FOREIGN POLICY AS A GROUND FOR EXTERNAL SELF DETERMINATION; A CRITICAL VIEW OF BREXIT AND SCOTTISH NATIONALISM

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Abstract

Self determination has been codified as a right in international law. The root of this right is however found in basic human desires. Much contention surrounding the right to self-determination has been concerned with domestic policy. This work therefore sets out to show that the foreign policy of a state may constitute a valid ground for the exercise of self-determination, in the light of the call for an independence referendum by the Scottish First Minister in reaction to the United Kingdom's EU Referendum (Brexit). This work finds that internal self-determination is usually the first option. Where this is not possible, external self determination or secession happens regardless of the absence of consensus on the existence of a right to that effect. It is therefore recommended that states should ensure that their foreign policies do not infringe on any of the benefits or guarantees of the right to self determination. This work adopts a doctrinal approach and it is normative in the sense that it attempts to dispel ambiguities concerning a core norm of international law. Reliance is made on primary sources such as statutes and case law as well as secondary sources like books, articles and internet resources.

Keywords: Self determination, Foreign policy, Brexit, Scottish Nationalism

1. Introduction

Starting with the UN Charter,[2] the principle of self-determination has been documented in a number of legal documents in the international community. Much self-determination discourse and contention has been concerned with cases of deprivation of one kind or another. But what has not up till now been expressly advanced as a reason for self-determination is foreign policy. Admittedly, foreign policy may lead to exclusion and other forms of oppression that have been used as a basis for exercising the right to self-determination in the past, but the peculiarity of recent developments and this work is the centrality of foreign policy as the trigger for the exercise of the right of self-determination.

Recent events in the United Kingdom have seen a majority of UK citizens vote to support the exit of the UK from the European Union. However, in this vote, 62% of Scottish voters voted to stay in the EU. Scotland, whose earlier referendum to decide whether or not it

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[2] UN Charter 1945 art. 1(2).

stays within the UK had resulted in favour of a decision to remain in the UK now considers conducting another referendum. The reason given is that it does not desire to be pulled out of the EU against its wish- a foreign policy decision. The question therefore is can the UK's decision to leave the EU constitute a valid ground for Scottish self-determination. Or could such an action within the context of the UK even be regarded as self-determination? This paper attempts to answer these questions which also have relevance in many other countries.

2. The Development of Self Determination

Self-determination in one form or another has been with man for long, probably since the beginning of the existence of tribes. The Israelites of biblical times desired to be free from the oppression of Egypt when they were no longer free to live as they wished.[3] Thus, it is not an invention of modern legal actors or society. Rather, it is an innate human desire. However the initial assertion of the principle of self-determination in recent international relations is usually traced to the period after the First World War. The President of United States of America, Woodrow Wilson described national self-determination as "an imperative principle of action".[4]However, Wilson's attempt to incorporate self-determination into the Covenant of the League of Nations failed, and therefore this principle could not obtain the status of legal principle at that era.[5]Having said this, self-determination came to be acknowledged by documentation starting with the United Nations Charter of 1945. One of the purposes of the UN is stated in article 1(2) of the UN Charter as follows;

> 1(2) To develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace.

Although Rosalyn Higgins has expressed the opinion that the "peoples" contemplated by this provision are those within sovereign states[6], it is as a matter of fact an acknowledgment of the fact that self determination is not a right belonging to an artificial geographical territory such as states may sometimes be, but peoples with a peculiar identity. The UN Charter appears to have been referring to peoples within sovereign states as they were constituted, but that does not derogate from the fact that it refers to peoples and not territories. As a matter of fact, the Charter could be said to have been based on an assumption that states should be constituted with the consent of its peoples (even though this is often not the case).[7] But what can certainly be gleaned from these provisions is that the Charter without doubt established the principle of self determination as it applied to sovereign states.

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3 Exodus 3: 7-9.

