

# Acquisition of Legitimacy in Self-Determination Conflicts

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## ABSTRACT

We have entered to an era in which the conflicts have become one of the most intensely perceived security problems of the contemporary world. Their nature is usually violent, accompanied by human casualties, which may escalate to humanitarian crises and may cause population migration, the formation of radical groups, economic decline, and eventually the fragmentation threat to the state territorial integrity. As a power-sharing formula, 'Acquisition of Legitimacy Approach' as a new Formula for Global Peace and Security Corporation has proposed to assist the State and sub-state entity involved in sovereignty conflicts, and future peace negotiators to identify an emerging approach, which may be well suited to help them in the resolution of their particular conflict. This article will demonstrate that the new formula may be attractive enough to those seeking to exercise the newly recognised right of remedial secession, who have grown unsatisfied with the prospect of simple autonomy. Accordingly, this theory would grant independence and statehood to those peoples that have been labelled as peaceful, that have engaged through peaceful means with the international community to assert their independence, such as Kosovar, Albanians or the East Timorese, would have earned their right to exist as sovereign independent States.

**Keywords:** Remedial secession, Earned Sovereignty, Recognition, Legitimacy and the Right of Self-Determination

## 1. Introduction

There are believed to be over fifty sovereignty-based conflicts throughout the world. The majority of these conflicts entail a high degree of violence, and a number of these conflicts are associated with territory and self-determination (United States Department of Treasury, Office of Foreign Assets Control, Cumulative List of Recent OFAC Actions, 2002). The international community has generally failed to respond adequately to these conflicts, and in many instances may have participated in further violence, Southern Sudan, and Israel-Palestine conflict as an example. To remedy this, the international community is facilitating a new

evolving process where sovereignty exists as a framework with a range of different sovereign statuses as part of the continuum.

Since the World War II, the international community has understood the concept of state sovereignty, but inherent difficulties exist with the term. In the 'Corfu Channel case', Judge Alvarez pointed out that 'by sovereignty, we understand the whole body of rules and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States' (Corfu Channel Case, Para 39). James Crawford on the other hand observed that, in its most modern usage, sovereignty is the term for the 'totality of international rights and duties recognised by international law, as residing in an independent territorial unit' (Crawford,, 2006, p 32). He argued that, the term is not itself a right, nor is it a criterion of

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statehood; it is an attribute of States, not a precondition, 'but a firmly established description of statehood'. As a legal term, 'sovereignty refers to the totality of powers that States may have under international law. Conversely, as a political term, it refers to those of unrestricted authorities and power and it is in such discourse that the term can be problematic' (Ibid, p33). Similarly, Raič argued that 'denotes the totality of competences attributed to the State by the international legal system, that is, the State's status of full international legal person'. Hence, the term, as observed by Crawford is 'a brief term for the State's attribute of more-or-less plenary competence' (Raič, 2002, p 25-26). Raič added that, the term 'independence' 'is often used as a synonym for State sovereignty, while the word independence is also employed to describe a criterion for statehood and vice versa' (Ibid, p 27). On the other hand, Brownlie argued that 'if only for reasons of juridical clarity, it must be deemed favourable to use the term 'independence' as a requirement for the acquisition of statehood, and sovereignty as the legal incident'. (Brownlie, 1998, p76). Thus, when one refers to a State as a 'sovereign' entity, Raič argued, 'one in fact alludes to a full international legal person, that is to say, to an entity, which possesses statehood'. Therefore, Crawford demonstrated that 'it has correctly been observed that no further legal consequences attach to sovereignty than attach to statehood itself'.

In addition, Krasner argued that the concept of sovereignty is not an 'inseparable set of rules' as we often witness it deployed to define the position of unrecognised entities; but it is a rather a more complex and evolutionary system for interactions between actors in international society. (Krasner, 2001). His conclusion is illustrated in 2011 papers, the complexity of sovereignty as a historical concept within international

relations, by identifying sovereignty as being far removed from representing a static, conventional norm. He wrote that:

[New rules could emerge in an evolutionary way because of trial and error by rational but myopic actors. However, these arrangements, for instance, international policing, are likely to coexist with rather than supplant conventional sovereign structures. Sovereignty's resilience is, if nothing else, a reflection of its tolerance for alternatives]. (Ibid).

