89] Lewis Black, *Stark Raving Black* (2009)
[90] Section 1.10, fn 85, pp.10-11.
[91] The English translation as presented on the ballot: "Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?"; Quebec 1995 Referendum,

proposed under the Scottish Consultation was the one posed to the Inuit, "Do you agree that Québec should become sovereign?"[92]. While similar in linguistic structure, the terms *sovereign* and *independent* should not be mistaken as interchangeable. As J Crawford states:

> "The term 'sovereignty' is sometimes used in place of 'independence' as a basic criterion for statehood. However, it has another more satisfactory meaning as an incident or consequence of statehood, namely, the plenary competence that States prima facie possess. Since the two meanings are distinct, it is better to use the term 'independence' to denote the prerequisite for statehood and sovereignty' the legal incident."[93]

The inclusion of "independent" raises another interesting dilemma, particularly when examined in light of the purpose of the referendum for empirically evidencing the true 'will' of the referendum franchise. There exists three distinct perspectives on the term *independent*, namely (a) the intention of its use by the drafters, (b) the international legal interpretation and understanding of its usage in regards to statehood, and (c) the perceived meaning by the referendum franchise at the polls. While the first two factor into a mostly an academic discourse, the public perception element is, arguably, the most critical in understanding the referendum outcome and, moreover, the legitimacy for any subsequent actions, domestically or otherwise.

Given the legal interpretation of 'independence' as *one* of the criteria, presentation of independence as the *sole* requirement for a sovereign Scotland is misrepresentation of the complexity beholden the standing of 'statehood' on the international level.[94] However, if one were to consider Crawford's comparison as mere pedantry, such criticism would suffer from a failure to achieve the mandate set to the Electoral Commission responsible for the formulation of the referendum question – clarity, neutrality, unassuming and *accurate*[95]. As for the interpretation of the lay person casting their vote, given the nature of Scotland's position within the UK, as well as the UK's position within the EU, some voters may not support independence from the UK, but indeed support an exit for Scotland from the EU. This postulate is not with precedent. Consider, for instance, the decentralisation of powers from Denmark to Greenland, and the latter's 1985 referendum resulting in Greenland's withdrawal from the European Economic Community (the precursor to the EU).[96] The need for clarity would require the introduction of an addendum stating '…a country independent from the United Kingdom.' This would also indicate the actual nature of secession that would be distinct from the operation of removing one's state from a treaty organisation. Regardless, in either situation, subject to the *Vienna Convention on the Succession of Treaties*[97], an independent Scotland would most likely be considered as required to secure the consent of existing Members as a new Member State. Again, the operation of recognition of statehood in light of legitimacy and legality would directly affect the probability of the current 27 EU Member States in allowing Scotland to accede to the European Union.

---

retrieved from <http://www.ccu-cuc.ca/en/library/referendum/1995referendum.html> on 3 September 2012; See also JD van der Vyver, *Self-Determination of the Peoples of Québec under International Law*, (2000) J Transnational Law & Policy 10(1), pp 6-8.

[92] J Wherrett, *Aboriginal Peoples and the 1995 Québec Referendum: A Survey of the Issues*, (Background Paper, BP-412E 1996), at p 7.

[93] fn 14, at para 40.

[94] *ibid*, at para 10; He also comments in regards to perception of statehood as a right: "To be a State is to have a range of powers and responsibilities at that level."

[95] The Electoral Commission, *Referendum question assessment guidelines*, November 2009; Accessed from <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/82626/Referendum-Question-guidelines-final.pdf> on 14 August 2012. *See also* fn1 as to the authority of the Commission on matters of intelligibility of referendum questions.

[96] Reuters, 'Greenland out of the EEC' *New York Times* (New York, 4 February 1985), retrieved from < http://www.nytimes.com/1985/02/04/business/greenland-out-of-eec.html> on 30 August 2012.

[97] Art 27, *Vienna Convention on Succession of States in respect of Treaties* (Done at Vienna on 23 August 1978, Entered into force on 6 November 1996) UNTS, vol. 1946, p. 3.

What becomes of concern here is the intentions of both the UK and Scottish Parliaments to address ambiguity in the question through an education outreach, as considered in the Scottish Government Consultation, wherein it states: "A principle underpinning the referendum is that of informed choice. The Scottish Government will ensure that voters have the information they need to participate in the national debate and to make an informed decision."[98] The target of that outreach is also a point worth addressing.

