Addis Ababa University

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''Criteria and Implementation of Secession Right under the FDRE Constitution in light of the International Law Regime: A Critical Analysis of the Law and the Practice.''

A Thesis Submitted In Partial Fulfillment of the Requirement for LL.M (Masters of Laws) Degree in Public International Law

By;

Tewodros Getachew Tulu

Advisor:

Abera Degefa Negewo(Phd)

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Addis Ababa University

School of Gradates

This is to certify that the thesis prepared by Tewodros Getachew, entitled ‘‘Criteria and Implementation of Secession Right under the FDRE Constitution in light of the International Law Regime: A Critical Analysis of the Law and the Practice’’ ***A Thesis Submitted In Partial Fulfillment of the Requirement for LL.M (Masters of Laws) Degree in Public International Law complies with the regulations of the university and meets the accepted standard with respect to the originality and quality.***

Approved by the Board Examiners ***Signature***

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DECLARATION

I, Tewodros Getachew, do hereby declare that this thesis is my own original work and that it has not been submitted for examination for the award of a degree at any other university.

SIGNED: ……

Tewodros Getachew Tulu

(STUDENT)

This thesis is submitted with the approval of the advisor.

SIGNED: …….

Abera Degafa Negewo (PhD)

(SUPERVISOR)

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Acronyms/Abbreviations

1. AAU- Addis Ababa University
2. ALF- Afar Liberation Front
3. ANDM- Amhara Nation Democratic Movement
4. BGPDUP- Benishangul Gumuz People's Democratic United Party
5. BLM- Benishangul Liberation Movement
6. CGCC- Center on Global Counterterrorism Cooperation
7. EU- European Union
8. ENLF- Ethiopian National Liberation Front
9. EPRDF- Ethiopian People's Revolutionary Democratic Front
10. FBI- United States Federal Bureau of Investigation
11. FDRE- Federal Democratic Republic of Ethiopia
12. GPDLF- The Gambella People Democratic Liberation Front
13. GPLM- Gumuz People's Liberation Movement
14. HPR- House of Peoples Representatives
15. IGAD- Intergovernmental Authority on Development
16. ICCPR- the International Covenant on Civil and Political Rights
17. ICESCR- the International Covenant on Economic, Social and Cultural Rights
18. ICJ- International Court of Justice
19. ICJ Reports - Reports of judgments and advisory opinions of the International Court of Justice
20. ILC- International Law Commission
21. ILM- International Legal Materials
22. *ILR- International Law Reports*
23. NOC- National Oil Ethiopia Company
24. OFC- Oromo Federalist Congress
25. OLF- Oromo Liberation Front
26. ONLF- Ogaden National Liberation Front
27. OILF- Oromo Islamic Liberation Front
28. OAU- Organization for the African Unity

29. TPLF- Tigray People Liberation Front
30. SIP- US Strategic Implementation Plan
31. UNODC- United Nations Office on Drug and Crime
32. UNGA- United Nations General Assembly
33. UNSC- United Nations Security Council
34. WSLF- Western Somali Liberation Front

Abstract

This thesis, among other things, studies both the theoretical and practical paradoxes of secession right under the FDRE constitution. Given the wider significance of this thesis, there is a serious concern regarding the current absurd incorporation of the unconditional secession right under the FDRE constitution and the criminalization of some aspects of this right at the same time. The paradox that, the grant of the widest form of the right to secession and lack of constitutional quests of secession rather the occurrence of many criminal cases of secession i.e. Crimes against the National State committed by the secessionist/separatist groups is continuing as a obscurity. Subsequent to reviewing the relevant literature, international legal frameworks, case laws, interviews and other methods, the author will identify and establish the international law regime and practice on secession. Pursuant to the findings, the thesis draws the FDRE constitution is not in conformity with the international legal regime, theories and state practice as far as secession and its implementation are concerned. Consequently, it also tries to create a coherence in implementing the right in doing so, possible demarcation will be made on the distinction between 'secession as a constitutional right' as against 'secession as a crime'. Thus, the thesis will bring possible alternatives which might thwart the paradoxes on the strange stand taken by the FDRE constitution on secession right and its application, as a way forward.

Chapter one

1.1. Introduction

Through the years, the notion self-determination including secession has represented everything from a political idea, ideology and principle to finally become a human right. Given that secession is often associated with destabilization, accomplishment of secessionist claims tends to depend on various explanations beyond its scope. The right to self-determination as declared in many international documents is fast becoming one of the thorniest issues for the international community. Considerable confusion and conflict have resulted so much over the notion of the right to self-determination. "Self-determination is an extremely controversial and confused area of international law" (Cassese, 1996). Nowadays the right of self-determination of peoples is a fundamental principle in international law and it is also embodied in the UN charter and other human right conventions. However it has been dominated by other important international law principle particularly the principle of territorial integrity. The principle of territorial integrity creates a limitation on the recognition and implementation of right of self-determination.

Self-determination served as a dynamic thought behind the decolonization movement post World War second, allowing colonized peoples the right to be free from their colonizers' domination through external self determination. However, in post-decolonization, the content of the right to self-determination under international law became more uncertain (Kelly, 2005). It is unclear whether the right applies equally in non-decolonization context.

According to the international law regime, self-determination does not necessarily imply secession from the state. "Self-determination can be effectuated in different ways: self-government, autonomy, free association, or, in extreme cases, independence" (Sterio, 2010). Broadly speaking, there are two categories of international scholars on secession. On the one hand, there is also a norm of the international law that manifests a more restrained form of interpretation as far as the right to secession is concerned. Such conservative stand i.e. 'the absolutists' (Castelino, 2005) goes to the extent that 'secession can only be invoked in the case where there is colonization'. In fact, the long rooted consensus on the principle of 'territorial integrity' which made it a norm of jus cogens under international law has clearly limited the

recognition and exercise of the right to external self determination. On the other hand, the second group i.e. the 'progressive approach' asserts the jurisprudence on 'remedial secession', in which secession could be exercised out of the context of colonization while the government fails to act in accordance with international legal rules but no option and as a last resort, has become foremost (Buchanan, 1997). Similar dictation is present in most of international instruments on the right.

As opposed to the above, the grant of the unconditional and unilateral right to secession by the FDRE constitution is an unusual and controversial at least theoretically. On the other hand, practically, in spite of the fact that the FDRE constitution has provided the widest form of secession, the implementation of the right is reverse. Although the right is stipulated under the constitution as an 'unconditional' right, groups who claimed secession have been criminalized as 'Terrorists' in the past two decades. Pursuant to the above prologue, the thesis will go through and analyze both the theoretical and the practical paradox on secession right under the FDRE constitution in specific reference to the international law regime and practice.

1.2. Statement of the Problem

External self-determination/Secession, starting from its meaning and contents, is the most problematic and controversial concept especially in countries with diversity. Among other things, the peculiar/strange incorporation of secession right including its criteria and the beneficiaries under the FDRE constitution should be addressed in light of the emerging trends and practices of international law. Moreover, whether the criteria and beneficiaries including the adding of two groups i.e. 'Nations and Nationality' by the constitution, are inconformity to the international law regime shall be scrutinized.

Even though the FDRE constitution grants the widest/extreme form of secession, some aspects of the right are already criminalized by the 2004 FDRE criminal code. Some of the separatist groups like OLF and ONLF are pronounced as 'terrorists' by the FDRE parliament*[1]. The contradictory status of allowing the widest dimension of the right to secession and the

[1] In the year 2010/11 the FDRE parliament has endorsed a massive decision by proscribing five organizations as terrorist organization for the first time. Those five organizations are the Oromo liberation front /OLF/, the Ogaden liberation front /ONLF/, Ginbot 7, al-Qaida and al- Shabab.

practical limitation on its exercise shall be clearly figured out. Hence, there needs to be a clear demarcation while interpreting the constitutionally guaranteed people's right to self-determination up to secession as against the criminalized political creed of the separatist groups i.e. OLF, ONLF and the others; as a way forward.

1.3. General and Specific Objectives of the Research

Generally speaking, the purpose of this paper, among other things, is to critically analyze the feature, criteria and implementation of the right to external self determination under the FDRE constitution in light of international law regime. In doing so, examining the paradox between allowing unconditional secession and inapplicability of the right will be the major objective.

- Meanwhile, the specific objectives of the study are therefore:-

To identify and establish whether there is an operative international law regime, accepted principles and practice as far as secession right is concerned.

Subsequently, it will try to examine the peculiar/divergent stands taken by the FDRE constitution on secession in light of the above established international law regime and practice, if any. It will also try to explain the absurd interpretation of the constitutional right perhaps by putting demarcation between the constitutionally guaranteed people's right to self-determination up to secession against the criminalized separatist groups i.e. OLF, ONLF and other separatist groups.

Further, it will try to craft consistency on paradoxical interpretation and implementation of the right. Lastly, puts possible solutions as a way forward. Thus is found helpful towards a more coherent interpretation and implementation if any, or a way out on the existing institutional mechanisms and legal and extra-legal frameworks on the matter.

1.4. Research Questions

- What are the contemporary legal frameworks that establish the right to external self determination/secession under international law?
- What are the criteria, preconditions and beneficiaries of the right under the established norm of international law? If any.

- What are the major deviations made by the FDRE constitution on secession right in light of international law, if any?
- What would be done as a way forward in helping to create coherency of the existing paradox and interpreting and implementing the right with the prevalence of international legal regime?

1.5. Research Method

While conducting this study, qualitative research methods are by and large to be applied. The thesis will be mainly based on secondary data. Thus, documentary and legal analysis will take the lions. Subsequently, the author will be conducting:-

a) Research design for primary sources

- *Exploratory research*

Since this research was designed based on an exploratory study technique, explaining what exploratory method means is essential. In that manner, exploratory research is typically used when there is little previous research on the subject under investigation. Exploratory studies can, in fact be understood as "condensed case study research" (C.R Kothari, (2004); 36). The main purpose of such studies is that of formulating a problem for more precise investigation or of developing the working hypotheses from an operational point of view (ibid).

- ***Interview***

In-depth interview is used as a means of extracting primary source (C.R Kothari, (2004); 110). Such interviews are held to explore needs, desires and feelings of respondents. Thus, after selecting the interviewees, the author will conduct an in-depth interview so as to grasp the utmost information they have.

- ***Sampling***

The author will employ more a purposeful sampling; however random sampling will also be employed to the extent of its relevance. Qualitative research methods are typically used when focusing on a limited number of informants, whom you select *strategically* so that their in-depth information will give optimal insight into an issue which little is known (An Introduction to Research Methods, (2009); 65).

b) Research design of secondary data

All relevant literatures including books, journals, articles and media publications; including international instruments, conventions, resolutions, declarations, practical cases, judicial decisions and other relevant materials will be assessed as a secondary source. Moreover, reviewing the Ethiopian Constitution, policies, relevant legislations, government reports and court and others will be employed.

- A desk review of literatures written in the area and other relevant documents will be critically reviewed.

1.6. Significance of the Research

The fact that studying the criteria and implementation of the right to secession is a virgin area; thus it's promising to bring out original research output indeed. As far as I am concerned, the existing studies/literatures of the Ethiopian Scholars did not address the inconsistencies of unconditional secession by the FDRE constitution especially in light of the contemporary international law regime and practices. Subsequently, the paper will help in creating coherency in interpretations as far as the practical paradox between secession as 'a constitutional right' and 'secession as a crime'.

Given the wider significance, there is a serious concern regarding the urgent need for coherency in designing and also implementing the institutional frameworks in fulfillment of secession right. Hence, this research will be exceptionally relevant to the members of the house of federation and house of representatives, federal and state organs, officials and practitioners including prosecutors and judges who are confronting the lack of coherence in interpretation and grave inconsistency in responding to quests of secession; moreover significant to the policy/law makers in identifying the gaps and addressing them accordingly.

1.7. Scope of the Research

Broadly speaking, the scope of the thesis is confined to researching the criteria and implementation of the right to external self determination. While doing this, the 1995 FDRE constitution and the recognized sources of international law and practice will be encountered mainly. Hence, formal institutional mechanisms including the UN charter, conventions, resolutions, declarations, court decisions including the ICJ, regional instruments; other domestic

legislations including relevant codes and proclamations; party documents, decisions made by the organs of the state (court and prosecutorial) will be encountered.