Hence, this 'tolerance for alternative' at the heart of the question of sovereignty reinforces some of the core hypotheses which propose that it is not the object (apropos sovereignty) which is of primary importance for solving the many theoretical problems concerning ambiguous state-like entities.

In many instances, either an entity is sovereign and independent, or it is not, and, therefore, has no sovereign rights. Problems arise however because solutions to conflicts cannot turn on such a black-or-white distinction. In fact, in the past few years, the nature of conflicts, has led to an expansion of the concept of sovereignty. However, the propensity of international lawyers to adhere to a narrow understanding of the term sovereignty remains. Therefore, in conflict negotiations, the parties often have a difficult time understanding that a different level of sovereignty can be gained at varying phases, not necessarily always leading to total independence or statehood. (Heymann, 2003). Simply, parties may walk away from negotiations, because they cannot get past the use of the term sovereignty.

Today, sovereignty is evolving into a set of powers that may be granted and refused. Although, the traditional legal rules of sovereignty generally control, innovative approaches are emerging. The intensity and severity of sovereignty-based conflicts, their relationship to

increasing levels of terrorism, and the lack of effective legal norms and principles have given rise to the need for a new approach to resolving sovereignty-based conflicts. (Williams and Pecci, 2004). A new formula, called 'Earned Sovereignty' has evolved. According to this approach, a self-determination seeking people must have demonstrated to the outside world that it is worthy of achieving statehood and that it has 'earned' its sovereignty. This approach provides that, a people in a particular territory must show to the international community that it has already been ruled and administrated separately from its parent State, which has facilitated power sharing between the people and the parent State, and which has engaged in institution building and capacity-development for self-determination seeking people. Most importantly, such group must have shown that their central government is relatively weak and causing violence and unrest, and that its independence was needed to preserve or re-establish peace and security.

Accordingly, the idea of the new formula is that a breakaway entity does not merit recognition as a new State immediately after its separation or quest to separate from its mother State, but that such an entity needs to earn its sovereignty. (Hooper and Williams, 2003). In other words, the formula implies that only those peoples who have struggled for independence through legitimate means, by engaging in responsible arrangement with the State, and that have proven to external States that they would be a reliable new sovereign partner, will ultimately become sovereign State. In other words, those people that have been classified as violent and that have arguably used illegal means to assure their independence, would not be able to benefit from the formula, examples would be Chechnya, Northern Cyprus, and The Republic of Srpska. Accordingly, for a legitimate claim to

statehood, people must have shown to the international community that they can function and behave as a good world citizen. Finally, such an entity must have enjoyed significant support from the international community mainly from the great powers. Thus, the role of super power States would be fundamental for a successful formula process, as they exert influence and pressure on the parent State to let go of secessionist people. 'Earned Sovereignty' as a conflict resolution process demonstrates that a new player on the international scene needs to show to the outside world that it is worthy of achieving statehood and that it has earned its sovereignty. Today, the need of this approach is required, in part, to the irrelevance and inadequacy of existing international principles and legal norms, including the right of self-determination of peoples. As a way to facilitate status determination, the new formula can promote and ensure human rights, minority rights, and the creation of valid democratic structures. In other words, as a remedial approach to the external right of self-determination, it can be considered as the most useful viable mechanism, based on the long-term success and minimization of short-term violence.

