THE RIGHT TO SELF-DETERMINATION: A CASE STUDY OF SOUTH SUDAN

BY

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DECLARATION

I hereby declare that the work in this thesis entitled; "**The Right to Self-Determination: A Case Study of South Sudan''** was undertaken by me in the Department of Public Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution.

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Signature Date

CERTIFICATION

This Thesis entitled; "**The Right to Self-Determination: A Case Study of South Sudan''** by Aondowase Francis ADASU meets the regulations governing the award of the degree of Doctor of Philosophy in Law of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This research is dedicated to Officers and Men of the Armed Forces of the Federal Republic of Nigeria who have in no small measure influenced my ardent quest for knowledge with utmost zeal and determination for nothing but the best as well as for Officers and Men battling to keep the peace in challenging circumstances globally.

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
AU	African Union
ABC	Abyei Boundaries Commission
AUHIP	African Union High Implementation Panel
CPA	Comprehensive Peace Agreement
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
DUP	Democratic Unionist Party
GOS	Government of Sudan
ICJ	International Court of Justice
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
INC	Interim National Constitution
IDP	Internally Displaced Persons
IGAD	Inter-Governmental Authority on Development
NATO	North Atlantic Treaty Organization
NIF	National Islamic Front
NDC	National Democratic Alliance
NCP	National Congress Party
NASS	Nationality Act South Sudan

OAU	Organization of African Unity
OSCE	Organization for Security and Cooperation in Europe
PCA	Permanent Court of Arbitration
SC	Supreme Court
SPLM/A	Sudan's Peoples Liberation Movement/Army
SAF	Sudanese Armed Forces
SSRA	Southern Sudan Referendum Act
SSRC	Southern Sudan Referendum Commission
SSRB	Southern Sudan Referendum Bureau
SNA	Sudanese Nationality Act
UN	United Nations
UNGA	United Nations General Assembly
USA	United States of America
UNIRED	United Nations Integrated Referendum and Election Division
UNDP	United Nations Development Programme
UNSC	United Nations Security Council
UNMISS	United Nations Mission in Southern Sudan
UNISFA	United Nations Interim Security Force in Abyei

ABSTRACT

This thesis entitled: "The Right to Self-Determination; A Case Study of South Sudan" centered on the legal challenges inherent in the attainment of statehood through self-determination outcomes. The thesis from the general perspective is directed towards addressing the problem of securing independence through self-determination of peoples as well as the ensuing legal challenges associated with post secession disputes particularly as it relates to South Sudan. The objective of the research is to locate the complexities associated with the general application of the right to self-determination. Another objective of the research is to resolve the inherent challenges relating to the interpretation of the word "peoples" which is the centre stage of the right to self-determination. Furthermore, the research is intended to appraise the technical areas of agreements between Sudan and South Sudan and to address the post-secession disputes relating to citizenship, border disputes and disputes over natural resources. Consequently, the post secession humanitarian disputes arising from the civil war as well as attempts to bringing peace in South Sudan were explored. The research found that the right of self-determination is vague and ambiguous in the relevant legal instruments. Also, national self-determination appears to challenge the principle of territorial integrity and sovereignty of states. Furthermore, the scope of the study is subject to differing views, hence it can be argued that uncertainty in the law of self-determination has contributed to many armed conflicts as the right is associated with notions of sovereignty. In line with the observations, it is recommended that in order to accommodate demands for minority rights, states should decentralize or devolve greater decision-making power to new existing sub units or even autonomous areas. Furthermore, it is recommended that the *Uti Possidents juris lines* may be modified by consent to ease tensions in certain given situations. Also, a legal clarification of the term people should be addressed by the international community and the role of the ICJ should be prominent in this regard. The doctrinal research methodology was primarily relied upon as text books, journal articles, newspapers/magazines, reports and other secondary sources such as internet materials formed the basis of the entire research contained in the thesis. The limitation of the research is the insistence by the interviewees not to be quoted for security reasons which hindered the researcher from publishing the contents of their interviews.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Self-determination as a right has found difficulty in interpretation as well as its exact meaning in international law. The determination and demarcation of fixed territories and the subsequent allegiance between those territories and the individuals or groups of individuals that inhabit them is central to the study of self-determination. This is arguably the prime factor that creates room for individuals and groups within international and human rights law to contest this right. [1] International society consists of individuals and groups that ostensibly gain legitimacy and *locus standi* in international law by virtue of being part of a sovereign state. [2] The acquisition of defined and fixed territoriality is a prerequisite for the recognition of statehood.[3] The quest for recognition has widespread manifestation in contemporary society; from indigenous people who seek control over the destiny of their ancestral land to struggle for self-determination.

The issue of territoriality itself remains contested in international law. The implication of this contest is most visible in the treatment of the right to self-determination.[4] To ascertain the manner in which the legal treatment of territory affects groups seeking self-determination, this thesis shall seek to identify the

1 Brod, R R., (1958) *Government in International Law;* C.H.M Waldock eds. p.45.

2. Hedley, B., (1995) *The Anarchical Society: A Study of Order in World Politics.* Oxford University Press, London.p.15

3. See Montivideo Convention on the Rights and Duties of States Art 1, Dec 26, 1933, 49, Stat. 3097, TS. 881.

4. Antonio ,C., (1995) *Self Determination of Peoples: A Legal Reappraisal*. Oxford Clarendon p.62

international legal regime on the subject as well as assess the doctrinal tools that lie at the foundation of territoriality and self-determination. In order to construct and uphold its legitimacy, international law must re-conceptualize the principle of territoriality and the right to self-determination. This can be approached by reconciling the traditional state centered approach. This approach views self-determination as the legitimacy of the state. On the other hand, the human rights approach, views self-determination as a foundational right on which the edifice of human rights can be built.[5]

Self-determination has as its core values, the free and genuine expression of the will of the people; the principles of equal rights of people; the basis for the development of friendly relations; the strengthening of universal peace and the possible amalgamation of nationalities if so freely chosen.[6] The historical context of the right to self-determination can be linked to morality, politics and law. Within moral theories, the idea of self-determination is derived from a specific understanding of the human nature that can be traced through the history of liberal thinking. Every person is capable of rational reasoning and the idea of the autonomy of the person. The autonomy of the person is often regarded as the source for the human dignity and gives the person its inherent value. The natural rights of all humans are then deducted from this absolute value of the person. This conception of natural rights has been challenged as liberal theories of human rights are not necessarily based on the assumption of human dignity. The general perception of the person as autonomous

[5]. Pekka, A.,Martin, S., (2000). *Operationalizing the Right of Indigenous Peoples to Self-Determinations* Scheinim p.78.
[6]. See UN Charter Debates, VI UNCIO 300 May 15 at 703-4.

and capable of rational choices remains the bases of the liberal idea of the right to self-determination.

Taking the liberal principle of self-determination further, it leads to the idea that the only legitimate government is that which has been authorized by the people themselves in their capacity as autonomous agents. The exercise of the constitutive power of the people is a manifestation of their political self-determination in the internal sense. It can therefore be summed up that the liberal principle of self-determination is linked to the idea of popular sovereignty and participation. These ideas have influenced political theories and are reflected in the debate on self-determination as the exercise of the constituent power of the people, popular sovereignty and democratic theories. The development of self-determination in international law is based on moral consideration, on justice and political consideration resulting from political struggles. The whole history of the right to self-determination is "for better for worse" the story of adaptation to the evolving struggles of peoples attempting to achieve effective control over their own destinies, especially in reaction to circumstances that are discriminatory, oppressive and unjust.

The nature and content of self-determination can be better imagined from the main international instruments giving credence to the principle under scrutiny. First, though the United Nations Charter ("the UN Charter")[7] contains rather few references to self-determination, it is in fact, the Charter itself that is considered to have given expression to the principle of self-determination. This is contained in Article 1(2) and

[7]. Brownlie, E.D., (1992) *Basic Documents on Human Rights; Oxford, Clarendom Press*, 3rd edition, p.95

55 of the UN Charter. Article 1(2) provides that one of the purposes of the UN is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.[8] Article 55 instructs the UN to promote higher standards of living, solutions to health and cultural problems, and universal respect for human rights. This is with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.[9] The UN Charter did identify the principle of self-determination as a major objective of the world body though not elaborate enough to serve as an effective means of expanding its legal boundaries.

The UN Charter did very little in developing the content of self-determination. Its pivotal role has been to provide the substratum for the rights of peoples. The Charter should also make provision to the effect that universal peace is impossible without self-determination. The text outlines a comprehensive concept linking independent factors of security, stability and human rights. The text is incomplete in terms of external or internal self-determination thus referring solely to the principle rather than a right. The principle of self - determination has been broadened having developed into a rule of customary law by additional instruments on the subject. In this regard, Article 1 of both the UN Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights include an article on self-determination phrased exactly in the same wordings.

[8]. Charter of the United Nations, 26 June, 1945, 59 Stat. 1031, TS, 993, 3 Bevans 1153.
[9]. Article 55 of the UN Charter.

The evolution of the right to self-determination culminated in the adoption by the UN General Assembly in 1960, of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[10] The declaration presents itself as an interpretation of the charter and stresses independence within the colonial context as the principal means through which self-determination is implemented. It proclaims solemnly, the necessity of bringing to a speedy and unconditional end, colonialism in all its forms and manifestations and declares that all people 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. The holder of the right to self-determination is considered to be the people, and the meaning of the word, "People" is considered by repeated reference to colonialism. The colonial declaration is viewed by most African and Asian nations as a document only slightly less sacred than the charter and as stating the law in relation to all colonial situations.

Self-determination made its entry in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states herein referred to as the (Declaration on Friendly Relations Charter). The Declaration contributed to the formation of a set of general rules concerning the right to self-determination. A number of international law authorities have asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance deriving from the interpretation of Paragraph 7 of the Declaration.[11] Again, the

[10]. UNGA. Res. 1514, 15 UN G AOR, Supp. 16 UN Doc. A/4684 (1960) p.66.

[11]. Declaration on Principles on International Law Concerning Friendly Relations and Co-operation Among States.

Conference on Security and Co-operation in Europe[12] adopted on 1 August, 1975, embodied a declaration on the principles concerning mutual relations of the participating states. Its principle VIII contains an explicit reference to internal and external self-determination. This formulation is construed to mean that, the right to self-determination is a continuing right, not a right exercised, once and for all, at the time of independence. Thus self-determination applies to all people. Further to this, the Charter of Paris adopted in 1990 during a meeting of the Organization for Security and Cooperation in Europe (OSCE), references self-determination in a manner that restricts previous formulations and limits its content. The charter reaffirms equal rights of people and their right to self-determination in compliance with the UN Charter and other relevant norms of international law, comprising those relating to territorial integrity. Again, the Vienna Declaration and Program of Action [13] adopted in 1993 by the UN Conference on Human Rights reconfirmed in Article 1 of the UN Covenant the right to self-determination.

Perhaps, most instructive and authoritative for purposes touching on this aspect under discussion is Article 20 of the African Charter on Human and Peoples Rights promulgated by the Organization of African Unity (OAU) now African Union (AU). This convention adopted in 1981, entered into force in 1986. Article 20 therefore lays out the right to self-determination as a substantive right having the force of free political determination with economic aspects as well.

[12]. The Helsinki Final Act does not have the status of a legally binding document.

[13]. A/Conf.157/24, 5 June 1993, hpp/www-Africut.com assessed on 25 November, 2015.

The Republic of South Sudan is a land locked country in East-Central Africa. However, it is classified as part of North Africa sub-region by the United Nations (UN). South Sudan became an independent nation on 9 July, 2011 with its capital in Juba. It shares boarders with Central African Republic, Democratic Republic of Congo, Ethiopia, Kenya, Sudan and Uganda. The historical perspective to the long years of struggle by the people of South Sudan to attain self-determination has been a thorny issue in international law and relations. Father Saturnino Lahure, a Southern Sudanese politician, stated in a speech delivered before the Sudanese National Parliament in Khartoun on 23 June, 1958, thus;

> Mr. President, Sir, the South has no ill-intensions whatsoever towards the North. The South simply claims to run its local affairs in a United Sudan. The South has no intention of separating from the North, for had that been the case nothing on earth would have prevented the demand for separation. The South claims to federate with the North, a right that the South undoubtedly possesses as a consequence of the principle of self-determination which reason and democracy granted to a free people. The South will at any moment separate with the North if and when the North so decides directly or indirectly through political, social and economic subjugation of the South. [14]

The divorce between Sudan and South Sudan as graphically captured in the above quotation ensued. An analysis of the historical background of the region would be relevant to this research. Before the Turko-Egyptian invasion of 1821, the Sudan consisted of kingdoms and tribal communities without modern forms of government. In other words, Sudan in its present boundaries did not exist. The Turko-Egyptian occupation of 1821 was promoted by the expansionist ambitions of the Ottoman

14. Perteno, S.A., (2007) The Rev F Saturnino, L: *A Roman Catholic Priest Turned Rebel*. *The South Sudan Experience* vol 119-20 p.65.

Empire and its craving for wealth and markets. The main commodities of interest were slaves, gold, ivory and timber. South Sudan provided the source of these commodities. The Turko-Egyptian rule lasted for a period of 60 years. Similarly, the Mahdist administration of 1883 -1898 did not succeed in imposing its full authority on the whole of Sudan. However, in 1892, the French led by Major Marchand occupied large parts of South Sudan and by 1896 had established a firm administrative structure in these areas. The French had wanted to annex South Sudan to the French territories in West Africa. However, an international conflict developed between the British and the French over South Sudan commonly known as the Fashoda incident. Again, in 1898, the Sudan was re-conquered by a joint British and Egyptian forces resulting in the signing of the Condominium Agreement between the British and the Egyptians to administer the Sudan in its present boundaries.

In 1899, the British and the French concluded an agreement in Europe which made the French pull out of South Sudan. A similar incident took place in 1910 when the Belgians withdrew from the Lado Enclave after an agreement was concluded in 1896 stipulating that the Enclave was to be handed over to the British after the death of King Leopold. The king died in 1910. The withdrawal of the French and Belgians from South Sudan ceded the territory to the British. Owing to the geographical, political, historical and cultural differences between North and South Sudan, the British devised a system of a separate administration for the two territories. To guarantee the effectiveness of the separate administration policy, the British passed the Closed Districts Ordinances of 1920s. In consolidation of this policy, the Passports

and Permits Ordinances was promulgated in 1922. This ordinance required the use of passports and permits for travelers shuttling between the North and South Sudan. The permits were to specify the conditions and purposes of visits. The immigration policy was further strengthened by the Permits and Trade Order enacted in 1925. This law required North Sudanese citizens to obtain permits to conduct trade in South Sudan. Furthermore, a language policy was entrenched in South Sudan in 1928 adopting English as the official language. The cumulative effect of the immigration and trade laws coupled with the language policy was to maintain South Sudan as a separate entity from North Sudan. Owing to these diversities, the people of South Sudan continued to struggle for independence until it was achieved in 2011.

The independence of South Sudan from Sudan poses major economic, political, social as well as legal implications which necessitate this research. The expansive border between the two countries spans 2,135 kilometers. There are struggles over boundary divisions, while some of the areas are still being disputed for instance the South Kordofan and the Abyei territories. There are disputes over the wide span of oil pipeline network from South which passes through the North. Additionally, there is widespread civil war in South Sudan with catastrophic consequences including human rights violations. Thus, the general euphoria that came with independence has turned into bitterness with developments threatening the very foundation of peace, security and order which is the hallmark of statehood. This thesis therefore seeks to investigate the legal implications of the independence of South Sudan from Sudan and the evolving practices in international law.

1.2 Statement of the Problem

In the years after World War II, through the decolonization process and moving towards the present international order, international, and regional organizations have drawn up legal instruments giving momentum to the right to self-determination. Gradually, the subject moved from a mere principle of international law to a widely applied right in international law. The principle is interpreted to mean the right of a particular group to freely determine and control their political, economic and socio-cultural destinies. The researcher however observes that the equation of this right to human rights with wide spread application may create problems. Public opinion and textbook writers on this subject have varied considerably. It could even be argued whether self-determination actually belongs in the province of law at all. Such a view cannot remain unchallenged in a legal inquiry. There is a dichotomy on this subject operating at the conceptual level. Self-determination like other UN charter concepts such as domestic jurisdiction and aggression belongs as much to the province of law as of politics, and no useful purpose will be served by setting law up against politics or politics against law.

The existence of a legal order supposes some criteria which evolve to grant legitimacy. This authorizes decision makers to engage in effective projects of order whatever their merits. If these conditions are not met, the society will find itself in the midst of complete absence of international legal order. The dynamics underlying state action is for the state to sustain and preserve itself precisely with the same independent force and energy with which it originally established itself. This is a

meta-legal drive which finds expression among International Lawyers when they say that the existence of a state is a question of fact. The existence of a state is a question of fact and not of law. The criterion for statehood is not legitimacy but effectiveness.[15] This fact is central to any analysis of international relations from critical perspectives because it prepares one for the compulsive, repetitive nature of the lust of states for security, a mark of all states and a fundamental characteristic of inter-state relations.[16] A State may have an individual self-referring drive of legitimacy, but this will not offer, or even try to offer a convincing basis for any international communal living.

The steps leading to the self-determination of South Sudan has raised questions on discourse about the form and the practice of self-determination under general

15. Abba, E., arguing before the Security Council, cited by James, C., (2006) in *The Creation of States in International Law* Oxford: OUP p.3 Crawford describes Eban as the Foreign Minister at that time he was Israeli Representative at the UN.

16. Derrida, J., (1990) *The Force of Law*: in, '*The Mystical Foundation of Authority'*. II Cardozo Law Review. p.919. See also Campbell, D (1998) *Writing Security, United States Foreign Policy and the Politics of Identity* (Minneaopolis,MN) University of Minnesota Press, , p.65

international law and African regional law: viz; what is the exact definition and content of the right to Self-determination? What are the circumstances and conditions under which self-determination can be applied? Are there limitations governing the principle of self-determination? Are territorial boundaries now indeterminate? At what

Point should a group of people or persons within a locality spring up to assert their claim to a given territory? Is there an end to claims to territory? Does the right to self-determination cease at any point? What about population requirements? Should it be a sizeable number of persons in a particular locality asserting this right? How can we distinguish between genuine groups and individuals whose activities constitute security threat? How can self-determination be distinguished from rebellion? Can new rules be formulated to allow for a patterned right to self-determination without recourse to violence and serious human rights violations?

Notwithstanding the retinue of questions posed above, other issues raised are; What criteria should be adopted for recognizing entities created from the exercise of the right to self-determination? Should such criteria be universal or dependent on the circumstances of each case? Is the territory of South Sudan free from disputes and controversies? Can the South Sudanese government maintain sufficient control over the entire territory in the maintenance of law and order? Did the South Sudanese independence satisfy the traditional criteria set out in the 1933 Montevideo Convention on the Rights and Duties of States? Can there be an end to hostilities in the newly independent South Sudan? Can the South Sudan's economy support governmental programs that would create harmony in the arms of government? Are the disputed boundaries resolved? What about the issue of oil pipelines crossing the North? These and many other implications appear to highlight the difficulties faced by South Sudan after independence from Sudan.

Aside from the underlying problems addressed in the preceding paragraphs, the right to self-determination has been opposed on policy grounds. Most notably, opponents of the right fear it could lead to anarchy and chaos, to a free for all in which any disgruntled group receives a ticket for setting up its own sovereign entity. It is thus perceived as a potential threat to the public order of already existing states. The right to self-determination certainly carries within it seeds for radical and even revolutionary change.

1.3 Aim and Objective of the Research

The aim of the research is to investigate the legal implications of the independence of South Sudan from Sudan and the involving practices in international law. The objective of the research is to;

a. Examine the inherent disputes associated with the term "people" contained in all international instruments on self-determination.

b. Address the practices of states in relation to the exercise of the right to self – determination in the international legal doctrine.

c. To address the circumstances and conditions under which self-determination can be applied.

d. To ascertain the population and territorial requirements for the exercise of the right to self-determination.

e. To formulate new rules that would allow for a patterned right to self-determination without recourse to violence and serious human rights violations.

f. To formulate a uniform procedure to be adopted for recognizing states

created as a result of the exercise of the right to self-determination.

g. To address the inherent challenges associated with citizenship of both countries after secession.

h. To address the post secession boundary disputes between Sudan and South Sudan.

1.4 Scope of the Research and Limitations

The right to self-determination is an inalienable right contained in Article 1 (2) of the United Nations Charter and in numerous other international documents. This includes the United Nations Covenants on Human Rights, the Declaration on the Granting of Independence to Colonial Countries and peoples and the Declaration on Friendly Relations. This right is universal with far reaching effects on international law and relations. The evolution of the legal basis of the right of self-determination covers several jurisdictions. The scope of the research is to analyze the doctrinal tools on the complex principle of self-determination in general and thereafter take a close look at its application as it relates to the South Sudan's post independence challenges. The researcher would therefore construct the basis and form in which such rights could be construed in the light of obvious academic dimensions appraising the institutional frame work, the attitude of the international community and the short comings affecting the South Sudan's post independence struggle.

The territorial scope would however be the state of South Sudan as it struggles with the post-independence problems. However, references would be made to

situations in other jurisdictions for an easier comprehension of the principle. Additionally, international and regional treaties and conventions as it relates to the principle of self-determination would be scrutinized. The obvious limitation of the research is the insistence by the interviewees from South Sudan not to be quoted based on security concerns. This has hindered the researcher from publishing the outcome of the interviews.

1.5 The Research Methodology

The researcher aware of the diverse fields with which the subject under scrutiny has posed will adopt a variety of complimentary methodological approaches. The bulk of the research will be based on doctrinal method. The method is considered appropriate as substantial part of the research will be conducted in modern libraries in Nigerian Universities, the Court of Appeal and the Supreme Court libraries. Further, the Nigerian Institute of Advanced Legal Studies Library as well as the British Embassy and the Sudanese Embassy libraries would be consulted. Additionally, other sources such as, textbooks, journals, magazines, periodicals, newspapers and further interfacing from the internet would be utilized. Opinions of erudite and jurists scholars on the subject will assist in bringing out the principle in its true perspective.

Furthermore, the experience of the researcher in peace keeping missions in countries such as the Sudan, South Sudan, Yugoslavia, Somalia, Sierra-Leone and Liberia where issues bordering on the principle has been tested in live situations would be brought to bear. The combination of doctrinal, empirical and the experience of the researcher in South Sudan would be rewarding. The limitation of the research is the

insistence by the interviewees from South Sudan not to be quoted as a source based on security reasons.

1.6 Literature Review

The researcher in a bid to explicitly analyze the principle, several textbooks, journals, seminar papers and views of erudite scholars expressed in published and unpublished works were consulted. An explicit analysis of the contents and scope of the works of these scholars as well as the researchers' comments are contained below:

Karen[17] dealt extensively on the principle of self-determination. She analyzed the emergence of new states and independence movements after the cold war and the long standing disagreements among international lawyers over the right to self-determination. The limitation of her work is it's over reliance on the principle in the colonial and immediate post-colonial era thus ignoring modern trends in respect of this subject matter.

On the other hand, Mathew [18] sought to identify and explore some of the legal consequences that flow from the various normative levels that have been ascribed to the right to self-determination in international legal doctrine. He argued that there is a haziness surrounding the normative status of the right to self-determination and this helps to explain the reluctance of states to publicize their views on the scope and content of the norm. The book further made suggestions on how the principle could be

17. Karen, K., (2002) *Diversity and self-determination in International Law,* Cambridge Press London, p.14

better understood. This publication is instructive, however it did not draw lessons from several seceded entities such as the Sudan, Eritrea and Kosovo, which could have added more flavour in the presentation and the differing scenarios in respect of each state actors.

Furthermore, Melena [19] argued that, traditional legal norms on self-determination have failed to explain and account for recent results of secessionist self-determination struggles. While secessionist groups like the East Timorese, the Kosovar Albanians and the South Sudanese have been successful in their quests for independent statehood; other similarly situated groups have been relegated to an at times violent existence within their mother states. He further pointed out that, Chechens still live without significant autonomy in Russia, while the South Ossetians

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18.Mathew, S., (2011) *The Normative Status of Self-determination in International Law*; *A Formula for Uncertainty in the Scope and Content of the Righ*t. Oxford University Press London, p.62

[19]. Milena, S., (2012) *The Right to Self-determination Under International Law*; "*Selfistans*", *Secession, and the Rule of the Great Powers*, Routledge Press London, p.22.

and the Abhkazia have seen their conflicts frozen because of the peculiar geo-political equilibrium of power within the caucuses region. This book authoritative as it does appear, failed to draw lessons from a series of recently contested self-determination cases before the International Court of Justice (ICJ). This include the cases concerning the independence of Kosovo from the former autonomous province of Yugoslavia and Quebec from Canada. A review of these cases could have provided a new insight in the study of the principle of self-determination.

Also, Joshua [20] posited that the acquisition of defined and fixed territoriality is prerequisite to the recognition of statehood. This quest for recognition has widespread manifestation in contemporary society, from indigenous peoples who seek control over the destiny of their ancestral lands to struggles for self-determination. The emphasis on territoriality affects many who would lay claim to such recognition. He therefore noted that the notion of territoriality remains contested in international law, the implications which become most visible in the treatment of the right to self-determination. Here again, the limitation is the authors fixed concern of the publication to the colonial period and the inherent right of the indigenes to self-determination and removal of all forms of oppression associated with colonial authority.

James [21] considered the principles of self-determination and humanitarian

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2[0]. Joshua, C., (2008) *Territorial Integrity and the Right to Self-determination: An Examination of the Conceptual Tools*. Middlesex University Press, London, p.62.

21. James, A.R., (1997) *Self-determination and Humanitarian Intervention in a Community of Powers*, Denver University Press, p.27.

intervention in the post-cold war era. The author suggests that it would be an appropriate time now for the international community to end the debates surrounding this principle and move on to constructive discussion about methods of solving the disputes which continue to arise. He opined that, efforts should include greater preventive diplomacy, pre-established procedures when disputes arise and multilateral initiatives by regional and international institutions. He further argued that relying on regional and international institutions, rather than the unilateral actions of individual

states may prevent the issues of self-determination and humanitarian intervention from becoming threats to international peace and security. Here again, the author did not cite the very examples or incidences where this right has been contested and the attitude of the international community in each instance. This could have aided prospective researchers into drawing distinctions from such incidences.

Hillbrink [22] dealt extensively on overseas territories rights to choose another relationship with their mother country. He argued that such territories should choose to become independent or to be an integral part of the mother country and the freedom of their own political status to act on the international scene. The book classic as the presentation appears, limited its scope to the colonial and immediate post colonial period. Modern issues on the subject have not been canvassed such as chaos and anarchy likely to ensue if the principle is not defined with accuracy rather than on individual basis and at the whims and caprices of the world super powers.

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22. Hillebrink, S., (2010) *The Right to Self-determination and Post – Colonial Governance*, Asser Press, p.31.

Cassese [23] analyzed the principle of self-determination from the perspective of its internal and external aspects. He covered instruments such as the Human Rights Covenants and Friendly Relations Declaration in detail. The book also made some case studies outline for a practical appreciation of the subject. As in the other texts outlined above, the author failed to canvass issues bordering on the rights inherent to oppressed people within entities already granted independence. This is the crux of the principle of self-determination in modern day international law.

On the other hand, Summers [24] considered in detail the principle of self-determination from the perspective of the interaction of nationalism with international law. The book covers international instruments and some cases on self-determination in considerable detail. The writer also drew conclusion on the legal status of different aspects of the right. This book though instructive, failed to provide the dichotomy between the colonial and modern day meaning of the principle as understood today. Its analysis dealt extensively on the practice of the United Nations though with little attempt in highlighting the differing attitude of the inhabitants of a particular country in the understanding and application of the right to self-determination. Rigo [25] provided an extensive and well researched account of self-determination focused on the practical application of the right. A number of case studies demonstrate

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23. Cassese, A., (1995) *Self-determination of Peoples; A Legal Reappraisal*, Cambridge University Press, p.26

24. Summers, J., (2011) *People and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations*. Laiden, The Netherlands: Martinus Nijhoff Press, p.32

25. Rigo,S.A., (2010) Evolution f the Right to self-determination; A study of United Nations Practice. Laiden,The Netherland, A.W Sighthoff p. 71

the problems involved in the general application of the principle. However, the structure of the book in which case studies are split up and returned to from different angles could be found disorientating. Thus it is difficult for any researcher to understand fully the context in which the author premises the discourse in the contextual order of events.

Umozurike [26] had an effective account of the law of self-determination, the focus of his book being on colonial self-determination, in particular-Namibia. The book also covers economic self-determination and case studies on secessionist

conflicts. The limitation of this publication is the non-recognition of the rule of the great powers. This rule asserts that, only those self-determination seeking entities which enjoy the support of the majority of the most powerful states will ultimately have their rights to self-determination fulfilled. The great powers, potent military, economic and political power houses such as the USA, China, Russia, Japan, UK, France, Germany and Italy often dictate self-determination outcomes through their influence on global affairs. Thus, issues of self-determination in the modern world canvassed by the author can no longer be effectively resolved through the application of national legal rules; rather, resort must be had to novel theories, such as the role of the great powers.

Tamis [27] invokes the notion of self-determination to shed light on the

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26. Umozurike, U.O., (1972) *Self-determination in International Law*. Hamden, CT: Archon, p.61
27. Tamis, K., (2009) *Self-determination and the Israeli – Palestinian Conflict*, North Whitehead Press, p.71.

Palestinian struggle for statehood. He views self-determination within the Palestinian enclave in terms of rival claims by distinct peoples, each wishing to determine its destiny, "a clash between competing interests". He notes that the members of each group try to deny the other the inherent right to self-determination. This clash of competing rights obscures its evolution while attempts by the parties points to blocking proposals for a just solution. At best, this dramatizes the difficulty without resolving it. He therefore notes that the principle of self-determination still remains relevant in understanding the critical historic and normative dimensions employed in justifying the present hostilities, explaining present obligations and proposing viable

solutions. This publication though viable and as contributing to the introductory aspect of this thesis, nevertheless could not posit recommendations which could solve the Palestinian lingering struggle to attain self-determination and ultimate statehood.

Kristina [28] emphasized on the enthusiasm with which self-determination was promoted in the past but which has changed into a cautious application of the right in the post-colonial period. This is because claims of self-determination have often led to violent wars of secession and break up of states. He further asserts that the inclusion of the right to self-determination into international human rights law allows for a different approach to its interpretation. With the emerging rights of indigenous peoples under international human rights law based on the claims of self-

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28. Kristina, R., (2012) *Self-determination of Indigenous People Within the Human Rights Context*: *A Right to Autonomy*. Oxford University Press, p.73

determination, the debate on the interpretation of this right has received new impetus. This is because of the introduction of the expressive right to autonomy as a means of exercising the right of self-determination into the legal discourse on international law. To this, he added that some clarification of the concept of autonomy and the implication of an emerging right to autonomy in the context of the rights of indigenous peoples are necessary. The author here is more concerned with the rights of indigenous peoples and the application of the principle in the immediate post-colonial era. Case studies on territories seeking cessation from their mother states was not considered in order to throw more light on the principle.

Nanda [29] views self-determination and secession as posing major challenges for international lawyers, particularly the former for its ambiguity and difficulties of operationalization. The latter term is uncertain in status as it is neither permitted nor prohibited under international law. The journal analyses the principle in a historic context. It also recommended a few criteria to be used in determining the validity of claims to secede. The journal made contributions in the study of the law on self-determination in detail by striking at a few case scenarios. The inclusion of South Sudan in the case analysis would no doubt have been an all-inclusive article. Notwithstanding it forms part of chapter three of this thesis.

Furthermore, Elizabeth [30] observed that most scholars seem to agree that the right to self- determination can be invoked as *Jus Cogens*. *Jus Cogens* refers to a peremptory norm of international law. Accepting the right of self-determination as *Jus-cogens* does not necessarily help in deciding which right would prevail when there is conflict between two or more rules of *Jus-cogens*. However, it does serve to reinforce an understanding of the right to self-determination as an actual legal right, as opposed to a simple principle of aspiration. She further posited that the full exercise of the right to self-determination include the attainment of sovereign independence. There is however no guaranteed set of procedural steps leading to national independence. Before a liberation movement can transform into a new nation state, many legal and

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[29]. Nanda, V., (2012) *Self-determination and Secession under International Law*; Denver Journal of International Law, Vol 6 p.14

[30]. Elizabeth, J.K., (1998) *The Right of self-determination in the Angola Enclave of Cabinda*: A Paper presented at the Sixth Annual African Studies Consortium Workshop, on 2 October,2014 p.7.

political strategies might be implemented. The ultimate success of a movement may depend not just on the validity of a peoples claim or on its political finesse. Other factors such as regional and political winds or third party power play, may independently impact on a claim to independence and determine its outcome. This seminar paper based its analysis on the Right to self-determination in the Angolan Enclave of Cabinda and contributed in the formulation of the introductory aspect of this research. Its shortcoming is the non-inclusion of other set examples in other regions with similar historical struggle for self-determination.

Gabriel [31] declared that;

> The evolution of new forms of social relations; the changes and enrichment in and ecological factors; new inventions of war and peace, the awakening of the collective conscience of mankind to the need to strengthen the legal regime for the protection of human rights, the content of existing relations; new inventions in science and technology; environmental especially the right to self-determination and independent existence of both small and big; weak and strong states as equal members of the community of nations and other burning issues of international significance are the natural causes of these metamorphoses.

31. Gabriel, I.I., Nwoke, F.C., (2009) *Critical Evaluation of the Right to Self-Determination in International Law*: University of Jos Law Journal, Vol.2 p.12.

It is within the context of these changes that the right of nations to self-determination can be properly understood. He further notes that although considerable controversy still surrounds the extent and content of the principle of self-determination in international law, yet to deny its total existence flies in the face of available facts and concrete realities of the contemporary world. This denial amounts to looking at the

present day international law through disney colored glasses. The submission by the author is thought provoking and captures the hallmark of the study on the subject. The presentations by these authors have some short comings which will be addressed by this thesis.

1.7 Justification of the Research

The importance of undertaking a research in this field cannot be underestimated. This is premised on the misconception associated with the subject, as Self-determination and secession pose major challenges for international lawyers. This is because self-determination on the one hand is an ambiguous principle which poses difficulties of operationalization. On the other hand secession is uncertain in its status, since it is neither permitted nor prohibited under international law. The study of the principle is also significant owing to the enthusiasm with which self-determination was promoted in the past which has changed into a cautions application of the right in the post-colonial periods. This is because; claims to self-determination have often led to violent wars of secession and breakup of states.

Furthermore, traditionally, self-determination was recognized as a right of people under colonial rule. It is therefore important that a research is undertaken in this field as the inclusion of the right to self-determination into international human rights law allows for a different approach to its interpretation. The debate on the interpretation of this right has received new impetus, especially in introducing the expressive right to autonomy as a means of exercising the right to self-determination

into the legal discourse in international law. The classification and application of this right therefore becomes imperative.

The right to self-determination is vague and ambiguous based on the articulation of the relevant legal instruments. This leaves space for interpretation, the scope and application of the right being subjected to controversies. Are indigenous groups entitled to the right to self-determination and if so, what is the appropriate interpretation of such a right. Does this imply a right to secession or is merely a narrow interpretation favouring the feasibility of autonomy arrangement. Does this correspond with the emerging right to democracy. This thesis seeks to provide a reasoned research that attempts to answer these questions with a view to bringing to the fore the practical issues connected with the principle.

It is in this direction that the thesis is a viable option. The research would therefore be of immense benefit to legal practitioners, academicians, law students and politicians alike. Practitioners of international studies will find the thesis quite interesting as it exposes both the theoretical and practical issues bordering on the principle of the right to self-determination.

