

**The tension between the right to external self-determination  
and territorial integrity in Africa: Somaliland as a case  
study**

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of the requirements of the degree of Masters of Laws  
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## **Dedication**

To my sister Fatimah who was responsible of my enlightenment

They say in Arabic

‘Behind every great man: there is a woman’

My dear sister, because you are a great woman, I am celebrating my success

This work is also dedicated to my indeed friend in the time of difficulty

Abdalla Hussein Ismael

My brother Abdalla, the ink of my pen cannot count your favours, but I promise that  
next generations will narrate your generosity

## **List of Abbreviations**

AMISOM	African Mission to Somalia
AU	African Union
EC	European Community
EPLF	Eritrean People's Liberation Forces
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
NFD	Northern Frontier District
OAU	Organization of the African Unity
SNM	Somali National Movement
SPLA	Sudanese People Liberation Army
TFG	Transitional National Government
UN	United Nations
UNESCO	United Nations' Education, Scientific and Cultural Organization
UNGA	United Nations General Assembly
WWI	World War I
WWII	World War II

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# Chapter one

## Background to the study

### 1.1 Introduction

The concept of nation-state was imposed on the African continent.<sup>1</sup>The African state is not the product of natural growth of the African peoples from tribal societies to nations.<sup>2</sup>The colonial masters brought to Africa a nation-state that was based on legal and philosophical principles evolved elsewhere in the world.<sup>3</sup>These principles became the measurements against which any nation should be tested to qualify for statehood. Accordingly, African borders were drawn.<sup>4</sup> The two conflicting principles of self-determination and territorial integrity are amongst those principles.<sup>5</sup> The former entails the right to peoples to determine their destination both politically and economically. The latter protects countries from fragmentation. The irony is how to ensure that all peoples achieve their right to self-determination and at the same time, national states are protected from dissolution.

In Africa, self-determination emerged as a tool of struggle against colonialism.<sup>6</sup>However, immediately after their independence, African countries have realized that the self-determination itself can be a destructive tool for the existing borders.<sup>7</sup>Responding to this problem, African leaders shifted their minds from self-determination to territorial integrity and therefore recognized the existing borders during the colonization era as the foundation of the African state.<sup>8</sup> From here appears the inherent tension between the two concepts of self-determination and territorial integrity. Because of these contradicting principles, internal conflicts started to spread

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<sup>1</sup> OC Okafor *Re-defining Legitimate Statehood: international law and state fragmentation in Africa* (2000) 30.

<sup>2</sup> M wa Matua 'Why redraw the map of Africa: A moral and Legal inquiry' (1995) 16 *Michigan Journal of International Law* 1113.

<sup>3</sup> RH Jackson & CG Rosberg 'sovereignty and underdevelopment: Juridical statehood in the African crisis' (1986) 24 *Journal of modern African Studies* 1.

<sup>4</sup> S Touval 'The Organization of African Unity and African borders' (1967) 21 *International Organization* 102 <http://www.jstor.org/stable/2705705> ( accessed 21 September 2010)

<sup>5</sup> For details regarding the origins of the two principles, see section 2.2 and 3.4 below.

<sup>6</sup> See section 2.3.1 below.

<sup>7</sup> See RS Mukisa 'toward a peaceful resolution of Africa's colonial boundaries' (1997) 44 *Africa Today* 7.

<sup>8</sup> Article III(3) of the Organization of African Unity, recognized the colonial borders as the base of the African state for the first time. Secondly, the OAU in its first session adopted the Cairo Resolution, which made the colonial borders sacrosanct and unacceptable for change. See below note 168.



across the continent and consequently thousands of African peoples lost their lives.<sup>9</sup> The cases of *Katangese people* of Congo, Biafra in Nigeria, Western Sahara, Eritrea and its struggle against Ethiopia and the *Gunme people* of Cameroon are relatively settled examples.<sup>10</sup> Other conflicts are still on going and therefore many African peoples are living with an uncertainty of their future. They can neither exercise their political will within the borders they live, nor exercise their right to self-determination and choose freely their own destination. The South Sudan (arguably) and Somaliland are examples.<sup>11</sup>

## 1.2 The case of Somaliland

The people of Somaliland are suffering due to the contradictions of self-determination and territorial integrity.<sup>12</sup> On 26 June 1960, Somaliland gained its independence from Britain after 80 years of colonization with the name, the 'British Protectorate of Somaliland.'<sup>13</sup> After 5 days of independence, Somaliland united with Somalia or the 'Italian Protectorate', which took her independence from Italy on 1 July 1960.<sup>14</sup> During these 5 days, Somaliland was recognized as an independent state.<sup>15</sup> For reasons explained below, Somaliland comprised its sovereignty and united with Somalia with the condition that the two nations create a more viable state based on equal justice of wealth and power sharing.<sup>16</sup> This did not happen and the ambitions

<sup>9</sup> Okafor, (n 1 above) 1. See also G Kreijen *State failure, sovereignty and effectiveness: legal lessons from the decolonization of Sub-Saharan Africa* (2004) 64.

<sup>10</sup> *Katangese Peoples' Congress v Zaire* (2000) AHRLR72 (ACHPR1995), *Kevin Mgwanga Gunme et al v Cameroon* (2003) [http://www.achpr.org/english/Decison\\_Communication/Cameroon/Comm.266-03.pdf](http://www.achpr.org/english/Decison_Communication/Cameroon/Comm.266-03.pdf) (accessed 13 Aug 2010), for the citation of Western Sahara, see note 173 below. On the documentation of Biafra, see note 93 below. By 'relatively settled', I mean that at least international bodies, such the OAU and the UN, made some decisions regarding these cases. For more discussions on these cases, see section 3.4.2 below.

<sup>11</sup> Although peace agreement was signed between the South and North of Sudan, the conflict seems not settled yet, because no one knows what the referendum scheduled for next year will result in. See section 3.4.2 (c) below.

<sup>12</sup> See chapter 4 below.

<sup>13</sup> For comprehensive historical background of both Somaliland and Somalia, see J Drysdale *Stoics without pillows: A way forward for the Somalilands* (2000) and specifically for Somaliland, see Somaliland Centre for Peace and Development 'A self-portrait of Somaliland: Rebuilding from the ruins' (1996) <http://www.apd-somaliland.org/docs/selfportrait.pdf> (accessed 4 Oct 2010)

<sup>14</sup> H M Adam 'formation and recognition of new states: Somaliland in contrast to Eritrea' (1994) 21 *Review African Political Economy* 21 <http://www.jstor.org/stable/4006181> (accessed 21 Sept 2010)

<sup>15</sup> See D Shinn, 'Somaliland: The little country that could', a paper presented at the Centre for Strategic and International Studies (2002) [http://csis.org/files/media/csis/pubs/anotes\\_0211.pdf](http://csis.org/files/media/csis/pubs/anotes_0211.pdf) (10 Oct 2010) and , AK Eggers 'When state is a state? The Case for Recognition of Somaliland' (2007) 30 *Boston College International and Comparative Law Review* 211.

<sup>16</sup> See Schoiswohl note 27 below 156.

of the people of Somaliland became fruitless. All kinds of human rights atrocities were committed in Somaliland by the military regime that collapsed in 1991.<sup>17</sup> Because of the mal-treatment, which they met due to the unification with Somalia and with the failure of Somalia to function as a state, Somalilanders decided to rebuild their nation within the British boundaries during the colonial era.<sup>18</sup> Consequently, Somaliland declared its separation from Somalia in 1991.<sup>19</sup>

The main reason why Somaliland hastily compromised her sovereignty was the dream of 'Great Somalia' or what is referred as the 'Somali irredentism'.<sup>20</sup> The aim of this dream was to unite the five Somali regions in the Horn of Africa and subsequently establish a Somali empire. Apart from Somalia and Somaliland, the other three regions were the Somali region in Ethiopia (Ogaden), French Somaliland (now Djibouti) and the Northern Frontier District of Kenya (NFD). Uniting these regions was an ambition that occupied the minds of the entire Somali race between the 1940s and 1970s.<sup>21</sup> In 1960, only Somaliland and Somalia gained their independence and together formed what was known as the Somali Republic. Based on this background, Somaliland did not compromise its sovereignty for the mere creation of the Somali Republic but for achieving a greater Somalia. This meant that if the condition of Great Somalia was not met, it was not necessary for Somaliland to remain in a union with Somalia. Thus, a critical question needed to be answered in this context: what is the solution if Somalia abused the already undesirable union? There is only one solution; that Somaliland restores its statehood within the British boundaries at the time of independence. In fact, this is what the Somaliland of today stands for.

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<sup>17</sup> Human Rights Watch 'hostages to peace threats to human rights and democracy in Somaliland' (2009) at [www.Somalilandlaw.com](http://www.Somalilandlaw.com) (accessed 11 Oct 2010)

<sup>18</sup> As below.

<sup>19</sup> The Republic of Somaliland 'Somaliland: Demand for international recognition' (2001) <http://www.Somalilandlaw.com> (accessed 7 Oct 2010)

<sup>20</sup> Carroll & Rajagopal below 659. See also Jhazbhay note 45 below 32.

<sup>21</sup> The dream of Great Somalia was buried for three reasons. First, the dissatisfaction of Somalilanders from the manner Somalia treated them by excluding them from the decision-making process. Secondly, the 1969 military coup that brought an end to the democratic rule. Thirdly, when Djibouti declared its own statehood after taking her independence from France on 27 June 1977. See note 27 Schoiswohl below 102.

### 1.3 The research problem

Although Somaliland has been an autonomous state for the last 19 years and fulfilled the statehood criterion, it has not yet received international recognition.<sup>22</sup> The non-recognition of Somaliland has a huge negative impact upon the lives of its people. Somalilanders are isolated from the international community. They cannot travel easily or trade with the world of which they are part, despite the strategic geographical location they occupy.<sup>23</sup> Education and health facilities are hardly accessible. This is because the government of Somaliland is unable to deliver the basic services to its citizens due to the siege imposed on it by the lack of recognition.<sup>24</sup> Thus, this study attempts to explore the reasons behind the non-recognition of Somaliland. It investigates the obstacles that prevent the international community to grant Somaliland an official recognition. The study assumes that most of these obstacles are political more than legal. However, the political factors are mixed with legal arguments. Therefore, there is a need for clarification about these issues. The study will be conducted with a specific reference to the principles of self-determination and territorial integrity within the African contentment.

### 1.4 Focus of the study

Many scholars have dealt with the case of Somaliland.<sup>25</sup> Their focus has been mainly on whether Somaliland qualifies for statehood and thus fulfilled the traditional criteria of statehood recognized in the Convention of Montevideo.<sup>26</sup> Another aspect highlighted by scholars, is whether Somaliland has a legitimate claim to secede from Somalia as the parent state.<sup>27</sup> However, only few of them have touched on the fact that Somaliland qualifies for being in a situation of union dissolution instead of secession and thus resembles the case of Yugoslavia.<sup>28</sup> Accordingly, what no one has addressed

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<sup>22</sup> See the International Crisis Group 'Somaliland: Time for African Union leadership' (2006) Africa Report NO. 110 <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somaliland%20Time%20for%20African%20Union%20Leadership.ashx> (accessed 1 October 2010)

<sup>23</sup> The African Union 'Résumé: AU Fact-finding Mission to Somaliland' (2005) unpublished report Para 9.

<sup>24</sup> As above.

<sup>25</sup> See note 46 below.

<sup>26</sup> The Convention of Montevideo on the Rights and Duties of States of 1933, internet <http://www.taiwandocuments.org/montevideo01.htm> (accessed 23 Sept 2010)

<sup>27</sup> M Schoiswohl, *Status and Human Rights Obligations of Non-Recognized De Facto Regimes in International Law: The case of 'Somaliland'* (2004)

<sup>28</sup> B Poore 'Somaliland: Shackled a Failed State' (2009) 45 Stanford Journal of International Law 117.

is the question of what justifies the non-recognition of Somaliland since it is illogical to argue that the case of Somaliland is about secession *per se*. One has to assume the logic that justified the recognition of the new republics after the disappearance of the Federation of Yugoslavia, should also justify all cases in similar situations.<sup>29</sup>

## 1.5 Research questions

The study poses number of questions including:

1. In situations where there is a conflict between the right to self-determination and the principle of territorial integrity which prevails both theoretically and practically?
2. In the case of failed states such as Somalia, can territorial integrity still be relevant?
3. Is it correct to assume that Somaliland sets a precedent for secessionist movements in the African context, while similar claims based on self-determination have already been recognized such as Eritrea and Western Sahara?
4. Will the South Sudan referendum of early 2011, set a precedent for Somaliland in case of secession, or there will be a double standard within the AU where it will treat similar cases differently?

## 1.6 Significance of the study

This study is significant because it deals with a unique case. The case of Somaliland is unique in several dimensions. First, it seems that the AU treats Somaliland as any other secessionist group, which might dismember an African country.<sup>30</sup> Secondly, the people of Somaliland suffered and are still suffering due to the so-called territorial integrity for almost two decades. Thirdly, it is unfounded argument to assert that the case of Somaliland is about secession. Rather it is dissolution of union where Somaliland restores its original boundaries before 1960.<sup>31</sup> Consequently, the researcher believes that the international community did not

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<sup>29</sup> For more discussions comparing between Somaliland and Yugoslavia, see sections 3.5.1 and 3.5.2 below.

<sup>30</sup> See the AU Fact-finding Mission report (n 24 above) Para 8.

<sup>31</sup> The Republic of Somaliland (n 19 above) 1.

give this problem the attention it deserves. From this background emerges the importance of this study.

## 1.7 Methodology

The study mainly relies on comparative analysis. It first, analyses the meaning and the content of self-determination and territorial integrity. Secondly, it invokes the case law raised in light of the two principles in the African continent. The study compares the different approaches in which the international law dealt with those cases. Specifically, the study refers to the cases of Eritrea, Katanga, Western- Sahara, and the South Sudan.<sup>32</sup> This does not exclude to consider case law elsewhere. More notably, the dissolution of Yugoslavia is extremely relevant to the case at hand. Finally, the study draws a conclusion from these cases to determine where the case of Somaliland can be fitted.

## 1.8 Definitions

Self-determination is a controversial concept, which has two components.<sup>33</sup> The first is internal self-determination that entails 'a people's pursuit of its political, economic, social and cultural development within the framework of existing state.'<sup>34</sup> The second component is external self-determination, which amounts to 'a unilateral secession.'<sup>35</sup> Self-determination is often mentioned in conjunction with two principles of international law; *Uti Possidetis* and territorial integrity.<sup>36</sup> *Uti Possidetis* refers to 'inviolability of previous administrative borders within the colonial context.'<sup>37</sup> However, territorial integrity does not denote a single meaning. According to the literature, *Uti Possidetis* has two aspects; *de facto* and *de jure*.<sup>38</sup> The latter is referred as territorial integrity, which implies that the legality of existing boundaries during the colonization cannot be questioned even if they are historically questionable.<sup>39</sup>

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<sup>32</sup> For the citation of these cases, see note 10 above.

