

**THE LAW OF SELF-DETERMINATION (SECESSION IN PERSPECTIVE): WAY FORWARD  
AFTER KOSOVO AND SOUTHERN SUDAN**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF  
PRETORIA, I PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF  
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**30 OCTOBER, 2009**

## Declaration

I **BRIGHT THEU** declare that the dissertation “**The law of self-determination (secession in perspective): way forward after Kosovo and Southern Sudan**” is my work and that it has not been submitted for any degree or examination in any other University. All the sources used or quoted have been duly acknowledged.

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## DEDICATION

To my parents and siblings for what many are not

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## **ACKNOWLEDGEMENTS**

**For this work, I would like to thank Assoc. Prof Dr. Ben Twinomugusha, for the supervision of this work. My special thanks to Zwe from Zim, my housemate, and the Makerere crew 2009. You were my world.**

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## CHAPTER 1: INTRODUCTION

### 1.1 Background to the study

Southern Sudan is a semi-autonomous region of the Sudan. Its semi-autonomous status is a result of compromises concluded in 2005 under the landmark Comprehensive Peace Agreement (CPA)<sup>1</sup> ending a more than two decades secessionist war of liberation fought by the Southern Sudanese against the predominantly Arab Northern Sudan. In many ways Southern Sudan is emblematic of many other states where part of the population demands total self-government.<sup>2</sup> Yet because of their unpopularity and the presumed inconsistency with states' territorial integrity and sovereignty, secession claims are given little attention. As a result the international community has been reticent to come out boldly and clarify the law on self-determination under which secession claims are legally premised. The traditional, yet problematic position is that secession is inconsistent with the territorial integrity of existing states.<sup>3</sup> Ironically this remains the position despite the fact that secession undeniably accounts for the incessant proliferation of states. The proliferation of states has been a product of repeated ordering and reordering of existing polities. From the disintegration of ancient empires into states, the recent fragmentation of the Soviet Union and the consequent states, secession has featured in the reordering of territorial polities.<sup>4</sup> The process can fairly be characterised as a convoluted function of both voluntary and involuntary coexistence of peoples; and disintegration of existing polities along incompatible ethnic, religious or ideological identities.<sup>5</sup>

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<sup>1</sup> Signed by Government of the Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) on 9<sup>th</sup> January, 2005. See Report of the UN Secretary General on the Sudan, 31<sup>st</sup> January, 2005, available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/220/62/PDF/N0522062.pdf?OpenElement>> (accessed 8<sup>th</sup> September, 2009).

<sup>2</sup> Listed at <[http://en.wikipedia.org/wiki/List\\_of\\_active\\_autonomist\\_and\\_secessionist\\_movements](http://en.wikipedia.org/wiki/List_of_active_autonomist_and_secessionist_movements)> (accessed 27<sup>th</sup> August, 2009)

<sup>3</sup> *Katangese Peoples' Congress v Zaire*, Communication 75/92 8<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples' Rights; *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, citing *Declaration on the principles of international law governing friendly relations and cooperation among states in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 October, 1970; *Vienna Declaration and Program of Action*, A/CONF.157/24, 25 June, 1993; *Declaration on the occasion of the fiftieth anniversary of the United Nations*, GA Res. 50/6, 9 November, 1995; and the European *Helsinki Final Act*, 14 I.L.M. 1292 (1975).

<sup>4</sup> The break-up of the Soviet Union produced fifteen separate, independent and sovereign states; while the Socialist Federal Republic of Yugoslavia (SFRY) broke-up into six states including Serbia: Mutua, M. 'Why redraw the map of Africa,' (1994-95) 16 *Michigan Journal of International Law* 1113. On 17<sup>th</sup> February, 2008 Kosovo's declared independence from Serbia: Vidmar, J. 'International legal responses to Kosovo's declaration of independence,' 42 *Vanderbilt Journal of Transnational Law* 779, 780

<sup>5</sup> Yugoslavia came into being following the Balkan wars of 1912 and 1913 where the Kingdom of Serbia acquired Kosovo, Sandjak and northern Macedonia. After the First World War Serbia enlarged its territory to include Bosnia, Croatia, Slovenia, Montenegro, and Vojvodina to form Yugoslavia. Later Yugoslavia disintegrated into almost the same components that formed it. see Vidmar, n 4 above, pp784-787

To date, the world order is replete with secessionists and autonomist claims.<sup>6</sup> One salient feature about such bids is that they are historical, and are made on the ground of marginalisation following ethnic, linguistic, ideological or religious cleavages. Further, usually such bids are made by “peoples” who have a historical claim to that part of the territory of a state they inhabit, and not infrequent, predating the state itself.

For Africa, and other regions with like histories, the problem is far more intricate on account of various factors. The arbitrary territorial demarcation of Africa and colonisation had the effects of dividing and coercing previously independent and self-governing ethno-political nations, characterised in almost all cases by cultural, linguistic, and ethnic homogeneity, to live together under single states.<sup>7</sup> Further, the use of one group to marginalise and govern other groups created an edifice of exclusionary politics that has yet to disappear.<sup>8</sup> This is reflected in modern democratic politics where political leaders mobilise political support from loyal kin groups and broader ethnic bases to help secure victories, limit support for political rivals, and restrict the mobilisation of potential challengers.<sup>9</sup> By default government attention and resource allocation follows the same configuration.<sup>10</sup> As a result a veritable maze of grievances and severe ethnic sensibilities has been nurtured contributing to a complex interplay of multiple factors which form the basis for internal conflicts or eventual demand for total self-government. Both internal conflicts of a mild magnitude and wars of secession have historically posed considerable threat to international peace and resulted in grotesque loss of innocent human life.<sup>11</sup>

From the perspective of international law, secession bids and the attendant wars resulting from countermeasures undertaken by states underscore the supposed tension between "self-determination" and "territorial integrity." One problem in developing coherent responses to the

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<sup>6</sup> Above n2

<sup>7</sup> Mutua, above n 4

<sup>8</sup> When Germany was the colonial power over Burundi and Rwanda, it used the strategy of divide and conquer by placing members of the Tutsi minority in positions of power. When Belgium took over in 1916, the Tutsi and Hutu groups were rearranged whereby a Tutsi was anyone with more than ten cows or a long nose, while a Hutu meant someone with less than ten cows or a broad nose. The two groups' struggle for power and the socio-economic divide between Tutsis and Hutus continued after independence and was a major factor in the Rwandan genocide of 1994. Almost the same treatment of natives was used by the British Empire in Sudan where the Southern Sudanese were marginalized in governance in favour of the Northern Sudan. This disparity partly accounts for the civil wars fought between the North and South Sudan culminating in the recent settlement where Southern Sudanese will exercise the option whether to secede from the Sudan or not: Wikipedia, the free encyclopaedia, available at [http://en.wikipedia.org/wiki/Divide\\_and\\_rule#Africa](http://en.wikipedia.org/wiki/Divide_and_rule#Africa)

<sup>9</sup> Marshall M.G. (2008) 'Conflict trends in Africa 1946-2004: a macro-comparative perspective,' *Report prepared for the Africa Conflict Prevention Pool, Government of the United Kingdom* p14.