1.8 Organizational Layout

A contextual understanding of the thesis requires a programmed flow of the chapters in order of events. This is to maximize its use by readers to appreciate the thesis in its entirety. The thesis is categorized into six distinct chapters. The first chapter deals with the general introduction. This covers aspects such as background to the study, statement of the problem, objectives as well as scope of the research. The

chapter further discusses the research methodology, as well as literature review of some works relating to the research. Finally the chapter outlines the justification for the study as well as the organizational layout. The chapter provided on overview on how the thesis is arranged. The entire conceptual frame work is embodied in the chapter. The chapter highlights preliminary issues which would ease the assimilation of the thesis. In this vain, the research made a historical background and the evolution of the principle of self-determination and the subsequent struggles leading to the eventual independence of South Sudan.

Chapter two lays emphasis on the legal framework for self-determination in international law. In this premise, the chapter consists of the meaning, nature and scope of the principle of self-determination. Furthermore, the development of the principle of self-determination would also be analyzed in detail as well as the theory of nationalism and self-determination. Also the legal framework for self-determination in regional and international law would be captured. Finally, the jurisprudence of case law on self-determination would be analyzed.

In chapter three, an analysis of the historical evolution of the right to self-determination for South Sudan is made. The chapter commenced with the historical perspectives of the South Sudan's struggle for self-determination as well as the processes leading to the exercise of the right to self-determination for South Sudan. Furthermore, the role of the opposition parties to the demand for self-determination is also considered in detail. Chapter three also discussed the position of the Government of Sudan to the struggle for self-determination by South Sudan. The research

concludes the chapter with an in-depth analysis on the year 2011 Referendum and the eventual independence of South Sudan.

In chapter four, an outline is made of the social, economic and political consequences of the post-independence struggles of South Sudan. The question of nationality of citizens as well as residency rights was considered in detail. Furthermore, the legal relations between Sudan and South Sudan were analyzed highlighting the politics of oil and the economic trade war between the two countries. Finally, a conflict over border issues as well as disputed territories is discussed in detail in chapter four.

Chapter five examines the post-independence challenges confronting the emerging state of South Sudan. The civil war and the humanitarian implications on the people of South Sudan were analyzed. Furthermore, issues dwelling on mass starvation, displacement of citizens and refugee problems were canvassed in details. The chapter further examines the challenges by the South Sudan's government in the maintenance of peace and order. The researcher concludes the chapter with attempts by the international community in bringing the South Sudan's civil war to an end.

Chapter six is the concluding chapter. It summarizes the entire discussion embodied in the thesis. The chapter further makes its findings deduced from the main body of the work. Furthermore, the chapter is concluded with suggestions as well as recommendations for possible implementation.

CHAPTER TWO

THE LEGAL FRAMEWORK FOR SELF-DETERMINATION IN INTERNATIONAL LAW

2.1 Introduction

In international law, the right of self-determination that became recognized in the 1960s was interpreted as the right of all colonial territories to become independent or to adopt any other status they freely chose. Ethnic or other distinct groups within colonies did not have a right to separate themselves from the "people" of the territory as a whole. Today, the right of groups to govern themselves is increasingly intertwined with human rights norms, in particular the right of minorities and indigenous people. The right to secession has been a thorny issue in international law. However, it is possible that such a right may be accepted in the future as an exceptional measure where a distinct group of people is systematically denied the right to participate in the government of the state. Furthermore, where individuals within such a group suffer systematic and gross violations of human rights that make their participation in that state impossible, this option could be a latent weapon.

Self-determination is not a mere phrase; it is an imperative principle of action. As with other rights and issues under international law, this chapter would provide an insight into the various principles and sources of international and African instruments on self-determination. Most of the legal principles on self-determination are anchored on United Nations instruments. Others are, the African Union (AU) as well as cases decided by the International Court of Justice (ICJ) and other municipal courts.

International instruments address the right of self-determination in binding and non-binding formats. Binding instruments include treaties and conventions. Declarations and resolutions of international bodies, on the other hand, are initially considered non-binding. However, they can later evolve into customary international law, which by itself is regarded as binding. Furthermore, judicial decisions on the principle might provide a second kind of source to the right of self-determination, for instance determinations by the International Court of Justice (ICJ). In practice however, most international judicial bodies have taken a cautious approach to adjudicating secessionist and other claims to national independence. [15] Furthermore, state actors in the international community have added content to the right of self-determination in the way they have accepted, rejected and manipulated self-determination outcomes.

This chapter examines the meaning, nature and scope of self-determination. It further examines the legal framework of self-determination in regional and international law as well as the juridical practices that have evolved over time dealing with the principle of self-determination.

2.2 Meaning Nature and Scope of the Right of Self-Determination

A doctrinal scrutiny of this subject shows that the principle of self-determination is part of modern international law. This principle has been confirmed, developed and given more tangible form by consistent state practice. Precedence has shown that the principle of self-determination is binding upon the parties. The

1· Umozurike, U O. *(1972) Self-determination in International Law,* Harden, CT; Archon. P.16

principle of self-determination was chosen as a basis for negotiation and in the agreement on ending war and restoring peace in Vietnam[16]. The parties expressly recognized the South Vietnamese people's right to self –determination. The practice of the UN under Chapter XI – XIII of the Charter laid the foundation of the law on decolonization. Furthermore, the Friendly Relations Declaration recognized that the territory of a colony or other non-self-governing territory has, under the UN Charter reached a status separate and distinct from the territory of the state administering it. Thus the use of force to prevent the exercise of self-determination of a colonial people has become unlawful. It should also be noted that the *Uti possidetis* doctrine guided the process of decolonization and self-determination as it guaranteed that the borders between the other colonies remained undisturbed.

Self –determination includes the right of a people of an existing state to choose freely their own political system and to pursue their economic, social and cultural development. Any legal approach to self –determination must identify the holder of the right to self – determination. However, the definition of the term 'people' is yet to be accorded the legal status. Here, highly antagonistic claims of competing groups regularly clash when self- determination is at stake. The claim of a particular group to constitute a people often goes unchallenged. One of such instance relates to Western Sahara where essentially disagreement arose as to who should be classified as a people. The right to self – determination may be exercised internally, within the confines of a state, or externally, in creating a new state. The distinction in the

2. The Agreement was reached in 1973.

implementation of the right to self-determination basically enables the extension of the right to self-determination beyond the domain of decolonization.

2.3 The Development of the Right of Self Determination through the United Nations Practice

The first significant contribution made by the UN in developing the principle of self-determination was the Declaration on the Granting of Independence to Colonial Countries and Peoples. [17] This resolution was adopted by the UNGA without dissenting votes. In accordance with the resolution, all peoples have the right to self-determination. Significantly, the administrative powers were called upon to take immediate steps to transfer power to peoples in the trust and non-self-government territories in accordance with their freely expressed will. [18] The Declaration on the Granting of Independence represents the political and legal basis for the decolonization policy of the UN. The UNGA [19] also elaborated a list of principles which was to guide members in deciding whether or not particular territories qualified as territories to which Chapter XI of the UN Charter applied.

A further step in the development of the principle of self- determination by the UNGA was the adoption of the International Covenants on Economic Social and Cultural Rights[20] (ICESCR) and the International Covenant on Civil and Political Rights [21] (ICCPR). The identically worded Article 1 (3) of the ICCPR and ICESCR restate the right of all peoples to self- determination. The covenants further called on

3.UNGA Resolution 1514 (XV) of 14 December, 1960.
4.Declaration on the Granting of Independence, Para 5.
5.UNGA Resolution 1541 (XV), 15 December, 1960.
6.Adopted in 1966.
7.Ibid

the states parties to promote and respect this right. The principle of self-determination as a whole was given the characteristic of a fundamental human right. It further had the feature of a source or essential prerequisite for the existence of individual human rights, since these rights could not genuinely be exercised without the realization of the collective right of self- determination. In their general formulation, the ICCPR and ICESCR provide essential evidence of the meaning and content of the principle of self- determination even for states which are not parties to them.

Furthermore, in its Friendly Relations Declaration[22] the UNGA worked out the most authoritative and comprehensive formulation on the principle of self-determination. Accordingly, the UN embraced the principle of optional rights and self-determination of peoples enshrined in the Charter of the UN. The right therefore encompassed freedom to determine, without external interference their political status and to pursue their economic, social and cultural development. This also includes the duty of every state to respect this right in accordance with the provisions of the Charter. The modes of implementing this right include the establishment of a sovereign and independent state, the association or integration with an independent state or the emergence into any political status freely determined by a people.

The principle of self-determination was invoked on many occasions during World War II. It was also proclaimed in the Atlantic Charter. [23] The President of the United States, Roosevelt and Prime Minister Churchill of the United Kingdom declared that they desired to see no territorial changes that do not accord with the

8. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, 24 October, 1970
9. Declaration of Principles of 14 August, 1941.

freely expressed wishes of the people concerned. [24] They also declared that they respected the right of all peoples to choose the form of government under which they lived. [25] They further affirmed that they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them[26]. The provisions of the Atlantic Charter were restated by the United Nations. [27]

The provisions of the Atlantic Charter had a considerable influence on the position adopted by the San Francisco Conference of 1945. Here the principle of self-determination formally took shape and was incorporated into the United Nations Charter. [28] The UN Charter also implicitly refers to the principle of self-determination in the part concerning colonies and other dependent territories. Article 73 of the UN Charter affirms that:

> Members of the United Nations who have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote the "utmost", within the system of international peace and security established by the present Charter, the well being of the inhabitants of these territories. [29]

Furthermore, Article 76(b) of the UN Charter provides that one of the basic objectives of the trusteeship system is to promote the progressive development of the inhabitants

10. Principle 2 of the Atlantic Charter
11. Ibid, principle 3
12. Ibid, principle 4
13. Endorsed on 1 January, 1942. See also the Moscow Declaration of 1943.
14. Principle 4 of the Atlantic Charter

15. Article 73 of the UN charter.

of the trust territories towards self-government or independence; taking into account, *inter alia*, the freely expressed wishes of the peoples concerned.

In an attempt to analyze the legal significance of these provisions, the researcher thus maintains that these provisions in the UN Charter are conclusive assertions that the principle of self-determination is a legally binding principle of conventional international law. The provisions concerning non-self-governing and trust territories entails binding international obligations. However, the general principles of self-determination and of equal rights of peoples which is the formula used by the UN Charter appear to be two component elements of the same principle. It is not therefore too vague and complex to entail specific rights and obligations, nor does it lay down the content of the principle. In the absence of any concrete definition and taking into account various facts of international life, it cannot be realistically interpreted, applied or implemented like a legal norm. This interpretation is further supported by the fact that self-determination is conceived in the text of Article 1(2) of the UN Charter as one among several possible measures to strengthen universal peace and in order to fulfill its instrumental function, must therefore be of a highly flexible nature.

2.4 The Theory of Nationalism and Self- Determination

The researcher earlier noted in chapter one that the principle of self-determination poses several questions one of which rests on whether or not there can ever be an end to claims to new territories. In this domain the writer takes a closer look at the theory of nationalism vis a vis self - determination with a view to analyzing

the two subjects in relation to claims to territories by individuals or groups of individuals in the exercise of this right. It is not clear whether the concept of nationalism is in direct opposite to self – determination. Nationalism as a concept is extremely complex. It is an ideological movement aimed at attaining and maintaining the identity, unity and autonomy through social cohesion.[30] Nationalism encompasses actions that the members of a nation take in seeking to sustain their political sovereignty. It also relates to the attitude that the members of a nation have when they care about their identity as members of that nation. Nationality thus raises questions about the concept of a nation or national identity. Nations and national identity may be defined in terms of common origin, ethnicity or cultural ties.

Nationalism typically features the supremacy of the nation's claims over other claims to individual allegiance and full sovereignty as the persistent aim of its political program. Territorial sovereignty has traditionally been seen as a defining element of state power and essential for nationhood. Nationalism concerns the mapping between the ethno-cultural domain and that of a political organization. Sophisticated pro – nationalists tend to stress cultural membership only. Classical nationalism is not only concerned with the creation of a state but also with its maintenance. Nationalism is sometimes used to promote claims for the expansion of a state. Expansion is often justified by appeal to the unfinished business of bringing liberally all members of the nation under one state and sometimes by territorial and resource interests. Nationalism therefore can be equated with patriotism.

16. Smith, AD., (1991) *National Identity*, Oxford, Penguin Book pp 71-76

The researcher therefore is of the view that nationalism may offer checks and balances over the threat posed by the principle of self-determination. In view of the continuing confusion surrounding the right to self-determination, especially the use of violence due to geopolitical force, there is the need for restraint in this field. It would appear that the drive for self-determination, which has acted as the principal inspiration for many modern day nationalists, challenges the legitimacy of the state by placing in question its claim to represent the popular will of the people. To sum it all, self-determination refers to the right of a particular group of people to freely determine and control their economic, political or socio-cultural destinies. Nationalism on the other hand refers to the projection of identity and unity through social cohesion and autonomy. The two concepts when closely examined appear to be extremely complex. The researcher therefore opines that nationalism is the nucleus of self-determination. That explains why states which hitherto were separated owing to political expedience at that time are seeking to be unified. The experiences of the Russian Federation and the unification by the Eastern and Western Germany points to this assumption. The Nigerian civil war which the Federal troops fought to maintain the unity of Nigeria belongs to this domain. The quest for the creation of entities may be regulated to reduce tensions caused by the exercise of the right to self-determination.

2.5 Legal Framework for Self-Determination in Regional law

The researcher will at this stage analyze the African regional instruments on self-determination. This is principally premised on the position under the Organization

of African Unity (OAU) on the one hand and the current position under the African Charter on Human and People's Rights. A vivid elucidation of the legal framework is captured hereunder.

2.5.1 The Position under the Organization of African Unity

The historical context of the legal articulation of claims for the right to self-determination can be traced to the decolonization process. The Charter of the Organization of African Unity (OAU Charter) [31] made an indirect reference to the right of peoples to self-determination in its preamble and principles. In paragraph one of the preambles to the OAU Charter, the Heads of African states and governments expressed their conviction that it is the inalienable right of all people to control their own destiny. In Article 3 of the OAU Charter, they further affirmed their adherence to the principle of 'absolute dedication to the total emancipation of African territories which are still dependent'. The word 'people' in the first instance was a reference to African peoples who were under colonial domination or those who were systematically suppressed by the practice of apartheid. It is submitted that the problems surrounding the right of African people to self-determination are thus clearly defined and cannot be stated in terms other than those of official decolonization. [32] It

17. The Charter of the OAU was adopted at the Heads of African States and Government Conference in Addis Ababa, Ethiopia on 25 May, 1993.

18. Fatsah, O., *(2003) The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Rights and Sustainable Democracy in Africa,* Hegue, Kluner press, , p.251.

is thus evident that the conceptualization of the term 'people' in the African context has been largely confined to the fight against colonialism and apartheid. [33]

There was little interest on the part of African states to allow the application of the right to self-determination to the various groups constituting individual states. [34] While affirming the right of people under colonial rule, the OAU Charter defended the sovereignty and territorial integrity of the state. [35] OAU member states expressed their commitment to adherence to the principle of respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence. [36] Indeed, immediately after the establishment of the OAU, African states accepted by resolution the application of the principle of *uti possidentis* to affirm the sanctity of Africa's colonially defined borders. The doctrine of *uti possidentis* was provided for in the 1964 OAU Declaration of Assembly of Heads of States and Governments, otherwise known as the Cairo Declaration[37].

At the level of the OAU, self-determination was thus seen to mean only one of the two things. First, the freedom of the totality of the people of a state to pursue its own ends without external interference. In the African context, this was not regarded as being any different from the right of the state to independent existence, as proclaimed in the OAU Charter. It was interpreted as imposing an obligation on the

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19. Kwaka, N.B., *(1985) Changing African Perspectives on the Right to Self-determination in the Wake of the Banjul Charter on Human and Peoples Rights,* Journal of African Law, Vol 29, p.147

20. There were however, some African states that accorded recognition to Biafra after it declared its independence from Nigeria. These were, Tanzania, Zambia and the Ivory coast.

21. Article 2 (2) c. of OAU Charter

22. Article 3 (3) of OAU Charter

23. See the 1994 OAU Resolution on Border Disputes Among African States, OAU document AHG/Res. 16 (1), reprinted in Ian, B. Basic Documents on African Affairs, Oxford, Clarendon press, p.360.

OAU and its member states to refrain from actions that threatened the territorial integrity of a state or its independent existence.

The second meaning attributed to the right of self-determination related to the decolonization process. It was concerned with the liberation of those African people under colonial rule or apartheid oppression. In both cases, the exercise of the right to self-determination was envisaged to take place within the colonially defined territories. Claims as to the right to self-determination outside these two cases were not considered to have a legitimate basis within the normative framework of the OAU.

2.5.2 The Right of Self-Determination under the African Charter on Human and Peoples Rights

The African Charter on Human and People's Rights [38] as an instrument on human rights in Africa was adopted in 1981 at the 18th Assembly of Heads of States and Governments of the OAU held in Nairobi, Kenya. It entered into force in 1986.The Act was domesticated in Nigeria by virtue of the African Charter on Human and Peoples Rights (Ratification and Enforcement) CAP A9 Laws of the Federation of Nigeria 2004.The Charter ushered in a new phase creating the legal basis for the evolution of the principle of self-determination in Africa beyond decolonization. It provides a dynamic and robust meaning to the right of self-determination capable of allowing different forms of applications to different sections of society within the framework of independent African states[39]. This feat was realized through the jurisprudence developed by the African Commission on Human and People's Rights.

24. The African Charter on Human and People's Rights entered into force on 21 October, 1986.

25. Kwaka, N.B., (1985) *Changing African Perspectives on the Right to Self-determination in the Wake of the Banjul Charter on Human and Peoples Rights,* Journal of African Law, Vol 29, p.147

The body is charged with the task of monitoring the promotion and the protection of rights under the African Charter. In the first case on people's rights to come before it, ***The Congress Du People Katanga's vs. Zaire,*** [40] the complainant, the President of the Katangese People's Congress, requested the African Commission to recognize, among other things, the independence of Katanga by virtue of Article 20 (1) of the African Charter. [41]

In this broad spectrum, three issues are isolated for scholarly and academic discourse. Firstly the Katangese are only a part of the population of the then Zaire. The case brought into sharp focus the politically sensitive question of whether people's rights apply separately to different sections of society. Secondly, the Katangese identifies themselves as a people and is therefore entitled to the rights of peoples as stipulated in the African Charter. This includes the right to self-determination, as defined in Article 20, an issue the African Commission did not contest. Finally, Katanga was a province of Zaire that consisted of different ethnic groups, including the Luba and the Kongo. This raised an important question about when the inhabitants of a particular territory of a state may, notwithstanding their different ethnic composition, qualify to be a people for the purpose of people's rights under the African Charter.

In its decision, the African Commission recognized that there are two versions of self-determination. The first was self-determination for all Zaireoise as a people, which the commission noted was not the issue involved in the case. The other was

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

27 Ibid p.6

self-determination for a section of the population of a state (the Katangese) which the commission considered to be the pertinent issue in the communication. The Commission's analysis and in particular the distinction between the self-determination of Zaireoise and the self-determination of Katangese affirmed self-determination as a right of peoples. This largely addresses the fear that people's rights would collapse into the sovereign rights of states.[42]

The right to self-determination within the framework of the African Charter is accordingly a right of either the whole people of a state or a section of the population of a state. It is therefore a right that imposes obligations on African states, which are bound to facilitate ways for allowing the exercise of the right by their peoples. Accordingly, the right to self-determination can be invoked either by the people of a state as a whole, or by a fraction of a state's people. Despite its outcome, which denied the Katangese the right to independence, the entertainment of the Katangese case by the African Commission was in itself an affirmation of the recognition of independence of a constituent element of the right to self-determination under Article 20 of the African Charter.

As earlier noted in the response offered by the commission, it is clear that although the right to self-determination may be exercised in different ways, including independence, it must be fully cognizant of other recognized principles such as sovereignty and territorial integrity.[43] In affirming that territorial integrity in principle takes priority over the right to self-determination, the commission declared in the

28. Howard, R E., *(1986) Human Rights in Commonwealth African,* New Jersey; Roman and Littlefield p.97

29. Katanga's Case, p.4

instant case that it was obliged to uphold the sovereignty and territorial integrity of Zaire.[44] Consequently, the Commission held that in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire could be called into question, and in the absence of evidence that the people of Katanga were denied the right to participate in government as guaranteed by Article 13 of the African Charter, Kantaga was obliged to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of Zaire. [45]

The finding by the African Commission leaves the possibility of independence wide open. Independence is one of the ways in which self-determination can be exercised. However, the researcher is of the view that the finding by the commission failed to address the pertinent and vexing question on the circumstances under which self-determination can be exercised through independence. The commission only indicated that the right to self- determination can only be exercised in conformity with the principles of sovereignty and territorial integrity.

An important academic question posed here would be, under what circumstances can the exercise of self-determination by a people through independence be in conformity with the principle of sovereignty and territorial integrity of states, arguably, outside of "secession". Accordingly, if any of the constituent ethnic communities inhabiting a contiguous territory freely decides to separate from the current Ethiopian Federation and does so in accordance with the procedure laid down in the constitution; it will be legitimate and acceptable under

30. Ibid p.5
31. Ibid p.6

international law. As espoused above, African regional law position shows that an exercise of the right of self-determination is subject to considerations of the territorial integrity of states and the principle of *Uti-possidentis*. These may be overridden only as a measure of last resort in cases of serious human rights violations of a nature that call into question the integrity of a state or where secession takes place with the agreement of the mother state.

2.6 Legal Framework for Self-Determination in International Law

There are several international instruments relating to the right of self-determination. A brief overview of the main international instruments would however be analyzed. For this purpose, the researcher will dwell on the United Nations Charter, the United Nations Covenants on Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples. Others are, the Declaration on Friendly Relations, the Helsinki Final Act and the Charter of Paris and Document of Copenhagen.

2.6.1 The United Nations Charter

The United Nations Charter [46] ("the UN Charter") contains few references to the principle of self-determination. The charter is thus viewed to be the historical basis on the principle of self-determination. The principle [47] of self-determination is expressly mentioned for the first time in Article 1 (2) and 55 of the UN Charter. Article 1 (2) provides that one of the purposes of the UN is to develop friendly

32. Brownlie, I., *(1992) Basic Documents on Human Rights*, Oxford, Clarendon Press, 3rd Edn p.44.

33. The reference to self-determination as a principle or a right is done in accordance with the terminology used in the relevant instruments.

relations among nations based on respect for the principle of equal rights and self-determination of peoples. [48] Article 55 instructs the UN to promote higher standards of living, solutions to health and cultural problems, and universal respect for human rights "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" .[49]

The references to self-determination in Articles 1 (2) and 55 of the UN Charter are further reinforced by Chapters XI and XII on non-self-governing territories, and the international trusteeship system. [50] Article 73 of Chapter XI of the UN Charter describes the development of self-government in non- self-governing territories as a 'sacred trust'. Article 76 of the Charter regarding the international trusteeship system provides for a progressive development in the Trust territories towards self-government or independence. The researcher however observes that Article 73 falls short of what is today considered as self-determination as the provisions stipulated in chapters XI and XII, particularly Article 73, support the assumption that Article 1 (2) of the Charter represents a moderate version of self-determination. [51]

It could be summed up that the reference to self-determination, as introduced for the first time into positive law by the charter, was in the context of friendly relations among nations and in conjunction with equal rights of peoples. The charter contributed to the principle that universal peace is impossible without self-

34. Charter of the United Nations, 26 June, 1945, 59 stat. 1031, T.S. 993, 3 Bevans 1153 entered into force on
35. Ibid, Article 55.
36. Higgins, R., *(1994) Problems and Process: International Law and How we Use It*. Oxford, Clarendon Press, p.112
37. Brownlie, I.,. *(1992) Basic Documents on Human Rights*, Oxford, Claredon Press, 3rd Edn p.48.

determination. The text outlines a comprehensive concept linking independent factors of security, stability and human rights. However, the text as a whole is very much incomplete in terms of external or internal self-determination, referring only to a principle rather than a right. The charter did not refer to the right of dependent peoples to be independent, or indeed, even to vote. The analysis of other international acts on self-determination indicates that the wording used to design the principle in the charter has been further enriched and its content broadly developed into a rule of customary international law.

2.6.2 The United Nations Covenants on Human Rights

The twin UN covenants on human rights, namely, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights both include an article on self-determination. In 1950, pursuant to a General Assembly resolution, the Commission on Human Rights was called upon by the Economic and Social Council of the UN to study ways and means, which would ensure the rights of peoples and nations to self-determination. [52] Two years later, the General Assembly decided that the covenants on Human Rights should include an article on the self-determination of peoples.[53]

Article 1 of both Covenants recognized and stipulates the content of the right to self-determination in the following terms;

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38. General Assembly (GA) Res. 421 UN DOC A/1775 (1950)

39. G.A. Res. 545, UN Doc/2119 (1951). The Commission on Human Rights completed the drafting of two international covenants at its tenth session, held from23 February to 18 April, 1954.

a. 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.

b. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

c. The state parties to the present covenant, including those having responsibility for the administration of non-self-governing and trust territories, shall promote the realization of the right of self-determination, and shall respect that right in conformity with the provisions of the Charter of the United Nations.[54]

As envisaged in the article above, self-determination is viewed as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. Self-determination is interrelated and serves as a prerequisite for the fulfillment of the range of human rights stipulated in the covenants.

It could be construed that, the right of self-determination stated in the covenants is universal. The text supports the view that the covenants reach beyond the colonial situation. The wording of the first clause of Article 1 (1) of the Charter imposes

40. Article 1of the UN ICCPR and ECOSOC

specific obligations on state parties. This is not only in relation to their own peoples but vis-à-vis all peoples, which have not been able to exercise or have been deprived of the possibility of their right to self-determination. The right over natural wealth and resources is another constituent element of the right to self-determination. According to Article 1 (2) of the Charter, the right of self-determination includes the simple and elementary principles that nations or people should be master of their own natural wealth or resources.

By virtue of Article 1 (3) of the Charter, all state parties, including those having responsibility for the administration of non-self-governing and trust territories, undertake two sets of obligations. This includes the promotion and realization of the right of self-determination in all their territories and to respect the maintenance of that right in other states. [55] The drafter of the covenants imposed on contracting states the duty to implement the above obligations in conformity with the charter. The latter applies not only to the provisions of chapter XI and XII or to Article 1, but also to the charter as a whole. [56] Article 1 (3) actually writes the principle of self-determination into the charters governing dependent territories, notwithstanding that self-determination is not specifically mentioned in chapter XI and XII. It is thus apparent that the obligations laid down in those charters could be altered only by amending the charter.

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41. The original proposal laid down obligations only upon states that were responsible for the administration of the Non-Governing and Trust Territories. Later the proposal was amended to include all states whether or not they were administering such territories. The Obligation imposed on the administering powers of the non-self-governing and Trust territories is now completely outdated because of the fact that almost all colonial people have achieved independence.

42. UN Doc A/C. 3/SR 668, 6 (ES)

The adoption of the texts of the UN Covenants on Human Rights marked the next phase of legal development of the principle of self-determination. This moved the principle from a legal obligation in the decolonization area, to self-determination as human rights, with two resolutions of the General Assembly serving as a bridge. [57] From this time onwards, there was repeated reference to self-determination in human rights terms.

2.6.3 Declaration on the Granting of Independence to Colonial Countries and Peoples

The evolution of the right to self-determination culminated in the adoption by the UN General Assembly in 1960, of the Declaration on the Granting of Independence to Colonial Countries and Peoples. [58] The Declaration presents itself as an interpretation of the charter and states independence within the colonial context, as the principal means through which self-determination is implemented. It proclaims solemnly the necessity of bringing to a speedy and unconditional end, colonialism in all its forms and manifestations. It further declares 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. The holder of the right to self-determination is considered to be the people, and the meaning of the word, "people" is conditioned by repeated reference to colonialism. The colonial

43. UN GA Resolution 1514 (XV) The Declaration on Granting Independence to Colonial Countries and Peoples. UN Doc A/4634 (1960) and Resolution 1541 (XV) UN Doc A/4684 (1960)

44. UN GA Resolution 1514, 15 UN GAOR SUPP.16 UN Doc A/6484 1960 p.66.

declaration is viewed by most of the African and Asian nations as a document only slightly less sacred than the charter and as stating the law in relation to all colonial situations.

2.6.4 The Declaration on Friendly Relations

Self-determination made its appearance in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States [59] four years after the adoption of the Covenants on Human Rights. The declaration contributed to the formation of a set of general rules concerning the right to self-determination. There was disagreement among members of the UN on whether the declaration represents a mere recommendation or a statement of binding legal rules. However, the principles involved are acknowledged by all to be principles of the charter. By accepting the respective texts, states have acknowledged that the principles represent their interpretations of the obligations of the charter. Notable textbook writers are of the opinion that there is consensus about the binding character of those provisions on which a broad measure of substantial and unreserved agreement was provided. [60] These include people under colonial rule or alien domination and people under racist regimes who are conferred with the right to self-determination. These provisions of the Declaration can be considered as codifying rules of customary international law.

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45. UN GA Resolution 1514 (XV) 24 October, 1970, UN General Assembly, 25th Session, DOC A/RES/2625 (xxv)

46. Cassese, A., *(1977) The Helsinki Declaration and Self-determination, in, Burgenthal, T., (ed) Human Rights International Law and The Helsinki Accord,* Oxford, Duld publishers, p.91.

47. UN Resolution 2625 (XXV)

A number of international law authorities have asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance deriving from an interpretation of paragraph 7 of the Declaration. The paragraph provides thus;

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of self-determination and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour. Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country. [61]

The above formulation connotes the recognition of the right to self-determination as to peoples within existing states, as well as the necessity for the governments to represent the governed. [62] It is the duty of the state to promote respect for an observance of human rights and fundamental freedoms in accordance with the charter. Thus, if peoples within existing states are treated in a grossly discriminatory manner by an unrepresentative government, they can claim self-determination without concern that arguments about territorial integrity will defeat their claim.

The underlying rationale of the saving clause of the declaration is that when a people are blocked from the meaningful exercise of their right to self-determination internally, it is entitled, as a last resort, to exercise this right by secession. In its decision on the ***Question of the Secession of Quebec,*** the Supreme Court of Canada

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47. UN Resolution 2625 (XXV)

48. Thornberry, P. (1971) The Internal Aspect of Self-determination, Martinus, Vindoof publishers, p.108.

asserted that the third circumstance where a right of secession might arise, parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. [63]

Another interpretation of the saving clause points to its application only to peoples living under racist regimes, or under colonial or alien occupation. This view is not only narrow in its interpretation of the saving clause, but also contradicts the meaning of the declaration itself. The declaration implies the extension and applicability of the right to self-determination to peoples living within existing states. It puts emphasis on the necessity for governments to represent the governed. Such a narrow interpretation makes the clause meaningless and without legal weight.

The preceding analysis of the Declaration and especially of the saving clause has asserted that the principle of national unity and territorial integrity may have to yield if the state concerned is not possessed of a government representing the whole people. [64] In addition, where the people are completely denied the freedom to effectively exercise their right to internal self-determination then secession would be inevitable.

2.6.5 The Helsinki Final Act

49. Judgment of the Supreme Court of Canada, concerning certain Questions Relating to the Secession of Quebec from Canada, as set out in Order in Council PC 1996-1497 dated 30 September, 1996 at p 135.

50. Tomuschat, C., *(1993) Self-determination in a Post Colonial World,* Martinus,Nighoff Publishers, p.9

51. The Helsinki Final Act does not have the status of a legally binding document.

The Final Act [65] of the Conference on Security and Co-operation in Europe adopted on 1 August, 1975, embodied a Declaration on the Principles Concerning Mutual Relations of the Participating States. It contains in principle XIII an explicit reference to internal and external self-determination. The principle provides thus;

> By virtue of the principle of equal rights and self-determination of peoples, all peoples have the right in full freedom, to determine when and as they wish, their internal and external political status, without external political interference and to pursue as they wish, their political, economic, social and cultural development.

The researcher is of the view that, this formulation could be construed to mean that the right to self-determination is a continuing right, and not a right exercised, once and for all, at the time of independence. [66] Self-determination applies to all peoples as evidenced in the above formulation. One notable author holds that, the interpretation given to the above text as a whole does not address the situation of national minorities. This is because they are dealt with in another section of the declaration. Thus, it means to refer only to groups characterized by the fact of living in sovereign countries and identifying with the population of these countries when threatened. [67]

The novelty of the Helsinki Act, however, is its concern with internal self-determination. The wording agreed upon by 35 states embodies the idea that self-determination means the permanent possibility for a people to choose a new social or political regime, to adapt the social or political structure to meet new demands, so that its voice is reflected in the policy of its government.

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52. Solomon. J. *(1993) Internal Aspects of the Right to Self-determination,* Martinus, Nijhoff press, p.268-269.

53. Cassese. A., *(1979) Political Self-determination Old Concepts, New Developments,* Horns, Tumocrafts press, , p.151

2.6.6 The Charter of Paris and Document of Copenhagen

The Charter of Paris was adopted in November 1990 during a meeting of the Organization for Security and Cooperation in Europe (OSCE). The document referenced self-determination in a manner that narrows previous formulations and thus limiting its content. The Charter reaffirms equal rights of peoples and their right to self-determination in compliance with the UN Charter and other norms of international law, comprising those relating to territorial integrity.

In the present document, the paragraph on self-determination is included in the chapter on "Friendly Relations among Participating States" and not on the chapter "Human Dimension" which includes the most important commitments of the members of the organization on the implementation of human rights and fundamental freedoms. The chapter on Human Dimension of the Charter likewise the Helsinki Acts, pays special attention to the rights of minorities, which are not included in the definition of self-determination. This interpretation is reinforced by the Document of Copenhagen, which does not include a section on self-determination. Thus the references to self-determination in the OSCE Acts are indicative of the linguistic limitations present in the human rights environment during the period following the fall of the iron curtain.

2.6.7 The Viena Declaration

The Vienna Declaration and Program of Action [68] were adopted in 1993, by the UN Conference on Human Rights. It was reconfirmed in Article 1 of the UN Covenant on Human Rights. As other international legal documents providing for the right to self-determination, the Vienna Declaration, affirms the people's right to determine their political, economic, social and cultural issues. It further provides that such rights are not to be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states. However, the emphasis is put again on the government representing the whole people belonging to the territory without distinction.

2.6.8 The Legal Effect of The United Nations General Assembly Resolutions Relating to the Right of Peoples and Nations to Self-Determination

The researcher in chapter one noted that the discussion relating to the aspect of the thesis appears controversial. This has been the basis of virtually all arguments touching on the principle of the right to self-determination. The issue appears to have been raised first over the Palestinian question. The then Secretary of State for the Colonies, Creech Jones declared in the House of Commons debate in February, 1947 that; "we are not going to the United Nations to surrender the Mandate. We are going to the United Nations setting out the problem and asking for their advice as to how the Mandate can be administered". [69] It has been opined by a renowned author that by

54. A/conf. 157/24, 25 June, 1993.
55. Jacob, R., *(1947) Palestine and the United Nations Prelude to Solution,* Washington, Dawud press, p.44.

