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QUEBEC'S RIGHT OF SECESSION UNDER CANADIAN AND INTERNATIONAL LAW

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I. INTRODUCTION

The nation-state would appear to be alive and well, judging by the number of aspiring secessionist movements in the world today. Aggrieved groups that have been subject to the sovereignty of existing states are increasingly seeking separate membership in the club of states. [FN1] And in spite of growing international economic and even political integration, many long-standing claims for secession have recently become more prominent than ever. Quebec's renewed threat to separate from the Canadian federation is one such claim, and shares many of the characteristics, though not the violence, of modern secessionist conflicts.

Quebec has long sought greater political powers to meet its cultural and linguistic needs, a fact which has shaped much of Canada's history. Since 1967, the struggle for these powers has manifested itself in the extreme by a demand, defined and driven by the separatist Parti Quebecois, for the secession of the province to form an independent, sovereign state. When, in 1980, Quebecers defeated a referendum that would have authorized negotiations for "sovereignty-association" with the rest of Canada, most observers concluded that the possibility of Quebec's secession had been relegated to the dust bin of history. [FN2] Quebec independence is, however, again the focus of national attention in Canada. [FN3]

Prior to embarking on a legal analysis of Quebec's secession under Canadian and international law, [FN4] it will be useful to consider the recent background to the present crisis in order to assess the prospects of secession.

A. Constitutional Options and the Likelihood of Secession

Despite the apparent on-again, off-again nature of Quebec separatism, the long-term trend of public sentiment in Quebec has in fact been increasingly to favor secession. Support in Quebec for sovereignty-whether defined as separatism, independence, sovereignty, or sovereignty-association-has grown steadily from 1960 to the present. According to numerous polls taken in 1990, forty-four percent of the Quebec population support outright separation, fifty percent support independence, fifty-five percent support sovereignty, fifty- eight percent support sovereignty-association, and sixty-eight percent support the province having a mandate to negotiate sovereignty-association. [FN5] It is therefore not surprising that the popular

acceptability of some form of independence for Quebec has been reflected in the continued strength of the Parti Quebecois, and in the adoption of an increasingly nationalist ideology by the governing, ostensibly federalist, Liberal Party of Quebec.

The past decade has also witnessed political developments that pose an even greater threat to the Canadian federation than the Parti Quebecois. In an effort to assuage moderate Quebecers during the 1980 referendum campaign, the federal government had promised imminent constitutional reform. This ultimately led in 1982 to the "patriation" of the Canadian constitution from Britain to Canada, which included a new charter of rights and freedoms. [FN6] Unfortunately, the process under which patriation was accomplished undermined much of its substantive achievement. Finding itself unable to garner unanimous provincial support that many saw as politically desirable, the federal government saw no alternative but to threaten to patriate the constitution unilaterally. Alone among the provinces, Quebec, having refused to accede throughout the negotiations, never signed the resulting 1982 Constitution Act. Not until after 1985, with new governments in both Quebec City and Ottawa, could Quebec's recognition of the constitution even be discussed. Robert Bourassa's federalist Liberal Party of Quebec and Brian Mulroney's decentralist Progressive Conservatives thereby began negotiations toward an accommodation. [FN7] An agreement was tentatively reached by all ten provinces in 1987-the so-called Meech Lake Accord-which reflected Quebec's demand for further powers and its desire to be recognized as intrinsically different from the other provinces. The Meech Lake Accord would have accomplished this without creating too asymmetrical a federation by devolving a number of powers from the federal sphere to the provincial while formally recognizing, in general terms, Quebec's status as a "distinct society." [FN8] A deadline of June 23, 1990 was set for final ratification of the amended constitution by all provincial legislatures. During that three year period, however, opposition to the Meech Lake Accord grew outside Quebec. As a result, the provinces of Newfoundland and Manitoba, which had new governments elected after 1987, refused to accede to the agreement by the deadline date. For Quebec, this failure to ratify the Meech Lake Accord was interpreted as a rejection by the rest of Canada, and injected new vigor into the separatist movement. For the rest of Canada, it meant that constitutional renewal was once again postponed.

Three broad options now present themselves to Quebec and the rest of Canada: 1) amending the existing constitution to devolve powers from the federal government to the provincial governments or to Quebec alone, so as to ensure that Quebec's special status is protected ("further decentralized federalism"); 2) creating a new constitution conferring political sovereignty to Quebec within an economic confederation with the rest of Canada ("sovereignty with association"); or 3) outright separation ("sovereignty without association") likely initiated by a unilateral declaration of independence. [FN9]

The first option-a further decentralized federation together with the recognition of Quebec's special status-is, in fact, what the Meech Lake Accord originally attempted, and remains the substance of the federal government's proposals issued in September 1991 [FN10] as well as those of a special joint committee of both Houses of Parliament set out in a report issued in February 1992. [FN11] Unfortunately for the proponents of this option, public opinion in the rest of Canada has shifted further against the notion of any "special status" for Quebec. At present, seventy-two percent of Quebecers think that the rest of Canada should grant Quebec powers other provinces do not have, whereas seventy-six percent of Canadians believe that Quebec should not receive powers greater than any other province in the federation. [FN12] Thus, any proposal similar to the Meech Lake Accord would likely satisfy neither the provincial

governments that refused to sign the original accord nor the majority of the Canadian public outside Quebec who object to a recognition of Quebec's "special status" within the existing Canadian constitution. [FN13] On the other side, the governing Liberal Party of Quebec, the separatist Parti Quebecois, as well as the majority of Quebecers, all now feel that the concessions reflected in the federal constitutional proposals are too little, too late. The Quebec government has accordingly wasted little time in rejecting the reform package on the grounds that the proposals are not sufficiently decentralist and would not adequately recognize Quebec's distinct status in the federation. [FN14]

Quebec will only accept a constitutional offer from the rest of Canada that gives it significantly more power than would have been obtained pursuant to the original Meech Lake Accord. On the other hand, the rest of Canada is no more willing to accept Quebec's distinctiveness (or at least the concomitant powers considered essential by Quebec politicians to pursue that distinctiveness), and, therefore, an asymmetrical constitution, than it was prepared to accept at the time of the failure of the Meech Lake Accord. Thus, under the impact of the present crisis, the positions of Quebec and the rest of Canada are growing further apart rather than coming closer together.

The second option-sovereignty with association-implies a large-scale devolution of powers from the federal to the Quebec government such that Quebec would obtain complete political autonomy; at the same time Quebec would continue or even strengthen its economic union with the rest of Canada. This option assumes that the rest of Canada would be willing to negotiate such an arrangement-at best an unreliable assumption given the shift in public opinion outside Quebec. [FN15] Sovereignty with economic association is seriously considered in two recent Quebec commission reports analyzing the province's constitutional future-the Allaire and the Belanger-Campeau Reports. [FN16] If the rest of Canada balks at the notion of Quebec substantially increasing its political sovereignty, both reports recommend unilateral secession, presumably with no guarantees of the continuation of economic association.

This, then, is the third option-sovereignty without association. Or, to put it another way, the third option involves a unilateral declaration of independence without association between Quebec and the rest of Canada negotiated in advance. Pursuant to the Belanger-Campeau Report, Bill 150 was passed in the Quebec National Assembly in June 1991. It calls for a sovereignty referendum by October 1992 if the rest of Canada, as represented by the federal government, does not come forward with a constitutional package that is reasonably satisfactory to Quebec. A recent poll suggests that fifty- five percent of Canadians outside Quebec find that deadline unacceptable. [FN17]

B. Rationale for a Legal Analysis of Secession

Given the obstacles which stand in the way of successfully negotiating a decentralized federation or sovereignty within an economic union, unilateral separation by Quebec must therefore now be considered a very real possibility. One reason for evaluating the legal principles underlying a secessionist attempt by Quebec concerns the consequences facing both sides should secession occur. A national or collective separation is by definition a traumatic experience. But if the process can more closely adhere to existing legal norms, it will be much less likely to cause the instability and violence (often unintentional) with which unilateral secession is so often associated. Although no polling evidence on the issue is yet available, it is possible that a majority of Canadians outside Quebec regard the act of secession as illegal whereas a majority of Quebecers regard secession as a legal right irrespective of their individual

views concerning its desirability. This perception is likely to have negative consequences, particularly in the event of a unilateral declaration of secession by Quebec.

It may fairly be asked, then, just what role law has to play in any debate over secession. Some view legality as entirely conclusive of the issue. They argue that if a given secession is consistent or inconsistent with national or international law, then that should dispose of the matter. Others argue that to debate the issue of legality alone amounts to nothing more than an academic exercise. [FN18] For them, secession is really a political process which in the final analysis may be realized notwithstanding the absence of legality. [FN19]

In fact, legality will not be entirely dispositive of any issue of secession, but nor will it be practically irrelevant. One commentator has noted that instead "its role is as a crucial if highly specialized rhetorical and moral weapon on each side of the debate." [FN20] And so while legal argument will not necessarily be made before a court of law, the wider court of public opinion will certainly be targeted for the purpose of granting or denying legitimacy to the secessionist movement. If legality is established, it would serve to reinforce public acceptance of secession and thereby its achievement in fact. Similarly, any perceived illegality would serve to discourage acceptance of secession. The legality of secession-and the elements necessary to establish it-are therefore important questions to consider in any discussion of Quebec's accession to sovereignty.

The advocates of secession for Quebec are well aware of law's important role in the debates on the issue, and in support of their goal will likely advance legal arguments under two broad categories. The first argument will be based on Canadian constitutional law. In addition to an argument based upon the express provisions of the Constitution, secessionists will assert the existence of an implied "compact" or contract relating to the nature of Quebec's entry into the federation. The second argument will be based on international law, specifically the universally-accepted principle of self-determination upon which a right of secession is premised. This article will address both arguments, and will then offer suggestions on how Quebec's secession may be achieved with a minimum of economic, political, and social disruption. It concludes that, depending on the emphasis to be attached to competing historical interpretations, Quebec may possess an implied right to secede under the Canadian constitution. Under a narrow interpretation of existing international law principles governing self-determination, Quebec's right to unilaterally secede from Canada would be doubtful but for the position likely to be taken by the government of Canada faced with a legitimate expression of the will of Quebecers to secede. More specifically, if the Quebec people democratically and overwhelmingly indicate their desire to govern themselves, it is almost certain that the rest of Canada will accede. The effect on international law of such a consensual secession would be to elevate the principle of political legitimacy over the traditional principle of territorial integrity as the essential criterion for the existence of a right of secession. In so acting, Canada would be contributing to the development of new customary international law respecting secession.