<sup>10</sup> Above n9 pp14-15

<sup>11</sup> Millions of lives have been lost during the secessionist wars of Biafra in Nigeria (1967), Eritrea (1993), Katanga in formerly Zaire, Southern Sudan (over two decades of war ending in 2005 claiming two million lives), Somaliland, Kosovo in Serbia, Sri Lankan government's crackdown on Tamil Tigers of Northern and Eastern Sri Lanka (April 2008), to mention but a few.

supposed conflict has been the vagueness of these terms. In the context of decolonization, self-determination meant immediate independence.<sup>12</sup> But there has been incessant disagreement over its applicability to non-colonial situations. Outside of the classic context of decolonization, the free exercise of self-determination has been constrained historically by great-power rivalry, questions about the potential economic and political viability of new states, and the overarching goal of maintaining order and stability by preserving existing territorial arrangements at all cost. As noted earlier, this position is maintained in the face of persistent and glaring secession claims around the globe. What lies at the root of this state of affairs?

## 1.2 Problem statement

The continued use of “self determination” especially in international human rights instruments and the attendant claims to secession crowns the international society heir to two apparently ‘competing’ cardinal principles of international order: “territorial integrity,” and the “peoples’ right to self-determination.” The essential content of the right to self-determination is that ‘peoples’ have the freedom to determine their political status and pursue their economic, social and cultural development.<sup>13</sup> This forms the basis for demands for secession by groups within a state. On the other hand, territorial integrity is the principle of international law that the territorial boundaries of sovereign states are sacrosanct and inviolable. To the extent that secession has the effect of redrawing the boundaries of existing states, it is considered to be inconsistent with territorial integrity. The supposed conflict of principles is further complicated by the fact that the principle of self-determination itself does not define the concept ‘peoples’; which peoples are entitled to sovereignty, and what territory they should get for that purpose. The failure by the international community to come to terms with the reality of secession claims has had serious implications. The law of self-determination in relation to territorial integrity remains ambiguous. Consequently, both deserving and non-deserving claims have been left to the mercy of states, which exploit the vagueness of the law by treating the claims as internal matters. Finally, as a result of the anachronistic and confused state of the law of self-determination the intervention of the international community through the United Nations or other regional structures in cases of grotesque human rights violations committed during the repression of secessionist demands is

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<sup>12</sup> United Nations Resolution 1514(XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 1960; Pomerance, M, (1982) ‘Self –Determination in Law and Practice: The New Doctrine in the United Nations,’ p.10 cited in Pritchard, S, ‘The Rights of Indigenous Peoples to Self-Determination under International Law,’ *Aboriginal Law Bulletin* available at <[http://www.austlii.edu.au/au/journals/Aboriginal\\_LB/1992/16.HTML](http://www.austlii.edu.au/au/journals/Aboriginal_LB/1992/16.HTML)>(accessed 28<sup>th</sup> October, 2009)

<sup>13</sup> See Art. 20(1) of the African Charter on Human and Peoples’ Rights (African Charter), and Article 1 of both the ICCPR and the ICESCR



seriously hampered. This legitimises states' use of brutal and lethal violence against secessionists groups. The foregoing state of affairs raises the fundamental question of how to address the root of the problem which lies in the vagueness of the law.

### **1.3 Research questions and objectives**

This research explores two fundamental questions. Firstly, drawing on modern versions of state sovereignty and democratic political theory, the study critically examines whether the principles of territorial integrity and self-determination in the sense of secession are really opposed. Secondly, by examining the *ad hoc* involvement of the United Nations and other regional bodies in maintaining peace and security in states faced with secession wars such as Southern Sudan and Serbia, the study will assess the prospects of a permanent and structured UN involvement for managing secession claims.

Like other critical studies with a jurisprudential outlook, the first question will be guided by three sub-questions: what is the law that poses the supposed conflict; what is the philosophical basis of the law in its current form and substance; and finally whether in light of the contemporary political theory and human rights there remains a proper basis for maintaining the law as it stands.

The main objectives of this study are:

- To critically appraise the supposed tension between 'territorial integrity' on the one hand, and the peoples' right to self-determination as a basis for secession.
- To demonstrate that the current position of the law is tactically vague and crippling to the international efforts for a better and peaceful world for all.
- To draw lessons from the practice of the United Nations and other regional bodies in diffusing violent conflict and maintaining peace where secession claims have taken violent forms.
- To suggest an edifice for the permanent mandate of the United Nations to deal with secession claims.

### **1.4 Significance and limitations of the study**

This work makes a contribution to the diverse and ever-growing scholarly literature in human rights and international law in general. The value of the contribution is twofold. Firstly, it exposes the fallacy that territorial integrity and self-determination are inimical in principle. Secondly, the

exposition advanced herein, though admittedly and deliberately radical, provides unique insight into the possible role that the United Nations can play in managing secession claims that often erupt into violent protracted conflicts. It is the author's considered view that the suggestions herein would go a long way in fostering international peace and respect for innocent human lives that are unnecessarily brutalised when peoples resort to armed struggle as a result of being denied the right to determine their political status apart from the states they have been part of.

Constrained by space, this work does not pretend to settle the on-going debate on the validity of a right of secession. Rather, it only addresses the main crucial issues and views involved in the discourse. Further, the author focuses on lessons from two scenarios that have experienced secession claims: Kosovo and Southern Sudan. The experiences of these two autonomous regions will be used to suggest an organised and permanent way of dealing with similar occurrences under the auspices of the United Nations.

## **1.5 Methodology**

Essentially, this study is a critical analysis of the law and practice. Findings presented arise from desk research that involves examining international treaties, case law, textbooks, journal articles and other scholarly works. The internet also formed a constant source of information.

## **1.6 Literature review**

The controversy surrounding the scope of the peoples' right to self-determination construed as the right to secede, and the principle of territorial integrity of states is not recent. It has been reflected in the deliberations preceding the adoption of major international treaties that have a bearing on secession and territorial integrity.<sup>14</sup> UN and regional practice affirms a tapered scope of the right to self-determination in favour of territorial integrity as evidenced by the numerous resolutions and declarations touching on self-determination.<sup>15</sup> The same attitude has informed judicial opinion on secession claims. In *Reference re Secession of Quebec*<sup>16</sup> where Quebec sought to secede from Canada, the Supreme Court of Canada held that international law does

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<sup>14</sup> The Republic of India declared on Article I of the ICCPR and ICESCR that "the right of self-determination' does not apply to sovereign independent states or to a section of the people or nation – which is the essence of national integrity." The Netherlands objection to that was that "any attempt to limit the scope of the right or to attach conditions would undermine the concept of self-determination itself and would seriously weaken its universal acceptability." UN Doc ST/HR/R/Rev. 4, 44ff quoted in Thornberry, P. (1994), *International Law and the Rights of Minorities*, pp214-215

<sup>15</sup> Above n 3

<sup>16</sup> [1998] 2 S.C.R 217

not grant component parts of sovereign states the right to secession under self-determination. A similar opinion was delivered by the African Commission in the case of *Katangese Peoples' Congress v. Zaire*<sup>17</sup> where the Katanga region of formerly Zaire claimed a right to secede based on Article 20(1) of the African Charter. The African Commission stated that it was 'obliged to uphold the sovereignty and territorial integrity of Zaire, a member of the AU, and party to the African Charter on Human and Peoples' Rights.'<sup>18</sup>

More categorical is the position espoused by most literary authorities. From about 1970s, there has been prodigious amount of writing on self-determination from varied perspectives.<sup>19</sup> Writing during the currency of decolonisation, most of these writings espouse the conservative view that secession was not part of self-determination.

However, some scholarship has attempted to be more modestly analytical. Thornberry<sup>20</sup> gives a fair analysis of self-determination from the perspective of minorities. Berman<sup>21</sup> candidly demonstrates the internal tensions in theories and applications of self-determination in mainly judicial materials. Allot<sup>22</sup> and Edward<sup>23</sup> merely explore the literary meaning of self-determination, while McCorquodale<sup>24</sup> gives a more prescriptive approach based on human rights law. In a bid to avoid secession claims, Simpson<sup>25</sup> suggests a re-conceptualisation of self-determination beyond the decolonisation epoch into forms that would be exercised within established states.