4 Burak Cop and Dogan Eymirlioglu, 'The Right of Self Determination in International Law Towards the 40th Anniversary of the ICCPR and ICESCR', (Perceptions Winter 2015) 116-117.

5 Ibid 117.

6 Rosalyn Higgins, 'Self-determination and Secession', cited in Solomon Dersso, 'International Law and the Self Determination of Sudan', (Institute for Security Studies Paper No. 231, 2012) 1-2.

7 Patricia Carley, SELF-DETERMINATION Sovereignty, Territorial Integrity and the Right to Secession, Report from Roundtable held in Conjunction with the US' State Department Policy Planning Staff, Peaceworks No. 7, 1996 (1996, United States Institute of Peace) 1.

The 1960 UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples[8] went farther than the UN Charter in establishing the principle as a right in international law. Unlike the Charter which merely stated it as a principle, Article 2 of the Declaration states that;

> 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.

Again, it has been opined that since the declaration referred to those under alien subjugation, it did not provide for a right in respect of groups within sovereign states. And it is believed here that despite the limited scope of the declaration, it could not have granted a right uncommon to all peoples. This is seen in the phrase "all peoples". And this though qualified by the reference to people under subjugation acknowledges the popular nature of the right to self determination.

The American founding fathers provide an insight into the true source of the right to self determination. They declare as follows;

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by the creator with certain unalienanle rights, that among these are life, liberty, and the pursuit of happiness.- That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed...[9]

In the statement above, could be found a classification of rights. There is the personal right which is inalienable, and there is the people's right which comes into existence as a result of the pooling of individual personal rights. When individuals who have aggregated their personal rights to form a people's right, exercise that collective right by surrendering some of it to a government, there is in effect a social contract. A contract being by nature an agreement between two parties, this social contracting is clearly a demonstration of self-determination. And while a sovereign state or government created by social contract has the right to self-determination in relation to other states, it continues to derive this right from the people. So,

> …That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.[10]

[8] UN Resolution 1514 1960. This Resolution was adopted by the General Assembly with eighty-nine votes in favour, none against, and nine abstentions.
[9] American Declaration of Independence 1776.
[10] Ibid.

The American founding fathers had as a matter of fact gained inspiration from the principles established during the French Revolution. According to Sureda;[11]

> The history of self-determination is bound up with the history of the doctrine of popular sovereignty proclaimed by the French Revolution: government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong should be able to secede and organise themselves as they wish. This meant that the territorial element in a political unit lost its feudal predominance in favour of the personal element: people were not to be any more a mere appurtenance of the land.

The importance of the doctrine of popular sovereignty is supported by the preamble to the Constitution of the Federal Republic of Nigeria, 1999, which begins with the words "We the people of Nigeria".

It must however be said that the resolutions of the UN General Assembly are recommendatory and not binding. Following the 1960 UN Declaration, both the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, have confirmed self-determination as a right. And unlike the preceding UN Declaration these covenants have a binding force because they are multilateral treaties.[12] These two covenants share a common Article 1 which reads as follows;

> Article 1
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> 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.
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> 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, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
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> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

These covenants recognize the obligation on governments to ensure that their citizens enjoy certain rights such as freedom from discrimination,[13] the right to receive a fair share of

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11 Lea Brilmayer, 'Secession and Self Determination: A Territorial Interpretation', (1991) 16 Yale Journal of Internal Law 177, 180 citing A. Sureda, 'The Evolution of the Right of Self Determination' (1973) 17.