4.3.3 THE FRANCHISE: LEGITIMATE ELIGIBILITY TO VOTE

The eligibility of voters to decide on the political future of any territory is an important aspect of any plebiscite, particularly where it seeks to ascertain the collective will of a people to remain or withdraw from a constitutional arrangement. In the present context, the proposed referendum would serve no purpose of determining the Scottish will if the franchise of voters were open to the remainder of the UK as well. As Scotland as a population represents only 8.3% of the total UK population, should Yorkshire or the West Midlands disagree with the question (each represents 8.4% of the UK population), the prospect of independence for Scotland would be over.[99] However, as a matter of fact, both governments of the UK and Scotland have agreed, in regards to territory, that:

> "As proposed in the Scottish Government's 2010 consultation paper, and following the precedent of the 1997 referendum, eligibility to vote in the referendum will be based on that for Scottish Parliament and Scottish local government elections. The franchise for these elections (which is set out in UK legislation) most closely reflects residency in Scotland and has been chosen for that reason. The choice of this franchise reflects the internationally accepted principle that the franchise for constitutional referendums should be determined by residency and the Scottish Government's view that sovereignty lies with the people of Scotland. The Scottish Government notes that the UK Government has also concluded that this is the most appropriate franchise for the referendum."[100]

From a perspective of age, the Scottish Government has proposed the expansion of the eligibility to include that reside in Scotland from the age of 16 and older. This position is contrary to the UK election rules requiring those persons voting to be 18 and older.[101] From the international perspective, this issue is one of purely domestic remit. However, it ought to be considered that the age of majority for voting in different countries varies[102], despite the average age of eligibility being 18. What is concerning is exactly what was identified in the Scottish Consultation, that there would be a drastic inconsistency in eligibility for two constitutionally-significant elections, and that it might taint the perception by other states of the fairness of the vote.

As a brief consideration of a consequence if independence were supported: While the 2014 Referendum entails a mandate to either remain or secede, the subsequent negotiated arrangement for independence would require another referendum inclusive of the remainder population of the UK, as compromises made on such a large constitutional issue, particularly regarding sovereign debt transfers. If the franchise were to be open in Scotland alone to 16 and older, and a second referendum were to occur, this would in fact either be a) unfair and b) disproportionately applied throughout the current United Kingdom. As a matter of aggregating legitimacy and

---

[98] fn 85.

[99] Office of National Statistics, *2011 Census – Population and Household Estimates for England and Wales, March 2011*, (Census, 2012), p 13.

[100] Section 2.10, fn 85, p 20.

[101] Section 1(d), *Representation of the People Act* 1983, c 2.

[102] Iran has a lower limit of 15 years old, certain German Lander permit local election voters to participate at 16, whereas fifteen international states set their minimum age at 21. See Sections 3.3 – 3.6, Electoral Commission, *How old is old enough? The miminum age of voting and candidacy in UK elections*, (Consultation Paper, 2003), p 15. *cf* "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child […]", Article 12(1), UN Convention on the Rights of the Child, UN General Assembly resolution 44/25 of 1989, A/RES/44/25 (20 November 1989).

legality, it would be highly recommended that the franchise parameters be as in line with UK law as possible, particularly as the existence of the Scottish devolved Parliament was subject to those limits as well. The effect of this decision, not just from the international recognition considerations, would be to affect the possible outcome of the referendum by perceived interference. Tailoring the proposed franchise to increase the eligibility of youth may suffer criticisms politically of targeting a demographic that polls in support of independence significantly higher than older age groups.[103]

4.3.4 The Result: Consideration of Thresholds

What must also be considered, alongside how many people may vote, is how many votes it takes to achieve a credible and clear response to the question. The controversy surrounding the result of the *Québec Referendum* in 1995 became apparent immediately, where the difference between the responses amounted to less than the amount of spoiled ballots. In addressing the issue at the Canadian Supreme Court, the decision noted "it will be for the political actors to determine what constitutes 'a clear majority on a clear question' in the circumstances under which a future referendum vote may be taken."[104] This sentiment is as applicable to the UK context as it was for Canada, with the latter deciding politically to introduce the *Clarity Act*[105] which secured the right to the Canadian Parliament decide what threshold would constitute 'clear'. The prospect of similar legislation being introduced in the UK[106] has drawn sharp criticism by the Scottish Government.[107]

However, a survey of the approaches of other nations[108] suggests the majority of European nations support a simple majority requirement for constitutional changes (as written into their respective constitutions). As the UK enjoys an uncodified single-document constitution without any special provisions or entrenchment, they may consider this the constitutional justification of simple majority, as with any Act of Parliament, requiring simply one more vote than the opposing position to pass. This simple majority tradition could be an asset for the independence campaign, but it does not preclude the possibility that Westminster could, and would be entitled to, introduce a prohibition to negotiate in the absence of a substantial majority.