More importantly are the various writings espousing ingenious and practical suggestions for confronting secession claims.<sup>26</sup> These works are modelled on the idea that severe human rights abuses or a denial to participate in government should give rise to a right of secession as a

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<sup>17</sup> Communication 75/92, 8<sup>th</sup> Annual Activity Report, also reported in (2000) AHRLR 72

<sup>18</sup> Above n 15, (2000) AHRLR 72, 73

<sup>19</sup> Simpson GJ 'The diffusion of sovereignty: self-determination in the post-colonial age,' 32 *Stan. J. Int'l L.* (1996) 255, 256, citing Emerson, R 'Self-determination' 65 *Am. J. Int'l L.* (1971) (positivist); Suzuki, E. 'Self-determination and world public order: community responses to territorial separation,' 16 *Va. J. Int'l L.* (1976) 779 (pseudo-legislative); Brilameyer, L. 'Secession and self-determination: a territorial interpretation,' 16 *Yale J. Int'l L.* (1991) 177 (pragmatically conservative); and Przetacznik, F. 'The basic collective human right to self-determination of peoples and nations as a pre-requisite to peace,' 8 *N.Y.L. Sch. J. Hum. Rts* (1990) 49 (extracting meanings from international law instruments that bears little resemblance to the realities of customary international law and practice)

<sup>20</sup> Thornberry, P 'Self-determination, minorities, human rights: a review of international instruments,' 38 *Int'l & Comp. L.Q.* 867 (1989).

<sup>21</sup> Berman, N 'Sovereignty in abeyance: self-determination and international law,' 7 *Wis. Int'l L.J.* 51 (1988)

<sup>22</sup> Allot, P 'The nation as mind politic,' 24 *N.Y.U. J. Int'l L. & Pol.* 1361 (1992)

<sup>23</sup> Morgan, EM 'The imagery and meaning of self-determination,' 20 *N.Y.U. J Int'l L. & Pol.* 355 (1988)

<sup>24</sup> McCorquodale, R. 'Self-determination: a human rights approach,' 43 *Int'l & Comp. L.Q.* 857 (1994)

<sup>25</sup> Above n 19

<sup>26</sup> Buchheit, L.C. (1978) *Secession: the legitimacy of self-determination*; Neuberger, B. (1996) *National self-determination in post-colonial Africa*; Kamanu, O. 'Secession and the right of self-determination: an OAU dilemma,' 12 *J. Mod. Afr. Stud.* 355 (1974); Nayar, KMG 'Self-determination beyond the colonial context: Biafra in retrospect,' 10 *Tex. Int'l L.J.* 321 (1975); White, RCA 'Self-determination: time for reassessment?' 28 *Neth. Int'l L. Rev* 147 (1981)

remedy of last resort. Indeed this view has informed judicial opinion recently.<sup>27</sup> Cassese,<sup>28</sup> Doerhing,<sup>29</sup> Thornberry,<sup>30</sup> and Tomuschat,<sup>31</sup> also acknowledge the view that international law does not allow secession *per se*. They take a step further to consider the moral and philosophical arguments in favour of a right to unilateral secession. However, they also end with the view that secession can only be allowed in exceptional circumstances such as a total denial of the right to participate in government and grotesque human rights abuses that call into question the very integrity of the state.

It is scarcely apparent from these works that a scrutiny striking at the roots of the controversy has been undertaken, namely, whether territorial integrity and secession are jurisprudentially inconsistent. Indeed the preference of territorial integrity to a right of secession is premised on the fears of the disruptive consequences of breaching territorial integrity of states and not the jurisprudential incongruity of the two principles. Further, the legal instruments on which the predominant view relies are unfortunately glaringly inapplicable to secessionists as will be demonstrated in the following chapter. As a result, there is no proper, clear and firm legal regime inhibiting secessionists from making their claims and using force to secure their objective.

Furthermore, the confusion surrounding the law of self-determination and the divergent scholarly views have crippled innovative dialogue aimed at developing an organised international structure to regulate secession claims. It is on these two fundamental gaps that this work suggests the way forward.

## 1.7 Overview of the chapters

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<sup>27</sup> This was the view adopted in *Katangese Peoples' Congress v Zaire*, above n 15. The Supreme Court of Canada also heavily relied on scholarly works to fortify the view that international law does not allow unilateral secession and that self-determination must be exercised internally through the variant forms such as federalism and confederalism: *Reference re Secession of Quebec*, above n3. The international Court of Justice is yet to pronounce on the issue in a request for an advisory opinion filed recently by the Government of Serbia following Kosovo's unilateral declaration of independence on 17<sup>th</sup> February, 2008: Accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo (Request for an advisory opinion) – public hearings scheduled for 1<sup>st</sup> to 11<sup>th</sup> December, 2009; available at <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case>>(18<sup>th</sup> September, 2009)

<sup>28</sup> Cassese, A. (1995) *Self-determination of the peoples: A legal reappraisal*, cited in *Reference re Secession of Quebec*, n 3 above.

<sup>29</sup> Doerhing, K. "Self-Determination." In Simma, B., Ed. (1994) *The Charter of the United Nations: A Commentary*, cited in *Reference re Secession of Quebec*, above n 3

<sup>30</sup> Thornberry, P., 'The democratic or internal aspect of self-determination with some remarks on federalism,' in Tomuschat, C. (ed.) (1993) *Modern Law of Self-Determination*

<sup>31</sup> Tomuschat, C., 'Self-determination in a post-colonial world,' in Tomuschat, C. (ed) (1993) *Modern Law of Self-Determination*.

This work is divided into four chapters. **Chapter one** comprises the background to the research, the research problem and questions, the objectives of the study, the methodology, and a review of the relevant literary work.

The **second chapter** comprise a discourse on the law as it exists, with a view to establishing whether the oft alleged conflict between secession and territorial integrity in principle really exists. This will be done by critically, albeit briefly, examining the relevant provisions in international treaties, the reigning practice under the United Nations and the explicating judicial pronouncements in light of modern political theory and human rights.

The **third chapter** examines the practice and involvement of the United Nations and other regional bodies in managing the phenomenon of secession with its ugly occurrences. It is here that important lessons are drawn and prospects of a permanent structure for dealing with secession claims are assessed.

The foregoing chapters will pave way for the articulation of the conclusions and recommendations in the **fourth and final chapter**.

## CHAPTER 2: SECESSION UNDER THE INTERNATIONAL LAW OF SELF-DETERMINATION AND TERRITORIAL INTEGRITY

### 2.1 Conceptual framework

#### 2.1.1 Self-determination

The concept of self-determination is not amenable to precise and comprehensive definition despite its considerable use in international history. From a cursory survey of its evolution it is apparent that it has had different meanings at different historical epochs and for different purposes. However, whereas particular historical moments countenanced different meanings of self-determination, it is not difficult to conceive of the idea that self-determination in the practical world of human societies existed long before it could be described in theory. In fact it is arguable that the act of self-determination is as old as human societies, and that a meaning that cuts across different historical moments can be worked out.