12 Burak Cop and Dogan Eymirlioglu, (n 4) 120-121.

13 ICESCR art 2(2), art 3; ICCCPR art 2(1), art 3, art 25.

resources[14] and particularly through work[15] and healthcare,[16] etc. Since these covenants are treaties, states may ratify them with reservations, for example, as to the meaning of self-determination. The 1970 UN Declaration on Friendly Relations also implicitly recognizes the people as the fountain of the right to self determination. This Declaration it has been argued is endowed with the status of a peremptory norm of international law because it was adopted by the UN General Assembly by a total consensus, that is, without any objection.[17] This declaration requires that states represent the interests of peoples within their territories irrespective of race, creed or colour. The principle of territorial integrity was by implication made subject to the requirement of true representation. Article 6(7) of the Declarations says that;

> Nothing in the foregoing paragraphs shall be construed as authorizing 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[18]

This Declaration also mentions the manner in which the right to self determination may be exercised which is "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people…"[19] While some may limit the applicability of this provision to peoples under colonialism, it is stated here that the right of a people to freely determine its political status cannot by any means be said to have expired after its first exercise of such right on the attainment of independence.

Despite this, states and other actors are very reluctant to expressly assert the right to secession as a form of self determination. This attitude is often supported by arguments about the meaning of "peoples" contained in the different relevant international legal instruments.[20]It has at different times been used to refer to the citizens of a nation-state, the inhabitants of a territory undergoing the process of decolonization, and an ethnic group.[21] Some have criticized the interpretation that equates "people" with "nation" because it is difficult to prove that a particular group corresponds to the totality of an ethnic group. On the other hand, interpreting people to mean an ethnic group creates concerns for multi-ethnic

14 ICESCR art 1(2); ICCPR art 1(2).
15 ICESCR art 6.
16 ICESCR art 12.
17 Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (Martinus Nijhoff Publishers, 2000) 34-35 cited Burak Cop and Dogan Eymirlioglu (n 4) 123.
18 The Vienna Declaration 1993 contains a similar provision.
19 Art 5(4).
20 Secession of Quebec [1998] 2 S.C.R 217, 123.
21 Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self Determination before and after Crimea', (2015) 91 International Law Studies 216, 225.

countries.[22] After the era of decolonization, scholars have sought to give a meaning to the word "people" which is devoid of ethnic connotations. Professor James Crawford advocates an approach which jettisons the word "people" in understanding the groups to whom the right of self determination accrues.[23] According to him;

> [t]he units to which the principle applies are in general those territories established and recognized as separate political units; in particular it applies to the following:
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> (a) trust and mandated territories, and territories treated as non-self-governing under Chapter XI of the [UN] Charter;
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> (b) States, excluding for the purposes of the self-determination rule those parts of States which are themselves self-determination units as defined;
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> (c) other territories forming distinct political-geographical areas, whose inhabitants are arbitrarily excluded from any share in the government either of the region or of the State to which they belong, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing; and
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> (d) any other territories or situations to which self-determination is applied by the parties as an appropriate solution.[24]

Crawford's classification which is designed to almost totally exclude the possibility of ethnicity-based claims does not take cognizance of practical realities. The category which allows self-determination for excluded groups is made unviable by the requirement of occupation of a distinct political-geographical area. This leaves room for strategic geographical permutations calculated to deprive certain groups of a right to self-determination if Crawford's classification should be applied. Thankfully, this is nothing but Crawford's opinion. This approach which admits a right of self-determination in relation to colonial territories artificially created by forcefully merging the territories of different ethnic groups but refuses to grant a post-colonial right of self-determination to these ethnic groups has been criticized as hypocritical.[25] And it is the view of this writer that such an approach sets the right scene for the operation of neo-colonialism. Proponents of this point of view generally deny a right to secession. Rather, they contend that if the requirements of internal self-determination are not met, then remedies should be sought under human rights law. However, this is not always the case and secession does happen. Currently, international law does not treat secession as an illegality despite the reluctance to create or acknowledge a positive right of secession as forming a part of the right of self-determination in deserving circumstances. Secession is treated as a fact. In three conferences held between 2000-2001, involving lawyers from the United States, Europe, and Russia, the lawyers from the United States were of the view that self-determination does not necessarily require secession but

22 Ibid.
23 James Crawford, The Creation of States in International Law (2nd ed), 2006, 127.
24 Ibid.
25 Lea Brilmayer (n 11) 182-183.