II. THE RELATIONSHIP BETWEEN INTERNATIONAL AND CONSTITUTIONAL LAW

This article examines Quebec's situation under Canadian constitutional law and then international law, but that is not necessarily to say that each is independent of the other. In the final analysis, both international and constitutional law are concerned with regulating the power that states wield. In simplest terms, international law deals with the external relations of states

with other states (inter-state law), while constitutional law deals with the legal structure of the state and its internal relations with its citizens, and is thus connected to the broad body of municipal law (intra-state law). [FN21] The connection-or lack thereof-between the two systems of law remains a matter of debate among legal scholars. [FN22] Dualists, generally identified with the positivist stream of legal thinking, argue that international law and municipal law (including constitutional law) operate at two distinct and completely separate levels. [FN23] Neither legal order has the power to create or alter the rules of the other. Nonetheless, in the case of a conflict between the two orders of law, the dualist generally assumes that intra-state law will be applied rather than inter-state law. [FN24] This implies the de facto, if not the de jure, supremacy of intra-state law over inter-state law. In part, this implication is the consequence of a strict view of international law which considers fully sovereign states (recognized as such by other sovereign states) as the subjects of international law, and thus concludes that the only valid source of international law is the practice of such sovereign states. [FN25]

Monists dispute both the assumptions and conclusions of the dualists. [FN26] Although monism includes many sub-schools, it rejects the notion that international law and municipal law are separate, watertight compartments. Whether Lauterpacht, who assumes the supremacy of international law over municipal law, [FN27] or Kelsen, who postulates international law as the basic norm of municipal law, [FN28] or other monists, who assert the existence of a third legal order-natural law-as being superior to both international and municipal law, all would point to the important connections between the two spheres of law. [FN29]

With specific reference to secession, dualists and monists would likely come to different conclusions concerning the relative importance and applicability of international law and constitutional law. The question poses itself in the following terms. In any given claim for secession in an existing federal state, are the international legal norms concerning the territorial integrity of states and the self-determination of peoples to be determinative over constitutional principles permitting or prohibiting secession? The dualist would argue that constitutional law must first be examined to determine whether secession is legally permitted under a given set of circumstances and whether the unit desiring independence has met the internal legal requirements for secession. Only if this constitutional inquiry were not dispositive would international law be examined. The monist would argue that both systems of law must be simultaneously analyzed to determine whether the secessionist unit has a good case in law. Monists assert that in the event of a conflict between the state's rights and obligations under its constitutional law, and its rights and obligations under international law, the latter would take precedence. Indeed, some monists would argue that international law would invalidate any aspect of a state's constitutional law that conflicted with its international legal responsibilities. [FN30]

According to Fitzmaurice, who rejects the "monism" of the monist approach but also the narrow view of the applicability of international law implicit in the dualist approach, the state is supreme in its own sphere, and its domestic laws (including its constitutional law) cannot be impugned by international law, but it can still be held responsible for falling beneath the standards of international law. [FN31] Presumably, even if a state has the "right" to prevent secession because of a constitution which expressly prohibits the dissolution of the federation or, in a weaker version, does not expressly permit secession, it may still be held legally accountable to the international community if the secessionist group meets the commonly accepted standards of a "people" with the "right" to self-determination. It is with this approach in mind that Quebec's potential right to secede will be addressed in relation to both Canadian and

international law.

III. RIGHT OF SECESSION UNDER CANADIAN CONSTITUTIONAL LAW

Unlike the constitution of the former Soviet Union which expressly permitted its republics to secede, [FN32] and that of Australia which implicitly prohibits its states to secede, [FN33] the constitution of Canada nowhere deals with the question of the secession of its provinces. The British North America Act, 1867 ("BNA Act"), now entitled the Constitution Act, 1867, addressed only the admission and not the secession of provinces. [FN34] When that legislation was finally patriated in 1982 by Canada as one of the several Constitution Acts, a formula for the amendment of the constitution was added but the right of secession for the provinces was left unaddressed.

The Canadian constitution is therefore like that of the United States which is similarly silent on the issue of secession. Unlike the case of the United States, [FN35] however, no Canadian court has definitively considered the issue of whether a right of secession nonetheless exists. [FN36] Since Canada's constitution is much more than the bare text of the BNA Act, it may be that such a right exists as part of the "unwritten" constitution. [FN37] Alternatively, it may be that a right can be inferred from the BNA Act itself. At least one scholar has argued that the absence of explicit constitutional text or judicial decisions does not necessarily imply that such a right does not exist. [FN38] After all, the BNA Act did not expressly prohibit the secession of a province. On the other hand, it has also been argued that "the absence of any provisions in the Constitution [authorizing secession] makes clear" that there can be no unilateral right of secession. [FN39] The more accurate view is arguably that a right of secession for Quebec, while it cannot be based on the express provisions of the constitution, may nevertheless find some implied basis. In the case of Canada, this implied basis will most likely be found in what has been described as the "compact theory of Confederation." [FN40]

There has always been a belief in Quebec (shared by only a few outside Quebec) that the BNA Act was a compact between the British and the French, the two "founding nations" of Canada. A variation of this theme is that the Canadian federation was a "compact, made originally by four provinces, but adhered to by all the ... provinces who have entered it." [FN41] To avoid confusion, the former will be referred to as the founding nations compact theory while the latter will be called the provincial compact theory. It is important to note that both concepts are not mutually exclusive; they can overlap and have often been confused historically. [FN42] This is due to the simple fact that one political unit-Quebec-is the home base of the majority of French Canadians in North America.

The validity of both versions of the compact theory rests on two foundations: law and history. The assumption is that the federation was created by independent "national units"-nations or provinces-and therefore, these primary units have an implicit right to leave their created federal unit should they so desire. In the context of the United States, this strong version of the compact theory was raised by the southern states before and during the American Civil War. Although the southern states were defeated militarily, the legal validity of their compact argument was never successfully challenged until Texas v. White. [FN43] The compact argument was denied in that particular case, but Chief Justice Chase's tortuous reasoning can hardly be employed as a general legal argument against the operation of the compact theory and the implicit right of secession in other circumstances. [FN44]

In fact, the compact theory has found limited acceptance in Canadian constitutional case

law, particularly in two Privy Council cases decided in the 1930's. [FN45] In the Aeronautics Reference case, Lord Sankey, speaking on behalf of the majority of the court, stated that:

Inasmuch as the [BNA] Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction ... should impose a new and different contract upon the federating bodies. [FN46]

The provincial version of the compact theory doctrine has since been attacked as legally invalid on the ground that as the BNA Act created the provinces, the provinces therefore could not have created the constitution and federal government. The argument is that the provinces were mere colonies before the enactment of the BNA Act and did not have the legal capacity to enter into "a binding contract of union" without authorization from the British Crown, and this authorization was never given. [FN47] This seems a rather circular argument, however, given that the BNA Act itself was an imperial statute passed by the Parliament of the United Kingdom acting in the capacity of a Parliament for the overseas territories of the British Empire and that Canada itself retained the legal status of a British colony until the passage of the Statute of Westminster in 1931. [FN48]

The real questions are whether Quebec (variously known as Lower Canada and Canada East before 1867) was a preexisting political jurisdiction before its entry into the Canadian Confederation in 1867 and whether it could legally have remained outside the Confederation if it had chosen to do so. The answer to both questions is yes. First, Quebec had a political and legal identity that originated with the colony of New France and extended up to the period of Confederation through subsequent negotiation and compromise. [FN49] Certainly, preexisting colonial units such as Prince Edward Island, Newfoundland and British Columbia chose to remain outside the Confederation until the political representatives within those colonies obtained terms of entry that were satisfactory. Although the union of its British North American colonies was politically desired by Great Britain, Quebec could legally have continued its evolution as a separate British colony, eventually achieving complete self- government in a manner similar to that actually experienced by the Canadian federation. Second, it can be argued that the British Crown, through the British government, did give the colonies the authorization to "enter into a binding contract of union," and that this could be construed either as an agreement among political units (the colonies that became provinces) or as a compact between the two main ethnic groups in British North America. [FN50]

Indeed, the historical basis for either version of the compact theory, but particularly the founding nations version, has been hotly debated by English- Canadian historians for many years, the majority of whom have come to agree with Donald Creighton's view that the notion has no historical validity. [FN51] In sharp contrast, the founding nations compact theory was firmly accepted by a broad spectrum of French-Canadian society during and after Confederation; it continues to be supported by twentieth-century historians of French-Canada who have found much evidence to support its validity. [FN52]

This strikingly different perception was most vividly expressed in the Tremblay Report, the published result of a Royal Commission of Inquiry into Quebec's constitutional difficulties with Ottawa ordered by the Quebec government following the Second World War. [FN53]

Confederation was viewed in this report as the product of the provinces, the British government, and the two founding nations of Canada. The Report stated that "anyone who searches for the true nature and sense of the 1867 union cannot overlook the existence of this prior agreement between the two principal races or national groups; an agreement which aimed at giving each of them official status in the Confederation, along with equality of treatment." [FN54] It concluded:

Such was the presiding spirit when the 1864-1867 agreement between the two main races was being drawn up. There was no question of victor or vanquished, nor of a superior or inferior race; both were to be associates and partners, with each possessing equal rights with respect to the survival of their ethnic groups in the Canadian union. It has been in this sense that the Province of Quebec has always interpreted and understood the spirit, and, therefore, the nature, of Confederation. [FN55]

There does exist objective, albeit limited, historical evidence to support the existence of a compact theory of Confederation. Most of the resolutions which eventually constituted the BNA Act were drafted at the Quebec Conference of 1864, where delegates from all the British North America colonies met to forge a new political and economic union capable of defending itself against the United States without British money or soldiers. Unfortunately, the Conference was not open to the public and a complete text of the proceedings was never published. [FN56] A fragmentary record drawn up from notes taken at the time by one of the delegates from Prince Edward Island is the only account of the proceedings known to exist. These notes reveal to a limited extent the differing objectives of the Quebec (Canada East) delegates relative to the English-speaking fathers of Confederation. [FN57] Delegates such as John A. Macdonald and George Brown would have preferred a unitary state, i.e., a legislative union, in place of a federation, but understood the impossibility of convincing their French-Canadian colleagues such as Georges- Etienne Cartier, Etienne-Paschal Tache, Jean-Charles Chapais, and Hector Langevin, who were determined to have a federation in which French-Canadians would democratically dominate their traditional territory of Quebec while participating as equals in the federal political unit. As Charles Tupper, the chief delegate from Nova Scotia, put it, "[i]f it were not for the peculiar condition of Lower Canada ... I should go in for a Legislative Union instead of a Federal." [FN58]

The American Civil War, still raging at the time of the Quebec Conference, was very much on the delegates' minds. Macdonald and Brown, two of the most significant authors of the Quebec Resolutions, wanted a centralized federation in which the residual powers would automatically lie with the federal government. This would, they thought, prevent the individual provinces from attempting secession. The historian J.M.S. Careless summed up their position as follows:

Macdonald and others had emphasized that the chief flaw in the American federal system was the fact that the states had delegated powers to the federal government and retained the residue themselves. This had given rise to the doctrine of states' rights, carried by the South to the point of breaking up the union. But Brown would wholly agree that "a great evil in the United States, the acknowledgement of an inherent sovereign power in the separate states," above all had to be avoided. British North America should reverse the United States Principle, keeping any "implied power" for the general government, and securing "all those powers which will enable the legislative and administrative proceedings of the central authority to be carried out with a firm hand...." The Civil War had proved the inherent defect in the American system; in the new Confederation there would be no basis for any right to secede, because the general

government would control "the whole nation." [FN59]

While this may have been the view of the most powerful English- Canadian delegates, it was not the view of the French-Canadian representatives. Nor did the French-Canadians share their counterparts' perception of the American Civil War. The issue of slavery aside, French-Canadians were inclined to view the states' rights espoused by the South as somewhat justified, and rejected the view of Macdonald and Brown that individual states with too much power had caused the Civil War. [FN60] The view was expressed in La Minerve of Montreal, the largest mass-circulation newspaper in nineteenth-century French Canada, that overly powerful central governments were the real threat to federations, calling the United States government "strongly centralized" and "capable of acting despotically, as we can see every day." [FN61] According to La Minerve, the Civil War was caused "not by the excessive power of the local governments, but by the central government, whose tyrannical actions came into direct opposition to the particular interests of a considerable part of the confederation." [FN62]

Canadian constitutional law, then, may indeed provide an implied right of Quebec to secede, depending on the emphasis to be given to irreconcilable historical interpretations by French or English-Canadian scholars. This difference in perception between French and English-Canadians concerning the legal and historical validity of the compact theory of Confederation, which appears to continue to the present, may cause grave difficulties if negotiations break down and Quebec unilaterally declares its independence. The non-acceptance of that action's validity by a significant number of Canadians outside Quebec would have an unsettling impact on Quebecers, most of whom assume that the compact theory extends to them the legal right to make such a determination. More importantly, Quebecers would be assuming that they have a basic right to self-determination-a belief not necessarily accepted outside Quebec.