<sup>33</sup> JD Vander Vyver 'self-determination of the peoples of Quebec under international law' *transnational law and policy* 10 (2000) 1  
[www.law.fsu.edu/journals/transnational/vol101/Vyver.pdf](http://www.law.fsu.edu/journals/transnational/vol101/Vyver.pdf) (accessed 21 Feb 2010)

<sup>34</sup> Vyver above 11.

<sup>35</sup> As above.

<sup>36</sup> As above.

<sup>37</sup> E Hassani *Self-determination, territorial integrity and international law* (2002) 17.

<sup>38</sup> As above.

<sup>39</sup> P Radan *the Break-up of Yugoslavia and international law* (2002) 128.

## 1.9 Literature review

The scholarly works on the topic are countless. Because of the controversy on the issue, scholars looked at it from different angles. Gerhard Erasmus writes on the criteria for statehood.<sup>40</sup> He intensively discusses what constitutes a state to be recognized as a state. In relation to the concept of failed states, Gerard Kreijen wrote about the relationship between state failure and effectiveness of state sovereignty.<sup>41</sup> More specifically, Kreijen deals with the development of the nation-state in Africa and the influence of colonizers on the process of its formation. Envar Hassani did an intensive work that fully analyzed the concept of 'self-determination' and dealt with its historical roots.<sup>42</sup> This work explains the various stages through which the principle evolved. In a more legalist point of view, Cassese also analyzes the content and the context in which the right to self-determination operates.<sup>43</sup> In this work, Cassese clearly differentiates between the political and legal aspects of self-determination. In a similar work to this of Cassese, Crawford wrote on the relationship between state creation and self-determination in international law.<sup>44</sup>

Specifically, on the case of Somaliland, a lot has been written.<sup>45</sup> Schoiswohl provides an extraordinary work that questions the non-recognition of Somaliland despite the collapse of the mother state; Somalia.<sup>46</sup> He calls the circumstances that surround Somaliland the 'odds': state collapse, secession, non-recognition and human rights. In his view, human rights are odd in this context because they are undermined in favour of territorial integrity.<sup>47</sup> These terms imply the question of why not human rights integrity instead of territorial integrity! Jhazbhay has recently published on

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<sup>40</sup> G. Erasmus 'Criteria for determining statehood: John Dugard's recognition and the United Nations' *South African Journal on Human Rights* 4 1988 207.

<sup>41</sup> G Kreijen, *State failure, sovereignty and effectiveness* (2004)

<sup>42</sup> Hassani ( n 37 above)

<sup>43</sup> A Cassese *Self-determination of peoples: A legal reappraisal* (1995)

<sup>44</sup> J Crawford, *The Creation of States in International Law* ( 2006)

<sup>45</sup> A J Carroll & B Rajagopal 'The Case for the Independent Statehood of Somaliland' (1992) 8 *American University Journal of International Law & Policy* 653, Poore (n28 above), Adam (n 14 above), Eggers ( n15 above), Schoiswohl(n 27above), A Kreuter 'Self-determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession' (2010) 19 *Minnesota Journal of International Law* 363, Iqbal Jhazbhay, *Somaliland an African struggle for nationhood and international recognition* (2009) and the International Crisis Group (ICG), *Somaliland: Democratization and discontents* (2003) [www.crisisgroup.org/.../somalia/Somaliland%20Democratisation%20and%20Its%20Discontents.ashx](http://www.crisisgroup.org/.../somalia/Somaliland%20Democratisation%20and%20Its%20Discontents.ashx) (accessed 7 Jan 2010) are examples.

<sup>46</sup> Schoiswohl ( n 27 above)

<sup>47</sup> See Schoiswohl (n 27 above) 3.

Somaliland and its struggle for international recognition.<sup>48</sup> Jhazbhay concludes that the main obstacle to the recognition of Somaliland is the AU.<sup>49</sup> Carroll & Rajagopal fully analyzed the legal grounds on which Somaliland bases its demand for international recognition.<sup>50</sup> The two authors concluded that it is unfair for the international community to let the people of Somaliland suffer because of the faults of others. Up to when Somaliland has to wait for Somalia to recover from its insanity!

## **1.10 Chapter breakdown**

The study consists of five chapters. Chapter one sets out the contextual background. Chapter two analyzes the content and the meaning of the right to self-determination. Chapter three assesses the tension between the self-determination and territorial integrity and whether this tension can constitute an obstacle to the recognition of Somaliland. Chapter four explores the justifications for the non-recognition/recognition of Somaliland. This Chapter also looks at whether this non-recognition is a legal matter or political one. Finally, chapter five summarizes the findings of the study and makes recommendations.

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<sup>48</sup> Jhazbhay ( n 45 above)

<sup>49</sup> This is because the AU treats as a secession based on illegitimate claim. See note 30 above.

<sup>50</sup> Carroll & Rajagopal ( n 45 above)

## Chapter two

### The concept of self-determination

#### 2.1 Introduction

‘Self-determination is at most basic level, a principle concerned with the right to be a state.’<sup>51</sup>

Much of Somaliland’s argument in its struggle for international recognition arises around the principle of self-determination. It is therefore necessary to examine the content of this principle in light of international law. It is an ambiguous concept and fairly difficult to define it or explain its content.<sup>52</sup> However, despite its controversy, self-determination is ‘one of the most important driving forces in the international community.’<sup>53</sup> The importance of self-determination becomes so imminent when it is a source for statehood.<sup>54</sup> This chapter defines the concept and looks at its historical origins. The chapter specifically examines the concept within the African context

#### 2.2 Origins and the content of self-determination

##### 2.2.1 Origins

There is disagreement among scholars with regard to when self-determination emerged as a useful concept.<sup>55</sup> Some argued that its appearance goes back to the peace of Westphalia where it appeared for the first time in 1648.<sup>56</sup> Others claim that self-determination originates from ‘the American Declaration of Independence in (1776) and the French Revolution, which marked the demise of the notion that individuals and peoples, as subjects of the King, were objects to be transferred, alienated, ceded... in accordance with the interests of the monarch.’<sup>57</sup> The two opinions, however, are close to each other. Though the Peace of Westphalia was the starting

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<sup>51</sup> Crawford (n 44 above) 107.

<sup>52</sup> Cassese (n 43 above) 1.

<sup>53</sup> As above.

<sup>54</sup> Crawford note 51 above.

<sup>55</sup> See Cassese (n 43 above) 11-22, Crawford (n 44 above) 108, Schoiswohl (n 27 above) 62 and SR Ratner ‘Drawing a better line: *Uti Possidetis* and the Borders of New States’ (1996) 90 *American Journal of International Law* 590.

<sup>56</sup> Hasani (n 27 above) 59.

<sup>57</sup> Cassese (n 43 above) 11.



point of self-determination, its practical use started with the American and French Revolutions.<sup>58</sup> Hassani for example argues '[that] in practice it was the French Revolution that proclaimed self-determination as a revolutionary principle against despotism and monarchic rule.'<sup>59</sup> Since then, the concept of self-determination has gone through various stages. Hence, the Peace of Westphalia together with the American and French Revolutions marks the first stage of the concept.<sup>60</sup>

A second, major phase of self-determination took place between the two World Wars (1919-1939).<sup>61</sup> As Hassani mentions, after the WWI 'self-determination does not appear anymore as a revolutionary principle but as a guide to the conduct of day-to-day international relations.'<sup>62</sup> In this period, self-determination was used as an effective political tool to restructure 'states of central Europe'.<sup>63</sup> The United States president Woodrow Wilson suggested 'that self-determination should be the guiding principle when it came to divide the Ottoman and Austro-Hungarian empires and redrawing the map of Europe.'<sup>64</sup> Wilson's ambition was to block the Allies powers from using self-determination as a tool of pressure against Germany, Austro-Hungarian and Ottoman empires and consequently redraw the territories fell under those empires.<sup>65</sup> In their war against those Empires, the Allies claimed that they were seeking self-determination based on nationality.<sup>66</sup>

Generally, in that period, there were two major opposing opinions: the Wilsonian representing the American view and the Soviet Union view conceptualized by Lenin.<sup>67</sup> To the Wilsonian thought, self-termination meant two things: 'The right of people to choose their own sovereignty and their own allegiance and not be handed about from sovereignty to sovereignty as if they were property.'<sup>68</sup> To Lenin, 'self-determination was a useful revolutionary slogan which would lose its force once the revolutionary class had seized power and multinational states merged into a unitary

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<sup>58</sup> Hasani ( n 27 above) 57.

<sup>59</sup> Hassani ( n 27 above) 60.

<sup>60</sup> Hassani ( n 27 above)

<sup>61</sup> Hassani ( n 27 above) 69.

<sup>62</sup> As above.

<sup>63</sup> Cassese (n 43 above) 20.

<sup>64</sup> As above.

<sup>65</sup> Hasani ( n 27 above) 82.

<sup>66</sup> Cassese ( n 43 above) 24.

<sup>67</sup> Hassani ( n 27 above) 70.

<sup>68</sup> Hassani ( n 27 above) 81.

socialist order, e.g., socialist (communist) federation.’<sup>69</sup> Thus, the American approach attached the right to self-determination to people, while the Soviet approach made it attachable to the state itself. Hence, the socialist approach is clearly contrary to the general view that self-determination is attached to ‘people and not states.’<sup>70</sup> A third and more important stage started after the WWII to which we turn to discuss later.<sup>71</sup>

### 2.2.2 The content of self-determination

Self-determination is a highly controversial notion, which does not have specific content. It has both political and legal dimensions.<sup>72</sup> As discussed above, at the very beginning, self-determination emerged as a political principle. It played a critical role among states in the international relations sphere.<sup>73</sup> However, after the WWII, self-determination became a legal standard intended for the liberalization of nations under colonization.<sup>74</sup> Since then the greatest challenge has been how to differentiate between the political and legal dimensions of the concept. According to Schoiswohl, ‘one has to distinguish the political principle or value self-determination, which has had a “place in democratic thought since at least 1789... from the putative legal right or principle, which is “of much recent origin...”’<sup>75</sup> It appears then that the most dispute about definition of self-determination is political more than legal. Crawford explains this tension by saying that ‘the question of the ambit of self-determination, the territories to which it applies, has arguably remained as much a matter of politics as law.’<sup>76</sup>

Notwithstanding, the political argument, self-determination is a legal right, which means the ‘right of peoples to determine their own destiny. In particular, the right allows a people to choose its own political status and to determine its own form of economic, cultural and social development, free of outside interference.’<sup>77</sup> As

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<sup>69</sup> Hassani (n 37 above) 73.

<sup>70</sup> See A Anni’im ‘self-determination and unity: the case of Sudan’ (2006) [www.sudan-forall.org](http://www.sudan-forall.org) (accessed 1 July 2010)

<sup>71</sup> See section 2.3 below.

<sup>72</sup> Schoiswohl (n 45 above) 61.

<sup>73</sup> See note 63 above.

<sup>74</sup> Cassese (n 43 above) 37, see also R Higgins, *Problems and Process: International Law and How We Use it* (1994) 113.

<sup>75</sup> Schoiswohl (n above) 61-62.

<sup>76</sup> Crawford (n 44 above) 115.

<sup>77</sup> Conference Report for the Unrepresented Nations and Peoples Organization ‘Self-determination in relation to individual human rights, democracy and the protection of the environment’ (1993)

appears from this definition, self-determination is classified into two broad categories; internal self-determination and external self-determination.<sup>78</sup> Highlighting this point, Schoiswohl states that international law '[aims] at the realization of self-determination either within or against a given [state]. Doctrine accordingly distinguishes two component parts of self-determination, namely the "internal" and "external" dimensions of the right.'<sup>79</sup> Internal self-determination 'encompasses the right to political participation, i.e. the people's right to assert their will, to choose a government and be represented.' On the other hand, external self-determination 'envisages a right to political independence (against outside interference) and ultimately a right to secessions.'<sup>80</sup>

However, self-termination is limited both by the context in which it is applied and by the peoples to whom it belongs. Regarding the content, literature indicates that in the post-colonial era, self-determination is confined within the national borders.<sup>81</sup> This means, after the achievement of independence there is no right for peoples to secede from the borders in which they found themselves even if these borders were arbitrarily drawn and against their free will. This is with few exceptions where there is a total denial of internal self-determination.<sup>82</sup> With regard to whom it belongs, there is a great controversy around what does constitute 'self' and whether this self can demand for self-determination outside of colonial context. Therefore, the following sections deal with in which context and to whom self-determination applies.

### **2.3 The context of the right self-determination**

As a legal right, self-determination appeared only after the WWII. At this stage self-determination became an effective tool by which colonized peoples liberalize themselves from foreign domination. Accordingly, self-determination was primarily applied in a colonial content. Latin America and Africa are the best

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<http://www.unpo.org/downloads/Self-determination%20conference%201993.pdf> ( accessed 29 Oct 2010)

<sup>78</sup> See Dugard ( above) 106.

<sup>79</sup> Schoiswohl ( n 40above) 68.

<sup>80</sup> As above.

<sup>81</sup> R McCorquodale 'Self-determination Beyond Colonial the Context and Its Potential Impact on Africa' (1992) 4 *African Journal of International & Comparative Law* 592.

<sup>82</sup> J Dugard *International Law: A South African perspective* (2005)106-107.

examples to explain the demand for the right self-determination in a colonial context. Moreover, self-determination also played a critical role in restructuring Yugoslavia after its dissolution.<sup>83</sup> This means there is a room for the right to external self-determination outside of colonial context. However, in each of these three regions, self-determination took different form. In both Latin America and Yugoslavia, self-determination was utilized in the form of the *Uti Possidetis* principle.<sup>84</sup> I will discuss self-determination in the context of these two regions later on. This section, briefly discusses how the African peoples exercised their right to self-determination.

### 2.3.1 Self-determination in Africa

Self-determination strongly manifested itself in the African context. This is because, the continent had a long history associated with colonialism and perhaps, Africa is the sole continent in the world, which colonial masters drew the entire of its borders. This gives the impression that Africa in fact was subjugated to absolute colonialism. Consequently, self-determination became the only means through which African peoples can achieve their statehood. Accordingly, self-determination emerged in the context of Africa as a tool of struggle against colonialism, alien subjugation and foreign domination. The United Nation General Assembly (UNGA) resolution 1514 (XV) and its supplementary resolution 1541 (XV) were the legal basis of that struggle.<sup>85</sup> Resolution 1514, among other things declared that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation;
2. 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.

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<sup>83</sup> See the Badinter Arbitration Commission at <http://www.la.wayne.edu/polisci/dubrovnik/readings/badinter.pdf> (accessed 26 Aug 2010)

<sup>84</sup> Hassani ( n 37 above) 274.