could be achieved through internal self-determination through means such as devolution, autonomy, local government among others.[26] European lawyers on their own part believed that there was a presumption against secession in contemporary international law and against the recognition of states that emerge as a result of a contested secession.[27] On the other hand, Russian lawyers saw secession as the ultimate form of self-determination, though they were of the opinion it can only be rightfully resorted to in extreme circumstances.[28]

The 1964 OAU Declaration of the Assembly of Heads of State and Government entrenched the doctrine of *uti possidetis*.[29] By this doctrine, administrative boundaries will become international boundaries when a political subdivision or colony achieves independence.[30] However, "*uti possidetis* is not a peremptory norm of international law, since states can derogate from it by common consent, as was often the case in Latin America, but also in Africa. In other words, *uti possidetis* is perceived as the basis of delimitation between newly constituted states until and unless those states decide to adopt different boundaries."[31] Encouragingly, the perception of the right to self-determination in Africa has been made more attractive by the approach adopted by the African Commission on Human Rights pursuant to the African Charter on Human and Peoples Rights 1981. Article 20 of the African Charter provides that;

> Article 20
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> 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
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> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
>
> 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

In *Congres du Peuple Katangais v. Zaire*,[32] the first case the African Commission ever handled, the president of the Katangese People's Congress requested the African

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26 Stanislav V. Chernichenko & Vladimir S. Kotliar, *Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends*, *in* SECESSION AND INTERNATIONAL LAW: CONFLICT AND AVOIDANCE – REGIONAL APPRAISALS 82-83 (Julie Dahlitz ed., 2003) cited in Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self Determination before and after Crimea', (2015) 91 International Law Studies 216, 231.

27 Ibid.

28 Ibid.

29 Solomon Dersso, 'International Law and the Self Determination of Sudan', (Institute for Security Studies Paper No. 231, 2012) 3; 1964 OAU Resolution on Border Disputes among African States, OAU document AHG/Res. 16(I).

30 Bryan Garner(ed.), *Black's Law Dictionary*, (10th edn. Thomson Reuters 2014) 1780.

31 Giuseppe Nesi, 'Uti Possidetis Doctrine', *Max Planck Encyclopedia of Public International Law*(2012) 626, 627.

32 Katanga Case, Communication 75/92, 8th Annual Activity Report (1994–1995).

Commission to recognize the independence of Katanga pursuant to Article 20 of the African Charter. The African Commission identified two different scopes of self-determination. The first was the self determination of a state, in this case the entire of Zaire, and the second the self determination of a group of people. Although the Commission did not grant the request of the Katangese People's Congress, its treatment of the case confirms the fact that independence is a legitimate means of achieving self-determination by sub-national groups in appropriate circumstances. It explicitly affirmed this option. The International Court of Justice (ICJ) *Western Sahara Advisory Opinion* given in 1975 recognized "the validity of the principle of self-determination".[33] In the East Timor case, the ICJ said that self-determination is "one of the essential principles of contemporary international law"[34], and also added that it is an *ergaomnes* obligation.[35] An example of a circumstance calling for external self-determination is that of South Sudan whose people endured severe deprivation and hardship under the domination of the northern leaders and people for decades. The self determination of South Sudan has helped to crystallize secession as an option in the realization of self-determination given the right circumstances. From slave and ivory raids before British rule to systematic marginalization under the British, South Sudanese had been denied basic rights and participation in the society. This marginalization continued through transition to self government.[36]Sharia Law was introduced in the whole of Sudan including the Christian south. However, in 1994, there was finally an acknowledgment of the principle of self determination with the signing of a Declaration of Principles. The Declaration was made possible with the signing of a Comprehensive Peace Agreement in 2005 which brought an end to the war.[37] This Agreement established the basis for the referendum of January 2011 in which South Sudanese voted for independence. The case of Sudan clearly demonstrates the achievement of self determination through independence or secession.