From the international observer's perspective, the larger the support for independence, the greater the acceptance that the acts taken to secure independence were legitimately an expression of the territorial population of the pertinent state. A substantial majority requirement, particularly negotiated and agreed upon by both Westminster and Holyrood would likely minimize controversy should a Québec-like result present itself. It would also remove the perception, particularly in Scotland, that, post-referendum (wherein Union was reaffirmed), legislation changing the threshold requirements would be punitive and oppressive. A negotiated threshold would remove the political aspects of a 'clear majority', and define a quantified target.

---

[103] fn 56.
[104] fn 35, para 153.
[105] Parliament of Canada, *The Clarity Act* 2000, c 26.
[106] H MacDonell, 'Cameron's plan to take charge of Scottish independence vote', The Independent (London, 11 November 2011), retrieved from <http://www.independent.co.uk/news/uk/politics/camerons-plan-to-take-charge-of-scottish-independence-vote-6260514.html> on 27 July 2012.
[107] P O'Neil, 'Don't impose Quebec-style Clarity Act on Scotland minister warns UK', The National Post, (Ottawa, 30 November 2011), retrieved from <http://news.nationalpost.com/2011/11/30/dont-impose-quebec-style-clarity-act-on-us-scotland-minister-warns-u-k/> on 8 June 2012.
[108] O Gay and D Foster, 'Thresholds in Referendums', (Standard Note, SN/PC/2809 2009).

5 POST-REFERENDUM CONSIDERATIONS: FUTURE SECESSION EFFORTS

As suggested in the epigraph at the beginning of this paper, there really is a long way to the top, especially when attempting to manifest statehood. The reservation of this status in the international system is not without reason. However, the result of this air of privilege is an ambiguous ability to discern the operations necessary for the creation of a state. What is clear is that the regime established by the *Montevideo Convention* in 1933 is no longer applicable in isolation. The constitutive theory of recognition is now regarded as the means by which a territorial entity may be regarded as a state, directly as a result of acquiring such indications from the international community of states.

As a group within a territory that adheres to the principles of human rights and minority protections, the principle of self-determination is somewhat less effective than in the oppressive context of colonisation, rights violations or democratic deficit in political participation. This is the result directly from the protection afforded to 'just' states to maintain their territorial integrity. However, the ability to secede though precluded as a right recognised as such by the international community, is not *impossible*. The acquisition of the pre-requisite qualities of statehood in a legal and legitimate means may entice such statehood recognition, but not prior to a formal and actual independence can be understood from the national context.

Regarding Scotland, the actions being taken in the lead up to the 2014 Referendum on Independence offer the opportunity for the region to muster international support through such legitimate means. However, there exist many questions as to the extent to which the domestic conversation will result in Scotland's hopes for sovereignty.

Finally, the actions of independence secession movements domestically provide the fundamental basis of evidence for other States when considering recognition of a new, non-colonial-context territory emerging from a 'just' state. Typically, these scenarios are heavy on rhetoric intended to rally support, often at the expense of internal domestic unity, threatening the territorial integrity of the nation state. However, the context of the UK/Scotland conversation has the opportunity to take on a distinctly peaceful and gracious approach, wherein both groups work together to produce a common effect. This approach will neutralize the 'stigma' of secession somewhat, and signify the importance of sub-national groups within the modern pluralistic state. When harmony gives way to persistent malcontent, even "mutual indifference", national and sub-national group must expedite matters in order to preserve both orders of society. The effect of in-fighting, vague commitments and recurring historical differences only serves to deepen prejudice and indifference. This process would also be subject to discrimination, violence and the eventual breakdown of both the parent and successor states. This is deleterious to the possible progress towards recognition that can occur when co-operation at the negotiating table trumps divisiveness, and consequently, make the process of recognition of a state unpredictable and unlikely. Noted by the Canadian Supreme Court:

"The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community."[109]

[109] fn 35, at para 152.