To begin with, the belief that people living in an organised society (polity) should not be subjugated by another society, their resources exploited by foreigners, or their representation in the running of the affairs of their society limited, is not controversial. This reality does not render itself to historical particularities. This also finds expression in the words of former United States of America President Wilson when he said that 'no people must be forced under sovereignty under which it does not wish to live.'<sup>32</sup> According to George,<sup>33</sup> self-determination is the ability of a people to separate from a national relationship and initiate their own government. This conceptualisation of self-determination inspired the American<sup>34</sup> and French<sup>35</sup> revolutions.

Further, it later continued to be used as a basis of decolonisation beginning as early as 1917 with Russia supporting the right of all nations including colonies, to self-determination.<sup>36</sup> Eventually, the concept found its way into the United Nations Charter (UN Charter) at the end of the Second World War as one of the organising principles for developing friendly relations

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<sup>32</sup> Quoted by Eastwood, L 'Secession: state practice and international law after the dissolution of the Soviet Union and Yugoslavia,' 3 *Duke J. Comp. & Int'l L.* 299

<sup>33</sup> George, RT 'The myth of the right of self-determination,' in Twining, W. ed. (1991) *Issues of self-determination*

<sup>34</sup> Uterberger, B.M. 'Self-determination' *Encyclopaedia of American Foreign Policy*, 2002

<sup>35</sup> Keitner, C. 'Self-determination: the legacy of the French revolution,' Paper presented at International Studies Association Annual Meeting, March 2000

<sup>36</sup> As early as 1914 Lenin wrote: "It would be wrong to interpret the right to self-determination as meaning anything but the right to existence as a separate state," Lenin, V.I. *The right of nations to self-determination*, available at <<http://www.marxists.org/archive/lenin/works/1914/self-det/ch01.htm#v20pp72-395>> (accessed 23 September, 2009). In fact the 1918 Constitution of the Soviet Union acknowledged the right of secession as self-determination for its constituent republics: above n 36

among states.<sup>37</sup> It was upon this ascendancy of self-determination from being a political ideology to a principle of international law that UN constructed an edifice of practice in which self-determination culminating into independence was viewed as an urgent goal for all peoples under colonial rule.<sup>38</sup> This ascendancy was epitomised by the adoption of two decolonisation resolutions by the UN General Assembly (UNGA) in 1960: Resolutions 1514 (XV) and 1541 (XV). This had two important effects on the principle. Firstly, the principle was elevated to a right of peoples. Secondly, it elucidated the content of the self-determination. The resolution stressed 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.’<sup>39</sup>

Judging by the title of the Declaration, this formulation was meant to apply to colonial contexts and peoples with the necessary consequence that once colonialism ended the right would be a spent force. However, while decolonisation was under way, the UNGA adopted the International Covenants on Human Rights in 1966 which came into force in 1976.<sup>40</sup> Article 1.1 of both Covenants reverberates the earlier formulation used in the Decolonisation Declaration. It 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.”<sup>41</sup>

From this formulation, it is clear that self-determination has been defined conclusively as a peoples’ **liberty to organise themselves freely in a community of their own making and nature in which they can develop culturally, socially and economically**. As pointed out earlier this resonates with the historical formulations of self-determination which formed the basis for the American and French revolutions, the claims for independent statehood of the

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<sup>37</sup> Article 1.2, UN Charter

<sup>38</sup> Pomerance, M (1982) ‘Self –Determination in Law and Practice: The New Doctrine in the United Nations,’ p 10 cited by Pritchard, S. “The Rights of Indigenous Peoples to Self-Determination under International Law.” *Aboriginal Law Bulletin* available at <[http://www.austlii.edu.au/au/journals/Aboriginal\\_LB/1992/16.HTML](http://www.austlii.edu.au/au/journals/Aboriginal_LB/1992/16.HTML)> (accessed 9<sup>th</sup> August, 2009)

<sup>39</sup> Shaw, MN (1997) *International law* p178

<sup>40</sup> International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)

<sup>41</sup> Articles 1.1 of both the ICCPR and ICESCR. Perhaps more emphatic is the formulation in the African Charter on Human and Peoples’ Right (ACHPR) which provides under Article 20.1 that “All peoples ...shall have the unquestionable and inalienable right to self-determination, freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”

Baltic States following the disintegration of the Soviet Union, Yugoslavia and Serbia in contemporary history. Perhaps this much is not controversial. Controversy only shows up when it comes to application of the right of self-determination especially in post-colonial Africa and Asia.

Whereas the peoples of the Baltic States have been allowed to exercise their right of self-determination and have finally had their independent status recognised, the same has been denied of other regions with like histories. The most emblematic of this is Africa which comprises of states formed and maintained by coercing peoples to co-exist under political units which do not answer to the realities of African civilisations that existed before colonisation. Applying self-determination to these circumstances would mean the disintegration of Africa into the so many pre-colonial ethno-political entities. Indeed it was the phobia of the disorder that would ensue that the principle of *uti possidetis*<sup>42</sup> emerged as a superior principle for maintaining the territorial states' status quo in Africa.<sup>43</sup>

From an analytical perspective, the application of self-determination at all times reflects two opposing forces of civilisation. The first is the urge of being in community with others as long as there is a common goal to be achieved by that co-existence against an 'external other.' Secondly, it is the tendency of bigger communities to hive off into smaller communities immediately the common goals for the existence of the bigger community are achieved, and the new 'other' is identified within the bigger community. The first urge explains the oneness of peoples under colonial domination within the colonial territorial state in the struggle for independence. The second urge is exemplified by the subsequent separatist demands from within the bigger community.<sup>44</sup>

The unqualified application of self-determination inevitably yields to the second impulse: the degeneration of established states into smaller homogenous nation states. It is this possibility that is believed to have disruptive consequences on international order. In a bid to limit the

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<sup>42</sup> Stated simply, *uti possidetis* provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence. The relevance of *uti possidetis* today is evidenced by the practice of states during the dissolution of the former Soviet Union, Yugoslavia and Czechoslovakia, where former internal administrative borders were sanctified as interstate frontiers: Ratner, SR 'Drawing a better line: *uti possidetis* and the borders of new states,' 90 *Am. J. Int'l L.* 1996 p.590

<sup>43</sup> Article 3.3 of the Charter of the Organisation of African Unity (OAU Charter) provides that in pursuit of among others defending their territorial integrity (Article 2.1(c), OAU Charter), member states shall respect the sovereignty and territorial integrity of each state. The respect for territorial integrity entailed the maintenance of colonial state boundaries as sacrosanct: *Burkina Faso v. Republic of Mali* I.C.J. Rep (1986) 554

<sup>44</sup> For example the demands for secession of Biafra in Nigeria, Katanga in formerly Zaire, the secession of Bangladesh from West Pakistan in 1971, and the secessions of the Baltic States in 1991.



application of self-determination, the fundamental question has hinged on which 'peoples' are allowed to exercise self-determination and under what circumstances. The following section looks at the developments on the concept of 'peoples' and its formulations that have gained currency in modern political and legal discourses.

### 2.1.2 Peoples

The right of self-determination is couched in international instruments as a accruing to 'peoples.' Accordingly, as correctly observed by the Canadian Supreme Court, access to the right requires the threshold of characterising as a 'people' the group seeking self-determination.<sup>45</sup> However, despite the right of self-determination developing through a recipe of international agreements and conventions coupled with state practice, there has been meagre formal elaboration of the concept of peoples. Immediately after the end of the Second World War, the political orthodoxy was that the terms 'peoples' meant the population of a state, and for the purpose of decolonisation, the population of a colonial entity. It was vigorously denied that a segment of an independent sovereign state's population could constitute a 'people.'<sup>46</sup> Whereas at the time of drafting the UN Charter, ICCPR and ICESCR the concept 'peoples' was left undefined for want of agreement,<sup>47</sup> the question was altogether shunned to avoid unnecessary controversy when drafting the ACHPR.<sup>48</sup> Granted a classic occasion to explicate the concept in the *Katangese Case*<sup>49</sup>, the African Commission on Human and Peoples' Rights (African Commission) stated that nationals of a state must exercise their right to self-determination within the state without undermining the territorial integrity of the state.