President Woodrow Wilson of the United States believed that self determination mirrored American ideals of democracy and considered it as a wider manifestation of the American principle of political fairness.[38] As early as the period after the First World War, he identified both internal and external forms of self determination. He however avoided discussing external self determination.[39] After asserting that "all nations had a right to self determination"[40] in his Fourteen Points, he later said that "when I gave utterance to those words, I said them without the knowledge that nationalities existed, which are coming to us day after day."[41] This attitude has continued among statesman and governments to this day. Obviously this is because they are cautious about the impact an open acknowledgment of the

[33] Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self Determination before and after Crimea', (2015) 91 International Law Studies 216, 223.
[34] Ibid.
[35] Ibid.
[36] Solomon Dersso, (n 28) 5-7.
[37] Solomon Dersso, (n28) 7.
[38] Lea Brilmayer, (n 11) 180.
[39] Patricia Carley, 'SELF-DETERMINATION Sovereignty, Territorial Integrity and the Right to Secession, Report from Roundtable held in Conjunction with the US State Department Policy Planning Staff, Peaceworks No. 7, 1996', (1996, United States Institute of Peace) 3.
[40] Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self Determination before and after Crimea', (2015) 91 International Law Studies 216, 222.
[41] Ibid.

right to secession would have on the stability of the international community no matter how qualified such an acknowledgment may be. The result is that external self determination has never been expressly declared legal or illegal by any international legal instrument. However, there are numerous cases where secession has been successfully pursued with the help of prominent members of the comity of nations. These include the case of the secession of Bangladesh from Pakistan, South Sudan from Sudan etc.

Proponents of the right to secession usually rely on the "safeguard clause" contained in article 5(7) of the UN Declaration on Friendly Relations 1970. The clause reads as follows;

> Nothing in the foregoing paragraphs shall be construed as authorizing 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The same provision is contained in the Vienna Declaration 1993. In *SecessionofQuebec*,[42] the Supreme Court of Canada stated that "[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances . . . ."[43] It is agreed in consonance with this judicial pronouncement that this right should be available only under certain circumstances. Similarly, some believe that the fact that the ICJ did not in the *KosovoAdvisoryOpinion*[44] declare the declaration of independence by Kosovo to be illegal is in itself a recognition of a remedial right of secession.[45]

4. Origins of Scottish Involvement in the United Kingdom

The United Kingdom of Great Britain and Ireland was formed in 1801. This included England, Scotland, Ireland, and Wales. There was a central government headed by a common monarch and a single parliament. Parts of Ireland achieved independence in 1922[46] and the Kingdom was renamed the Kingdom of Great Britain and Northern Ireland. But before this union, there had been an earlier union between England and Scotland in 1707 by an earlier Act of Union. The prospect of a union came into being after the Scottish monarch also ascended the English throne in 1603. The two countries however remained under separate governments until 1707 when the parliaments of both countries passed the Act of Union, thereby forming the kingdom of Great Britain.[47]

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42 Secession of Quebec, [1998] 2 S.C.R. 217, 123 (Can.).
43 Ibid.
44 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 82 (July, 22).
45 Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self Determination before and after Crimea', (2015) 91 International Law Studies 216, 230.
46 The six northern counties remained a part of the United Kingdom as Northern Ireland.
47 Henry G. Weisser and Mark Kishlansky, 'United Kingdom', *Microsoft Encarta Premium 2009*.

Some features of this arrangement included a single national administration, a single parliament, free trade, and uniform taxes.[48] From that time, Scotland was administered as a part of the United Kingdom with 59 seats in the House of Commons. However, the Scottish National Party had brought the issue of independence back into to the picture in the 1960's. The Labour Party also called for devolution of powers all through the 1970's, and in 1979 a referendum was held to resolve the question of devolution. Although the referendum reflected a desire by a majority of voters for devolution, the majority which represented 52% as against 48% who opposed devolution only constituted 32.9% of the registered electorate and therefore devolution could not be acheived.[49] During the 80's and early 90's when the Conservatives were in power in the UK, devolution was not favoured, but with the coming to power of Tony Blair and the Labour Party in 1997, devolution once again came into serious consideration. Tony Blair said that devolution would "lance the boil of independence".[50] By virtue of the Scotland Act of 1998, a separate parliament was created for Scotland with powers to legislate on devolved matters.[51] The Scottish executive is constituted by the party with parliamentary majority. From 1888 to 1999, the day-to-day administration of Scotland was mainly handled by a British Cabinet ministry headed by the Secretary of State for Scotland. However since the coming into being of the Scottish parliament in 1999, much of the responsibilities formerly handled by the cabinet ministry are now handled by the parliament. But some key areas remain under the control of the London government. One of these, which is central to this work is foreign affairs.[52]