<sup>85</sup> UN Resolutions 1514 (XV) ‘Declaration on the granting of independence to colonial countries and peoples’ of 1960 at <http://0-daccess-dds-ny.un.org.innopac.up.ac.za/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement> and 1541(XV) ‘ Principles which should guide members in determining whether or not an obligations exists to transmit the information called for under article73 of the Charter’ at <http://0-daccess-dds-ny.un.org.innopac.up.ac.za/doc/RESOLUTION/GEN/NR0/153/15/IMG/NR015315.pdf?OpenElement> accessed ( 23 Aug 2010)

Two points are clear from this resolution. Firstly, the basis for the right to self-determination is the UN Charter to which the resolution makes reference. Specifically, this reference is made to article 1 (2) of the Charter, which provides that one of the UN objectives is ‘to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...’ Secondly, in this context, self-determination means the right to be free from the control and domination of the colonizing powers. It covers political, economic, social and even cultural aspects. In other words, self-determination means the complete freedom from any foreign interference by allowing colonized nations to govern themselves. Accordingly, the UN recognizes the right to self-determination in a very narrow sense, which implies that no nation or group of people has the right to external self-determination outside of colonial context. This will be the case even if those peoples have to suffer the same situation as if they were under colonialism. Resolution 1514 itself supports this interpretation by stating that ‘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.’<sup>86</sup> The 1970 Declaration on the Friendly relations, which was issued to supplement the above resolutions further support this position of the UN.<sup>87</sup>

Apart from the Charter and the followed resolutions, the right to self-determination was also entrenched into two fundamental human rights conventions. These are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>88</sup> Common article 1 of the two Covenants reads as follows:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation,

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<sup>86</sup> Article 7 of the UN Res 1514 above.

<sup>87</sup> The UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations at <http://0-daccess-dds-ny.un.org.innopac.up.ac.za/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement> (accessed 23 August 2010)

<sup>88</sup> Both Conventions were adopted by the UN General Assembly in resolution 2200 A (XXI) of 16 December 1966 in New York.

based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The states parties to the present covenant...shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisos of the Charter of the United Nations.

The first observation about this provision is that it repeats almost the same wording of the above resolutions and makes again a reference to article 2(1) of the Charter. It is also clear that the provision deals with self-determination in a colonial context. In addition, the provision puts an obligation upon the member states to respect the right self-determination in a way that is consistent with the UN Charter. What is meant by this 'qualification' as many scholars explained is that the UN wanted to close the door before secessionist movements.<sup>89</sup> This takes me back to my earlier assertion that the UN recognized the right to external self-determination only in a colonial context. Whatever the case might be, since the adoption of these provisions, the right to self-determination became a legal standard in the UN context.<sup>90</sup>

By interpreting these legal norms in the African context, I do not mean that they were specific for Africa. Rather, my argument is that they manifested themselves rightly in the African context. This is because firstly, at the time of drafting the UN Charter and the two resolutions; 1514 and 1541, most African nations were under colonization. Secondly, although the Charter of the Organization of the African Unity (OAU) of 1963 primarily targeted at eradicating all forms of colonialism, at the same time, it recognized the colonial borders.<sup>91</sup> Thirdly, after the decolonization process, several African peoples claimed the right to external self-determination. Examples are the cases of Biafra, *Katangese people v Zaire*, the recent case of *Gunme People v Cameroon* and possibly the Ethio-Somali conflict in the *Ogden* region in late 1970s.<sup>92</sup>

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<sup>89</sup> Dugard ( n 82 above)106.

<sup>90</sup> Cassese ( n 43 above) 37.

<sup>91</sup> See article 2 (1) ( c) and (d) of The Charter of the OAU.

<sup>92</sup> See note 10 above. On Biafra and the Ethio-Somali Conflict on *Ogaden*, see SA Tiewul 'Relations between the United Nations Organization and the Organization of the African Unity' (1975)16 *Harvard Journal of International Law* 259 and R McCorquodale 'Self-determination Beyond the Colonial Context and Its Potential Impact on Africa' (1992) 4 *African Journal of International and Comparative Law* 592.

The OAU response to all of these cases, was the same and constant; no right to external self-determination after the independence.

### 2.3.2 The concept of people-hood

Another aspect of self-determination which makes it complex and so controversial is the problem of to whom it belongs. There is uncertainty around the identity of the groups of people who can claim self-determination as a legal right. Schoiswohl, highlights that:

There is currently no general definition of the “self” as the main beneficiary of self-determination. Neither the UN Charter, nor the subsequent resolutions, nor the two Covenants, though establishing a clear legal right to self-determination, explicitly define the “peoples” who were its beneficiaries. The “peoples” who are granted a right to self-determination are rather indirectly determined by the nature and scope of the right, thus its underlying source.<sup>93</sup>

Cassese, in seeking to specify the meaning of the concept raises number of questions.<sup>94</sup> Among these questions: does self-determination belong to the populations of sovereign states? Does it belong to colonized peoples alone? Does it belong to specific groups of the society? He submits that all of these groups can arguably claim the right to self-determination.<sup>95</sup> Cassese classifies these categories of people along the lines of the right to external self-determination and the right to internal self-determination. In his view, external self-determination belongs to peoples under colonization, alien subjugation and foreign domination alone.<sup>96</sup> On the other hand, while the right to internal self-determination belongs to the whole society of sovereign states but more specifically, it is attachable to ‘ethnic groups, linguistic minorities, indigenous populations and national peoples living in federal states.’<sup>97</sup>

In a similar argument, Crawford emphasises the difficulty that surrounds the identification of the groups to whom self-determination belongs.<sup>98</sup> He makes this point in saying that ‘at the root, the question of defining ‘people’ concerns identifying the

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<sup>93</sup> Schoiswohl ( n 27 above) 64.

<sup>94</sup> Cassese ( n 43 above) 102.

<sup>95</sup> As above.

<sup>96</sup> Of course, this is the language of the two resolutions 1514 and 154. See note 85 above.

<sup>97</sup> As above. See also Dugard (n 83 above) 106.

<sup>98</sup> Crawford ( n 44above) 124.

categories of territory to which the principle of self-determination applies as a matter of right. Practice identifies such categories plainly enough.’<sup>99</sup>In addressing the question of how practically these groups can be identified, Crawford reaches the same conclusion made by Cassese as indicated above.<sup>100</sup> In other words, he takes the view that in order identify holders of self-determination; one has to consider whether such claim was made in a colonial context or outside of it. Consequently, the second step as a logical result becomes the question of whether the claimed right is internal or external.

From the literature reviewed under this section, it appears that the concept of ‘people-hood’ is problematic when it is used outside of colonial context. The cases of *Katangese People*, *Reference re Secession of Quebec* and recently the *Gunme people* and the recent ICJ advisory opinion on the legality of the Kosovo unilateral declaration were all raised in this regard.<sup>101</sup>In *Katangese People*, the African Commission although recognizing the importance of identifying the characteristics that identify the right holders of self-determination, did not put much emphasis on the meaning of people-hood. The Commission simply expressed that ‘the issue in the case is not self-determination for all Zaireoise as a people but specifically for the Katangese. Whether the Katangese consists of one or more ethnic group, is for this purpose, immaterial and no evidence has been adduced to that effect.’<sup>102</sup> In my mind, the fact that Katangese qualified for being a specific group, was obvious from their name; they were called ‘the Katangese people. ‘In the *Quebec* case, the Canadian Supreme Court noted that because international does not offer a formal definition for the term “peoples” ‘the result has been that the precise meaning of the term “people remains somewhat uncertain.’<sup>103</sup>However, the Court further went to say ‘it is clear that “people may include only a portion of the population of an existing state.’<sup>104</sup>

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<sup>99</sup> As above.

<sup>100</sup> As above.

<sup>101</sup> *Katangese* and *Gunmen* cases ( n 67 above), *Reference re Secession of Quebec*, (1998) 2 S.C.R. 217 and the ICJ advisory opinion on Kosovo at <http://www.icj-cij.org/docket/files/141/15987.pdf?PHPSESSID=3f4577f1bc6cceef5b950e692e2849f1> ( accessed 25 July 2010)

<sup>102</sup> Para 3.

<sup>103</sup> Quebec case Para 123.

<sup>104</sup> Above Para 124.



The *Gunme* case illustrates the meaning of ‘people’ under article 20 of the African Charter on Human and Peoples’ Rights (the African Charter).<sup>105</sup> In this case the Cameroonian government as the respondent side ‘contested... the claim that Southern Cameroonians are “a separate and distinct people.”’<sup>106</sup> In response to this contestation, the African Commission stated that despite the fact that there is a controversy around meaning of people-hood, ‘there is a recognition that certain objective features attributable to a collective of individuals, may warrant them to be considered as “people.”’<sup>107</sup> The Commission further expressed that:

[A group of international law experts commissioned by UNESCO to reflect on the concept of “people” concluded that where group of people manifested some of the following characteristics; a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity religious and ideological affinities, territorial connection, and a common economic life, it may be considered to be a “ people.” Such a group may also identify itself as a people by virtue of their consciousness that they are people.]<sup>108</sup>

Using this quote and its own jurisprudence as a guide, the Commission concluded that the people in Southern Cameroon qualify as “a people”, because they manifest the majority of the characteristic suggested by UNESCO.<sup>109</sup>

## 2.4 Concluding remarks

This chapter discussed the historical background of self-determination. The chapter realized the critical role that self-determination played in international relations as a political principle. Self-determination evolved from political tool to a legal right entitled for all oppressed peoples. As a legal principle, self-determination for the first time appeared in the UN Charter followed by number of resolutions and declaration calling for the need of equal enjoyment of self-determination among nations. The legislation process at the UN level ended up with the inclusion of self-determination in the two Covenants of the ICCPR and ICESCR. However, there is huge controversy around the meaning and the content of the concept and the identity

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<sup>105</sup> Adopted on June 27, 1981, OAU Doc.CAB/LEG/67/3rev.5,21I.L.M (1982)

<sup>106</sup> Para 166.

<sup>107</sup> Para 169.

<sup>108</sup> Para 170.

<sup>109</sup> Para 179.

of the holders of this right. Despite this controversy, there are minimum threshold guidelines to the scope of self-determination and to whom it belongs. Accordingly, self-determination has two dimensions; external and internal. According to the majority of scholars, external self-determination was confined with the colonial context except few exceptions where internal self-determination is totally denied. On the other hand, internal self-determination continues to apply within existing states.

## Chapter 3

### The tension between the right to self-determination and territorial integrity

#### 3.1 Introduction

No one disputes that all peoples have the right to self-determination. However, there is great tension between this right and the principle of territorial integrity.<sup>110</sup> The implication of territorial integrity is that while all peoples have the right to self-determination, all nations have also the right to protect their countries from fragmentation.<sup>111</sup> Thus, there is inherent tension between the two concepts that raises number of questions.<sup>112</sup> The first of these questions is which borders should be given the right to integrity. In other words, should we protect even those borders, which were drawn arbitrarily and without the consent of their inhabitants? A second question is which of the two principles, prevails the other in resolving this conflict. Put differently, which of the two should we prioritize when harmonizing the tension between self-determination and territorial integrity? Another critical question is whether territorial integrity can be relevant in the case of failed states such as Somalia. This chapter answers these questions in detail.

#### 3.2 Conceptualizing territorial integrity

It is rare to find a definition for this principle in literature. As a principle of law, territorial integrity appeared in the Covenant of the League of Nations. Article 10 of this Covenant provided that ‘the members of the League undertake to respect and preserve as against external aggression the territoriality integrity and existing political

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<sup>110</sup> OS Kamanu ‘Secession and the Right of Self-determination: An OAU Dilemma’ ( 1974) 12 *Journal of Modern African Studies* 355, Mukisa (n 7 above), JR Maguire ‘The Decolonization of Belize: Self-determination v Territorial Integrity’ (1982) 22 *Virginia Journal of International* 849 , L Brilmayer ‘ Secession and Self-determination: A territorial Interpretation’ ( 1991) 16 *Yale Journal of International Law* 177 , LS Estwood, Jr ‘Secession, State practice and International Law after the Dissolution of the Soviet Union and Yugoslavia’ ( 1993) 3 *Duke Journal of International Law* 33, J Castellino ‘Territorial integrity and the “Right” to Self-determination: An exmamination of the Conceptual Tools’ ( 2008) 33 *Brook Journal of International* 499 and PR Hensel , M Allison & A Khanani ‘Territorial Integrity Treaties, Uti Possidetis and armed conflict over territory’(2001) [www.paulhensel.org/Research/cmpps09.pdf](http://www.paulhensel.org/Research/cmpps09.pdf) ( accessed 12 Sept 2010)

<sup>111</sup> See A El Ouali ‘Territorial integrity: Rethinking the Territorial Sovereign Right of the Existence of States’ (2006) 11 *Geopolitics* 630, internet <http://dx.doi.org/10.1080/14650040600890792> (accessed 12 Sept 2010)

<sup>112</sup> Maguire above 850.

independence of all members of the League.’<sup>113</sup> In addition, both the UN Charter and the OAU Charter( and currently the AU Constitutive Act ) emphasized the importance of territorial integrity but none of the two defined the concept. Article 2 (4) of the UN Charter provides that ‘all members shall refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state...’ Further more, article 3 of the OAU Charter stipulates that one of the Origination’s principles is to ‘respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.’<sup>114</sup>

The UN resolutions of 1514 and 1541 and the 1970 Declaration concerning Friendly Relations and the Vienna Declaration and Programme for Action (the Vienna Declaration) all made clear that self-determination does not mean the violation of the territorial integrity of any member state in the United Nations without out defining what the concept means.<sup>115</sup> The Declaration concerning Friendly Relations expressed the most scholarly cited paragraph in this respect, which states that:

Nothing in the forgoing 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 principle of equal rights and self-determination of peoples... and thus possessed of a government representing the whole people belong to the territory without distinction as to race, creed or colour.<sup>116</sup>

Article 2 of the Vienna Declaration in emphasising on the principle of territorial integrity, makes a reference to above cited paragraph of the Declaration concerning Friendly Relations adopting the same wording of the paragraph.<sup>117</sup> All what can be inferred from these instruments is that territorial integrity is a vague concept, which does not have a specific content. However, some scholars have attempted to define it. For example, El Ouali defines territorial integrity as ‘the character attached to the territory of every state, which should not be subjected to any

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<sup>113</sup> The Covenant of the League of Nations of 1919, <http://www.unhcr.org/refworld/publisher/LON,...3dd8b9854,0.html> (accessed 23 Sept 2010)

<sup>114</sup> Currently Article 3 (b) of the AU Constitutive Act.

<sup>115</sup> The UN resolutions 1514 and 1541(n 85 above), the UN Declaration concerning Friendly Relations (n 87 above), the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 July 1993.

<sup>116</sup> The UN Declaration Concerning Friendly Relations (n 87 above), the principle of equal rights and self-determination of peoples Para 8.

<sup>117</sup> The Vienna Declaration above.

kind of grip aiming at subtracting it, durably or momentarily, from the authority of the state.’<sup>118</sup> As this definition implies, the purpose of territorial integrity is to prohibit the use of force against any sovereign state. Accordingly, Zacher observes that the principle refers to the ‘growing respect for the proscription that force should not be used to alter interstate boundaries.’<sup>119</sup>

To some scholars, territorial integrity aims to block the ambitions of secessionist movement.<sup>120</sup> This is because secessionists often demand to ‘redraw the political boundaries’.<sup>121</sup> According to this view, even if such secession is based on a legitimate claim of right to self-determination ‘unfortunately, it seems directly contrary to another, equally venerable, principle of international law, which upholds the territorial integrity of existing states.’<sup>122</sup> The violation of territorial integrity can also be external where other states may support or encourage secessionists in their cause.<sup>123</sup> That is why, the UN Charter required state members to refrain from any act that may amount to the disruption of wholly or partly of the territorial integrity of other states.<sup>124</sup> It is clear then that territorial integrity is a political tool that compels the nations of the world to comply with the new world order.