As of all the above primary and secondary sources, only relevant to the study will be selected and employed. In addition, the practical cases relating to secession that took place some countries will be referred to the extent and its relevance.

1.8. Limitation of the Research

While conducting the research the first challenge to be encountered by the writer will be; lack of both local and foreign literatures. The other limitation is shortage of resources (financial and other) to properly manage costs that the research will incur. The interviewees and key informants might not be too much open and tell what's really happening in practice due to sensitiveness and politicization of the subject matter.

1.9. Organization of the Study

This study will have the following organizational structure.

Chapter one includes background, statement of the problem, objective of the study, research questions, the research method, significance, scope and limitation are parts and parcels of chapter one. This chapter then tried to put preliminary parts of the study.

Chapter two comprises theories, conceptual and legal frameworks of secession including historical background and definition of the right. The criteria, beneficiaries, implementation and interpretations of the right, limitations and practical cases entertained at the international law level will be dealt with. Most importantly this part will identify and establish the legal basis of secession under international legal regime.

Chapter three, perhaps the most important part of the thesis, will critically analyze peculiar stipulation of secession by the FDRE constitution including the criteria and beneficiary of the right as opposed to international law regime. Moreover, the Grant of the Unconditional right to Secession by the FDRE Constitution and its rationale; The paradox while implementing the Constitutional Right to secession with the competing political goal of the secessionist groups in Ethiopia; the irony of secession as 'a right' and secession as a crime will be thoroughly analyzed as well. Lastly, possible mechanisms in

creating coherency for the theoretical and practical paradox will be encountered as a way forward.

Lastly, Chapter Four will summarize findings of the study and will provide recommendation thereof.

Chapter Two

Review of Related Literature

Conceptual and Legal Frameworks of Secession

2.1. Secession/External Self Determination

2.1.1. Historical Perspective of the Right

The notion of self-determination has been developed with political views for centuries. Some writers argue by expanding 'self determination' a way back to the philosophy of the age of enlightenment. ''The concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely- ordained, hierarchical dynastic realm'' (Benedict, 1983. 50). "In both the French and American revolutions towards the end of the 18th Century, the demand for self-determination constituted the foundation for formation of the nation (Indigenous Peoples Rights, (2007) p-56)". Amongst many authors who had contributed for the development of the right to self determination under the international law realm, Lenin and Stalin are notable. In 1913 Stalin wrote a detailed pamphlet, *Marxism and the National Question*, in which he assumed the concept of "nation" as a cultural historical phenomenon, and claimed that the right of self-determination gave every nation a right to decide for itself between for example autonomy and secession from its mother-state (Brownlie, 1970). In 1916, Lenin published his thesis *The Socialist Revolution and the Right of Nations to Self-Determination* in which also he claimed a "right of self-determination of nations" (Ibid). By and large their arguments were presented in light of the theory of socialism so that one may not find complex and stylish legal issues pursuant to international law jurisprudence. Lenin's "oppression-secession-theory" should however not be underestimated said Raic David, for him Lenin was the first to insist to the international community that the right of self-determination should be established as one general decisive factor for the liberation of peoples, or nations, as a remedy of last resort (Raic, 2002, 188-189). Initially, the principle was expressed as a right of colonized people to self-government.

Afterwards, the principle of self-determination was elevated to the international plane by President Woodrow Wilson, who included it in his infamous Fourteen Points, following World War I (Raic D. 2002, 178-180). The distinction between Woodrow Wilson and Vladimir Lenin in advancing the philosophy of self determination is that: the former based on violent secession

to liberate people from bourgeois governments, and the latter based on the free will of people through democratic processes (Kelly, 2005). After the First World War the initial appearance of the principle of self-determination was materialized. To this effect self-determination was "the touchstone for peacemakers at Versailles" (Burak & Dogan, 2005).

The League of Nations the predecessor to the current UN - applied the principle of the peoples' self-determination as a fundamental ideological and political principle, even though the League of Nation's Covenant did not explicitly include any provisions on self-determination (Shaw, 2003). As explained by a Committee report of the League of Nations, "The recognition of the principle of self-determination of peoples in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations" (Cassese, 1995, 30). Consequently, the recognition and application of the right to self determination was minimal because of the reason that it was more of political than legal. "In the ten years before the Second World War, there was relatively little practice regarding self-determination in international law" (Shaw, 2003, 225).

Later, the right of self-determination was recognized as a general principle through Articles 1(2) and 55 of the UN Charter of 1945. Thus, it marked the beginning of the history of the modern international law on the right to self-determination although many argued that 'it lacks boldness' (Shaw, 2003). The right was included in Article 1 as one of the major purposes of the United Nations: "To develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples…"

Thereafter, the United Nations General Assembly adopted ''The Declaration on the Granting of Independence to Colonial Countries and Peoples'' in 1960 (UNGA Resolution 1514(XV)). This was a move forward to the incorporation of the right to self determination in the two prominent human right documents i.e. ICCPR and ICESCR six years later to the resolution 1514 (XV). The most important historical development of the right to self determination is the adoption of the two human right covenants by the UN GA in 1966. Both the ICCPR and the ICESCR included the right of self-determination in their Common Article 1. There are also other international instruments promulgated starting from 1970 (UNGA Resolution 2625), which contributed much for the evolvement of self determination.

To summarize, self-determination evolved from a mere slogan to a principle and later into an actual right in international law even though its scope is still disputable. The end of World

War I, the decolonization period and the post 1966 period where human rights gained importance; have played a major role on the evolution of the right to self determination.

2.1.2. Meaning of Secession

The right to self-determination as declared in many international documents is fast becoming one of the important but controversial issues of international law. Most of the international instruments that include the right of self-determination gloss over its various contradictions and leave its definition vague. The failure to define self-determination explicitly, while perhaps intentional, has left international organizations ill equipped to respond to the ever-increasing number of claims from currently unrepresented minority and other national groups throughout the world. Some says self-determination has never been defined. Yet the paradox remains: Self-determination has little legal meaning but is nevertheless a tremendously powerful political principle. Steinhardt, who is a legal scholar in George Washington University, outlined some essential propositions regarding self-determination and international law. For him, "self-determination refers to the end of colonialism and the creation of new states" (Carley, 2005, 08). Broadly speaking, 'it refers the right to their own political destiny, the right to equality in relations with other states, etc (Ibid). On the other hand, for Buchanan secession is "the taking of a part of the territory claimed by an existing state by which severance of a government's control over territory" (Buchanan, 2003). "Secession is the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter" (Kohen, 2006, 03).

Does the principle of self-determination mean that a "people" is free to determine only its internal status? Or, does it mean that a "people" is entitled to decide over its external political status, e.g. through independence or assimilation with another state? Or does it imply both? This has been the critical concern throughout international documents in defining self determination.

Pursuant to recognized sources of international law, the right to self-determination is generally fulfilled through internal self-determination which includes a democratic ability of a people to determine its political destiny within a state. Secession/the right to external self determination, on the other hand, includes a right of a people to establish an independent and sovereign state, to freely associate and integrate with an independent state, or to freely emerge into any other political status. Several relevant legal instruments concerning the principle of self-determination however refer to the principle of territorial integrity as well, and it is stated that

self-determination is not to be construed as authorizing or encouraging any action that would dismember or impair the territorial integrity of a state (RE Secession of Quebec, 1998;). In contrary, others define "the right of self-determination may still arm a population with the power to choose its own political destiny" (Brownie, 2003).

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), two of the most important international treaties on human rights, defined it as follows *"**All peoples** have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."* However, defining self determination will be ridiculous without agreeing on concepts like 'who people are?'As with the UN Charter, the Covenants do not go on to explain what is meant by the right of self-determination or who the "peoples" are.

2.1.3. Theories of Secession

There are "choice" theories, "remedial right" theories, and "national self-determination" or "ascriptive" theories (Moore, 2003). Broadly speaking, the conceptualizations of these theories are classified into two major groups. According to Allen Buchanan, there are the Primary Right Theories and Remedial Right Only Theories (Buchanan, 2003). The first asserts that certain groups can have a (general) right to secede in the absence of any injustice (Ibid). Conversely, remedial theory presupposes prior injustice which might take a form of gross and consistent human right violation from the government (Mueller C. 2012). For Buchanan, there are three types of injustices under remedial right to be justified; those are "large-scale and persistent violations of basic individual human rights", "unjust taking of a legitimate state's territory", and the "violation of intrastate autonomy agreements" (Buchanan, 2003). Remedial secession implies the right for a group to secede if and only if it had suffered certain injustices, and the secession remains the last remedy to such a situation (Vidmar, p-37). It's clear from the definition that, there is a prior harm inflicted on the seceding entity. On the other hand, another perspective of Remedial Secession right comes into existence only if all the three special conditions are met (Vezbergaite, 2011, 96). Those are; the secessionists qualify as 'people', denial of self determination of the people (Gross human right violation) and secession is a last resort (Ibid). Although there are many issues unclear on the above conditions/criteria, the 'remedial secession' is already working practically. The case analysis of Kosovo, Bangladesh and Eritrea may be

taken as examples since all of them bring persistent and gross human right violations inflicted against them.

When it comes to the case of the FDRE constitution it looks like adopting the primary secession theory since it granted unconditional secession expressly, however much absurdity is occurring on the interpretation of the right including the position taken by the ruling party, EPRDF. This will be elaborated and analyzed in the next chapter.

2.2. The Right to Self Determination as a Human Right

The aforementioned international instruments suggest that, in principle, self-determination is a right which goes beyond the colonial context – at least in its internal form. A more controversial question is whether external/secession would be a right in circumstances where a state denies the internal form of the right to a people by violating their fundamental human rights.

While discussing the relationship between human right and self determination, there have been continuous developments under the international law arena. Firstly, the United Nations General Assembly adopted ‘‘The Declaration on the Granting of Independence to Colonial Countries and Peoples’’ in 1960 (UNGA Resolution 1514(XV)). The resolution stated that; “all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. Secondly, there comes the adoption of the two most prominent human right covenants by the UN GA in 1966. Both the ICCPR and the ICESCR included the right of self-determination in their Common Article 1. The first paragraph of common article 1 states: "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"* (ICCPR & ICESCR).

Thirdly, many contemporary constitutions, including the FDRE constitution, incorporated the right to self determination in the human right provisions, usually chapter three, of their constitution as part of the human right package. The Helsinki Final Act under principle VIII puts self determination as a human right.

For the author of this thesis, People’s right to self determination, which comprises both internal and external dimensions, has already become a human right. In spite of this, both the principles of self-determination and territorial integrity are incorporated in the UN charter and other major international instruments at the same time (Art 1(2) and art2 (4), UN charter).

Seemingly, in order to protect/defend territorial integrity of a nation state, the right to self determination will usually be defeated. Moreover, there are several interpretations on the correlation between human rights, self-determination and territorial integrity. "Number of international scholars believe that the principle of territorial integrity is eroding" (Simpson, 1996, 613). In support of this position Simpson refers "the UN sanctioned intervention on behalf of the Kurds who were subject to massive human right violations, by breaching Territorial Integrity of Iraq (Simpson, 1996, 616).

Hence, different writers tried to distinguish the edge between the two and some others put human rights and self determination in conflicting status. Steinhardt concurred by suggesting that self-determination is a "symptom" of the human rights crisis (Carley, 2005, 08). For him, claims to self-determination usually indicate a human rights problem in its final stages (Ibid). In fact, this is one of the main reasons that complaints about human rights violations must be addressed before they reach at the stage of secession. On the other hand, according to the renowned international law Professor Hurst Hannum; "Self-determination *is* a human right" (Hannum, 1998, 01). Robert McCorquodale also argued the same 'self determination is a human right but it isn't absolute and has limitation on its exercise' (McCorquodale, 2000). From a human rights context, the focus is often on the internal dimensions of the right to self-determination, such as the peoples' right to elect their own leaders and representative institutions as well as participate in the public exercise of power in the country. For the majority population, the internal dimension of the right to self-determination mainly entails a right to a democratic government (Indigenous Peoples Rights (2007) p-60). However, under self determination, a group forming part of an existing state may secede from the state as a matter of right where it is the subject of oppression, gross human rights violations, and is denied access to government for self-rule within the state (Cassese, 1995). In any of the cases, it is undisputable that the right to peoples self determination has already become a human right. Human right is inherent, universal, indivisible and interdependent; hence its application is expected to be uniform globally yet in cases of inconformity with domestic legislations. Ethiopia, as a party to the above major international instruments, is expected to be consistent while applying the right to self determination with that of the international law principles and practice. Accordingly Ethiopia has included the right under chapter three of its constitution i.e. the human right package. "Human rights are universal values and legal guarantees that protect individual and groups against actions

and omissions primarily by state agents that interfere with fundamental freedoms and entitlements and human dignity" (UNODC, 2009. 05).