6 BIBLIOGRAPHY

6.1 TREATIES

Montevideo Convention (1933)

UN Charter (1945)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

Vienna Convention on Succession of States in respect of Treaties (Done at Vienna on 23 August 1978, Entered into force on 6 November 1996) UNTS, vol. 1946

6.2 UNITED NATIONS

6.2.1 GENERAL ASSEMBLY

Declaration on the granting of independence to colonial countries and peoples, UNGA Resolution 1514, A/RES/1514 (XV) (12 December 1960)

Programme of Action for the Full Implementation of the Declaration on Granting of Independence to Colonial Countries and Peoples, A/RES/2621 (12 October 1970)

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Resolution 2625 (XXV), A/RES/2625 (XXV) (24 October 1970)

Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, A/RES/2787 (6 December 1971)

UN Convention on the Rights of the Child, UN General Assembly resolution 44/25 of 1989, A/RES/44/25 (20 November 1989)

6.2.2 UN DOCUMENTS

Final Document, *2005 World Summit Outcome*, UN Doc A/RES/60/1 (24 October 2005)

Report, *The Responsibility to Protect*, International Commission on Intervention and State Sovereignty (December 2001)

UNESCO World Heritage List, *Frontiers of the Roman Empire*, UNESCO Online, retrieved from <http://whc.unesco.org/en/list/430/> on 30 August 2012.

6.3 LEGISLATION

6.3.1 COUNCIL OF EUROPE

European Charter for Regional or Minority Languages (1992), CETS No: 148.

6.3.2 UK/SCOTLAND

Gaelic Language (Scotland) Act (2005), 2005 asp 7.

The Scottish Adjacent Waters Boundaries Order 1999, 1999 No 1126.

Explanatory Note to The Scottish Adjacent Waters Boundaries Order 1999, 1999 No 1126.

Scotland Act 1998, c 46.

United Nations Act 1946, c 45.

Scotland Act 2012, c 11.

Representation of the People Act 1983, c 2

6.3.3 CANADA

The Clarity Act 2000, c 26

6.4 CASE LAW

6.4.1 INTERNATIONAL COURT OF JUSTICE

Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, ICJ General List No 141 (22 July 2010)

Advisory Opinion, *Western Sahara,* 16 October 1975, ICJ Reports 1975, p 12

Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), ICJ Reports 1971, p 16

Judgment, *Case concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, p 90

Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ Reports 2004 (I)

6.4.2 CANADIAN SUPREME COURT

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

6.5 TEXTS/BOOKS

AF Bayefsky (ed), *Self-determination in International Law: Quebec and Lessons Learned,* (Kluwer Law: The Hague 2000)

> TM Franck, R Higgins, A Pellet, MN Shaw and C Tomuschat, Expert Opinion prepared in 1992, "The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty" p 241

H Beran, *The Consent Theory of Political Obligation*, (Routledge: London 1987).

S Blay, R Piotrowicz and BM Tsamenyi (ed.), *Public International Law: An Australian Perspective* (Oxford University Press Australia: Melbourne, 1997).

I Brownie, *Principles of Public International Law*, 3rd ed. (Oxford University Press: Oxford, 1979)

I Brownlie, *The Rule of Law in International Affairs*, (Martinus Nijhoff: The Hague 1998)

LC Buchheit, *Secession, The Legitimacy of Self-Determination* (Yale University Press: New Haven 1978)

A Cassese, *Self-determination of peoples: A legal reappraisal*, (Cambridge University Press: Cambridge 1995)

J Dahlitz (ed), *Secession and International Law*, (UN: New York, 2003)

RJW Evans, *Austria, Hungary, and the Habsburgs: Essays on Central Europe, C.1683-1867*, (Oxford University Press: New York 2006)

LC Green, *International Law through the Cases*, 3rd ed. (Stevens & Sons Ltd: London, 1970)

R Higgins, *Problems and Process*, (Clarendon Press: Oxford 1994)

T Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Ltd: London, 1998)

R Burns, *Such a Parcel of Rogues in a Nation*, (Song XXXVI) from J Hogg, The Jacobite Relics of Scotland: being the songs, airs and legends of the Adherents to the House of Stuart,(Vol 1, Oliver & Boyd: Edinburgh 1819), pg 56

A Kaczorowska, *Public International Law*, (Old Bailey Press: London 2002)

MG Kohen (ed), *Secession: International Law Perspectives*, (Cambridge University Press: Cambridge 2006)

T Christakis, "The State as a 'primary fact': some thoughts on the principle of effectiveness" p 138