This research will review and analyse the concept and the core elements of Earned Sovereignty as a conflict resolution process that creates an opportunity for the parties to agree on basic requirements that the emerging entity must meet during the process in order to discuss the final status. Later, it will turn to discuss the application of (Earned Sovereignty), as a remedial approach to self-determination conflicts. It will discuss both advantages and disadvantages of the formula, and drawing some cautious policy conclusions from the approach. Eventually, the research will examine (Acquisition of Legitimacy Approach Guidelines) as a useful paradigm for whom there is no other choice or

alternative solution, for the people seeking to exercise the external aspect of the right to self-determination as a last resort through secession and obtain international legitimisation, thereby resolving the recognition dilemma.

## **2. The Concept and the Core Elements of 'Earned Sovereignty'**

### **2.1 The Concept of Earned Sovereignty (ES)**

It is true that, the Public International Law and Policy Group (PILPG) and the International Crisis Group (ICG) initially developed the Concept of Earned sovereignty in 1998, as a policy prescription and conflict resolution strategy for Kosovo. Then it has become a core element of the Rambouillet Peace Accords and UN Security Council Resolution 1244. Building on the remedial position, their 1998 report before of the NATO intervention, reasoned that Kosovars were entitled to heightened sovereignty because of past abuses by the Serbian Regime. However, they were required to 'earn full sovereignty at the end of an interim period by demonstrating their commitment to democratic self-government, to the protection of human rights, and the promotion of regional security'. (Williams, 2003). They required accordingly that the international community should intervene and oversee a three-to-five-year period of transition. During this transitional period, Kosovo would assume increasing levels of sovereign authority and functions, so long as it met certain conditions. The approach was described as an 'intermediate sovereignty', thereafter; it was referred to as 'phased recognition', 'provisional statehood', 'conditional independence', 'supervised independence'. (Ibid). Thereafter, a number of expert commissions and think tanks further developed the approach, including the Goldstone Commission for Kosovo, the Centre for Strategic and International Studies, the International

Crisis Group and the current UN doctrine of Standards before Status. Accordingly, ES was refined in response to developments in Kosovo, seven contemporaneous 'sovereignty conflicts' also drew on elements of earned sovereignty in efforts to deal with their conflicts. (Williams, Scharf, and Hooper, 2011). Thus, through its application and development, the 'ES' approach competed for influence with the alternative approach of stability through accommodation and was shaped by the compromises inherent in the foreign policy decision-making process.

The concept is described as entailing 'the conditional and progressive devolution of sovereign powers and authority from a State to sub-state entity under international supervision'. (Williams and Pecci, 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination', 2004). It has been defined as comprising three core elements (shared sovereignty, institutional building, and a determination of final status), and there optional elements, phased sovereignty, conditional sovereignty and constrained sovereignty. In addition, Williams and Heymann have defined the concept as a conflict resolution process that creates an opportunity for the parties to agree on basic requirements that sub-state entity must meet during transitional phase in order to attain or discuss final status. (Williams and Heymann, 2004). The need for this approach to solving sovereignty-based conflict is required, in part, to the irrelevance and inadequacy of existing international principles and legal norms, including the right of self-determination of peoples. In addition, as a way to facilitate status determination, ES can also promote and ensure human rights, minority rights, and the creation of valid democratic structures. On the other hand, Heymann suggested that, as a form of conflict resolution, ES allows the parties to agree on basic requirements that the sub-state must meet before

the parent State will grant various sovereign powers, such as the right to govern and sign international instruments. (Heymann, 'Earned Sovereignty For Kashmir: The Legal Methodology To Avoiding A Nuclear Holocaust, 2003). Similarly, Williams argued that, as a formula for progressive devolution of power, it could allow for greater negotiation power regarding democratic principles and the protection of human rights, because the sub-state is capable of exercising sovereign powers while ensuring democracy and human rights. (Williams, 2003). As such, the concept could protect minority rights by conditioning the grant of full sovereignty. It is also supports the building of feasible democratic structures for popular representation of the people.