IV. RIGHT OF SECESSION UNDER INTERNATIONAL LAW

Since the main objective of any secessionist movement is to subvert the constitutional arrangements of the existing state, the tendency is to characterize secessions as purely internal conflicts. Such a characterization is complicated, however, by the existence of international law principles which also apply. In this regard, the principle of self-determination has become the most widely used concept to assert the legitimacy of secessionist movements. Indeed, it has been described as "the basis of all 'liberation movements."' [FN63]

In practice, however, the principle of self-determination has proven to be vague, subject to conflicting opinion, and generally hampered by problems of definition, implementation, and enforcement. According to one commentator, it has the distinction of being one of the most complex and confusing concepts in international law. [FN64] A review of the evolution of the concept and its meaning today is therefore a prerequisite to any attempt to apply it to the Quebec situation.

The concept of self-determination had its origin in the French and American Revolutions in which it was seen to be a "simple corollary of democracy." [FN65] Government was no longer to be based on the claim and consent of the monarch, but on that of the people. Also at this time, the growing entrenchment of the nation-state provided form for the political aspirations of peoples. In the 19th century, consequently, the struggle against autocratic states resulted in a marriage of democratic and nationalistic movements within the concept of self-determination. [FN66] During the First World War, self-determination came to mean "the right of a people

[i.e., a nation] to determine the sovereignty over the territory in which they lived." [FN67] It was to be granted to nationalities that had previously lacked political form, common at the time due to the existence of the multi-national empires of the Central Powers (Germany, Austria-Hungary, Ottoman Turkey). President Woodrow Wilson became a leading proponent of the principle of self-determination, and succeeded in having it included as a fundamental principle in the first drafts of the Covenant of the League of Nations, although it found no place in the final drafts. [FN68] The Second World War fostered further development of this principle. In fact, self- determination was one of the principles for which the allies avowedly fought. [FN69] But the focus of the principle had more to do with the restoration of sovereignty and self-government in Europe than with the emerging demands for statehood of colonies and other peoples.

The establishment of the United Nations provided a new forum which enabled the entrenchment of self-determination as a fundamental principle of international law. At the San Francisco Conference in 1945, the Soviet Union first proposed the insertion of a clause among the organization's purposes to the effect that relations among nations be "based on respect for the principle of equal rights and self-determination of peoples." [FN70] That phrase was adopted as part of article 1(2) of the United Nations Charter. [FN71] Article 55 [FN72] and article 73b [FN73] also specifically declare the principle of self-determination. Although a general meaning and broad scope were probably intended by these provisions, [FN74] the principle subsequently evolved in the narrower context of decolonization. [FN75] African and Asian states, with the support of socialist states, employed both self-determination and human rights arguments to give effect to the era of decolonization of overseas territories held primarily by European states. The result was a number of United Nations instruments citing a right of self-determination. [FN76] The context of these resolutions was relatively specific regarding "external" self- determination (relating to colonies) and vague and evasive regarding "internal" self-determination (relating to secessionist movements), suggesting that the instruments had decolonization as their focus.

In the post-decolonization era since the 1970's, the principle of self-determination has been increasingly resorted to in order to justify claims for secession advanced by peoples within the territory of existing sovereign states. [FN77] Not coincidentally, the principle is coming to be more broadly defined in international law. Perhaps the most significant development in this regard was the 1975 Helsinki Accord, an agreement by thirty-three states in Europe plus the United States and Canada, which addressed a wide range of subjects including human rights. [FN78] Principle VIII, reciting the familiar wording found in the United Nations instruments on self-determination, states that the "participating States will respect the equal rights of peoples and their right to self-determination," but goes on to specifically declare that "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference." [FN79] This wording suggests a more universally based right of self-determination.

The contradictions in this historical development of the principle of self- determination are notable. Whereas democracy and individual freedom were once the cornerstone of self-determination, the form of government is no longer an essential feature. Whereas there once existed an assumption that the characteristics of the population involved were the controlling factor (new nations were to be composed of peoples sharing traits of language, culture, religion and ethnicity), the anticolonial phase accepted the old colonial boundaries as legitimate, regardless of the incongruous mix of peoples within the political unit. The freely

expressed will of the people did not govern in these cases. In contrast, self-determination claims today are being fashioned by popularly supported secessionist movements for groups inhabiting particular geographic regions of existing states. Much confusion continues to surround the principle.

Opinions have been very much divided as to whether international law has developed to the point that self-determination generally is to be considered a legal right under international law. [FN80] As international conventions constitute the primary source of international law, [FN81] some accordingly see the inclusion of self-determination in the United Nations Charter as conclusive of the question. [FN82] But the general formulation of the principle has left its meaning to judicial interpretation and international custom (defined as the practice or usage of states acting out of a sense of legal obligation [FN83]). On this basis, it has been asserted, on the one hand, that there exists "massive evidence ... that the principle has indeed ripened into a rule of [customary] international law." [FN84] Similarly, "the pre-United Nations principle or theory of self-determination has matured into a full-fledged, recognized right in international law." [FN85] And another has claimed that it "seems inescapable that self-determination has developed into an international legal right ...." [FN86]

On the other hand, it has also been argued that "to a significant extent ... the principle of self-determination as a moral, not as a legal, principle has gained considerable influence in the international community." [FN87] Another commentator concedes that "'self-determination' is not a part of customary international law since the custom and usage of member states of the world community do not evidence it by their practice." [FN88] And, most forcefully, "[w]hat emerges beyond dispute is that all peoples do not have the right of self-determination: they have never had it, and they never will have it." [FN89]

How is one to resolve these patently inconsistent views? The problem of definition would appear to be the primary source of difficulty in attempting to determine whether self-determination is a legal right. Any definition involves a complex interplay among territorial boundaries, group affiliation, and time. [FN90] For the most part, though, the confusion appears to find its source in the use of the same term to describe two arguably quite distinct phenomena: since the Second World War, the accession to sovereignty of colonies in Africa and Asia, and, more currently, the secessionist movements of territories within existing states. It is the reason that one authority has admonished that "[a]t the outset, one must be careful not to confuse the debate over the status of a general right of self-determination with the arguably quite distinguishable question of the place of secessionist self-determination." [FN91]

With regard to a more general right, it has been said that "there is almost complete unanimity that self-determination applies to colonial peoples ...." [FN92] In fact, in the 1950's and 1960's self-determination became virtually synonymous with decolonization. [FN93] The International Court of Justice had occasion to consider the principle in the Western Sahara case, whose primary issue was rooted in decolonization. [FN94] In the early 1970's, Spain had enunciated a policy of liberalization of its Western Sahara colony, triggering historically based claims by Morocco and Mauritania to the territory. The Court held, however, that the present wishes of the inhabitants of the territory were paramount to alleged past legal claims by its neighboring states. [FN95] It further stipulated that "[t]he right of self-determination leaves the General Assembly a measure of discretion with respect to forms and procedures by which that right is to be realized." [FN96]

The experience of the United Nations also suggests that self-determination as applied to decolonization has the character of a right under international law. The General Assembly

resolutions on the matter may also constitute a source of international law. [FN97] While there is a general consensus that United Nations resolutions in and of themselves are not binding, [FN98] it "is now generally accepted that there are methods by which General Assembly resolutions may be transformed into international law." [FN99] At a minimum, the resolutions are now seen as evidence of state practice and thereby customary international law. That they can be referred to as a "collective body" of resolutions on the subject of a right to colonial self-determination strengthens their claim to constitute part of customary international law. [FN100] As a result, some have argued, at least in the context of decolonization, that "the principle of self-determination necessarily possesses the character of jus cogens." [FN101]

The proposition that a right of self-determination is applicable to secessionist movements arising within sovereign states has not-as yet, at least-been similarly universally accepted. Territorial integrity and the sovereignty of states are the distinguishing factors that pose obstacles to wider acceptance. [FN102] "While recognising the right of a people to change their government if they so desire ... [some] were opposed to the idea of self- determination for a particular group, as this could lead to the destruction of the political unity of new states having minorities." [FN103] While this argument has been criticized as undemocratic, [FN104] it is understandable when one considers that most states comprise more than one people. For this reason, many states, including Canada, that signed the 1970 Declaration on Friendly Relations [FN105] did not fail to emphasize in doing so that it applied to colonial situations and not to causes arising in established states. [FN106]

The provisions of the Helsinki Accord suggest a broadening of the right of self-determination to include secession, [FN107] though they are not part of an international convention and have not yet attained the character of customary international law. Considering also that none of the signatory states is in a colonial situation, it seems clear that the Accord "guarantees both external and internal self-determination of peoples on a universal basis." [FN108] The Helsinki Accord is significant because it enhances and extends the principle of self-determination as enunciated in the United Nations instruments. It may yet have international legal significance as states modify their practice accordingly, but for now it is doubtful that it reflects customary international law.

It may be asked what theoretical justification exists to accord a right of self-determination to peoples in colonial situations but to deny one to those within independent states. [FN109] Should a people's fortunes rest on an accident of geography? Why cannot secessionist movements be considered to arise from a form of colonialism, perhaps termed "internal" or "adjacent" colonialism, that is as odious as "external" or "overseas" colonialism? [FN110] At least one scholar has accordingly criticized the distinction because it "reveals a basic democratic weakness and is intended to exclude from international concern situations created by the denial of self-determination. The principle [of self-determination] applies equally to dependent and independent peoples ...." [FN111]

It is not so much the musings of political and legal theorists, however, as the practice and consensus of states which dictate the circumstances in which a right of secession will be granted under international law. "Specifically which groups are allowed self-determination is decided by the configurations of power and interest between dominant and oppressed groups and between competing states." [FN112] Indeed, it may simply be that "[a]t best ... once the basic decision for political reorganization or redistribution of power has been made, the principle of self-determination is invoked to attain the result in a desirable fashion." [FN113] In any claim for secession, there will therefore exist practical problems of implementation which directly

challenge theoretical notions of self-determination.

When, then, does a right of secession arise? It can be noted at the outset that "the mere fact of a successful conclusion to a secessionist attempt ought not to be considered sufficient evidence of the jural legitimacy of the claimant's demand; nor does the failure of such an attempt resolve all questions in favor of a conclusion of illegitimacy." [FN114] Nevertheless, state practice is such that the legality of a secessionist movement is only recognized after the fact upon a consideration of, among other things, its outcome. More precisely, "where the circumstances indicate that the world community has accepted the grounds, as well as the fact, of a successful separatist undertaking, an inquiry into the background of the attempt may cast some light on the community's unwritten standards in judging these phenomena." [FN115] It will therefore be important for the legality of a proposed secession (and thereby its likely success) that certain conditions, determined according to state practice in respect of previous secession attempts, are satisfied. One author has devised the following set of criteria to determine whether a secession attempt is legal. "To establish the minimum standards of legitimacy, it is necessary to identify: 1) the group that is claiming the right of self-determination; 2) the nature and scope of their claim; 3) the underlying reasons for the claim; and 4) the degree of deprivation of basic human rights." [FN116]

Secessionist self-determination may therefore be considered a qualified right, a right that is "subject to heavy limitations." [FN117] This implies that secessionist self-determination, as with any principle of customary international law, is very much a fluid concept, one that is constantly evolving according to states' assessment of the applicable factors. It may yet become an absolute right.