5. 'Brexit' and Scottish Nationalism; Key Questions

Pre-1707 resistance to the union with England did not end after the union. Both Jacobite and Republican influences combined with earlier desires for Scottish independence which were kindled by the Scottish War of Independence.[53] These biases persisted in Scotland up till the time of the formation of the Scottish Nationalist Party in 1934 as a fusion of the left of centre NationalParty of Scotland and the right-wing ScottishParty.[54] The SNP won a majority in the Scottish Parliament in 2011. The party had promised in its manifesto to conduct a referendum on Scottish independence, and in 2014 the referendum took place.[55] A majority of voters however opted to remain with the UK. On the 23rd of June 2016, another referendum took place, this time to decide whether or not the UK should remain a part of the EU. This referendum ended in favour of a decision to leave the EU. But a majority of Scottish voters, 62% precisely, had voted to remain within the EU, and as a result the Scottish First Minister, Nicola Sturgeon has said that there could be another referendum on Scottish

48 Both countries still maintained separate legal traditions and official churches.
49 Belen Olmos Guipponi and Hannes Hofmeister, 'The "Day After" the Scottish Referendum: Legal Implications for other European Regions', (2015) 36 Liverpool Law Rev 211, 212-213.
50 Ibid 213.
51 These are issues over which the national government in London has delegated power to the Scottish parliament. Matters falling outside devolved matters are referred to as reserved matters over which London still has jurisdiction.
52 See schedule 5 of the Scotland Act 1998. Others include defence, welfare, and employment policies.
53 'From Jacobitism to the SNP: the Crown, the Union, and the Scottish Question', The Stenton Lecture 2013, 9-17.
54 Ibid 5.
55 Iain Halliday, 'The Road to the Referendum on Scottish Independence; the Role of Law and Politics', 2.

independence.[56] This situation leads us to ask certain questions concerning the right to self-determination with a view to determining whether or not a foreign policy issue could be a valid ground for the exercise of this right. First, can a Scottish independence referendum be regarded as an exercise of the right to self-determination? Second, does the decision of the UK to exit the EU constitute a foreign policy issue? Third, what particular characteristics must foreign policy have in order to be regarded as violating the guarantees provided by the right to self-determination? These questions are asked against the background knowledge of the evolutionary nature of the right to self-determination which has seen it being used as a basis for secession in places like East Timor and South Sudan.

5.1 The Scottish Independence Referendum; an Exercise in Self Determination or Not

In 1995, the Scottish Constitutional Convention was convened. The *Claim of Right for Scotland* which was adopted at the beginning of the Convention referred to "the sovereign right of the Scottish people to determine the form of Government best suited to their needs."[57] According to David Sinclair, even the opponents of Scottish independence concede this fact.[58] He quotes Margaret Thatcher, the former British Prime Minister thus;

> As a nation, they have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way, however much we might regret their departure.[59]

Therefore the Scottish independence referendum was clearly an exercise in self determination. Scotland joined the UK by an act of self determination, the ratification of the Treaty of Union, and cannot by its membership of the union be considered to have lost that right. As a matter of fact, Brexit itself has also been described as an exercise of the right of a state to self determination. Flowing from that, it could be argued that as the UK is to the EU, so is Scotland to the UK. This is so even though the union within the EU is not as close as that between Scotland and London. And while the EU is a union of states, the UK is basically a union of peoples. This is because Scotland does not have a wholly independent government even though it maintains a strong national identity. Thus, while the UK exercised the right of a state to self determination, Scotland exercised the right of a people to the same right. As earlier mentioned, self determination is fundamentally a people's right, but states have a right to self determination in relation to other states, which must be regarded- at least theoretically- as derived from the people(s) making up the state.