Hence, as a negotiated process the concept has evolved without name or structure through its use by international negotiators and State parties to agreements. Examples given of recent precedents to support the argument that there is an emerging State practice and therefore, a legal basis for ES, range from peace agreements in Northern Ireland and East Timor, Kosovo and Bosnia-Herzegovina, the Western Sahara (the Baker Plan) and the peace proposal for Israel/Palestine the so called (Roadmap). In Kosovo, the ('UNMIK') supported the use of ES when it laid out its 'standards before status approach'. (Implementing Standards before Status Policy Core Political Project, UN Kosovo Mission' (6 February 2004). The two central statements of the approach were that a return to Serbian control was not in Kosovo's future, and that UNMIK would establish a set of 'benchmarks' that Kosovar institutions must meet'. It is true that, in recent years, the increasing number of States and sub-state entities willing to consider the process for resolving self-determination conflicts is corresponded by the increasing ability of the international community

to help States in institution building and transfer of sovereign powers and authority. For example, the UN with the creation of mechanisms to ensure the protection of human rights and implementation of the rule of law, while the EU is now possesses a significant experience with the creation of new State institutions.

Thus, it seems that the idea of 'ES' is that a break-away entity does not merit recognition as a new state immediately after its separation or quest to separate from its mother state, but that such an entity needs to comply with the concept's elements first. In other words, the break-way entity must demonstrate to the international community that it is capable of functioning as independent State, that would be a reliable sovereign partner, and that it is worthy of recognition.

## **2.2 The Core Elements**

It has been seen above that the concept of ES seeks to promote peaceful mechanism between a State and sub-state entity by establishing an acceptable power sharing arrangement, and promoting democracy and institution building in a disputed territory. Most importantly, the formula may prevent the majority in a State from using a guise of State sovereignty and territorial integrity to justify committing horrible acts against the sub-state entity or the minority. It may also address some of the inherent problems with strict application of the self-determination approach. This approach has been refined as an inherently fixable process implemented over a different period. Accordingly, as mentioned earlier, ES is defined as comprising three core elements, shared sovereignty, institution building, and a determination of final status. It may also encompass three optional elements: phased sovereignty, conditional sovereignty, and constrained sovereignty. (Hooper and Williams, 'Earned Sovereignty: The Political Dimension', 2003). These optional elements



have been employed to tailor the process to the particular needs of the parties and to the exceptional circumstances of each conflict, such as conditional and constrained sovereignty.

Accordingly, as a peace process ES can be implemented in three phases:

**First:** Power sharing as a mode of conflict management:

The first element endorses power sharing and the international supervision of the self-determination unit both before and after sovereignty is achieved. In Kosovo, in pre-sovereignty phase ES prescribes an internationally monitored initial period of 'shared power' between the sub-state and the parent State or international institution. In this stage, the State and sub-state entity may exercise sovereign authority and function over a defined territory. The international community may occasionally exercise authority and functions rather to or in lieu of the parent State. (Comprehensive Proposal for the Kosovo Status Settlement, 2007). Hence, an international institution will be responsible for monitoring the parties' exercise of their authority and functions. Whereas, in the post-sovereignty phase, the element of the so-called constrained sovereignty that may be deployed to place 'limitation on the sovereignty authority and functions of the new State'. (Williams and Pecci, 2004). For example, the Roadmap plan establishes a timetable for the possible creation of an independent Palestinian State subject to an enhanced international role in monitoring transition with the active, sustained, and operational support of the Quartet. (Ibid). In Kosovo, the Report of the Special Envoy of the Secretary-General has recommended that 'Kosovo Status should be independence, to be supervised for an initial period by the international community'. (UN Doc, 2007, para 5). Rather, it has been argued that, the 2007 'Comprehensive Proposal for the Kosovo Status

Settlement' 'set forth a basic formwork for governing a post-independent Kosovo, the implementation of which is to be monitored' by 'international civilian military presence'. (Ibid).