"taking the Palestine problem to the UN, the British Government did not tie itself to any commitment and felt that matters would not go beyond recommendations.[70]

In the 1950s, issues relating to the legal effect of the United Nations resolutions occurred over South Africa's refusal to hand over the League of Nations Mandate to the United Nations. Technicalities arose over the interpretation of Article 22 of the Covenant of the League of Nations [71] which established the Mandate System. Another difficulty arose over the contents of Article 5 of the Covenant which provided that decisions of any meeting of the assembly or of the council shall require the agreement of all the members of the league present at the meeting. To resolve these conflicts and other related ones, the United Nations General Assembly submitted the matter to the ICJ for an Advisory Opinion, which it gave on 7 June, 1955. The ICJ advised that the union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate, for South West Africa. It also has the obligation to transmit petitions from the inhabitants of that territory. The supervisory functions, to be exercised by the United Nations to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court. [72]

Consequent upon this opinion, the United Nations General Assembly decided in 1954 that the supervision over the territory should be carried out by the General

56. Galina, V., (*1973) The State of Israel,* Matinus Vsijhoff press, p.47

57. Johnson, L. *(1956) The Effect of Resolutions of the General Assembly of the United Nations.* London. BYIL Press p.98

58. ICJ Reports, (1950), p.128 -143

Assembly, but in addition, that decisions relating to petitions and reports from inhabitants of the territory shall be taken by two-third majority instead of agreement of all the members as provided for in the Covenant of the League.

The separate opinion of two Judges of the ICJ will help unveil the theoretical contents of some of the issues involved; Judge Klaedsted submitted that: the Resolution of the General Assembly;

> Are in my view not of a legal nature in the usual sense but rather of a moral and political character. This does not however mean that such a recommendation is without real significance and importance, and that the union Government can simply disregard it. As a member of the United Nations, the Union of South Africa is duty bound to consider in good faith, a recommendation adopted by the General Assembly with regard to the attitude which it has decided to take in respect of the matter referred to in the recommendation. But a duty of such nature, however, real and serious it may be, can hardly be considered as involving a true legal obligation, and it does not in any case involve a binding legal obligation to comply with the recommendation. [73]

The researcher is of the opinion that the effect of the General Assembly Resolutions are in three fold; moral, political and legal. This whole idea runs through the entire opinion expressed by the learned Judge. If this approach is adopted, then the resolutions of the UNGA will have little or no effect. On the other hand, Judge Lauterpacht submitted thus;

> A resolution recommending to an administering state a specific course of action creates some legal obligations which, however, rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The state in question, while not bound to accept the recommendations is bound to give it due consideration in good faith. If having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, is bound to explain the reason for its decision. These obligations appear intangible and

59. Judge Klaestad, ICJ Reports (1955) p.88

> almost nominal when compared with the ultimate discretion of the Administering Authority. They nevertheless constitute an obligation …..[74].

If this reasoning is accepted, it then follows that United Nations General Assembly resolutions relating to granting independence and self-determination are in essence not obligatory. What is obligatory, but though inconsequential is to consider the resolution. It is the submission of the researcher that this line of reasoning is out of touch with the true legal consequence of the United Nations General Assembly resolutions.

The resolutions of the United Nations General Assembly on questions of self-determination are obligatory. It should be stated that;

> Self-determination is a peremptory norm of international law, thus the title of colonial powers over territories was rendered illegal. Thus, the colonies became separate legal entities (Personalities) recognized as such in international law. [75]

Furthermore, the principles contained in Article 2 (1) of the Charter of the United Nations posit that the organization is based on the principle of sovereign equality of all its members. Also, Article 2 (4) of the Charter provides that "All members shall settle their international disputes by peaceful means in such a manner that international peace, security, and justice, are not endangered." it therefore means that these goals are unattainable if a portion of the world community is under colonial rule. It could therefore be summed up that colonialism conflicts with sovereign equality. Similarly, where a people have offered evidence of having been subjected to

60. Judge Lauterpocht, ICJ Reports (1955) p.118-119

61. Rigo, S.A., *(1973) The Evolution of the Right to Self-determination. A Study of United Nations Practice*, London, sijhot press, p.443

inhuman treatment and non representation in government within an entity, self-determination is the only viable option to maintain peace and stability. The researcher therefore posits that though self-determination may be viewed as a political weapon, the principle governing it is contained in the Charter of the United Nations as well as other obligatory rules of international law. These include the resolutions of the United Nations.

2.7 The Jurisprudence of Case Law on the Right to Self-Determination

The researcher would at this stage analyze the contributions of the Intentional Court of Justice (ICJ) and other municipal courts touching on the right to self-determination. The ICJ is the judicial arm of the United Nations. The instrument that established the ICJ specifies peoples as the organizations constituency, but accepts only states as its members. The UN system is built on the international community of states, not peoples. This equally applies to international law, the body of law being administered by the ICJ. There is no difficulty where a people have achieved the status of a state, but where this is not the case, the UN system, including its judicial body, faces a dilemma. The vital issue therefore is, how has the ICJ dealt with the questions arising from the application of the right to self-determination of peoples. The role of indigenous people in ICJ practice would be closely scrutinized to ascertain the relevance of the international body. It does appear that the struggle by peoples to gain collective rights is currently a challenge to international law.

Over a long period of time, the court rendered a number of important decisions in the area of international law. Self-determination is rather a contentious issue. It is

therefore not surprising that compliance with the court's rulings has overtime been problematic. Thus, a look at the relevant cases would demonstrate the critical major role of the court in the development of the principle of self-determination and its recognition as a legal right. The focus on the role of the ICJ would be tied to the external aspect of self-determination, which is the right of peoples to determine freely their political status and their place in the international community. This is clearly distinguished from the internal aspect of the right; that is, the rights of all peoples to pursue freely their economic, social and cultural development within the political and legal framework of a given state.

A cursory look at the cases determined by the ICJ on this subject shows that the origin commenced within the context of the decolonization period. However, with that process having drawn to its end, self-determination disputes occur in markedly different political and legal contexts. [76] This is best illustrated by the developments surrounding Kosovos declaration of independence and its aftermath. Aside from this, there are other examples which would be illustrated hereafter. The contribution of the court towards clarifying this very important principle of international human rights law is analyzed through focusing on some of the courts important findings. A common feature of the majority of the cases decided by the ICJ shows that the issue of the right to external self-determination was not spelt out in explicit terms. That notwithstanding, the analysis of the cases relating to self-determination within the

62. White, R.C.A., *(1981) Self-determination: Time for Re-Assessment,* Netherlands International Law Review, vol. 28, p.149.

decolonization context was central to the ICJ pronouncements. The researcher will therefore analyze some of the cases in the next paragraphs.

2.7.1 The South-West Africa Decolonization Cases (1949-1971)

An issue relating to the international status of South-West Africa (now Namibia) was referred to the ICJ by the United Nations General Assembly (UNGA) in December, 1949. This was the origin of what was to become an intricate judicial process that extended for a period of over three decades. [77] The findings made by the Court on the international status of this territory in their first advisory opinion, paved the way for many of the actions which were undertaken later by the General Assembly, the Security Council, and certain concerned states, in compelling South Africa, the Mandatory Power, to secure the process leading to Namibia's independence. Between 1949 up to 1971, the Court remained actively engaged with different legal issues concerning the decolonization process of South-West Africa,[78] issuing four advisory opinions and two judgments.

The South-West Africa decolonization cases were instrumental in the clarification of important legal aspects of the exercise by the peoples of South-West Africa of their rights to self-determination. The cases also helped in the understanding of the right to self-determination for non-self- governing territories and its place within the corpus of general public international law. The process of the decolonization of Namibia ended on 21 March, 1990 with the independence of that country. The importance of the case law of the court with regard to the development

63. ICJ International Status of South-West Africa, Advisory Opinion on 11 July, 1950. ICJ Reports, 1950, p.128

64. ICJ, South West Africa Cases (Ethiopia V. South Africa, Liberia V. South Africa, (second phase), Judgment of 18 July, 1966. ICJ Reports 1966, p.6

and interpretation of the right of the people of South-West Africa to self-determination is manifold. Firstly, through its advisory opinions delivered to the UNGA and the Security Council, the Court clarified the aim and scope of the right of the people of Namibia to self-determination. The court also clarified the related obligations incumbent upon other states not to recognize the illegal situation created by the Mandatory Power, South Africa, arguably including also the effective occupation of the territory.

Further to this, the ICJ added its powerful voice to the international condemnation of the policy of apartheid as practiced by South Africa in Namibia. The Court contributed to linking respect for fundamental human rights with the right to self-determination. The Courts condemnation of the practice of apartheid was its affront to the purposes and principles of the UN Charter. The ICJ clarified the duty of the mandatory power vis a vis the inhabitants of the territory placed under its administration, thus;

> Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinction, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter. [79]

65. ICJ, Legal Consequences of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion, ICJ Reports 1971 p.57

These purposes and principles, besides promoting and encouraging respect for human rights include also developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. [80]

Thirdly, the findings of the court served as a guide in the work of the political organs of the UN and the advancement of their decolonization and related human rights agenda. Moreover, the controversy following the courts judgment in the South West Africa cases caused a discernible shift from an overly legally positivistic into a more forward-looking and solution-based approach by the court. The central message of the international reaction was that the finding of a fine balance between the letter and the spirit of the law and upholding certain basic human entitlements were part and parcel of the duties with which the states composing the international community had entrusted the court. While the conclusion of the decolonization process and the attainment of independence by Namibia came only after the end of the cold war, it can be said that the case law of the court has played an important role in the process.Finally,in the South-West Africa cases,the ICJ regarded the terms of Article 2 of the Mandate Agreement concerned as disclosing a legal obligation in spite of the political nature of the duty to promote to the utmost, the material and moral well being and the social progress of the inhabitants of the territory.

2.7.2 Western Sahara (Advisory Opinion of 16 October 1975)

66. Paragraphs 2 and 3 of Article 1 of the UN Charter

On 13 December 1974, the UNGA adopted Resolution 3292 (XXIX) requesting the Court for an advisory opinion on the issue of Western Sahara. The General Assembly reaffirmed the right of the population of the Spanish Sahara to self-determination in accordance with the Decolonization Declaration of 1960.The UNGA considered that the persistence of a colonial situation in Western Sahara jeopardized stability and harmony in the North-West Africa region. [81] The advisory opinion was necessary for the General Assembly in any further steps it was to take on this issue in view of the conflicting territorial claims that the Kingdom of Morocco and Mauritania had toward the territory. The ICJ noted that the opinion was sought for a practical and contemporary purpose, namely, in order that the General Assembly would be in a better position to decide on the policy to be followed for the decolonization of Western Sahara. [82]

In the Courts opinion, the right of that population to self-determination constituted basic assumption of the questions put before it. The Court noted that the Decolonization Declaration was complemented by the UNGA Resolution 1541 (XV) which contemplated three possibilities for the decolonization process of non-self-governing territories. This includes emergence as a sovereign independent state, free association with an independent state or integration with an independent state. [83] The validity of the principle of self-determination is construed as the need to have due regard to the freely expressed will of the people. In the view of the Court, this is not affected by the fact that in certain cases the General Assembly had dispensed with the

67. General Assembly Res. 3292 (XXIV) of 13 December,1974

68. ICJ Western Sahara, Advisory Opinion of 16 October,1975, ICJ Reports 1975, p.20

69. General Assembly Resolution 1541 of 15 December,1960, UN Doc. A/4684 (1960)

requirement of consulting the inhabitants of a given territory. [84] The Court was of the opinion that the decolonization process envisaged by the General Assembly was one which respected the rights of the population of Western Sahara to determine their future political status by their own and freely expressed will. [85] Further, the Court acknowledged that the UNGA was left with a measure of discretion with regard to the forms and procedures by which the right to self-determination was to be realized. [86]

In its advisory opinion of 16 October, 1975, the Court mentioned two important requirements for the exercise of the principle of self-determination. The Court noted that the expression thereof must be free without outside interference and genuinely expressed by the people of the territory concerned. [87] Furthermore, the Court drew attention to the 1970 Friendly Relations Declaration, which besides the three options of emergence as a sovereign independent state, association and integration included also 'any other political status freely determined by a people'. [88] Those findings were in line with the position of the General Assembly itself, as expressed in its numerous resolutions, including those concerning Western Sahara.

Apart from rendering helpful legal advice to the UNGA in discharging its functions with regard to the decolonization of that territory, the opinion has contributed in establishing referenda, as being the accepted means of consultation of the popular will. This further kept Western Sahara on the UN agenda. It should be noted that the decolonization process took another turn when Morocco annexed two-

70. Western Sahara Case p.33
71. Ibid p.36
72. Ibid p.36
73. Ibid p. 32
74. Ibid p.33

thirds of Western Sahara in 1976 and the whole of it after Mauritania's withdrawal in 1979. An UN brokered cease-fire, effective from September 1991, put a stop to the conflict between the Polisario Front and Morocco. Nevertheless, the attempts of the UN Mission for the Referendum in Western Sahara (MINURSO) to hold a referendum has failed and the parties have thus far rejected all brokered proposals. This is certainly an example of a situation where the advisory opinion of the court, if applied in good faith, could have brought about a just, peaceful and lasting solution. Instead, its disregard has led to a long standing conflict and the need to deploy UN troops and humanitarian aid agencies in that region so as to contain the conflict and alleviate human suffering. The legal effect of the Western Sahara Advisory opinion is that the ICJ confirmed the validity of the principle of self-determination in the context of international law.

2.7.3 East Timor (Portugal vs. Australia, Judgment of 30 June 1995)

Portugal, the then administering power for the territory of East Timor, instituted proceedings against Australia on 22 February, 1991 concerning 'certain activities of Australia with respect to East Timor'. The subject-matter of the dispute was an agreement entered into by Indonesia and Australia for the exploration of the continental shelf of the so called 'Timor gap'. Portugal contended that Australia had, by its conduct, failed to observe "the obligation to respect the duties and powers of (Portugal) as the administering power of East Timor and the right of the people of

East Timor to self-determination and related rights".[89] Related rights in this case included the right to territorial integrity, unity and permanent sovereignty over natural wealth and resources, as corollaries of the right to self-determination of peoples. As a consequence, Australia had to cease infringing the relevant international norms and it owed reparation to the people of East Timor and to Portugal. [90]

While acknowledging that 'Portugal's assertion that 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', [91] the Court did not go any further in setting out what exactly entailed that *erga omnes* character. Thus the Court missed the opportunity of clarifying the scope of *erga omnes* obligations with regard to the right to self-determination. Had the Court decided to pronounce even obiter on this issue, it would have helped to bridge to some extent the gap between what a renowned author has called the world of the 'ought' and the world of the 'is'. [92] In any case, the publicity given to the issue of East Timor simply by bringing it before the ICJ, coupled with the renewed efforts of the international community, brought about the UN-supervised population referendum of 30 August, 1999. Here, the East Timorese people voted for their independence from Indonesia. [93] Although, the Court concluded that it had no jurisdiction to entertain the case, [94] it could be agreed that the legal

75. ICJ, East Timor (Portugal V. Australia), ICJ Reports, 1995, p 92

76. Ibid p.95

77. Ibid p.102

78. Simma, B , *(1993) Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes ?, in: Dulbruk, J., (ed.), The Future of International Law Enforcement, New Scenarios-New Law ?,* Dunker & Humblot, p.126

79. East Timor became officially independent on 20 May, 2002.

80. East Timor case (supra) p. 106

proceedings before it seem to have had positive impact on the solution of the problem of East Timor. [95]

2.7.4 Legality of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion of 9 July 2004)

In this advisory opinion, the ICJ looked at the right of the Palestinian people to self-determination as part of the rules and principles of international law relevant to assessing the legality of the construction of a wall in the occupied Palestinian territory. The Palestinian case can be seen as an interrupted case of decolonization, where the armed conflict and occupation by Israel and subsequent events have resulted in a denial of the right to self-determination to the Palestinian people. [96] In clarifying the principle of self-determination, as enshrined in a number of key international instruments, the ICJ noted;

> The principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which every state has the duty to refrain from any forcible action which deprives peoples referred to in that resolution of their right to self-determination. Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the states parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter. [97]

The duty incumbent upon every state to refrain from any forcible action which deprives people of their right to self-determination, referred to by the court would necessarily include acts of foreign military intervention, aggression and occupation.

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81. Gill, T.D., *(2003) The World Court, What it is and How it Works,* Laiden, Martinus Nijhft Publishers, 2003, p.193.
82. ICJ, Illegal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, p.165-167
83. Ibid p.171-172

Recalling its 1971 advisory opinion on South-West Africa, the Court stated that 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 such territories. The Court further found that these developments left little doubt that the ultimate objective of the sacred trust referred to in Article 22, paragraph 1, of the Covenant of the League of Nations was the self-determination of the peoples concerned.[98] After outlining the development of this right through its own jurisprudence, the court recalled its position that at present, this right has an *erga omnes* character. [99]

With regard to the existence of a 'Palestinian people', the court stated;

> As regards the principle of the right to self-determination, the Court observes that the existence of a 'Palestinian people' is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September, 1993 between Mr. Yasser Arafat, President of the Palestinian Liberation Organization (PLO) and Mr. Yatzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized "the right of the state of Israel to exist in peace and security" and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, "the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people". The Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September, 1995 also refers a number of times to the Palestinian people and its "legitimate rights". The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions. [100]

The researcher observes that the court avoided providing a definition of a people in general and in the present case relating to the Palestinian people, chose instead to rely

84. Ibid p.173-174
85. East Timor (Portugal V Australia) Supra. p.102
86. Ibid p.182-183

on political statements. That choice does not provide much guidance or certainty as to what constitutes a people. In any event, the Court noted two of the traditional elements of a state, namely, a people and a government. Moreover, it put on record those basic, but yet cornerstone commitments that the two parties involved in the conflict had made to each other. Having concluded that the construction along with measures taken previously, severely impeded the exercise by the Palestinian people of its right to self-determination, and was therefore a breach of Israel's obligation to respect that right. [101] The Court went on to clarify the obligations of Israel and other states stemming from the *erga omnes* nature of the right to self-determination". [102]

It could be construed from the UN Charter that, every state has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples. Furthermore, states have the duty to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle. Thus the ICJ noted that self-determination as a right *erga omnes*, entailed the duty of every state to promote that right through joint and separate action. Accordingly, the Court opined that all states, while respecting the UN Charter and international law, should see to it that any impediment resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination were brought to an end.[103] However, notwithstanding the broad language used, it is not entirely clear what that duty entails for every state. Arguably, that would include a duty to ensure that no aid

87. Ibid p.184-185
88. Ibid p.199.
89. Ibid p.200

or funds are used to impede or obstruct the right of the Palestinian people to self-determination and that any company vested in the state do not render a contribution in building a construction deemed illegal under international law. The ultimate value of the ICJ's judgment in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory is that the ICJ recognized the principle of self-determination as one of the rules and principles relevant to the legality of the measure taken by Israel. The court also notes that the principle of self-determination of peoples has been enshrined in the UN Charter and reaffirmed by the General Assembly in Resolution 2025 (XXV) pursuant to which every state has the duty to refrain from any forcible action which deprives peoples referred to in that Resolution of their right to self-determination.

2.7.5. The Northern Cameroons Case

The Cameroons had been a German Colony transferred to the Mandate System after World War 1 and divided into units, administrated by the United Kingdom and France. The UK divided its territory into the Northern Cameroons, which was administered as part of Nigeria and the Southern Cameroons, and managed as a separate province of Nigeria. After the creation of the United Nations, the mandate territories of the Cameroons were placed under the international trusteeship system by trusteeship agreements approved by the UNGA on 13 December, 1946. The French trust came to an end with the independence of the Republic of Cameroon in 1960, and the UNGA recommended to the UK that it organize plebiscites in order to terminate its trusteeship. The UK organized plebiscites in its two territories, following which the

Southern Cameroons decided to join the Republic of Cameroon and Northern Cameroon, Nigeria.

The UNGA endorsed the outcome of the plebiscites and decided that the trusteeship agreement should be terminated. This decision was opposed by the Republic of Cameroon, which had reservations as to how the plebiscites had been organized by the UK and Nigeria in Northern Cameroons. It claimed that the people of Northern Cameroons had not been able to express their will freely due to the way the UK and Nigeria had organized the plebiscites and in effect questioned whether the people had properly exercised their right to self-determination. The Republic of Cameroon took the UK to the ICJ, requesting it to declare that the UK had failed, with regard to the Northern Cameroons to respect certain obligations flowing from the Trusteeship Agreement, an application to which the UK raised preliminary objections.[104] Although the case never proceeded to the merits phase, the ICJ could have had an easy task to deem the case inadmissible, because the UNGA had already terminated the trusteeship agreement upon which Cameroon built its case.

2.7.6 The ICJ Advisory Opinion on Kosovo on 22 July 2010

Kosovo was a former autonomous province of Yugoslavia contained within Serbia with a population consisting of approximately 90 percent ethnic Albanians. In 1989, Serbia revoked Kosovo's autonomy, leading Kosovo to declare independence and various armed groups to launch attacks under the banner of the Kosovo Liberation Army. In response, the Serb government initiated repressive actions and policies;

90. Case Concerning the Northern Cameroons (Cameroons V United Kingdom), 63 ICJ 15

including employment discrimination, arbitrary detention and torture, rape, summary executions, and ethnic cleansing leading to a vast refugee crisis. In 1999, NATO intervened with a bombing campaign against Serbia, which resulted in the Serb government withdrawing its security forces. Following this development, the UN Security Council Resolution 1244 brought Kosovo under UN and NATO administration. [105]

The UN Resolution 1244 demanded an end to violence and empowered the UN Secretary General to establish "an interim administration for Kosovo" that would promote the establishment of substantial autonomy and self-government in Kosovo.[106]The Resolution reaffirmed the United Nations commitment to "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia''. [107] Following seven years of UN administration, UN envoy, Martti Ahtisaari led final status negotiations between Kosovo and Serbia in 2006 which failed. He then authored a report recommending independence for Kosovo. [108] After Serbia rejected the plan, and further negotiations failed, Kosovo declared independence on 17 February, 2008.[109] On 8 October, 2008, the General Assembly requested an advisory opinion from ICJ to answer the question, "is the unilateral declaration of independence by the Provisional Institution of Self-Government of Kosovo in accordance with international law?'' [110]

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91. Herbert, F.K., *et al (2009) From Protectorate to Statehood,* Oxford, Duketel Press p.36
92. UNSC Resolution 1244, UN. Doc.S/PES/1244 10 June, 1999
93. Kosovo Advisory Opinion, p.61-61
94. UN.Doc S/2007/168,26 March, 2007.
95. Kosovo Advisory Opinion p.72-74
96. UNGA Resolution 63/3 U.N. DOC.A/RES/63/3 of 8 October, 2008

The ICJ unanimously found that it had jurisdiction to give an advisory opinion, decided to comply with the request by a nine-to-five vote, and concluded by a ten-to-four vote that Kosovo's declaration of independence "did not violate international law".[111] The question before the court was narrow and specific. The issue was whether the declaration of independence was in accordance with international law. The question before the court was not about the legal consequence of the declaration. [112] The ICJ therefore did not address the issue whether Kosovo had achieved statehood or the validity of other states recognition of Kosovo. The court noted that the inconclusiveness of state practice and Security Council action on the subject under scrutiny made the question very unclear as international law contains no prohibitions of declaration of independence. [113]

Another vital issue is whether the declaration of independence violated UN Security Council Resolution 1244 which provided the constitutional framework created under the resolution. The ICJ stated that the resolution was silent on the conditions for the final state of Kosovo, as such the declaration could not have violated the resolution because the two instruments operate on a different level. [114] The Court thus concluded that the declaration did not violate any applicable rule of international law. [115] The dissenting judges of the ICJ argued that the courts approach

97. Kosovo Advisory Opinion pp 18-28
98. Ibid p.51
99. Ibid p.84
100. Ibid p.114
101. Ibid p.121

was too narrow. They observed that the court should have addressed Kosovo's claim to secession and clarified the scope of Kosovo's right to self-determination. [116]

Kosovo's secession presents a fundamental conflict between the right of peoples to self-determination and the rights of states to territorial integrity. The court sidestepped this conflict by focusing solely on the seemingly technical question of the legality of the declaration of independence, avoiding comment on Kosovo's entitlement to independence. This approach did disservice to each right. The court failed to affirm the right to self-determination for Kosovo. This also damaged the right to territorial integrity by broadly asserting that declarations of independence do not violate international law. The researcher is of the view that the court should have affirmed Kosovo's right to secede by emphasizing Kosovos unique historical status as a former autonomous federal unit that had suffered severe repression and denial of fundamental rights.

The researcher is of the view that self-determination of peoples has become an established legal right, but its tension with the right of states to territorial integrity remains unresolved. In addressing the secessionist claim of Kosovo, the ICJ had an opportunity to address the previously undefined borderline between the rights to self-determination and territorial integrity.[117] However, the ICJ declared that it was not addressing whether Kosovo was entitled to statehood or the scope of the right to self-

102. Ibid p.35

103. The case generated widespread interest beyond the Balkan peninsula because of its implications for the many separatist movements around the world. Several states facing such movement within their own borders participated in the proceedings and strenuously opposed Kosovo's declaration e.g. written statement by the Russian Federation – Kosovo at 39-40

determination. [118] The decision undermined the territorial integrity of states by embracing the positivist principle of the case of the "SS Lotus", [119] that international law permits whatever it does not prohibit. [120] The court thus avoided recognizing a positive entitlement to independence but this very evasion led to a result that could have broad and harmful effects. By holding that the declaration of independence does not violate general international law, [121] the court gave license to separatist movements worldwide to declare independence. Sources of international law have confirmed that claims for secession are strongest when a group is denied fundamental rights and democratic participation.

The saving clause of the Friendly Relations Declaration implies that secession may be warranted when a state does not conduct itself in compliance with the principle of equal rights and self-determination of peoples. [122] Likewise, in the case of ***Reference Re "Secession of Quebec***, [123] the court made out a category of groups that may secede as a last resort" when "blocked from the meaningful exercise of the right to self-determination internally". [124] Scholars and academic commentators have argued that denial of rights internally can give rise to a right to secede. [125] Kosovo clearly has suffered a denial of fundamental rights that serves as a foundation of a strong case for secession. Kosovo enjoyed a history of substantial autonomy in a

104. Kosovo Advisory Opinion, pp 82-83

105. S.S. "Lotus" case (Fr. vs. Turk.) (1927) P.C. I.J (Ser. A).

106. The ICJ embrace of the Lotus principle represented a shift in the Courts jurisprudence. See Michael, J., (2007) Was the Ship Ever Afloat, International Law Journal vol 73, p.71.

107. Kosovo Advisory Opinion p.84

108. UNGA. Resolution 2625 (xxv) p.124

109. (1998) 2 S.C.R. 217 (Canada)

110. Ibid p.134

111. Donald, L *(2003) A Right to Serve ?, in Secession and Self-Determination*, Macedon & Allen, Buchanan pp 50-65.

federation that subsequently dissolved, but the Serb authorities revoked that autonomy and denied the Kosovar people the right to participate in their own government. This was further evidenced by years of brutal repression which justified their fears of personal safety let alone political participation.

It would be easy to question the relevance of the ICJs non-binding advisory opinion, as the success of secessionist movements is ultimately determined by the political process of recognition by other nations. Nevertheless, interpretations by organs such as the ICJ often lead to the initialization of new international norms that the global community comes to view as binding. The intense interest this case drew suggests that the ICJ could have played a particularly prominent role in the non internalization process regarding self-determination. An opinion affirming Kosovos right to statehood while distinguishing the Kosovars from other groups would have had two positive effects. First, it would have affirmed the self-determination of the Kosovars, a people that has suffered brutal repression and denial of political rights within Serbia. Second, by clarifying that unilateral secession will be permitted if and only if a group suffers repression, it would have incentivized States to increase the rights of minority groups so that those groups would not have the legal right to secede. Unfortunately, the court missed an opportunity to affirm Kosovo's self-determination while buttressing the territorial integrity of states that treat their minority groups less like the Kosovars and more like the Quebecers.

2.7.7 The Quebec Secession Case

The early 21st Century witnessed a tide of nationalist movements and a rediscovery of ethnic identities. This awakening has led to a demand for increased autonomy by many groups. At various points throughout Canadian history, the Quebecois have clamored for their independence from the rest of Canada. Their demands came to the forefront in the Canadian legal community when the Supreme Court of Canada addressed the issue In Re Secession of Quebec.[126] In the Quebec case, the Canadian Supreme Court was asked to decide the following questions:

a. Under the constitution of Canada, can the National Assembly, legislature or government of Quebec affect the secession of Quebec from Canada unilaterally?

b. Does International law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right of self – determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

c. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

112. (1998) 2 S.C.R. 217 (Can).

The request for the opinion of the Supreme Court was at the instance of the Governor in Council. The Court was asked to give its opinion regarding the legality of unilateral secession if Quebec passed a referendum in favour of secession. Following the request, the Quebec government denounced the federal government for turning to the Court on the issue and declared that the matter was inherently political and was thus beyond the purview of any court. It refused to participate in the proceedings in consequence of which the court enlisted the help of *amicus curiae* to argue the case for Quebec's right of unilateral secession.

The Supreme Court of Canada ruled that neither the Canadian constitution nor international law allows Quebec to secede from Canada unilaterally. Secession would require amending the constitution. However, if a clear majority of Quebecers unambiguously opts for secession, the Federal Government and the other provinces would have a constitutional duty to negotiate. This is an obligation that the Court declared to be implicit in four principles that "inform and sustain the constitutional text" federalism, democracy, constitutionalism and the rule of law, and respect for minorities. The same set of principles would govern the negotiation themselves. Accordingly, Quebec could not dictate the terms of secession, and one cannot assume the agreement would be reached. If negotiations fail, and Quebec declares independence unilaterally, the international community would have to decide whether Quebec's action was legitimate. [127]

113. Ibid at p.37

In a very thoughtful and scholarly opinion, the Court analyzed various sources of international law. Based on that analysis, the Court identified three types of circumstances in which a group could make a plausible claim for an international legal right of secession. These include, situations involving former colonies, cases involving foreign military occupation, and situations where "a people is blocked from the meaningful exercise of its right to self-determination internally".[128] The Court diligently analyzed the Quebec situation and concluded that Quebec did not have an international legal right to secede from Canada because the fact of the Quebec case did not fit within any of these three categories.

The researcher is of the view that judges on the Canadian Supreme Court acted in their individual capacity, not as political representatives. Furthermore, they were not compelled to adopt ambiguous phraseology in the interest of promoting consensus. Also, the Court was able to articulate a clear statement of the general principles governing the international legal right of secession, far clearer than any statement contained in any UN Declaration. The Court did not merely articulate general principles, but it applied those principles to a specific set of facts. The process of applying law to the set of facts helped the Court to clarify the general principles. There are compelling reasons to believe that a common law method of case by case adjudication of secessionist claims is likely to be a better tool than UN Declarations for clarifying the international legal rules governing the relationship between people's self-determination rights and states territorial integrity rights.

[1]14. Ibid p.285

2.8 Applicability of Case Law to the Principle of Self-Determination

The development of case law relating to the principle of self-determination cannot be underestimated. The role of the courts in developing self – determination as a norm of international law has been significant. On the part of the ICJ, it is regrettable that the Court has been very secretive in addressing issues before it. What emerges clearly from the jurisprudence of the ICJ is that the right to self-determination is a right of process and not of outcome. International law requires that people be allowed to express their opinion on the alternative choices available to them, be it independence or some other status. Furthermore, on the close examination of the Courts case law, it can be concluded with certainty that 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.[129] By contrast, outside the decolonization context, it is difficult to draw conclusions regarding claims to self – determination that would be generally acceptable to all states. It therefore means that, there is no coincidence on the existence of any ready-made formula to properly balance the competing demands of self-determination and territorial integrity.

The researcher therefore views that self – determination belongs to an area where states interests and views are so conflicting that states are unable to agree upon

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[1]15. *ICJ, Legal consequences for states of the continued presence of South Africa in Namibia (South West-Africa) notwithstanding Security Council Resolution 276 (1970), Advisory opinion, ICJ* Reports 1971 p.31

definite and specific standards of behavior. In the light of these conflicting views, we must therefore be content with the loose formulation of very general guidelines and principles.

CHAPTER THREE

HISTORICAL EVOLUTION AND THE RIGHT TO SELF-DETERMINATION FOR SOUTH SUDAN

3.1 Introduction

Self-determination denotes the legal right of peoples to decide their own destiny in the international order. It is a core principle of law arising from customary international law and enshrined in a number of international treaties and conventions. Self-determination has two aspects; internal and external. Internal self-determination is the right of the people of a state to govern themselves without external interference. External self-determination on the other hand denotes the right of the people to determine their own political status and to be free of alien domination, including formation of their own independent state. However, independence is not the only possible outcome of an exercise of self-determination.

In international law, the right of self-determination that became recognized in the 1960s was interpreted as the right of all colonial territories to become independent or to adopt any other status they freely choose. Ethnic or other distinct groups within colonies did not have a right to separate themselves from the "people" of the territory as a whole. Today, the right of groups to govern themselves is increasingly intertwined with human right norms, in particular, the right of minorities and indigenous people.

The origin of the modern principle of self-determination can be traced back to the declaration of independence of the United States of America (USA). [130] The declaration proclaimed that governments derived their just powers from the consent of the governed and that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it. The principle of self-determination was further shaped by the leaders of the French revolution. During the 19th century and the early part of the 20th century, the principle of self-determination took a new form by nationalist movements. They interpreted the principle as meaning that each nation had the right to constitute an independent state and that only nationally homogeneous states were legitimate. The interpretation accorded the principle by nationalist movements provided the basis for the formation of a number of new states in the 20th century. The principle of self-determination was also prominent in the unification processes of Germany and Italy.

Self-determination further evolved when it was espoused by the socialist movement and the Bolshevik Revolution. It was then defined and developed by Lenin and Stalin as one of international law. It must be mentioned however that the right to self-determination in Soviet-doctrine existed only in cases where it served the cause of class conflict and social justice. It was a tactical means to serve the aims of world communism and not an end in itself.

1 The USA Declaration of Independence was on 4 July, 1776.

The *President* of the USA [131] championed the principle of self-determination during World War I. The proposal formed the basis of the peace negotiations with the central power. It was also reflected in a number of Plebiscites held by the Allies in some disputed areas. Furthermore, it was one of the basic components of a series of treaties concluded under the League of Nations for the protection of minorities. [132] The mandates system was devised as a compromise solution between the ideal of self-determination and the interest of the administrative powers. [133] Self-determination as a general principle did not form part of the covenant of the League of Nations. The principle therefore for the duration of the League of Nations was used as a political rather than a legal principle. This was confirmed by the Council of the League of Nations and its expert advisors in the Aland Islands Dispute Case. [134] This chapter will discuss the historical evolution as well as the procedural steps embarked by South Sudan in the exercise of their right to self-determination.

3.2 Historical Perspectives of the South Sudan's Struggles for Self-Determination

The Republic of South Sudan is a land locked country in East-Central Africa. However, it is classified as part of North Africa sub-region by the United Nations (UN). South Sudan became an independent nation on 9 July, 2011 with its capital in

2.President Wilson, W., (1918) Fourteen Points. Accessed at www.usa.org on 6 July, 2015.
3. Minority Protection System Between World War I and World War II
4.Article 22, of the Covenant of the League of Nations
5.Aland Island Dispute Case 1920-1921. p.61.