More interestingly, Casttelino links territorial integrity to the concept of statehood itself and therefore believes that territorial integrity is one of the four prerequisite conditions for statehood as enshrined in the Convention of Montevideo among which fixed territory is required.<sup>125</sup> He adds that ‘to identify such fixed territory, international law uses the doctrinal tools of *Uti Possidetis Juris* and its older companion principle *Terra Nullius*- no man’s land.’<sup>126</sup> Cassese also links between the concept of territory acquisition and territorial integrity when the later is used in the form of *Uti Possidetis*.<sup>127</sup>

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<sup>118</sup> Ouali ( n 111above) 632.

<sup>119</sup> Cited in Hensel *et al* ( n 110 above) 3.

<sup>120</sup> Brilmayer ( n 110 above)178.

<sup>121</sup> As above.

<sup>122</sup> As above.

<sup>123</sup> See R Gordon ‘Saving Failed states: Sometimes a Neocolonialist notion’ (1997)12*American University Journal of International Law and Policy* 903.

<sup>124</sup> See note 115 above.

<sup>125</sup> Casttelino (n 110 above) 503.

<sup>126</sup> As above.

<sup>127</sup> Cassese (n 43 above )

From this perspective, territorial integrity is a complex concept, which is used in conjunction with many other principles of international law. Among these are the principle of 'state sovereignty' and non-interference in the internal affairs of other states, 'international peace and stability', 'territory acquisition' and principle of *Utis possidetis*.<sup>128</sup> However, in practice, only *Uti Possidetis* has a direct link to territorial integrity since the aim of both principles is to protect the boundaries of existing states from fragmentation. Additionally, although the protection of boundaries implies sovereignty, I have a great difficulty with accepting that territorial integrity is a means for territory acquisition, because currently there is no space for the notion of territory acquisition in international law since all territories belongs to someone.<sup>129</sup>

### 3.3 Which boundaries should be protected from disintegration?

It is a noble idea to protect all the boundaries of sovereign states from disintegration. However, 'all boundaries are constructed, and are in some sense artificial.'<sup>130</sup> This reality necessitates the need for rechecking the validity of the existing borders. Accordingly, as Casttelino argues:

One approach to resolving the legitimacy of territorial boundaries would be to examine the manner in which some of these critical dates were decided, and to test their validity vis-à-vis, for example, the patently unequal acquisitory treaties between the colonizer and the indigenous community.<sup>131</sup>

This need is specifically pressing in relation to African borders. Matua paints a painful picture on how African borders were created unethically and without the consent of the African peoples.<sup>132</sup> He states that 'unlike their European counterparts, African states and borders are distinctly artificial and are "not the visible expression of the age-long efforts of...peoples to achieve political adjustment between themselves and physical conditions in which they live." Colonization interrupted that historical and evolutionary process.'<sup>133</sup> Therefore, it is unreasonable that such borders remain unquestioned. Matua brings our attention to the need for moral and legal inquiry about the current African borders arguing that the post-colonial state in Africa

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<sup>128</sup> See Hassani ( n 37 above)10.

<sup>129</sup> See Dugard ( n 82 above)126.

<sup>130</sup> Casttelino ( n 110above) 528.

<sup>131</sup> As above.

<sup>132</sup> Matua ( n 2 above)

<sup>133</sup> Matua (n 2above) 1115.

and its borders are not sustainable, 'because it lacks basic moral legitimacy. Its normative and territorial construction on the African colonial state, itself a legal and moral nullity, is the fundamental reason for its failure.'<sup>134</sup>

The case of *Burkina Faso v Mali* explains what Makua highlights.<sup>135</sup> This is a case where the International Court of Justice (ICJ) expressly declared that African peoples do not have the choice to question the validity of the existing borders at the time of independence.<sup>136</sup> Surprisingly, the Court emphasized the importance of those borders for the entire continent. It stated that 'the chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties.'<sup>137</sup> I cannot appreciate how these arbitrarily created boundaries became so important for the African masses which are grappling with the legacy of those borders.

Notwithstanding what the Court said, since the ambit and the spirit of self-determination is to free oppressed peoples from domination of others and illegal exploitation, one was expecting the possibility of redrawing of these illegitimate borders.<sup>138</sup> However, it seems that even the meaning of self-determination was abused. Rejecting the colonized nations the option to recheck the viability of the existing borders, constitutes a bare denial of the very right to self-determination.<sup>139</sup> Matua rightly observes this point saying that 'the invention of the African state by colonialism and the subsequent misapplication of self-determination are the root causes of the crisis of the post-colonial state.'<sup>140</sup> It is clear that neither self-determination nor territorial integrity necessarily served the aspirations of the colonized peoples. 'The right to self-determination was exercised not by the victims of the colonization but their victimizers, the elites who control the international state

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<sup>134</sup> Matua (n 2 above) 1116.

<sup>135</sup> *Case concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* ICJ ( 22 December 1986) (1986) ICJ Reports 554.

<sup>136</sup> ICJ above Para 20.

<sup>137</sup> As above.

<sup>138</sup> See Casttelino note 131 above.

<sup>139</sup> As below.

<sup>140</sup> Matua ( n 108 above) 1150.

system.’<sup>141</sup> This view is further supported by the fact that all UN resolutions relating to self-determination were issued in relation to territories and not peoples.<sup>142</sup>

### **3.4 Which of the two principles prevails over the other?**

The above addressed question of which borders should be protected does not stop there. It raises a more critical question. This is which of the two contradicting principles should prevail the other territorial integrity or the right to self-determination. This is where the international law truly contradicts.<sup>143</sup> Looking at the wording of the legal instruments, which deal with the issue it is clear that self-determination is the rule while territorial integrity is the exception to the rule. Consider for example, article 2 of the Vienna Declaration which emphasizes that ‘the world conference on human rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination.’<sup>144</sup>

As clear from this provision, the international community does not recognize the right to self-determination only, but also authorizes for those under suppression to take any legitimate action if they are denied to exercise this right freely. It is only after setting out the foundations of self-determination, when the Vienna Declaration recommends that use of the right to self-determination should not mean the violation of the territorial integrity of any member.<sup>145</sup> Accordingly, it is apparent that these instruments present territorial integrity as a limitation clause to self-determination. McCorquodale makes this point very clear.<sup>146</sup> Explaining this point, McCorquodale states that ‘this limitation is an extension of the desire in most societies to create a societal and legal system which is relatively stable.’<sup>147</sup> This is because, ‘the stability desired primarily concerns territorial boundaries.’<sup>148</sup> In addition, McCorquodale

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<sup>141</sup> Matua above 1116.

<sup>142</sup> Both resolution 1514 and 1541 use the term ‘non-self-governing territories’ which indicates that self-determination in the UN context was meant for territories rather than peoples.

<sup>143</sup> See Maguire (n 110 above) 850. See also the detailed discussions on this point in sections 3.4 and 3.5 below.

<sup>144</sup> The Vienna Declaration (n 115 above)

<sup>145</sup> As above.

<sup>146</sup> R McCorquodale ‘Self-determination: A human rights approach’ (1994) 43 *International & Comparative Law Quarterly* 857.

<sup>147</sup> McCorquodale above 879-880.

<sup>148</sup> McCorquodale above 874.



explores a crucial point by mentioning that, states cannot invoke this limitation to self-determination unless they fulfil certain conditions.<sup>149</sup> He summarizes that:

the declaration on the Principles of International Law Provides that only “states conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed a government representing the whole people belonging to the territory without distinction as to race, creed or colour” can rely on this limitation. So a government which does not represent the whole population on its territory without discrimination...cannot succeed in limiting the right to self-determination on the basis that it would infringe that states territorial integrity.<sup>150</sup>

Additionally, many scholars refer this limitation as ‘the saving clause’ meaning that territorial integrity is an exception to the general rule of self-determination.<sup>151</sup> Contrary to the above legal principles is the practice of states. More specifically, such contradiction dominates the AU legal system. During the decolonization process, African leaders were so keen about self-determination and enthusiastically advocated for that all peoples should exercise their right to self-determination.<sup>152</sup> However, immediately, after the independence, African leaders took completely an opposite direction. This is by adopting and putting much emphasis on the principle of *Uti Possidetis*.<sup>153</sup> It is therefore, an ideal to look at the content of this principle and then at the practice of the AU both in terms of legislation and case law.

### 3.4.1 The content of the *Uti Possidetis* principle

The *Black’s Law Dictionary* defines the principle as ‘the doctrine that old administrative become international boundaries when a political subdivision achieves independence.’<sup>154</sup> The principle originated when the Spanish colonies of Latin America became independent.<sup>155</sup> In that context:

The principle laid down the rule that the boundaries of the newly established republics would be the frontiers of the Spanish provinces, which they were succeeding. This general principle, offered the advantage of establishing the general that in law no territory of old Spanish

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<sup>149</sup> McCorquodale above 879.

<sup>150</sup> As above.

<sup>151</sup> See Crawford (n 44 above) 118 and Cassese (6 above) 109.

<sup>152</sup> During the decolonization process, African leaders sincerely advocated for that all peoples exercise their right to self-determination. See Kamanu (n above)?

<sup>153</sup> For the explanation of this principle, see section 3.4.1 below.

<sup>154</sup> Cited in Hensel et al (n 110 above) 8.

<sup>155</sup> Hassani (n 37 above) 19.

America was without owner. The principle also the advantage, it was hoped, of doing away with boundary disputes between the new state.<sup>156</sup>

As appears from this quote, the principle of *Uti Possidetis* had two functions in Latin America. First, the Latin American leaders adopted this principle to eliminate the notion of *terra nullius* and any new territorial claim to the continent. This was ‘because the entire continent was already considered under the sovereignty of independent [Latin American] states.’<sup>157</sup> Secondly, the new Latin American states after gaining their independence from Spain have to inherit those borders as their frontiers.<sup>158</sup> This choice indicates how wise the Latin American leaders were at that time. They did not adopt *Uti Possidetis* blindly, but because they ‘foresaw the creation of a confederation among themselves as well as the need to avoid conflicts over borders and a unified stance against European interference’ so that they can resolve their disputes later on in a regional arrangement.<sup>159</sup> The African leaders adopted the second function of *Uti Possidetis* in the Cairo Resolution in which they recognized the sanctity of this principle.<sup>160</sup> In the African context, the ICJ summarized that:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries may be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *Uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.<sup>161</sup>

It is apparent that Africans took the *Uti Possidetis* for granted and forever. They did not allow themselves to rethink about the validity of the principle and its compatibility with the right of peoples to self-determination. It is therefore clear that Latin American leaders chose this principle for the common interest of their peoples while Africans thought only about their personal political and economic gains.<sup>162</sup> This

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<sup>156</sup> Hensel *et al* ( n 110 above) 8.

<sup>157</sup> As above.

<sup>158</sup> As above.

<sup>159</sup> Hassani ( n 37 above) 21.

<sup>160</sup> OAU, AHG/Res. 16 (I), Resolution adopted by the first ordinary session of the assembly of heads of state and government held in Cairo, July 1964 at <http://www.africa-union.org/root/au/Documents/Decisions/hog/bHoGAssembly1964.pdf> ( 23 9 2010)

<sup>161</sup> *Burkina Faso v Malia* ( n 136 above ) Para 23.

<sup>162</sup> See Matua below.

was as Matua explains because African elites who possessed the leadership in the Africa's post colonial state '[were] loathe to give up privileges come from control of the state. Since their lavish lifestyle stems from the state as organized, it would be suicidal for the leaders to participate in changing it.'<sup>163</sup> It appears that in Africa the aim was not to achieve self-determination of peoples. Rather there was a long-term contract between the colonial masters and their successors of the so-called African elites, because 'dependence continued under the post-colonial state, the instrument of narrow elites and their international backers.'<sup>164</sup> Accordingly, many African peoples were denied any historical claim to their ancestral lands.<sup>165</sup>

### 3.4.2 The practice of the OAU

Legally, the OAU has been constant in adopting the principle of *Uti Possidetis* and therefore blocked any claim to self-determination after the independence. As indicated above, the 1963 Charter of the OAU expressly recognized this principle and made it the foundation of resolving all dispute pertaining to the frontiers of the new African states.<sup>166</sup> The Cairo Resolution followed the Charter, in which the OAU 'solemnly [reaffirmed] the strict respect by all member states of the Organization for the principle laid down in paragraph 3 of article III of the Charter...'<sup>167</sup> Accordingly, African leaders appeared to have prioritized territorial integrity than self-determination. However, there is a clear contradiction in the OAU attitude when it comes to case law. In the cases of *Biafra*, *Katangese people* and *Gunme* the OAU clearly rejected those claims to secession.<sup>168</sup> However, the question arises around what justified the OAU support of the *Western-Sahara* case and its silence with regard to the secession of Eritrea in which the most illegitimate way of seeking self-determination was used; that is to use force against the mother state.<sup>169</sup> In addition, the AU principally agreed the secession of South Sudan from the North if the expected Referendum is held earlier next year.<sup>170</sup> Let us now consider these cases briefly.

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<sup>163</sup> Matua ( n 2 above) 1119.

<sup>164</sup> Maua above 1118.

<sup>165</sup> Hassani gives an example for Somalia with regard to the Somali region in Ethiopia (*Ogaden*) and Morocco with regard to Western-Sahara ( n 37 above) 24.

<sup>166</sup> Article 3 of the OUA Charter.

<sup>167</sup> Article 1 of the Cairo Resolution ( n 160 above)

<sup>168</sup> See note 67 above.

<sup>169</sup> See Haile note 194 below 526.

<sup>170</sup> The International Crisis Group Report

## a) Western Sahara

Western Sahara was historically a region of Morocco colonized by Spain.<sup>171</sup> During the colonization of the region, there has been a dispute between Spain and Morocco as to the future of the region.<sup>172</sup> While Spain advocated for the independence of Western Sahara after its departure, Morocco had argued that the region formed an integral part of its territory.<sup>173</sup> Consequently, the United Nations General Assembly (UNGA) referred the dispute to the ICJ for an advisory opinion.<sup>174</sup> The finding of the Court was simple and straightforward.<sup>175</sup> It firstly found that the people of Western Sahara had the right to self-determination and therefore their free will has to be respected.<sup>176</sup> Secondly, that there was legal ties between Morocco and Western Sahara before the arrival of the Spanish colonial to the territory.<sup>177</sup> Following the advisory opinion of the ICJ, Morocco declared what became known as the 'Green March' in which it liberated the Western-Saharan from the colonization of Spain annexing the region to its territory.<sup>178</sup> This act of Morocco created a new conflict between Morocco and the Polisario Front, which was the main political actor in the region.<sup>179</sup> The response of the Polisario was to announce Sahawari Arab Democratic Republic (SADR) declaring an independent state.<sup>180</sup>

The finding of the ICJ tells us that Morocco had sovereignty over the region before the colonization and therefore the call for separate statehood of the Saharawi people amounts to violation of the Morocco's territorial integrity. Accordingly, the OAU was expected to stand against any attempt of this kind as it did with the previous cases.<sup>181</sup> Surprisingly, the OAU did the opposite. At the beginning, the OAU pretended to be neutral to the dispute and called the two parties to resolve their

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<sup>171</sup> This is clear from the finding of the Court where it found that there were legal ties between Morocco and Western Sahara prior to the colonization of Spain. See note 178 below.