Given the difficulties inherent in current legal analysis, it may therefore be more useful simply to focus on state practice and the factors generally associated with a successful secession. One author has recognized these analytical shortcomings by noting simply that "[l]egal theorists have no option but to accommodate their concepts to the facts of political life." [FN118] Similarly, "[i]n cases of secession it is less a question of right than of success or failure." [FN119] The following factors need to be considered in the context of Quebec, then, as much to assess the likelihood of the success of its secession as to determine whether Quebec has a right to secede under international law. These factors include: status as a "people"; broad associational desire; distinct geographic territory; nature of and reasons for the claim; minimal infringement of territorial integrity; minimal disruption of national unity and international harmony; occurrences of violence; and denial of human rights or democratic process.

A. Quebec's Status as a "People"

An essential requirement of self-determination is that Quebec demonstrate that it is a "self" capable of independent existence. Two schools of thought, objective and subjective, have developed which focus on different factors that states may take into account in recognizing when a group is capable of implementing self-determination. The objective school examines characteristics such as race, religion and language and uses empirical data to assess a claim for self-determination. [FN120] The subjective school examines the will of the people and uses elections, plebiscites, or commissions to ascertain it. [FN121] Both schools then point to their implementation devices-data or plebiscites-as a means of subsequently demonstrating that a particular group is ripe for self-determination. [FN122] In fact, a combination of the two schools seems more appropriate. In other words, the best means to determine whether there exists a legitimate "self" for the purposes of a claim for self- determination is to examine the

will of a people who share similar racial, religious and language bonds.

A cursory examination of these criteria suggests that French-speaking Quebecers undoubtedly constitute a "people" or a "nation". They share the basic characteristics of language, culture, religion, and ethnicity necessary to establish a "group consciousness" that is distinct from that which exists in the rest of Canada. [FN123] Moreover, there is little doubt that an independent Quebec would be economically and politically viable. [FN124] A defined geographic territory, the basic political structure, and a large degree of autonomy already exist by virtue of its place in the Canadian federation. Beyond these objective factors, a successful referendum (or, more accurately, plebiscite) on the question of independence would constitute an expression of the will of the Quebec people and provide subjective evidence of their strong associational desire. [FN125] The essential features for consideration of a legitimate claim of self-determination will thus have been met.

Curiously, some would nevertheless argue on a purely theoretical basis that Quebec must also be a "state" to qualify for a right to self-determination. [FN126] Since international law is primarily the law of relations between states, [FN127] there arises a fundamental conceptual difficulty inherent in any claim in international law for a right of self-determination. Strictly speaking, Quebec, not being a state, [FN128] is therefore legally incapable of advancing such a claim. Quebec's dilemma, of course, is that the elements of statehood can only be fulfilled after it has exercised its right to self- determination and constituted itself as a valid actor in the international system. This circular argument has led some commentators to assert that the right of self-determination is juridical nonsense. [FN129] Their arguments are based on a "[s]tate-centered prejudice of international law" [FN130] which does not hold up in practice and is no longer an accurate description of contemporary international law. [FN131] Examples abound illustrating that rights and obligations under international law may attach to entities other than states. The Nuremberg International Military Tribunal rejected the argument that individuals are not direct subjects of the international laws of war. [FN132] The United Nations has clarified the meaning of "human rights" by indicating unequivocally in the Universal Declaration of Human Rights that the right of the individual cannot be ignored in international relations. [FN133] And most significantly, the United Nations no longer addresses its resolutions concerning self-determination of colonial peoples directly to states, but instead affirms directly the rights of the peoples themselves. [FN134]

Even if Quebec cannot properly be considered to qualify for a right of secession as a subject of international law, international legal theorists nonetheless postulate that rights may also arise in respect of individuals by virtue of their status as "objects" of international law. [FN135] In this sense, individuals may have rights under international law, although it remains unclear whether they are entitled to directly assert these rights or whether these rights must be asserted for them by a state. Any right of secession held by the Quebec people would therefore arguably have the effect of placing an obligation on Canada to respect that right, [FN136] but it would be for another state or the United Nations to take up their cause. In any event, the argument that Quebec is not a state does not go far in either theory or practice in depriving Quebecers of their legitimate status to at least assert the claim of a right to self-determination.

B. The Nature of Quebec's Claim

A people that asserts a claim of secession may possess particular characteristics which can either help or hinder its case in the perception of the international community. One such characteristic may be the length of time that a state has embodied the claimant people and

associated territory. The fact that a state has held sovereignty over the territory for a relatively short time may suggest greater legitimacy for that people's claim. Secessionist movements in the Baltic states or Slovenia and Croatia, for example, were probably considered to have had stronger cases due to the short duration of their membership in the Soviet and Yugoslav federations respectively. Corsica, on the other hand, long a part of France, probably has a weaker case. Quebec, too, has this factor working against it since it has been a vital part of Canada since the country was founded in 1867, and before this as Canada East, with direct political links to Canada West (now Ontario) since 1841.

The nature of Quebec's entry into the Canadian federation may also be a factor in assessing the merits of its claim for secession. Forcible incorporation will almost certainly provide for a more legitimate secessionist claim as the example of the Baltic states attests. While New France's incorporation into the British empire in 1763 was manifestly against the will of its people, their descendants joined the Canadian federation in 1867 in more voluntary circumstances. It is true that a public plebiscite was not held, but, given the historical context, Quebec's entry was relatively consensual, particularly when compared to the experience of New Brunswick and Nova Scotia. [FN137] Given that Confederation was a generally consensual experience in which Quebec played a full and active role, [FN138] the inference would follow that secession should not be available. Indeed, some have argued from the maxim pacta sunt servanda that a people that freely agrees to associate with others within a state should, other things being equal, remain bound to that agreement. [FN139] Ironically, this "freely made agreement" is precisely what underlies the compact theory of Confederation which Quebec has argued permits it to unilaterally withdraw from the federation. [FN140] In the final analysis, though, time may have undermined all arguments relating to this factor. Circumstances change and it is not realistic to suggest that a people should forever be bound by the acts of its forbearers. The Quebecers who negotiated Confederation in 1867 cannot be said to be the "people" of Quebec that asserts a claim for independence today. [FN141] And so while Quebec's agreeable entry into the Canadian federation cannot provide support for its case for secession today, neither should that fact detract from it.

A final factor to consider regarding the nature of Quebec's claim for secession, one which may be peculiar to Quebec, concerns the very survival of the Quebec nation. Proponents of secession argue that the future of the French-speaking people of Quebec is at risk, if not by design, then by virtue of Quebec's place as an island in a sea of English-speaking North Americans. [FN142] Unless Quebec can take the necessary measures to protect itself-which, they argue, only a sovereign Quebec can do-the certain outcome will be assimilation. It may well be that the disappearance of a people, and with it a distinctive language and culture, constitutes an event worthy of international supportive action. Empirical sociological evidence will, however, be required to confirm that a people's anticipated decline is due to its presence within the existing state. Even though the assimilation argument is a popularly held view in Quebec, there exists no conclusive evidence to suggest that Quebec's language and culture cannot be equally protected within the Canadian federation. In fact, recent research by the Quebec government itself suggests that the French language is presently flourishing in Quebec. [FN143]

C. Canada's Right to "Territorial Integrity"

The very existence of a principle of self-determination challenges the traditional view of absolute state sovereignty. It should not be surprising, therefore, that there also exists the

competing principle of territorial integrity which essentially underlies today's state-oriented international legal system. That principle, first judicially considered in the Aaland Islands Case, [FN144] holds that existing states have a right to preserve their boundaries and constituent territories. It is a measure of the extent of the dispute that the recognition of the rights of one claim involves the denial of the rights of the competing claim.

All other factors being equal, it would appear historically that the right of territorial integrity generally prevails over a right of secessionist self- determination. [FN145] Why this should be the case may not be readily apparent until one considers the identity of the claimants. States are the actors that wield power in the international political order, and they are understandably reluctant to accept a principle which might allow, and perhaps even encourage, groups within their own population to secede. [FN146] Until recently, most states have therefore rejected on principle all claims for territorial separation in non-colonial settings. This intolerance of secession was evident in the Biafran claim to secede from Nigeria, [FN147] the Katangan claim to secede from the Congo, [FN148] and the Eritrean claim to secede from Ethiopia. [FN149] The resolve of states not to recognize a secessionist claim by Quebec might be as strong in the case of Canada, a middle power that is politically stable, internationally respected, and geographically enormous.

Moreover, the United Nations itself has been reluctant to embrace a broader formulation of the principle of self-determination. It has been observed that the United Nations "would be in an extremely difficult position if it were to interpret the right of self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members." [FN150] The concern is that an unrestricted right of secession may lead not only to the creation of inviable states, but to the fragmentation of the present international system. Indeed, the United Nations Charter, in addition to its commitment to protect the "equal rights and self-determination of peoples," [FN151] goes on to guarantee the "territorial integrity and sovereign equality of states." [FN152] The 1961 Declaration on the Granting of Independence to Colonial Countries and Peoples reinforces this principle: "Any attempts 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." [FN153] Similarly, the 1970 Declaration on Friendly Relations provides that "[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country." [FN154] The international concern for territorial integrity evidenced by these instruments suggests that Quebec may find resistance to its secessionist claim at the United Nations.

Even the Helsinki Accord, to which Canada is party, has in Principle VIII retained the requirement in respect of self-determination that states act "at all times in conformity with the purposes and principles of the United Nations and with the relevant norms of international law, including those relating to the territorial integrity of States." [FN155] Principle IV, moreover, specifically states: "The participating States will respect the territorial integrity of each of the participating States." [FN156] Because the language restricts the obligation to respect territorial integrity to states and not peoples, however, one commentator has argued that "[i]t would follow that, under the Helsinki Declaration, a 'people' can claim a right to secede if they consider secession the only means available to implement their right to self-determination." [FN157] Due to its non-treaty status, the Helsinki Accord cannot be considered binding in areas in which it conflicts with customary international law. Quebec will undoubtedly resort to the argument that it is further evidence of the current state of customary international law. At the very least, moreover, "although it cannot be said that disregard of the Helsinki Declaration amounts to an

international delict," Canada will still be subject to what amounts to a "code of conduct." [FN158] "Signatory states are not freed from the political and moral duty to comply with the Helsinki Declaration." [FN159]

D. Disruption of Canadian "National Unity" and International Harmony

Closely related to the concept of territorial integrity is the question of the anticipated effects of the secession on the national unity of the existing state and on the general international order. Secession will almost invariably result in some disruption, if only because of a diminution of the unified state's economic capability and international influence. The concern of the international community will be whether general international harmony is better served by the status quo or by a secession. It follows that this factor is best assessed by balancing the amount of disruption likely to occur if the secession were to be accepted with that resulting from the existing condition of the secessionist group.