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[56] BBC, 'Sturgeon: Independence option stay "on the table"', (BBC, September 2, 2016) <http://www.bbc.com/news/uk-scotland-scotland-politics-37255679 accessed September> 11, 2016.

[57] David Sinclair, 'Issues around Scottish Independence', (The Constitution Unit 1999) 6 citing the Scottish Constitutional Convention, *Scotland's Parliament Scotland's Right* (Scottish Constitutional Convention 1995) 10

[58] David Sinclair, 'Issues around Scottish Independence', (The Constitution Unit 1999) 6.

[59] Ibid.

5.2 Is 'Brexit' a Foreign Policy Issue?

The Scotland Act which established the Scottish Parliament was passed as an Act of the Parliament in 1998. This Act devolved certain legislative competencies to the Scottish Parliament. Under Schedule 5 of the Act which is entitled "Foreign Affairs", the United Kingdom is given responsibility for conducting international relations on behalf of Scotland. Scotland however is given the power to implement norms of international law within the Scottish legal regime.[60] Paragraph 7 of Schedule 5 provides as follows;

> 7(1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters. (2) Sub-paragraph (1) does not reserve—(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law.

Relations with the EU and its institutions clearly fall within international relations. The implications of Brexit also fall within other foreign policy areas like international trade and international development assistance and co-operation. And having determined that Scottish independence referendums are exercises in self-determination, and that Brexit is a foreign policy issue, it can therefore be concluded that the desire of the Scottish ruling party to conduct a fresh independence referendum in reaction to Brexit, recognises another dimension in the interpretation of the extent of the right to external self-determination in terms of what may trigger its use. But how could this be justified? In other words, what kind of foreign policy should be regarded as justifying a resort to external self-determination?

5.3 Foreign Policy Formulation and the Guarantees of the Right to Self Determination

In order to be able to answer the question as to what kind of foreign policy should justify an application of the right to self-determination in its secessionist incarnation, one has to identify and understand the securities provided by the right. When these securities or safeguards are recognized, then one can go on to consider whether a particular foreign policy of government is in breach of any of these securities in such a way as to necessitate a recourse to external self-determination. This calls for a reference to relevant international law instruments and cases.

First of all, Article 1(2) of the UN Charter conveys the message that the right of self-determination guarantees equal rights for all persons and groups of people. Again, from the shared Article 1 of the ICCPR and ICESCR, we see that in addition to the guarantees in the 1960 UN Declaration, self-determination secures the right to resource control. Other rights secured by the covenants include mandatory and equal access to minimum living standards and opportunities,[61] freedom from discrimination,[62] right to life,[63] right to liberty[64] etc. The

[60] Belen Olmos Guipponi and Hannes Hofmeister, (n 49) 213.
[61] ICESCR art 11, 9, 6.
[62] ICESCR art 2(2), art 3; ICCCPR art 2(1), art 3, art 25.

1970 UN Declaration on Friendly Relations and the African Charter on Human and People's Rights also affirm rights like freedom to determine political status,[65] freedom from domination,[66] and use of force which deprives a people of the right to self-determination.[67] Thus, any foreign policy of any state which deprives a people within that state of the above-mentioned rights and any other right guaranteed by the right to self-determination, shall be a valid ground for the exercise of self-determination by such deprived people, and if the circumstances be such that an internal exercise of the right would not provide an adequate remedy, then they may resort to external self-determination. In the case of Scotland, Brexit deprives Scotland of the freedom to freely determine its political status and all other benefits that may come with such determination, by belonging to the EU.