Juba. It shares boarders with the Central African Republic, Democratic Republic of Congo, Ethiopia, Kenya, Sudan and Uganda. The historical perspective to the long years of struggle by the people of South Sudan to attain self-determination has been a thorny issue in international law and relations. Father Saturnino Lahure, a Southern Sudanese politician, stated in a speech delivered before the Sudanese National Parliament in Khartoun on 23 June, 1958, thus;

> Mr President, Sir, the South has no ill-intensions whatsoever towards the North.The South simply claims to run its local affairs in a United Sudan. The South has no intention of separating from the North, for had that been the case nothing on earth would have prevented the demand for separation. The South claims to federate with the North, a right that the South undoubtedly possesses as a consequence of the principle of the free self-determination which reason and democracy granted to a free people. The South will at any moment separate with the North if and when the North so decides directly or indirectly through political, social and economic subjugation of the South. [135]

The divorce between Sudan and South Sudan as graphically captured in the above quotation ensued. An analysis of the historical background of the region would be relevant to the study. Before the Turko-Egyptian invasion of 1821, the Sudan consisted of kingdoms and tribal communities without modern forms of government. In other words, Sudan in its present boundaries did not exist. The Turko-Egyptian occupation of 1821 was promoted by the expansionist ambitions of the Ottoman Empire and its craving for wealth and markets. The main commodities of interest were slaves, gold, ivory and timber. South Sudan provided the source of these commodities. The Turko-Egyptian rule lasted for a period of 60 years. Similarly, the Mahdist

6. Perteno, S.A., (2007) The Rev F Saturnino, L: *A Roman Catholic Priest Turned Rebel*. *The South Sudan Experience* vol 119-20 p.65.

administration of 1883 -1898 did not succeed in imposing its full authority on the whole of Sudan. However, in 1892, the French led by Major Marchand occupied large parts of South Sudan and by 1896 had established a firm administrative structure in these areas. The French had wanted to annex South Sudan to the French territories in West Africa. However, an international conflict developed between the British and the French over South Sudan commonly known as the Fashoda incident. Again, in 1898, the Sudan was re-conquered by a joint British and Egyptian forces resulting in the signing of the Condominium Agreement between the British and the Egyptians to administer the Sudan in its present boundaries.

In 1899, the British and the French concluded an agreement in Europe which made the French pull out of South Sudan. A similar incident took place in 1910 when the Belgians withdrew from the Lado Enclave after an agreement was concluded in 1896 stipulating that the Enclave was to be handed over to the British after the death of King Leopold. The king died in 1910. The withdrawal of the French and Belgians from South Sudan ceded the territory to the British. Owing to the geographical, political, historical and cultural differences between North and South Sudan, the British devised a system of a separate administration for the two territories. To guarantee the effectiveness of the separate administration policy, the British passed the Closed Districts Ordinances of 1920s. In consolidation of this policy, the Passports and Permits Ordinances was promulgated in 1922. This ordinance required the use of passports and permits for travelers shuttling between the North and South Sudan. The permits were to specify the conditions and purposes of visits. The immigration policy

was further strengthened by the Permits and Trade Order enacted in 1925. This law required North Sudanese citizens to obtain permits to conduct trade in South Sudan. Furthermore, a language policy was entrenched in South Sudan in 1928 adopting English as the official language.

The cumulative effect of the immigration and trade laws coupled with the language policy was to maintain South Sudan as a separate entity from North Sudan. During this period, colonial governors from South Sudan used to attend regular administrative conferences in East Africa instead of Khartoun. After the establishment of the condominium rule, the British continued to consolidate its position in North Sudan by creating the necessary administrative and political structure for the state of North Sudan. In an effort to prepare the North Sudan for self-rule, the North Sudan Advisory Council Ordinance was enacted in 1943. The Ordinance covered the six North Sudanese provinces; Khartoun, Kordofan, Darfur, Eastern, Northern and Bluenille provinces. The Ordinance had no application to the territory of South Sudan. The resolutions of the Administrative Conference held in Khartoun in 1946 advocated the handover of South Sudan to the North. The subsequent reversal of the Southern policy by the British in an effort to avoid the union of the Sudan and Egypt resulted in the union of the socio-economically and politically marginalized and undeveloped South with the historically and politically dominant North. The forced union left the South with no other option than recourse to armed struggle.

The breaking point came when Northern officials demanded that Southern troops be moved out of their Southern bases and be replaced by Northern troops.

When soldiers refused to move to the North in August, 1955, it resulted in a mutiny. This mutiny later turned into a revolt, marking the first phase of the South's armed struggle in support of its demand for the right to self-determination. In 1963, the soldiers who had been involved in the abortive revolt in 1955 and who had fled to neighboring countries during the brutal armed repression of the revolt founded the first Anya-Nya guerilla army. They subsequently launched a series of coordinated attacks against government outposts in the South. The Anya-Nya struggle continued with increasing intensity through the first military government of General Ibrahim Aboud [136] and the second democratic period. [137]The first civil war ended in 1972 with the signing of the Addis Ababa Agreement during the second military regime of General Mohammed Numeri. The agreement guaranteed Southern Sudan regional self-government status within the Republic of Sudan. Self-government was established in South Sudan under Sudan's 1973 Constitution. Due to administrative weaknesses and implementation problems[138], Southern government survived only until 1983 when the Numeri government's Republican Order No. 1 (1983) reduced the status of Southern Sudan to three weak administrative regions.

In response to the Sudan's abrogation of the Addis Ababa Agreement, the second armed struggle commenced in 1983 by the people of South Sudan. The struggle continued unabated and it was clear that the strife could only be contained upon the granting of self-determination to South Sudan. This principle was fully

[136]. 1958-1964.
[137]. 1964-1969.
[138]. Lam, A., (2007) *Southern Sudan: Colonialism, Resistance and Autonomy*, Trenton, NJ: Red Sea Press, Inc. p.14

endorsed in 1994 when a declaration of principles was signed. This declaration paved the way for years of negotiations on a Comprehensive Peace Agreement. The path to political divorce of the South Sudan from Sudan was enabled by the terms of the Comprehensive Peace Agreement (CPA) of 9 January, 2005. The CPA was made possible because of the intense pressure and activities of the Sudan's Peoples Liberation Movement/ Army (SPLM/A).The CPA sought to bring an end to the 22 years of war between the North and the South. The agreement further called for national elections and a referendum for the independence of the South in 2010. The CPA addressed a wide range of controversies and challenges surrounding religious and cultural diversity, rural marginalization, power-sharing and transformation towards democratic governance. The people of South Sudan went to the polls to vote on referendum for independence between 9 – 15 January, 2011. At the end, the vote for independence was passed by more than 98% of ballots cast. Independence from the Republic of Sudan was the South Sudanese people's response to a long history of acrimony, mistrust and war. South Sudan declared its independence on 9 July, 2011 to which 192 member states of the United Nations (UN) offered their endorsement.

There are wide ranging implications in international law on the granting of the right to self-determination of the people of South Sudan. These implications are wide spread on the people of Sudan and South Sudan on the one hand and the sub region and the continent on the other. It reflects the evolving conceptualization and application, particularly outside the classical colonial context, of the right to self-determination. The state of South Sudan manifests the application of self-

determination in its evolved formulation in terms of both its history and struggle. It further represents a case of self-determination through independence that came about as a result of serious human rights violations and denial of the right to participate in public affairs and the running of the country on equal basis. The significance of the developments in South Sudan lies in the fact that it adds to other legal and political developments in Africa. This suggests that there may be a relaxation of the firmly held view in Africa that colonial borders are non-negotiable. In the case of South Sudan, this relaxation was first affirmed by other African States when they supported the declaration of principles on 20 July, 1994. The 1994 principles firmly established the fact that the people of Southern Sudan had the right to determine whether the majority of the citizens were in favour of independence from the Sudan. The jurisprudence of the African Commission on Human and Peoples Rights has developed a framework that, upon the fulfillment of certain conditions, independence would be recognized as a legitimate option.

The implications on the granting of the South Sudan's independence establishes that respect for the territorial integrity of African States and the principle of *uti possidentis* is no longer absolute and unconditional. Rather, where circumstances are of such a nature that the quest for self-determination by a section of a state's population can only be ratified by a redefinition of colonially drawn borders, the application of these principles will for the purpose of the law be suspended. The evolution in Africa's regional law as well as the support of African States for the independence of South Sudan is also a manifestation of the normative shift from the

concept of state security. This gives premium to sovereignty, territorial integrity and non-intervention. It further guarantees the right of the AU to suspend the principle of non-intervention and intervene in a member state in grave circumstances such as the commission of war crimes, genocide and crimes against humanity.

The significance of this development is that it makes self-determination a pre-requisite for the legitimacy of a state and its claim to respect for its sovereignty and territorial integrity. It further sends a warning to African States that respect for their sovereignty and territorial integrity is not absolute. This is subject to their ability to demonstrate against a claim for independence that they provide for the fulfillment of the right to self-determination through a government that is representative of all sections of the society.

3.3 The Processes Leading to the Exercise of the Right to Self-Determination for South Sudan

The processes leading to the exercise of the right to self-determination for the people of South Sudan was a long and difficult one which spanned over a decade. The people of South Sudan first raised this issue during the preparation for the roundtable conference in 1965. During the conference, some of the Southern leaders made it an agenda for the conference but it was turned down by the Northern parties. The SPLM/A stated clearly in its manifesto in 1983, that it was fighting for a secular democratic united state, the new Sudan. The quest for self-determination came up in the list of their demands in 1991. [139] What prompted this change in strategy by the

10. The Rise and Evolution of the SPLM, SPLM Today.com Accessed at http://www.SPLM today.com/index. php/about/what-is-the-splm (last visited 28 February, 2016.)

SPLM/A was the fall of the autocratic regime of Mr Mengistu Haile – Mariam in Ethiopia in 1991. Principally, after the attack on the Bor Garrison by the Sudanese Army in May 1983, Colonel John Garang retreated to the border area with Ethiopia and established his military base there. [140] Mr Mengistu Haile – Mariam welcomed the SPLM/A in Ethiopia and provided them with massive military and logistic support thus becoming their closest ally. At this same period Mr Mengistu Haile–Mariam was fighting a similar war and facing similar demands for separation by the Eritreans. [141] However, the fall of the regime of Mr Mengistu Haile – Mariam in May, 1991 paved the way for the SPLM/A to raise four months later in the Torit meeting, the issue of self-determination, including secession.

The SPLM/A was influenced by the success of Eritrea which was then about to gain independence from Ethiopia in 1991. The SPLM/A's path to self-determination was fraught with legal and political challenges. One of such hurdle was the resolution of the Organization of Africa Unity (OAU) now African Union (AU) which mandated that the borders between African states inherited from the colonial era was sacrosanct. [142] The OAU declared that all member states pledge themselves to respect the frontiers existing on their achievement of national independence. [143] In essence, the resolution reconfirmed the principle of stability of borders. The OAU resolution made it clear that secessionist movements would not be recognized. For instance, the quest

11. Paanluel ,W., (2012) *Timeline South Sudan- The Evolutionary Phases of South Sudan's Liberation Struggle*. Torit Press p.*66*
12. John, G., (2012) *The Fate of Sudan: The Origins and Consequences of a Flawed Peace Process,* Zed books, London pp.45 -46.
13. Lydia ,P., (2012) *For Rebels in Mali, Odds of Establishing a Nation are Slim*. New York Times p.22
14. Resolution on the Intangibility of Frontiers, 1st session, 17 – 21 July, 1964. OAU Res. At 16 (1).

by Biafra to break away from Nigeria and to become an independent nation in the 1960s was resisted by Nigeria. Almost all the African states declined the recognition of Biafra as a state. Eritrea was the only country before South Sudan to break away from their host country in post-colonial Africa. This was the strategic route the SPLM/A decided to take after broken promises and dishonored agreements.

3.3.1 The Acceptance of the Right to Self-Determination by the Government of Sudan

In January, 1992, the Government of Sudan represented by Mr Ali Al-Haj, a leading member of the National Islamic Front Party (NIF) met with representatives of the Southern Sudan in Frankfurt, Germany. The Frankfurt meeting took place from 23 – 25 January, 1992. The two parties concluded the Frankfurt Agreement also referred to as the Frankfurt Declaration. The declaration consists of four paragraphs. The first paragraph stated that there would be a transitional period to be agreed upon during which Southern Sudan shall enjoy a special constitutional and political status within the United Sudan. [144] At the expiration of the period, the people of the South shall exercise their right to freely choose the political and constitutional status that accord with their national aspiration, without ruling out any option. [145]

The second paragraph consisted of the agreement of the two parties to establish constitutional and legal rules for resolving differences through the political and constitutional institutions. The remaining paragraph dealt with agreement of the parties for continuation of the negotiations in Abuja, Nigeria at a time to be

15. Garang. J.,(1992) *The Call for Democracy in Sudan,* Mansour, Khalid press, pp.85 – 100.
16. Al-TAHIR, H. ET-AL (2011) *My Journey with the SPLM,* Septugass press p.292.

determined by the parties. The negotiations would be preceded by a ceasefire and would address the system of government during the transitional period, sharing of power and wealth, as well as security arrangements, and the return and resettlement of refugees. [146] The Frankfurt Agreement was a milestone in the actualization of the South Sudanese dream of statehood. It was the first time ever that any Northern Political Party or government in Khartoum recognized the right of self-determination for the people of South Sudan. The fact that no option was excluded simply meant that the Frankfurt Agreement recognized the rights of the Southern Sudanese to self-determination with all options including secession.

The Frankfurt Agreement meant that the psychological and political barriers against self-determination for the South had finally been broken. The decade of the 1990s was therefore viewed as a period when the right to self-determination for Southern Sudan received wide acceptance and recognition by the Sudanese government , the opposition parties, trade unions, as well as the neighbours of the Sudan and the United States. The right to self-determination proved to be a unifying element for the splinter group within the SPLM. In an attempt to re unite those groups, the United States administration called for a meeting in Washington, DC in October, 1993. The meeting was attended by the SPLM, led by Mr John Garrang, the splinter group of the SPLM, led by Mr Reik Machar and Mr Lam Akol; and representatives of the Northern opposition groups under the umbrella of the National Democratic Alliance. At the end, the two SPLM groups failed to agree on a joint declaration to be

17. Stephen, N., (2000) *The Sudanese Peace Initiative*. Mirghani press, Juba p.40.

issued on their reunification. However, each of them signed a separate statement that included a reference to the right of self-determination for Southern Sudan as a means of ending the conflict in the Sudan. [147]

The SPLM and its splinter groups had a common objective dwelling on their right to self-determination. This singular pursuit reunited the main body and the splinter groups. Thus, by 1993, they all had one and the same goal; resolution of the North – South conflict through self-determination for the Southern Sudanese with the option of secession. The SPLM decided to give the demand for self-determination its full legal, constitutional, and political cover. It called for a national conference of the SPLM, which was held within the first week of April, 1994 in Shagdom in East Equatorial State of South Sudan. The conference endorsed the right of self-determination for the three provinces of Southern Sudan, in addition to the Abyei area, South Kodofan, and the Blue Nile State in the North. [148] The conference went beyond the decision of the Torit meeting in September, 1991 which limited the demand for the right of self-determination to Southern Sudan with its borders as they stood on independence on January, 1956.

Building on the Frankfurt agreement and the Washington statements, the Inter-Governmental Organization (IGAD) countries [149] which were then involved in the South Sudan problem following the failure of the Abuja meetings held series of meetings between the parties in March and May, 1994. A draft Declaration of

18. Garang, J., Nyuot, Y., (2004) *Peace Initiative in Sudan and Lessons Learned*, Kalio press p.379.
19. Fathi, A., (2006) *Sudan, the Fall of the Masks* Dweudhi press p.541.
20. IGAD is an inter-governmental organization consisting of Kenya, Uganda, Djibouti, Somalia, Ethiopia and the Sudan, Eritrea joined in 1993 after it emerged an independent nation.

Principles on the conflict in Sudan was produced afterwards. The draft was completed in Nairobi; Kenya on 20 July, 1994 and presented to the government of Sudan and the SPLM. [150] The IGAD Declaration stated that the right of self-determination of the people of South Sudan to determine their future status through a referendum must be affirmed. [151] The government of Sudan formally rejected the IGAD Declaration in September, 1994. However, in 1997, the government of Sudan affirmed that the Declaration would form the basis for negotiation with the SPLM. [152]

The emerging development and the momentum accorded the Southern Sudanese right to self-determination was well applauded by the United States administration. Thus, on 4 August, 1994, the United States House of Representatives issued a resolution condemning Sudan for its support for international terrorism and also recognized the right of self-determination for South Sudan. [153]

3.3.2 The Role of Northern Opposition Parties to the Demand for Self-Determination for South Sudan

The outcome of the Frankfurt Conference of 1992 led to a change of heart by the government of Sudan. The government of Sudan at this stage agreed to accede to the request of the right to self-determination by the people of South Sudan. Thereafter, following the issue of Declaration by IGAD in 1994 on self-determination, the SPLM commenced intensive lobbying to persuade the Sudanese political parties to endorse this demand. The Democratic Unionist Party (DUP) was the first Northern Sudanese

21. Alex, D.W., (2006) *Peace by Piece, Addressing Sudan's Conflict*, Acoab Publishers pp. 78 – 81.
22. For the IGAD Declaration of principles on the conflict in the Sudan, see the 1993 Abuja 2 Sudanese Peace Conference 20 May, 1994.
23. Alex, D.W., (2006) *Peace by Piece, Addressing Sudan's Conflict*, Acoab Publishers pp.78 – 81.
24. See House Approves Measures Against Sudan, REUTERS (4 August, 1994). See also Angela ML (1994) *The Southern Sudan, A Compelling Case Secession*, Transitional press, p.419.

party to recognize the right of self-determination for Southern Sudan. This was primarily owing to the close ties between Mr Garang and Mr Al- Mirghani. The two leaders met in Addis-Ababa in November, 1988 and concluded the Sudan peace initiative. Recognition of the right of self-determination for the South was the highlight of the Cairo Agreement concluded by the DUP. At the negotiations, the DUP was represented by Mr Ahmed Al-Sayyed Hamad while the SPLM was represented by Mr Yosif Kuwa Mekki at the meeting in Cairo on 13 July, 1994.

The agreement recognized the sovereign entity and unity of the Sudan with some principles recommended for inclusion in the Sudanese constitution. The agreement went on to state in Article 6 that if a violation of any of the principles agreed upon during the constitutional conference occurred, the aggrieved party would have the right of self-determination through a referendum and the result would be binding on the parties. The Cairo Agreement also endorsed the IGAD Declaration of Principles, an implied but obvious reference to the right of self-determination for Sudan, which was the main element of the Declaration. With this agreement, the DUP became the first Sudanese political party to recognize the right of self-determination for South Sudan. Although the right of self-determination was qualified, the Cairo Agreement was a major breakthrough for the SPLM and was the equivalent of the Frankfurt Agreement. This also represented a major threshold in the history of the North-South relations.

Five months after the Cairo Agreement, the Umma Party represented by Mr Omar Nour Al-Daiem, the Secretary General of the party, signed an agreement with

the SPLM represented by Mr Salva Kiir, in Shagdom, South Sudan on 12 December, 1994. The Agreement laid down detailed procedures for the exercise of the right to self-determination. [154] This was another major breakthrough for the SPLM. With the agreement, the SPLM had the approval of the two largest political parties in the Sudan for the right of self-determination for Southern Sudan. Immediately after that agreement, the SPLM moved swiftly to get the grouping of the Sudanese opposition political parties and trade unions in its quest for the right to self-determination. This was later organized under the umbrella of the National Democratic Alliance (NDA) which took place in Asmara, Eritrea from 15 – 23 June, 1995. This resulted in the Asmara Declaration. [155] The Asmara Declaration addressed and endorsed the right of self- determination for the people of South Sudan as a basic democratic and human right to be exercised after a transitional period. The options for the people of Southern Sudan were unity (federal or co federal) or secession.

As part of efforts to provide an all inclusive resolutions and to address the Sudan crisis, the Asmara Declaration was all encompassing. The people of Abyei area were also to decide through a referendum to be held during the transitional period, whether they wanted to remain within the geographical boundaries of the Kordofan province in the North, or to become part of the Bahr Al-Ghazal province in the South. Thus if they decide to be part of the Bahr Al-Ghazal province, then they would participate in the self-determination referendum of the South. The Asmara Declaration was signed by all the NDA political opposition parties and representatives of the trade

25. Silva, K., (2012) *From the Jungle to the Palace*, Sudan, Vision press. p.15
26. Alex, D.W., et al (2006) *Peace by Piece*, Addressing Sudan's Conflicts, Sudan, Accord Press, pp.78 - 81

unions in exile, as well as the SPLM /A[156]. The outcome of the Asmara meeting was a major achievement for the SPLM. It sealed the right of self-determination among the opposition parties by giving it a solid legal and political foundation. The Asmara meeting elected Mr. Mohammed Osman Al-Mirghani as the Chairman of the NDA, Dr. John Garang as Deputy Chairman and Mr. Mubarak Al-Fadil Al-Mahdi of the UMMA party as the Secretary-General. This was clearly an attempt to underscore the unity of the opposition groups, and by implication of the Sudan.

3.3.3 Reconfirmation by the Government of Sudan of the Right to Self-Determination for South Sudan

The SPLM had, by 1995, crossed a major threshold in its diplomatic campaign to win the right of self-determination for the people of Southern Sudan. However, they needed the support of the Government of the Sudan in its campaign. On 21 April, 1997, the National Islamic Front (NIF) government of the Sudan concluded an agreement with a number of Southern groups known as the Khartoum Peace Agreement. This peace agreement reconfirmed the right of self-determination for Southern Sudan provided in the Frankfurt Agreement and to be exercised through a referendum. The Khartoum Peace Agreement paved the way for a yet another agreement called the Political Charter for Peace. The Charter was signed in Khartoum on 10 April, 1996 by a number of Southern parties and groups. The Charter included a reference to the right of self-determination for the people of South Sudan to be exercised after a transitional period to be agreed upon by the parties.

27. Accessed at http:// www. Umma.org last visited on 28 March, 2015.

In furtherance of the government of Sudan's recognition of the right to self-determination by the people of South Sudan, the Constitution of the Republic of Sudan, issued by the NIF Government on 1 July, 1998, included a reference in Article 139 (9) to the right to self determination for South Sudan[157]. Article 139 (9) indicated that Southern Sudan has a transitional system of federal government which would expire by the exercise of the right of self-determination[158]. By 1999, the SPLM had amassed a large number of agreements with both the government and the opposition parties recognizing the right of self-determination for Southern Sudan. These agreements included the Frankfurt Agreement of 1992, the IGAD Declaration of Principles of 1994, the U.S. House of Representatives Resolution of 1994 and the Cairo Agreement of 1994. Others are the Shagdom Agreement of 1994, the Asmara Declaration of 1995, the Political Charter of 1996, the Khartoum Peace Agreement of 1997 and the Sudan Constitution of 1998. These agreements facilitated the task of the SPLM negotiating team in Naivasha which paved the way for the conclusion of the Machakos Protocol on 20 July, 2002. The Machakos Protocol was the flagship of the Comprehensive Peace Agreement (CPA) which provided for the right of self-determination for the people of South Sudan with the option for secession. [159] The Sudanese opposition parties of the NDA endorsed the Machakos Protocol granting the South the right of self-determination in its council meeting held in Asmara on 7 August, 2002.

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28. See. The Constitution of the Republic of the Sudan 1998, accessed at http: //www. Sudan embassy.ca/Docs/the % constitution% of % the % Republic % Sudan % 1998 pdf.
29. This constitution was replaced by the 2005 Interim Constitution.
30. Sudan Government Concludes with the SPLM "Machakos Protocol" and Issues a Joint Communique (20/July/2012) accessed at http://south Sudan friends.org/news/machkols.html.

3.4 Agreements and Protocols under the Comprehensive Peace Agreement

In June 2002, the SPLM (A) and the Government of Sudan (GOS) began negotiations to end Sudan's second civil war. Those negotiations culminated in the signing of the Comprehensive Peace Agreement (CPA) on 9 January, 2005. The CPA itself comprised six protocols concluded between 2002 and 2005. These six protocols provided among other things, the following:

a. A six year interim period, at the end of which the people of Southern Sudan were given the right to vote in a self-determination referendum to decide whether to remain united with the Sudan or to secede;

b. A cessation of hostilities between the SPLM and SAF and the maintenance of SPLA forces in the South and SAF forces in the North.

c. The establishment of a secular, semi-autonomous Southern Sudan with its own executive, legislative and judicial institutions;

d. Power sharing arrangements between Sudan's two major political parties, the SPLM and NCP as well as smaller parties, at the national and Southern Sudan's levels of governments;

e. Wealth sharing arrangements whereby, among other things, profits from oil extracted in Southern Sudan were split equally between the national and Southern Sudan levels of government;

f. Democratic elections to occur during the interim period; and;

g. The establishment of a special administrative status for the disputed Abyei area, as well as referendum for the "residents" of Abyei to be carried out at the same time as the Southern Sudan referendum.

The CPA's main provisions were reflected in the Interim National Constitution of the Republic of the Sudan which was adopted on 6 July, 2005. The text of the CPA was lodged with the United Nations in order to strengthen the legal and political foundations of the CPA. [160] The most vital of these agreements was the Machakos Protocol, concluded on 20 July, 2002. The preamble underscored the need to redress the historical injustices and inequalities in development between the different regions of the Sudan. It further confirmed the desire of the two parties to resolve the Sudan conflict in a just and sustainable manner by addressing the root causes of the conflict and by establishing a framework for governance through which power and wealth could be equitably shared and human rights guaranteed. The preamble noted that the rejuvenated IGAD Peace process and the IGAD Declaration of Principles provided the means to resolve the conflict and reach a just and sustainable peace for the benefit of all the people of Sudan. Thus, the last recital of the preamble to the Machakos Protocol had clearly set the scene for the right of self-determination because that right was the highlight of the IGAD Declaration. The protocol stated in paragraph 1. (1) thus;

> That the unity of the Sudan, based on the free will of its people, democratic governance, accountability, equality, respect, and justice for all citizens of the Sudan is and shall be the priority of the parties and that

31. The lodgment of the CPA with the UN was in compliance with Article 102 of the UN Charter which requires all international agreements entered into by any member state to be lodged with the world body.

> it is possible to redress the grievances of the people of South Sudan and to meet their aspiration within such a framework.

The underlying basis for the Machakos agreement was to lay in detail contending issues for determination that would end the Sudan's civil war and further provide the groundwork for resolution of disputes and interests as it relates to the regions in the Sudan. Accordingly, Paragraph 1.3 of the Agreement provided for the right to self-determination for the people of South Sudan, through a referendum to determine their future status. Specifically, Paragraph 2.5 provided that at the end of the interim period, there shall be an internationally-monitored referendum organized jointly by the government of Sudan and the SPLM/A for the people of South Sudan to confirm the unity of the Sudan by voting to adopt the system or to vote for secession.

The Machakos protocol also dealt with state and religion. It recognized that Sudan is a multi-cultural, multi-racial, multi-religious and multi-lingual country and confirmed that religion would not be used as a divisive factor. It also stated that the religions, customs and beliefs are a source of strength and inspiration for the Sudanese people, and confirmed the freedom of belief, worship and conscience for followers of all religions or beliefs or customs. However, the protocol allows Northern Sudan to continue with Sharia Law. It further stated that nationally-enacted legislation having effect only in respect of the states outside Southern Sudan would have as its Source of legislation Sharia and the consensus of the people. Although, the SPLM had insisted in the past on the total abrogation of the September Laws, it finally agreed in 2002 to exclude the South from the Sharia Laws, while its application continues in the North. This clearly marked the end of a new secular unified Sudan called for

under the SPLM manifesto of July 1983. Henceforth, the Northerners opposed to the Sharia laws would have to fight their case themselves. The principle of a united new secular Sudan was no longer on the agenda of the SPLM.

The protocol proscribed discrimination against anyone on the basis of religion. Similarly, eligibility for public office, including the presidency and public service would be based on citizenship as opposed to religion or beliefs. All personal and family matters including marriage, divorce, inheritance, succession and affiliations would be governed by personal laws (sharia, religious laws, custom or traditions) of those concerned. [161] Thus the Machakos protocol concentrated on the two issues of self-determination and state religion. The protocol included two diametrically contradictory features; the aspiration for unity of the Sudan and the right of the Southern Sudanese to self-determination with the option of secession. These issues dominated the discussion within the entire interim six years period before it finally led to the secession of the South Sudan. The Agreement on security was concluded on 25 September, 2003. [162] It provided for an internationally monitored ceasefire to enter into effect upon the signing of the CPA. It also provided for the continued existence of two separate and equal armed forces during the interim period, the Sudanese Armed Forces and the SPLM, along with a number of joint integrated units incorporating members from both forces.

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32. This paragraph of the protocol gave the SPLM the right to reverse the decision taken in 1960 during Abbouds regime which imposed Friday as the day of rest in the South instead of Sunday.

33. Government of the Republic of the Sudan and the SPLM/A Agreement on permanent casefile and security agreement implementation modalities during the Pre-Interim and Interim periods Between the Government of the Sudan and the SPLM/A (31, December, 2004) Accessed at http:// relief. Int/report/Sudan/agreement-permanent casefile – and – security – arrangement – implementation modalities

The agreement on wealth sharing was concluded on 7 January, 2004. It addressed land and natural resources, including oil. [163] It provided for the establishment of a National Land Commission, a Southern Sudan Land Commission, a National Petroleum Commission, a Fiscal and Financial Allocation and Monitoring Commission, and Oil Revenue Stabilization Account. It further set out guiding principles for sharing oil and non-oil revenues, and dealt with monetary policy, banking, currency, borrowing and the establishment and operation of multi-donor trust funds. The wealth sharing agreement of multi-donor trust revenue from the oil in Southern Sudan would be divided equally between the national government and the government of South Sudan, after deduction of a certain amount for the oil revenue stabilization account and two percent for each of the oil-producing states or regions.[164] This provision was resented by most southerners as unfairly giving half of their oil revenue to the North at a time when huge funds were needed to start the process of rebuilding the South.

The agreement on power sharing was concluded on 26 May, 2004. [165] It set forth principles of governance and human rights and fundamental freedoms. Enumerated freedoms included freedom of thought conscience and religion, expression, assembly, and association. It called for a decentralized system of government with significant devolution of power to Southern Sudan, the states, and local governments and described the structure and institutions of the national, Southern Sudan and state governments.

34. Agreement on wealth sharing during the pre-interim and interim period. Art 5.3 SPLM/A 7 January, 2004
35. Ibid
36. Protocol on Power Sharing, Sudan – SPLM/A 26 May, 2004.

The protocol on the resolution of the conflict in the two states of Southern Kordofan and Blue Nile was also concluded on 26 May, 2004. [166] It dealt with those two states that are geographically part of Northern Sudan, but inhabited by people who identify culturally and ethnically with Southern Sudan. It called for the diverse cultures and languages of the people in these states to be developed and protected. It underscored the need for the development of the two states with special structures set up to achieve this objective. It also stipulated carrying out popular consultation for ascertaining the degree of achievement of these objectives. These two areas were engulfed in war with Khartoum prior to the secession of Southern Sudan on 9 July, 2011. As earlier discussed, the Asmara Declaration addressed those two areas and proposed a similar approach.

The protocol on the resolution of the Abyei conflict, also known as the Abyei Protocol was the third agreement concluded on 26 May 2004 and the sixth and last agreement under the CPA. [167] There were several issues relating to the negotiation on Abyei. The parties were deadlocked on the definition and size of the Abyei area, each sticking to its position. The dispute was further exacerbated by the competing claims of the Ngok Dinka, a Southern Sudanese tribe, and the Misseriya, a Northern Sudanese tribe, over the Abyei area. The Americans who were actually involved in the peace negotiation at that time stepped in attempting to break the deadlock over Abyei. The then US Special Envoy to the Sudan, Senator John Danforth presented in March 2004 certain proposals to the two parties, including a definition of the area, a

37. The Comprehensive Peace Agreement CH.V Sudan – SPLM/A 26 May,2004
38. Protocol on the Resolution of the Abyei Conflict, Sudan – SPLM/A, 26 May, 2004

process for delimiting it, and resolution of the dispute. Those proposals were accepted by the two parties and became the basis for the Abyei Protocol. [168]

The protocol defined Abyei as the area that was transferred from Southern Sudan to the North during the colonial era in 1995. [169] The protocol established the Abyei Boundaries Commission (ABC), for defining the boundaries of the area. Once the Abyei area was defined, a referendum would be carried out simultaneously with the Southern Sudan referendum to determine the Abyei areas future. [170] The choices under the referendum were whether the Abyei area would continue as part of the North in a special administrative status, or whether it would revert to the South.[171]The issue of Abyei was dealt with in the Addis Ababa Agreement in 1972. However, nothing was done during the Nimeiri era to resolve the dispute. The Abyei referendum did not take place as planned on 9 January, 2011. The resolution of the Abyei dispute remains one of the thorniest issues in the relationship between Sudan and the Republic of South Sudan. On 6 July, 2005, the Interim National Constitution of the Republic of the Sudan was accepted, incorporating the basic provisions of the CPA.[172]

Mr John Garang returned to Khartoum on 9 July, 2005 to an unprecedented hero's welcome by a huge crowd numbering millions. He was sworn in as the first Vice President of the Republic of Sudan, the highest political office ever to be held by a Southern Sudanese. He was also sworn in as the President of the Government of

39. The parties declared to adopt these principles as the basis for the resolution of the Abyei conflict.
40. The Abyei Protocol Alt, 1.1.2.
41. Ibid
42. Ibid
43. Article 225 of the Interim Constitution provided clearly to the comprehensiveness and authority of the CPA and came very close to recognizing the supremacy of the CPA over the Interim Constitution.

Southern Sudan while maintaining his position as the Chairman of the SPLM/A. This was a defining moment in the history of the Sudan. A new chapter of the Sudan started same day with the commencement of the interim period. Ironically and sadly too, it turned out to be the final chapter of the United Sudan.

3.5 The Holding of the 2011 Referendum and the Independence of South Sudan

The CPA and the Interim Constitution provided for the interim period to commence on 6 July, 2005 within the period Mr John Garang was sworn in as the First Vice President on 9 July, 2005. However, three weeks into the interim period, Mr Garang was killed in a plane crash on 30 July, 2005 while returning to the South from Kampala on an Ugandan Presidential Jet. Riots broke out and Khartoum was engulfed in a major disturbance. [173] Following the death of Mr Garang, Mr Salva Kiir took over as the new Chairman of the SPLM, First Vice President of the Sudan and President of the Government of Southern Sudan. The death of Mr Garang swiftly marked a sharp departure from the commitment of the unity of the Sudan. The unfolding events pointed to secession as was demonstrated by the leadership of the SPLM after Mr Garang's death. The first Vice President spent most of his time in Juba. He was rarely in Khartoum. He equally did not visit the North during the interim period including Darfur. He openly indicated on several occasions that he preferred to be referred to as president of the government of South Sudan. [174]

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44. Mabior, A.K., (2007) *Death of John: Huge Controversial and Worse Scenario of the Year*. Scope Khartoum press, p.44

45. Gabriel, PA., (2012) *The President of South Sudan, Silva Kiir, Must Resign*, , Aguly press, Khartoum p.15.

The inevitable consequence of the approach of the new leader was a resort to the CPA which ultimately led to the referendum and eventual independence of South Sudan from the Sudan. The referendum for Southern self-determination was the foundation and the culmination of the Comprehensive Peace Agreement signed in Naivasha, Kenya, in 2005 between the Government of Sudan and the SPLM. Its purpose was to provide a democratic avenue for southerners to express their right to self-determination. It was framed as a tool that could help resolve a conflict that had defined Sudan since before formal independence in 1956. The international community was committed to supporting a peaceful, transparent, and credible referendum process that met Sudan's legal commitments and international obligations and represented the genuine expression of the will of Southern Sudanese. The Southern Sudan referendum was assessed against the 2005 CPA, the Interim National Constitution (INC), and the Interim Constitution of Southern Sudan, the Southern Sudan Referendum Act (SSRA) as well as other national laws. Other areas are, the Sudan's International Treaty Obligations including the African Charter on Human and Peoples Rights, and the International Covenant on Civil and Political Rights (ICCPR).