An argument can certainly be made that the survival of the rest of Canada as a political unit would be questionable in the event of Quebec's secession. The effect of the loss of Quebec on the rest of Canada would indeed be significant. Not only is Quebec Canada's largest province in area and second- largest in population, [FN160] but it contains a large share of Canada's resources and industrial capability. At the very least, a major political restructuring of Canada would be required when one considers that after secession fully half the Canadian population would be located in one province, Ontario. This would only serve to aggravate the western provinces' traditional suspicion of the concentration of power in central Canada. Moreover, Quebec's strategic location in Canada's heartland means that the Atlantic provinces will be geographically removed from the rest of Canada. Even discounting the fact that the Atlantic region is economically Canada's weakest, the prospects for the survival of such a geographically divided country cannot be seen as favorable. [FN161]

The outlook for the continued existence of the Canadian federation after secession appears gloomier still when one considers that the distinctive bilingual nature of the country will disappear with Quebec. [FN162] English- Canadians, already long suffering from a national identity crisis, will be hard-pressed to articulate a national purpose other than a union deriving from two great peoples, and will seek, probably futilely, fresh reasons to distinguish themselves from their American neighbors. Some foresee union with the United States as inevitable. [FN163]

Complicating this question is the not-insignificant presence of French- Canadians in most other provinces. As a stranded minority, they will likely lose the linguistic and cultural protection that they enjoyed under Quebec's anchoring of the French presence in Canada. [FN164] In this regard, former Prime Minister Pierre Trudeau has noted that:

As for French minorities in other provinces, they can only have a future if Quebec establishes itself as a strong, progressive force within Confederation; if Quebec withdraws into itself or secedes, these French minorities will have approximately the same rights and the same influence as cultural groups of German origin in Canada. [FN165]

Similarly, minorities in Quebec who retain their loyalty to Canada will question their place in the new society. The possibility of additional secessionist movements within Quebec (by English-speaking groups or native peoples, for example) is not unfathomable. [FN166] Indeed, the Cree aboriginal people of northern Quebec have already made a formal submission before the United Nations Commission on Human Rights that, without denying Quebec its right of self-determination, asserts a right of self-determination for the Crees. [FN167]

The international community will be justifiably concerned with the dismemberment of as important an international player as Canada. There will be instability resulting from a collection of widely scattered provinces seeking to find a new equilibrium among themselves, with their new neighbor, and with the rest of the world. Without a strong central government presence, there will be an effective power vacuum left in Canada's enormous Arctic region. Perhaps most importantly, there will also be a notable precedent set for the many secessionist groups in other states, and within Quebec itself, which seek justification for their own causes.

Against this potential disruption must be weighed the current disruption caused by the continuing presence of Quebec within Canada. Certainly, there has been a seemingly endless expenditure of resources in Quebec and all of Canada on questions of language, politics and the constitution. The country is consumed by the Quebec question to the detriment of its ability to address other pressing problems. The effect on international order, however, has so far been minimal. Most persons outside Canada are aware of the Quebec problem, but fail to fully comprehend it and do not feel affected by it.

Secession theorists typically measure current disruption by emphasizing how the claimant people are treated-whether their human rights are violated, whether they are discriminated against, and whether their right to participate in the political process is respected. One scholar has suggested, for example, that secession may be warranted when the claimant group has been subjected to a "wholesale denial of human rights as a [result of a] deliberate policy" of the existing state. [FN168] It is a compelling argument, for it posits that the purpose of government is to advance the legitimate interests of the governed. While the absence of denial of political freedom or of human rights may not automatically vitiate any claim for secessionist self-determination, it has therefore been argued that this factor constitutes the sine qua non of a legitimate secessionist claim. [FN169] The argument hardly applies to Quebec, however. Quebec has full control over its civil law system, education, and social services. It has consistently received federal spending that has been at least proportionate to its population and fiscal contribution. [FN170] Federal laws and policy have been developed, albeit only within the last twenty years, to promote the use and availability of services in the French language and the employment of French-speaking Canadians in government. [FN171] Most importantly, French-Canadians have also played a full role in the democratic process throughout the history of Canada despite early efforts of the English-Canadian majority to the contrary. Indeed, this same scholar argues that "a majority or minority accorded its normal democratic rights cannot legally request the international community to help it to secede." [FN172]

To summarize, in the absence of international agreements and other instruments which deal specifically with a right of secession, the existence of such a right under international law will depend on a combination of factors as determined by state practice. These factors include Quebec's status as a people, the nature of Quebec's claim, the disruption that secession would create to Canadian national unity, and Canada's right to territorial integrity. Of these factors, states continue to consider their right of territorial integrity as preeminent. That right as it is presently interpreted means in effect that international law has developed a strong presumption against secession, and a formidable case for independence must therefore be made to rebut it. [FN173] Even if independence would produce some political, economic, and cultural gains for Quebec, the evidence suggests that they would not be great enough to overcome the negative consequences for Canada flowing from a breach of its territorial integrity. To the extent that state practice is the measure of legality, a legal right of secession for Quebec therefore seems doubtful under international law. [FN174] But state practice may be evolving in such a way as

to place greater emphasis on factors other than territorial integrity. Quebecers do constitute a distinctive people, and a strong expression of their will to secede, through referendum or otherwise, may well overcome the obstacles that currently block the existence of a right to secede.

V. CONCLUSION

The nation-state was on the rise when Canada was created and it continues to be the cornerstone of the international legal and political systems. Its maintenance or achievement remains a fundamental political ideal due to the persistence of nationalism as a force in international politics. [FN175] The principle of self-determination has, in turn, been the link between nationalism and the nation-state.

It may be argued that nationalism is a destructive force in international politics, that it "has passed from the stage of state-making to that of state- breaking." [FN176] For some, the solution is to dissolve nationalism and to encourage "internationalism," thereby obviating notions of self-determination. But this view, in effect, supports the status quo of the present nation-state system and all of its shortcomings. At one extreme, for example, successful colonial self-determination has resulted in a proliferation of "micro-states" challenging the validity of Westphalian notions of state equality and ultimately the credibility of the United Nations. [FN177] At the other extreme, self-determination has failed many peoples who remain trapped within "foreign" states in what essentially amounts to internal colonialism. It is for this reason that some believe that it is really a lack of political legitimacy and not nationalism that is the source of claims for self- determination and their associated international tension. [FN178] Whatever their impetus, these claims for self-determination will continue to arise and it is for the international legal and political systems to reform in order to accommodate them. Thus, the law relating to secession will continue to occupy a prominent place in international politics, and legal justification will continue to be sought from both domestic constitutional sources and the principle of self-determination.

Unfortunately, however, there remains an absence of international consensus regarding the status of secession within this principle. The result is that states respond to secessionist claims not in a preemptive manner according to international legal principle, but after the fact (occasionally by intervention) according to political expediency. Only then are the actions justified on the basis of legal principle.

The law relating to recognition of sovereignty is relevant in this regard. Despite an absence of legality under constitutional or international law, a "revolution," if demonstrably successful, may nonetheless become the foundation of a new, and entirely legitimate, legal order within a territory. [FN179] The issue for the courts purporting to exercise jurisdiction is simply whether or not the breakaway government has established effective control of the territory which it claims to govern. [FN180] For foreign governments, the decision whether to recognize will similarly consider effective control, [FN181] but will also take into account political factors based on national interests. [FN182] In the case of Quebec, the most influential states in terms of recognition will be France (which despite Gallic affiliation may be more cautious in view of its own secessionist movements in Corsica, Brittany, and the Basque region), and the United States (which despite official disinterest in or even support of the continuation of the Canadian state may be more prone to accept Quebec's actions in order to quickly normalize political, business, and trade relations with the new state [FN183]). To the extent that customary

international law is formed by state practice, the assessment of Quebec's legal right by these states will be particularly significant to the existence of such a right. In turn, positions taken by foreign governments will depend in large part on the approach taken by the Canadian government in response to Quebec's claim for independence.

In conclusion, Quebec may indeed have an implied right to secede under Canadian constitutional law, though irreconcilable interpretations as to the existence of this right inside and outside Quebec rooted in opposing historical perceptions will ultimately produce a stalemate. Nowhere are the conflicting perceptions of Canadian federalism more evident. Therefore, reference to Canadian constitutional law, rather than resolving conflict, may actually deepen the divisions that presently exist. It is much more likely that the issue of the legality of Quebec's secession will be peacefully resolved by an appeal to international law. Under international law, as defined by state practice, Quebec's case for secession fails in respect of most of the factors that have been central to traditional analysis. Consistent with this analysis, states would likely be very hesitant to override the presumption of territorial integrity in the case of Canada. But the position likely to be taken by the Canadian government itself undermines this conclusion. In brief, the factor that distinguishes Quebec's case from other secessionist movements is to be found in the consensus, broadly held in the rest of Canada, that so long as the will of Quebecers to secede has been legitimately determined there will be no military intervention to block Quebec's giving effect to secession. [FN184] In effect, the federal government, in refusing to intervene militarily, would be conceding that its right of territorial integrity and national unity are subordinate to the Quebec people's right to determine themselves. Such action would have a significant impact on the decisions of other states to recognize Quebec's declaration of independence. The international community would have no alternative but to accept the result, and the legality of Quebec's act of secession would thereby be recognized. [FN185] In this sense, Canada's action, in setting the course for state practice, could be considered to be leading the development of customary international law respecting secessionist self-determination to an area that is grounded more in democratic legitimacy than in the preservation of the integrity of existing states. The implications of such a development are significant. Secessionist movements in the future may as a result meet with less political resistance and, correspondingly, less violence.

Given these implications, a key issue is how Quebec's claim to secession, irrespective of its outcome, can be dealt with so as to be least disruptive to all parties concerned. Although one must be careful in drawing parallels, precedents for peaceful, successful secession do exist. [FN186] Probably the one essential requirement for a peaceful process is that the will of the people be explicitly and thoroughly tested in a democratic manner. [FN187] Only through a referendum that is fairly framed, properly executed, and broadly based will a successful result be accepted as legitimate by the rest of Canada and the international community. [FN188] It is essential that the legitimacy of the claim based on the factors cited herein [FN189] be discussed openly and extensively to ensure an informed decision. In addition, matters of succession need to be thoroughly considered in advance to ensure a smooth transition period. Of specific interest would be the succession of Canadian treaty rights to Quebec (particularly as they relate to the rights of aboriginal peoples in Quebec's northern territories), Quebec's responsibility for the federal public debt, and a determination of the ownership of federal public property in Quebec.

Quebec's claim for secession should nevertheless be viewed in the context of larger developments. As global economic and technological forces become more powerful, it may be

that super-state entities will eventually replace the nation-state as the most significant governing organ in people's lives. [FN190] The state would retain its primary position in international relations, but would surrender to a higher regional authority responsible for such broader concerns as security and the economy. The European experience already portends this. At the same time, the reduced importance of states would permit devolution of decision-making responsibility to more responsive local levels and thereby actually allow more scope for the self-determination of peoples. [FN191] The result will be a global system of political units which are both more and less inclusive than the present-day nation-state. Far from reflecting the health of the nation-state, then, increased secessionist activity in the world today may in fact be reflecting its diminishing importance. Such developments are likely some time away, however, and the existing nineteenth-century governing arrangements in Canada certainly cannot be maintained in the meantime. Indeed, Canada is well-placed to lead the way to developing a novel state structure that accommodates the needs of all its peoples. [FN192]

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FNaa. This is a pseudonym.

FN1. Since the United Nations was founded in 1945, the number of member states has increased from 51 to 179.

FN2. The first attempt at separation commencing with the election of the Parti Quebecois in Quebec in 1976 until the narrow defeat of the "sovereignty- association" referendum in 1980 has been well covered. See, e.g., William Coleman, The Independence Movement in Quebec, 1945-1980 (1984); Louis Balthazar, Bilan du nationalisme au Quebec (1986). As to the apparent decline of the movement towards secession, see Dominique Clift, Le declin du nationalisme au Quebec (1981).

FN3. Some of the recent U.S. literature includes: The Collapse of Canada (R.K. Weaver ed., 1992); Jonathan Lemco, Turmoil in the Peaceable Kingdom: The Quebec Sovereignty Movement and its Implications for Canada and the United States, 3 Can.-U.S. Outlook 1 (1992).