**Second:** Conditional Sovereignty or Conditional Independence:

Hopper and Williams argued that, sovereignty refers to the fact that the sub-state entity must meet certain benchmarks, such as protecting human rights, developing democracy, respecting the rule of law, and supporting regional stability, before its sovereignty may be increased. (Hooper and Williams, 2003). In Kosovo, the Independent Commission of Kosovo Report and encapsulated in UNMIK's catchy (in popular) slogan, 'Standards before Status'. (Williams, 2003). This approach renders the exercise of self-determination conditional on self-determination unit meeting certain benchmarks such as 'halting terrorism, instituting rule of law, protecting minority rights, and human rights, and promoting regional stability. (Hooper and Williams, 2003). It rather suspends any discussion of final status until after certain standards are met. For example, under the Roadmap, 'progress towards the creation of an independent Palestinian State depends on the Palestinians meeting certain conditions relating to the cessation of violence and terrorism, constitutional reform, restructuring of the security services, elections, and so forth'. (A Performance-Based Roadmap, 2005).

**Third:** is the determination of final status for the sub-state entity, involves either a referendum to determine such final status, or a negotiated settlement between the mother-state and the sub-state entity, with the help of international mediation. In this regard, William and Pecci argued that: 'The options for final status range from substantial autonomy to full independence. This decision is generally made through either some sort of

referendum or instructed negotiations, but invariably involves the consent of the international community'. (Williams and Pecci, 2004). Examples of peace agreements, which suggest referenda, include those for Montenegro, Southern Sudan, as well as the Baker Plan for Western Sahara. Examples of agreements, which provide for structured negotiations include, the Road Map, and the Rambouillet Accord in relation to Kosovo. Accordingly, it has been argued that, a review of the final status determination of the peace agreements and proposal, which endorse, and were endorsed by, an ES approach reveals a 'tipsy topsy' 'world legally speaking, in which entities with no recognised right to external self-determination have been granted a right to a referendum including independent statehood as an option'. (Drew, 2007, p 99-100). For example, under the Road Map, the Palestinians are recognised as entitled to the fullest expression of the right to self-determination under international law but are conditionally entitled to negotiate a settlement that 'will result in the emergence of an independent, democratic, and viable Palestinian State'. (A Performance-Based Roadmap, 2005). In many instances, the parties may agree upon final status during the initial stages of the process, such as in East Timor, whereas in others such as Kosovo it may be determined after a period of shared sovereignty and institutional building. Ultimately, the final status will be determined by a referendum, it may also be determined through a negotiated settlement between the State and sub-state entity. Thus, once the final status has been determined, 'constrained sovereignty applies limitations on the sovereign authority and functions of the new State, such as continued international administration and/or military presence, and limits on the right of the new State to undertake territorial association with other States'. (Hooper and Williams, 2003). Accordingly, it seems that the core and optional

elements of the process should be adopted by mutual consent. However, in some cases, such as in the case of Kosovo the international community may impose these elements against the will of the parent State and sub-state entity.

The supporters of the process argued that, the consideration of sovereign rights as individual negotiating points and the ability to consider and discuss the elements allows the flexibility in negotiation. It is clear that the process requires conclusive discussions regarding the powers the sub-state will initially hold, the speed with specified powers would devolve, and the determination of final status. For instance, it is obvious that the immediate discussions on Kosovo's status was affected Serbia and this would potentially create an opportunity for reigniting violence. Besides, the use of the process is the domino theory. States and scholars worry that allowing phased sovereignty and conditional independence for sub-state entity would induce a fight for similar results in other multi-ethnic State. The Kosovo Commission maintained, however, that conditional independence in Kosovo would not give rise to the domino theory, arguing that 'ES' is a legal rule that simply is not applicable to every fact situation. (Independent International Commission on Kosovo, 2001, p 28-31). Consequently, without parameters in each case, it is too easy for the agreement to cause further conflict in the future. Moreover, from a traditional self-determination perspective the method of final status determination ignores the distinction between the different categories of self-determination claims and beneficiaries under international law, between decolonisation, alien occupation, and secession; between the Palestinians and Sahrawi and the Kosovars. Consequently, there is an erosion of legal entitlements.