Sudan Interim Constitution incorporates the CPA as the cornerstone of Sudan's interim government and calls for referendum to be held in accordance with the provisions of the CPA. [175] In 2009, pursuant to the CPA, the National Assembly passed the Southern Sudan Referendum Act which established the guidelines for the administration of the referendum. In addition, Sudan acceded to and ratified

46. Interim National Constitution for the Republic of the Sudan, Act, 224 – 226 (2) (2005).

international treaties and incorporated internationally recognized obligations into its Constitutional Bill of Rights. In doing so, the GOS committed itself to the protection of political and human rights essential to the conduct of a democratic referendum. [176]

In accordance with the Referendum Act, the referendum requires that at least 60 percent of registered voters cast their votes for the referendum to be considered valid.[177] Where the turn out did not reach the required threshold, the referendum was to be repeated within 60 days of the final vote declaration. [178] A simple majority of 50 percent plus one of the total votes was necessary for either unity or secession to be certified as the expression of the will of the Southern Sudanese people. [179] The CPA and INC called for the referendum to be internationally monitored. The Referendum Act further asserted the need for international observation of the process. [180] The Referendum Act granted observers the right to observe all referendum processes, including voter registration, polling and aggregation and declaration of the results. In recognition of the widespread displacement that accompanied the conflict in Southern Sudan, the Referendum Act provided for voting in Southern Sudan, Northern Sudan, and eight out – of – country (OCV) locations.

The enfranchisement of voters outside of the territory of Southern Sudan was intended to ensure the broadest possible pool of voters. The referendum was managed by the Southern Sudan Referendum Commission (SSRC), an independent

47. See Article 25 of the International Covenant on Civil and Political Rights (ICCPR)
48. Southern Sudan Referendum Act, Art, 41 (2)
49. Ibid Art, 41 (2).
50. Ibid Art, 41 (3)
51. Ibid Art, 5, 7, (d)

governmental body based in Khartoum to oversee the Southern Sudan referendum. [181] The body was responsible for the overall administration of the referendum, including the promulgation of the referendum regulations, organization of voter registration, polling, and the final declaration of results. Furthermore, the Southern Sudan Referendum Bureau (SSRB) was established as a subsidiary of SSRC. [182] It was based in Juba with the task of managing referendum operations in Southern Sudan. The SSRB was responsible for overseeing the work of the referendum authorities in Southern Sudan and arranging all logistic equipment necessary to carry out the referendum. Both the SSRC and the SSRB worked in tandem to ensure a successful referendum process.

The voter registration process was conducted between 15 November, to 8 December, 2010. The registration process was adjudged by the Carter Center as generally credible and establishing a strong foundation for the conduct of a successful referendum. The Carter Center also reported that the Sudanese security forces provided adequate security during voter registration and played a positive role in the process by refraining from interference in the registration process. Voter's education and campaign commenced immediately after the voter registration. The campaign conducted by the political parties in Northern Sudan was in support of unity while almost all the campaigning in Southern Sudan was in support of secession. The preparation for the polling began in earnest towards the end of the voter's registration.

52. The SSRC comprised nine members, a chair person, deputy and seven members. Five of the members are from Southern Sudan

53. The SSRB comprised of five members. The SSRC,s deputy chairperson also chairs the SSRB.The SSRC on the recommendation of the SSRB chairperson appoints the SSRB,s others members.

The United Nations Integrated Referendum and Election Division (UNIRED) and the United Nations Development Program (UNDP) provided technical aid to the SSRC. The polling was conducted between 9 – 15 January, 2011.

The voter turnout for Southern Sudan exceeded 90 percent of registered voters while in the North it recorded more than 50 percent turnout. The counting of the ballots as well as the tabulation processes was done by the SSRC and the SSRB. The final results showed that 97.58 percent of registered voters participated in the referendum. Consequently, 98.83 percent voted for separation overwhelmingly confirming the will of the Southern Sudanese people to form an independent state. [183] As mandated by the CPA, the state of South Sudan was formed on 9 July, 2011. The creation of the state of South Sudan presents several issues in Africa as well as international law on self-determination.

3.6 The Implications of South Sudan's Independence on The Literature of African Legal System

The legal significance of the independence of South Sudan lies in the fact that it adds to other legal and political developments in Africa. Together, these suggest that there may be a relaxation of the firmly held view in Africa that colonial borders are non-negotiable. In the case of South Sudan, this relaxation was first affirmed by other African states when they supported the Declaration of Principles on 20 July, 1994. They helped establish a process for the achievement of self- determination by South Sudan within a framework that was laid down in the 2005 Comprehensive Peace Agreement (CPA). The 1994 principles firmly established the fact that the people of

54. This included 3, 792,518 votes for separation out of 3, 837, 406 valid votes cast.

Southern Sudan had the right to self-determination, provided a referendum was held to determine whether the majority of Southern Sudanese were in favour of becoming independent of the Sudan.

The jurisprudence of the African Commission on Human and Peoples Rights has developed a framework that, upon the fulfillment of certain conditions, recognizes independence as a legally legitimate option. It is apparent that Southern Sudan suffered serious injustices at the hands of the successive Sudanese governments. Following this, its people were forced to raise arms in their own defence. Consequently the region negotiated the CPA of 2005 and thereafter entered into a transitional arrangement with the North to give unity a chance. It thus became the first test case of implementing evolving African Law vis-à-vis self-determination and the principle of territorial integrity.

The case of South Sudan clearly established that respect for the territorial integrity of African States and the principle of *uti possidentis* is no longer absolute and unconditional. The point therefore is, where circumstances are of such a nature that the quest for self-determination by a section of a state's population can only be rectified by a redefinition of colonially drawn borders, the application of these principles will for the purposes of the law be suspended. This evolution in African regional law, as well as the support of African States for the independence of South Sudan, is also a manifestation of the normative shift from the concept of state security. This gives premium to sovereignty, territorial integrity and non- intervention, to human security which is under the constitutive act of the AU. This guarantees the

right of the AU to suspend the principles of non-intervention and intervene in a member state in grave circumstances such as the commission of war crimes, genocide and crimes against humanity.

The significance of this development is that it makes self-determination a pre-requisite for the legitimacy of a state and its claim to respect for its sovereignty and territorial integrity. This sends a warning to African States that respect for their sovereignty and territorial integrity is not absolute. This is subject to their ability to demonstrate against a claim for secession that they provide for the fulfillment of the right to self-determination through a government that is representative of all sections of the society. It could therefore be summed up that African regional law recognizes that the principle of territorial integrity of states is not absolute. The case of South Sudan is illustrative of this recognition on the part of African States and potentially offers the first test case for applying these normative developments in practice. This applies to both internal and external self-determination.

CHAPTER FOUR

LEGAL IMPLICATIONS OF THE EMERGING POST INDEPENDENCE ISSUES BETWEEN THE REPUBLIC OF SUDAN AND SOUTH SUDAN

4.1 Introduction

Self – determination through secession and the creation of a new state is not an end in itself. The sustained achievement of set goals inherent in statehood requires the state to maintain peace and security which is the hallmark and main attribute of a state. The Comprehensive Peace Agreement (CPA) which ushered in the machinery for the secession of South Sudan from the Sudan left unresolved key issues which might endanger the full peace process between the two neighbours. In particular, the unresolved issues over citizenship, Abyei, borders and the sharing of resources (Oil revenues and Nile waters) presents grave dangers over which confrontation could ensue. Furthermore, the Nile waters potentially expose South Sudan to risks of conflicts with other regional actors, including Egypt.

The main protagonists in the referendum from both the National Congress Party (NCP) and Sudan People's Liberation Movement (SPLM) have not yet agreed on several post-referendum issues. Critical components of these negotiations cover citizenship, Abyei ,oil revenues, Nile water sharing and borders among others. Unless resolved, these outstanding issues will continue to cause tensions. It is therefore necessary for the sovereign states concerned to cooperate, build and maintain two economically viable states in order for political, economic and social development to

be sustained in the region. The researcher would therefore analyze these key issues as set out hereunder.

4.2 Nationality and Citizenship Rights

The secession of South Sudan from the Sudan has posed several legal challenges relating to the nationality and citizenship of individuals on both sides of the divide. Following the independence of South Sudan on 9 July, 2011 both states have passed new citizenship laws with serious implications for the protection of individuals. The new state of South Sudan has promulgated an entirely new Nationality Act [184] (NASS), while Sudan has introduced a number of significant amendments to the 1994 Sudanese Nationality Act [185] (SNA). The two laws combine to produce a substantially increased risk of both *de jure* and *de facto* statelessness. The researcher seeks to analyze the impact of these laws on individuals from both divides of the borders.

The Sudanese nationality regime makes aggressive provision for the automatic denationalization of individuals as they obtain the citizenship of South Sudan. [186] Provision for involuntary denationalization following acquisition of a foreign nationality is common among states that seek to avoid dual or multiple nationality. [187] However, this is normally done only in those cases where a person acquires foreign

1. The Nationality Act 2011 (South Sudan) (NASS).
2. Sudanese Nationality Act 1994 as amended by the Sudanese Nationality Act (Amendment) 2011 (Sudan) (SNA)
3. Article 10 (2) of the SNA
4. See the 1999 International Law Commission Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, vol II part II, Article 10, Commentary 1.
5. *A comprehensive list of such provision is provided in Maurice Kamto's Forth Report on the Expulsion of Aliens, International Law Commission, Sixteenth Session, 24 March, 2008. UN Doc A/CN. 4/594, 9 – 18.*
6. *Universal Declaration of Human Rights 1948 General Assembly Resolution 217 A (111), Art, 15 (2)*.
7. *UN Doc NO A/HRC/13/134, UN Doc A/34/46 Art 9.*
8. *Article 8 (2) (a) and 8 (2) (b) of the Statelessness Convention 1961*.

nationality on a voluntary basis or retains it following acquisition by automatic operation of laws. [188] Where an individual is denationalized in advance of their voluntary acquisition (or retention) of a foreign nationality, they will frequently be rendered as *de jure* stateless. If these measures are implemented in a manner that fails to appropriately balance the legitimate interests of the state and the individual, this will constitute a violation of the guarantee against arbitrary deprivation of nationality. This is reflected in Article 15 (2) of the Universal Declaration of Human Rights [189] which has now formed part of Customary International Law. [190]

In accordance with Article 8(2) and 8(2)(b) of the 1961 Statelessness Convention, deprivation resulting in statelessness is arbitrary, except when this is done in response to the most pressing needs of the state. [191] The UNHRC in their reply to the report of the UN Secretary General on the arbitrary deprivation of nationality stated thus;

> The avoidance of statelessness is a general principle of international law. Deprivation of nationality resulting in statelessness will generally be arbitrary unless it serves a legitimate purpose and complies with the principle of proportionality. Thus, Article 8 of the Convention on the Reduction of Statelessness allows for a limited set of circumstances under which deprivation of nationality resulting in statelessness is permissible, but as exceptions to a general principle, they must be narrowly construed. [192]

There is, however, considerable state practice supporting the involuntary substitution of nationality in the context of state succession. [193] Hudson (1952) states thus;

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9. Report of the UN Secretary General, para p. 51.

10. UN Doc No A/CN.4/50

> If the effects of the session on the nationality of the inhabitants of the ceded territory are regulated by treaty, such treaties usually provide that the nationality of the predecessor state is lost by the conferment of nationality by the successor state. Where the transfer of territory and the conferment of nationality is in accordance with international law, the predecessor state is obliged to recognize it. Its sovereignty has been replaced by that of the successor state (……..). [194]

Habitual residence is the test most frequently used to assess the connection between the individual citizen and a successor state.[195] This test achieves two key goals. First, it ensures that individuals in receipt of citizenship have a genuine or effective link with the state in question. [196] Secondly, it ensures that in practice, the individuals who require citizenship of a state will actually be resident in that state. A vivid scrutiny of the approach adopted by the Sudan and South Sudan's nationality laws would now be scrutinized with a view to exposing inherent challenges and legal tests associated with self-determination and succession of states on the one hand and the citizenship of individuals on the other.

4.2.1 South Sudanese Approach

In contrast with widely accepted international practice, the NASS does not rely on habitual residence in South Sudan as a test for acquisition of its citizenship. The Act relies on connections with the indigenous ethnic communities [197] or individuals born [198] in South Sudan. The NASS does include a reference to 'domicile' which as used in the Act is synonymous with the concept of habitual residence. [199] However,

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11 Hudson, M.O. (1952) Report on Nationality Including Statelessness. Year Book on International Law Commission 1952 vol II para p. 10.

12 Patrick, O. (1967) State Succession in Municipal and International Law. Oxford, Clardon Press, p.518

13 Rezck, J.F. (1987) Le Droit *International de la Nationale, in Collected Courses of the Hague Academy of International Law. Martinis Nijihoff, vol 198, p.307.*

14. Article 8 (1) (b), South Sudanese Nationality Act. 2011.

15 Article 8 (1) (a) South Sudanese Nationality Act 2011

16 Ibid, Article 8 (2)

the application of this concept is limited to those individuals or, for those individuals claiming citizenship through an operative relative, their parent or grand-parent, 'domiciled in south Sudan continuously since 1 January, 1956.' [200]

The provision of the NASS has two key implications. Firstly, a wide range of individuals with familial and ethnic affinities to South Sudan will acquire South Sudanese citizenship *ex lege* without any guarantee that they will have a practical or effective link with the new state as might otherwise be established by their habitual residence. Secondly, there will continue to be a group of individuals that are actually habitually resident in South Sudan but cannot acquire citizenship due to their lack of relevant familial or ethnic connection. The resulting nationality regime is at once both over and under-inclusive.

The above situation is further aggravated by the absence of a general *jus soli* (citizenship based on the place of birth) right to citizenship for children born in South Sudan. Whereas Article 8 (4) of NASS contains a modified *jus soli* right, its application is restricted to children found in South Sudan as a deserted infant of unknown parents. [201] No provision is made for children who are born in South Sudan to parents who are themselves stateless or citizens of states that adhere strictly to the principle of *jus soli*, and so are unable to pass on their citizenship to children born abroad. [202] For those children born to stateless parents, this will mean that

17 *Holt, P.M., and Daly, M.W., (2011) A History of the Sudan: From the Coming of Islam to the Present Day. London, Longman, p.11.*

18. Article 8 (4) of the Nationality Act of South Sudan 2011

19. Article 1 (a) (4) Stateless Convention, 1961.

statelessness is passed on from generation to generation like a hereditary disease. [203]

Article 13 of the, ILC Draft Articles provides thus;

> A child of a person concerned, born after the date of the succession of states, who has not acquired any nationality, has the right to the nationality of the state concerned on whose territory that child was born.[204]

The ILC Draft Articles are otherwise limited to considering nationality solely in relation to the occurrence of a succession of states. [205] In this case the ILC recognized the need for an exception from the rigid definition for addressing also the problem of children born after the succession of states from parents whose nationality has not been determined. [206]

4.2.2 The Sudanese Approach

The impact of the South Sudanese citizenship provisions can only be properly understood when they are examined together with the denationalization provisions of the Sudanese Nationality Act (SNA). Article 10 (2) of the amended SNA provides that an individual will automatically lose his Sudanese nationality if he has acquired, *de jure* or *de facto*, the nationality of South Sudan. [207] The SNA incorporates the nationality provisions of the NASS as the basis for denationalization. The huge breadth of the South Sudanese nationality provisions makes the Sudanese denationalization provisions sweeping.

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20. Hudson, M.O. (1952) Report on Nationality Including Statelessness. Year Book of International Law Commission vol II.
21. Article 13 of the ILC Draft Articles (77)
22. Ibid, Article 13 Commentary 1.

23 Ibid Article 13 Commentary para 2
24. Article 10 (2) of the Sudanese Nationality Act as Amended 2011.

The researcher views these provisions of both laws as constitutive rather than constative. They operate *ex lege* without further intervening state action. As an individual falls within the scope of the criteria of the South Sudanese nationality, they are denationalized by operation of the Sudanese law. Any later determinations with respect to either the acquisition or loss of nationality are merely declarative. Official recognition does not make someone a national of South Sudan but declares them to be one. They do not become nationals because of their recognition by the authorities but are recognized by the authorities because they are nationals.

For individuals who are already resident in South Sudan who fall within the acquisition criteria of the NASS, the combined effect of these two laws provides an efficient mechanism for re – nationalization from Sudanese to South Sudanese citizenship. However, the South Sudanese acquisition criteria are sufficiently sweeping so as to include many individuals resident outside of South Sudan. It is commonly estimated that up to 500,000 individuals of South Sudanese origin remain resident in Sudan. [208] The combined effect of these laws is to nationalize these individuals to citizenship of a state where they are no longer (or, indeed, never were) resident and so leaving them without effective national protection in their actual place of residence. [209]

4.2.3. *De Jure* and *De Facto* Acquisition of Citizenship

The word *de facto* and *de jure* contained in Article 10(2) of the SNA as conditions for the acquisition of nationality is striking. It is tempting to attribute to

25. Refugees International, South Sudan Nationality. <http:// www. Refugees International.org. Accessed on 2 June, 2015.

26. *Bronwen, M. (2012) The Right to a Nationality and the Secession of South Sudan.< http: // www. Open Society. Org. Accessed on 2 June, 2015.*

them some role in determining the Sudanese denationalization provisions. The reference in the SNA is to the *de facto* acquisition of nationality, rather than the acquisition of *de facto* nationality. What must be established *de facto* for the operation of Article 10(2) is not actual state protection but the legal fact of acquisition.

On the other hand, due to the constitutive structure of Article 8 of the NASS, individuals acquire nationality as soon as they meet criteria in that Article. The legal fact of acquisition is both *de jure* and *de facto* without further or intervening administrative measures. The addition of *de facto* acquisition as a condition for denationalization adds nothing to ordinary legal (*de jure*) acquisition. Although, the Human Rights Watch has stated that "the fact that a person is eligible to be a citizen of South Sudan is not to say he or she has acquired South Sudanese citizenship." [210] This issue remains controversial as would be examined hereunder.

4.2.4 Resulting *De Jure* Statelessness

A close examination of the SNA and the NASS on nationality could result in legal challenges which would amount to statelessness. From the analysis of the constitutive nature of the provisions of the SNA, anyone denationalized by operation of the Sudanese law will necessarily have acquired citizenship of South Sudan. The denationalization procedures of the Sudanese law do not operate unless and until the individual acquires the nationality of South Sudan. Where the individual does not acquire South Sudanese citizenship, the Sudanese denationalization provisions do not apply. This appears to eliminate potential for resulting *de jure* statelessness.

27. Human Rights Watch, Sudan: Don't Strip Citizenship Arbitrarily, 2 March 2012 <http://www.hrw.org/navis> 2012. Accessed on 3 June, 2015.

Superficially, the acquisition of citizenship and subsequent denationalization appear to depend on shared criteria which basically revolve around the acquisition of South Sudanese citizenship. This preposition according to the researcher is misleading for two reasons. Firstly, this criteria is complex and depend upon the evaluation of civil evidence relating to family relationship, [211] ethnicity [212] and, in some cases, contineous residency in South Sudan. [213] Although the South Sudanese law appears comprehensive with respect to the grounds for the acquisition of citizenship, it provides no guidance as to the meaning of 'belonging' to an indigenous ethnic group. [214] However, some provision is made in the implementing regulations for the use of oral evidence where documentary evidence is unavailable; it is completely unclear what standards of admissibility or proof will apply in the course of such proceedings. [215] This is particularly important in the context of South Sudan where, in part, due to the recent history of civil disorder and resulting displacement, it can be expected that such documents would be unavailable to establish nationality claims under the NASS.

In theory, it does appear that the acquisition provisions are constitutive. In practice however they require confirmation by the state authorities if this is declarative in effect. In the present case, each state reserves to itself the right to determine the fact of acquisition. The criteria would however be different substantially. Any

28. Article 8 (1) (a), Nationality Act of South Sudan, 2011

29. Ibid. Article 8 (1) (b)

30. Ibid Article 8 (2)

31. Mike, S., (2014) *Statelessness and Mass Expulsion in Sudan: A Reassessment of the International Law.* Northwest Journal of International Human Rights, vol 12 Issue 1, p.15.

32. Section 1 of the Nationality Regulations 2011 (South Sudan)

determination made by the Sudanese authorities in respect of denationalization will require a prior determination (by the same authority) as to the acquisition of South Sudanese citizenship. However, any determinations made by the Sudanese authorities as to the fact of acquisition will not influence any later determinations by the South Sudanese authorities themselves. It remains to be seen whether the Sudanese authorities will accept decisions made by the South Sudanese authorities as to the acquisition of South Sudanese citizenship as determinative for the purposes of denationalization proceedings in Sudan. As a result, the individual will be rendered *de jure* stateless regardless of what might be the potential for a later or further application for citizenship. [216]

The administrative capacity of an emerging state is open to challenges. Thus, even where an application for South Sudanese citizenship is not refused, it is predictable that there would be significant delays in the regularization processes. Where this produces an undue delay in confirming the acquisition of South Sudanese citizenship, the process of substitution should be regarded as complete. The individual may have been prevented from confirming their acquisition of South Sudanese citizenship due to simple error or lack of administrative capacity. Nevertheless, during the period of this delay, they are not considered as a national by any state under the operation of its law, [217] and, as such are left as *de jure* stateless.

In the present circumstance, an observer state or party may construe that those provisions of the NASS as applied to have granted South Sudanese citizenship in a

33. UN High Commissioner for Refugees, expert Meeting. The Prato Conclusions, May, 2010.
34. Convention Relating to the Status of Stateless Persons. 360 UNTS 117, Article 1 (1)

particular case. This may in fact be an unavoidable conclusion. Nevertheless, should the relevant administrative body in South Sudan deny or unduly delay recognition of the applicant individual, the practical effect of this is to fail to consider that individual as a South Sudanese national under operation of its law. The judgment as to whether an individual is stateless within the meaning of Article 1 (1) of the 1954 Stateless Convention is an essentially subjective one and must be viewed from the perspective of the responsible granting state. It does not matter if the individual is manifestly entitled or, indeed, has actually received citizenship by operation of that states nationality law if the state itself does not accept that this is the case. The relevant inquiry in the context of *de jure* statelessness is whether the state apparatus itself considers the individual to have acquired their nationality.

4.2.5 Resulting *De Facto* Statelessness

By the operation of Article 8 of NASS, individuals with ethnic or familial affinities with South Sudan regardless of their place of habitual residence including those resident in Sudan will have acquired South Sudanese citizenship *ex lege*. There is an important distinction to be made here between those cases where a state refuses or unduly delays recognition of its nationality and where it has not yet been asked the relevant question. In the absence of clear measures by the state to indicate that the individual has not in fact, acquired South Sudanese citizenship (including outright rejection or an undue or disproportionate delay in confirming acquisition) it is correct to assume that acquisition has occurred in the expected manner. To assume otherwise would frustrate the process of substitution envisaged by the ILC Draft Articles.This

would leave individuals falling within the nationality provisions of the South Sudanese law as inchoate. Following their denationalization by the operation of Article 10(2) of the Sudanese law, they are rendered as de jure stateless. In addition to leaving these individuals without national protection, this would place an almost insurmountable burden on the South Sudanese administration. It would be called upon to individually consider and process applications for citizenship made by all individuals denationalized by operation of the Sudanese law and who would otherwise acquire the citizenship of South Sudan *ex lege*.

The researcher observes that the acquisition of a new nationality *ex lege* does not necessarily translate into good national protection. Those individuals who have been denationalized by operation of Article 10(2) of the Sudanese law and who remain in Sudan will frequently be left as *de facto* stateless. Regardless of their acquisition of South Sudanese nationality, they remain outside their country of nationality and in many cases, without meaningful national protection. This follows the definition of *de facto* statelessness as given in the UNHCR Prato Conclusions, thus;

> ..... de facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a state of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the state of nationality. [218]

35. UN High Commission for Refugees, Expert Meeting, The Concept of Stateless Persons Under International Law, May 27 – 28, 2010.

It therefore follows that until South Sudan takes positive steps to extend national protection to their nationals in Sudan, including practical assistance to facilitate their return, such individuals should be considered as *de facto* stateless within this definition.

There is an extensive and well articulated treaty regime for the protection of individuals who are *de jure* stateless as defined in Article 1 (1) of the 1954 Statelessness Convention. This includes most notably, the 1954 and 1961 Statelessness Conventions. [219] However, there is no particular regime for the protection of *defecto* stateless persons. Individuals left outside their country of nationality and in need of national protection are reliant on any discretionary measures that might be taken for their protection by the host state. The researcher will hereafter proceed to consider the likely outcome that may ensue following the classification of an individual as a stateless person and without protection.

4.2.6 Expulsion Under International Law

Once individuals are denationalized by operation of the Sudanese law, they are eligible for expulsion as foreign nationals. It is an established principle of Public International Law that states have the power to expel foreign nationals as an incidence of their sovereignty. [220] The classic position was summarized by the Privy Council in the case of A.G (Canada) vs. Cain, [221] thus;

> One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what

36. Convention Relating to the Status of Stateless Persons, 1954.

37. Fong Yue Ting vs. United States (1893) 149 US 698, Vishimura Ekiu V. United States (1892) 142 US 65, 659 Netherlands vs. Venezuela, TOR.I.AA 730,731 (1903) (Perm.ct.Arb)

38. Attorney General for the Domain of Canada vs. Cain (1906) AC 542, 546, Can.

> conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order and good government or to its social or material interest. [222]

While states continue to enjoy a wide margin of discretion in such matters, it is the prevailing view that a state has wide discretion in expelling foreigners. However, certain procedures and substantive minimum standards are guaranteed under international law. [223] Further, any such exercise of power is subject to general public international restrictions with respect to the abuse of rights, [224] good faith [225] arbitrariness, [226] and the treatment of aliens. [227]

This basic position is now considerably constrained by the right of *non refoulement* [228] as interpreted broadly in light of the complementary non-return obligations found in a range of the international human rights treaties. [229] In the researcher's context, particular note should be taken of Articles 31(1) and 32(2) relating to 'expulsion' contained in the 1954 Convention on the Prevention of Statelessness:

a. By section 32(1),the contracting states shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.

39. Ibid p.546.

40. Yeager vs. The Islamic Republic of Iran; 17 Iran-US. CI. Trib. Rep. 92, 106 (1987).

41. Corfu Channel Case; United Kingdom vs. Albania (1949) ICJ 4, 47-48 p.129.

42. Federal Republic of Germany vs. Iceland (1973) ICJ Reports p.18

43. Asylum Case: Columbia vs. Peru (1950) ICJ, 266 p.284.

44. Myres, S et al., (1976) *The Protection of Aliens from Discrimination and World Public Order*. Oxford, Gill, p.46

45. Convection on the Status of Refugees. 189 UNIS 150

46. UNHCR Legal and Protection Policy Research Series, PPLA/2005/02.

b.In accordance with section 32(2) ,the expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. [230]

While this article permits the expulsion of *de jure* stateless persons, this is confined to those circumstances where there is a legitimate ground of national security or public order to justify the expulsion. The researcher observes that Article 31 (2) provides due process guarantee which appears to operate only with respect to the grounds of the expulsion. This does not provide an opportunity for the stateless person within the meaning of the convention. This section thus applies to documented stateless persons lawfully in the territory of the state party. It thus leaves unprotected individuals either undocumented as stateless persons or persons unlawfully present in the territory of the state.

The expulsion of aliens is regulated by Article 13 of the ICCPR, which provides;

> An alien lawfully in the territory of a state party to the present covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be

47. Statelessness Convention 1954.

> represented for the purpose before the competent authority or a person or persons especially designated by the competent authority [231]

Article 13 deals primarily with the procedural requirements for expulsion. However, the Human Rights Committee interpreted this to encompass prohibitions that are substantively arbitrary. It explained in its general comment thus;

> Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with the law", its purpose is clearly to prevent arbitrary expulsion. [232]

The concept of arbitrariness remains somewhat under-defined in international law. However, it is clear that any determinations with respect to expulsion requires the state to balance their own interests against that of the individual alien to see that the measures taken in defense of their interest are both proportionate and bear a meaningful relationship to the facts of the case. This, in turn, requires the state to determine a legitimate ground for the expulsion of the alien and to present this as part of any proceedings to review the legality of the expulsion.

4.2.7 Expulsion under the African Charter on Human and Peoples Rights

The African Charter has made significant inroads relating to the issue of mass expulsion of individuals. Of particular significance in this context are Articles 12(4) and 12 (5) of the Charter. Sudan is a state party to the Charter. The Articles provide;

> *a.12(4) A non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law,*
> *b.12(5).The mass expulsion of non-nationals shall be prohibited. Mass*

48. Article 13 of the ICCPR

49. 10 UN Doc HRI/GEN/ 1 Rev 6, 11 April, 1986.

expulsion shall be that which is aimed at national, racial ethnic or religious groups.

The prohibition on mass expulsion in Article 12(5) of the African Charter is of particular significance for South Sudanese nationals remaining in Sudan. Article 12(4) provides an important guarantee of due process that requires access to the independent judicial review of administrative actions taken pursuant to expulsion. It may also provide for further substantive review of the reasons for the expulsion. The African Charter under Article 2 also serves to bar expulsion where such action directly or indirectly discriminates against individuals on grounds of ethnicity or religion. These standards remain markedly under-examined and left open to a wide range of interpretations by member states. In contrast, Article 12 (5) embodies a clear prohibition on expulsion where this affects groups defined on national,racial,ethnic or religious grounds.

The class of South Sudanese nationals at risk of expulsion from Sudan can be defined according to nationality, race, ethnicity and possibly religion. By definition, individuals denationalized by operation of Article 10 (2) of the SNA should fall within the criteria for nationality found in Article 8 of the NASS. They can therefore be distinguished on grounds of nationality. Furthermore, in so far as the process of denationalization will serve to reproduce the Article 8 (1) (b) grounds for South Sudanese nationality with respect to ethnicity, any subsequent process of expulsion with respect to this group will indirectly discriminate against a class made up of individuals of predominantly South Sudanese ethnicity. Although this in itself

comprises a somewhat disparate group of tribes/ethnicities, it is at least as coherent as the class of "West Africans" defined by the African Commission in the case of ***Recontre Africaine***. [233]

In reliance on the ***Rencontre Africaine*** case, [234] it seems unnecessary for a group to be arrested detained, processed, or actually expelled simultaneously to attract the protections of Article 12 (5). [235] It is sufficient if this is done only roughly contemporaneously and aimed at a named category such as nationality or race. Whether framed with respect to nationality or race, the result is an absolute prohibition on any large-scale expulsion of South Sudanese nationals from Sudan. Regardless of whether the ethnic or national basis for this expulsion is made explicit or this is done at once or as part of a process which extends overtime, if the end result is the expulsion of individuals that is defined as a class, directly or indirectly, according to the criteria enumerated in Article 12 (5), actions leading to their expulsion are prohibited by the Charter.

While the individual expulsions of non-nationals continue to lie within the discretion of states, such actions are subject to the due process requirement of Article 12 (4). This requires, at a minimum, the opportunity for meaningful judicial review of the state action taken with respect to expulsion, almost certainly including a substantive review of the reasons given for the expulsion. The range of reasons that might legitimately support expulsion are not made clear by the African Commission

50. Recontre Africaine Pour la Defence des Droits de L Homme vs. Zambia (2000) 1 AHRIR 321.

51. Ibid p. 325

52. Union Interafricaine Del Homme and Others vs. Angola (2008) AHRLR 43, p.45

as these somewhat remain open-ended. However, following the case of ***Union Inter Africaine,*** [236] it is now plain that economic order cannot justify expulsions. Similarly, the expulsion of non-nationals cannot be justified when they infringe upon the non discrimination provisions of Article 2 in the Charter.

In theory, the renationalization of Sudanese nationals with ethnic and family affinities to South Sudan should occur instantaneously. Individuals who fall within the nationality criteria in Article 8 of the new South Sudanese Act acquire South Sudanese nationality automatically and are only then denationalized by operation of Article 10 (2) of the SNA. In practice, however, this system produces only an illusory certainty with respect to citizenship. It is still the prerogative of the two states to confirm citizenship by making formal determinations as to the application of relevant nationality criteria and to issue documentation in support of this fact. While this system may work well for those individuals who automatically acquire South Sudanese nationality and who are resident in South Sudan, it leaves individuals with familial or ethnic affinities to South Sudan but who remain in Sudan in a deeply vulnerable position. Their denationalization will precede any grant of effective state protection by South Sudan. Many will remain in Sudan without either the resources to travel to South Sudan or a realistic prospect of supporting themselves should they return to South Sudan. These individuals will remain for the foreseeable future without effective state protection and as such, *de facto* stateless with the risk of expulsion.

[53.] Ibid p 47

4.3 The Abyei Territorial Dispute between Sudan and South Sudan and the International Attempts at its Resolution

The Abyei territorial dispute remains one of the thorniest post independence issues between the Republic of Sudan and the newest independent state of South Sudan. Abyei is located between Northern Bahr al Ghazal, Warrap and Unity States of the South and Southern Kordofan to the North. The region is geographically, ethnically and politically caught between North and South. It is home to the Ngok Dinka, while Misseriya nomads migrate seasonally through the territory. The Misseriya belongs to a group predominantly Arab Muslim, named Al Baggara. The Ngok Dinka belongs ethnically and racially to the South, and are predominantly Christians. [237] Abyei has long been and remains a flash point, where land, nomadic grazing rights, security and oil contribute to volatility.

The unique nature and complexity of the Abyei dispute are quite evident. The dispute revolves around the boundaries and size of the area and who should be defined as the rightful owner of the territory. Owing to the duality of issues involved, the parties agreed on a two stage resolution process, namely a quasi-judicial process for determining the boundaries and size of the area, to be followed by a political process, the referendum, which would decide which part of the country the residents have agreed to join. However, the first stage of the process agreed upon for delimiting and demarcating the area upon the report of the Abyei Boundary Commission (ABC)

54. Abdalla, M.A., *(2002) Abyei Natural Resources Conflict Situation Report*. Institute for Security Studies, Research Series p.6

failed. This resulted into a dispute with the subsequent adjudication by the Permanent Court of Arbitration (PCA).

The award by the PCA became another source of dispute owing to the opposition by the Misseriya. The second stage of the process which was the referendum of the area fixed for 9 January, 2011 could not hold due to disagreement over who should be considered as the rightful residents of the area. Accordingly, seven years after the Abyei Protocol was signed, the Abyei dispute eluded all attempts and hopes for its resolution. The completion of the first stage took more than five years, beginning with the signing of the Abyei Protocol in May, 2004. It required the conclusion of a large number of agreements to clarify and elaborate on the provisions of the Abyei Protocol, including the more wide-ranging issues contained in the Comprehensive Peace Agreement (CPA) of 9 January, 2005.

Following the signing of the CPA, a number of other agreements were also concluded to clarify and elaborate the process for resolving the dispute. All these agreements did not lead to the resolution of the dispute. More agreements were needed to move the process forward including the Road Map for Return of IDP's and Implementation of the Abyei Protocol, [238] which was after clashes between the inhabitants of Abyei which devastated Abyei town. Other agreements were; the Memorandum of Understanding on the Abyei Arbitration, [239] the Arbitration

55. The Abyei Protocol, June 2008

56. The Memorandum of Understanding on the Abyei Arbitration, June 2008

Agreement on Delimiting the Abyei Area [240] and the Abyei Area Referendum Act adopted on 30 December, 2009. As a result, the Abyei dispute, no doubt, has one of the largest numbers of agreements aimed at its resolution, yet without meaningful impact.