FN4. A small body of literature has treated various aspects of the subject. See generally Jacques Brossard, L'accession a la souverainete et le cas du Quebec (1976) [hereinafter L'accession]; David Cameron, Nationalism, Self- Determination and the Quebec Question (1974); Marcel Chaput, The Secession of Quebec from Canada, in Politics Canada 45 (Paul Fox ed., 1962); John Claydon & John Whyte, Legal Aspects of Quebec's Claim for Independence, in Must Canada Fail? 259 (Richard Simeon ed., 1977); Peter Hogg, Constitutional Law of Canada 101-06 (2d ed. 1985); Claude Morin, Quebec v. Ottawa: The Struggle for Self- Government 1960-1972 (1976); Kevin Murphy, Is There a Right to Secede?, in The Referendum and Separation Elsewhere: Implications for Quebec 163 (Donald Rowat ed., 1978); Jacques Brossard, Le droit du peuple quebecois a l'autodetermination et a l'independance, 8 Etudes internationales 151 (1977); Jacques Brossard, Le droit du peuple quebecois de disposer de lui-meme au regard du droit international, 15 Can. Y.B. Int'l L. 84 (1977); Thomas Carey, Self-Determination in the Post-Colonial Era: The Case of Quebec, 1 A.S.I.L.S. Int'l L.J. 47

(1977); Roger Chaput, Du rapport Durham au rapport Brossard: le droit des quebecois a disposer d'eux-memes, 20 C. de D. 289 (1979); Greg Craven, Of Federalism, Secession, Canada and Quebec, 14 Dalhousie L.J. 231 (1991); F. Murray Greenwood, The Legal Secession of Quebec: A Review Note, 12 U.B.C.L. Rev. 71 (1978); David Matas, Can Quebec Separate?, 21 McGill L.J. 387 (1975); R.A. Mayer, Legal Aspects of Secession, 3 Man. L.J. 61 (1968); Jacques-Yvan Morin, Le federalisme canadien apres cent ans, 2 Rev. jur. them. 13 (1967-1968); Marc Thibodeau, The Legality of an Independent Quebec: Canadian Constitutional Law and Self- Determination in International Law, 3 B.C. Int'l & Comp. L. Rev. 99 (1979).

FN5. See the statistics presented in Stephane Dion, Explaining Quebec Nationalism, in The Collapse of Canada, supra note 3, at 87, table 3. See also Stephane Dion, Will Quebec Secede? Why Quebec Nationalism is so Strong, 9 Brookings Rev. 14 (1991).

FN6. The Canadian constitution was largely found in the British North America Act, 1867, 30 & 31 Vict., ch. 3, reprinted in Hogg, supra note 4, at 831, which, being an Act of the Imperial Parliament, could not be amended by the Canadian Parliament.

FN7. See And No One Cheered: Federalism, Democracy and the Constitution Act (Keith Banting & Richard Simeon eds., 1983); Paul Davenport & Richard Leach, Reshaping Confederation: The 1982 Reform of the Canadian Constitution (1983); David Milne, The New Canadian Constitution (1982); Roy Romanow et al., Canada Notwithstanding: The Making of the Constitution 1976-1982 (1984).

FN8. Meech Lake and Canada: Perspectives from the West (Roger Gibbons ed., 1988); The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord (Michael Behields ed., 1989); Bryan Schwartz, Fathoming Meech Lake (1987).

FN9. These three broad options have been more finely categorized into nine possible options. See Ronald Watts, Canada's Constitutional Options: An Outline, in Options for a New Canada 15 (Ronald Watts & Douglas Brown eds., 1991).

FN10. See Shaping Canada's Future Together, Constitutional Proposals of the Government of Canada, Sept. 24, 1991. Very briefly, the federal proposals envisage recognition of Quebec as a distinct society, as well as greater political decentralization and, concurrently, greater economic centralization through the creation of a more liberalized Canadian common market.

FN11. See Report of the Special Joint Committee of the Senate and House of Commons on a Renewed Canada, Issue No. 66 of the Third Session of the Thirty- Fourth Parliament, Feb. 28, 1992. These proposals do not fundamentally alter the principles agreed to in the Meech Lake Accord, but go further by recommending entrenchment of intergovernmental delegation arrangements and curtailment of the federal spending power.

FN12. Lemco, supra note 3, at 48.

FN13. In its report issued on June 27, 1991, the federal government's Forum on Canada's Future (the Spicer Commission) found "overwhelming" resistance by the rest of Canada to

special constitutional provisions for Quebec. See the summary by External Affairs and International Trade Canada, Citizens' Forum on Canada's Future: The Spicer Commission, Sept. 24, 1991.

FN14. Rheal Seguin, Quebec Says Unity Offers Won't Do, Toronto Globe and Mail, Nov. 6, 1991, at A1.

FN15. See Spicer Commission, supra note 13.

FN16. A Quebec Free to Choose, Report of the Constitutional Committee of the Quebec Liberal Party (the Allaire Report), Jan. 28, 1991; Report of the Commission on the Political and Constitutional Future of Quebec (the Belanger- Campeau Report), Mar. 1991.

FN17. Poll published in Quebec and Canada, Toronto Globe and Mail, April 22, 1991, at A6.

FN18. These two opposing views are discussed by Craven, supra note 4.

FN19. Sovereignty can in fact be realized notwithstanding the absence of legality. "All the legal arguments in the world could not prevent the Quebecois from carrying out a [political] decision to secede." Mayer, supra note 4, at 61.

FN20. Craven, supra note 4, at 256. See also Mayer, supra note 4, at 61.

FN21. Emlyn Wade & G. Godfrey Phillips, Constitutional and Administrative Law 7 (1977).

FN22. See generally Ian Brownlie, Principles of Public International Law 32-35 (4th ed. 1990).

FN23. Id. at 32-33.

FN24. Id. at 33.

FN25. Id. at 32-35.

FN26. Id. at 33.

FN27. Hersch Lauterpacht, 1 International Law: Collected Papers 151-77 (Elihu Lauterpacht ed., 1970).

FN28. Kelson, Principles of International Law, 290-301, 533-88 (2d ed. 1966).

FN29. See generally, Brownlie, supra note 22.

FN30. Id. at 30.

FN31. Id. at 35.

FN32. Article 72 of the Constitution (Basic Law) states that "The right of free secession from the USSR shall be preserved for each union republic." Reprinted in William Butler, Basic Documents on the Soviet Legal System 16 (1991).

FN33. The preamble to the Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., ch. 12, states that the colonies "have agreed to unite in one indissoluble Federal Commonwealth."

FN34. For example, the title of the British North America Act, 1867 [hereinafter BNA Act,], 30 & 31 Vict., ch. 3, states that it is an "Act for the Union of Canada, Nova Scotia, and New Brunswick and the Government thereof." The preamble further refers to the desire of the four provinces to federate as a dominion. Under the British North America Act, 1871, 34 & 35 Vict., ch. 28, the Parliament of Canada was given the power to establish and make provision for new provinces out of the remaining territories.

FN35. In Texas v. White, 74 U.S. (7 Wall.) 700, 724-25 (1868), the Supreme Court of the United States considered the legality of some internal acts performed by the state of Texas during its unsuccessful secession. The Court inferred the absence of a right to secede from the wording of the United States Constitution:

> By these [the Articles of Confederation] the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

Id. at 725.

FN36. "[A]lthough the Privy Council has confirmed the provinces in a wide range of powers, it has never said anything to support the right of the provinces to withdraw from Confederation." James Corry & J. Hodgetts, Democratic Government and Politics 559 (1959).

FN37. The preamble to the BNA Act declares that the provinces have expressed a desire to be united "with a Constitution similar in Principle to that of the United Kingdom" which, of course, does not have a written constitution. BNA Act, supra note 34.

FN38. Brossard, L'accession, supra note 4, at 96-97.

FN39. Hogg, supra note 4, at 102.

FN40. Norman Rogers, The Compact Theory of Confederation, 9 Can. B. Rev. 395 (1931).

FN41. Sir Wilfrid Laurier speaking in the Canadian House of Commons in 1907, quoted in Paul Gerin-Lajoie, Constitutional Amendment in Canada 292 (1950).

FN42. See George Stanley, Act or Pact: Another Look at Confederation, Can. Hist. Ass'n Report 1 (1956), reprinted in Readings in Canadian History 501 (R. Douglas Francis & Donald Smith eds., 2d ed. 1986).

FN43. 74 U.S. at 700.

FN44. See Robert Cushman, Leading Constitutional Decisions 91-92 (1977).

FN45. In re The Regulation and Control of Aeronautics in Canada (the Aeronautics Reference) (1932) A.C. 54; Attorney-General for Canada v. Attorney- General for Ontario (1937) A.C. 326. See the discussion in Mayer, supra note 4, at 70-73.

FN46. Aeronautics Reference, supra note 45 at 70.

FN47. This argument, which seems to have originated with Rogers, supra note 40, is set out in Mayer, supra note 4, at 71.

FN48. Mayer, supra note 4, at 71.

FN49. This included the period from 1840 to Confederation when Quebec, renamed Canada East, was joined to Upper Canada (renamed Canada West) to form the single colony of Canada. See generally, J.M.S. Careless, The Union of the Canadas: The Growth of Canadian Institutions, 1841-1857 (1967). The union, however, was only partial and Quebec continued to retain its own legal and political identity for the most part, including the civil law system. Id.

FN50. On Great Britain's historical role, see The Causes of Canadian Confederation (Ged Martin ed., 1990); Ged Martin, Launching Canadian Confederation: Means to Ends, 1836-1864, 27 The Hist. J. 575 (1984).

FN51. See D.G. Creighton, Confederation: the Use and Abuse of History, 1 J. Can. Studies 3 (May 1966); D.J. Hall, "The Spirit of Confederation": Ralph Heintzman, Prof. Creighton, and the Bicultural Compact Theory, 9 J. Can. Stud. 24 (Nov. 1974); Ralph Heintzman, The Spirit of Confederation: Prof. Creighton, Biculturalism, and the Use of History, 52 Can. Hist. Rev. 245 (1971).

FN52. Jean-Charles Bonenfant, Les Canadiens francais et la naissance de la confederation (1952); Lionel Groulx, Les Canadiens francais et la confederation canadienne (1927); A.I. Silver, The French-Canadian Idea of Confederation, 1864-1900 (1982); Jean-Charles Bonenfant, L'Esprit de 1867, 17 Revue d'histoire de l'Amerique francaise 19 (June 1963).

FN53. Government of Quebec, Report of the Royal Commission of Inquiry on Constitutional Problems (1956).

FN54. Id. at 142.

FN55. Id. at 143.

FN56. W. Menzies Whitelaw, Reconstructing the Quebec Conference, 19 Can. Hist. Rev. 123 (1938).

FN57. A.G. Doughty, Notes on the Quebec Conference, 1964, 1 Can. Hist. Rev. 43 (1920).

FN58. Charles Tupper, quoted in Doughty, supra note 57, at 43.

FN59. J.M.S. Careless, 2 Brown of the Globe 169 (1963).

FN60. Silver, supra note 52, at 33-46.

FN61. La Minerve, quoted in Silver, supra note 52, at 37.

FN62. Id.

FN63. Christopher Quaye, Liberation Struggles in International Law 14 (1991).

FN64. W. Ofuatey-Kodjoe, The Principle of Self-Determination in International Law vii (1977).