Therefore, in order to overcome the weakness of the

process the collaboration between the party seeking independence and the parent State is important. In addition, as explained earlier that 'remedial secession' provides a theoretical framework for evaluating the root causes of the governance and sovereignty problems emanating from the gross violations of human rights, and the violation of internal self-determination including the abolition of autonomy. However, remedial secession provides limited guidance in resolving the problems it so accurately predicts. (Bolton and Visoka, (2010). ES, which identified sex elements for analysis, fill this gap. Although, they overlap, 'a cautious application of these elements to Kosovo facilitates a comprehensive analysis of the different phases and shifting focus of the international administration of Kosovo, including supervised independence'. (Bolton and Visoka, (2010). Nevertheless, the process does not address violations of internal self-determination and human rights abuses, these conditions constitute the root of the problems that ES aims to resolve.

Accordingly, it can be argued that, the causal factors and conclusion of sub-state's entity path towards successful legitimate independence can be explained by what we describe as 'Acquisition of Legitimacy Approach'. According to this approach, people in a sub-state entity may have to comply with all conditional mechanisms. This refers to the efforts of people within a sub-state entity to comply with all conditional requirements to achieve the statehood criteria and to engage in good faith with final status negotiations. Eventually, independent sovereign States can facilitate this externally by the act of recognition. Externally, designed sovereignty relates to the set of norms and actions imposed by international administration in order to create the political, social, and economic infrastructure whereby the entity

consolidates its statehood abilities with the capacity to make law, functioning democratic institution, a self-reliant market economy and contribute to regional stability. However, for constructing a long-term resolution of the self-determination seeking group dispute several considerations can be made. First, either domestic law or the federal constitution would need to make some provision for secession, whether through adoption of legislation specifically allowing it or some other methods. Secondly, it is necessary that there be a creation of mechanisms for joint co-operation between the sub-state entity government and the parent State government. Third, the making of specific commitments on the part of the sub-state entity and the parent State is required, in the area of human rights and minority rights, and engaging in a series of defined confidence building measures. The final requirement is the preparation for status determination with possible assistance of the international community. Most importantly, the determination of the international mechanism would be based on self-determination seeking group's compliance with the commitments undertaken during the interim period, take into consideration parent State's compliance with its commitments as well, and the results of referendum held in sub-state entity.

### **3. The Application of "Acquisition of Legitimacy" as a mode of self-determination Conflicts Resolution:**

The right of people to self-determination is known as a right under international law; scholars disagree whether the right includes a right of secession and if so, under which circumstances. It is true that international law provides for a right to independent statehood in the context of decolonisation. Whereas outside the context of decolonisation it has been argued that, the right has to be exercised within the boundaries of the existing State. In this regard, the Supreme Court of



Canada in the Quebec case held that 'the exercise of any self-determination right 'must be sufficiently limited to prevent threats to an existing State's territorial integrity or the stability of relations between sovereign States'. ('Reference Re Secession of Quebec', [1998], para 127). However, it is still questionable whether some groups may be entitled to full independent and statehood under certain conditions. For example, secession may be accepted in cases where it constitutes a group's only option to protect itself from gross human right violations committed by an oppressive State, as the case of South Sudan and Kosovo. Thus, despite the disagreement over the status of secession within international law and UN system, Kohen argued, 'when secession actually occurs, international law imposes certain rules with regard to the procedural aspects of the creation of States, the territorial scope, governance, human rights and State succession'. (Kohen, 2006, p19). On the other hand, it cannot seriously be argued today that international law prohibits secession. It cannot be denied that international law permits secession. (Ibid). There is a privilege of secession recognised in international law and the law imposes no duty not to secede. In recent years, ICJ has shown that no rule in international law contained prohibition of declarations of independence unilateral secession. Accordingly, an entity may exercise its right of independence, on any matter, even if there is no specific rule of international law permitting it to do so. In these instances, an entity has a wide measure of discretion, which is only limited by the prohibitive rules of international law. *S.S. Lotus (France v Turkey) 1927*.