2.3. The Legal Basis of Secession Right under International Law and its Contents

As the author of this paper repeatedly discussed, Self-determination, as a political aspiration, began to be discussed after the World War I, but it failed to become generally accepted as a legal norm. In fact, during the Aaland Islands case, it was clearly defined as a 'purely political concept' (Nawaz M.K. 1965, 86). It was only with the establishment of the United Nations that the notion became more prominent, firstly with the inclusion in the UN Charter, and subsequently via states' practice. There is a conflicting conception and application between the two principles of 'Territorial Integrity' and 'Peoples right to Self Determination' under international law practice. However identifying and establishing the international legal regime on the right to internal and external self determination/secession is imperative for the ongoing discourse of this thesis.

a) The UN charter: articles 1(2) and 55

The right of self-determination was recognized as a general principle through Articles 1(2) and 55 of the UN Charter of 1945. Article 1(2) specifically, speaks of friendly relations, the principle of peoples' equal rights and self determination and universal peace. Article 55 is part of the chapter concerning international economic and social cooperation. However the inclusion of self-determination in the UN Charter was surrounded by much controversy the language used was vague to please all parties. Shaw explains these articles by saying ''it is possible to state that the manner in which UN Charter conceives the right of self-determination is far from being directed to create a binding legal norm, but it rather constitutes the mere expression of a political principle'' (Shaw, 2003). Among the criticisms, the first one relates to that 'it's not strictly legal right, it's weak' and the second goes to its concept, scope and the definition of terms such as "peoples" are not clear. Perhaps the Charter did not call specifically for decolonization, nor did it explain exactly what was meant by the self-determination of peoples.

b) The Declaration on Granting Independence to Colonial Countries and Peoples

By 1960 and prior to the adoption of the Declaration on Granting Independence to Colonial Countries and Peoples (GA Resolution 1514 (XV), 1960), numerous Resolutions expressing the

right to self-determination were adopted by the GA. The resolution stated that; "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (GA Resolution 1514 (1960)). Although the Resolution, being a GA Resolution, is not legally binding, it has used a language indicated a binding nature to the right. The term "right" is, for instance, used instead of the term principle, as is done in the UN Charter (Ibid).

This declaration, which was adopted unanimously, was yet another important part of the development of this right into a rule of law in international law (Castelino, (2000)). The '*a contrario'* reading of the provision can be alleged that the principle of Territorial Integrity is rebuttable notion (Simpson, 613). The resolution also contributed for the incorporation of the right to self determination in the two prominent human right documents i.e. ICCPR and ICESCR six years later.

c) <u>The two International Human Right Covenants of 1966</u>

The two International Human Right Covenants of 1966: *the International Covenant on Civil and Political Rights* (ICCPR), and *the International Covenant on Economic, Social and Cultural Rights* (ICESCR), also refer to the right of self-determination. Phrased with the same wording, Articles 1(1) stipulate that ''a*ll peoples have the right of self-determination*", and by virtue of that right *they freely determine their political status and freely pursue their economic, social and cultural development*". Due to the adoption of these two covenants the notion of self-determination shifted from a legal obligation, in essentially the area of decolonization, to a universally recognized human right.

According to H. Wilson (1988), "widespread adoption of these Covenants would give the right to self- determination legal force established by treaty". Among other things, one of the significant feature of the covenants is they didn't restrict the right of self determination to colonized or oppressed peoples but include all peoples. However, the term all peoples used in the Covenants is still "open to interpretation". For instance India had objected and made a reservation that "the right of self-determination" appearing in those articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States (Hannum, 1996, 42). Nevertheless, countries like Germany and France seriously objected India for the reason that the right belongs to all peoples not only to colonized or oppressed (Ibid).

d) The Friendly Relations Declaration

In the year 1970, the UN GA has come up with a resolution named as ''the Declaration On Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN". As the title itself reveals "was meant to be a clarification of the purposes and principles of the United Nations (GA Resolution 2625, 1970). Castelino (2000) argued that 'due to the fact that the 1970 Declaration passed with no vote against, and therefore it was adopted with a wide consensus, it is argued that this Resolution "can be considered as encompassing norms of jus cogens". This declaration is highly important in the area of international public law and is one of the most important legal instruments concerning the right to self-determination because of two reasons. Firstly it was adopted unanimously, therefore it can be said to express the Opinio Juris of the states, secondly, its content is strictly legal (Shaw, 2003). In such cases the instrument will have a binding character and may constitute a customary international law. ''In order for a GA Resolution to constitute customary international law two criteria must be fulfilled: firstly the Resolution must be adopted by consensus or "without a vote" and secondly the text must clearly affirm legal principles of a general scope and applicability (Shaw, 2003, 27).

e) Regional Instruments

There are also regional human right instruments which are purported to protect this right to self-determination, among which;

1) The *African Charter of Human and Peoples' Rights;* 2) The *Helsinki Final Act (1975)*; and 3) The *American Human Rights Convention*.

Among these regional human right instruments the author will look in to the most relevant document i.e. the *African charter*.

Pursuant to Article 19 of the African charter, the *Charter* proclaims: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights", adding: "Nothing shall justify the domination of a people by another" (Art-19, African Charter). The charters of article 20 also strengthen the above by stating "A*ll peoples shall have the unquestionable and inalienable right to self-determination". S*imilarly, such strong wordings are included in the 1975 Helsinki, "all peoples have always a right to internal and external self determinations" (Helsinki, 1975).

f) Other Resolutions

As it has been told earlier, there are numerous Resolutions regarding specific situations and specific conflicts. There are also declarations concerning the right, or aspects of it, in general and which are not linked to a certain people or specific circumstances. In this context the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (GA Resolution 2131(XX), 1965) is of interest. It has been followed by many GA Resolutions that recalled and reaffirmed its importance. The other UNGA instrument is Resolution 36/103, 1981. There are also numerous Resolutions prohibiting unilateral economic measures as a means of political and economic coercion against developing countries.

Yet another important GA Resolution that could be associated to self-determination and the issues mentioned above is the Declaration on the Right to Development, the GA Resolution 41/128, 1986. The right to development is based on the idea of self-determination, including economic self-determination, and the free disposal of one's natural resources (GA Resolution 1986, Art 1&5,).

Moreover, there are also similar other instruments like; Declaration *on Social Progress and Development (1969), Vienna Declaration and Program of Action (1993)* which do have their own significance for the jurisprudence on the right.

g) International Court of Justice/ICJ Decision

Furthermore, the ICJ has affirmed in the East Timor Case that the right to self determination has an "erga omnes character" (ICJ Reports, 1995, 90). The Court went on stating that the right of peoples to self-determination is "one of the essential principles of contemporary international law" (Shaw, 2000, 180). The consecutive and consistent happenings in which the numerous Resolutions are formulated by the UN GA, the State practice, where States have repeatedly expressed the obligation to respect the right, the rulings of the ICJ and the strong standpoint taken in the doctrine supporting the idea of jus cogens are all factors, according to Raic, supporting the notion that this right constitutes jus cogens (Riac, 2000, 217-219). The principle also received judicial approval in the *Namibia,*[2] *Western Sahara (ICJ Reports, 1975)* and *East Timor* cases. In East Timor case, the *erga omnes* character of the principle was

[2] ICJ Reports (1971) 16, at 31, where the International Court of Justice declared that "the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them'.

proclaimed and it was stated that self-determination was indeed 'one of the essential principles of contemporary international law' (Shaw, 480). In the Advisory Opinion on Western Sahara the ICJ emphasized "the need to pay regard to the freely expressed will of peoples" (*(ICJ Reports, 1975).*

In addition, although it was not entertained/decided by ICJ, the case of Quebec (Quebec 1998) has also been a very important milestone concerning the right to secession. Today, the principle of self-determination is embodied in multiple international treaties and conventions, and has "crystallized into a rule of customary international law, applicable to and binding on all states" (Scharf, 2003).

Definitions of the principle serving also as a law-creation steps, comprise UNGA Resolution 1514 (XV), the 1966 International Covenants on Human Rights, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, 1975 Helsinki Accords Final Act, and 1993 Vienna Conference on Human Rights (Ibid). Even the International Court of Justice (ICJ) was repeatedly involved in the discussions, confirming the ranking of self-determination as a new norm of international law – affording it also an erga-omnes character.

Content wise, "there are not two different rights to self-determination, one internal and the other external, but two aspects of a single right" (Kohen 2006, 09). The right to self determination has two indispensable elements i.e. internal and external dimensions (Sterio, 2010). "No-one would have to engage in difficult legal argument to draw the conclusion that the right to secession constitutes a necessary component of the right to self-determination (Kohen, 2006, 24).

2.4. Beneficiaries of the Right to Self-Determination under International law Regime

- The concepts of People, State, Nation and Minorities under the International Law

As I have already mentioned in the earlier parts of the paper, the right to self-determination was primarily associated with the discharge of colonies and establishment of new nation states that was the result of the decolonization process. After decades of development of the right, the external aspect of the right to self-determination in other words the right of an ethnic group to secede from a state has been connoted as one of the most disputed agendas. In fact, the approach in which the beneficiaries of self-determination are not confined to colonial

people is convincing. To corroborate this assertion, the following international instruments will be helpful.

To begin with, most of the international instruments, including the UN charter, the two human right covenants (ICCPR & ICESCR), they named the beneficiaries of the right "peoples" (Art-1 of ICCPR & ICESCR). Furthermore, it is emphasized that international treaties lay down the obligation regarding self-determination to all states, not merely those administering Non-Self-Governing and Trust Territories (Article 1 (3), ICCPR). Thus, none of the multilateral treaties limited its applicability, 'all people' have the right. However such a conclusion might be dangerous since it widens the beneficiaries of the right which in effect could lead to fragmentation of sovereign states. The United Nations Secretary General is among those concerned "If every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become even more difficult to achieve" (UN Secretary General Report, 1992).

For Christian Tomuschat the classification issue is crucial. "According to Article 1 of the two International Covenants on human rights, not every people, but only 'a people' have the right to self-determination. If every group that qualifies as a people in the ethnic sense were to be considered a people under that provision, the present legal position would be marked by a blatant inconsistency" (Tomuschat, 1993, 15) . So who are 'people will be the issue at hand? During recent decades UN bodies, member states and experts on international law are concerned on who qualify as people so as to claim the right. As peoples no longer is understood as only the total of all inhabitants of a state, the UN system has started work on various working definitions of the term 'peoples'. In the 1970's a UN Special Rapporteur while studying issues relating to indigenous people, used a working definition so called a Cobo's definition.[3]

The Cobo definition reads as follows;

«Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations' existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

[3] see «Study of the Problem of Discrimination Against Indigenous Populations», UN document E/CN .4/ Sub.2/1986/7/Add.4,

Almost similar definition is used by the World Bank for its 'indigenous people's policy' (World Bank Operative Manual).

Throughout the review of related literatures on the meaning of peoples, the author has not found any such sort of distinction on the definition of indigenous people and people. So the above definition could be used as equivalent definition for 'people'. 'People' under international law can be identified in particular geographical land; having their own culture, including a separate language, their own livelihoods and even a clear historical link to their traditional land and water areas accompanied by Self-identification and identification by others as members of a distinct cultural group (UN document, 1986).

On the other hand, the term 'minority' is also not defined in international law. "One of the most central elements in the working definitions of peoples is the peoples' historical link to their traditional land areas, which minorities do not have" (Matias & Martin, 2007, 63). It is easy to find out that most of the criteria that characterize people, such as a common language and common culture, also characterize many minorities.