FN65. Alfred Cobban, The Nation State and National Self-Determination 114 (1969). Cobban further notes that:

The effect of Revolutionary ideology was to transfer the initiative in state-making from the government to the people. Nation states had formerly been built up, in the course of centuries, from above, by the influence of government: henceforth they were to be made much more rapidly from below by the will of the people. The logical consequence of the democratisation of the idea of the state by the revolutionaries was that nationalism took the form of the theory of national self-determination.
Id. at 41.

FN66. For example, the German Declaration of Rights of 1848 reflected self- determination principles based on nationalistic and democratic principles. Id. at 43, 45.

FN67. Harold Johnson, Self-determination within the Community of Nations 32 (1967).

FN68. Wilson gave a clear and supportive statement of the concept before Congress in 1918: "National aspirations must be respected, peoples may now be dominated and governed only by their consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril." 56 Cong. Rec. 1,952 (1918).

FN69. Johnson, supra note 67, at 35.

The Atlantic Charter does not contain the phrase ["self-determination"] ... but it does suggest part of its meaning in that the signers "desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned" and that they "respect the right of all people to choose the form of government under which they will live."
Id.

FN70. Ruth Russell, A History of the United Nations Charter 811 (1958).

FN71. U.N. Charter art. 1(2).

FN72. Article 55 begins: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall ...." Id. art. 55.

FN73. Article 73(b) states that one of the goals for non-self-governing territories is "to develop self-government, to take due account of the political aspirations of peoples ...." Id. art 73(b).

FN74. One commentator has argued, for example, that inclusion of the principle of self-determination in the United Nations Charter was accepted not only to imply the right to self-government of peoples, but as a means of furthering friendly relations among states and strengthening universal peace. Antonio Cassese, The Helsinki Declaration and Self-Determination, in Human Rights, International Law and the Helsinki Accord 83, 84 (Thomas Buergenthal ed., 1977) [hereinafter Human Rights].

FN75. "The anticolonialist force of the principle spread while its other possible meanings grew progressively less important." Id. at 85.

FN76. For example, article 21 of the Universal Declaration of Human Rights provides generally that "the will of the people shall be basis of the authority of government." G.A. Res. 217A, U.N. Doc. A/810, at 71, 75 (1948). More specifically, self-determination was made a fundamental human right in the 1961 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961) [hereinafter Declaration on the Granting of Independence], and in the 1966 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 220, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESC], and the International Covenant on Civil and Political Rights, G.A. Res. 220, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]. Both of these Covenants stated in identical articles that "[a]ll 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." ICESC art. 1(1); ICCPR art. 1(1). Lastly, the General Assembly took a major step to recognize the concept of self-determination as a right under international law by adopting the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/80228 (1971) [hereinafter Declaration on Friendly Relations]. In part, this resolution proclaims that "every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples ...." Id. at 123- 24.

FN77. Secessionist movements in Biafra, Katanga, Eritrea, Bangladesh, Kurdistan, the Basque region, Scotland, Northern Ireland, Tibet, the Baltic states, Ukraine, Georgia, Moldova, Slovenia, Croatia, Czechoslovakia and, of course, Quebec are all prominent recent examples of this type of claim to self- determination.

FN78. Final Act of the Conference on Security and Co-operation in Europe, August 1, 1975 [hereinafter Helsinki Accord], reprinted in Basic Documents on Human Rights 320 (Ian Brownlie

ed., 2d ed. 1981).

FN79. Id.

FN80. Legal authorities are "divided on the status of the principle ... and arguments have been advanced both for and against its existence in international law." Umozurike Oji Umozurike, Self-Determination in International Law 177 (1972).

FN81. Article 38(1) of the Statute of the International Court of Justice defines the sources of international law as:

(a) international conventions, whether general or particular, establishing the rules expressly recognized by the contesting States;

(b) international custom, as evidence of general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (1969).

FN82. One commentator has argued that "[t]he simple existence of this principle within the United Nations Charter suggests its recognition as a fundamental principle of international law." John A. Collins, Note, Self-Determination in International Law: The Palestinians, 12 Case W. Res. J. Int'l L. 137, 141 (1980).

FN83. Brownlie, supra note 22, at 4-5.

FN84. Ofuatey-Kodjoe, supra note 64, at 150.

FN85. Collins, supra note 82, at 142.

FN86. Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations 103 (1963).

FN87. Rouhollah Ramazani, Comments: Self-Determination and the Settlement of the Arab-Israeli Conflict, 65 Am. Soc'y Int'l L. Proc. 50, 51 (1971).

FN88. M.C. Bassiouni, "Self-Determination" and the Palestinians, 65 Am. Soc'y Int'l L. Proc. 31, 33 (1971). See generally Rupert Emerson, Self- Determination, 60 Am. Soc'y Int'l L. Proc. 136 (1966); Zubeida Mustafa, The Principle of Self-Determination in International Law, 5 Int'l Law. 479 (1971).

FN89. Rupert Emerson, Self-Determination Revisited in the Era of Decolonization 64 (1964).

FN90. Michla Pomerance, Self-Determination Today: The Metamorphosis of an Ideal, 19 Israel L. Rev. 310 (1984).

FN91. Lee Buchheit, Secession: The Legitimacy of Self-Determination 127 (1978).

FN92. Umozurike, supra note 80, at 190.

FN93. Yehuda Blum, Reflections on the Changing of Self-Determination, 10 Israel L. Rev. 509, 512 (1975).

FN94. Advisory Opinion on Western Sahara, 1975 I.C.J. 12 (Oct. 16).

FN95. Id.

FN96. Id. at 36.

FN97. See supra note 76.

FN98. See Brownlie, supra note 22, at 14; Richard Falk, On the Quasi- Legislative Competence of the General Assembly, 60 Am. J. Int'l L. 782, 783 (1966).
FN99. Roland Rich, Comment, The Right to Development as an Emerging Human Right, 23 Va. J. Int'l L. 287, 296-97 (1983).

FN100. "[E]ven within the conservative frame of article 38 of the statute, legal effect may be given to the collective pronouncements of the General Assembly ... despite their formally non-binding character." Oscar Schacter, The Evolving International Law of Development, 15 Colum. J. Transnat'l L. 1, 5 (1976).

FN101. Hector Espiell, Special Rapporteur, Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/390 (1977), at 17, P 63. Jus cogens refers to a peremptory norm of international law, defined in article 53 of the Vienna Convention on the Law of Treaties as a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, U.N. Doc. A/Conf. 39/27 at 296 (1969).

FN102. See infra text accompanying notes 144-58.

FN103. Umozurike, supra note 80, at 197.

FN104. Id.

FN105. Supra note 76.

FN106. Brossard, L' accession, supra note 4, at 101.

FN107. See supra notes 78 & 79 and accompanying text.

FN108. Thomas Buergenthal, International Human Rights Law and the Helsinki Final Act: Conclusions, in Human Rights, supra note 74, at 9.

FN109. Buchheit, supra note 91, at 17.

One searches in vain ... for any principled justification of why a colonial people wishing to cast off the domination of its governors has every moral and legal right to do so, but a manifestly distinguishable minority which happens to find itself, pursuant to a paragraph in some medieval territorial settlement or through a fiat of the cartographers, annexed to an independent State must forever remain without the scope of the principle of self- determination.
Id.

FN110. Id. at 18.

FN111. Umozurike, supra note 80, at 197.

FN112. Harris Schoenberg, Limits on Self-Determination, 6 Israel Y.B. Hum. Rts. 91 (1976).

FN113. S. Prakash Sinha, Is Self-Determination Passe?, 12 Colum. J. Transnat'l L. 260, 271 (1973).

FN114. Buchheit, supra note 91, at 198-99 (emphasis in original). But see Maarten Bos, Self-Determination by the Grace of History, 15 Netherlands Int'l L. Rev. 362 (1968). "[S]elf-determination is not a right under international law, but by virtue of history and provided the act of self-determination is crowned with success. History, bestowing its 'grace' upon an attempt at self- determination, thereby recognizes the group's (historical) right ex post." Id. at 372.

FN115. Buchheit, supra note 91, at 199.

FN116. Ved P. Nanda, Self-Determination under International Law: Validity of Claims to Secede, 13 Case W. Res. J. Int'l L. 257, 275 (1981).

FN117. Buchheit, supra note 91, at 136.

FN118. Stanley de Smith, Constitutional and Administrative Law 76 (Harry Street & Rodney Brazier eds., 4th ed. 1981).

FN119. Johnson, supra note 67, at 50.

FN120. See generally Buchheit, supra note 91, at 9-10.

FN121. Id.

FN122. Id.

FN123. "History, language, law, ethnicity, feelings and politics render Quebec at once a society, a province and the stronghold of the French-Canadian people. Taken together, these factors

produce in the Quebecois a vision of Quebec as the living heart of the French presence in North America." Task Force on Canadian Unity: A Future Together 24-25 (1979).

FN124. Economic Council of Canada, A Joint Venture: The Economics of Constitutional Options (1991).

FN125. In fact, Quebec's premier Robert Bourassa is at least ostensibly bound by Quebec law to hold a referendum by October 1992. By that time, the government of Quebec is to seek a mandate from the people of Quebec to accept any offer from the federal government setting out a renewed federal structure or, alternatively, to proceed to giving effect to independence.

FN126. See Buchheit, supra note 91, at 22-23.

FN127. "Since the law of Nations is primarily a law for the international conduct of States, States are, to that extent, the only subjects of the Law of Nations." Lassa Oppenheim, International Law: A Treatise 636 (Hersch Lauterpacht ed., 1955).

FN128. To be a state under international law, an entity must possess several attributes which are generally agreed to be set out in the 1933 Montevideo Convention on Rights and Duties of States. Article 1 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 other States." Convention on Rights and Duties of States in the Seventh International Conference of American States, Dec. 26, 1933, 49 Stat. 3097, U.S.T.S. No. 881. Quebec lacks the last attribute. While the Convention has had little acceptance, it is nonetheless viewed as reflecting norms of customary international law.

FN129. Because states are the only legitimate actors in the international system, an entity which does not constitute a state is nonexistent and therefore cannot possess a right. If it does possess a right, it must already be determined and the right itself makes no sense. See Fitzmaurice, The Future of Public International Law, in Institut de droit international, Livre du Centenaire 233 (1973).

FN130. Buchheit, supra note 91, at 23.

FN131. See generally Quaye, supra note 63, at 46-52; Buchheit, supra note 91, at 22-23.

FN132. "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." 22 Trial of the Major War Criminals before the International Military Tribunal Proceedings 16, 878 (1948).

FN133. Universal Declaration of Human Rights, supra note 76, at preamble.

FN134. See Cassese, supra note 74, at 86-93.

FN135. See, e.g., Oppenheim, supra note 127, at 636-42.

FN136. Even this has been disputed.

A state's obligation under international law may find its counterpart in another state's right, but not in the right of a people.... [I]t is either a state or the community of states forming the United Nations which can seek performance of a state's obligation to accord self-determination to its people, not the people of that state."
S. Prakash Sinha, Self-Determination in International Law and its Applicability to the Baltic Peoples, in Res Baltica 256, 256-57 (1968).

FN137. See generally James Beck, Joseph Howe (1983); Jean-Charles Bonenfant, La Naissance de la Confederation (1969); William MacNutt, New Brunswick: A History, 1784-1867 (1962); Kenneth Pryke, Nova Scotia and Confederation, 1864- 1871 (1979); Phillip Buckner et al., The Maritimes and Confederation: A Reassessment, 71 Can. Hist. Rev. 1 (1990).