<sup>172</sup> JG Naldi *The Organization of The African Unity: An analysis of its roles* ( 1999).

<sup>173</sup> *Western Sahara advisory Opinion* ( 16 October 1975) ( 1975) ICJ Reports 12.

<sup>174</sup> Naldi above 54.

<sup>175</sup> See the order of the opinion Para 163.

<sup>176</sup> Para 162.

<sup>177</sup> The Court was asked to give an advisory opinion on two questions: whether the region was *Terra Nullius* and whether there were legal ties between Morocco and Western Sahara prior to the colonization. See para 75. The term legal ties meant in this case: as a claim to ties of sovereignty Para 90.

<sup>178</sup> Naldi ( n 173above) 54.

<sup>179</sup> As above .

<sup>180</sup> As above.

<sup>181</sup> More specifically its rejection the cases of Katanga, Biafra and the *Gunme People* case, see note. 10 above.

dispute amicably.<sup>182</sup> However, since 1978 started to take more progressive steps towards the recognition of SADR as the legitimate representative of the Sahawari people.<sup>183</sup> This was by issuing number of resolutions regarding this matter. The most notable of these resolutions is the 92 (XV) in which the OAU appointed an *ad hoc* Committee to give a final say about the matter.<sup>184</sup> The recommendation of the committee resulted in the OAU resolution No.114, which recommended that Morocco withdraw from Western Sahara and the inhabitants of the region exercise their right to self-determination.<sup>185</sup>

As the above resolution failed to bring a considerable solution, the OAU took a more radical step; this is by accepting the SADR to the membership of the OAU in 1984.<sup>186</sup> Surprisingly, OAU relied on article 28 (2) of its Charter, which stipulated that ‘admission (of new states) shall be decided by simple majority of the member states.’<sup>187</sup> Thus, the OAU treated Western Sahara as an independent state. Consequently, Morocco withdrew from the membership of the OAU.<sup>188</sup> The OAU finally expressed its full support of Western Sahara in resolution 104 which recalled upon that the parties undertake direct negotiations and secondly, the UN in conjunction with the OAU will provide peacekeeping force.<sup>189</sup> The Western Sahara case does not illustrate the OAU contradictions alone, but also as Hassani well explains ‘this precedent showed the futility of the UN and the domination of politics over law notwithstanding the destabilising effects of the Sahara’s precedent.’<sup>190</sup> Perhaps the only reason that forced the OAU to treat this case uniquely was that Western Sahara had a different colonizer from that of Morocco. If such justification legitimises secession in international law, Somaliland can argue on the same ground.

## **b) Eritrea**

This is another case, which reverses the OAU principle that colonial borders should be maintained. As mentioned before, the OAU opposed any attempt of

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<sup>182</sup> Naldi ( n 173above) 58-59.

<sup>183</sup> Naldi ( 173above) 61.

<sup>184</sup> OAU Res92(XV) [http://www.africa-union.org/Official\\_documents/Heads%20of%20State%20Summits/hog/oHoGAssembly1978.pdf](http://www.africa-union.org/Official_documents/Heads%20of%20State%20Summits/hog/oHoGAssembly1978.pdf)

<sup>185</sup> OAU Res...

<sup>186</sup> Naldi ( 173)above 65.

<sup>187</sup> Morocco protested that this provision was not applicable to Western Sahara since it was not a state.

<sup>188</sup> Naldi ( n 173 above) 58.

<sup>189</sup> Naldi ( n 173above) 66.

<sup>190</sup> Hassani (n 27above) 110.

secession from the existing borders in the Cairo resolution of 1964.<sup>191</sup> At that time, Eritrea was an integral part of Ethiopia though the signs of the Eritrean struggle had already begun.<sup>192</sup> Since then, Eritrean movements intensified their armed struggle, which resulted in the full independence of Eritrea from Ethiopia.<sup>193</sup> There are two arguments regarding the legality of Eritrea's secession.<sup>194</sup> One argument is as asserted above to assume that Eritrea was an integral part of Ethiopia and consequently the 1949 UN decision, which federated Eritrea to Ethiopia and the Ethiopia's subsequent full annexation of Eritrea were both Legal.<sup>195</sup> Therefore, it was questionable whether Eritrea had the right to secede from Ethiopia.<sup>196</sup>

In submitting, that indeed Eritrea had such right, the international law does not allow the use of force to achieve such secession.<sup>197</sup> Contrary to this and also to the OAU sanctioned principle of territorial integrity, Eritrea used war as a primary means to achieve its secession.<sup>198</sup> Having said this, I do not ignore the UN referendum that finally led to the complete independence of Eritrea, but because it is obvious that the referendum itself was a direct result of the armed struggle. Surprisingly, as Iyob explains though 'the Eritrean case went against the grain of Africa's post-colonial order and its attendant philosophical, ideological and political premises...', the OAU did not express a single objection to the Eritrea's unlawful use of force.<sup>199</sup> Instead, the OAU did not only recognize Eritrea as an independent state but also witnessed its secession as an observer during the UN referendum for the Eritrea's independence.<sup>200</sup>

A second argument that might justify the OAU position is that Eritrean struggle was against colonialism and foreign domination. In this Ethiopia is regarded as a colonial state and therefore Eritrea's use of force was legitimate because it was

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<sup>191</sup> The Cairo Resolution of 1964, see ( n above)?

<sup>192</sup> R Iyob, *The Eritrean Struggle for Independence: Domination, Resistance and Nationalism* 1941-1993( 1995)

<sup>193</sup> Iyob above 54. See also LB Serapiao 'International Law and Self-determination: the question of Eritrea' (1987) 15*Journal of Opinion* 3.

<sup>194</sup> M Haile 'Legality of Secessions: The Case of Eritrea' (1994) 8*Emroy International Law Review* 479.

<sup>195</sup> In 1950, the UN federated Eritrea to Ethiopia and in 1962 Ethiopia fully annexed Eritrea ending the internal rule of Eritrea's Assembly. See Haile above, 486 – 487.

<sup>196</sup> Haile above 497.

<sup>197</sup> See ( n 44 above) Crawford 132-134.

<sup>198</sup> T Negash, *Eritrea and Ethiopia: The federal experience* (1996) 164.

<sup>199</sup> Iyob ( n 192above)54.

<sup>200</sup> Iyob (n 192 above) 45.

fighting for its freedom.<sup>201</sup> Again, this does not serve the OAU for two reasons. First, the OAU did not assist the people of Eritrea while one of its purposes was ‘to eradicate all forms of colonialism from Africa.’<sup>202</sup> Accordingly, the OAU was under obligation to assist Eritrea in its fight against colonialism. The OAU reluctance to support the Eritrean struggle shows its belief that this case was not in fact about colonialism.<sup>203</sup> Secondly, the Eritrean people themselves could not win their case under this argument.<sup>204</sup> After noticing the international community’s objection this argument, the Eritrean struggle movement shifted its focus to the principle of self-determination and argued that they were denied this right internally by their own state; Ethiopia.<sup>205</sup> Another factor accelerated the success of the Eritrean secession was the argument that Eritrean people did not exercise their right to self-determination since the Italian colonialism.<sup>206</sup>

### c) South Sudan

In the very near future, there will be another test for the AU and its loyalty to the principle of *Uti Possidetis*. This is when as is scheduled in January 2011, a referendum will be held in South Sudan, which will determine the future of that region as the UN Secretary-general announced in September 2010.<sup>207</sup> Both the UN and the AU will be among the observers of the referendum. This referendum is the final stages of implementing the Comprehensive Peace Agreement between the Sudanese People Liberation Army (SPLA) and the government of the Sudan in 2005.<sup>208</sup> The AU played a critical role in making this agreement.<sup>209</sup> In fact, the AU repeatedly proposed such agreement.<sup>210</sup> The European Union (EU) in a report dealing with this matter, observed that the outcome of this referendum will be one of four scenarios; namely: ‘(i) forced

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<sup>201</sup> The basis of this argument is that the UN federation Eritrea to Ethiopia was unlawful.

<sup>202</sup> Article 2 (d) of the OAU Charter.

<sup>203</sup> Negash ( n 198 above) 163.

<sup>204</sup> As above.

<sup>205</sup> As above.

<sup>206</sup> Cassese ( n 43 above) 222.

<sup>207</sup> Aljazeera ‘The UN Secretary-General says that the referendum will determine the future of South Sudan’ [www.aljazeera.net](http://www.aljazeera.net) (accessed 24 Sept 2010)

<sup>208</sup> The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People’s Liberation Movement/the Sudan People’s Liberation Army (2005) at [www.aec-sudan.org/docs/cpa/cpa/-en.pdf](http://www.aec-sudan.org/docs/cpa/cpa/-en.pdf) (accessed 25 Sept 2010)

<sup>209</sup> The AU supervised the negotiations between the two sides. See the Preamble of the CPA.

<sup>210</sup> UN Integrated Regional Information Networks ( IRIN) ‘ The African Union ( AU) is to play a key role in discussions between Northern and Southern Sudan following a referendum that is widely expected to initiate the secession of the latter’ (29 June 2010) at <http://www.afrika.no/Detailed/19731.html> ( accessed 26 Sept 2010)

unity, (ii) forced secession (iii) agreed unity; (iv) agreed secession.<sup>211</sup> These scenarios are the same options put forward by the Eritrean People's Liberation Forces (EPLF) during their struggle for secession from Ethiopia and in fact were what determined the Eritrean future at the end.<sup>212</sup>

Additionally, the text of the agreement and the political climate across the continent are all indicating that Southern Sudan will secede from the North and become a new state in the map of Africa.<sup>213</sup> Therefore, 'the probable emergence of a new country on the map of Africa raises new challenges for the continent and could ... lead to a spiral of states disintegration.'<sup>214</sup> Despite that, this case clearly violates the spirit of the AU constitutive Act with regard to the question of borders, the AU does not seem to object this move of the Southern Sudan. This shows the AU implicit support of the South Sudan secession. Probably, the only justification that the AU has for its support is that there is an agreement between the two parties. This justification ignores the fact that this agreement was the result of bloody conflict in which the SPLA waged a guerrilla war against the government of the Sudan for at least 27 years.<sup>215</sup> This argument further suggests that if any group wishes to secede from a given country, that group should firstly start fighting and finally sign a peace agreement as in the case at hand. In contrast, in the case of Somaliland, it is the will of the people, which led to a peaceful separation from Somalia and not the gun.

### **3.5 Is territorial integrity relevant in the context of failed states?**

The above cases were raised in the context of functioning states and the question was whether some part of those states can seek an independent statehood. However, the difficulty arises where the mother state from which secession is sought does no longer exist. Unfortunately, the international community has failed in the same manner the OAU/AU has failed, to reconcile between self-determination and the

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<sup>211</sup> The EU Institute for Security Studies, Report No. 6 'Post-2011 Scenarios in Sudan: what role for the EU?' 6 at [www.iss.europa.eu/.../Post-2011\\_scenarios\\_in\\_Sudan.pdf](http://www.iss.europa.eu/.../Post-2011_scenarios_in_Sudan.pdf) (accessed 1 July 2010.)

<sup>212</sup> Negash (n198 above) 165.

<sup>213</sup> For example, the Machakos Protocol states 'that the people of South Sudan have the right to self-determination ... through a referendum to determine their future status' Part C 1.3 of the Protocol. The visit of the US vice President to Kenya the mid of this year, who plainly said that the US is ready to recognize the South Sudan as an independent state, is another indicator. also the leader of the SPLA, announced this week (24 Sept 2010) before the UNGA that his people will vote for independence is again an strong indicator for the secession of the South [www.alzeera.net](http://www.alzeera.net) (accessed 24 Sept 2010)

<sup>214</sup> The EU (n 212 above) 8.

<sup>215</sup> For historical background on this conflict, see M Deng 'Sudan at Crossroads' in FM Deng (eds) *New Sudan in the Making?* (2010)30.



so called territorial integrity. As discussed earlier, the UN Charter and several resolutions clearly rejected any division or secession from member state of the UN.<sup>216</sup> Those provisions did not differentiate between the dissolution of federal and the disintegration of single states.<sup>217</sup> Yet we see in practice if set of states secede from a federal state, such act is regarded as dissolution of federation and not secession. In contrast, if a single state fails to exist, a functioning part of that state cannot claim statehood. The cases of the former Somalia and Yugoslavia clearly illustrate this situation. In the following paragraphs, let us compare the two scenarios.

### 3.5.1 The failure of Somalia

Somalia does not exist today as it was between 1960 and 1991.<sup>218</sup> For the last 20 years, there has been no central government in Somalia save the so called the Transitional Federal Government (TFG).<sup>219</sup> It is indeed a mockery to international law to refer the TFG as the legitimate government of Somalia while it does not control more than 10 kilometres square of the capital city; Mogadishu.<sup>220</sup> The TFG controls the Villa Somalia (the presidency house), the Mogadishu International Airport and the main seaport of Mogadishu with the assistance of the African Mission to Somalia (AMISOM) troops.<sup>221</sup> The rest of the country is under the effective control of warlords save the north-eastern region of Puntland.<sup>222</sup> The totality of these scenarios tells us one fact: that Somalia is a failed state.<sup>223</sup> In contrast, Somaliland is a well-functioning state. While successive warlords displace their rivalry in Somalia, a new elected

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<sup>216</sup> See section 3.2 above.

<sup>217</sup> See note 115 above.

<sup>218</sup> The Republic of Somalia consisted of a union between two states; Somaliland and Somalia. See the International Law Commission Yearbook Vol. II ( 1972) 285.

<sup>219</sup> It was formed in Kenya in 2004. The mandate of the TFG was restore peace and reconcile between the fighting functions within years, but up to moment after six years, the TFG cannot even defend itself forget about restoration of peace. See article 11 of the TFG Charter(2004) [www.ilo.org/wcmsp5/groups/public/---ed.../wcms\\_127637.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed.../wcms_127637.pdf) ( accessed 18 Sept 2010)

<sup>220</sup> See Amnesty International 'Hard news: Journalists' lives in danger in Somalia' ( 2009) at <http://www.amnesty.org/en/library/asset/AFR52/009/2010/en/fa122891-03a6-4bac-9d83-4e1b515be50a/afr520092010en.pdf> ( accessed 10 October 2010.)

<sup>221</sup> C Hull & E Svensson 'African Union Mission in Somalia (AMISOM)' (2008) at <http://www.foi.se/upload/projects/Africa/FOI-R--2596--SE.pdf> ( accessed 10 October 2010)

<sup>222</sup> Puntland is a relatively stable autonomous region locates in the northeastern Somalia.