- **People vs. Nation and/or State**

Regardless of the fact that states do not have human rights, it is sometimes argued that when international law talks of the right to self-determination of all peoples; "peoples" is to be understood as the total of all inhabitants within a state (Raic, 2002). Professor R. Higgins supports this approach as she indicates that pursuant to the relevant documents and state practice "peoples" is understood in the sense of *all* the peoples of a given territory (As quoted by Raic, 2002, 244). Therefore, only the "nation", not subgroups, has a right to external as well as internal self-determination (Ibid). Consequently, he inferred "peoples" can exercise both forms of self-determination without a threat against the territorial integrity of the state.

However such an interpretation is a risky one since it excludes the possibility of external self determination for a subgroup within a state. In this regard, the term "peoples" ignores ethnic, cultural and/or other differences between distinct groups within a state by undermining their collective right. The author believe this kind of interpretation is against article 1 of ICCPR which constitutes "peoples" in the meaning of all inhabitants of a state or a territory, or whether peoples within existing states may also be entitled to self-determination.

To sum, 'all people' including the entire population of a state and subgroups within a state and all peoples under foreign occupation who satisfies the definition of 'people' under

international law will have the right to self determination. The same is true with inhabitants of Trust and Non-Self-Governing territories (ICCPR Art-1). The distinction between “peoples” and “states” was clearly reflected by the Human Rights Covenants and the Friendly Relations Declaration. The international documents declare that “all peoples” have the right to self-determination and “every state” has “the duty to respect this right” and to promote its realization. Therefore, it would be safe to conclude that “peoples” and “states” are separate notions.

2.5. The Criteria and Implementation of Secession Right at the International level

The criteria and implementation of secession right have always been controversial. Even though international law doesn’t come up with a clear stand on secession; quests and secession cases have been entertained in the last couple of decades. Due to this, international law practices have been developing in the course of the actual cases. The deliberation that secession right can only be invoked in colonial rules does not work anymore. The contemporary understanding of the right to secede is based on the type of the government that the mother state have. Therefore, criteria like gross human right violation and lack of internal autonomy would serve as a ground for secession.

The Canada Supreme Court has come up with a decision which can be cited as a landmark in the field of secession. The court argued that, “the right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part” (RE Secession of Quebec, 1998; 84). According to Milena Sterio, who is the Professor of international law at Cleveland University, a people must satisfy the following four criteria: it has to show that it has been oppressed; that its central government is relatively weak; that it has already been administered in some form by some international organization; and that it has the support of the Great Powers. The Cleveland University Professor boldly extends his argument by saying ‘‘As long as those rights are respected by the mother state, the “people” is not oppressed and does not need to challenge the territorial integrity of its mother state’’ (Sterio, 2010; 138). Cassese (1996) and Tomuschat (2006) argued ‘If a group is endangered and government is irremediably oppressive, the right of self-determination overrides the principle of territorial integrity and legitimizes secession as the

remedy of last resort'. Some other international law authors emphasize on irreplaceable role of recognition. In fact, the issue of statehood through secession will probably ultimately depend of its recognition by other states. Recognition by other states gives strong evidential value to the question under dispute, because it has a deep symbolic meaning (Hannum, 1998, 15-17).

Despite the above discussions, the world has faced/entertained specific cases that to some extent manifested the level of implementation of the right to external self determination under the international legal regime. Some of the cases will be referred here so as to draw the interpretation and application of the right under int'l law.

a) The case of Kosovo;

It was starting from 1980 that the tension and clashes began to escalate between Serb and Kosovo. There happened serious of clashes and atrocities due to long-term ethnic tensions between Kosovo's Albanian and Serb populations which left the province ethnically divided, resulting in inter-ethnic violence, culminating in the Kosovo War of 1998–99 (Noel, 1998, 310-315). In 1990 Kosovo declared the first declaration of independence which caused a bloody conflict. Finally there comes the unilateral secession by the Kosovo people's representatives in 2008 unanimously (Kosovo, 2013). However Serbia didn't recognize this unilateral secession for the claim that the declaration is illegal under international law. ICJ also rejected Serbia's claim on the illegality of Kosovo's unilateral declaration. In the contrary ICJ has recognized Kosovo's right to self determination and it also referred 'remedial secession' in its report (ICJ Kosovo, 2010). Many international lawyers argued that Kosovo has substantiated all the three requirements of remedial secession (Vezbergaite, 2011, 96).

b) ***The case of Quebec;***

Amongst several court rulings on issues of self-determination, the decision which was rendered by the Canadian Supreme Court on the secession of Quebec from Canada was the renowned one. During the 1990s, a secessionist movement in the Canadian province of Quebec threatened the stability of Canada when the citizens of Quebec increasingly sought to separate from Canada and form their own independent state (Sterio, 2010; 145). A popular referendum was organized in Quebec in 1995, in which more than 49% of the Quebecois expressed their desire to secede from Canada, and only a very small majority voted to stay within the mother state (Re secession; 1998). Because of the divided nature of the secession referendum results, the Canadian Supreme Court was asked to issue a decision on the question of whether Quebec

had the right to secede from Canada and if so, under what circumstances (Sterio, 2010; 145). The Canadian Supreme Court issued its decision in 1998.

According to the this court's interpretation, under the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development (Re Secession of Quebec, 1998).

c) ***The case of East Timor;***

In 1960, when the General Assembly put East Timor on its list of non-self-governing territories, East Timor was a Portuguese colony (ICJ Report on East Timor, 1995). In December 1975, Indonesia invaded and occupied East Timor, claiming sovereignty over it. East Timor's international status thus remained in question for over 25 years. The United Nations in 1999 organized a "popular consultation" of the East Timorese people through a "direct, secret and universal ballot" (Singh, 2010). The purpose of the ballot was to determine whether the people of East Timor wished to be part of an autonomous unit of Indonesia. It ended up with 98% of the East Timorese people voted to reject autonomous status in Indonesia (Singh, 2010).

Consequently angered by the agreement to allow the popular consultation and the eventual results of the vote; pro-Indonesia militias engaged in mass violence in East Timor before and after the ballot, including murders, massacres, disappearances, forced expulsion, rape, sexual harassment of women, and destruction of property (Ibid). In response, the UN Security Council authorized the creation of the International Force for East Timor (INTERFET) to restore peace in East Timor and to protect the results of the popular consultation (UN on East Timor). Despite this unclear legal status, and despite the lack of any precedent supporting the right to independence in territories that were neither colonized nor non-self-governing, the UN chose to support the right of the people of East Timor to form a new State. The *erga omnes* character of the right of self-determination was reaffirmed by International Court of Justice in Case concerning East Timor*[4] (ICJ Report on EAST TIMOR Case (1995).

[4] "(…) the right of peoples to self determination, as it evolved from the Charter and from United Nations practice, has an erga-omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court ...; it is one of the essential principles of contemporary international law."

As Shaw also points out; "the Court moved one step further in the East Timor (Portugal v. Australia) case" by stating that Portugal's allegation that the self-determination has an erga omnes nature, is "irreproachable". The Court also defined the right of self-determination as "one of the essential principles of contemporary international law" (Shaw, 2003, 229).

d) ***The case of Crimea;***

The unconstitutional coup that took place in Ukraine on February 2014 caused protests by the population of Crimea (Kapustin A.2015, 110). Accordingly, the executive bodies of the Autonomous Republic of Crimea refused to recognize the legitimacy of the new Ukrainian government (ibid). A referendum on the status of Crimea was held in 2014. It was announced by the Rossiyskaya gazeta No. 6333, according to official figures 83.1 % of the voters of Crimea took part in the referendum, 96.77 % of whom voted in favour of the reunification of Crimea with Russia as a subject of the Russian Federation (as quoted by Kapustin A. 2015).

According to many international NEWS sources at the time, including CNN*[5], there were no mass killings of civilians or full-scale military actions in Crimea by the Ukrainians. The Russian writer Kaputsin also agrees on this point to some extent "Of course, compared to Bangladesh, Kosovo and other examples of this kind, the situation in Crimea was different" (Kapustin A. 2015, 117). However, the conclusion was "in the Crimean situation the physical existence of the people was at stake and therefore secession from Ukraine was justified under the requirements of "remedial secession" (ibid).

On the contrary many other neutral authors are against the above deliberation. "There are no indications that the meaningful exercise of the right to internal self-determination of the Crimean population was denied and there have been no reports of gross human rights violations or structural discriminatory treatment by the Ukrainian authorities" (Driest, 2015, 360). Consequently Driest concluded, the Crimean authorities could not claim a right to remedial secession.

The above four cases could give us a clue that how the contemporary international law regime has been responding for the quests of secession. In effect, the criteria and implementation for the right to external self determination/secession under the international law regime have been identified and established. Accordingly, in most of the above secession cases including the cases of Bangladesh and Eretria, remedial right of secession has been invoked in one way or

[5] www.**cnn**.com/2014/03/17/world/europe/ukraine-vote-legality/ visited on 20th September 2016

another with a view to justify secession under the international law. Hence, these instances could indicate the emerging trends in allowing/disallowing secession right under international level. They will also help in examining the controversial incorporation and implementation of secession right under the FDRE constitution.

Chapter Three

Criteria and Implementation of Secession under the FDRE Constitution in light of International Law

3.1. The basic Features of the Right to Self Determination under the FDRE Constitution

✓ Internal and External Self Determination under FDRE Constitution

Ethiopia clasps a complex variety of nations, nationalities and peoples, and linguistic groups. Hence, its peoples speak more than 80 different languages, comprising 12 Semitic, 22 Cushitic, 18 Omotic and 18 Nilo-Saharan languages (Central Statistic Report, 2007). In such diversified societies, the notion of self determination, including internal autonomy and external/secession, is a spotlight in constitution making. In fact, the 1995 FDRE constitution is one of the prominent constitutions which give much emphasis to fundamental human rights and freedoms. The constitution is comprised of 106 articles among which one third/1/3 of them are provisions on fundamental human and democratic rights. This number/segment of human right provisions within a single constitution by itself talks a lot and it's indeed remarkable. The secession right is also one of the fundamental human rights and freedoms which are provided under chapter three of the constitution. However, there are multiple of criticisms and controversies on the application of those constitutional provisions incorporated in the biggest chapter three of the constitution. Equivalently, the 'famous' provision of the FDRE constitution art- 39 which provides an unconditional right to self-determination up to secession to every nation, nationalities and peoples of Ethiopia. Since the FDRE constitution is the only one to proclaim' people's right to secession constitutionally and unconditionally. A wider discussion and arguments will be forwarded in this controversial issue in the part of the thesis. Despite the multiple controversies on this specific sub article, the author believes that it's useful to look in to the entire notion of the above provision. Article 39 is not only about secession but also very useful in recognizing and promoting the right to 'internal self-determination.'

Among other things, there is a decisive incorporation made by the constitution so as to confer the Nation, Nationality and People of Ethiopia a wider right to promote, develop and preserve their *language*, *culture* and *history* as well (FDRE constitution, 1995; article 39(2)). These three distinct notions have been connoted as identity- related- matters (Yonatan, 2008;

103). They are very crucial rights as far as self-rule is concerned. Accordingly the FDRE constitution has come up with important aspects of self-rule. In relation to this, an important cross reference could be drawn to Article 5 of the constitution which gives a power to determine their respective working language which is a huge discretion that enables the nation, nationalities and people to promote their language.

The other exceptionally important incorporation here is the one provided under article 39(3), which introduced the combination of both self-rule and shared rule in the Ethiopian federation.

- Self-rule (Internal Autonomy) in light of Article 39

''Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits …'' (FDRE cons, 1995; art 39(3)).

This consists of establishing regional executive and judicial powers including regional constitution and law making power together with.

- Shared rule in light of article 39

The remaining part of the above cited article 39 (3) has introduced shared rule. By saying '*Every Nation, Nationality and People in Ethiopia has the right …… and to equitable representation in state and Federal governments*.' This is refers to the right to equitable representation in state and Federal governments that the nations, nationalities and people of Ethiopia should have. Federation as "regional self-rule plus shared rule" was introduced by Daniel J. Elazar. For Watts also the basic notion federalism involve the combination of *regional self-rule* for some purposes and *shared-rule* for others within a single political system so that neither is subordinate to the other has been applied in different ways to fit different circumstances (Watts, 2008; 1-2). Consequently, the Ethiopian federal system has designed such a decisive combination of self-rule and shared rule constitutionally under article 39(3).