In the Quebec case, the Supreme Court of Canada held that, 'The right to secede and the possibility that certain secession, once factually established, creates legal effects at international level were two different matters from a legal point of view. If the purported secession of

Quebec was declared in defiance of the Canadian Constitutional principles, democratic principles, federal principles, rule of law, and the fundamental principles of the international community, respect Human rights, peaceful settlement of the disputes...etc.'. The process would most likely be seen as illegitimate and gain only limited if any recognition in the international community'. The Court goes so far as to state that: 'one of the legal norms which may be recognised by States in granting or withholding recognition of emergent States is the legitimacy by which the de facto secession is, or was, being pursued.' (Reference Re Secession of Quebec, paras 90, 143).

On the other hand, legitimacy has been defined through two criteria. First, the internal merit of the claim, which refers to the criteria for effectiveness of the self-determination unit, such as the ethnic and social cohesiveness, the occupation of a distinct territory and the economic viability of a future state. Second, the disruption factor: this refers to the potential threat of the secession for regional and international peace and security. (For more details see, Buchheit, 1978, p 216-220). On the other hand, Roepstorff argued that, secession can be legitimate if it was as a remedy of last resort for large-scale, persistent violations of basic human rights of a particular group residing on a particular territory. (Roepstorff, 2013, p133-114). Under this view, other States are required to recognise the new political entity as having all rights and privileges, immunities and obligations this status entails. Rather, Buchanan argued that, before the new political entity should be recognised as a legitimate State, it is required for the new entity to provide a credible assurance that it will respect the rights of minorities within its territory. (Buchanan, 2004, p 234). Thus, it seems that scholars to envisage legitimacy built within an international legal framework as being pre-conditional to secession.

Apparently, when it comes to the question of legitimacy of secession, scholars differentiate between consensual and unilateral secession. In alike manner, it has been known that, cases of consensual secession are less disputed than cases of unilateral secession and do not raise the same legal and moral problems. Accordingly, most scholars agree that the cases of unilateral secession are more controversial and more likely to escalate into a secessionist conflict.

Even if there is no right, under the constitution to unilateral secession, this does not rule out the possibility of an unconstitutional declaration of independence leading to a de facto secession. The ultimate success of such secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession. ('Reference Re Secession of Quebec', paras 123, 124, 125).

Based on the argument explored above, the research has applied several principled guidelines in certain limited cases, for the States in dealing with post-colonial situations where a people seek to exercise the external aspect of the right to self-determination; these obviously also serve as guidance to would-be States as to what they need to be or to have in order to gain the desired legitimisation:

**First:** A 'people'

The group in question is indeed a 'people' entitled to the right to self-determination.

For a group to be entitled to a right to collectively determine its political destiny, it must possess a focus of identity sufficient for it to attain distinctiveness as a people. In addition, such 'people' should have a homeland or being linked to a specific territory.

**Second:** An exceptional situation

The right to self-determination has been grossly violated within the existing framework of the State. The

situation must be exceptionally serious.

The self-determination seeking group must prove that it has been oppressed, that its central government consistently and flagrantly violates human rights of the people concerned, and that they have been blocked from meaningful exercise of its right to self-determination internally. Accordingly, the degree of oppression and suffering of the separatist people by its parent State plays a determinative role in self-determination quests.

**Third:** Responsible behaviour

The would-be entity has behaved responsibly within the existing framework of the State, including in consideration of the rights and entitlements of other groups within the larger unit, and has not itself violated any fundamental rights in the course of the dispute.