The complexity of the Abyei dispute stems from the multiplicity of the parties, claims and issues. The contending parties in the Abyei dispute are principally the Republic of Sudan and the South Sudan on the one hand and the Misseriya and the Ngok Dinka ethnic groups on the other. Conflicts between these groups were managed relatively successfully in the past through customary land tenure systems.However, this has dramatically changed as a result of larger herds, reduced water and pasture, instability and prejudices stirred up by the war, and a proliferation of arms among herders. [241] In addition, patron-client politics, weak natural resource management and development policies, and top-down government institutions have encouraged ethnic polarization and social divisions.

The Abyei issue is considered the key point to a lasting peace between North and South Sudan. Abyei is a fertile region with oil deposits. The researcher is of the view that if the Abyei status is left unresolved, the area will be caught between two nations, possibly triggering a return to conflict in Sudan. The 2005 peace agreement, which ended the war, promised the people of Abyei their own referendum on whether to be part of the North or South. The Abyei referendum was to be held on 9 January,

57. The Arbitration Agreement on Delimiting the Abyei Area, July, 2008
58. Crisis Group Briefing, Defining the North-South Border, 2September, 2010

2011 simultaneously with the Southern referendum. [242] However, the two sides failed to agree on who was eligible to vote. This resulted in the referendum being postponed indefinitely.

The situation in Abyei has the potential to degenerate into an armed confrontation with increased force mobilization by the armed forces of the North and South. However, there is real concern that the conventional forces can be drawn into a stalemate position and militias introduced by both parties to perpetrate violence in an effort to influence the political situation. There is a high degree of uncertainty regarding the possibility of holding the referendum in Abyei. The Ngok Dinka held series of meetings and issued statements threatening to undertake a referendum and to disallow the Misseriya using their grazing lands. In parallel, the Misseriya decided to set up their own government. [243] These developments portend grave security risks. Similarly it is feared that a separate resolution or agreement between the parties on the referendum in Abyei outside the CPA would create a precedent to deal with other CPA items separately.

These political tensions will require close monitoring and contingency planning by the African Union. Furthermore, coordination with relevant regional and international bodies to ensure early warning would be instructive as increased clashes could affect relations between the Sudan and South Sudan. The Southern Sudan Referendum Act, 2009 listed 10 issues which needed to be resolved by the two parties.

59. African Union Achieve, The Comprehensive Peace Agreement (CPA)

60. Misseriya Forms Alternative Government for Abyei, Sudan Tribune, 4 December, 2010, p.4 .

All of these issues remained without a resolution after the Southern Sudan voted overwhelmingly for secession more than 4 years after the Act was adopted.

The researcher is of the view that, the non inclusion of the traditional leaders in the resolution of the Abyei dispute seem to be one of the major obstacles in resolving the dispute. This is premised on the protracted history of the two parties prior to the eruption of the civil war in 1955 where disputes between the two parties were resolved by their leaders on the basis of the traditions and customs of the two tribes. The dispute should have been placed from the onset in the hands of the traditional rulers for resolution. It may be argued however, that the intervening factors such as the recommendations by the ABC, the award by the PCA and the takeover of the area by the Government of Sudan in May 2011 could harden the position of the authorities in South Sudan and the Ngok Dinka ethnic group.

The seeds of the Abyei dispute were sown by an act intended to achieve administrative convenience and expediency; bringing two feuding tribes under one jurisdiction by transferring a Southern Sudan area to the North where it could be more easily governed by the Anglo – Egyptian Colonial administration. The 1905 decision by mid – level provincial administrators mushroomed, a century later, into a national dispute.This has posed a major and serious threat to the entire relations between Sudan and South Sudan as well as between the Misserinya and the Ngok Dinka, thus prompting major international intervention. Now the Abyei dispute poses a major threat to the relations between Sudan and the new state of South Sudan. It is now quite

apparent that the relations between the two states will depend largely on a resolution of the Abyei dispute in a manner that is acceptable to all the parties.

The volatility of the Abyei area has led to the deployment of the United Nations Interim Security Force for Abyei (UNISFA). The United Nations Security Council in Resolution 2205 of 26 February, 2015, extended the mandate of the interim force to 15 July, 2015. The UN body in its 7,393rd meeting condemned the continued presence of Sudanese Oil Police in Abyei as well as the repeated entry of armed militias. The Council underscored its concern over reports that various communities were heavily armed. The Council further affirmed the tense political and security situation in Abyei and urged both parties to use dialogue to resolve the impasse. [244] The Abyei Area is a potentially explosive situation if not well handled and resolved in the best interest of the region.

4.4. The Legal Status of Pending Border Disputes Following the Secession of South Sudan from the Republic Of Sudan

Article 1 of the Montevideo Convention on Rights and Duties of states provides; "The State as a person of international law should possess the following qualifications; a permanent population; a defined territory; government; the capacity to enter into relations with the other states and diplomatic recognition". [245] These qualifications are the attributes of statehood under customary international law. Practice however shows that meeting these stated criteria is neither necessary nor sufficient for an entity to become a state. Indeed, a state does not emerge

61. United Nations Security Council Resolution 2205 (2015) of 26 February, 2015 http:// www.un.org 1 press/en/2015/sc 11800.drc-htm, accessed on 4 June, 2015.

62. Convention on Rights and Duties of States, Art 1, 26 December, 1933, 49 stat. 3097, 165 L.N.T.S. 18.

automatically; independence would need to be an entitlement under international law. Outside of colonialism, this is completely different.

In the UN Charter era, self-determination has become codified as a human right under international law, [246] and an entitlement of all peoples, not only those subjected to colonialism. [247] The researcher observes that in the process of decolonization, the only territorial relationship to be altered was that with the metropolitan power. Achieving independence did not come at the expense of another sovereign state's territory or that of an adjacent colony. [248] Outside of colonialism, the right of self-determination needs to be squared with the principle of territorial integrity.

The Declaration on principles of international law which forms part of customary international law provides for the following limitation on the right of self-determination:

> Nothing in the forgoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self- determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. [249]

The researcher construes the interpretation of the existing international law practices on the principle to mean that outside of colonialism, independence is not an entitlement under international law. Furthermore, it would be erroneous to interpret

63. International Covenant on Civil and Political Rights, Art 1, 16 December, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S 171

64. Dinah, S. (2011) Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon, 105 AM. J INT.L L p.60.

65. Gregory. F. (1994) Self-Determination in Post-Cold War Era: A New Internal Focus ? Mich. J INTLL. 733 p. 736

66. G.A. Res. 2625 (xxv) UN Doc. A/8082 at 124, 24 October, 1970.

67. Pakistan recognized Bangladeshis independence on 22 February, 1974 after which universal recognition followed.

the absence of an entitlement to independence as a prohibition of secession. It thus follows that in contemporary international legal doctrine, states do not emerge simply upon meeting the Montevideo statehood criteria. The parent state of the independence – seeking entity is protected by the principle of territorial integrity. It is erroneous to interpret this principle as creating an absolute prohibition of secession. The principle does however stand as a barrier between the claims for independence and its acquisition.

Outside of the colonial context, an entity can unequivocally emerge as a state only upon removal of its parents states claim to territorial integrity. The least controversial mode of state creation is where consent of the parent state is given. Consent may be given politically, prior to declaration of independence, or subsequently, after the declaration of independence has been issued. Pakistan consented to the independence of Bangladesh, [250] the Soviet Union consented to the independence of the Baltic States, [251] Ethiopia consented to the independence of Eritrea, [252] and Indonesia consented to the independence of East Timor. [253] These examples demonstrate that approval tends to be given in difficult political circumstances, often marked by atrocities and armed conflict. More so, new states have emerged in recent practice as a result of dissolution of their parent states. Such examples are the Soviet Union, [254] the Socialist Federal Republic of Yugoslavia, [255]

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68. Soviet Union recognized the three Baltic states on 6 September 1991 following which the UN considered their application for membership.

69. G.A Res. 47/230, U.N. Doc. A/RES/47/230 28 may, 1993.UN. Doc/A/53/951, 5 May 1991.

70. UN. Doc/A/53/951, 5 May 1991.

71. The Agreement on the Establishment of the Commonwealth of Independent States, Art 1, 8 December, 1991.

72. UN Doc. S/RES/7.57 30 May 1992

and Czechoslovakia. [256] Where dissolution is concerned, the international personality of the parent state is extinguished, and in the absence of a parent state, there can be no competing claim to territorial integrity. In the case of Ethiopia, under Article 39 of the Ethiopian Constitution, every nation, nationality and people in Ethiopia has an unconditional right to self – determination, including the right to secession. The Article further prescribes the mode by which the right can be exercised.viz;

a. The demand must be approved by two-thirds majority of the members of the legislative council.

b. The Federal Government will organize a referendum within 3 years on the receipt of the request for secession.

c. There must be a majority vote from the referendum

d. There shall be a transfer of power to the council, or people concerned, and;

e. The division of assets in a manner prescribed by law.

On the other hand, Section 2 (1) of the Nigerian Constitution states that, "Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria." From the analysis above, while the Ethiopian constitution has provided for the right to self –determination, the Nigerian Constitution forbids same. It is the researchers opinion that there should be constitutional provisions that tends to address the current agitations, though not outright secession.

73. UN Doc. A/RES/47/222, 19 January, 1993

4.4.1 Legal Significance of International Delimitation and Emerging Border Disputes between Sudan and South Sudan

The preceding legal analysis confirmed that the requirement of statehood spelt out in the Montevideo Convention on Rights and Duties of States is not a condition precedent to self-determination. The territory of South Sudan cannot be said to have had a compositely defined territory prior to independence. However, South Sudan declared independence on 9 July, 2011. International recognition followed promptly on 14 July, 2011 when South Sudan became a member of the United Nations.[257] There is no controversy arising from the independence of South Sudan. Controversy however arises in relation to the new international delimitation. The agreed border between Sudan and South Sudan, in principle, follows the former colonial boundary in existence on 1 January, 1956 when Sudan gained independence. The Republic of Sudan announced that it recognized the republic of South Sudan as an independent state, according to the borders existing on 1 January, 1956. [258]

South Sudan, however, invokes an exception to the 1956 boundary. Article 1 (2), part 1 of the Provincial Constitution of South Sudan provides:

> The territory of the Republic of South Sudan comprises all lands and air space that constituted the three former Southern Provinces of Bahr el Gahzal, Equatoria and Upper Nile in their boundaries as they stood on 1 January, 1956, and the Abyei Area, the territory of the nine Ngok Dinka Chiefdoms transferred from Bahr el Ghazel province to Kodofan province in 1905 as defined by the Abyei Arbitration Tribunal Award of July 2009. [259]

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74. G. *A. Res. 65/308/UN Doc A/RES/65/308, 14 July, 2011*

75. South Sudan Counts Down to Independence, BBC News, 8 July, 2011 http:// www.bbc.co.uk/news/world-africa-1407711

76. The Transitional Constitution of the Republic of South Sudan, 9 July 2011, Art 1 (2)

As indicated in the South Sudanese constitutional provision, in 1905, the Abyei Area was transferred from a Southern to a Northern province. Abyei Protocol, which is included in the Comprehensive Peace Agreement, also defined the disputed territory "as the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. [260] Since the boundaries of the disputed area was unclear, the Abyei Protocol established the Abyei Boundary Commission in order "to define and demarcate" the area geographically". [261]

The Abyei Protocol further contained a separate referendum to determine the areas future status, either within the northern or southern part, and further specified: "The 1 January, 1956 line between north and south will be inviolate, except as contained in the agreements reached in the referendum". [262] The 1956 boundary was not adopted in its full extent. The Abyei protocol acknowledged the Abyei Area exception to the 1956 line and the final delimitation was to be determined by popular consultation. A separate referendum on the legal status of the Abyei Area never took place. This was due to disagreement between North and South on determining the population eligible to take part in the vote. Accordingly, the Abyei Area boundary was to be determined by an independent commission, while its legal status of the disputed area was to be determined by the expression of the will of the people in a referendum.

77. The Resolution of the Abyei Conflict, Art 1 (2) 26 May, 2004
78. Ibid Art 5 (1)
79. Ibid Art 1 (3)

International law does not preclude rearrangement of boundaries when new states are created. It is possible that the border arrangement would become a part of the political process, possibly (but not necessarily) leading to consensual secession. If an independence seeking entity is presented with the choice of becoming independent within narrower borders or not becoming independent at all, accepting independence within narrower borders may be an appealing choice. But such practice has not yet developed.

The re-established 1956 boundary has a colonial pedigree. However, the colonial *uti possidentis* line could apply automatically only if North and South Sudan became two separate states on 1 January, 1956. This was not the case and the emergence of South Sudan as an independent state is not a matter of decolonization as demonstrated above. It is rather, a situation of a consensual emergence of a new state outside the colonial context. Practice of state creation shows that new international borders are drawn along the line of the most recent international boundary arrangement. [263] The relevance of the 1956 boundary is therefore not in its colonial pedigree. It is relevant because it was adopted by the internal legal regime of 2005. [264] Since the 2005 boundary is the latest international boundary regime, the 1956 boundary is legally relevant only to the extent to which it was adopted in 2005.

The latest internarnational boundary arrangement in 2005 did not fully adopt the 1956 line. It acknowledged the Abyei Area exception, [265] albeit not by determining

80. The Agreement on the Establishment of Commonwealth of Independent States, 8 December, 1991, Article2.

81. The Resolution of the Abyei Conflict, Art 1.2, 26 May, 2004.

Ibid Article 5 (1)

82. Ibid Article 5 (1)

its legal status but rather by creating a mechanism for its determination by popular consultation. [266] The consultation never took place. The Abyei Boundary Commission and the Arbitral Tribunal were asked to determine the Abyei Area geographically, they were not asked to determine its legal status. [267] As a consequence, the area is now determined geographically, but with the referendum still outstanding, its legal status remains in dispute.

Aside from the Abyei issue, other borders are also in dispute between the Sudan and South Sudan. These include the South Kordofon, Blue Nille, Upper Nile, White Nile and Unity states. Other areas in dispute are the Heglig, Kafia, Jau, Bahrel, Arab (Kiir) River, Megenis, Mountain and Jodha. [268] Most of these disputed borders witnessed tensions and clashes leading to breakdown of law and order. The disputed areas are a contest over natural resources, (oil, water and copper mining). The African Union in consultation with the international community could negotiate with the two states in order to end these border disputes.

4.5 Disputes over Sharing of Resources

Self- Determination and secession is a complex process. Several issues bordering on territory as well as sharing of natural resources could spring up after a country has gained independence. The CPA which ushered in the political structures and mechanism for the self – determination of South Sudan is a fairly wide – ranging

83. Ibid Article 4 (1)

84. Ibid Article 5 (2)

85. Interview with Pagam, SPLM Secretary General <Al-Sharg al-awsat> 9 June 2014

agreement. It consists of a chapeau, six separate protocols and agreements, with two annexure and spans over 250 pages. The undertakings under the different protocols and agreements of the CPA have been duly reflected in the National Constitution of South Sudan. On 7 January, 2004, a year and half after the Machakos Protocol, the two parties concluded the third agreement under the CPA dealing primarily with wealth sharing. The main areas addressed under this Agreement are land, natural resources and oil resources. The Agreement included detailed provisions on the establishment and mandate of a National Land Commission, a Southern Sudan Land Commission, a National Petroleum Commission, a Fiscal and Financial Allocation and Monitoring Commission and oil Revenue Stabilization Account.

There are other areas which were equally addressed under this Agreement. This include guiding principles for sharing oil revenues and non – oil revenues. The Agreement specified a fixed percentage of the revenue from the oil in Southern Sudan for each of the National Government. The Agreement further dealt with monetary policy, banking, currency, borrowing, and the establishment and operation of the multi – donor trust funds. The Agreement on wealth sharing does not address water resources. Water resources are briefly addressed under the fourth agreement on power sharing concluded on 26 May, 2004. The researcher would proceed to analyze the disputes over oil and water resources between the new emerging state of South Sudan and the Republic of Sudan.

4.5.1 Oil Resources

The discovery of oil in the late 1970s turned out to be a dominant factor in the economics, domestic and international politics of Northern and Southern Sudan. Oil wealth contributed to the second phase of Sudan civil wars, and the sharing of oil revenue was a key component of the 2005 Comprehensive Peace Agreement. It has been a major issue in post referendum negotiations. Sudan emerged as an oil producer in 1993 when smaller independent oil companies invested in oil exploration and production. Sudan was the first country in Africa to receive large – scale Chinese oil investment when the China National Petroleum Corporation (CNPC) invested in 1996.

Several Sudanese oil fields lie in the border area dividing Sudan and South Sudan, and in the months leading up to independence, both countries negotiated the precise division of oil revenues after Southern secession. The broad outline of what oil resources lie in South Sudan is clear, but the details of how the fields straddling the border are to be allocated and managed are not. [269] Oil issues were prominent in the negotiations between north and south both before and after the referendum of January 2011. The key questions concerned who owned the oil fields straddling the (not yet fully demarcated) north – south border; whether a revenue sharing formula of 50 percent to each party would be retained as stated in the CPA; and if not, what price the south would pay to access export pipeline and ports in the north; and how state owned oil assets, including those held by the state oil company, SUDAPET, would be distributed after southern secession. These issues were unresolved between

[86.] One oil field – Diffa – is in Abyei, the status of which remains disputed in the run – up to independence

the parties at the time of January 2011 referendum; although an agreement was made on security arrangement in order to ensure that oil revenues continue to accrue. [270]

The oil produced in South Sudan is exported by the use of two main pipelines that run through the north to the export terminal at Port Sudan, on the Red Sea. The existing export pipelines from Sudan were financed and built by the consortia of oil companies producing oil in Sudan. South Sudan is expected to honor existing production sharing contracts, so that broadly the same consortia will keep operating. Before secession, SUDAPET had a share in each oil concession. These shares are among the assets to be divided between the two states. Under the CPA, the oil sector was managed by the National Petroleum Commission (NPC), in which both north and south were represented and which was intended to provide for full sharing of information and decision making. In practice the NPC did not function well.

Sharing of oil revenue has been identified as one of the most difficult issues faced by the two parties after the independence of South Sudan. South Sudan is a land locked country and dependent on Port Sudan located in the North as well as oil pipelines passing through the North. During the operation of the CPA period leading to independence, a 50 percent share of oil proceeds between Sudan and South Sudan was operative. Following the secession of South Sudan, an agreement was reached for South Sudan to pay a fee for the use of the pipelines rather than a share of the revenue. However, in December 2011, Sudan announced that it would take payment of transit

[87.] Sudan's Factions Agree to Preserve Oil Fields commonly online, 9 December 2010. http: www.commodity online.com/news/34347 – 3 – 1 html. retrieved 2 June, 2015.

fees in kind. In other words siphoning off part of Juba's share, as compensation for unpaid fees it claimed South Sudan owed. [271]

In January 2012, South Sudan decided to shut down oil production after Khartoum impounded South Sudanese oil shipments amid a dispute over transit fees. [272] The north was asking the south to pay $36 (€23) per barrel of transit oil fees through the Greater Nile Pipeline, which is considerably more than 10 times, the international average. At this fee, the South would have paid the north $2.6 billion, which is almost exactly what the north would have earned had South Sudan not gained independence. [273] South Sudan however offered about a dollar per barrel as transit fees, $7 per barrel as customs fees from new oil fields and $4 per barrel from existing oil fields. After much negotiations and intervention by the African Union High Implementation Panel (AUHIP), the South commenced further exportation and transporting of oil through the Northern pipelines. [274]

Arising from the disputes over transit fees, South Sudan proposed a pipeline that would run from Juba through Kenya to the Port of Lamu on the Indian Ocean. South Sudan and Kenya reached an agreement in January, 2012 to build the pipeline, which would be able to export 700,000 to 1,000,000 barrels per day, about three times

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88. South Sudan: Prospects for Peace and Development http:// www.publications .parliament. uk/1570/15709 htm. retrieved 2 june,2015.

89. South Sudan Bombing Despite UN Sanctions Deadline (http:// www.bbc.co.uk/news 1 world africa - BBC news 4 may, 2012.

90. South Sudan Refuses to be Held to Ransom by the North, (http://www.quardian.co.uk Guardian 17 may 1012, retrieved 3 June, 2015

91. According to the Minister of Petroleum and Mining, South Sudan received $ 3.376 billion in oil revenue in 2014,of this amount, $ 884 million more than a quarter of its annual revenue was paid to Sudan for the use of its pipeline to the Red sea and $ 781 million was used for repayments of Loans, leaving just $1.711 billion to fund the budget. Sudan Tribune, South Sudan to renegotiate oil fees with Sudan: Official, 31 January 2015, available at http:/www.sudantribune.com.

more crude that South Sudan can export through Sudan's present network. The current deal on the use of the Sudan's pipeline network terminated in December, 2015. As at April, 2014, environmental impact studies have begun on the Kenyan sides. The proposed route covers approximately 850 kilometers (530 miles). In November, 2014, Toyota Tsusho was selected as the sole consultant for the pipeline. The completion of the pipeline network will reduce the friction inherent in the North – South oil rivalry. However, post- independence hostilities have put the project at abeyance.

4.5.2 Nile Waters

The Nile is the longest river basin in the world stretching about 6,825km (about 4,320 miles). The Nile River is estimated to be carrying about 84 billion cubic meters of water. The Nile has ten riparian states: Burundi, Egypt, Ethiopia, Eritrea, Kenya, Democratic Republic of Congo, Rwanda, Sudan, Tanzania, and Uganda. The independence of South Sudan will affect the political dynamics of the Nile countries by the entry of the eleventh riparian state that shares the Nile water. Regional competition would increase for the same water as the South Sudan requires its use for agricultural and other industrial uses.

The power sharing Agreement contained in the Comprehensive Peace Agreement included provisions on water resources. Nile water was specifically mentioned in the Comprehensive Peace Agreement. Paragraph 33 of Schedule A of the Interim Constitution places exclusive competency of the National Government on:

> Nile Water Commission, the management of the Nile waters transboundary waters and disputes arising from the management of

interstate water between Northern States and any dispute between Northern and Southern States.

Paragraph 9, Schedule B of the Power Sharing Agreement, which is also reiterated as paragraph 9, Schedule B of the Interim Constitution lists the powers of the Government of South Sudan. These powers include the co-ordination of Southern Sudan services including the provision of water and waste management services. The power also include, under paragraph 19 of the above schedule, natural resources and forestry, as well as disputes arising from the management of interstate waters strictly within Southern Sudan. All issues relating to the Nile waters are placed within the exclusive jurisdiction of the national government.

Egypt and Sudan concluded an agreement for the full utilization of the Nile waters in November, 1959. [275] The Agreement sanctioned the construction of the Aswan High Dam in Egypt, and the Reseiris Dam on the Blue Nile in the Sudan. The Agreement established the total annual flow of the Nile measured at Aswan as 84 Billion Cubic Meters (BCM) and allocated 55.5 BCM to Egypt, and 18.5 BCM to the Sudan. The remaining ten BCM represent the evaporation losses at the large reservoir extending below the Aswan High Dam in Southern Egypt and Northern Sudan. The Agreement established the permanent Joint Technical Committee composed of an equal number of members from both countries. [276]

Paragraph 33 of the Power Sharing Agreement does not make an explicit mention of groundwater shared between the North and the South of Sudan.

92 See Agreement between the Republic of Sudan and the United Arab Republic for the full Utilization of the Nile water signed on 8 November 1959, 453 U.N.T.S 64 (1963)

93. See Protocol Concerning the Establishment of the Permanent Joint Technical Committee U.N.L.S B/12 p. 143

93. See Protocol Concerning the Establishment of the Permanent Joint Technical Committee U.N.L.S B/12 p. 143

Nevertheless, the term “transboundary waters” in that paragraph can be interpreted to mean both surface and ground water. A number of ground water basins fall across the borders between the North and the South largely fed and replenished by the White Nile and its tributaries. The Upper Nile Basin is one such shared aquifer. However, the borders between the Sudan and the South Sudan are still being contested. Additionally, there is limited use of ground water resources by the agro – pastoral communities in the south.

Unlike oil, a water crisis may well develop between Sudan and South Sudan. When the 1959 treaty was signed, Sudan was a single country. The emergence of South Sudan as an independent country in 2011 threatens the existing treaty between Sudan and Egypt. When the two countries divided in 2011, no mention was made of whether or not South Sudan should get a share of the 1959 treaty rights to the Niles flow. The cooperation agreement between Sudan and South Sudan did not cover the Nile waters. However, in 2013, the South Sudanese parliament voted to become a member of the Nile Basin Initiative (NBI) after joining the NBI, South Sudan ratified the Cooperative Framework Agreement which was signed in June, 2013. With these developments, attempts are being made to avoid a water sharing dispute as with oil. However, since the Nile water sharing arrangements with Sudan is yet to be concluded owing to the disputed borders, it is the researchers opinion that water politics could turn out to be one of the potentially explosive issues in the North – South relations.

CHAPTER FIVE

CIVIL WAR AND HUMANITARIAN IMPLICATIONS ON SOUTH SUDANS INDEPENDENCE

5.1 Introduction

The previous chapter dealt with several outstanding post secession issues which if not handled could pose an obstacle to the new state of South Sudan and her immediate neighbour, Sudan. Issues such as the residency and citizenship rights, border disputes, the Abyei territorial dispute, the politics of oil and sharing of Nile waters were canvassed. Aside from the issues discussed in chapter four, other issues have yet emerged which tends to pose great challenge to the sustenance of peace and stability in the young nation. In this chapter the researcher shall analyze the challenges to peace and stability of South Sudan owing to the ensuing civil war in the country. Similarly, the humanitarian situation in South Sudan will be examined as well as the use of child soldiers by the various combatants in the civil war. The researcher will also scrutinize the various efforts by the international and regional bodies towards ending the civil war.

5.2 The Evolution of the South Sudan's Civil War

The underlying conflicts in South Sudan dates back to the Sudan's civil war (1983-2005). There was persistent tensions and mistrust among South Sudanese leaders and ethnic groups. In-fighting among Southern rebel commanders in 1990s almost derailed the Southern bid for self-determination. The Sudan People's Liberation Movement/Army (SPLM/SPLA), competed for power and mobilized along

ethnic lines resulting in atrocities by all sides. [277] The major factions reconciled in the early 2000s, although several smaller Southern militias continued to operate. Most SPLM leaders put aside their difference in the latter years of the independence struggle, choosing to focus on presenting a unified front, and in some cases, presenting themselves for political office in the new arrangement.

The effort at the unified front of the parties aside, simmering ethnic tensions and bitter interpersonal rivalries remained present. The strain of establishing government institutions and increased development responsibilities amid severe human, institutional and infrastructure capacity constraints were manifest. Political maneuvering in advance of 2015 elections added to these dynamics. There were allegations of leaders using ethnic patronage to solidify their bases, [278] while work on the new constitution stalled. Amidst such pressure, an escalating political struggle among senior SPLM member's unfolded, as key figures traded accusations of unilateral decision-making, corruption and bad faith. Top officials moved to isolate potential rivals. Amidst this simmering mistrust, the president of South Sudan, Mr Salva Kiir Mayardit announced in July 2013 a major cabinet reshuffle, in which the then Vice President, Reik Machar and several other key officials were removed from office. This marked the melting point which crystallized into a major dispute within the ruling party.

The leadership of the SPLM in a bid to address these issues called a general meeting in December, 2013. Rather than recourse to a resolution of the pending

1. The acronyms SPLM refer to the political and armed wings of the former Southern insurgency respectively. The SPLM is now South Sudan's ruling party and the SPLA refers to the country's armed forces.
2. Peter, G. (2013) *Thinking the Ethnic Box in South Sudan,* Al Jazeera News, 28 December 2013.

issues, tensions and acrimony overtook the entire session as leading figures publicly aired grievances against each other. On 15 December, 2013 following a series of meetings, fighting reportedly broke out among members of the presidential guard. The initial conflict took ethnic dimensions as it involved soldiers from the country's two largest ethnic groups; the Dinka and the Nuer (largest and second largest) who claimed loyalty to Salva Kiir and Reik Machar respectively. The fighting subsequently spread to the military headquarters and by 16 December, 2013, gunfire was reported throughout Juba. Since then, the conflict has extended to other parts of the country, including the eastern state of Jonglei, where more than 100,000 people were already displaced by ongoing inter-communal violence and instability.

There were allegations of a coup plot led by Reik Machar following which senior political and military figures were apprehended. Those arrested denied the allegations. The US officials indicated that no evidence of a coup plot could be established. [279] Following this development, forces loyal to Reik Machar who evaded arrest, subsequently took control of the capital of Jonglei and Unity States. On 23 December, 2013, Machar claimed he had taken control of oil fields in the Unity and Upper Nile States. [280] SPLM forces loyal to Kiir launched offensive to regain territory in Jonglei Unity and Upper Nile, and fighting in the contested states has been fierce as the rival forces struggle to take and hold maximum territory prior to a possible ceasefire. Most foreign aid and oil workers in these states have been evacuated or

3. Testimony of Assistance Secretary of State, Linda Thomas-Greenfield Senate Foreign Relations Committee (SFRC) The Situation in South Sudan 9 January, 2014.
4. Radio Tamazuj (Juba), Salva Kiir: We lost control over Unity State and Jonglei, 23 December, 2013

have sought protection at UN bases. Several other states have since been affected by violence.

5.3 The Parties to the South Sudan's Civil War

In the 1990s, during Sudan's north-south war, former vice president Riek Machar was a senior Nuer SPLA commander. He also with others split from the SPLA/A, citing grievances with the centralized leadership of the SPLA under John Garang, a Dinka, alleged rights abuses, and disagreements on the objectives of the insurgency against Khartoum. [281] Machar and his allies, who were primarily ethnic Nuer and Shiluk, later allied themselves with the government in Khartoum and briefly held positions in the Sudanese government. Machar's struggle with Garrang's forces cost thousands of Southerners lives. The Amnesty International estimated that 2,000 civilians were killed in a series of raids referred to as the Bor Massacre under Machar's command. [282] Abuses against civilians by both sides fueled ethnic hatred and fighting, particularly in the Greater Upper Nile area (now Northern Jonglei, Unity and Upper Nile States) throughout the 1990s. Machar reconciled with the SPLM in the early 2000s and assumed the third-highest position in the leadership structure, after Garrang and his deputy, Salva Kiir. After John Garrag died in a helicopter crash in 2005, shortly after the signing of the 2005 Peace Accord, Kiir then became head of the SPLM with Machar as his deputy.

Sudan held national elections in 2010, prior to the 2011 referendum on Southern independence. As part of the CPA deal, the SPLM had formed a temporary

5. Douglas, H.J., (2013) *The Root Causes of Sudan's Civil Wars London*, Oxford Press. p.16.
6. Report by Human Rights Watch, Civilian Devastation: Abuse by All Parties in the war in Southern Sudan,1 June,1994.

government of national unity with Sudan's ruling party. Salva Kiir as Chairman of the SPLM served as first Vice President under Sudanese President Omar Bashir, and concurrently as President of then-semi-autonomous government of Southern Sudan (GOSS). As incumbent GOSS President, Kiir retained his post, now as President of the Republic of South Sudan, under a transitional constitution after independence, with Riek Machar remaining his Vice President, for a four-year term which commenced on 9 July, 2011. [283]

Efforts by senior leaders often led by Kiir, to seek reconciliation with various armed groups and among communities throughout South Sudan have been ongoing for more than a decade. As part of these efforts, Kiir granted amnesty to several individuals who once led rebellion against the SPLM. In addition to Machar, other faction leaders who returned to the party were often incorporated into either the government or the security forces. Many of the faction leaders brought their forces with them, adding to the government's new challenges of reforming the ever bloated security sector. Some faction leaders, including Peter Gadget a Nuer commander who fought against John Garrang during the civil war, received senior posts in the SPLA. [284]

In 2013, President Kiir made major changes to his government. This was aimed at downsizing the over bloated government structure and to address wide spread corruption and improve governance. He equally replaced two state governors, both

[7]. Under South Sudan's current transitional constitution, the vice president is appointed by the president and may be removed by him, or by a two-thirds majority of the legislature on a vote of no confidence.

[8]. Report by the small Arms Survey's, Human Security Baseline Assessment for Sudan and South Sudan http:/www.smallarmssurvey.org accessed on 18 June, 2015.

elected in 2010, by Presidential Decree. In June, 2013, he dismissed two senior cabinet ministers over alleged corruption charges and conducted a major cabinet reshuffle in July, 2013, removing Vice President Riek Machar and his entire cabinet. Kiir also dismissed ruling party Secretary General, Pagan Amum, who had been publicly critical of the dismissals. The SPLM dominated parliament in August, 2013 approved a leaner cabinet on Presidents Kiir's request. Among his notable appointments was naming the powerful Dinka Governor of the volatile Jonglei State as Defence Minister. Kiir, in turn appointed the previous defence minister, a Nuer seen as loyal to him to assume the Junglei State governorship.

Jonglei State is believed to have significant untapped oil reserves and has been a historic flashpoint for inter-ethnic fighting, including, at various times clashes between Nuer, Murle and Dinka, as well as between Nuer and Dinka. Given its mixed ethnic composition and existing tensions, the Jonglei capital, Bor, was among the first areas where fighting spread during the current crisis.

The political dispute that appears to have triggered this crisis was based on ethnic identity or a communal dispute. The leaders who were aligned with Machar prior to the onset of the fighting represent multiple ethnic groups. Broadly, Machar and his political allies contend that President Kiir has become increasingly dictatorial, using corruption allegations to sideline perceived rivals, increasingly condoning human rights violations and abandoning the ideals of the independence struggle. He

was accused of allowing regional and ethnic lobbies override collective decision making within the ruling party. [285]

Since the outbreak of fighting on 15 December, 2013, the rhetoric from both the Kiir and Macher camps has been at times bellicose and other times conciliatory. On 16 December, 2013, President Kiir addressed a press conference in military uniform accusing former Vice President Reik Machar of orchestrating a coup attempt. [286] Machar speaking to the press on 18 December, 2013, denied the charge, suggesting that the fighting was a misunderstanding among the presidential guards. Report of a mutiny by Nuer soldiers in Bor and ethnic clashes in Unity State emerged the same day. By 21 December, 2013, Machar had openly declared rebellion, stating that the forces that had mutinied on Jonglei and Unity States, purportedly in response to the attacks on Nuer, were now loyal to him. [287]

As the ensuing crisis continued, several politicians who publicly shared Machar's political views of Kiir's leadership were detained soon after the violence began. Access to the detained was limited until US special Envoy to Sudan and South Sudan was able to visit them on 24 December, 2013. Machar demanded their release as a precondition for dialogue, calling for one of the detained, Pagan Amum, to lead a negotiation for talks in Addis Ababa, Ethiopia, on his behalf. Kiir, in contrast, called for talks without preconditions. On 27 December, 2013, Kiir announced that he would release most of the detainees as a goodwill gesture, but that those detained on corruption or pre-existing criminal charges would remain in detention.

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9. Senior SPLM Colleagues Gives Kiir Ultimatum Over Party Crisis, Sudan Tribune, 6 December, 2013. P6

10. Al Jezeera America, 20 December 2013, accessed from www.aljjazeera.com on 16 June, 2015.

11. BBC Correspondent James Copnall's interview with Machar, reported via Twitter on 21 December, 2013

Under pressure from regional mediators and others in the international community, Kiir agreed in principle to an immediate cessation of hostilities and to peaceful dialogue on 29 December, 2013. At the same time, government forces continued operations to retake rebel seized areas. [288] Machar expressed skepticism of the government's ceasefire, reiterating his call for all detainees to be released and suggesting that mechanisms for monitoring a ceasefire be established through negotiations. [289] Both sides agreed on 31 December 2013 to send teams to Ethiopia, while talks are underway, fighting between government and rebel forces continued unabated.