3.2. Criteria for Secession and its Procedural Pre-requisite in Specific reference to the FDRE Constitution as opposed to the International Law Regime;

Previously, in the last chapter, the author tried to exhaust and establish the criteria and legal standing of claiming and winning secession under the international law regime. While doing this, many UN documents including the Charter, conventions, declarations, resolutions and human right documents; regional conventions, court rulings including ICJ and practical secession cases were thoroughly analyzed. Hence, the author has made a conclusion in the previous chapter on the criteria, beneficiary and implementation of the right under international law regime and practice. Pursuant to the above prologue, the right to self-determination of a people is normally fulfilled through internal self-determination under international law. However, if a certain group alleges external self determination then there will be conditions and criteria so as to consume the right under international law. Subsequently, the group claiming secession shall primarily satisfy the definition and criteria of 'people' in both notions, i.e. objective and subjective. Secondly, there shall be admissible cases like colonization; or gross human rights violation, oppression, and lack of meaningful access to the government so as to claim secession under international law. In addition, and the remedy shall be as a last resort, even then, under carefully defined circumstances.

On the other hand, the FDRE constitution has come up with its peculiar characteristic on the external dimension of the right to self-determination/secession. Among those peculiarities, the issue of criteria to attain the right is the major one. Firstly, there is the criterion of being beneficiary of the right by which the holder of the right will be identified. International law grants the right to self-determination to "peoples"; accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination (RE secession of Quebec, 1998; 69-70). As distinct to international law, the Ethiopian constitution has given the right to self-determination to 'Nations, Nationalities and People' of Ethiopia. As a result, two groups have been incorporated by the FDRE constitution in addition to 'people', i.e. the 'Nation' and 'Nationalities'. To that end, whether these additional groups are able to meet the basic criteria in order to qualify as 'people' in light of the international law shall be examined.

In fact, in the *Charter of the United Nations*, the term "peoples" is used "particularly in its Preamble, as a synonym for 'Nations' or 'State. On the other hand, the author tried to examine

various definitions given to 'people' including the Cobo and the World Bank definitions. When it comes to the case of the FDRE constitution, the reading of sub article 5 of article 39 seems to address this issue to some extent by giving the following definition or criteria to the 'Nation, Nationalities and People' so as to acquire the right to self-determination including and up to secession. It reads as follows;

> *A "**Nation**, **Nationality** or **People**" for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory (art-39(5)).*

Thus, the FDRE constitution gives a similar meaning to all the three groups. What are Nation, Nationality and People? What is their exact distinction from 'people' under international law? Do they qualify the term 'people' under international law?

Pursuant to international law, there are objective and subjective criteria in order to qualify as ''people''; first prong of the test is objective and seeks to determine to what extent the group members "share a common racial background, ethnicity, language, religion, history, and cultural heritage," as well as the historical link to the land which the group is claiming (Sterio, 2010; 142). The second prong of the test is subjective and examines "the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct 'people,'" and "the degree to which the group can form a viable political entity" (Sterio, 2010; 142).

As far as the author of this paper is concerned, while evaluating article 39(5), in light of the internationally agreed standards, the FDRE constitution definitely seems to meet the objective criteria. Those are sharing similar racial background, ethnicity, language, religion, history, territorial integrity and the like, are compatible with the international standard. However I do not think the second subjective criterion is fully met under the FDRE constitution; that is the one which refers the extent of a group collectively perceiving itself as a 'distinct people' and possibility of forming a 'viable political entity.' The criterion 'viability' is missing from the constitution. For me the effective existence of the seceding territories is a crucial issue not only for that single state but also to the international community at large since it might threaten international peace and security. "Chechnya, Bougainville, Somaliland, Anjouan, South Sudan,

North Ossetia or Abkhazia could be mentioned as instances that international law shall be concerned of the consequences of secession" (Kohen, 2006, 05). Although, the subjective criterion is not incorporated in the FDRE constitution article 39, the author believes that it is an essential component while dealing with rights conferred on such group of people. Consequently, it could be safe to conclude that the subjective criterion is not fully present in the FDRE constitution. Besides, there is lack of clarity as far as the categories of 'Nation and Nationalities' in light of international legal regime.

Secondly, international law confined the conditions of claiming the right to secession in extreme cases and as last resort. Thus, a 'people seceding' have to show the presence of colonization, gross human right violation, oppression and lack of access to the government. For Dugard and Raic the Friendly Relations Declaration implicitly acknowledged the existence of a right of unilateral secession for peoples within existing states under certain exceptional circumstances of grave human right violation or denying autonomy and refer to it as 'the qualified secession doctrine' (Dugard and Raic, 2006). 'As long as those rights are respected by the mother state, the "people" is not oppressed and does not need to challenge the territorial integrity of its mother state' (Sterio, 2010; 138). Pursuant to the Cleveland University Professor, there are also other frequently practiced criteria under international law for instance recognition of great powers, relatively weak central government and the like.

Despite the above international law practice, article 39 of the FDRE constitution is silent whether one should show the deprivation of those rights within the framework of internal autonomy. On the contrary, secession is apparently *an unconditional right* of nations, nationalities and peoples (FDRE cons. art-39).

> *''Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession'' (FDRE cons, 1995; art 39(1)).*

Although the FDRE constitution doesn't have such criteria and conditions in the context of international law, it provide procedural pre-requisite in attaining secession. Whether such procedures can be considered as criteria will be analyzed here under.

- *The 'Procedural Pre-requisite in Winning Secession*

Under the current FDRE constitutional framework, the right to self-determination including secession, of every nation, nationality and people shall come in to effect when the five

pre-conditions laid down under the constitution are satisfied. First of all, the demand for secession has to be approved by the 2/3rd majority of the members of the legislative council of the nation, nationality or people concerned (FDRE cons, 1995; art 39(4) a). Secondly, the federal government has to organize a referendum which must take place within three years of the council's decision and, thirdly the referendum is supported by a majority vote (FDRE cons, 1995; art 39(4) b & c). Fourthly, there should be a transfer of power from the federal government to the seceding council and finally, the legal procedure of division of assets should be met so as to complete a full process of secession (FDRE cons, 1995; art 39(4) d & e).

The above mentioned procedures are the ones that shall be met for a certain 'nation, nationality and people' in order to achieve their right to secession. However there are several issues that could be raised here. For the author of this thesis, the preconditions for wining secession are basically two than five although the FDRE constitution puts them in the above manner. Initially the concerned council should approve the demand by 2/3rd majority and then this claim of secession shall get a simple majority in favour of the referendum. For me, the other remaining procedures are more or less matters of executing the already rendered decision rather than a precondition. The procedural prerequisites enshrined under article 39(4) cannot be criteria particularity in the sense of international law. Thus, it will be safe to conclude that criteria under international law starting from the beneficiary of the right and including the criteria/conditions like gross human right violation, are absent from the FDRE constitution in effect makes secession unconditional.

Lastly but not least, the author deems the FDRE constitution allowed not only an unconditional secession but also a unilateral one. This is evident from the procedures that might be applied in deciding and executing secession as per the constitution. The FDRE constitution showed its exceptional hub towards the right to secession not only in allowing it in its widest sense but also making it one the few non-derogable rights in times of state of emergency.*[6]

[6] Article 93(4)(c) of FDRE Constitution- 'In the exercise of its emergency powers the Council of Ministers cannot, however, suspend or limit the rights provided for in Articles 1, 18, 25, and sub-Articles 1 and 2 of Article 39 of this Constitution.'

3.3. The Paradox of granting the widest form of Secession right by the FDRE Constitution and Interpretation attempts of narrowing Secession;

The FDRE constitution is the only constitution which expressly granted unilateral and unconditional secession right. In fact, all through my research there are other countries which have inserted a possibility of secession right in their internal legislation; however none of them are comparable to Ethiopia's case. They adopted diverse modes in accommodating the right carefully. To that end, the European Union, St. Kitts and Nevis, Austria, Singapore, Switzerland, and Canada could be mentioned.

As it has been stated earlier, pursuant to international law, the right to self-determination of a people is normally fulfilled through internal self-determination in which a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. Broadly speaking, there have been mainly two competing arguments on secession right under the international law realm. Firstly, many international law scholars and practitioners argue that, the external dimension of the right/secession come to dialogue only in extreme circumstances of gross human right violation, oppression, exploitation and the like. On the contrary, the second group argues that 'it's only for decolonization that secession right will be in use.' These group strengthen its stand by articulating that, international law is unclear and uncertain on the right to secession of non-colonial people since it is against the principle of territorial integrity which is a jus cogens norm of international law (Moore, 2003; Babbit, 2006).*[7] 'Concerning minorities' striving for independence outside the colonial context the principle of self-determination is generally considered not to imply a right to unilateral secession' (Muharremi, 2008: 416-417). In sum, the international legal regime on secession is flanked by two positions; those are 'only for decolonization' and the other is in 'extreme cases and as a last resort'.

Regardless of those two stands of the international legal regime and practice, the 1995 FDRE constitution comes up with a big diversion from the international legal regime and practice by allowing 'unconditional' and 'unilateral' secession expressly. Consequently, the Ethiopian constitution is the only constitution worldwide which provided the right to external

[7] Jus cogens is defined in Article 53 of the Vienna Convention 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

self-determination/secession expressly and unconditionally. In contrary to the above constitutional stipulation, many, including the ruling party EPRDF, have argued that secession is conditional in Ethiopia so that it is not against the internationally accepted and recognized principle i.e. 'Territorial Integrity' (EPRDF, policy document, 2002).

According to the official policy document of EPRDF, "secession is a way out not to get back to suppression, rule of man, inequality, and especially if we cannot make what we have enshrined in the preamble of the constitution" (EPRDF, Building Democratic System (**የዲሞክራሲያዊ ስርዓት ግንባታ**), 2002; 4-5). Hence, democracy, rule of law, equality and good governance are not preference for Nation, Nationalities and People of Ethiopia, rather the only option which is the question of survival (Building Democratic System, 2002; 12-13). Thus, the party document is trying to make some sort of interpretation for secession right in the constitution, in the way of formulating it as 'Remedial Secession'. Even though this policy document tries to bring an interpretation which is compatible with international law regime in the form of 'remedial secession', article 39(1) looks quite clear in laying down secession as an unconditional right. This important document, off course, might indicate the intention and the rationale behind the constitutional stipulation of secession since there is a high level of participation by the same party and its highest men in both the constitution and policy document.

The other argument worth discussing regarding the 'conditional' nature of secession is, the one provided under preamble of the FDRE constitution. While investigating such issue which needs constitutional interpretation, it might be proper to resort the preamble of the constitution. The preamble repeatedly underlined the necessity of the fulfillment and protection of basic fundamental and human rights in order to live together.

> *"Convinced that to live as one economic community is necessary in order to create sustainable and mutually supportive conditions for ensuring respect for our rights and freedoms and for the collective promotion of our interests";*
>
> *"Firmly convinced that the fulfillment of this objective requires full respect of individual and people's fundamental freedoms and rights, to live together on the basis of equality and without any sexual, religious or cultural discrimination"*

Thus, it could be argued from the preamble itself that secession would serve as a door way out if those rights and freedoms are not respected furthermore if we failed to achieve what is

enshrined under the preamble. Based on the above paragraphs of the preamble some scholars argued secession is conditional under FDRE constitution.

Thirdly, amongst the scholars who are proponents of 'secession' clause, Fasil Nahom, connoted the secession as, "it is the guarantee of democratic government and he also argues that it is a 'basis for unity in diversity and serves as a litmus test for democracy'" (Nahum, 1997; 205).

In sum, the cumulative reading of the above documents and arguments may possibly build up a conclusion that the FDRE constitution inserted article 39(1) as a last resort of going away from the federation peacefully. In effect, it creates similarity between the 'remedial secession' theory under international law and that of secession under FDRE constitution. However this is unacceptable deduction as far as the author is concerned.