<sup>223</sup> Therefore, it is unreasonable for Somaliland to join a failed state. See Shinn ( n above)? See also the Inter-Africa Group Report 'Conference on the current peace and security challenges in the Horn of Africa' ( 2007) [www.life-peace.org/sajt/filer/pdf/Horn\\_Of\\_Africa\\_Bulletin/HAB1003.pdf](http://www.life-peace.org/sajt/filer/pdf/Horn_Of_Africa_Bulletin/HAB1003.pdf) ( accessed 9 Oct 2010)

president replaces the previous in every five years in Somaliland.<sup>224</sup> Therefore, the question is, is it logic to invoke the principle of territorial integrity in such context? Perhaps the case of Yugoslavia provides some guidance.

### 3.5.2 The dissolution of Yugoslavia

The republics of Slovenia, Croatia, Serbia, Bosnia- Herzegovina, Montenegro and Macedonia made up what was historically know as the Federal Republic of Yugoslavia.<sup>225</sup> In addition to these six republics, there were two autonomous regions; Kosovo and Vojvodina.<sup>226</sup> In 1992, waves of conflicts based on self-determination claims spread over the Federation of Yugoslavia. These conflicts emerged after Slovenia, Croatia, Bosnia; Macedonia declared their independence from the parent federation.<sup>227</sup> According to Hassani, ‘a common thread in all four cases, in contrast with Serbia and Montenegro, was that they were territorially-based quests for self-determination.’<sup>228</sup> Consequently, the Federation descended into dissolution.

As a response to this crisis, the European Community (EC) swiftly intervened in the situation. The EC established the international peace Conference on Yugoslavia on 27 1991.<sup>229</sup> At that conference, an Arbitration Commission chaired by Robert Badinter was appointed.<sup>230</sup> The commission was asked to formulate an opinion or make a recommendation about the legal position of two questions:

- (a) whether the declaration of those republics amounts to secession and therefore, the Federation of Yugoslavia continues to exist; or
- (b) Whether the question is about disintegration of the federation and therefore Yugoslavia does not exist as an entity anymore?

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<sup>224</sup> Since 1991, the international community initiated not less than 14 conferences but none of these has brought a solution due to the resistance of the warlords.

<sup>225</sup> M Weller ‘The international response to the dissolution of the socialist Federal Republic of Yugoslavia’ (1992) 91 *American Journal of international law* 569.

<sup>226</sup> As above. In addition The case of Kosovo has recently become more important because of the controversy as to whether it is an independent republic or remains an integral part of Serbia.<sup>226</sup>

<sup>227</sup> Crawford ( n 44 above)

<sup>228</sup> Hassani ( n 37 above) 201.

<sup>229</sup> International Legal Materials ‘Conference on Yugoslavia arbitration commission: opinions on questions arising from the dissolution of Yugoslavia’ (1992) 31 I.L.M 1488.

<sup>230</sup> As above.

The Commission very carefully delivered several opinions.<sup>231</sup> First, it concluded that Yugoslavia was in the process of dissolution.<sup>232</sup> Secondly, the new republics should be recognized as independent states with the condition that they grant the protection of the rights of minority groups within their territories.<sup>233</sup> The commission, avoided to use of the term secession. The careful formulation of these two questions and corresponding response from the Commission implies that the EC did not want to acknowledge expressly that self-determination could be achieved through unilateral secession. For this reason, Radan questions whether what happened in Yugoslavia was a secession or dissolution.<sup>234</sup> Moreover, Radan raises the question 'whether the Badinter Commission was justified to conclude that Yugoslavia was in the process of dissolution' and whether in fact this 'expression has legal meaning'.<sup>235</sup> Radan concludes that the EC recognition of the new states emerging from this dissolution, clearly explains that these states seceded from Yugoslavia.<sup>236</sup> Although the EC at the beginning indicated its scapegoat from using the sensitive term of self-determination, it finally recognized the importance of basing the recognition of the new republics on self-determination.<sup>237</sup>

Due to the EC special treatment and the international positive response to the new republics, some scholars asserted that the case of Yugoslavia 'may provide the most compelling evidence of a trend in state practice that in time could establish the right of secession under international customary law'.<sup>238</sup> The signs of this trend are inferred from the prompt recognition that the international granted the new republics emerging from the dissolution of the former Yugoslavia Federation.<sup>239</sup> The international community recognized these new states while destabilising and creating serious conflicts within the borders of the mother state; Yugoslavia.<sup>240</sup> This again

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<sup>231</sup> Namely the Commission issued 10 opinions.

<sup>232</sup> Opinion No. 1.

<sup>233</sup> See Opinion No. 2.

<sup>234</sup> Radan (n 39 above) 204.

<sup>235</sup> Radan (n 39 above) 206.

<sup>236</sup> As above.

<sup>237</sup> See Opinion No. 2.

<sup>238</sup> Brilmayer (n 110 above) 332.

<sup>239</sup> As above.

<sup>240</sup> Weller (n 188 above) 574.

explains the political hypocrisy that dominates the attitude of states in international relations<sup>241</sup>

### **3.5.3 The dissolution of Yugoslavia v the disintegration of Somalia: is there a difference?**

What justified attaching the new terminology of ‘dissolution’ to the secession of the Yugoslav republics was the mere fact that Yugoslavia was a Federation in its administrative structure.<sup>242</sup> This means that whenever group of states are federated into one regime, that federation automatically disintegrates if some of its members opt out of the federation or the central authority lacks the necessary power to exercise its sovereignty over its sub-states.<sup>243</sup> As will be discussed in chapter four, Somalia was also a union between two states. That union does not exist any more, therefore the question is what makes Somaliland differ from Yugoslavia. Is it not a case of dissolution and the disappearance of the mother state as was case in Yugoslavia?

Additionally, the international community required the new states emerging from the dissolution of Yugoslavia, to stick to their original borders and show a minimal exercise of authority on their territories to qualify for statehood.<sup>244</sup> Interestingly, Somaliland fulfils these conditions and more. Since 1991, Somaliland controls its borders effectively within the British boundaries.<sup>245</sup> Somaliland does not only control its original boundaries, but indeed is also one of the most democratic countries in the horn of Africa. In less than 20 years, four presidents handed over the power peacefully to each other in Somaliland.<sup>246</sup> In this period, a peaceful transfer of power did not happen in the region and rarely happens in Africa as a whole.<sup>247</sup>

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<sup>241</sup> Otherwise, such recognition is contrary to the UN Charter itself.

<sup>242</sup> Weller ( n 188 above)

<sup>243</sup> This was the justification of the arbitration commission that the federal of Yugoslavia ceased to exist because the central authority no longer exercise any control over the seceding republics.

<sup>244</sup> Weller above ( n 110 above)

<sup>245</sup> The Republic of South Africa ‘Somaliland’s Claim to Sovereign Status’ (2003), unpublished legal opinion issued by the Office of the chief of state law adviser (international law), Department of foreign affairs.

<sup>246</sup> More specifically, the last elections, which were held on 26 June 2010, attracted the international community’s attention. See Somaliland Women Lawyers Association ‘Report on Somaliland elections’ (2010) <http://www.mbali.info/doc524.htm> ( accessed 29 Oct 2010)

<sup>247</sup> For example, the current Ethiopian prime minister has been in power since 1990, since 1970s, Kenya had once changed its leader whereas the followed elections led to a horrific conflict in 2008 while Eritrea did not hold any elections since its independence in 1993 and Djibouti is not in a better than these countries.

### **3.6 Concluding remarks**

This chapter has discussed the dilemma of how to reconcile between the rights of people to self-determination and the protection of borders from disintegration. The international legal norms and practice of states regarding this issue seem contradictory. While the law seems to have favoured self-determination than borders, state practice shows the prioritization of territorial integrity. Therefore, it is clear that there is a confrontation between law and political interests. It is clear also that politics determine the interpretation of law. Many cases illustrate this point, both internationally and within African context. Two lessons emerged from those cases. One that territorial integrity is disregarded when a given is about a unique case. Secondly, when the mother state ceases to function territorial integrity cannot be invoked as a defence against secession. Not surprisingly, both scenarios apply to Somaliland.

## Chapter Four

### What justifies the non-recognition/ recognition of Somaliland?

#### 4.1 Introduction

The foregoing discussions in the above three chapters, have laid down the foundations for the right to external self-determination in light of international law and that this right is limited by the principle of territorial integrity.<sup>248</sup> It became clear that though self-determination is a legal right, state practice threatens this right by putting much emphasis on the importance of territorial integrity.<sup>249</sup> This emphasis clearly showed that territorial integrity is a political tool more than legal.<sup>250</sup> For this reason, even self-determination is often politicized.<sup>251</sup> Subsequently, it is difficult to achieve self-determination without confronting with territorial integrity.<sup>252</sup> The confrontation between the two principles has created the dilemma of whether international law favours the right of peoples to self-determination or territorial integrity when the two cannot go together.<sup>253</sup> This dilemma is what calls the case of Somaliland into examination. A critical question here is in light of the above discussions, should Somaliland be recognized as an independent state or not? In both scenarios; answering either in the affirmative or in the negative, the next question is what justifies the non-recognition or the recognition of Somaliland. This Chapter answers these questions.

#### 4.2 Justification for the recognition of Somaliland

Though the main purpose of this study is to find out why the international community is so reluctant to recognize Somaliland, I found it necessary first to determine whether in fact Somaliland deserves such recognition. Apart from fulfilling the criteria of statehood and being a *de facto* state for the last twenty years,

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<sup>248</sup> See note 125 above

<sup>249</sup> See Makua ( n 117 above)

<sup>250</sup> Maguire ( n 87 above) 879. See also H Hannum 'Rethinking Self-determination' (1993) 34 *Virginia Journal of International Law* 1.

<sup>251</sup> See note 76 above.

<sup>252</sup> See Kreuter (n above) 372. Almost all successful secessions were achieved after long bloody conflicts. Examples are: the dissolution of Yugoslavia, Bangladesh from Pakistan, Eritrea from Ethiopia, East Timor from Indonesia and hopefully South Sudan from the North.

<sup>253</sup> See Kamanu ( n 110 above) 357.

Somaliland has many other grounds that justify its recognition as an independent state.<sup>254</sup> These grounds are discussed below.

#### 4.2.1 Historical difference

It is extremely important to understand that Somaliland's history is dramatically different from that of Somalia.<sup>255</sup> This difference is in three dimensions. Firstly, prior to the colonial rule, there was not a Somali state which had sovereignty over the territories inhabited by the Somali race.<sup>256</sup> Rather there were nomadic tribes led by traditional chiefs known as the *Sultans*.<sup>257</sup> Nevertheless, there was a substantive difference between Somaliland and Somalia in this regard. Whereas Somalia's tribes were purely nomadic, the British colonizer arrived Somaliland coasts while the features of the modern nation-state of Somaliland had already shaped itself.<sup>258</sup> An example illustrating this fact is that Somaliland traditional leaders signed formal treaties with the British Empire.<sup>259</sup> These were not treaties merely by name but were such that shows the strong bargaining position of the Somaliland leaders at that time. The following quote gives us the essence of those treaties:

No treaty contained clauses relating to cession of territory; the clans merely pledged Britain a right of pre-emption. The treaties only granted one such right; the right of British agents to reside on the Somali coast. Most of the treaties contained clauses expressly declaring the treaties as provisional and subject to revocation or modification. The treaties therefore left a large measure of sovereignty in the hands of the clan occupying the land.<sup>260</sup>

The fact that Somaliland leaders entered into such powerful treaties is sufficient to indicate that Somaliland was indeed a sovereign state before the colonial era.<sup>261</sup> In contrast, history did not record that Somalia's clan leaders attempted to sign

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<sup>254</sup> Somaliland has been *de facto* functioning state for last 20 years.

<sup>255</sup> Eggers ( n 27 above ) 212.

<sup>256</sup> Schoiswohl ( n 27above ) 97.

<sup>257</sup> See Drysdale 4.

<sup>258</sup> Somaliland Centre for Peace and Development ( n 13 above) 11.

<sup>259</sup> Schoiswohl ( n above) 111.

<sup>260</sup> Carroll and Rajagopal ( n 45 above)

<sup>261</sup> In Western Sahara case, the ICJ held that that Western was not a *terra nullius*, because the tribal chiefs had the competent to represent their people and therefore signed number of treaties with Spain. See Para 80-81 of the advisory opinion ( n above). However, the sovereignty of Somaliland at that time was not from vacuum. Rather there were geopolitical reasons for this early maturation of Somaliland statehood. First because of the geographical position, the Islamic Caliphates in the Arabia peninsula, had influenced on the statehood of Somaliland. Secondly, the Ottoman Empire indirectly ruled the

such treaties when Italy came to colonize them. Secondly, during the colonization era, Somaliland had 80 years of self-governance experience.<sup>262</sup> Because the British colonizer rule was indirectly, local leaders ‘were able to continue autonomously with the societal structure they had been living with for centuries’.<sup>263</sup> Contrary to this situation, Somalia was under the Trusteeship of the UN from between 1950-1960, which implies that Somalis were unable to govern themselves.<sup>264</sup> Thirdly, immediately after the independence, Somaliland became an independent state before uniting with Somalia and many countries recognized Somaliland as such.<sup>265</sup> However, only after 5 days of its independence, Somaliland united with Somalia through the allegedly Act of Union.<sup>266</sup> In submitting that this Act was not legally valid, Somaliland remained *de jure* independent since 1960.<sup>267</sup>

## 4.2.2 Somaliland the right to self-determination

A second argument that justifies the recognition of Somaliland as an independent state is the right to external self-determination. As discussed in the previous chapters, a right to external self-determination is granted either in a colonial context or exceptionally in a post-colonial context where internal self-detrimental is denied or gross violation of human rights is committed against those demanding such right.<sup>268</sup> Interestingly enough, Somaliland argues on both grounds.<sup>269</sup> These arguments are formulated below.

### a) Self-determination from colonialism

On this ground, the people of Somaliland argue that they did not achieve their right to self-determination from Britain yet.<sup>270</sup> This is because they were not given an

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urbanized regions of Somaliland such as the cities of Berbera and Zeila. See Jhazbhay (struggle n above 112-113)

<sup>262</sup> From 1884 to 1960.

<sup>263</sup> Schoiswohl note 260 above.

<sup>264</sup> See Poore ( n above ) 123.

<sup>265</sup> Some experts on Somaliland narrated that not less than 35 countries recognized Somaliland as independent state in 1960. See Shinn ( n above) Others even argue that Somaliland became a member of the UN, Eggers (n 15 above)212.

<sup>266</sup> The Act of Union of 1961 ( n above)

<sup>267</sup> Poore ( n above) 140.

<sup>268</sup> See the *Canadian re case* Para 126.

<sup>269</sup> Carroll & Rajagopal above 662-666.

<sup>270</sup> Kreuter ( n above) 382.



opportunity to express their will freely due to a forceful annexation to Somalia.<sup>271</sup> The unification with Somalia was not based on the true expression of the free will of Somalilanders. Rather, it was a conspiracy between few political elites who were fascinated by the ideals of the so-called 'Great Somalia' and Somalia taking advantage of the enthusiasm of the Somaliland political elites for Greater Somalia.