A very illuminating analysis of the term has been provided in a recent work by Viljoen who analyses the term as follows:

"Morphologically, the terms 'people' and 'a people' are distinguishable. On the one hand, the term 'people', used with the definite article ('the') but not with an indefinite article ('a'), has no plural form: in a given context it always denotes an inclusive plurality of all

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<sup>45</sup> *Reference re Secession of Quebec*, above n3

<sup>46</sup> Pavkovic, A. & Radan, P. 'In pursuit of sovereignty and self-determination: peoples, states and secession in the international order': available at <<http://www.austlii.edu.au/au/journals/MqLJ/2003/1.html>> (accessed 9th August, 2009)

<sup>47</sup> The Western European states argued that self-determination was a principle and not a right and that it would be premature to include it in the international covenants. On the other hand the Afro-Asian block successfully argued that self-determination is the most fundamental of all human rights and therefore supersedes the enjoyment of all other rights. See Simpson, above n 19

<sup>48</sup> The Rapporteur of the Ministerial Meeting, M'baye, explained that the refusal to define the concept was deliberate so as not to end up in difficult discussions: (CAB/LAG/67) *Draft Report (II)* Rev. 4 para 13.

<sup>49</sup> Above n 3

human beings, such as ‘the people of Congo’. On the other hand ‘a people’ (and its plural form, ‘peoples’, the term used in the African Charter), is a term with a more restricted scope, and may be demarcated by factors other than territorial boundaries or nationality.”<sup>50</sup>

From this analysis, Viljoen suggests<sup>51</sup> three ways of understanding the term ‘peoples.’ Firstly, the term denotes everyone within a state with the consequent problem of not being able to refer to the people in a plural form ‘peoples.’ Secondly, the term can be understood as denoting distinct groups<sup>52</sup> comprising individuals who are subjects of the same state. Thirdly, placed in a historical context, ‘peoples’ would mean inhabitants of an African territory under colonial rule, with the resultant problem of using the term in post-colonial contexts as the end of colonialism would render the term redundant.

It is the application of the term in the second meaning that is usually questioned when it comes to claims for secession as an exercise of the right of self-determination. Whereas the traditional understanding is that ‘peoples’ cannot refer to groups within a state, recent both political and legal developments would seem to be concretising that very possibility. In the *Katangese Case*,<sup>53</sup> the African Commission hinted at two possible grounds for identifying subjects of the right to self-determination that could include groups within a state. One ground is concrete evidence that the people asserting the right have suffered violations of their other rights to the point that the territorial integrity of the state is itself in question.<sup>54</sup> The second is when it can be established that the concerned people are denied the right to participate in government as guaranteed by the ACHPR.<sup>55</sup> The reasoning of the African Commission on these two grounds implies that the right may be extended to groups within a state who are persecuted, whose rights are consistently violated and who are denied a meaningful say in government. Such a group would be “a people.”

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<sup>50</sup> Viljoen, F. (2007) *International human rights law in Africa*, p 243

<sup>51</sup> Above n 50 pp 243-244

<sup>52</sup> Such as linguistic, religious, ethnic or other groups with a common identity distinguishing them from other groups within the same polity

<sup>53</sup> Above n3

<sup>54</sup> The Katangese claim failed on this ground in that it lacked a factual or evidentiary basis indicative of the oppression or human right abuses by the Zairian government directed at the Katangese people: Viljoen, above n 45 p245. See also *Legal Resources Foundation v. Zambia*, (14<sup>th</sup> Annual Activity Report), where it was argued that the right of peoples to equal respect under Art. 19 of the African Charter had been violated. The Commission commented that reliance on the said right required evidence showing that an ‘identifiable group of Zambian citizens by reason of their common ancestry, ethnic origin, language or cultural habits was adversely affected’.

<sup>55</sup> Art. 13(1) ACHPR

From a domestic perspective the Supreme Court of Canada seized its opportunity to elucidate the concept in the *Quebec Secession Case*,<sup>56</sup> where it succinctly stated that:

It is clear that “a people” may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain reference to “nation” and “state”. The juxtaposition of these terms is indicative that the reference to people does not necessarily mean the entirety of a state’s population. To restrict the term to the population of existing states would render the granting of the right to self-determination duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purposes.<sup>57</sup>

Accordingly the court held, albeit hesitantly, that the Francophone minority in Canada predominantly in the Quebec region would constitute “a people” for purposes of self-determination.<sup>58</sup> Having recognized the conventional groups of people entitled to self-determination, the Court went further to acknowledge the category of a people blocked from participating in government, noting though that it is uncertain if this category is an established international standard. However, with the adoption of the UN Declaration on the Rights of Indigenous Peoples,<sup>59</sup> it would now seem concrete that sections of populations of states can be recognised as a people, albeit for particular reasons.

From a wider perspective, it should be noted that common article 1(1) of the ICCPR and ICESCR, both living documents, entrenches a general statement about the right of self-determination for “all peoples.” The application unquestionably extends to peoples beyond the colonial milieu. In any case the right of self-determination for peoples under foreign subjugation is particularly provided for under common Article 1(3) of the ICCPR and ICESCR. Arguably, if the concept of “peoples” was intended to be of such limited scope as to exclude segments of existing independent states in view of the purported threat to territorial integrity, the same would have been accorded unequivocal expression in the covenants and declarations. There had

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<sup>56</sup> *Reference re Secession of Quebec*, supra n.3

<sup>57</sup> Above n 3 para 124

<sup>58</sup> Above n3, para 125 While accepting that much of the population of Quebec shares the traits (such as common language and culture) that would be considered in determining whether a group constitutes “a people” the Court thought the legal characterisation not necessary to resolve the questions under consideration.

<sup>59</sup> UNGA Resolution 61/295, available at <[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)> (accessed 23 October, 2009).

been incessant argument about the meaning of “peoples” prior to the drafting of the covenants. Despite that, the concept of peoples was included without express limitation on its scope. That performance is sufficient indication that there were, as there are, arguments of fairly equal force for a wider application than the reigning one.

The same argument holds well for the provision in the African Charter. A close reading of Article 20 of the ACHPR shows that Article 20(1) contains a general statement about the right of self-determination of “all peoples.” Article 20(2) deals specifically with the right of “colonized and oppressed peoples.” The use of two different concepts implies that the right in Article 20(1) is available to a broader group than just those under colonialism or other forms of subjugation. It leaves open the possibility that the right to self-determination may also apply to peoples in the post colonial context. Credence is added to that conclusion by two facts. The first is that the ACHPR does not mention territorial integrity - the very principle purportedly in conflict with the right of self-determination - though it is one of the anchors of the Organisation of African Unity Charter.<sup>60</sup> The second is that the provision was adopted without amendment, despite the fact that the possibility of its application beyond the colonial context had been raised during deliberations,<sup>61</sup> preferring instead to avoid difficult controversy.<sup>62</sup>

In the final analysis it can be surmised that the concept of “peoples” in the ICCPR, ICESCR and ACHPR bears the ordinary meaning which encompasses segments of populations of existing states, whatever the implications may be. Accordingly, any such “peoples” must be entitled to self-determination which as noted above includes the liberty to organise themselves in a society of their own making and nature. It may be added here that whereas the international community avoids such a meaning of the term ‘peoples’ on the ground of the possible disruptive consequences, the avoidance has produced no admirable consequences either. For groups continue to demand statehood, and usually by resorting to armed demands.<sup>63</sup> The restriction of the meaning of the term ‘peoples’, therefore is a glaring failure to come to terms with the reality on the ground. To that extent it is highly pretentious and therefore incapable of managing real life situations such as secession claims by groups identifying themselves as peoples within sovereign states.