The South Sudanese crisis is complex and politically driven. The conflict appears to have dove-tailed into ethnic lines, with Dinka-on-Nuer violence reported in Juba and Nuer-on-Dinka violence reported in parts of Jonglei, Unity and Upper Nile States. In Juba, many civilians seeking refuge with UNMISS have been Nuer, according to UN officials and reports indicate that Nuer were initially targeted by Dinka security forces in the capital. The situation elsewhere is volatile, with clashes reported in seven of the country's 10 states. In the first two weeks of the crisis, UNMISS reported that most of the brutal atrocities were carried out by people in military uniforms. [290] However, given the split in the security forces, this could be considered an accusation against both government and rebel forces. As the fighting spread beyond Juba to other states, the role of the armed actors in the violence is of serious concern, with the potential to spiral beyond the control of political and military

12. Defected Commander in Unity State confirms presence of Sudanese rebels, Sudan Tribune, 29 December, 2013.

13. South Sudan Rebel Leader Riek Machar Wary of Truce Offer, BBC News, 27 December, 2013.

14. Mounting Evidence of Human Rights Violations: UNMISS, UN Press Release, 31 December, 2013

leaders. On 21 December, 2013, civilians sheltering at an UNMISS peacekeeping base in Akobo, Jonglei State were attacked by a group of about 2,000 armed Nuer youths, according to UN officials. [291] More than 20 civilians of Dinka ethnicity were reportedly killed along with two Indian peacekeepers. Other peacekeepers were equally injured in the attack. The media and UNMISS have reported on movements in Jonglei of large numbers of armed men, collectively referred to as the "White Army", a term used to describe a grouping of armed Nuer youth that periodically unite for community defence and cattle raiding. This force, whose composition and leadership fluctuates, has been described by experts as sometimes, but not always, under the control of Nuer community leaders. [292] The extent to which this group could be controlled remains unclear.

The crisis engulfing the young state of South Sudan in post secession from the Sudan was not unforeseen. The violence was triggered by political disputes among elites that had long been predicted by analysts and reflects underlying ethnic tensions. [293] The fighting has led to severe humanitarian crisis as well as the use of child soldiers by both parties to the conflict. Furthermore, how has the regional and international bodies responded in bringing the crisis to its logical end. The researcher would therefore proceed to analyze hereunder other critical issues associated with the ethno based conflict in South Sudan.

5.4 Violation of International and Regional Instruments on the Use of Child Soldiers by Parties to the Conflict

15. UNMISS Press Release, UNMISS Issues Preliminary Account of Akobo Base Attack, 20 December, 2013.

16. John, Y., (2012) *The White Army: An Introduction and Overview.* Juba, Dudd Press p. 25

17. Who can "Halt the Crisis in South Sudan" ? The Guardian 26 December, 2013.

One of the most alarming characteristics of modern armed conflicts is the increasingly widespread employment of children as soldiers. The civil war in South Sudan is not an exception to this violation of international law practices prohibiting the use of child soldiers in armed conflicts. Child soldiers are found on each continent, in nearly every major armed conflict in the world today. It is estimated that over 300,000 child soldiers are engaged in over 30 current conflicts around the world. [294] Children become soldiers in different ways: Some are conscripted or kidnapped, while others see the gesture as a way to offer protection to their families. Children are recruited into both government armed forces or armed groups, as well as paramilitary groups, militias and civil defence forces. Usually children serve as combatants or as cooks, informants, porters, bodyguards, sentries and spies. Many child soldiers belong to organized military units, wear uniforms and receive explicit training. The researcher would therefore examine in details the international instruments prohibiting the use of child soldiers as well as regional instruments and further show cause why both parties to the South Sudan's civil war has violated these instruments.

5.4.1 International Instruments Prohibiting the use of Child Soldiers

International law governing children may be found in a broad realm of human rights law encompassed in treaties, international humanitarian law and customary international law and in the laws and practices of individual states. Until recently, the prevailing legal standard in international law, established in the 1977 Additional Protocols of the Convention and the 1989 Convention on the Rights of the Child was

[18.] Michael, G., (2001) *The Impact of War on Children.* Hurst and Company, London p7.

that children as young as 15 years could be legally recruited and used in combat. [295] A child is defined as anyone under the age of 18 years and is entitled to special protections. [296] The weak legal standard established by the 1977 Additional Protocols of the Geneva Convention prompted a rethink. Consequently, the 1998 Rome Statute of the International Criminal Court (ICC), adopted by 120 states made the practice of conscripting, enlisting, or using children under the age of 15 years in hostilities a war crime. [297]

In June 1999, the International Labour Organization(ILO) adopted the Worst Forms of Child Labour Convention (Convention 182), which prohibited the forced recruitment of children under the age of 18 years for use in armed conflict. [298] Again in May 2000, the United Nations accepted the optional protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, establishing 18 years as the minimum age for participation in armed conflict, for compulsory or forced recruitment, and for any recruitment by non-governmental armed groups. [299]

The 1977 Additional protocols to the Geneva conventions were the first international instruments to regulate the role of children in armed conflict. [300] Additional Protocol I, which applies to conflicts of an international nature, obligates parties to the conflict to "take all feasible measures in order that children who have

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19. Protocol Additional to the Geneva Convention of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflict, 8 June 1997. Article 77 (2)

20. Convention on the Rights of the Child, 20 November, 1989. Article 1

21. Rome Statute of the International Criminal Court, 17 July, 1998, Article 8 (xxvi), UN DOC. A/CONF.183/9/at 9,9,17,37, ILM. 999

22. International Labour Organization Worst Forms of Child Convention 182, S Treaty. NO. 106-s (1999). 38 ILM. 1207.

23. Optional Protocol to the Convention on the Rights of Child on the Involvement of Children in Armed Conflict, GA Res.45/263. 25 May, 2000.

24. Protocol I and II of the Geneva Convention.

not attained the age of 15 years do not take a direct part in hostilities and in particular, they shall refrain from recruiting them into their armed forces". [301] Additional Protocol II develops and supplements the earlier position of the law relating to children. Protocol II extends its applications to children involved in non-international armed conflicts by providing that "children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities". [302] This total prohibition is stronger than that in protocol I, since it prohibits voluntary enlistment and indirect participation.

International humanitarian law did not do enough in the protection of child soldiers engaged in armed conflict. This led to attempts to improve international legal standard relative to child soldiers through the adoption of human rights instruments. The 1989 Convention on the Rights of the Child (CRC) provides children with protection during times of war and peace. [303] The CRC became the most ratified human rights treaty in history with 191 of the 193 participating nations ratifying it at record-breaking rates. [304] The CRC addresses the use of child soldiers by providing that "state parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. [305] Despite the widespread global acceptance of the CRC, several imperfections render it incapable of protecting children in armed conflict. Article 28 has been a subject of

25. Article 77 (2) of Protocol I of the Additional Protocol to the Geneva Convention.
26. Article 4 (3) (c) of Protocol II of the Additional to the Geneva convention.
27. Article 38 (4) of the Convention on the Rights of Child.
28. Ann, D., (2004) Child Soldiers: *No longer a Minor issue*. Willamette, Rosol p.24.
29. Article 38 (1) of the Convention on the Rights of the Child.

considerable criticism as it deviates from the general age limit of 18 years. Again, the CRC has a large number of reservations which weakens its requirement.

Furthermore, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted on 25 May, 2000 strengthens protection for children in armed conflict. It establishes an International standard for the employment of children in armed conflict and codifies a legal norm by which states can be held accountable. Article I of the Convention provides that "state parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 do not take a direct part in hostilities". [306] This is considered the most important article in the optional protocol as it raises the minimum age for participation in hostilities from 15 to 18 years and therefore represents an improvement of the present protection provided by intentional law. [307] By the provision of Article 2 of the Convention, state parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces. [308]

In this direction, Article 2 seems to have taken effective measures at correcting the imbalance created in Article 77, Paragraph 2 of the Additional Protocol. Article 4 of the convention forbids armed groups that are distinct from the armed forces of the state from recruiting children under the age of 18 for use in hostilities. [309] Accordingly, non-state entities are prohibited from recruiting children either forcibly

30. Article 1 of the Protocol on the Involvement of Children in Armed Conflict
31. International Review of the Red Cross. No 322 107-125 91998.
32. Ibid p.112
33. Ibid p.118

or voluntarily. They are also prohibited from allowing children to participate in hostilities. Despite perceived weaknesses, the optional protocol represents progress and serves to consolidate existing international law concerning the protection of children from recruitment and participation in hostilities.

5.4.2 African Charter on the Rights and Welfare of the Child

In 1990, the then Organization of African Unity (OAU) now African Union (AU) adopted the African Charter on the Rights and Welfare of the Child. [310] Article 22 (1) of the Charter provides that "state parties to this Charter shall undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflicts which affect the child". [311] By Article 22 (2), state parties are also instructed to "take all necessary measures to ensure that no child shall take a direct part in hostilities and shall refrain, in particular, from recruiting any child". [312] Although the charter is only a regional instrument, it is far more reaching than the CRC. Unlike the CRC, the Charter recognizes that a child is anyone below 18 years, including those involved in armed conflict. [313] Also unlike Additional Protocol II, the Charter applies to internal skirmishes, tension and strife and therefore recognizes that the rights and welfare of a child are of more value than the type of conflict they are involved in. [314]

34. African Charter on the Rights and Welfare of the Child, OAU DOC. CAB/LEG/24.9/49, 1990.
35. Ibid Article 22 (1)
36. Ibid Article 22 (2)
37. Ibid, Article 2
38. Ibid Article 22 (93)

The Charter implementation mechanism is very similar to that of the CRC as it has a similar reporting system. [315] It accepts complaints from non-party states, individuals, organizations and non-governmental organizations. [316] The shortcoming associated with the Charter is that it is only binding on states that have ratified it. [317] Similarly, "any custom, tradition, cultural, or religious practices that are inconsistent with the rights and obligations contained in the present Charter shall to the extent of such inconsistency be null and void. [318] This provision leaves it open for state parties to use cultural or religious inconsistencies with the African Charter as a pretext for non compliance with the Charter. Regardless, the Charter compliments the CRC and international humanitarian law concerning child soldiers, in particular those involved in internal conflicts.

5.4.3 The use of Child Soldiers by Parties to the South Sudan's Civil War

The Republic of South Sudan gained independence on 9 July, 2011 following a referendum which favored secession from Sudan. South Sudan was thereafter admitted into the comity of nations having joined the United Nations. South Sudan has ratified several treaties including the African Charter on the Rights and Welfare of the Child. Before the current civil war began on 13 December, 2013, South Sudan had made tangible progress in addressing grave violations against children and implementing an action plan to end the recruitment and use of children. Such progress included issuing command orders to stop recruitment and use of children within the

39. Ibid Article 43 (1)

40. Ibid Article 44 (1)

41. Marshal, L.H (2009) *Can the Optional Protocol for the Convention on the Rights of the Child Protect Uganda Soldier?* 10 Ind Intl and Comp. 1. Rev 418.

42. Article 1 (3) African Charter on the Rights and Welfare of the Child.

SPLA. [319] Before the current crisis, the use of children, mostly between 14 and 17 years was documented. [320] In all, 99 boys were associated with SPLA, three with South Sudan National Police Service and 35 with militia allied to David Yau in Jonglei State. Furthermore, 25 were mobilized from Lou Neur tribe to conduct community policing in Jonglei State. Children associated with SPLA were identified in military barracks, wearing SPLA uniforms as well as undergoing military training in conflict areas. [321]

The use of child soldiers in the South Sudanese civil war has intensified as both parties seek to make gains prior to negotiations. Between January – April 2015, several incidents of recruitment and use, abduction, killing and sexual violence perpetrated against children and military use of schools were reported, affecting over 1,837 children. [322] These incidents were verified by the United Nations-Government National Technical Committee on the Implementation of the United Nations-SPLA Recommitment Agreement. [323] These violations cover six states – Central Equatoria, Eastern Equatoria, Jonglei, Upper Nile, Lakes and Unity States. [324] It is estimated that the Divid Yau led Cobra faction is holding about 3,000 child combatants. Of this number 1,314 had been released in January 2015 while the outstanding number remained in active hostile activity. In February 2015, the SPLA in opposition (IO) led by the former Vice President Riek Machar released 18 boy

43. Report of the Secretary General of the United Nations to the Security Council, 15 May, 2015 UN DOC A/68/878-S/2014/339
44. Ibid p. 3
45. Ibid p.11
46. Report of the UN Secretary General on South Sudan Security Council, 29 April, 2015. UN DOC S/2015/296.
47. Ibid p. 5
48. Ibid p. 10

soldiers in Leer, Unity State. [325] On 16 February 2015, in Malakal County, Upper Nile State an estimated 1,000 individuals, including a number of children were adopted from a school at an IDP site in Wau Shilluk by elements from Johnson Olonyi's armed Shilluk militia allied to SPLA, and forcibly recruited. These violations by parties to the conflict contravene both international and regional instruments prohibiting the use of child soldiers in conflicts.

5.5 Violation of International Humanitarian Law by Parties to the South Sudan's Crisis

Conflict broke out in South Sudan on 15 December, 2013, and the world's newest nation is now facing a major humanitarian disaster. The crisis led to mass displacement of civilians, hunger, starvation and violation of international humanitarian law by parties to the civil war. Humanitarian aid delivery has been challenging due to high levels of violence, including attacks on UN Peacekeeping Force. In this direction, the researcher shall highlight a brief outline of the contents and scope of international humanitarian law and thereafter, proceed to analyze the major violations of these international instruments by parties to the conflict.

International Humanitarian Law (IHL) is directed towards achieving order and regulates the use of armed forces by defining how, when and where armed force can be used. IHL is particularly concerned with protecting non-combatants, civilian property and humanitarian organizations attempting to alleviate the suffering caused

49. Ibid p. 11

by armed conflict. These concerns are addressed in Four Geneva Conventions [326] and three Amending Additional Protocols. [327] These Conventions and the Additional Protocols deal with humanitarian issues arising from armed conflict and its aftermath. Directing armed force against civilians, non combatants and humanitarian agencies or mistreating prisoners of war are all violations of IHL.

In the nineteenth century, the production of sophisticated and destructive weaponry brought apprehension that issues of armed conflict should be addressed nationally with movement towards a written international humanitarian law. The Hague Conventions of 1899 and 1907 addressed the rights and duties of belligerent states who are parties to the conventions in conducting military operations. [328] These conventions, sometimes referred to as the laws of war, address military concerns. The 1899 Hague Convention refer to "seeking means to preserve peace and prevent armed conflicts among nations" and for the necessity to have regard to cases where an appeal to arms may be caused by events which their solicitude could not avert. [329] The objective was " to revise the laws and general customs of war, either with the view of defining them more precisely or of laying down certain limits for the purpose of modifying their severity as far as possible".

The 1899 Hague Conventions and the four accompanying Additional declarations limited the use of weaponry by prohibiting, *inter alia*, the use of chemical weapons and hollow point bullets, dropping projectile from balloons, killing or

50. The Geneva Convention entered into force on 21 October, 1950.

51. Protocol Additional to the Geneva Conventions of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June, 1977, 1125 U.N.T.S

52. The full text of the convention accessed at <http://wwi.l.l.byu.edu/index.php/Hague convention.

53. The convention was signed on 29 July, 1899 and entered into force on 4 September 1900.

wounding an enemy who had surrendered, declaring that no quarter be given, using arms causing superfluous injury, making improper use of flags of truce and destroying or seizing enemy property unless imperatively demanded by the necessities of war. Contemporary IHL emphasizes protecting civilians, civilian property, humanitarian organizations, those who can no longer fight and regulating armed conflict. The first Geneva Convention addressed the amelioration of the condition of the wounded and the sick in armed forces in the field. The second Geneva Convention was expressed to be "for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at sea. The third convention addressed issues relative to the Treatment of Prisoners of War whilst the fourth convention was concerned with the matters "relative to the Protection of Civilian Persons in Time of War.

The convention was followed by three additional amending protocols. Protocol I relating to the Protection of victims of International Armed Conflicts, while protocol II relates to the Protection of Victims of Non-international Armed Conflicts. Protocol III relates to the Adoption of an Additional distinctive emblem for Humanitarian Relief Agencies. The suffering inflicted upon non-combatants during the Second World War underlined the need for a universal standard to protect non-combatant civilians and civilian property from the effects of armed conflict. This led in 1949, to revisions to the first and third Geneva Conventions and the adoption of the Fourth Geneva Convention. The Fourth Geneva Convention contained detailed provisions about civilians and their property, and matters not addressed in the earlier conventions.

The four Geneva Conventions and the three additional protocols are the body of IHL. They are designed to limit the use of armed force. Armed Force can only be legitimately used to weaken the military forces of the enemy. Civilian and civilian areas are not legitimate targets. Careful assessments are required about the risk of civilian causalities in attacking legitimate military targets. Where the risk to civilian property outweighs the military value of the target, it should not be attacked. The Fourth Geneva Convention and the revisions to the three earlier conventions in 1949 drew upon experiences and lessons from armed conflicts up to that date which had generally been international in nature and between states. Understandably, the 1949 revisions looked towards armed conflicts where at least one of the states involved had ratified the conventions.

The increasing number of non-international conflicts after 1949 directed towards ending colonial rule or states' splitting into smaller states was addressed by Additional Protocol II in 1977. That protocol applied the Geneva Conventions to armed conflicts occurring in the territory of states party to the Geneva Conventions involving dissident armed forces or other organized armed groups whilst under responsible command, exercise such control over a part of its territory which enable them to carryout sustained and concerted military operations and to implement the protocol. Protocol II does not extend to internal disturbance such as riots or sporadic violence.

The changing nature of armed conflict and the rise of terrorism bring problems of definition. Questions arise about what is an insurgency, about dissident armed forces, about what amounts to sustained and concerted military action, and about who is a combatant. In this realm, the Geneva Convention regards combatants as persons in an organized force, under responsible command, identified by a flag or other distinguishing symbols, who openly carry arms and who adhere to the laws and customs of war. [330] This definition appears to exclude groups not identified by a flag or other distinct symbol and not carrying arms openly and who carry out serious acts of violence either directed at citizens or not discriminating between civilian and military personnel. Presumably they are not combatants for the purpose of the Geneva Convention and their acts are not violations of IHL but of national law or other applicable international law.

State responsibility requires states to honour their obligations. Where a violation of IHL is committed by a state which ratified the conventions, there is an obligation to cease the violation and make reparation for the breach. Article 1 of all the four Geneva Conventions requires states to "respect and ensure respect" for the conventions. There is a positive duty both to adhere to the conventions and to ensure they are respected by other ratifying states. The duty to respect the conventions requires states to exercise close control over their armed forces, military personnel and other institutions involved in armed conflict. States must ensure that personnel are properly trained to observe the requirements of IHL. Enacting national legislation and

54. Article 4, Geneva Convention III Relative to the Treatment of Prisoners of War. 75 U.N.T.S. 135

actively prosecuting violations of IHL provide evidence that a state is honoring its obligations under the convention.

Where a state breaches its international obligations, another state could ask the International Court of Justice (ICJ) to investigate. [331] The role of the ICJ is to settle in accordance with international law, legal disputes submitted to it by states. Only states have standing before the court in contentious cases. [332] A dispute can only be entertained if the states concerned have accepted its jurisdiction either by entering into a special agreement to submit to the court's jurisdiction, by a jurisdictional clause in a treaty or through the reciprocal effect of declarations made by them under the courts status. The court's judgment is final and binding upon the state parties to the dispute. [333] States are expected to honour the judgment and to take the necessary measures to implement the judgment. If a state party considers the other state party to the dispute before the court has failed to implement the court's judgment, it may refer the matter to the United Nations Security Council which may decide upon the measures to be taken by the defaulting state to implement the court's judgment.

State responsibility does not exclude individual responsibility. Concerns over the lack of a unified procedure to address serious violations of IHL by individuals led to the establishment of the International Criminal Court (ICC) in 2002. [334] The ICC deals with the most serious violations of IHL. This includes genocide, crimes against humanity and war crimes. It is a court of last resort and will not act where a case is

55. Status of International Court of Justice (1945) adopted on 26 June, 1945 and entered into force on 24 October, 1945.
56. Charter of the United Nations, Adopted 26 June, 1945 and entered into force 24 October, 1945.
57. Article 60, ICJ Status 1945.
58. Rome Statute of International Criminal Court, adopted on 17 July 1998. UN DOC. A/CONF. 183/9 entered into force on 1 July, 2002.

investigated or prosecuted by national courts unless the entire process is flawed and aimed at exonerating the individual. The ICC has jurisdiction where the accused is a national of a state which has accepted its jurisdiction and the crime occurred in the territory of the state party or in the territory of another state party to the ICC.

The United Nations Security Council may however refer a case to the ICC prosecutor whatever the nationality or wherever the offence occurred. Over 100 states have accepted the ICC's jurisdiction though there are notable exceptions; the United States. The ICC can try individual violators as well as any person who aids, abets or otherwise assists in the commission of the alleged crime. Military commanders are a case in point either ordering or directing the commission of offences and also for failing to take necessary measures to prevent violations. As canvassed above, several humanitarian breaches are associated with the war in South Sudan. The researcher shall now dwell on these issues with its affront on IHL rules.

5.5.1 Breaches of IHL by Parties to the South Sudan's Civil War

The situation in South Sudan remains among the world's biggest humanitarian crisis since the outbreak of civil war in December, 2013. Over 2,000,000 people have fled their homes, including over 500,000 who have sought refuge in neighboring countries. (70%) of them are children). [335] It is estimated that at least 1,500,000 people have been internally displaced (IDPs) mostly because of widespread violence against civilians. In addition, over 521,000 South Sudanese have taken refuge in Ethiopia, Uganda, Sudan and Kenya. The crisis has had destabilizing effect on the

59. European Commission, Humanitarian Aid and Civil Protection Report Fact Sheet, 16 April, 2015. Accessed at www.european aid.org on 14 June, 2015.

whole region. Inside South Sudan, over 112,000 IDP's fled the violence by seeking shelter in over-crowded Protection-of-Civilian (PoC) areas in UN bases. Additionally, South Sudan hosts more than 257,000 refugees from neighboring countries (mainly Sudan).

Inside South Sudan, an estimated 235,000 children under five years are severely undernourished. About 70% of the South Sudanese refugees in the region are children and youth under 18 years old. UNICEF estimates that over 800,000 children under 18 years are internally displaced while over 12,000 children may have been recruited as child soldiers by armed forces and groups in the country. [336] This constitutes a grave violation of IHL. The United Nations estimates that 2,500,000 people face food insecurity and the number rose to 3,500,000, during the lean season in May 2015. [337]

The United Nations High Commissioner for Human Rights, Navi Pillay reported mass extra judicial killings, the targeting of individuals on the basis of their ethnicity and arbitrary detention. [338] The commissioner expressed concern about the safety of detainees, including several hundred civilians who were reportedly arrested in Juba and hundreds of police who were also reported arrested across the capital. [339] Human rights violations against civilians by targeting specific ethnic groups as well as indiscriminate killings, family separation and sexual and gender based violence

60. Ibid. p2
61. Ibid p6
62. OHCHR "Pillay Urges South Sudan Leadership to Curb Alarming Against Civilian" 24 December, 2014.
63. Ibid. p.8

including rape have been reported. [340] The African Union has established a commission of inquiry to investigate the human rights violations. [341]

The UN Peacekeeping Mission in South Sudan (UNMISS) has a mandate to take all necessary actions to protect civilians, including the use of force. [342] Several civilians have sought protection in UN bases. This has often times resulted in skirmishes between the UN authorities and parties to the conflict. In February 2015, groups of SPLA soldiers in military pick-up trucks randomly fired gunshots into the air in front of the UNMISS base and protection site in Bentiu, Unity State. On 9 March, 2015, during clashes between SPLA and armed youth in Nassir, Upper Nile State, small arms fire hit the sentry outposts, as well as some containers in the accommodation portion of the UNMISS Camp. Furthermore on 17 March 2015, during clashes between SPLA and SPLA (IO) in Bentiu, a number of rockets landed inside the UNMISS protection site. [343] These actions pose a direct threat to the safety and security of UNMISS personnel and to the civilians sheltered at the protection site. These violations of IHL by parties to the conflict require immediate action by the world and regional bodies (the UN and AU) to address the challenges facing South Sudan.

5.6 Regional and International Efforts at Ending the South Sudan's Civil War

64. United Nations Mission in South Sudan. Conflict in South Sudan: A Human Rights Report. 8 May 2014. p.6

65. The African Union Commission of Inquiry on South Sudan, 20 April 2015. Accessed at African Union. Au.int/en/sites.

66. UNMISS Mandate un.org/en/peacekeeping/mission/unmiss/mandate.shtml. see Also the United Nations Security Council Resolution 2132, 24 December, 2013

67. Report of the Secretary General of the United Nations on South Sudan to the UN Security Council 29 April, 2015, p.14

The enthusiastic population of South Sudanese's voters who casted their votes during the independence referendum had great hopes of achieving secession and thus ending the long strife that had prevailed over the years in the protracted war with the North. This enthusiasm was short lived when civil unrest broke out barely two years after the declaration of independence on 9 July, 2011. World leaders emphasize that the crisis is inherently political and requires a political solution. The former President of the United States, Barrak Obama, the former United Nations Secretary General, Ban Ki Moon and Pope Francis have cautioned South Sudanese leaders and participants in the conflict that their actions threatens the gains made since independence and the future of the country. [344]

The regional bloc, the Intergovernmental Action on Development (IGAD) led by Ethiopia, Kenya and Sudan has put their weight behind the IGAD led mediation process. [345] Uganda has given Juba direct military support, both to defend and to retake territory. Forces associated with Ugandan supported Sudanese armed groups (JEM) have also intervened alongside other regional non-state armed groups that reportedly support the government. Rwanda is a significant troop contributor to UNMISS, while Ethiopia is the sole contributor to UNISFA, the lynchpin of stability in that volatile and disputed border region of Abyei. The IGAD mediation efforts focused mainly on cessation of hostilities and the release of political detainees. Neither the government forces nor the SPLA (IO) have complied with the cessation of hostilities.

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68. The White House, Statement by the President on South Sudan, 19 December, 2013. The Holy See *urbi Et orbi* Message of Pope Francis; Christmas December, 2013.

69. "Sudan's Leader Flies South for Crisis Talks" The New York Times, 6 January, 2014.

The involvement of IGAD and non-IGAD neighbours as well as the AU, UN, China and others in resolving South Sudan's civil war poses serious challenges to the international community's ability to coordinate and reach consensus. To support coordination and dialogue, the international community should establish a contact group. Aside from the regional efforts, international efforts aimed at ending the conflict have evolved. For instance the United Nations Security Council unanimously adopted Resolution 2132 (24 December, 2013) in which it called for immediate cessation of hostilities and the opening of political dialogue. The resolutions equally approved an increase in the military component of UNMISS from 7,000 to 12,500 troops and the police component from 900 to 1,323 personnel. It additionally authorized the Secretary General to facilitate inter mission cooperation and if needed and subject to further Council consideration", complementary force and asset generation, including through the possible transfer of troops and force enablers from other United Nations missions. [346]

Officials of the United States have engaged both South Sudanese leaders and key figures in Africa and the international community to seek a mediated solution to the current crisis. The then President Obama administration refereed to the US-South Sudan relationship as one based on "deep ties" and an" affinity" cast in the context of American public sentiment towards the South Sudanese that developed during the civil war. [347] Despite increasing strains in recent years, the then Secretary of State, John Kerry, and the then National Security Adviser, Susan Rice, have acknowledged a

70. UN Security Council Resolution 2132 (2013). 24 December, 2013.

71. Princeton, L., (2013) *The United States and South Sudan: A Relationship Under Pressure;* The Ambassadors Review, available at http://www.amricaabassadors.org.

personal stake in finding a resolution to the crisis. [348] Furthermore, US Special Envoy to Sudan and South Sudan Donald Booth and US Ambassador Susan Page are engaging both sides in the region. The envoy, who previously served as Ambassador to Ethiopia, has offered US support to the regional mediation effort in Addis Ababa.

The US State Department has underscored that there can be no military solution to the conflict, forcing a durable and lasting peace depends on resolving the underlying political causes of the conflict". [349] The State Department has urged the immediate release of political detainees whose presence US officials describe as key to discussions of political issues, while at the same time, urging that the status of detainees should not be used as a precondition for a cessation of hostilities. The White House has stated that the United States will hold leaders responsible for the conduct of their forces and will withhold US support to elements that use force to seize power. [350]

The African Union launched a new peace initiative for South Sudan on 15 June, 2015. The new approach is to try to stop the bloody civil war in South Sudan. It established an AU Ad-hoc High-Level Committee of five heads of states and government to add heft and impetus to the existing peace process run by the regional body IGAD. The AU Ad-hoc committee representing each of the AU "regions, comprises South Africa, Nigeria, Algeria, Chad and Rwanda. The AU peace and Security Council which met at heads of state level at the AU summit held on 15 June, 2015 called on the UN sanctions committee on South Sudan to take urgent steps to designate individuals and entities who should be sanctioned. The decisions by the

72. Remarks by Secretary of State Hohn Kerry during a solo press interview in Jerusalem, 5 January, 2014.

73. State Department Spokesperson, Maria Harf, beginning of direct talks on South Sudan 5 March, 2015

74. The White House, Statement by NSC spokesperson Caitlin Hayden on South Sudan, 13 December, 2014.

AU peace and Security Council at the summit were a very strong signal to the South Sudanese parties that this is the time to stop the fighting and move forward on a peace agreement and a transitional process that will give South Sudan an opportunity for a new start.

In order to achieve peace, there has to be the leadership demonstrated to make the compromises for peace. The AU has appointed the former president of Mali Alpha Oumar Konare as AU High Representative for South Sudan. The aim is to further strengthen the AU contribution towards ending the conflict in South Sudan and the untold suffering inflicted upon the civilian population. In the discharge of its responsibilities, the AU High Representative is to maintain close contact with the South Sudanese parties and other stake holders and to interact with the IGAD leaders as well as African stakeholders and members of the ad-hoc high-level committee. The role is also to facilitate a collective and coordinated African action, in the search for a negotiated solution, and work within the United Nations and other international actors in support of the African-led peace efforts.

Despite steps taken by the regional and international bodies towards bringing the South Sudan's civil war to its logical conclusion, the reality on the ground supports renewed violence and atrocities committed by all parties to the dispute. On 15 and 16 May, 2015, the SPLM/A in opposition forces and allied militia loyal to Major General Johnson Olony took Malakal, Upper Nile State, from government forces. Similarly on 25-26 May, 2015 Government forces re-took the town and

surrounding area. [351] On 25 May 2015, gunfire was directed in the vicinity of the UNMISS compound and PoC site in Malakal. The IGAD monitoring and verification team then carried out extensive investigations and interviews. With the weight of evidence collated, it was concluded that government forces had fired in the direction of the UNMISS compound and PoC site for a period of two hours. Four people were injured including one UNMISS officer and three civilians. The shooting was deliberate and sustained. [352] Regardless of the cause of the attack, it is clear that the firing by government forces was carried out with blatant disregard for the safety of civilians in the UNMISS compound and PoC site. This is a clear violation of Article 3 (1) of the Cessation of Hostilities Agreement between the warring parties and against International Humanitarian Law.

The researcher is of the view that, the negotiations, mediated by IGAD are narrowly focused on Salva Kiir and Riek Machar. This is despite the fragmentation and proliferation of armed groups, including those operating across the South-Sudan border, that are often independent of either's control and complicate efforts to end the fighting. Furthermore, regional tensions resulting from Uganda's intervention have further hindered IGADs diplomacy, while the efforts by the African Union have yielded no results. New strategies must be evolved to stem the tide. Positive inducements by the United States and China with close ties with the regional powers could change calculations and produce a positive result.

75. IGAD reports to the office of the special envoys for South Sudan 29 May, 2015 – 9 June, 2015 p5 Accessed at www.southsudan.igad.int on 27 June, 2015.
76. Ibid p 8.

An UN-imposed arms embargo for South Sudan, supported by more effective cross-border monitoring of armed groups and weapons flows, would increase leverage in all directions. This should be done in conjunction with increased monitoring by the IGAD verification and monitoring mechanism of cessation of hostilities violations. This should be complemented by a mechanism to examine how the war is financed and identify measures to prevent South Sudanese leaders using oil revenues and bankrupting the state to fund the war in violation of the cessation of hostilities agreement. There must be an effective mediation including greater IGAD outreach to armed groups and hardliners across South Sudan. A better coordination with AU mediation in Sudan and more strategic and concerted US and Chinese commitment could help break the regional deadlock. The protracted civil strife would lead to further escalation, destabilization, humanitarian crisis and atrocities by parties to the conflict.

Self-determination and Secession of South Sudan from the Republic of Sudan hitherto seen as an enabling window in ending the protracted war in Sudan has turned into misery for the people of South Sudan. Neither the peace agreement that ended the Sudan's second civil war (1983-2005) nor South Sudan's 2011 independence brought stability to the region. A difficult divorce that included a border conflict, an oil shutdown and other emerging conflicts inclusive of the war in South Sudan makes the issue intertwined and complex. Self-determination has thus failed to address the South Sudan's crisis. This is in consequence, the failure by the central government to put in

place reforms and galvanize the economy towards building infrastructure for the young nation now faced with civil war and humanitarian strife.

CHAPTER SIX

SUMMARY AND CONCLUSION

6.1 Summary

This research for purposes of clarity is broken down into six distinct chapters. Chapter one captures the introductory aspect of the thesis. The research analyzed the legal perspectives on the principle of self-determination in international law with emphasis on South Sudan as the objective of the study. The thesis revealed that self-determination and secession pose major challenges for international lawyers; the former for its ambiguity and difficulties of operationalization and the latter for the uncertainty of its status, since it is neither permitted nor prohibited under international law. The right to self-determination has been identified by the International Court of Justice (ICJ) as one of the essential principles of contemporary international law, [353] yet it remains one of the most unsettled norms in international law.[354] This is most true of its application beyond the colonial context.Essentially, it has been described by Drew (2002) [355] as 'plagued by an excess of indeterminacy both in terms of scope and content'. Even though the scope and content of the right is now relatively settled in sterms of the colonial context, international lawyers continue to be troubled by the question of whether or not any aspect of the legal norm has *jus cogens* status. [356]

The thesis also addressed both the legal meaning of the right and its normative status. More specifically the thesis concentrates on how the various normative levels that have been ascribed to self-determination in international legal doctrine relate to

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1. Case Concerning East Timor (Portugal V Australia) ICJ Reports 1995 at 102
2. Cassese, J., (1992) *Rethinking self-determination: A critical Analysis of current International Law* Theories. Journal of International law vol. 18. p.21.
3. Drew, K., (2001) The *East Timor Story: International Law on Trial,* European Journal of International law Vol 12, p.651 at p.658.
4. Summers, J., (2003) *The Status of Self-determination in International Law: A question of the legal Significance or Political Importance:* Finish Yearbook of International law vol 14, p.271 at 283.

the willingness of states to help the scope and content of the right become more determinate. The research determined that international legal norms are not static, rather their scope and content can change over time. [357]The central components in any development of an international legal norm are the practices and views of states. This is likely to be either as evidence of the nature of a rule of customary international law, [358] or as support for a particular interpretation of a treaty provision. [359] A norm might be formulated in vague terms, a more definite meaning can develop over time.