The basis of the unification between Somaliland and Somalia was the invalid Act of Union.<sup>272</sup> The Act was invalid both procedurally and substantively. At the procedural level, the drafting process of the Act was totally contrary to what was agreed upon between the two sides. 'Delegates from Northern Somaliland and Southern Somalia were to sign an international treaty between the two states to form a union, after which the Southern legislative assembly was to approve the document.'<sup>273</sup> Only after signing such treaty 'the National Assembly should have elected a Provisional president.'<sup>274</sup> Following this procedure, on 27 June 1960, the Somaliland Legislative Assembly passed an act known as the 'Union of Somaliland and Somalia Law'.<sup>275</sup> However, Somalia's Legislative Assembly did not sign this Law and consequently it never came into force.<sup>276</sup> In contrast, on 30 June 1960, Somalia's Legislative Assembly passed the so-called Atto di Unione (the Act of Union) without the consent of Somaliland's Legislative Assembly.<sup>277</sup> On 31 January 1961, the National Assembly in which Somaliland representatives were outnumbered replaced the 1960 Act of Union with a new Act of Union repealing the Union of Somaliland and Somalia Law, which had a retroactive application from 1 July 1960.<sup>278</sup>

At the substantive level, the Act was also defect. It 'was significantly different from the Union of Somaliland and Somalia Law'.<sup>279</sup> It did not recognize even the right to internal self-determination for Somalilanders.<sup>280</sup> Additionally, the Act was the

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<sup>271</sup> Self-determination means 'to pay regard to the freely expressed will of peoples' the Western Sahara advisory opinion (n above) Para 59.

<sup>272</sup> There is no any source that provides the text of this Act. Rather, what we have is the Somali Republic Constitution of 1961 which was based on the Act and against which Somalilanders voted.

<sup>273</sup> The case for independent Somaliland at 660

<sup>274</sup> As above.

<sup>275</sup> At [http://www.somalilandlaw.com/Somaliland\\_Act\\_of\\_Union.htm](http://www.somalilandlaw.com/Somaliland_Act_of_Union.htm) (accessed 23 Sept 2010)

<sup>276</sup> The case of independent Somaliland above.

<sup>277</sup> Above at 661.

<sup>278</sup> As above.

<sup>279</sup> As above.

<sup>280</sup> The denial of internal self-determination, gives rise to what is known as the 'remedial secession' which is exercised when people are denied 'to effectively participate in the political and economic process of the country.' Poore (n above) 139.

product of Somalia's representatives alone.<sup>281</sup> This was because Somaliland representatives in the National Assembly were excluded from the drafting process.<sup>282</sup> For these reasons, Somalilanders rejected the validity of the Act. A referendum on the 1961 Constitution of the Republic of Somalia reflected this rejection.<sup>283</sup> Approximately 90 % of Somalilanders voted against the ratification of that Constitution.<sup>284</sup> Therefore, the union between the two countries lacked any legally valid basis. It is clear then that the people of Somaliland did not exercise their right to self-determination. Accordingly, the case of Somaliland is akin to that of Eritrea where Ethiopia illegally annexed it to its territory.<sup>285</sup> This illegal annexation finally justified the secession of Eritrea and only after this secession, Eritrea exercised her right to self-determination and gained its independence from the original colonizer; Italy.<sup>286</sup>

## **b) Self-determination based on gross violation of human rights**

We have a moral obligation to be recognized. In Europe a number of countries with no previous experience of statehood have been recognized... and international lawyers tell us any nation, which has been victimized by a state of which it was part, has the *right to secede* (Egal; a former president of Somaliland)<sup>287</sup>

As indicated earlier, international law exceptionally grants external self-determination outside of colonial context. One of these exceptions is where a given state commits a gross violation of human rights against some part of its population.<sup>288</sup> This was what happened in Somaliland when a military coup led by Siyad Barre destroyed any hope of democratic rule on 21 October 1969.<sup>289</sup> From that day until its collapse in 1991, this military junta committed all sorts of human rights atrocities in Somaliland.<sup>290</sup> The government denied Somalilanders any form of participation in the

<sup>281</sup> It was agreed that Somaliland and Somalia have to negotiate a draft for an act of Union... but

<sup>282</sup> Firstly, they were not consulted, because the Act was the result of negotiation between Italy and its Trusteeship Somalia. Secondly, even if they were consulted Somaliland representative 'could only make marginal changes' because they minority; they were 30 out of 120 representatives. See Carroll & Rajagopal (n 45 above) 661.

<sup>283</sup> [www.somalilaw.org/Documents/Constitution1960.pdf](http://www.somalilaw.org/Documents/Constitution1960.pdf) (accessed 17 Sept 2010)

<sup>284</sup> Poore (n above) 125.

<sup>285</sup> See Iyob (n 192 above) 16.

<sup>286</sup> Cassese (43 above) 222.

<sup>287</sup> Cited in Schoiswohl (n 27 above) 163.

<sup>288</sup> 'An accepted, enduring maximum in legal and political is that the deprivation of basic human rights justifies rebellion' Carroll & Rajagopal (n 228 above) 662.

<sup>289</sup> M-R Sh Hassan 'the 1969 military coup in Somalia part III: in search for a new ideology and alliance' (2009) at [www.warkamaant.com](http://www.warkamaant.com) (accessed 26 Sept 2010) see also Schoiswohl (n above) 101.

<sup>290</sup> For example it has been estimated that between 1988-1989 alone 50,000-60,000 Somalilanders were killed by the Siyad Barre regime. See Resource information centre, Washington 'Somalia things fall

political decision-making and excluded them from sharing in the country's wealth.<sup>291</sup> What was worse, when Somalilanders attempted to challenge the regime and demanded for their rights, they were subjected to degrading and dehumanizing treatments 'including extra-judicial executions, disappearances, arbitrary arrest and detention, torture, harassment', massive rape of women, and confiscation and destruction of prosperities that worthy billions of dollars if not trillions.<sup>292</sup>

For the above reasons, some have argued that what happened in Somaliland was in fact genocide or at least was an attempt of genocide.<sup>293</sup> This specifically is the case when one looks at how the regime specifically targeted the *Isaaq* clans who constitute the majority of Somalilanders.<sup>294</sup> The International Crisis Group observed that 'the government's simultaneous practice of repopulating *Isaaq* communities with refugees from other clans was analogous to ethnic cleansing, and there were widespread and credible reports of war crimes.'<sup>295</sup> Consequently, the Somali National Movement (SNM)- primarily from the *Isaaq* clans- ventured an armed struggle that ended up with the successful separation of Somaliland and the collapse of the military regime.<sup>296</sup>

### 4.2.3 Dissolution of Union

A third reason, which justifies the recognition of Somaliland, is that the union between Somaliland and Somalia has been dissolved. This is with the assumption that the Act of Union was legally valid.<sup>297</sup> Under this assumption, the Act had a contractual nature and as we know, whenever one of the contracting parties fails to fulfil its obligations under a contract or acts contrary to it, such contract automatically terminates. This is exactly the case of Somaliland and Somalia. The Act of Union terminated because of three reasons. Firstly, the purpose of the Act was to achieve the ideals of 'Great Somalia', which did not happen to date. Secondly, the Union

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apart' ( 1993) at <http://www1.umn.edu/humanrts/ins/somala93.pdf> ( accessed 36 Sept 2010) See also Carroll and Rajagopal ( n above) 665.

<sup>291</sup> 'When people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession' *Canadian re case* Para 134.

<sup>292</sup> Somaliland Centre for Peace ( n above) 17

<sup>293</sup> MF Hersi 'The possibilities of international prosecution against the former Somali military regime for human rights abuses in Somaliland from 1981 to 1991' (2010) unpublished master thesis.

<sup>294</sup> See Somaliland Centre for Peace and Development ( n above) 17.

<sup>295</sup> International Crisis Group report ( n above) 14.

<sup>296</sup> Above note 211.

<sup>297</sup> Above.

presupposed the respect for human rights and the rule of law. Somalia acted contrary to this obligation when it violated various fundamental rights of thousands of Somalilanders. Finally, Somalia failed to exist as a functioning state and therefore cannot any more fulfil its obligations under the contract of union because if one of the contractors dies, the contract terminates. Mazrui rightly described the status of the Act, raising the question ‘what if the marriage included spouse abuse? In a union between two individuals, wife beating can be grounds for divorce. Is it not about time that partner-abuse became grounds for divorce in a marriage of states also?’<sup>298</sup>

Moreover, dissolution of union states is not a stranger either to Africa or to international law. In Africa, many unions were dissolved. Examples are the unions of Senegal and the Gambia, Senegal and Mali and Egypt and Syria.<sup>299</sup> Internationally, the dissolution of the federation of Yugoslavia is sufficient as previously discussed in this study.<sup>300</sup> Therefore, rejecting the Somaliland claim on the ground of secession is a baseless argument.

### 4.3 Justifications for the non-recognition of Somaliland

The reasons behind the non-recognition of Somaliland are complex. They are mixture of political considerations and legal dimensions.<sup>301</sup> Additionally, it seems that the political considerations dominate the legal justifications.<sup>302</sup> The reason is that the law itself is often used as a political tool.<sup>303</sup> In fact, Somaliland argues that the question of recognition remains unsettled merely for political considerations.<sup>304</sup> However, one cannot disregard the legal aspects as well. In the following paragraphs let us deal with both legal and political questions which may constitute a bar to the recognition of Somaliland.

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<sup>298</sup> Cited in the International Crisis Group ( n above) 17.

<sup>299</sup> For the federation between Mali and Senegal, see Serapiao ( n above) 6,? For the rest, see the Republic of South Africa Legal Opinion (n 246 above) 5.

<sup>300</sup> See section 3.5.2 above.

<sup>301</sup> Schoiswohl ( n above) 171.

<sup>302</sup> See I Jhazbhay, *Somaliland: Post-war nation-building and International Relations, 1991-2006* (2006) unpublished PDH thesis 253-254.

<sup>303</sup> WT Worster ‘Law, politics, and the conception of the state in state recognition theory’ ( 2009) 27 *Boston University International Law Journal* 115.

<sup>304</sup> Schoiswohl ( n 27 above) 171.

### 4.3.1 The legal question

The legal question relating to the non-recognition of Somaliland is primarily based on the assumption that the case of Somaliland is about secession.<sup>305</sup> This assumption raises two interrelated questions. Firstly, whether Somaliland fulfilled the statehood criteria and therefore qualifies for recognition. Secondly, whether the secession through which Somaliland seeks independence is legitimate in the first place. Answering these two questions in the negative clearly blocks Somaliland from gaining an international recognition as an independent state.<sup>306</sup> Below these two questions are answered.

#### a) **Has Somaliland fulfilled the statehood criteria?**

The Convention of Montevideo sets out the classic criteria of statehood, which determines whether a newborn state can be recognized as such.<sup>307</sup> Article 1 of this Convention, provides that ‘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.’ Accordingly, it is only when these conditions are met, that an entity can be called a state. Fortunately, there is no dispute about that Somaliland completed these four criteria and more.<sup>308</sup> Somaliland has permanent population of 3.5 million.<sup>309</sup> Somaliland restored and controls the same territory at the time of the independence, which ‘covers an area of 137, 600 square kilometres.’<sup>310</sup> To fulfil the third criteria, Somaliland does not have only a government but sufficiently effective and truly democratic government like which is rare in the horn of Africa.<sup>311</sup> Finally, Somaliland has the capacity to enter into diplomatic relations with other states both in Africa and outside of Africa.<sup>312</sup> Somaliland has liaison offices in Kenya, Djibouti, Ethiopia, France, the Republic of Ireland and Yemen.<sup>313</sup> Somaliland has also good relationship

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<sup>305</sup> Schoiswohl above 177.

<sup>306</sup> Because in this sense Somaliland lacks any legitimate claim.

<sup>307</sup> The Convention of Montevideo on the Duties and Responsibilities of states (n above)

<sup>308</sup> See AU fact-finding mission report (n above)

<sup>309</sup> Eggers (n 15 above) 213.

<sup>310</sup> Somaliland Centre for Peace and Development (n 224 above) 10. See also Schoiswohl (n above) 166.

<sup>311</sup> The ICG report (n 22 above)

<sup>312</sup> Somaliland officials travel outside of the country whenever they want and are received as diplomats by the countries they visit, see [www.Somaliland.org](http://www.Somaliland.org), [www.Somalilandpress.com](http://www.Somalilandpress.com), [www.Somalilandpatriots.com](http://www.Somalilandpatriots.com) and [www.sdwo.com](http://www.sdwo.com)

<sup>313</sup> For the details of the Somaliland diplomatic relations, see <http://www.somalilandgov.com>

with the Republic of South Africa, Ghana, Uganda, the United States of America, the United Kingdom, Sweden and Denmark.<sup>314</sup> In addition, the European Union supports Somaliland financially.<sup>315</sup> These examples are not but mention few when it comes to Somaliland's capacity of entering into relations with the outside world.<sup>316</sup>

Additionally, apart from the Convention of Montevideo, modern international requires other criteria for statehood.<sup>317</sup> Respect for human rights and the assurance of minority rights including self-determination and generally the promotion of the democratic rule of law are among these new conditions.<sup>318</sup> As Dugard explains, 'states in recent times have alluded to respect for human rights and self-determination as a precondition for the recognition of statehood.'<sup>319</sup> Luckily, the Constitution of Somaliland is founded on number of noble principles that sufficiently addresses the above requirements.<sup>320</sup> Amongst these principles: separation of powers, multiparty system, free and fair elections, respect for the rule of law and the promotion of fundamental human rights.<sup>321</sup> Human Rights Watch has observed this fact stating that:

Somaliland has done much to build the foundations of democratic governance grounded in respect for fundamental human rights. In 2003 and 2005- in June 2010-, it held competitive and credible national elections, including parliamentary polls that put the territory's House of Representatives firmly in the hands of the political opposition. There is a vibrant print media and an active and independent civil society.<sup>322</sup>

## **b) Is the case of Somaliland about Secession?**

The second legal argument that may justify the non-recognition of Somaliland is to claim that Somaliland seeks illegitimate secession.<sup>323</sup> This argument is based on the assumption that Somalia functions as a state and accordingly granting any recognition to Somaliland violates the territorial integrity of Somalia and

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<sup>314</sup> [www.hadhwanaag.com](http://www.hadhwanaag.com) ( 19 Sept 2010)

<sup>315</sup> Shinn ( n 209 above)

<sup>316</sup> For example though the Arab countries oppose the Somaliland separation from Somalia, number of these countries recently expressed their interest in building new relations with Somaliland. Among these Qatar, Kuwait and the United Arab Emirates [www.hadhwanaagnews.com](http://www.hadhwanaagnews.com) ( accessed 21 Oct210)

<sup>317</sup> Dugard ( n 83above)

<sup>318</sup> Dugard (n 83above) 89.

<sup>319</sup> Dugard ( n above) 88.

<sup>320</sup> The Constitution of the Republic of Somaliland (2001) [http://www.somalilandlaw.com/somaliland\\_constitution.htm](http://www.somalilandlaw.com/somaliland_constitution.htm) ( accessed 29 June 2010)

<sup>321</sup> See chapter two of the Constitution of Somaliland above.