To begin with, the party document, even though it is directly related to the issue at hand, it cannot be used as a relevant and admissible document while interpreting the constitution. On the other hand, the preamble is relevant but not mandatory. It's only explaining the rationales and history behind the constitution. The reading of the whole preamble between the lines endeavor some criteria/precondition in order to the federation however there is no such criteria attached under the substantive provisions of the constitution. Therefore, it appears to be generally recognized that the preamble of an instrument can never take primacy over an operative provision with which it would be incompatible. Without incorporating the essential criteria within the operative provision i.e. Art-39, which dictates the substantive rights of peoples to secede, it would be absurd to request them as an obligatory precondition when secession is claimed.

To sum, the FDRE constitution conclusively puts the right to secession in a very clear term as an 'unconditional'. Since the constitutional provision is clear then no need of interpretation. In other words, a nation, nationalities or peoples who are alleging secession cannot mandatorily be demanded to show the presence of gross human right violation, oppression, lack of democracy and equality; and other similar criteria/preconditions under the international law regime so as to claim and win secession in accordance with article 39 of the FDRE constitution. This is so because the very nature of a preamble is not conferring a criterion in order to acquire the substantive right to unconditional secession. It may have off course an interpretive value. The author believes that a preamble is general phrase which might give a clue

on the background of the constitution, in contrary article 39 is specific for secession. Consequently the specific provision derogates the general if in case interpretation necessitates. To deduct, the FDRE constitution clearly stipulated that secession is unconditional and unilateral right so that using interpretation rules will be irrelevant.

3.4. The 'Constitutional Secession Right' as against the Political Program of the Secessionist Groups in Ethiopia;

Ethiopia is one of the most diversified nations in Africa; its diversity includes ethnic, linguistics, religion and so on[8]*. According to the 2010 data by the national statistical agency of Ethiopia (CSA), the country is a home to more than 80 ethnic groups which vary in population size (CSA, 2010). Such diversity has its own drawbacks equivalent to the opportunities. ''Nationalist, separatist or ethnic motivations- Heterogenic countries often proved to be a target of violence (including terrorism) motivated by the need to redraw political boundaries in search of self-determination (concepts of terrorism, 2008; 4).'' Accordingly there have been abundant numbers of separatist groups from different ethnic set of Ethiopia which aimed secession. It would be very interesting to examine the implementation of such an exceptionally peculiar constitutional right under the FDRE constitution especially when it's seen in light of the official political ideology of the secessionist groups.

Moreover, there are many ambiguities as far as the legal/constitutional framework on the subject matter of secession and its applicability. On the one hand, secession is an unconditional and unilateral right to the Nations, Nationalities and People under the FDRE constitution. On the other hand, the FDRE criminal code has criminalized the planning, preparation, provoking, incitement, membership and other acts committed with a view of separating/severing part of the federation i.e. secession. Before and after the promulgation of the FDRE constitution 1995, there have been many groups who have claimed secession for more than two decades. Among those separatist groups who have claimed and fought for this constitutional right to secession, the following four are the renowned and relevant for the purpose of this thesis.

[8] * The estimate of the number of ethnic groups in Ethiopia ranges from 63 (the number given by the transitional government in 1991) to 84 (based on the number of languages in the country).

a) the Oromo liberation front /OLF/, b) the Ogaden liberation front /ONLF/ c)Benishangul Gumuz Peoples Liberation Movement /BPLM/ d) The Gambella people democratic liberation front /GPDLF/

Among the above four separatist groups two of them are already proscribed as a terrorist organizations by the FDRE parliament*[9]. Although the rest two i.e. BPLM and GPDLF haven't been yet proscribed as 'terrorists' by the parliament, there had been many criminal charges and court rulings on their leaders and members for more than a decade.

3.4.1. The Separatist/Secessionist Groups in Ethiopia

In our context, the separatist groups are those groups which their political ideology or objective is focused in forming an independent state by alienating part of the territory from the existing federation. Hence, four of them will be subject to the discussion here under.

a) The Oromo liberation front /OLF/

OLF was created in 1973 as a nationalist group fighting for the rights of the Oromo people against the Ethiopian government (Think Security Africa, 2012; 1). According to Dr. Negaso Gidada, who was the former FDRE president, in the year 1972-73 Abdi Gode and some of his friends produced an idea not to continue in collaboration with the Somali liberation front and instead, form the Ethiopian national liberation front /ENLF/ (Gidada, 2011; 96). Negasso, in his book of '**የነጋሶ መንገድ**' /YE NEGASSO MENGED/'', termed ENLF as a ''preconception of the Oromo liberation front /OLF/'' (Gidada, 2011; 96).

After the fall of the Derg, OLF played the major role in the creation of the transitional government in 1991 (Think Security Africa, 2012; 1). However, ''they left the transitional government alleging that its members were being killed, arrested and jailed''. The OLF is classified as a secessionist group and was formed in order to promote self-determination for Oromo people (Policy of OLF, 2005; art 1, 2 and 4). The Oromo liberation front says that "it seeks to bring an end to centuries of oppressions and exploitation of the Oromo people by Ethiopia." In clear terms, it has been seeking a form of independence from the Ethiopian government for almost four decades. Unlike TPLF /Tigray people liberation front/, who argues in favour of the existence of ethnic suppression, OLF believes that there was a colony in Ethiopia

[9] In the year 2010/11 the FDRE parliament has endorsed a massive decision by proscribing five organizations as terrorist organization for the first time. Those five organizations are the Oromo liberation front /OLF/, the Ogaden liberation front /ONLF/, Ginbot 7, al-Qaida and al- Shabab.

(Gidada, 2011; 96). ‘’OLF has made it clear that it is a secessionist group who is fighting for independence against the oppressive and exploitative Ethiopia’’ (Policy of OLF, 2005; art 4). The group defends its armed struggle, maintaining that it is a form of self-defense against the Ethiopian government which, according to OLF, is an oppressive government denying them their right to self-determination (Think Security Africa, 2012; 1).

b) <u>The Ogaden liberation front /ONLF/</u>

To begin with, ONLF are among the five organizations proscribed by the FDRE parliament as terrorist organizations. According to the political program the front itself, the ONLF was formed in the 15th of august 1984 in Ogaden. The same is affirmed by the international crisis group, by declaring that the ONLF was founded in 1984 by six people.[10]However the Ogaden conflict is five-decade-old along with the Eritrean question which has been a perennial concern to Ethiopia (Prospects for Peace in Ogaden, 2013; 1). It has an official population of 4.5 million, predominantly ethnic Somalis, Ethiopia’s third largest nationality (around 6.2 per cent), and “roughly one-third of the widely dispersed Somali nation in the Horn” (Prospects for Peace in Ogaden, 2013; 1). ‘’The ONLF headed the Somali regional government from 1991 to 1994, in the initial years in alliance with the WSLF. It was forced out of regional office by EPRDF after it requested the holding of a referendum on self-determination/secession in 1994 (Healy, 2007; 6). In fact, control of the region has been a national security priority for successive governments in Addis Ababa.

The ideology and objective of the ONLF is clear and evident from its policy document. It is ‘’to free the Ogaden from Ethiopian colonization’’ (Political Program of ONLF, Preamble). The preamble reads that: ‘… *Recognizing that our country has been colonized against our will and without our consent by Ethiopia*…’’.

c) <u>Benishangul Gumuz Peoples Liberation Movement /BPLM/</u>

Most of the sources I referred on witnessed that BPLM was viable even in the DERG regime. ‘’The BPLM was the first political organization in the region, established in 1989 in the Sudan’’ (Young 1998). As a result, the later take part at the interim non-elected legislative

[10] Abdirahman Mahdi, chairman of the Western Somali Liberation Movement Youth Union; and former WSLF members Mohamed Ismail Omar, Sheikh Ibrahim Abdallah Mohamed, Abdi Ibrahim Ghehleh, Abdirahman Yusuf Magan and Abdulahi Muhammed Saadi. It was then led by Sheikh Ibrahim Abdallah Mohammed.

assembly of the Transitional Government of Ethiopia in July 1991; however, the BPLM could not sustain its political dominance mainly because of internal divisions (Federalism and Autonomy Conflicts in the Benishangul-Gumuz Region, 160).

Some of the cases entertained by federal high court concerning crimes against the national state were the case of the Benishangul Gumuz liberation movement /BPLM/. Engineer Jemua Rufael was among the founders of this liberation movement. The major political objective of this group is to alienate Benishangul Gumuz region from the Ethiopian federation and form an independent Benishangul (Federal high court file no- 77113). Its founding engineer had fled away to Sudan leaving his state parliamentary membership and higher executive position in 2004. Since then he has been fighting with the Ethiopian government for secession until 2010.[11]*

d) The Gambella people democratic liberation front /GPDLF/

The GPDLF has been established in December, 2003 with a view achieving the political agenda of separating the Gambella region from the entire federation (Federal high court file no-84977).[12]* According to the GPLM/F's first press release, 'the major objective is to fight for self-determination' for Gambella. It further claimed that the people of Gambella had been systematically attacked since December 2003 'purely for the government of Ethiopia to settle their own tribes in the region and use the available natural resources' (Young, 2007; 39). In contrary to the above, some says the growing influence of the Nuer under the auspices of the SPLA, joined an Anuak-led rebel movement, the Gambella People's Liberation Movement (GPLM) created in 1979 with the support of the Sudanese government (Medhane, 9). However the basic objective here is not to research history of GDPLF accordingly 2003 is more relevant for the purpose of this thesis.

[11] * the FEDERAL PROSECUTOR Vs. ENGINEER JEMUA RUFAEL et.al he himself was arrested and prosecuted with his fellow fighters, engineer Jemua Rufael was sentenced to death penalty, the federal high court 2nd criminal division on the 15th of June 2010, has sentenced him a death penalty. He was the master mind behind exceptionally brutal murders on civilians but he thinks they are informants of the government.

[12] * the FEDERAL PROSECUTOR Vs. UBONG ULOCH et.al (3 accused) they were also fighting against the Ethiopian military in order to dismantle the Ethiopian federation and to separate Gambella region from the federation. The federal high court 2nd criminal division convicted all the 3 and 2 were sentenced to life imprisonment and 1 was sentenced to 10 years of imprisonment on September 2, 2010.

- *What is the distinction between the notion of article 39(1) and the political ideology of the above four groups?*

Secession is unilateral and unconditional constitutional rights under the FDRE constitution as far the procedures are fully satisfied (FDRE constitution, 1995; art 39).

At the same time separatist groups/''freedom fighters'' in Ethiopia are also working to achieve this unconditional constitutional right since they are invoking separation of part of the federation with a view to form an independent state from the republic of Ethiopia. As per the discussion on their ideologies and prioritized political agendas, all of the separatist groups are struggling for secession. Secession is a right which has been provided by the FDRE constitution, so that at least in principle, there is no variance between their political objective and the constitution as far as secession is concerned. Thus, at least in their face value, the founding political goal of the separatist groups or 'secessionist groups' seems to go in line with the constitutional stipulation of secession as a right.

Despite the grant of unconditional secession as per article 39 of the FDRE constitution, the 2004 criminal code has criminalized acts which target on dismantling or severing a territory from the federation and made it punishable up to death penalty (FDRE criminal code, 2004; art-241 and 257). This is a clear quandary especially when it comes to implementation. For now, I can put it in a way that 'the terrorist/separatist groups are in a contending/rivalry situation with the constitutional right to secession'.

3.5. The Implementation Paradox of the 'Constitutional Right to Secede' under the FDRE Constitution; the Law and the Practice;

So far, the author tried to look in to the conceptual part, the institutional mechanism and the legal frame works under the international law and domestic laws as well in relation to the right to secession. Globally, many countries like Canada have accepted and decided on the quests for secession without conferring the right under their constitution. It's almost impossible to find a constitution which puts secession as a right expressly worldwide. Nonetheless, the FDRE constitution has come up with explicit stipulation of an unconditional and unilateral secession. After going through the FDRE constitution, particularly article 39, one may deduct that there is a wider space to exercise the right to self determination in its external dimension i.e. secession. However it might be a wrong deduction when it comes to the practice. There are many reasons

that hinder the exercise of the wider right conferred by the constitution, one of which is the criminalization of some aspects of the right. What if one create a pressure group so as to achieve secession right to a certain group by alienating from the Ethiopian federation? What about inciting, encouraging others to attain the right? Are these acts in violation of the provisions on 'crimes against the national state'? Why those separatist/secessionist groups are being prosecuted? There are also many other questions to be addressed. With a view to clearly underline the practical absurdity of the right, the author has tried to investigate the most relevant aspect of the practice.