FN138. "It's a denial of history, ours and theirs, to suggest that there's any similarity between the situation in the Soviet Union, and in Yugoslavia for that matter, and the situation in Canada. Nobody brought any part of Canada into Confederation at the barrel of a gun." Derek Burney, Canadian Ambassador to the United States, quoted in Carol Goar, Small Wonder Foreigners Fear for Canada, Toronto Star, July 13, 1991, at D4.

FN139. See generally Buchheit, supra note 91, at 21-22.

FN140. See supra text accompanying notes 40-62.

FN141. "Surely it is too much to ask that every successive generation patiently accept the 'sins of its fathers,' committed in some dimly remembered age, in the name of a fiction like the continuing identity of a community." Buchheit, supra note 91, at 22.

FN142. Dion, Explaining Quebec Nationalism, supra note 5, at 88-102.

FN143. Sandro Contena, Thriving French May Be Bad News for Separatists, Toronto Star, July 6, 1991, at D5.

FN144. The dispute involved an attempt to escape Finland's asserted sovereignty over the Aaland Islands. A Commission of Rapporteurs concluded in its report to the League of Nations that to concede the right of territorial separation "would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity." Report of the Commission of Rapporteurs on the Aaland Islands, League of Nations Doc. B.7 21/68/106 (1921).

FN145. But cf. Umozurike, supra note 80, at 178.

FN146. "[N]o State's population is so homogeneous that its leaders may openly embrace the right [of self-determination] without some lingering uneasiness." Buchheit, supra note 91, at 17.

FN147. For example, Canada itself scrupulously avoided lending any support to the Biafran movement for fear of the implications for Quebec. See David Cameron, Nationalism,

Self-Determination and the Quebec Question 104 (1974). Note also that the Organization of African Unity regarded the preservation of Nigerian unity as a common African interest. The preamble to its charter provides: "The Member States ... solemnly affirm and declare their adherence to [the principle of] respect for the sovereignty and territorial integrity of each State and for its inalienable right to independence and existence." African [Banjul] Charter on Human and People's Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 I.L.M. 58 (1982). See generally S. Azadon Tiewul, Relations Between the United Nations Organization and the Organization of African Unity in the Settlement of Secessionist Conflicts, 16 Harv. Int'l L.J. 259 (1975).

FN148. United Nations forces were used to help suppress the Katanga secession. See generally E.M. Miller, Legal Aspects of the United Nations Action in the Congo, 55 Am. J. Int'l L. 1 (1961). Subsequently, the Security Council adopted a resolution completely rejecting the claim that Katanga is a "sovereign, independent nation," reaffirming that the United Nations action was to maintain "the territorial integrity and political independence of the Congo," and demanding that "secessionist activities ... shall cease forthwith." U.N. SCOR, 16th Sess., Supp. for Oct.-Dec. 1961, at 148, 149, U.N. Doc. S/5002 (1961).

FN149. Since Eritrea's annexation by Ethiopia in 1962, Eritrean representative organizations have been submitting almost annually to the United Nations General Assembly memoranda urging, to no avail, consideration of their case. See Gebre Tesfagiorgis, Self-Determination: Its Evolution and Practice by the United Nations and its Application to the Case of Eritrea, 6 Wis. Int'l L.J. 75, 125 (1987).

FN150. Vernon Van Dyke, Human Rights, the United States and the World Community 102 (1970). In the context of the attempted Biafran secession, U. Thant, then U.N. Secretary General, asserted that the United Nations "has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State." 7 U.N. Monthly Chron. 36 (Feb. 1970).

FN151. See U.N. Charter art. 1(2).

FN152. Id. arts. 2(1), 2(4).

FN153. Declaration on the Granting of Independence, supra note 76.

FN154. Declaration on Friendly Relations, supra note 76.

FN155. Helsinki Accord, supra note 78, Principle VIII.

FN156. Id. Principle IV.

FN157. Cassese, supra note 74, at 104.

FN158. Id. at 106.

FN159. Id. at 106-07.

FN160. Quebec has a land mass of 594,860 square miles out of 3,851,809 square miles for all of Canada. Its population of nearly seven million constitutes approximately one-quarter of the total Canadian population.

FN161. See Deborah Jones, Crisis seen as Threat to Atlantic Canada, Toronto Globe and Mail, Apr. 8, 1991, at A5.

FN162. "Language duality remains very much at the heart of our national vision." Dilberville Fortier, Federal Official Languages Commissioner, quoted in Jeffrey Simpson, It is Folly to Expect French-language Rights in a Canada without Quebec, Toronto Globe and Mail, Mar. 27, 1991, at A18.

FN163. See, e.g., Jeffrey Simpson, After Quebec Leaves, Canadians Will be Embroiled in New, Crucial Debates, Toronto Globe and Mail, Feb. 1, 1991, at A12. See also Lemco, supra note 3. But cf. Reg Whitaker, The Birth of Two Nations?, Toronto Star, Feb. 19, 1991, at A19.

FN164. See, e.g., Miro Cernetig, Western Francophones Fear They May be Forgotten, Toronto Globe and Mail, Feb. 23, 1991, at A6; Martin Cohn, We're Bound to Lose, Acadians Say, Toronto Star, Mar. 31, 1991; and Simpson, supra note 163.

FN165. Pierre Elliot Trudeau, Federalism and the French Canadians 34 (1968) (emphasis in original).

FN166. In northern Quebec, for example, native Indians and Inuit remain in the majority. Moreover, this territory has never historically been a part of French Canada, but was granted to Quebec by the Canadian government in 1912 by virtue of the Quebec Boundaries Extension Act, 1912, 2 Geo. 5, ch. 45. Paragraph 2(e) provides that "the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the government of Canada subject to the control of Parliament." Id. See A.J. Arnett, The Quebecois Can't Take it All With Them, Toronto Globe and Mail, October 10, 1991, at A19; Christopher Young, A Potential Dispute over Quebec's North, Toronto Star, June 10, 1991, at A17.

FN167. "[I]ndigenous peoples must not be prevented from freely determining their own destiny, should Quebec take steps to accede to independence." Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada, Submission to the U.N. Hum. Rts. Comm., Feb. 1992, at 180.

FN168. Umozurike, supra note 80, at 199.

FN169. Buchheit, supra note 91, at 94.

States are under no obligation imposed by international law to recognize [secessionist groups'] demands beyond providing protection for human rights, a representative government that does not discriminate on the basis of race, creed or color, and the other requirements set forth in the [Declaration on Friendly Relations]. If these conditions are satisfied, the instrument

apparently consigns discussions regarding the political status of such groups within their States to the level of internal constitutional law.
Id.

FN170. Compare the situation in Pakistan prior to the secession of Bangladesh (East Pakistan). West Pakistan, with only 45% of the population but 100% greater income, received 80% of government spending including 70% in respect of development. See Claydon & Whyte, supra note 4, at 267-68.

FN171. Ironically, the Supreme Court of Canada has held that Quebec's own French-only language legislation, The Charter of the French Language, is a denial of human rights to its English-speaking minority. See Ford v. Quebec (Atty-Gen), 54 D.L.R.4th 577 (1989).

FN172. Umozurike, supra note 80, at 199.

FN173. By way of illustration, the presumption in favor of territorial integrity was so great that the deaths of millions of Bangladeshi in the early 1970s aroused only a slow, mixed reaction from the United Nations. See Quaye, supra note 63, at 233-40; Buchheit, supra note 91, at 198-215.

FN174. "It is safe to conclude, therefore, that the practice of States holds no hope for those who maintain that Quebec has an international protected right to secede from Canada." Carey, supra note 4, at 51.

FN175. Nationalism has been described as a state of mind which inspires a people (nation) to assert that the national state is the ideal and only legitimate form of political organization. Hans Kohn, Nationalism: Its History and Meaning 10 (1955).

FN176. Cobban, supra note 65, at 17.

FN177. By the year 2000 A.D., micro-states (defined as having fewer than two million inhabitants) are expected to constitute one-fourth of the membership of the United Nations. See Lawrence Farley, Plebiscites and Sovereignty: The Crisis of Political Illegitimacy 13 (1986).

FN178. Id. at 19.

FN179. Hogg, supra note 4, at 104.

FN180. See Madzimbamuto v. Lardner-Burke, 1 App. Cas. 645 (1969) (U.K.), where the Privy Council initially refused to recognize the legality of acts of the government of Southern Rhodesia following its unilateral declaration of independence because that government was not in effective control. The High Court of Rhodesia later held, however, in R. v. Ndhlovu (1968) 4 S.A.L.R. 515 (Rho.), that it could "now predict with certainty that sanctions will not succeed in their objective of overthrowing the present government and of restoring the British government to the control of the government of Rhodesia," and that acts of the existing Rhodesian government were legal. Id. at 532.

FN181. Canada, for example, professes to base decisions to recognize on "whether the particular authority is regarded by Canada as able to exercise effective control, with a reasonable prospect of permanency, over the area which it claims to govern." Note from the Department of External Affairs (1974) setting out the Canadian policy of recognition, reproduced in Hugh Kindred, International Law: Chiefly as Interpreted and Applied in Canada 275 (1987).

FN182. The recent widespread recognition of the Baltic states arguably followed this pattern.

FN183. This seems to be the main conclusion in J.-F. Lisee's examination of U.S. views concerning Quebec's possible separation from Canada before and during the 1980 referendum campaign. See Jean-Francois Lisee, In the Eye of the Eagle (1990).

FN184. Philip Resnick, Toward a Quebec-Canada Union 57-58 (1991).

If the people of Quebec today wish to define themselves collectively as sovereign vis-a-vis the people of Canada and to vest that sovereignty in institutions and an elected government all their own, they have every democratic right to do so. And many of us would want no part of an English Canada that says no to them.

Id. The governing Progressive Conservative Party has apparently endorsed this view. See Graham Fraser, Tories Back Quebec's Right to Choose, Toronto Globe and Mail, Aug. 10, 1991, at A1.

FN185. This implies that if Canada were to more firmly assert its right of territorial integrity, at least in a manner somewhat short of use of military force, a more uncertain situation would result. States would undoubtedly be more reluctant to acknowledge Quebec's right to secede in the face of denial by Canada.

FN186. The Baltic states represent the most recent example of attainment of independence in a relatively peaceful manner. In addition, the union of Norway and Sweden was amicably dissolved in 1905. Senegal peacefully seceded from the Mali Federation in 1960. Singapore's secession from the Malaysian Federation in 1965 was also carried out in a peaceful manner. See generally Buchheit, supra note 91, at 98-99. See also Desmond Morton, Can We Learn from Norway's Peaceful Secession?, Toronto Star, May 26, 1991, at B3.

FN187. "[S]ince at root it embodies the quintessentially democratic concept of 'consent of the governed,' self-determination ought to be approached from a truly democratic perspective." Michla Pomerance, Self-Determination in Law and Practice: The New Doctrine in the United Nations 73 (1982).

FN188. "[I]t is for the people of Quebec to declare themselves on their political and constitutional preferences, and not the country as a whole; it is important, therefore, that whatever process is employed to determine the will of the people of Quebec is accepted as legitimate by both governments." Task Force on Canadian Unity: A Future Together 114 (1979).

FN189. See supra note 116 and accompanying text.

FN190. See generally Kemichi Ohmae, The Borderless World: Power and Strategy in the Interlinked World Economy (1990).

FN191. See Richard Falk, A Study of Future Worlds 214 (1975), in which it is foreseen that many states will move toward internal power-sharing in the form of greater autonomy for subnational groups.

FN192. See generally Resnick, supra note 184, who proposes a Canada-Quebec superfederal level of government which is responsible for limited areas of jurisdiction such as foreign policy, defense, finance, and international trade.
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