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<sup>60</sup> Now replaced by the Constitutive Act of the African Union which entered into force in May 2001

<sup>61</sup> Christof, H. Ed. (2004), *Human Rights Law in Africa*, cites Blay in 29 *Journal of African Law* (1985) 147-158.

<sup>62</sup> Above n 48

<sup>63</sup> For example, Southern Sudanese, Tamil Tigers in Sri Lanka, Kosovo Albanians in Kosovo/Serbia, modern Bangladesh have had to fight wars of marginalisation demanding independent statehood.

### 2.1.3 Secession

The precise definition of the term 'secession' has not been subject of controversy both by academics and in international practice. In the context of international law, secession can be properly understood as the act of withdrawing allegiance from the authority of a state by a people inhabiting part of the territory of that state with the intention of becoming an independent sovereign state. The Supreme Court of Canada in the *Reference re Secession of Quebec* case succinctly said that secession is

“ [the] effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane.... Secession is a legal act as much as a political one.”<sup>64</sup>

From that definition, secession entails the withdrawal of a territory and its inhabitants from the existing political system and the jurisdiction of the existing governmental institutions. It is therefore the termination of the competence of particular political and legal institutions over a certain territory and establishing new bodies with the same kind of political and juridical competence over that territory. From another perspective, secession is the withdrawal of sovereignty from the central authority of a state to which it had initially been entrusted by part of the population of the concerned state whether by force or consent.<sup>65</sup>

One of the most crucial features of secession therefore is that there is a loss of jurisdiction by the original bigger state over the territory inhabited by the part of the population that is severing its allegiance from the government of the bigger original state. Thus it entails the adjustment of territorial boundaries of the original state.

### 2.1.4 Territorial integrity

The principle of territorial integrity of states is well established under international law. It is a principle of international law that states should not attempt to promote secessionist movements or to promote border changes in other states.<sup>66</sup> It was first mentioned with the appearance of the

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<sup>64</sup> Above, n3 para.83

<sup>65</sup> For example the declaration by the provisional institution of government in Kosovo of independence from Serbia, a state Kosovo had until 17<sup>th</sup> February been part of. If the plebiscite scheduled for 2011 in Southern Sudan is in favour of an independent Southern Sudan, that decision will be an act of secession: severing allegiance to the government of the Sudan and becoming an independent state, Southern Sudan or whatever the preferred name will be.

<sup>66</sup> Article 2.4, UN Charter

Peace of Westphalia in 1648 that inaugurated the modern state system. However it was not until the end of the Second World War that the principle began to be honoured in practice. With the formation of the United Nations and other regional organisations, territorial integrity became a vital organising principle of the international order. Article 2.4 of the UN Charter forbids the threat or use of force against the territorial integrity and political independence of any state. Further, it has been reaffirmed in a number of resolutions and declarations concluded by states where it stresses the inviolability of the frontiers of a sovereign state by another state.<sup>67</sup> This principle was used together with the principle of *uti possidetis* to maintain colonial boundaries in Africa at the time of decolonisation. It was later incorporated in the OAU Charter.<sup>68</sup> It is considered as a fundamental principle for the maintenance of international order.

## 2.2 Legal framework governing self-determination

Invariably the starting point is Article 1 of the UN Charter which states in the material part that one of the purposes of the United Nations is:

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.<sup>69</sup>

Article 55 of the same Charter tracks the language of article 1 in requiring states parties to promote higher standards of living, international and cultural co-operation and universal respect for human rights and freedoms.<sup>70</sup> Reference to the principle of equal rights and self-determination can also be found in articles 73 and 76(b) of the UN Charter. As a principle of the United Nations, self-determination has also been carried to the fore and addressed in a number of conventions, cases and resolutions.<sup>71</sup> Two 'Decolonisation Resolutions' were passed in 1960 by the UN General Assembly – Res. 1514 (XV) and 1541 (XV), which provided for the right to self-determination in terms precisely identical to the contemporary framing of the right in the covenants. Suffice it to say that the two Resolutions were purely of colonial context and purpose

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<sup>67</sup> See UN General Assembly Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, 9<sup>th</sup> November 1995; Final Act of the Conference on Security and Co-operation in Europe, (Helsinki Final Act), 14 *I.L.M.* 1292 (1975); Vienna Declaration and Program of Action, A/CONF. 157/24, 25 June 1993; and the Friendly Relations Declaration, above n. 3.

<sup>68</sup> Article 3.3, OAU Charter

<sup>69</sup> Art. 1(2), UN Charter

<sup>70</sup> Art. 55, UN Charter

<sup>71</sup> To vouchsafe the point that UN practice is well established, Doehring notes that "the sheer number of resolutions concerning self-determination makes their enumeration impossible", quoted in *Reference re Secession of Quebec*, above n3

though still regarded to be the cornerstone of the UN law of self-determination.<sup>72</sup> The principle has also been applied in a series of judgments by the I.C.J such as the *South West Africa Case*,<sup>73</sup> the *Western Sahara Case*<sup>74</sup> and the *East Timor Case*.<sup>75</sup> In the *East Timor case*, the I.C.J stated that the right of peoples to self-determination was one of the ‘essential principles of contemporary international law’.

Further, the UNGA *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter* states that:

“By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.”<sup>76</sup>

The principle’s standing as a human right is most ardently confirmed by common Article 1 of the ICCPR and ICESCR which reverberating Res. 1514 (XV) declares 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.”<sup>77</sup>

Furthermore, the most authoritative exposition is to be found in the U.N. General Assembly’s *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*<sup>78</sup> which emphasised the right to self-determination by providing that the UN’s member states will:

“... continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of people under colonial or other forms of alien domination or foreign occupation, and recognise the right of peoples to take legitimate action in accordance with the provisions of the Charter of the United Nations to realize their

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<sup>72</sup> Pritchard, S. above n12

<sup>73</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), 49 I.L.R., p. 3.

<sup>74</sup> 59 I.L.R., p. 30

<sup>75</sup> I.C.J Rep. (1995). 90.

<sup>76</sup> GA Res. 2625 (XXV), 24 October, 1970.

<sup>77</sup> Articles 1.1, ICCPR and ICESCR. Further, the U.N. World Conference on Human Rights adopted the *Vienna Declaration and Program of Action* in 1993,<sup>77</sup> affirming common Article 1 of the ICCPR and ICESCR

<sup>78</sup> GA Res. 50/6, 9 November 1995.

inalienable right of self-determination. This shall not be construed as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole of the people belonging to the territory without distinction of any kind.”<sup>79</sup>

On the other hand on a regional basis, two documents will suffice as authorities. The first is the *Helsinki Final Act*<sup>80</sup> which accentuates the ‘peoples’ full freedom to determine both their internal and external political status without external interference.<sup>81</sup> Secondly, and most categorical is the provision in the ACHPR which provides under Art. 20(1) that:

“All peoples have the right to existence. They shall have the *unquestionable and inalienable* right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”<sup>82</sup>

The foregoing is the legal framework for the position that international law does not countenance secession as way of exercising self-determination by peoples. The main argument for such a position is that since secession entails the redefinition of territorial borders of an existing sovereign state, it is contrary to the international law principle which secures states boundaries as sacrosanct. The other instruments captured above are used as further evidence that the international law does not allow secession. It is this position that is pretentious, artificial and a twist of the proper and realistic meaning of self-determination as understood historically. A few observations will expose this fallacy.