C Tomuschat, 'Secession and self-determination' p 23

C Ku and PF Diehl (ed.), *International Law: Classic and Contemporary Readings* (Lynne Rienner Publishers: London, 1998)

R Mullerson, M Fitzmaurice and M Andenas, *Constitutional Reform and International Law in Central and Eastern Europe* (Kluwer Law International: the Hague, 1998)

MJ Peterson, *Recognition of Governments: Legal Doctrine and State Practice* 1815-1995, (MacMillan: Basingstoke 1997)

G Schwarzenberger, *A Manual of International Law*, 6th ed. (Professional Books Ltd: Milton, 1976)

MN Shaw, *International Law*, 6th ed. (Cambridge University Press: Cambridge, 2008)

MN Shaw, *Title to Territory in Africa*, (Clarendon Press: Oxford 1986)

IA Shearer, *Starke's International Law*, 11th ed. (Butterworths: London, 1994)

JG Starke, *Introduction to International Law*, 7th ed. (Butterworths: London, 1972)

D Thurer and T Burri, 'Secession', in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008-, online edition, [www.mpepil.com], visited on 13 August 2012.

RMM Wallace, *International Law*, 4th ed. (Sweet & Maxwell: London, 2002)

A Xanthaki, *Indigenous Rights and United Nations Standards*, (Cambridge University Press: Cambridge 2007)

Welsh Language Board, *2004 Welsh Language Survey Report*, (Welsh Language Board: Cardiff 2006).

J Wherrett, *Aboriginal Peoples and the 1995 Québec Referendum: A Survey of the Issues*, (Background Paper, BP-412E 1996)

Office of National Statistics, *2011 Census – Population and Household Estimates for England and Wales, March 2011*, (Census, 2012).

Electoral Commission, *How old is old enough? The miminum age of voting and candidacy in UK elections*, (Consultation Paper, 2003)

O Gay and D Foster, 'Thresholds in Referendums', (Standard Note, SN/PC/2809 2009)

6.6 JOURNALS/ACADEMIC PAPERS

CHM Waldock, *Recueil des cours*, Vol 106 (1962-II), p 33

CJ Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*, (2008) ASIL 12(2)

A Pellet, *The Opinions of the Badinter Arbitration Committee - A Second Breath for the Self-Determination of Peoples*, (1992) 3 EJIL 1, pp 178-185

D Türk, *Recognition of States: A Comment*, (1993) 4 EJIL 1, pp 66-91

Estrada Doctrine of Recognition, (1931) 25 AJIL 4, Supplement: Official Documents, p 203

A Buchanan, *Theories of Secession*, (1997) Philosophy & Public Affairs 26(1), pp 31-61

A Margalit and J Raz, *National Self-Determination*, (1990) Journal of Philosophy 87(9), pp 439-461

H Beran, *The Consent Theory of Political Obligation*, (Routledge: London 1987)

CH Wellman, *A Defense of Secession and Political Self-Determination*, (1995) Philosophy & Public Affairs 24(2), pp 142-171

RCA White, *Self-determination: Time for a Re-Assessment?*, (1981) Netherlands Int'l Law Rev 28(2), pp 147-170

A Ross and MS Crespo, *The effect of devolution on the implementation of European Community law in Spain and the United Kingdom*, 2003 EL Rev 28(2), pp 210-230

A Salmond, *Statement on the Launch of the Referendum Consultation*, Hansard (Scotland) 25 January 2012, at 5607

408 HL Deb., cols. 1121-2, 28 April 1980.

CT Reid, *Who makes Scotland's law? Delegated legislation under the devolution arrangements,* (2002) EEdin LR 6(3), pp 380-384

Scott, Peterson and Millar, *Subsidiarity: a Europe of the regions v the British constitution,* (1994) JCMS 47

G Little, *Scotland and parliamentary sovereignty*, (2004) Legal Studies 24(4), pp 540-567

Scotland Office of the UK, *Scotland's Constitutional Future*, (White Paper, CM8326, 2012)

The Scottish Government, *Your Scotland, Your Referendum*, (Consultation, 2012)

JD van der Vyver, *Self-Determination of the Peoples of Québec under International Law*, (2000) J Transnational Law & Policy 10(1)

6.7 Newspaper Articles

H MacDonell, 'Cameron's plan to take charge of Scottish independence vote', The Independent (London, 11 November 2011), retrieved from <http://www.independent.co.uk/news/uk/politics/camerons-plan-to-take-charge-of-scottish-independence-vote-6260514.html> on 27 July 2012