<sup>322</sup> Human Rights Watch ' Hostages to peace: Threats to human rights and democracy in Somaliland' (2009) at <http://www.hrw.org/node/84298> ( accessed 11 October 2010)

<sup>323</sup> Somaliland Republic submission ( n above)

consequently dismembers Somalia from the international community.<sup>324</sup> Secondly, the proponents of this view argue that Somaliland can seek internal self-determination instead of external.<sup>325</sup> This argument is baseless because it ignores the political vacuum, the lawlessness, the anarchy and the social chaos that prevail Somalia today.<sup>326</sup> Thus, any argument regarding the relationship between Somalia and Somaliland should depart from dissolution of union point of view instead of secession let alone illegitimate secession.

### 4.3.2 The political question

The geopolitical position of Somaliland is such a one that attracts both regional and international interests.<sup>327</sup> The reason is, Somaliland locates in one of the most strategic regions in the world; the Gulf of Aden.<sup>328</sup> The Gulf of Aden links the three major continents of the world; Asia, Africa and Europe.<sup>329</sup> The Gulf of Aden is strategic primarily for trade reasons because it is the biggest trade route in the world through which 16,000 commercial vessels cruise yearly.<sup>330</sup> In addition, most countries in the Gulf region are rich with oil and thus they need to channel their exports through the Gulf of Aden to the outside world.<sup>331</sup> Secondly, the Gulf of Aden is important for security reasons.<sup>332</sup> The conflict in the Middle East, disputes around the Nile waters, the war against terrorism and recently the problem of piracy all has its impact on the determination of the case of Somaliland.<sup>333</sup> This means that there are multiple

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<sup>324</sup> As above.

<sup>325</sup> Eggers (n 15 above) 383.

<sup>326</sup> A.-H Sievers and D Spilker, *Somalia: current conflicts and new chances for state-building* (2008) at <http://www.boell.or.ke/downloads/Somalia-engl-i.pdf> (accessed )

<sup>327</sup> See for example, Commission of the European Communities 'Strategy for Africa: An EU regional political partnership for peace, security and the development in the Horn of Africa' (2006) at <http://europafrika.files.wordpress.com/2008/05/10-06-eu-africa-regional-partnership-on-peace-and-security.pdf> (accessed 9 October 2010), MA Varner 'Strategic Importance of Africa Command' (2007) at <http://www.thepresidency.org/storage/documents/Vater/Varner.pdf> (accessed 9 October 2010.)

<sup>328</sup> See BJ Kimani 'Strategy for the Horn of Africa' (1993) at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA264860> (accessed 9 October 2010.)

<sup>329</sup> The Canal--- links the Mediterranean sea to the red sea through the Gulf of Aden and accordingly creates the connection between three continents.

<sup>330</sup> R Beckman 'Somali Piracy- Is international law part of the problem or part of the solution?' (2009) at <http://www.rsis.edu.sg/research/PDF/Beckman%20Somali%20Piracy%20RSIS%2023%20Feb%202009.pdf> (accessed 19 June 2009)

<sup>331</sup> Kimani (n 328 above) 1.

<sup>332</sup> See for example, CC Osondu 'The Horn of Africa and International Terrorism: the Predisposing Operational Environment of Somalia.' (2008) <http://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/70/OSONDU,%20thesis.pdf?sequence=3> (accessed 10 October 2010.)

<sup>333</sup> Jhazbhay (n 302 above) 247.



stakeholders in relation to the non-recognition of Somaliland. In the following, let us consider the most important of these stakeholders.

### a) The AU

The major opponent to the case of Somaliland is the AU.<sup>334</sup> African leaders are sceptical about borders and any claim that questions it.<sup>335</sup> In view of the AU, recognizing Somaliland sets a precedent for similar claims and therefore such recognition ‘may trigger a Balkanization’ of the entire continent.<sup>336</sup> This is argument an ill-founded for several reasons. First, it is not reasonable to simply argue that the case of Somaliland cannot be considered because of its secessionist motive. The problem of Somaliland is unique and truly new to Africa.<sup>337</sup> We are dealing with *de facto* state for 20 years besides a failed state the same period.<sup>338</sup> The AU itself sent a fact-finding mission to Somaliland that recommended that ‘objectively viewed, the case should not be linked to the notion of “opening a Pandora’s box”’. As such, the AU should find a special method of dealing with this outstanding case.’<sup>339</sup> Secondly, OAU/AU has already recognized similar secessionist claims, which rebut the argument that Somaliland sets a precedent for the rest of African. By recognizing the Western Sahara and Eritrea as independent states and by lobbying for the secession of the South Sudan, the question of whether secession is acceptable in Africa is settled. Thirdly, In addition, Somaliland cannot sustain its current situation without international recognition.<sup>340</sup> There is a great possibility that Somaliland can collapse like the rest of Somalia if it is not granted urgent recognition.<sup>341</sup> Such collapse will have wider ramifications to the entire continent and not only to Somaliland.<sup>342</sup>

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<sup>334</sup> Schoiswohl ( n above)173.

<sup>335</sup> See 160 above.

<sup>336</sup> See Shinn ( n 209 above), Carroll & Rajagopal ( n above) 679.

<sup>337</sup> An AU fact-finding mission to Somaliland recommended that ‘the AU should be disposed to judge the case of Somaliland from an objective historical viewpoint and a moral angle vis-à-vis the aspirations of the people.’ Para 10 of the AU Mission Report.

<sup>338</sup> See section 4.3.1 (a).

<sup>339</sup> The AU Mission Report, Para 8.

<sup>340</sup> Apart from the maintenance of peace, Somaliland lacks institutional capacity, which enables it to respond to the challenges that it faces due to the lack of recognition because it cannot transact with the outside world since it lacks official recognition. See Poore (n above) 134.

<sup>341</sup> The ongoing conflict in Somalia affects Somaliland since the borders are not properly drawn yet. For example there have been some serious attacks that targeted Somaliland including acts of terrorism and piracy incidences. See Schoiswohl (n 27 above) 178.

<sup>342</sup> The problem of piracy is an example. Criminals of piracy have already been charged as far as in the United States, see Jurist- Legal News & Research ‘Somali Pirates’ (2010) <http://jurist.org:80/paperchase/2010/09/kenya-court-convicts-7-more-somali-pirates.php> ( 27 Oct 2010)



## **b) League of Arab States**

The League of Arab States is the second major stakeholder that plays a critical role in the non-recognition of Somaliland.<sup>343</sup> There are number of reasons for the Arab countries concern about Somaliland' recognition. Firstly, Somalia as a whole was a member country of League.<sup>344</sup> Consequently, any partition of a member country is contrary to the spirit of the Charter of the League.<sup>345</sup> Secondly, there is a great fear that Israel might use the strategic military-base of Berbera\* for military purposes, which is a sensitive issue to the security of the Arab countries.<sup>346</sup> Thirdly, there is another concern that Ethiopia might be the mastermind behind the secession of Somaliland because it has interests in the Somaliland's waters since Ethiopia is a land-locked country.<sup>347</sup> This scenario is also fearful to Arab countries because they consider Ethiopia the African twin of Israel.<sup>348</sup> One of the reasons, is that there is a potential dispute between Ethiopia and the most populous Arab country; Egypt about the Nile river waters.<sup>349</sup> Therefore, Somalia should remain stronger and united in order to play an effective regional role that could mitigate Ethiopia's threats to the Egyptian interests.<sup>350</sup>

## **c) International players**

Internationally, two major powers are notable here; the US and the EU.<sup>351</sup> It seems that the case of Somaliland confuses these two powers and consequently, their attitude is contradictory. On one hand both, the EU and the US are worried about the instability of Somalia and at the same time so keen about the stability of Somaliland.<sup>352</sup> On the other, both the US and the EU have special relations with the

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<sup>343</sup> See Shinn ( n 15 above)

\*Berbera which, is one of the oldest Somaliland cities, locates in the red Sea. It is the heart of the Somaliland Economy; it hosts the main seaport of the Country.

<sup>346</sup> There is a belief that Israel wishes to be amongst the first countries to recognize Somaliland and for this reason, Israel might establish good relationship with Somaliland. See A. Al -Mutairi ' Arabs losing Somaliland to Israel' ( 2010) [www.Somalilandpress.com](http://www.Somalilandpress.com) ( accessed 10 Oct 2010)

<sup>347</sup> Ethiopia uses the main Somaliland seaport of Berbera for its imports and receiving international aid.

<sup>348</sup> Al-Mutairi above.

<sup>349</sup> Jhazbhay (n 45 above) 166.

<sup>350</sup> As above.

<sup>351</sup> For the EU perspective, see Jhazbhay (n 45 above) 174. For the US, Shinn expressed that the US has a great sympathy for Somaliland but cannot recognize it, because western countries 'tend to defer to African Union when issues concerning boundary change' cited in, International Crisis Group Report (n 22 above) 13.

<sup>352</sup> Both the US and the EU support the TFG as well as Somaliland!

other stakeholders in the case of Somaliland; the African and Arab countries.<sup>353</sup> This means that the US and the EU have greater interests both in Africa and the in the Arab world.<sup>354</sup> Therefore, neither the US nor the EU wishes to harm its relations with these regional players by recognizing Somaliland, because taking such step will mean sacrificing greater interests in favour of a tiny country; Somaliland.<sup>355</sup> Hence, in order to promote the case of Somaliland, the EU and the US need to whisper in the deaf ears of the Arab and the African leaders.<sup>356</sup> It is clear then that the people of Somaliland are suffering not because they are guilty of illegitimate secession but because they are victims of contradicting interests of the world major powers.

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<sup>353</sup> See Shinn note 15 above.

<sup>354</sup> International Crisis Group 'Somaliland: Time for African leadership' (2006) Africa Report N0. 110 <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somaliland/Somaliland%20Time%20for%20African%20Union%20Leadership.ashx> (accessed 1 October 2010)

<sup>355</sup> For example, Poore argues that 'the lack of Arab support for Somaliland's cause makes United States and the United Kingdom reluctant to risk damaging their ties with the Middle East' Poore (n28 above) 121.

<sup>356</sup> The view of the former US ambassador to Ethiopia; David Shinn explains this point. See (n15 above)

## **Chapter five**

### **Conclusion and recommendations**

#### **5.1 Conclusion**

The above discussions examined whether Somaliland has a legitimate claim under international law to be recognized as a separate state from Somalia. The study discovered that legally speaking Somaliland has a legitimate case under the umbrella of the right to self-determination. This is by considering two different contexts in which a right to self-determination can be claimed. Firstly, self-determination is a legal right belong to peoples under colonization. To be free from colonialism, such people must be given a suitable opportunity to express their will freely in determining their economic and political status without any interference. Somaliland was not given a proper opportunity to be free from Britain. This was because the process of decolonization was interrupted by the haste unification with Somalia on 1<sup>st</sup> July 1960 only after 5 days of Somaliland's independence. Secondly, international law grants a right external self-determination to any group whose rights were violated by the state to which they are part. Accordingly, even if we assume that Somaliland is an integral part of Somalia, it has the right to secede because its human rights were violated. Between 1981 and 1991, Somalia's central government executes not less than 50, 000 Somalilanders. There is no human rights violation greater than killing such number of innocent human beings.

Another dimension that sufficiently justifies Somaliland's claim to statehood is that the Republic of Somalia was a union between two sovereign states; Somalia and Somaliland. The former failed and the latter fully functions. Therefore the Union dissolved. In such circumstances, international law permits the functioning part to restore its original territories. This is what Somaliland did in 1991. Furthermore, international law requires such part seeking recognition to fulfil the criteria of statehood under both the Convention of Montevideo and modern international human rights law. Under the Montevideo Convention requirements, Somaliland has a permanent population of 3.5 million and a defined territory of 137,600 square kilometres. Somaliland has a government, which effectively controls its territory, maintains security, provides basic services, holds free and fair elections and punishes

criminals such as pirates who are threat to the international trade in the Gulf of Aden. Finally, Somaliland has the capacity to enter into diplomatic relations with other states. It has number of liaison offices in several countries such Djibouti, Yemen and France. Under the modern international law requirements for statehood, Somaliland has a good constitution that guarantees fundamental human rights with an independent judicial body, which monitors its implementation. International organizations involved in the promotion of human rights such as Human Rights Watch and Amnesty International, praised the Constitution of Somaliland.

However, the question that begs answer is why Somaliland remains unrecognized despite its full completion of all legal requirements for statehood. The study answered this question in that the main obstacles to the recognition of Somaliland are political interests other than legal justifications. There are number of stakeholders in the political game responsible for the non-recognition of Somaliland. These stakeholders include the Arab League, Unites States, European Union and the African Union. However, the AU is the biggest opponent to the recognition of Somaliland. This is because the international community left all matters concerning African borders for the AU. The problem is that the AU does not treat the case of Somaliland objectively. It simply argues that the recognition of Somaliland has the potentiality to balkanize Africa. Put differently, the AU argues that such recognition will open Pandora's Box for similar secessionist claims. This argument is rebutted by the OAU recognition of Eritrea, Western Sahara and the AU advocacy for the expected secession of the South Sudan at the beginning of 2011.

## **5.2 Recommendations**

Somaliland survived from the anarchy into which Somalia fell for the last 20 years. However, the situation in Somalia is getting worse day after day. The conflict in Somalia is expanding to take new dimensions such as the emergence of the piracy phenomenon. All what is happening in Somalia has a direct impact on Somaliland. Additionally, Somaliland has its own internal problems such as the lack of infrastructure, poor services delivery and an unemployment that devastates the youth of Somaliland. Somaliland cannot respond to these challenges effectively. This is because Somaliland is under a siege imposed upon it by the lack of recognition. Due to the lack of recognition, Somaliland cannot trade with the outside world, it cannot

barrow money from international financial institutions and the people of Somaliland cannot travel because their passports are not recognized and they do not have alternative documents.

The totality of these factors tell us one thing: that Somaliland can collapse like the rest of Somalia then there will be a disaster. This disaster will have serious ramifications not only to Somaliland but also to the whole region of the Horn of Africa and consequently to the entire continent and to the world. Therefore, the AU has a moral obligation to change its attitude and take positive steps towards Somaliland. As has been previously recommended to the AU by its own fact-finding mission to Somaliland and by the International Crisis Group, the AU should:

- a) be disposed to judge the case of Somaliland from an objective historical viewpoint and a moral angle vis-à-vis the aspirations of the people;
- b) if not recognition, at the minimum level, the AU assign Somaliland an interim observer status which will allow Somaliland to:
  - (i) be present for open sessions of the AU relevant to Somaliland's status;
  - (ii) have access to non-confidential AU documents with the status issue;
  - (iii) participate in meetings to which Somaliland invited without voting; and
  - (iv) to present its argument before the AU official meeting.
- c) Finally, given the acute humanitarian situation prevailing in Somaliland, the AU should mobilize financial recourses to help the government of Somaliland to achieve a better standard of living for its citizens and more specifically those were impoverished by the lack of sounding socio-economic infrastructure under which Somaliland has been living for the last two decades.

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