- **<u>the Law and the Practice;</u>**

Many say that, it is impossible whether to initiate or pressurize the consummation of secession in the existing institutional mechanisms under the FDRE constitution. The main reason might relate to the criminalization of planning, preparation, provoking, incitement, attempt, conspire, organize and recruiting with a view to undertake secession by the 2004 FDRE criminal code.*[13] As a result they say 'the consequence is jail'. According to Merara Gudina, who was the chairman of Oromo Nationalist Congress which is one of the main opposition parties in Ethiopia, "it is a fake right". He argued that EPRDF will never allow anyone to initiate and consummate this right unless for a mere political consumption.[14] He also cites the instance of the former Oromo National Congress/**ኦብኮ**/ under his leadership which was, according to him, 'tactically smacked by the EPRDF government because the fear of possible claims of secession'.

The same issue rose in the case of ONLF since it was forced out of regional office by EPRDF for asking a referendum to be held for seceding Ogaden/Somali from Ethiopia. "The ONLF headed the Somali regional government from 1991 to 1994, in the initial years in alliance with the WSLF however kicked out after it requested the holding of a referendum on self-determination/secession in 1994'' (Healy, 2007; 6).

For the author of this thesis, as far as there is no prohibition stipulated by the constitution, anybody can initiate the demand to the council subject to the practice/rule of the council. There

[13] As per articles 238-260 of the 2004 criminal code those acts have been made punishable up to death penalty (see art 241 &257)

[14] Interview conducted with Dr Merara Gudina, who was a chairman of MEDREK party and a political science professor at the Addis Ababa University, on the 23rd December, 2014.

is no standard for the illegibility of initiating the demand for secession which makes the right wider and easier. However, the government of Ethiopia deems to narrow the exceptionally wider right to secede by the constitution with criminalizing the above acts/i.e., planning, preparation, and incitement, including provoking and assembly for secession/ by stipulating it punishable up to life imprisonment and death penalty i.e. the ethnic motivated terrorism. I strongly believe that the prosecutorial and judicial organs should be very critical in demarcating the line between 'secession' as a constitutional right as against 'secession' as a crime.

With a view to deepening the discussion on the practical implementation of the controversial constitutional right, real court cases on quests of secession are highly relevant. Accordingly, the author of this paper was able to assess the cases that have been adjudicated on the 2nd, 3rd and 4th (19th) benches of the federal high court which are 'specialized' on cases of terrorism and crimes against the national state'. Thus the author has collected and analyzed the decisions rendered on cases related to crimes against the national state starting from October 2008 till September 2015. As per the data collected; the decisions rendered by those criminal benches regarding crimes against the national state or the ethnic motivated terrorism cases were 189 (one hundred eighty nine) as of October 2008. The author used a random sampling method in order to decide the sample size from that huge number of cases decided/entertained in the above consecutive years.

Accordingly the author selected randomly 50(fifty) cases/files to be encountered. Among the fifty cases analyzed by the author of this thesis, nearly 46.5% were cases related to the Oromo Liberation Front/OLF/. The remaining, just above 35% were cases related to other ethnically motivated movements like Arbegnoch Ginbar, ONLF, GPDLF, BPLM. The rest 18.5% were cases motivated by political and religious reasons, and the rest were related to transnational terrorist organizations.

Thus, the author is referring that more than 70% of the cases entertained by the above federal high court terrorism benches are cases related to secessionist sentiment or ethnicity in one way or another. As a matter of fact, in Ethiopia, ethnic based separatist groups have been established here and there for the couple of decades. The best models are the Oromo liberation front /OLF/ and Ogaden national liberation front /ONLF/. As the constitutional stipulation allowing secession in clear terms, the above liberation fronts have also been fighting to realize this constitutionally provided right to secession in their way. However those who were fighting

for this right have been prosecuted and sentenced for transgressing the provisions on 'crimes against the national state' i.e. articles 238-260 of the criminal code. Certainly there looks to be some sort of indistinguishable status which shall be cleared out.

Amongst my interviewees, the federal high court judge, who has worked for five years and more on the specialized bench on cases of terrorism and crimes against the national state, they usually focus on the motive of the group or the individual while deciding cases related to secession in other words if the evidence brought by the prosecutor indicates that the individual has a secessionist aim, then acquittal is unlikely*[15]. The same argument is forwarded by the senior prosecutor that "whether the means of quest of secession is peaceful or not, the most important element for their criminal charge is the end goal of the accused"*[16]. Consequently, it is inferable that even non-violent movements so as to claim and win secession have a risk of being criminalized and punished for transgressing the above provisions of the criminal law.

However in order to make a distinction on the ambiguity of secession as a right and secession as a crime, the author tried to collect and analyze criminal cases in relation with the right to secession i.e. crimes against the national state. Along with discussing the practical incite on these cases in effect it will be possible to mark the line clearly between secession as a right and secession as a crime.

Case 1:- The Federal Higher Prosecutor Vs Engineer Tesfahun Chemeda et.al. (No of accused persons -16)

In this case, the accused were prosecuted for 10 distinct criminal charges participating in different levels starting from acts of planning, conspiracy, financing, assisting, incitement, preparation and the like. All accuses were members of the OLF, which has been fighting for its policy of alienating/separating a substantial part of the Ethiopian federation i.e. Oromia since 1970's; (Policy of OLF, 2005).[17]

This movement is nothing but to break away or separate Oromia from the federation by which at its face value is a constitutional right pursuant to Article 39 of the FDRE constitution.

[15] The interview conducted with a federal high court Judge, who is not willing his name to be mentioned, on 7th of October 2016 in Addis Ababa, Ethiopia.
[16] The interview conducted with a senior public prosecutor in the attorney general, who prefers to be anonymous, on 4th of October 2016 in Addis Ababa, Ethiopia.
[17] See also Federal high court file no- 74659

So what makes it a crime is a proper question. The procedures required in order to achieve the right enshrined under article 39 of the constitution have been addressed so far. However, now it is necessary to look in to what actions were taken by the accused persons in pursuit of secession. Among all some of them are; committing homicide, robbery, inflicting bodily harms, instigating civil war, and others. All the above violent acts might not be acceptable in any way. According to the 1st and the 2nd charge the offenders were prosecuted for violating articles 240 and 241 of the 2004 criminal code. The 3rd charge is talking about the role of the 1st and the 2nd accused persons in aggravated robbery of more than a 2.1 million birr from Fincha sugar factory. The 4th and the 5th charges are showing aggravated homicide by using bombs on gas stations.

Accordingly, the above are simply criminal acts, however as we have seen in the literature review part, how motive is essential while dealing with such cases unlike other crimes. Accordingly their motive is inferred from the objective of the organization that they are members and working for i.e. OLF. The OLF is a political organization having its own secessionist agenda on Oromia which continued for decades. The accused have committed those criminal acts so as to achieve those political goals of OLF. We may say that the members of OLF did not follow the procedures laid by article 39 (4) of the FDRE constitution however they choose the violent method. However the important concern here is whether the formal and informal institutional mechanisms are allowing or at least welcoming secession quest. Similar argument could be extended to other OLF cases including the famous Ms. Dirbe Etana Gemechu et.al.[18]*

Case 2- ***The Federal Higher Prosecutor vs. Hussien Usman et.al (No. of charges-3)***

Obviously the 1st charge is brought against the accused for contravening article 241 of the criminal code. The 2nd is for contravening article 256 and the most relevant 3rd charge is brought against the accused for violating article 257 of the 2004 criminal code. In the 3rd charge the prosecutor has mentioned that the accused with a view to accomplish the policy of OLF, he has exchanged emails that may incite others about secession (see prosecutor file no- 01504/02 Hussien Osman et.al 6th page). Among the emails that the prosecutor used to criminalize and

[18] * See Federal high court file no- 71881-the FEDERAL PROSECUTOR Vs DIRIBE ETANA et.al the attack was organized by OLF and the leading women were Diribe Etana and Urge Qabata by which in one of the attackers Yisak Guttu who was the former OLF eastern zone deputy commander in chief was also dead (suicide bomber) during the attack. The federal high court 2nd criminal bench sentenced death penalty by the request of the federal higher prosecutor on both the women and one other co- offender.

charge the accused, one of them says ‘‘the quest of Oromo is liberty/secession so that the ‘HABESHA army’ shall leave Oromia” (Prosecutor file no- 01504/02). Exchanging emails with a view to instigate others is one of the activities expected to be done in consuming the constitutional secession right though it has been criminalized. This is one of the instances that corroborate the above arguments raised by the federal high court judge and prosecutor.

Case 3:- The Federal Higher Prosecutor Vs Engineer Jemua Rufael et.al. (No of accused persons -4)

The accused were prosecuted for 4 (four) distinct criminal charges participating in different levels starting from masterminding terrorist attacks, committing, conspiracy, assisting, hostage taking, taking part in inciting a civil war and the like. All accuses were members of the Benishangul peoples liberation movement (BPLM), which has been fighting for its policy of alienating/separating Benishangul from the Ethiopian federation starting from 1996 (Federal high court file no- 77113).[19] Among the criminal acts that he was engaged in, as per the 1st charge; with violating article 241 of the 2004 criminal code the accused were working for alienating the Benishangul Gumuz region from the federation. The 2nd, 3rd and 4th charge was brought against the 1st accused in violation of article 522 (a) of the 1957 penal code of Ethiopia which is murder. Their motive was to work out on the political agenda of BPLM that is seceding Benishangul Gumuz from the federation.

Case 4:- The Federal Higher Prosecutor Vs Ubong Uloch et.al. (No of accused persons -3)

The accused were prosecuted for two concurrent criminal charges participating in different levels starting from masterminding terrorist attacks, commission, conspiracy, financing, assisting, incitement, preparation and the like. All the accused were members of the Gambella people liberation democratic front (GPLDF), which has been fighting for its policy of alienating/separating part of the Ethiopian federation i.e. Gambella starting from the year 2003 (Federal high court file no- 84977). The accused have killed many innocent civilians including engineers, gold diggers and others in November 2003 in the town of Agnwak (Federal high court

[19] * the FEDERAL PROSECUTOR Vs ENGINEER JEMUA RUFAEL et.al the federal high court 2nd and 3rd criminal division on the 15th of June, 2010 has sentenced him a death penalty. He was the master mind behind exceptionally brutal murders on civilian but he thinks they are informants of the government.

file no- 84977).[20] As it can be inferred from the charge and the decision of the court the accused were trying to achieve the goals set by GPLDF in order to break away Gambella from the Ethiopian federation.

Generally speaking, the above entire separatist rebel groups/organizations and their political goal is in principle accommodated in the constitution since they have been targeting to achieve what's enshrined under the FDRE constitution i.e. secession. However many of the sample cases analyzed here showed that the secession claims were out of the constitutional framework at least procedurally. In other words, they do not go in line with the procedures prescribed under article 39(4), rather they used violent means. By this, the author came to stature how ***the Constitutional Right to Secession as Distinct to the crime secession*** in the context of Ethiopia.