The first relates to the actual content of the right to self-determination as elaborated in international law. The *Friendly Relations Declaration* elaborates the content of the right in a classic statement:

“The establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence of any other political status

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<sup>79</sup> Above, n 78

<sup>80</sup> Final Act of the Conference on Security and Co-operation in Europe, 14 *I.L.M.* 1292 (1975)

<sup>81</sup> Above, n80, Part VIII.

<sup>82</sup> Article 20.1 ACHPR, italics my emphasis.



freely determined by a people, constitutes modes of implementation of the right of self-determination of that people.”<sup>83</sup>

In defining thus, the *Friendly Relations Declaration* does not refer to the expression ‘external’ or ‘internal’ in relation to self-determination.<sup>84</sup> In any case though heavily relied on, the *Friendly Relations Declaration* is hesitant in juxtaposing self-determination with territorial integrity. It does not in express terms forbid ‘secession’ - a term which was no doubt at the fingertips of the participating parties. Instead it includes a mere disclaimer from construing the right of self-determination as authorising or encouraging separatist acts. On the other hand by the same *Declaration* ‘a people’ are entitled, in exercise of their freedom to choose their political status, to among others, *establish a sovereign and independent state*. There is no basis in the language of the instruments for holding that this option does not obtain for ‘peoples’ in an existing state especially considering the fact that states have deliberately shied away from expressly defining the term ‘peoples’. Additionally, the language of the *Declaration on the Occasion of the Fiftieth Anniversary of the UN* is equivocal. The territorial integrity protected thereunder is that of states conducting themselves in accordance with, among others, the principles of participation of all subjects in government and self-determination.<sup>85</sup> It must follow therefore that a construction that restricts self-determination to exclude secession as a variant is unfounded because establishment of a sovereign and independent state is equally a recognized mode of exercising self-determination by ‘a people’ who as demonstrated above include part of the population of a state in contemporary international law.

Moreover, the legal instruments relied on to proscribe secession are opposable between states and not groups of people within a state. The fundamental purpose of all the instruments relied on is to develop friendly relations among states and foster international peace. What is clearly outlawed is the intervention of one state in another state’s affairs for the purpose of dismembering its territorial integrity.<sup>86</sup> It is arguable that as long as the demand for secession is not being supported by another state, there is no breach of the obligation to desist from acts that would maim the territorial integrity of an independent state.

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<sup>83</sup> Principle 5 on equal rights and self-determination of peoples, quoted by Richardson, H.J., ‘Rights of Self-Determination of Peoples in Established States: Southern Africa and the Middle East’, *85 Am. Soc’y Int’l L. Proc* 541 1991.

<sup>84</sup> The terms appear however in the Helsinki Act, above n 80

<sup>85</sup> Above, n 78

<sup>86</sup> Such as was the case of India’s intervention in Bangladesh during the latter’s fight for independent statehood from Western Pakistan. Surprisingly, Bangladesh was accepted into the UN despite the fact that it came into being through the intervention of India.

Further, the position that secession is outlawed in international law is merely based on convenience and not reality or sound political or legal theory. From a political theory point of view, secession entails the divisibility of sovereignty into the constituent parts of the population of a state. The conflict over the legitimacy of secession in political theory can be traced to the conflict between two competing conceptions of a legitimate political order.<sup>87</sup> This conflict involves the competition between the paradigms of English philosopher Thomas Hobbes in his seminal political work, the *Leviathan* published in 1651; and Johannes Althusius, a Dutch philosopher in his seminal political work, the *Politica* published in 1603.<sup>88</sup>

The Hobbesian paradigm involves a contract among 'egoistically motivated individuals' within a state of nature who unanimously consent to transfer their individual sovereign wills to that of a third-party ruler. The sovereign ruler's power over individuals is considered to be indivisible, infallible, irrevocable and irresistible.<sup>89</sup>

On the other hand, the Althusian hypothesis conceives of political order as a federated in nature. No single state institution monopolises political authority. Rather, government is viewed as a pluralised entity, with sovereign power shared by multiple social units going down to the lowest level of authority – the family. The smaller units become part of the higher unit by consent. The consent of these units is continuous and may be withdrawn at any time. Any of the social units that have the means to do so may secede from the higher social unit to which it has delegated authority.<sup>90</sup>

In democratic theory, it is accepted that the power to govern vests in the governed; that this power is entrusted to government to be exercised solely to serve the interests of the governed.<sup>91</sup> To make sure that the people who are the source of the power to govern are not completely disenfranchised, there is provision for periodic elections. This in democratic theory is called popular sovereignty,<sup>92</sup> the very essence of democracy.

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<sup>87</sup> Livingston, D. 'The very idea of secession,' *Society* 35 No 5 (July-August 1998) p.38

<sup>88</sup> Above, n87

<sup>89</sup> Above, n87

<sup>90</sup> Hueglin, TO 'Review of the *Politica*' quoted in A. Kreptul, 'The constitutional right to secession in political theory and history,' *17 Journal of Libertarian Studies*, No. 4 p.43

<sup>91</sup> Many states especially in Sub-Saharan Africa which have embarked on democratic reforms have provisions in their constitutions to that effect: for example the Constitution of the Republic of Malawi, Section 6.

<sup>92</sup> Popular sovereignty or the sovereignty of the people is the belief that the legitimacy of the state is created by the will or consent of its people who are the source of all political power. This resonates with the social contract theory as developed by among others, Johannes Althusius, Thomas Hobbes, John Locke and Jean-Jacques Rousseau: see 'Popular sovereignty' in *Wikipedia: the free encyclopaedia* at <[http://en.wikipedia.org/wiki/Popular\\_sovereignty](http://en.wikipedia.org/wiki/Popular_sovereignty)> (accessed 13 October, 2009)

It can be noted here that the Althusian paradigm must be preferred because it depicts reality in the most vivid way. It is readily acceptable in modern political theory that states are based on the consent of the governed. At the same time the world is experiencing an increasing number of demands by component parts of states for independent statehood. Accepting the Althusian postulation is the only way the international community can come to terms with this reality of civilisation. It should not be difficult to

“...accept the fact that states have lifecycles similar to those of humans being who created them. Hardly any member state of the United Nations has existed within its present borders for longer than five generations. The attempt to freeze human evolution has been a futile undertaking and has probably brought about more violence than if such process had been controlled peacefully. Restrictions on self-determination threaten not only democracy itself but also the state which seeks its legitimation in democracy.”<sup>93</sup>

In stating that the consent of the governed is continuous and may be withdrawn at any time, the Althusian hypothesis leads to the conclusion that a right of secession is a matter of choice.<sup>94</sup> This is unlike other theories that seek to ground a right of secession on certain factors being fulfilled.<sup>95</sup> As long as submission to the state is by consent, there should be no reason in principle why that consent cannot be withdrawn. In any case it will be withdrawn by violence. Once that is accepted, it also becomes readily acceptable that the realities of the cycle of states make it imperative that the right to secede must override the desire to maintain purported territorial integrity whenever there is a demand for secession. It must be noted that people living under any state would not capriciously decide to secede. Formation and maintenance of a state that can stand the vagaries of international relations is serious business – a venture not all or many ‘peoples’ have the capacity to manage.