P O'Neil, 'Don't impose Quebec-style Clarity Act on Scotland minister warns UK', The National Post, (Ottawa, 30 November 2011), retrieved from <http://news.nationalpost.com/2011/11/30/dont-impose-quebec-style-clarity-act-on-us-scotland-minister-warns-u-k/> on 8 June 2012

Reuters, 'Greenland out of the EEC' *New York Times* (New York, 4 February 1985), retrieved from < http://www.nytimes.com/1985/02/04/business/greenland-out-of-eec.html> on 30 August 2012

R Dinwoodie, *Support for Independence Growing*, The Herald Scotland, 9 June 2011, retrieved from <http://www.heraldscotland.com/politics/political-news/support-for-independence-is-growing-exclusive-support-for-independence-growing.13986498>

P Kane, *Scotland's independence referendum will see a Scotterati recruitment drive*, The Guardian, 20 May 2011, retrieved from <http://www.guardian.co.uk/commentisfree/2011/may/20/scotland-independence-referendum-pat-kane> on 15 August 2012

6.8 Online Sources

UCL Constitution Unit, 'Devolution Monitoring Programme 2006-09', School of Public Policy, retrieved from < http://www.ucl.ac.uk/constitution-unit/research/research-archive/archive-projects/devolution-monitoring06-09> on 5 September 2012

India's reservations to the ICCPR, "Reservations, Declarations, Objections and Derogations: CCPR – India", retrieved from <http://www.bayefsky.com/html/india_t2_ccpr.php> on 31 August 2012

M Ibeji, 'The Darien Venture', BBC History, retrieved from <http://www.bbc.co.uk/history/british/civil_war_revolution/scotland_darien_01.shtml> on 3 September 2012.

BBC Online, 'Scotland Referendum – Briefing History', retrieved from <http://www.bbc.co.uk/news/special/politics97/devolution/scotland/briefing/history.shtml> on 3 September 2012.

Ipsos MORI, *Scottish support for Independence/Devolution 1978-95*, Retrieved from <http://www.ipsos-mori.com/researchpublications/researcharchive/2781/Scottish-support-for-IndependenceDevolution-197895.aspx?view=wide> on 21 June 2012.

UK Labour Party, *1997 Labour Party Manifesto*, Retrieved from <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> on 10 July 2012.

BBC Democracy Live, "12 May 1999: Winnie Ewing reconvenes the Scottish Parliament", retrieved from <http://news.bbc.co.uk/democracylive/hi/historic_moments/newsid_8187000/8187312.stm> on 22 August 2012.

Census Results, *2001 Scotland Census*, Scotland's Census Results Online (SCROL), retrieved from <http://www.scrol.gov.uk/scrol/analyser/analyser?topicId=4&tableId=UV12&tableName=Knowledge+of+Gaelic&selectedTopicId=&aggregated=true&subject=&tableNumber=&selectedLevelId=&postcode=&areaText=&RADIOLAYER=&actionName=view-results&clearAreas=&stateData1=&stateData2=&stateData3=&stateData4=&debug=&tempData1=&tempData2=&tempData3=&tempData4=&areaId=01&areaId=02&areaId=03&areaId=04&areaId=06&areaId=08&areaId=09&areaId=10&areaId=11&areaId=12&areaId=13&areaId=14&areaId=32&areaId=15&areaId=16&areaId=17&areaId=18&areaId=19&areaId=20&areaId=21&areaId=22&areaId=23&areaId=24&areaId=25&areaId=26&areaId=05&areaId=27&areaId=28&areaId=29&areaId=30&areaId=07&areaId=31&levelId=1> on 1 September 2012.

Census Results, *2006 Canadian Census*, Statistics Canada (StatsCan), retrieved from <http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/hlt/97-555/T401-eng.cfm?Lang=E&T=401&GH=4&SC=1&S=99&O=A> on 1 September 2012.

Declaration contained in a Note Verbale from the Foreign and Commonwealth Office of the United Kingdom, handed at the time of deposit of the instrument of ratification on 27 March 2001, retrieved from <http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=148&CM=1&DF=&CL=ENG&VL=1> on 1 September 2012.

Quebec 1995 Referendum, retrieved from <http://www.ccu-cuc.ca/en/library/referendum/1995referendum.html> on 3 September 2012

The Electoral Commission, *Referendum question assessment guidelines*, November 2009; Accessed from <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/82626/Referendum-Question-guidelines-final.pdf> on 14 August 2012.