Fourth: Either secession is the only option, or the option of secession is the choice of the majority of the population in the entity [obviously can't be both]

a. Secession is the only option

All efforts at negotiation within that internal framework have failed and the continued relationship is impossible. There are no other realistic and effective remedies - secession is the only solution to the problem. In other words, if the central government has engaged in a consistent policy of ethnic war, remedial criteria would conclude that the self-determination seeking group has the moral right to secede. In this case, secession must be the only remedy to exercise it by secession (to remedy the harm). In a like manner, in the case of Quebec where the Canadian government has granted procedural equality and vast autonomy, no moral claim to any somewhat hard, external self-determination.

b. Choice

Secession should be the choice of the majority of the

population in the entity in question. In this regard, public consultation would be essential for successful free democratic choice, having a mandate from the people to pursue certain political steps including the final one of self-determination through secession. In other words, there must be a consensual agreement for independence. The best way for a population concentrated on a territory to make such a choice is, without any doubt, through a referendum or a plebiscite of all eligible voters.

**Fourth:** Capacity for self-governance and ability to provide and protect

The entity must be able to demonstrate capacity for self-governance. It must be able to meet the basic requirements of, and provide essential protections to, those within its jurisdiction. The entity must show that it is functioning separately of the parent State going beyond the federal structure, is the level of independence such that there is a 'de facto' state within a State—it is on a separate path—political, cultural, economic, linguistic, social, etc... [From the parent State]. In other words, a people that chose to exercise an external right to self-determination may need to demonstrate to the outside world that it satisfies the criteria of statehood, and function as an independent sovereign State. Most importantly, it must demonstrate that they are capable of protecting its population from violence, and consider itself required and under the obligation in accordance with the human rights conventions and United Nations Charter to protect its population from violence.

Fifth: It is important for the self-determination seeking group to show that its central government is unrepresentative, abusive, and relatively weak, and cannot protect and secure its population and borders from violence. Consequently, such groups have been marred by violence and civil unrest, so that to have any

kind of stability they must be allowed to break away.

Finally: and most importantly, the self-determination-seeking people must prove that external actors, including the Super Powers, view its struggle as legitimate, and that they are ready to embrace it as a new sovereign partner. In other words, peoples whose struggles are not viewed as legitimate by the Great Powers will never be able to garner Security Council support for the creation of some form of an international administration within their region.

Thus, for an entity seeking to join the international community it is important to rely more on the compliance with other fundamental principles of international law to justify legitimisation of a territorial situation produced by the act of secession. It must demonstrate that it merits recognition by external actors, and that it will be a reliable legitimate partner. In addition, they should provide credible assurances that it will respect the rights of minorities within its territory. Consequently, the international community including the Super-Power States may recognise the new political entity as having all the rights, immunities, privileges, powers, and obligations this status entails.

#### **4. Conclusion**

The article has shown that in light of the insufficiency and irrelevance of existing international legal norms and a principle, including the right of self-determination of peoples, 'Acquisition of Legitimacy Approach' is applied as an alternative approach to solving sovereignty-based conflicts. The new peace formula demonstrates that a new player on the international scene needs to show to the outside world that it is worthy of achieving statehood and view its struggle as legitimate. The primary aim of the approach is the cooperation between the party seeking independence and the parent State. The process has two requirements. First, it requires the efforts of people

within a sub-state entity to comply with all conditional requirements to achieve the statehood capacities and to engage in good faith with final status negotiations. Such sort of discussion within the State would need to take to successfully gain independence, including a referendum, addressing the rights of minorities and the interests of an entity and the parent State government.

On the other hand, the research demonstrated that, despite there being no rule, under the constitution or at international law, to unilateral secession, this does not rule out the possibility of an unconstitutional declaration of independence leading to a *de facto* secession. Accordingly, an entity may exercise its right of independence, on any matter, even if there is no specific rule of international law permitting it to do so. In these instances, an entity has a wide measure of discretion, which is only limited by the prohibitive rules of international law. In this regard, international law may 'adapt to recognise a political and/or factual reality, regardless of the legality of the steps leading to its creation' draws some support from previous State practice'. In this regard, 'if successful in the streets, right will lead to the creation of new State'. Here, the ultimate success of secession will depend on recognition by the international community, which is likely to consider the legitimacy and legality of secession.

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