As opposed to the above, in case-2*[21], we have seen the contents of the 3rd charge which criminalized exchange of emails provoking secession. Now the question is how come a group can initiate, convince others to accept its idea, create and join a pressure group on regional councils by provoking the public without exchanging such information concerning its secession right? Article 257 of the criminal code will tell us a lot on it. Reads as follows;

> ***Article 257.- Provocation and Preparation.***
> *Whoever, with the object of committing or supporting any of the acts provided under Articles 238-242,246-252:*
> *(a)* ***Publicly provokes*** *them by* ***word*** *of mouth, images or* ***writings****; or (b) conspires towards,* ***plans*** *or urges the formation of, a band or group with other persons, whether within or outside the country; or (c) joins such band or group, adheres to its schemes or obeys its instructions; or (d) enters into relations or establishes secret communication with a foreign government, political party, organization or agent; ……*

In sum, after assessing all the above real cases, although secession is constitutional in the Ethiopian federation as far as the procedures are met; many groups prefer a violent means in order to achieve their right to secession. Besides, many of the acts to be done in winning secession including planning, preparation, provoking and the like have been criminalized. The above provision has criminalized most of the activities to be done in claiming and winning

[20] * the FEDERAL PROSECUTOR Vs UBONG ULOCH et.al the attack was organized by GPLDF and many civilians were killed by the perpetrators, the federal high court 3rd criminal bench has sentenced them to life imprisonment and other grave punishments on the day of 2nd September 2010.
[21] Federal prosecutor Vs Hussien Osman et.al file no-01504/02 on page 6 of the charge.

secession which in one way or another affect the realization of the constitutional right without violence. Thus, due to the inoperative secession clause and other political reasons, the above separatist groups are trying to achieve secession out of the constitutional framework. There has been no single secession claim through the state councils, other than the instance provided earlier in 3.5, however the same claims are abundant in criminal benches. Moreover, the absence of a clear and noticeable institutional setup to entertain secession cases and claims has to be questioned. In some other cases the government also showed its rigid stand on secessionist quests by criminalizing planning, preparation, incitement and provoking secession even through non violent means.

5. Conclusion and Recommendations

5.1. Conclusion

From the beginning, then, the right of self-determination is not clearly explained or defined. As decades passed, however, the right has massively elevated to be termed as 'a human right', at least in its internal form i.e. autonomy. Though the right to self determination comprises both internal and external/secession dimensions. This thesis has entirely focused on the controversial aspect of the external dimension i.e. secession right. The FDRE constitution adopted a peculiar/strange position by making secession an unconditional and unilateral right, as opposed to the international legal theory and practice. The paradoxes that need creating coherency are both Theoretical and Practical.

Firstly, there comes the theoretical paradox. To begin with the criteria and conditions, as it has been previously discussed the FDRE constitution has undoubtedly diverted from the international law regime and practice. Regarding the holder of the right to self determination, the constitution added two additional groups i.e. the Nations and Nationalities. However the definition and conditions to be termed as 'people' under international law is not presence in its full sense within the constitution. With a view of upholding its international obligation,*[22] there needs to be a constitutional amendment which might bring consistency as far as the definition and contents of the 'Nations, Nationalities and People'.

The other principal diversion taken by the FDRE constitution is regarding the criteria/preconditions to secession right, which provides it as an unconditional and unilateral. Pursuant to article 39(1) secession is unconditional right and its major procedures are made unilateral. It is a very distinct stand as compared to that of the international legal regime and practice. Under the international law arena, the understandings, arguments and the practice are usually confined into two major blocs. Firstly, 'the absolutists' (Castelino, 2005), the one is that advocate in favor of the jus cogens norm of 'Territorial Integrity' by limiting secession only in cases of decolonization. The second bloc, the 'progressive approach' (Buchanan, 1997), argues that secession could be allowed in extreme cases of gross and persistent human right violation,

[22] Ethiopia is a party to the most of the major international human right/legal instruments discussed in chapter two including the UN charter, the UDHR, ICCPR & ICESCR. Since the right to self determination has already become a human right, its application and interpretation is expected to go consistently with the international law regime, practice and principles like 'Territorial Integrity'.

but as a last resort. Subsequently, many scholars are invoking the second argument eventually created a theory called 'Remedial Secession' under international law. For me, remedial secession has emerged as part of international law regime through state practice during the last couple of decades. The cases of Bangladesh, Eretria, Kosovo and Quebec which alleged 'remedial secession' could be cited as practical instances. In contrary to the abovementioned, the FDRE constitution has taken quite a distinct stand by providing unconditional and unilateral secession right as opposed to the jus cogens norm of the principle of 'territorial integrity.' This peculiar stand taken by the FDRE constitution has become the most extreme form of secession right.

The ridiculousness of the grant of the right to unconditional secession under the FDRE constitution is more severe during practical implementation and interpretation of the right. One could imagine the situation if one of the opposition parties won the majority in one of the states and constitutionally claim secession through their state council. No one can predict the consequence. Many countries in the world have entertained secession quests without providing it explicitly in their constitution. Unlikely, Ethiopia is unique in constitutionally granting unilateral and unconditional right to secede. However the practical space of the widest right to secede is exceptionally narrowed down in various modes. Subsequent to the constitutional grant of the unconditional right, the FDRE criminal code has criminalized most aspects and acts done in consummation of secession right which in effect could obstruct its realization. Different interpretations have been launched with a view of making secession conditional as discussed earlier. To this effect, there are various interpretations and other attempts launched, including the ruling party's policy document, with a view of categorizing secession in Ethiopia as 'Remedial Right'. However such attempts of creating compliance with the international legal regime cannot be achieved without a constitutional amendment, since the provision operative on secession i.e. art-39(1) is very clear as to the unconditionality of secession right.

Remarkably, in many of the cases concerning 'crime against the national state or the federation; the prosecution department usually uses the secessionist motive of the separatist groups as a fundamental element of its criminal charge. Courts also entertain the same and dictate the motive of secession as vital measurement in deciding guilt or not. These are evident from the interviews; the criminal charges and the decision of courts (see annexes). In fact, amongst the five practical cases analyzed previously most of them used the violent methods of attaining their constitutional right to secession. The reasons behind such violence shall be

addressed accordingly. Lack of institutional mechanisms in determining the whole procedures of claiming and winning secession has caused ambiguity and it is still a major incumbent. The proceedings are vague and unclear starting from initiating the demand, lobbying, provoking others including members of the state council in creating supporters of the idea. Previously I have discussed the case of OFC/Oromo Federalist Congress/ in which there was a claim that the FDRE government has tactically smacked OFC for the fear of a possible quest of secession. There was also a similar episode when ONLF was forced out from regional office for requesting ruling party a referendum to be held. To deduct, the tapered space in entertaining secession and the inoperative secession clause under the constitution might have been the reasons of abundant cases of violent secession or crimes against the national sate.

The absence of a constitutional court also contributed for the lack of constitutional jurisprudence and absurdities on the interpretation of secession right in light of international law. Pursuant to the FDRE constitution, the power to interpret the constitution is given to the house of federation (Art- 62). No secession quest is passed through the state councils or entertained by the HOF; however abundant cases of secession are being adjudicated in criminal benches. Besides, the past 22 years experience told us that, there are no enough cases, no procedures experienced; no enriched constitutional jurisprudence as far as constitutional secession is concerned. The author cannot find a single secession case passed through state councils or council of nationalities and entertained by the House of Federation regarding secession while hundreds of similar cases/criminal/ adjourned in federal courts in relation to secession. This is nothing but a paradox. As it has been mentioned earlier, one may imagine the above controversies in a situation where a certain opposition party won the majority in one of the states and claim secession through their state council. Thus, there is an urgent need of creating coherence in both theoretical and practical paradoxes on the absurd incorporation of secession right.

5.2. Recommendations

Primarily, amending the provisions of the constitution regarding criteria and conditions of secession in conformity with the international legal regime and practice is indispensable. The constitutional amendment should incorporate the full sense of 'people' under international law by adding in the subjective element of the definition which might bring consistency as far as the meaning and contents of the 'Nations, Nationalities and People' under the FDRE constitution.

The author of this thesis recommends that, with the prevalence of international law, revoking 'unconditional secession' under Art-39 and incorporating 'Remedial Secession right' in the FDRE constitution through constitutional amendment. Subsequent to amending the FDRE constitution by incorporating the 'Remedial Secession theory', there are other commitments expected from the government, starting from loyalty to the constitutional stipulation. Respecting fundamental human and democratic rights including 'remedial secession' accompanied by genuine federalism are among the key positive obligations anticipated from the government.

On the other hand, a constitutional court shall be established with a meaningful umpiring discretion so as to develop and amplify the constitutional jurisprudence on fundamental human rights and freedoms including the right to secession. I favor the establishment of a constitutional court with full empowerment since it will contribute a lot for the enrichment of the constitutional jurisprudence and solve the inexperienced handling and implementation of the right. This will contribute for the platform and may also have effect on possible future claims of secession.

Courts, prosecutorial offices and other security organs shall also be keen in demarcating the line between the constitutionally guaranteed right to secession and that of elements of 'crimes against the national state.' However, strategies in countering secessionist sentiments of the various ethnic groups should not rely on the formal criminal justice response including criminalization and pronouncing the groups as 'terrorists'. ''Coercion it exacerbates nationalism and xenophobia in the countries associated with the extremism'' (Frey, 2010, 491-492). In contrary, the government shall confirm its utmost commitments in protecting and respecting fundamental human and democratic rights even including 'Remedial Right' to Secede.

Autonomy and genuine federalism are also the vital elements may be used as an effective antidote counter extremism and secessionist sentiment. For instance, in the case of the GPLM, as mentioned above, lack of economic autonomy intensified the fight for secession in Gambela.

GPLM claimed that the people of Gambella had been systematically attacked and marginalized since December 2003. This is because of 'purely for the government of Ethiopia to settle other groups in the region and use the available natural resources' (Young, 2007; 39). Here it is evident that lack of opportunity and economic right/autonomy in their locality exaggerated the secessionist sentiment and resistance in the area.

In fact many of the above may relate to the widening up of the political space which necessitates not only legal or constitutional reforms but also a high level of political commitment. The government also needs to proof its commitment in allowing some space in exercising the right to secession within the notion of international law. Unless this happens the above separatist groups and other potential claimants may resort to the violent methods so as to achieve the constitutionally stipulated but inapplicable right. The above groups might use a violent method due to frustration of the inapplicable secession clause in the constitution.

Subsequently it's possible to conclude that, the long-term solution for winning the battle on violent secessionist movement and extremism is not explicit stipulation of the right in the constitution. Rather it shall focus on the advancement of freedom and human dignity through effective democracy after making the necessary constitutional amendment. Elections are the most visible sign of a free society and can play a critical role in advancing effective democracy but elections alone are not enough. Genuine federalism, accompanied by effective self and shared rule, is imperative. Effective democracies honor and uphold basic human rights, including freedom of religion, conscience, speech, assembly, association, press and 'Peoples' right to Self Determination as well. Thus, the best strategy to get rid of secessionist sentiment is upholding democracy and respecting individual and group rights and freedoms which will thwart the justifications for claimants of secession.

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g. Interviews

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B. An interview conducted with a federal Higher Prosecutor within the attorney general, on 4th of Oct, 2016, in Addis Ababa.

C. An interview conducted with a federal High Court judge, on Oct 07, 2016, in Addis Ababa.

D. An interview conducted with a federal Prosecutor within the attorney general, on 8th of Oct, 2016, in Addis Ababa.

E. Interview conducted with Dr Merara Gudina, who was a chairman of MEDREK and OFC and a political science professor at Addis Ababa University, on the 23rd February, 2015.

F. An interview conducted with a senior State/Supreme Court prosecutor of Amhara regional state, on November 2016.

G. An interview conducted with Mr. Amanuel Yohannes, who is a senior prosecutor in SNNP regional state, on October 2016.

7. ANNEXES

1) The decision index of the Federal High Court specialized terrorism benches of 2nd, 3rd and 4th criminal divisions showing six years data from October 2008 up until July 2014.
2) The Policy of the Oromo Liberation Front from Paragraph 1-8 (selected due to largeness)
3) The criminal charge brought by the federal higher prosecutor against 16 perpetrators Engineer Tesfahun Chemeda et.al (Prosecutor file no-01335/01) (selected due to largeness)
4) Court decision/sentence on 25 OLF fighters (ALYU MUMME et.al.) rendered on 4th may and 17th June, 2010 (Federal high court file no- 80784) (selected due to largeness)
5) The criminal charge brought by the federal higher prosecutor against HUSSIEN OSMAN et.al. (Prosecutor file no-01504/02)
6) Court decision/sentence on 4 BPLM members (Engineer Jemua Rufael et.al.) rendered on 4th May and 15th June, 2010 (Federal high court file no- 77113) (selected due to largeness)
7) Emails with a content of provoking and inciting secession however used by the federal prosecutor in criminalizing individuals with crimes against the national state