The thesis made it clear that the right to self-determination was introduced into international law in vague terms. For instance, Article 1, Paragraph 1 of the International Covenant on Civil and Political Rights 1996 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (together 'the Human Rights Covenants') provides that; "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." [360] The research found that, given the passage of time since this clause was formulated, it might have been expected that a more determinate understanding of the scope and content of the right would have emerged, or at least be on its way to emerging. This is not the case. The doctrinal debates on the meaning of 'peoples' and the contents of the right that 'people' enjoy have no end in sight.

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5. Simma, P., (1999) *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View.* American Journal of International law vol. 302 at 307.

6. North Sea Continental Shelf, Germany V Denmark: Germany V Netherlands (1969) ICJ Reports P3 at p.44

7. Article 31 (3) (b) Vienna Convention on the Law of Treaties(1969) 1115 UNTS 331: 8 ILM 679 (1969), entered into force 27 January, 1980.

8. 999 UNTS 171, entered into Force on 23 March 1976 and 993 UNTS.3 entered into force on 3 January 1976.

The thesis brought to the fore the lack of clarity on the meaning of self-determination as a legal norm. Perhaps this hindrance is attributable to the controversial nature of the principle. This is central to why state actors rarely venture opinions on the nature of the right in their resolutions, reports or diplomatic exchanges on the subject. [361] The controversial nature of some of the subject matter that the right to self-determination has been suggested to include such as the right of a group within a state to secede and form a new state [362] might not be the only reason that states have not made more efforts to make their views on the scope and content of the right known. It is possible, for instance, that states place some value in the vagueness of the law of self-determination because it permits a broad range of plausible interpretations and is therefore able to accommodate unforeseen circumstances. [363] It is also possible that doctrinal debates about the normative status of the right could be deterring states from suggesting content for fear of the consequences that will flow from a more determinate norm coupled with a particular normative status.

Another area analyzed in the thesis is the attitude of state actors regarding the principle of self-determination. The research observed that political importance could be a reason why states prefer that the right remains ill-defined. This is because, the international community is more likely to respond to the breach of a norm that is perceived as politically significant, but if the norm is kept ill-defined, states will retain a leeway to resist claims that they are not fulfilling obligations to people under their

9. Fox, E.A., (1995) *Self-determination in the Post Cold War Era: A New Internal Focus.* Michigan Journal of International Law vol 16, p.733 at p.780

10. Mc Corquodale, S. (1994) *Self-determination; A Human Rights Approach International and Comparative* Law Quarterly Review vol 43, p.857 at 862

11. Sheeran, O. (2011) *International Law, Peace Agreements and Self-determination: The Case of the Sudan*. International and Comparative Law Quarterly Review, vol 60, p 423 at p.458.

authority. However, there are also established and potential legal consequences attached to the acceptance of a particular normative status for self-determination. To illustrate further, if the legal right to self-determination was to be accepted as a *jus cogens* norm, any treaty that contravened an aspect of the right would be void. [364] It is not unreasonable to suspect that this type of consequence might deter states from actions that would help to make the legal meaning of the right more determinate.

The thesis seeks to contribute towards a fuller understanding of the significance of the uncertainty surrounding the normative status of the right to self-determination. It does so by identifying and exploring the legal consequences that flow from the various normative levels that have been ascribed to the right to self-determination in legal doctrine.

The thesis in an attempt to explicitly analyze the principle of self-determination in detail, presented in chapter two the legal framework for self-determination in international law. The research noted the commitment of the international society of states to the self-determination of all peoples as demonstrated with the signing of the United Nations Charter in 1945. Article 1 (2) of the UN Charter states that one of the purposes of the United Nations is to pursue the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. [365] Nevertheless, the backdrop to the emergence of the legal right to self-determination was the movement for decolonization during the 1960s. [366] This helps to explain why, in spite of self-determination as a political principle having a number of

12. Article 53 and 64 of the Vienna Convention on the law of Treaties.

13. UNTS 993, entered into force 24 October 1945.

14. Weller, D., (2008) Escaping the Self-determination Trap, Laiden: Martinus p.35

different dimensions, including the *jus congens* content, the core meaning of the legal right to self-determination centers on the idea of freedom from subjugation. For instance, the UN General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 states that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental rights, is contrary to the Charter of the United Nations……" [367] The declaration further provides 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. This is the basis for a people subject to colonial rule to be given the choice of how they wish to be constituted: independence, integration or association with another state". [368]

The research in chapter two identified the various international instruments that have addressed self-determination: rights that fall upon a people before they go through the process of determining their status. These have been identified by Drew (2001) thus;

> While its normative contours are yet to be definitively settled, the following can be deduced as a non-exhaustive list of the substantive entitlements conferred on a people by virtue of the law of self-determination in the decolonization context; the right to exist-demographically and territorially-as a people; the right to territorial integrity; the right to permanent sovereignty over natural resources; the right to cultural integrity and development; and the right to economic and social development. [369]

15. GA Res 1514 (XV) 14 December 1960 at paras1 and 2

16. See Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion ICJ Reports (1971) p.16 at p.34

17. Drew, K., (2001), *The East Timor Story: International Law on Trial.* European Journal of International Law vol 18. p.663.

The thesis noted that the legal right to self-determination applied beyond the colonial context. [370] However, the broad formulation that 'all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development', which is repeated in a similar manner in almost all the relevant UN documents including the Declaration of Principles of International Law Concerning Friendly Relations [371] and common Article 1 of the Human Rights Covenants presents some problems. This is central to why its meaning has been and continues to be the source of considerable contestation away from the colonial context. In particular, there is controversy as to who else (other than the population of an overseas colony) is a 'people', whether other people have a right to self-determination, and if, so how they can exercise their right of self-determination.

Chapter two also dealt with the African instruments on self-determination provided under the African Charter on Human and Peoples Rights. Furthermore, judicial decisions on self-determination particularly evolving from the jurisprudence of the International Court of Justice (ICJ) and other municipal courts have been scrutinized. Cases such as the South-West Africa Decolonization (1949-1971) as well as the Western Sahara Advisory Opinion (1975) were considered in detail. Other cases considered include the East Timor Case (1995), Legality of the Construction of a Wall in the Occupied Palestinian Territory (2004) the Northern Cameroons Case, the ICJ Advisory Opinion on Kosovo (2010) and the Quebec Secession Reference. The case

18 Gareau, B. (2005) *Shouting at the Wall: Self-determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Laiden Journal of International Law vol 18, p 489 at 505.

19 Declaration on principle of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations. GA Res 2625, 24 October 1970

law has further provided an in-depth analysis on the principle of self-determination in the contemporary international law.

The research for the purpose of clarifying the principle as it relates to South Sudan outlined in chapter three, the steps undertaken by the people of South Sudan to attain independence. The research noted that the processes leading to the exercise of the right to self-determination for the people of South Sudan was a long and difficult one which spanned over a decade. These processes involved series of agreements by the SPLM/A and the Government of Sudan. The Northern opposition political parties were not left out in the support of the quest for self-determination by South Sudan. This struggle led to the signing of the Comprehensive Peace Agreement (CPA) on 9 January, 2005. The resultant effect of the CPA was the holding of the 2011 Referendum and the independence of South Sudan. South Sudan thus became an independent state on 9 July 2011.

In chapter four, the thesis centered on the legal implications of the emerging post independence issues between the Republic of Sudan and the South Sudan. It was noted that self-determination and secession resulting from the creation of a new state is not an end in itself. The sustained achievement of set goals inherent in statehood requires the balancing of security and peace as the hallmark and main attributes of a state. The research observed that the CPA which ushered in the machinery for the secession of South Sudan from the Republic of Sudan left unsolved key issues which might endanger the peace between the two neighbours. Unresolved issues dealing with rights over citizenship, the Abyei territorial dispute, contested border disputes, sharing

of oil revenues as well as the Nile waters presents grave concerns that could endanger the full prospects for peace.

Following the secession of South Sudan from Sudan on 9 July, 2011, both countries have passed new citizenship legislation with dramatic effects on the rights of individuals on both sides of the new border. While the South Sudanese nationality provisions appear generous, its regime is at once both over and under inclusive. It grants citizenship to a broad range of persons with little connection to South Sudan but fails to guarantee citizenship for individuals habitually resident in South Sudan and children born in South Sudan to stateless, undocumented or foreign parents. The Sudanese Act provides for the automatic denationalization of South Sudanese nationals only and reserves to its own authorities, the discretion to determine whether South Sudanese nationality has been acquired. This will lead to *de jure* statelessness as individuals denationalized by operation of the Sudanese law struggle to establish their nationality claims in South Sudan. Those individuals who have acquired South Sudanese citizenship but remain in Sudan are left as *de facto* stateless in the continuing absence of effective state protection from South Sudan.

The thesis also discussed in details the Abyei territorial dispute as one of the thorniest post independence issue between the Republic of Sudan and South Sudan. The status of Abyei was billed for referendum at the same time as that of the South Sudan referendum but was stalled owing to disputed claims regarding who should be the rightful residents to take part in the referendum. The situation in Abyei has the potential to degenerate into an armed confrontation with increased force mobilization

by the armed forces of both the North and South. At present, the Permanent Court of Arbitration (PCA) has made an award delimiting the boundaries. However, the legal status of Abyei remains contested as the parties are yet to hold a referendum to determine whether they would align with the Republic of Sudan or South Sudan.

The polities of sharing of resources (oil and water) were canvassed in details as one of the post secession issues between the Sudan and South Sudan. Several Sudanese oil fields lie in the border area dividing Sudan and South Sudan. The oil produced in South Sudan is exported by the use of two main pipelines that run through the North to the export terminal at Port Sudan. Sharing of oil revenue has been identified as one of the most difficult issues faced by the two parties after the independence of South Sudan. The two neighbours had faced difficulties arising from the share of oil revenue leading to the shutdown in oil production in January, 2012. The African Union intervention helped to calm down nerves leading to further agreements and the commencement of oil production and shipments.

The thesis assesses how South Sudan's 2011 vote for independence has influenced the Nile Basins debate over water rights. Although, it initially seemed that South Sudan were aligning itself with the upstream riparian states such as Ethiopia and Uganda, effectively leaving Egypt and Sudan as the only opponents to a cooperative framework agreement and redefining the historic water rights. The escalation of the South Sudanese internal conflict between President Salva Kiir and the then Vice President Reik Machar changed this situation entirely. The conflict has reached a new stalemate, with Egypt giving military support to Salva Kiir in his fight

against Machar thus strengthening its position in the Nile Basin. Ethiopia on the other hand is hesitating to offer such assistance thus losing out in the new calculations. Currently, Egypt reasserts its dominant position in the debate. This study foresees three different possible future scenarios: one of the perpetuated violent conflicts, the other of political conflict and increased interstate political cooperation.

The thesis in chapter five dealt extensively with the post independence humanitarian crisis that engulfed the new state of South Sudan after secession following the outbreak of a civil war. In December 2013, growing political tension among key leaders in South Sudan erupted in violence, just three years after the country gained independence from Sudan in an internationally supported referendum. The political dispute that triggered this crisis was not clearly based on ethnic identity, but it however overlapped with preexisting ethnic and political grievances that sparked armed clashes and targeted ethnic killings in the capital, Juba and then beyond. The fighting which has occurred between forces loyal to President Salva Kiir and forces loyal to the then Vice President Riek Machar and among armed civilians has caused a security and humanitarian emergency that is drawing the world's newest country into a civil strife.

The civil strife has caused grave humanitarian crisis resulting in the displacement of more than 3,000,000 civilians due to the violence. Further, more than 500,000 IDPS have sought refuge at UN peacekeeping bases. [372] As many as 2,500,000 people have fled to neighboring countries. By UN estimates, thousands

20. United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), South Sudan crisis: Situation Report, 7 January 2015.

have been killed and UN officials indicate that targeted attacks against civilians and UN personnel may constitute war crime or crimes against humanity. [373] The UN Security Council in response to the violence unanimously authorized substantial increase in peacekeeping forces for UNMISS through Resolution 2132 (2013).

There has been growing diplomatic pressure both regionally and at the international level to protect civilians and facilitate an end to the violence. Given the insecurity, many countries and aid agencies have evacuated their foreign nationals. This, together with ongoing hostilities and related security concerns, constrains the humanitarian response. Talks between the parties began in January 2014, hoisted by regional leaders in Addis Ababa, Ethiopia. Progress, to date, has been limited, as both sides wage fierce campaigns to gain and hold ground, seeking to maximize their negotiation position prior to any cease fire agreement. The status of political figures detained by the government at the onset of the crisis remains a striking point. Diplomatic interventions by the United States, China, Sudan and others aimed at stopping further hostilities and to prevent further civilian displacement has yielded little. Meanwhile, the potential for tensions among the IDPS is a growing concern. The study further highlighted the fact that child soldiers are being used by both parties to the conflict based on UN reports in the field.

6.2 Findings

Self-determination and secession pose many challenges to international Lawyers. The former for its ambiguity and difficulties of operationalization and the

21 United Nations Office of the High Commissioner for Human Rights (OHCHR) Report, 24 December 2014.

latter for its uncertainty in status since it is neither permitted nor prohibited under international law. An analysis of the principle reflected these indices throughout the study. The thesis therefore revealed the following findings:

a. It has been observed in the research that the main problem with the right of self-determination is its vague and ambiguous articulation in the relevant international legal instruments. The articulation of these instruments leaves space for interpretation, scope and application of the right subject to controversies. In fact, there are conflicting definitions and legal criteria for determining which groups may legitimately claim the right to self-determination. Furthermore, there is not yet a recognized legal definition of "peoples" in international law. In cases where people lack representation by a states government, the unrepresented becomes a separate people. International law did not define ethnicity or other minorities as separate peoples.

b. The thesis found that national self-determination appears to challenge the principle of territorial integrity and sovereignty of states as it is the will of the people that makes a state legitimate. This implies a people should be free to choose their own state and its territorial boundaries. However, there are far more self-identified nations than there are existing states. Similarly, there is no legal process to redraw state boundaries according to the will of these peoples. Furthermore, self-determination, in the form of the creation of a new state through secession, could override the principles of majority rule and of equal

rights, which are primary liberal principles. This includes the question of how an unwanted state can be imposed upon a minority.

c. The principle of self-determination, though generally accepted as a right, the scope remains ambiguous and consequently subject to differing views on the meaning of the term. There are several unresolved questions regarding the time and to whom self-determination is appropriate. The principle of self-determination lacks precise guidelines for its application. The researcher noted that the right of secession is a latent option that may be conferred on peoples only in exceptional situations, and that even this limited right is controversial. The alleged right to self-determination is often used to serve the policies of ethno-nationalist ideology.

d. The position presented by this research posits that the full exercise of the right of self-determination includes the attainment of sovereign independence. There is, however, no guaranteed set of procedural steps leading to national independence. Before a liberation movement can transform into a new nation state, many legal and political strategies might be implemented. The ultimate success of a movement may depend not just on the validity of a peoples claim or on its political finesse. Other factors, such as regional and global political winds or third party power play, may independently impact on a claim to independence and determine its outcome. Article 1 of the Human Rights Covenants reads; “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" [374] Given the passage of time since this clause was agreed upon, it might have been expected that a more determinate understanding of the scope and content of the right would have emerged. This is not the case as the doctrinal debate on the meaning of 'peoples' and the contexts of the right that 'peoples' enjoy have no end in sight.

e. Clarity on the meaning of self-determination as a legal norm is perhaps hindered more than other norms by the controversial nature of the topic. This must be central to why the state actors rarely venture opinions on the nature of the right in their resolution, reports or diplomatic exchanges on the subject. Yet the controversial nature of some of the subject matter that the right to self-determination has been suggested to include, such as the right of a group within a state to secede and form a new state might not be the only reason that states have not made more efforts towards making their views on the scope and content of the right known. It is possible, for instance, that states place some value in the vagueness of the law of self-determination because it permits a broad range of plausible interpretations and is therefore able to accommodate unforeseen circumstances. It is also possible that doctrinal debates about the rights normative status could be deterring states from suggesting content for fear of the consequences that will follow from a more determinate norm coupled with particular normative status.

22.99 UNTS 171, entered into force 23 March, 1976 and 993 UNTS 3, entered into force 3 January 1976.

f. The thesis observed that uncertainty in the law of self-determination has been responsible for certain armed conflicts. It can be argued that uncertainty in the law of self-determination has itself contributed to many human tragedies the world has witnessed in the post-world war II period. This is because it gives false hope to minority groups that they have rights to autonomy or independence against the states which they are found, even without a colonial history. This is a strong reason why, even in the light of the benefits that states might derive from the indeterminacy of the law, it would be reasonable to expect states to have been more forthcoming than they have been to date with regard to publication of views on the meaning of the right.

g. One of the primary conflicts associated with the principle of self-determination is its association with notions of sovereignty and title to territory. This is a reference to substantive elements of the law of self-determination, other than the right to a free choice, that apply in the decolonization context, such as the right to permanent sovereignty over natural resources. It is also possible to identify a different type of relationship between the right to self-determination and sovereignty beyond the colonial context. The principle of popular sovereignty has long been used as a rhetorical device to legitimize governmental authority, by depicting as something granted by the people rather than obtained through a display or threat of force. It has been difficult to find support for popular sovereignty as a point of international law. The right of self-determination provides a basis for arguing that popular sovereignty has now

been legalized. This is possible when one accepts that the populations of a state as a whole are a people for the purposes of the right to self-determination. This gives the people a continuous right to freely determine their political status and freely pursue their economic, social and cultural development. This in so doing provides an ethnically more convincing explanation for sovereignty, than the traditional explanation based on effective control of territory.

h. The thesis examined the role of the ICJ in the interpretation, adjudication and clarification of the contentious issues relating to the right of self-determination. Where the right of self-determination of people is concerned, the court has arguably followed rather than pioneered the legal developments in international law. Its approach to the right has been rather consistent, especially in abstract terms. The court has consistently upheld the right as universally applicable one. However, it has not been able to determine who the beneficiaries of the right are. The ICJ has been rather conservative in most of its pronouncements. With states as its constituency, the court is more likely to contribute to a state-centric view of international law than to any alternative vision of international law. However the importance of the ICJ's role is that, the court has consistently treated the right to self-determination as a universal right, not a right confined to certain peoples. In adjudicating issues before it, the court has been rather cautious and therefore unable to formulate legal principles on the subject for an easy comprehension of the right to self-determination.

i. The thesis observed that following the secession of South Sudan from Sudan on 9 July, 2011, both countries have passed new citizenship legislation with dramatic effects for the rights of individuals on both sides of the new border. While the South Sudanese nationality provisions appear generous, its regime is at once both over and under-inclusive. It grants citizenship to a broad range of persons with little connection to South Sudan but fails to guarantee citizenship for individuals habitually resident in South Sudan and children born in South Sudan to stateless, undocumented or foreign parents. The Sudanese Act provides for the automatic denationalization of South Sudanese nationals only and reserves to its own authorities the discretion to determine whether South Sudanese nationality has been acquired. This will lead to *de jure* statelessness as individuals denationalized by operation of the Sudanese law struggle to establish their nationality claims in South Sudan. Those individuals who have acquired South Sudanese citizenship but remain in Sudan are left as *de facto* stateless in the continuing absence of effective state protection from South Sudan. The two laws combine to produce a substantially increased risk of both *de jure* and *de facto* statelessness.

j. The research analyzed the Abyei territorial dispute between Sudan and South Sudan and why it has been difficult to resolve the dispute. Abyei is noted to be on the border between the Republic of Sudan and South Sudan that has been the focus of a dispute between the two neighbours. This dispute has a number of unique aspects. First, it concerns not only the question as to which of

the disputing parties the territory belongs, but also the boundaries and limits of the territory itself. The issue of the boundaries needed to be resolved first, to be followed by a referendum in which the residents of Abyei would decide which part of the country the area would become part of. The second unique aspect is the large number of agreements that have been concluded by the disputing parties which are not aimed at the resolution of the dispute. The third issue relates to the contribution of the international community to the dispute resolution process. This has involved a major role by the United States; the Abyei Boundaries Commission (ABC), composed of independent experts; and the Permanent Court of Attribution (PCA) in The Hague, as well as the United Nations and the African Union. The research observed that indeed, there is no precedent for resolution by the PCA, or any other international tribunal, of a country's internal territorial dispute. Additionally, the dispute involves Sudan, South Sudan, the Ngok Dinka and the Misseriya tribes each claiming the area. Indeed, the crux of the dispute gradually shifted since 2009 from the limits and boundaries of the Abyei areas to whether the Messiriya - a nomadic tribe are entitled to participate in the referendum. This protracted dispute in Abyei strains relations between the Republic of Sudan and the South Sudan and therefore endangers the prospects for peace between the two neighbours. Aside from the Abyei dispute, other borders are also in dispute between Sudan and South Sudan. These include the South Kardofon, Blue Nile, Upper Nile, White Nile, and Unity State. Others are the Heglig, Kaifa, Jau, Bahrel, Arab (Kiir) River,

Magnenis Mountains and Jodha. Most of these disputed borders witnessed tensions and clashes leading to breakdown of law and order.

k. The research found that the Comprehensive Peace Agreement (CPA) and the process of independence of South Sudan have left unresolved some key issues that might in the end endanger the full peace process. In particular unresolved issues over the sharing of resources (oil revenues and Nile waters) represent issues over which confrontation with Sudan could escalate. The Nile waters potentially expose South Sudan to risks of conflicts also with other regional actors, including Egypt. Oil was not addressed in great detail in the CPA talks. There should have been some level of agreement before the referendum as both economies needed uninterrupted revenue to sustain the confidence of the oil companies. Oil production was brought to a halt in 2012 following disagreement between the two countries over sharing formula. The same dynamics is being repeated with respect to the Nile waters. There was no agreement on the utilization of the Nile waters in the CPA and this unlike the oil revenue crisis is a potential for future tension in the region.

l. The research observed that the South Sudan's civil war that broke out on 15 December, 2013 was decades in the making. The speed with which the SPLM and SPLA collapsed reveals the ephemeral nature of the steps taken prior to secession. The transition to a more broadly representative political and military institutions clearly remained woefully uncompleted due to the lack of substantive SPLM and SPLA reforms. The failure to reconcile political and

military grievances that built up during the 1983-2005 civil wars was also reflected in the rapid recourse to ethnic violence. President Kiir's initial steps to establish multi-ethnic and broadly representative political and military institutions that began in 2006 could serve as the basis of a serious reform process for both institutions. The democratic space that was closed after independence must be reopened urgently to enable peace and reconciliation processes to take root. The difficult challenge of building a stable polity and mending relations between communities required a long-term commitment from both South Sudanese and international actors. The civil war has thus led to grave humanitarian crisis and gross violations of international humanitarian law. This includes targeted killings as well as the use of child soldiers by both parties to the conflict. An immediate resolution of the crisis would halt the IDP crisis, hunger and starvation as well as put back on track prospects for reconciliation of the young state of South Sudan.

m. The thesis observed that the South Sudanese war has created severe humanitarian issues. These issues revolve around the targeting of civilian populations as well as UNMISS compounds by combatants in the dispute. These actions constitute grave humanitarian challenges to the region with catastrophic effects on the peace process. This would need to be addressed in order to effect the necessary safeguards for access to people in dire need of humanitarian assistance.

n. The analyses of the South Sudanese war and efforts at its resolution revealed several shortcomings. It has been observed that the peace process did not include the civil society representatives, community based organizations, youth leaders and women associations. Wide consultation on the part of the African Union is equally lacking. Furthermore political coordination on the part of the regional leaders seems to be lacking in the efforts at ending the crisis.All these issues needs to be addressed in order that progress could be achieved in resolving the protracted war.

6.3 Recommendations

Having regard to the findings contained in the paragraphs above, the following recommendations are hereby made:

a. Self-determination includes the right of a people of an existing state to choose freely their own political system and to pursue their economic, social and cultural development. However, legal approach to the study of self-determination must identify the holder of the right to self-determination and who is "the people" to be qualified to exercise the right. A retinue of legal regime was thoroughly analyzed in the thesis. It is however disturbing that the UN instruments and other legal documents dealing with the principle did not provide a useful definition of the term "people". The research noted that finding an answer to this question is obviously not an easy task especially, bearing in mind other definitions of the "minority, indigenous population" or 'nation'. The

term “people” have not received a generally acceptable definition. In this context, it is recommended that the word “people” should encompass nation, nationality, culture, geographical boundaries, customs, Language, beliefs or common related identities who inhabits an identifiable predominantly contiguous territory.

b. Despite the uncertain legal status ascribed to self-determination, especially in its territorial dimension, it remains the only vehicle through which indigenous rights to territory can be expressed. The right itself has seen numerous changes since its early expression and has developed much more a political than a legal principle. Given a principle of uncertain substantive content, the authority of a legal tenet was arguably fraught with danger. Yet, political forces bestowed the right to self-determination as the vehicle for expression of freedom in the face of oppression. Having regard to this formulation, it is recommended that a more concerted approach at engaging the underlying tensions in many post-colonial states will allow a more thorough analysis and reflection on whether the quest to protect order-by sanctifying inherited international frontiers has truly yielded order. Thus th*e uti possidentis juris* lines may be modified by consent. However, this consent should be restricted to that between sovereign states.

c. In the past, textbook writers and international lawyers have often assumed that the only way of exercising the right of self-determination is by way of secession or external self-determination. But there exist a variety of

forms by which the right of self-determination can be exercised, and secession is only one of them. From a liberal perspective, the right to self-determination is never absolute but must always be in accordance with the right of others. A right to secession does not necessarily flow from a right of self-determination yet, in the case of gross human rights violations, secession might be the only way to exercise the right of self-determination and thus secession may be legitimate as a last resort. Much of the reluctance to grant a right of self-determination to indigenous peoples is caused by the assumption that a full exercise of the right of self-determination would imply their right to secede. But self-determination does not necessitate a fixed outcome but rather prescribes the process leading to the outcome. In this domain, it is recommended that in order to accommodate demands for minority rights and avoid secession and the creation of a separate new state, many states should decentralize or devolve greater decision-making power to new existing sub-units or even autonomous areas. More limited measures might include restricting demands to the maintenance of national cultures or granting non-territorial autonomy in the form of national associations which would assume control over cultural matters. This would be available only to groups that abandoned secessionist demands and the territorial state would retain political and judicial control, but only on grounds that the entity seeking group's remains within the territorially organized state.

d. It is recommended that sovereign states should include in their constitution the Ethiopian and the CPA model by outlining all the political strategies that ought to be implemented by the self-determination seeking entity to attain statehood. These should include the holding of a referendum,the vote by the national legislature as well as sharing of assets between the new entity and the mother state.

e. The right to self-determination is one of the most unsettled norms in international law. This is true of both its legal content and its normative status. This research has shown that there is reason to believe that the way the normative status has been presented in legal doctrine could be deterring states from publishing their views on the scope and content of the right. In particular, the presentation of the norms as one of *jus cogens* has been highlighted. It has been suggested that because the identification of the case for the norm to be seen as *jus congens* is often made in a general manner, as such states might form the impression that any aspect of the right to self-determination that becomes more determinate will automatically also have *jus cogens* status. This has been argued to be the contrary, but it still might be enough, in the light of the consequence that follow from *jus cogens* status, to deter states from contributing to the determinacy of the scope and content of the right to self-determination. To address this concern, it is recommended that as a first step towards states making more effective use of the opportunities they have to present their views on the scope and content of the right to self-determination,

states should be encouraged to make a conscious effort to use these opportunities to publicize their understanding of the normative status of the right. The idea is that clarity on the normative status issue might make states more willing to discuss the scope and content of the right to self-determination.

f. The colonial history of self-determination seeking entity should be well defined. The International community must from the onset discourage people who lack the requisite political history from attempting to embark on separatist activities. This would in the long run assist in the maintenance of law and order in sovereign states.

g. Sovereignty and territorial integrity of states is a direct affront to the principle of self-determination. There is therefore the need to define with precision the distinction between the two principles of international law. The failure of the international community to draw a distinction between sovereignty and self-determination would continue to account for series of civil unrests by people attempting to secede from their host state.

h. The role of the International Court of Justice (ICJ) in developing self-determination as a norm of international law has been significant. At a general level, the ICJ asserted plainly, at a time of substantial opposition, that self-determination is part of international law. The court consistently maintained that position over the years. It is however regrettable that the ICJ did not always elaborate on issues adequately. What emerges clearly from the jurisprudence of the ICJ is that the right of self-determination is a right of process and not of

outcome. That is, international law requires that 'peoples' be allowed to express their opinion on the alternative choices available to them, be it independence or some other status. It is therefore an entitlement that gives people a choice. Its opinion should be succinctly sought in contested cases. It is therefore recommended that the ICJ advisory opinions be sought and received by international bodies inclusive of state actors in contested cases of secessionist struggles. The advisory opinion of the ICJ is a mechanism that is often underutilized which may prove helpful in promoting political settlement of some secessionist disputes. Moreover, an ICJ advisory opinion concerning a specific secessionist claim would help clarify the legal relationship between the right of peoples to self-determination and the right of states to preserve their territorial integrity. In the same sphere, ICJ advisory opinion should elaborate in details the issues at stake with a view to the further development of international law on self-determination rather than the secretive approach which have dominated its opinions overtime.

i. The amended nationality regimes of Sudan and South Sudan together produce a significantly increased risk of both *de jure* and *de facto* statelessness. The most important way of avoiding statelessness is to ensure that no individual loses his or her Sudanese nationality without acquiring South Sudanese nationality under the laws of South Sudan. Therefore, the Republic of Sudan should not withdraw its nationality from persons resident in the Republic of Sudan unless proof is obtained that South Sudanese nationality has been

acquired in fact and not in accordance with the theoretical interpretation of the law. If Sudanese nationality has been revoked, those persons who are allowed to reacquire it under new provisions in the law should include, at minimum, persons who can show that they were refused recognition of South Sudanese nationality. The norms established by Article 2 of the African Charter on Human and Peoples Rights and other international law instruments prohibit discrimination on the ground of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. This should be respected in the nationality laws of both Sudan and South Sudan, and in their implementation. Perhaps of most concern is the action of the Sudanese authorities to withdraw nationality from individuals on purely ethnic ground. Decisions relating to the nationality status of large groups of people require simple and accessible procedure for recognition or acquisition of nationality and due process protections for revocation of nationality. South Sudan has adopted regulations under its Nationality Act, which provide for a right to appeal decisions made under the Act. However, Sudan has yet to adopt regulations that take into account the 2011 amendments to the law. These amendments should introduce accessible procedures for administrative and judicial review of decisions to refuse recognition of, or revoke nationality, with specific protection for due process rights including the right to written reasons for the refusal and the right for the individual to be heard. The provision of the Interim National Constitution of Sudan and the Transitional Constitution of

South Sudan that a person who has one parent with the nationality of that state has the right to nationality of that state should be respected. Others with an appropriate connection to Sudan, including long-term residents should also have the right to retain Sudanese nationality. The right to dual nationality, if permitted under national law (as it is in general for both Sudanese states), should not be restricted in the case of one particular state (as the amendments to the Sudan Nationality Act purport to do in relation to nationals of South Sudan). At minimum, dual nationality between the two states should be permitted during a child's minority, with a right to opt for the nationality of either state on majority and those who are already adults should be given the same right to opt.

j. The findings of the research suggest that the Abyei territorial dispute can best be resolved by the traditional leaders of both the Messeriya and the Ngok Dinka tribes. Both tribes have lived in peace for a long time prior to the eruption of the civil war in 1955. Differences between members of the two communities were resolved by their leaders on the basis of their traditions and customs. Those leaders know better than anyone else issues relating to the boundaries and rights of each community. Indeed the dispute should have been placed from the very beginning of the process, in the hands of the traditional leaders and should not have been dealt with by the politicians and international experts and entities. A resolution of the dispute by the leaders of the two tribes is more likely to be acceptable to their members and more implementable and

sustainable than a resolution by the two governments or by a third party. The resolution of the dispute would be of immense benefit to the two states.

k. The thesis analyzed the inconclusive agreements provided in the CPA relating to oil revenues and water resources. In this regard, both governments need to reform the process of natural resource management and further strengthen agreements on oil revenue sharing. This would provide the necessary leeway needed for uninterrupted oil revenues required for development by the two countries. Furthermore, the Nile water issue can best be tackled effectively through regional and international cooperation and a continuous effort by the riparian states to strengthen agreements on the Nile water usage. The Nile Basin states should enter into negotiations to divide the Nile to everyone's benefit and to support cooperation over common interests.

l. The research examined the immediate post secession challenges in the ensuing civil war in South Sudan with its humanitarian effects on the citizens. There is therefore the need to address immediately the deteriorating political, security and humanitarian situation. In this domain, the UN Security Council should amend the mandate of the UN mission in South Sudan (UNMISS) to ensure it is consistent across the country. The mission must emphasis protection of civilians, human rights reporting, and support for the Inter-Government Authority on Development (IGAD) mediation process and logistical help for the African Union (AU) Commission of Inquiry. The UN Security Council should clearly indicate that leaders will be held responsible for the action of troops they

command, and any interference with UNMISS and humanitarian operations may give rise to targeted sanctions. Additionally, any support provided to an IGAD or other regional force is consistent with and does not undermine UNMISS ability to carry out its mandated tasks, particularly, its protection of civilians responsibilities. The UNMISS mission should communicate more effectively to all parties the parameters of its refocused mandate, including its Chapter VII protection of civilians responsibility. It should respond consistently to increase restriction and violations of its Status of Forces Agreement with the government of South Sudan that undermine its ability to carry out the tasks assigned by the UN Security Council.

m. To enable impartial humanitarian access to civilians in need, all armed actors must be specifically reminded of their adherence to international humanitarian obligations. They must specifically halt the targeting of civilians and must halt combat operations in areas where civilians cannot be distinguished from combatants and must avoid combat action in areas around UN bases where those seeking protection are sheltered. Commanders of the above armed actors must end the looting and destruction of humanitarian facilities. To promote inclusive political dialogue, ensure accountability for war crimes and atrocities and prevent further regionalization of the conflict, the South Sudanese actors, IGAD, the AU and other international partners need to coordinate their activities on a common front. They need to establish three separate negotiations tracks-focused on the SPLM, armed groups and

communal conflict-that are appropriately sequenced and contribute to the broader process of national political dialogue. There is the need to discuss and plan interim political and military arrangements that go beyond simple power sharing between the elites driving the conflict to bring in an inclusive group of South Sudanese who reflect the country's political and ethnic diversity, as well as regional figures.

n. Regional and international partners should include in the peace process, South Sudanese civil society representatives, such as regional leaders, community-based organizations, youth leaders and women's associations. They should recognize that engagement with all armed groups and militarized communities is critical to sustainable conflict resolution and that failure to do so will undermine the mediation efforts. Furthermore, truth, justice and reconciliation should be part of the process to address mass atrocities and prevent further conflict. The African Union should provide the AU Commission of inquiry into human rights abuses with adequate staff, time and resources to consult widely when formulating its recommendations, inclusive with the parties in conflict, civil society, religious organizations and communities. The international bodies should consider a hybrid tribunal with South Sudanese and international judges, similar to the Special Court for Sierra Leone, as a vehicle through which to obtain concrete and visible justice for the people of South Sudan. The international partners should increase political coordination between the IGAD mediation process and the African Union High-Level

Implementation Panel (AUHIP) for Sudan and South Sudan, as tensions continue to increase between the two states. It should also establish a contact group that includes IGAD, the AU, EU, China and South Africa to facilitate the discussions on the way forward and coordination between the international actors. The use of child soldiers should be discouraged by both actors in the conflict while the humanitarian situation should be improved by allowing access to the IDPs and those placed in the UN protection centre.

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