7. Recommendations

Despite the fluctuating political treatment of self determination, its true legal nature has never been in doubt. In the history of international law and relations, states for different reasons have been cautious about the interpretation of the right to self-determination. This is because they have always sought not to create a situation which is unfavourable to their political interest. For example, a state would not support an interpretation that justifies a secessionist movement within its sphere of influence.[68] India for instance has a number of separatist self-determination movements in its North East region,[69] and does not accept a secessionist interpretation of self-determination.[70] At the same time another state whose foreign policy is more militaristic in nature and is likely to make more gains in international affairs through war, might support an interpretation that permits secession. This might explain why the principle of self-determination found its way into the UN Charter at the instance of the Soviet Union.[71] Since the time of Lenin, Russia had been an advocate of the right to self-determination and it lent great support to anti-colonial movements. Russia stood to profit from decolonization because most of its rivals were colonial powers and decolonization meant that it could expand its influence in decolonized territories. During the Cold War, the Soviet Union maintained a more militaristic stance and thus stood to gain more through direct military expansion or proxy wars. Even so, the position of the Soviet Union, and subsequently Russia, on self determination, has not been consistent. This can be seen from the divergent attitudes towards Kosovo[72] on one hand and Crimea on the other.[73]

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63 ICCPR art 6.
64 ICCPR art 9.
65 United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States art 5(1).
66 African Charter on Human and Peoples' Rights art 19.
67 UN Declaration on Friendly Relations art 1(7).
68 For example India's reservation to the interpretation of the right to self determination under articles 1 of the ICCPR and the ICESCR. India states "…that 'the right of self determination' appearing in those articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent states…"
69 Maling Gombu and Julie Buragohain, 'Internal Self Determination: an Alternative to the Secessionist Movements in India's Northeast', (1998) 10 The Student Advocate 81.
70 Burak Cop and Dogan Eymirlioglu, (n 4) 122.
71 Ibid 117.
72 Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self Determination before and after Crimea', (2015) 91 International Law Studies 216, 234-280.

The same can be said about the official positions western powers like the United States and the United Kingdom concerning these two territories.[74] As a matter of fact, politics has long undermined the effective operation of the right of self-determination. This was the case with the victorious powers in World War 1, who rather than partition the colonies of the defeated countries according to the principle of self-determination, entered into secret agreements to determine how the territories would be divided. This is despite the fact that President Woodrow Wilson of the United States, a major force behind the formation of the League of Nations, actively promoted the principle of self-determination. This is one of the problems this paper seeks to point out and hope that is resolved. It is strongly recommended that a unified definition of self-determination be adopted at the international stage which takes cognizance of the developments concerning this right over the years. This implies factoring in developments in different places including Kosovo, East Timor, Sudan, and most recently Scotland. This would necessarily result in a definition that accommodates external self-determination in appropriate cases including when a country's foreign policy derogates from the guarantees provided by the right to self-determination. The option of external self-determination should be provided as a measure of last resort where other means are unavailable or have failed.

Such a definition as suggested above should be adopted at the most inclusive level of the international community, and subsequently adopted at lower levels. As the United Nations enjoys the highest level of participation by any international institution, this should be the appropriate stage, and having been adopted, a cascading of this definition should be facilitated by adoption at regional, sub-regional, national, and other levels.

Conclusion

The need for unity and stability of states is subject to certain superior imperatives. One of these is the right of a people to self determination. Thus, a state must endeavour to respect this right which as has been pointed out, is a cluster right that encompasses several legal protections. As regards foreign policy, states should avoid towing paths that infringe on the safeguards provided by the right to self determination because if this is done, it cannot rightly be contended that there exists no right to external self determination. Therefore, in order to avoid degeneration into undesirable situations, governments should always take into consideration the rights and interests of peoples in foreign policy matters and in other areas as well.

[73] Christian Marxsen, 'The Crimea Crisis, an International Law Perspective', (2014) 74 ZaoRV 367.
[74] Christopher J. Borgen, (n 72) 234-280.