Further, the fear that allowing secession based on choice would result in a proliferation of smaller states and create confusion is equally problematic. Mainly, it assumes that smaller and

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<sup>93</sup> Prince Hans-Adam II of Liechtenstein, addressing the International Institute for Strategic Studies on 25 January, 2001, quoted at [http://en.wikipedia.org/wiki/Territorial\\_integrity](http://en.wikipedia.org/wiki/Territorial_integrity) (accessed 11 October, 2009)

<sup>94</sup> This also called the primary right theory which states that secession does not, and need not depend on any other factors such as grotesque violations of other rights or threat of the existence of the group constituting the people. Rather, it should be a mere democratic choice of the majority of the population in that part of the state seeking secession: MacMillan, K. ‘Secession perspectives and the independence of Quebec,’ *7 Tul. J. Int’ & Comp. L.* (1999) 333, 335

<sup>95</sup> This is the remedial right theory which postulates that secession should only be allowed where the people seeking to secede have suffered serious violations of other rights at the hands of the state: MacMillan, above n 87, p 336. This is the approach adopted by the African Commission in the *Katangese Case* and the Canadian Supreme Court in *Reference re Secession of Quebec*: above n 3

probably homogenous states are not to be preferred to bigger and heterogeneously complex states. In fact the latter accounts for the failure of certain states especially in Africa.<sup>96</sup> Moreover it would seem the smaller the state, the more governable and stable it is.<sup>97</sup> With the growing regional integration of states, there should be little worry about confusion. Any state coming into being will find it advantageous in the modern world to belong to a regional structure. The disintegration of Eastern Europe into smaller states while at the same time there is growing integration at the regional level would seem to be the way to go – smaller but stable states are more conducive to successful regional integration than bigger highly unstable ones.<sup>98</sup>

Furthermore, the preferred variants of self-determination such as federalism, confederalism and increased participation in government<sup>99</sup> have failed to satisfy the urge for independence in many cases. Indeed the restriction placed on the peoples' right to withdraw their sovereignty from an existing state and form their own state is unrealistic. It is not surprising that those that have the means have withdrawn it. By extension, those that did not have the means have sought such means and reclaimed it. Those that do not have the means are forced to survive under states they have no real consent to be governed by, or simply blackmailed into supposing there is no solution to their predicament. The unfortunate fact is that the means have been violence, costing so much human life. The international legal restriction on a reality as glaring as the history of the proliferation of states itself is a recipe for so much problems. The principle of non-interference is the reason the international community is paralysed when egregious wars of secession erupt.<sup>100</sup> On the other hand, the supposed illegality of secession only serves to give the state the legal basis for dealing with secessionists as they wish.<sup>101</sup>

More importantly, the reticence of the international community to face the paralysing incidence of secession has stalled if not blocked innovation on how best to deal with them in a manner that will foster peace and respect for human life. It is surprising that the global community is

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<sup>96</sup> Mutua, above n 4

<sup>97</sup> States like the Democratic Republic of Congo are almost ungovernable owing to the size which is so big that the central government has no real capacity to reach out to all parts with institutions of government.

<sup>98</sup> Africa will take a long time to integrate as a continent in a similar way to the recent advances taking place in Europe.: the adoption of the Lisbon Treaty which will create among others a presidency of the European Union of a term of two and a half years; 'The Lisbon Treaty at a glance', available at [http://europa.eu/lisbon\\_treaty/glance/index\\_en.htm](http://europa.eu/lisbon_treaty/glance/index_en.htm) (accessed 27 October, 2009)

<sup>99</sup> As suggested in the *Katangese case* and *Reference re Secession of Quebec*, above n3

<sup>100</sup> The international community remain aloof when internal conflicts between a state and part of its population as to intervene would be an affront to the principle of non-intervention in the internal affairs of a sovereign state: Article 2.7 of the UN Charter

<sup>101</sup> The crack down on Tamil Tigers by government of Sri Lanka serves as an example. The international community was totally blocked from reaching the fighting zone in a bid to avoid reports about human rights abuses and possible breaches of humanitarian law

content with people having to demand self-determination (secession) through protracted violence at a time when respect for human rights is the imperative and a common responsibility. The theoretical bickering about the morality or immorality of secession has served nothing but the postponement of viable and realistic solutions.

### 2.3 Conclusion

The interpretation that self-determination must only be exercised within existing states is an empty fiction which has been challenged repeatedly by secession claims. The solution to this predicament lies in first accepting that the urge to secede is an inevitable part of the cycle of civilisation and cannot be wiped away. Once it is accepted that part of a population may choose to exercise self-determination by secession, it will become imperative to consider how such claim can be managed at an international level.

The preference for imperative to deal with secession claims at an international level is based on sound theory. A secession claim is in essence a challenge of the sovereign authority of the state over the people and territory seeking to secede. The authority of a state is exercised through different organs of the state including the judiciary. By extrapolation, a secession bid is a challenge of the authority of, among others, the judiciary. Considering what is at stake for the parent state, it is not consistent with sound principle that the same authority being challenged determines the legal propriety of the claim as was the case in *Reference re Secession of Quebec*.<sup>102</sup> The solution lies in secession claims being dealt with at an international forum which is independent of domestic interests. The following chapter considers the role that can be played by the organised international community (such as under the UN or regional bodies) in dealing with secession claims. The chapter draws lessons from the *ad hoc* role the UN and regional bodies have since been playing in managing secession claims and their usually ugly consequences. For this purpose, two case studies will be examined: Southern Sudan and Kosovo.<sup>103</sup>

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<sup>102</sup> Above n 3

<sup>103</sup> Southern Sudan is currently in a transitional period awaiting a referendum scheduled for 2011 where Southern Sudanese will opt either to secede from the Sudan or remain part thereof. On the other hand, Kosovo, which was until 17<sup>th</sup> February, 2008 part of Serbia, declared independence from the latter and has since been recognised by several states. In the meantime, a request for an advisory opinion filed by the government of Serbia is pending determination before the ICJ.

## **CHAPTER 3: UN AND REGIONAL PRACTICE IN MANAGING SECESSION WARS: DRAWING LESSONS FROM KOSOVO AND SOUTHERN SUDAN**

### **3.1 UN general approach for managing violent secession claims**

As elaborated in the foregoing discussion, secession claims and the consequent wars have legally been treated as internal matters and therefore subject of state sovereignty and integrity. As a result, the role played by the UN and other regional bodies has been reactive: peace keeping. The UN or other regional bodies have acted to diffuse violent conflict between secessionists and their parent state only after such violence could be technically classified as a threat to international peace and security. Technically, it is only then that the UN can properly assume the responsibility of securing and maintaining peace.<sup>104</sup> Without such a condition being met, the UN has no legal basis authorising it to intervene in matters which are essentially within the domestic jurisdiction of any state.<sup>105</sup> This position is legally premised on the proposition that international law does not allow secession and that territorial integrity is a principle of the higher order than self-determination where the latter is interpreted to mean secession.

However, once it is accepted as a starting point that secession is a variant form of exercising the right of self-determination by peoples within an existing sovereign state, the international community stands in a better position to regulate and manage secession claims at an international level. As noted above, the international forum is more suitable for dealing with secession claims. This is because secession claims challenge the very sovereignty of the parent state by seeking to divide and apportion it to the societies that constitute the population of the state. It is therefore in principle inconsistent and pretentious to have the same authority being challenged to exercise jurisdiction (sovereignty) through the judiciary in determining the propriety of the claims. Rather, an international institution without vested stakes would be a preferred option.

Building on the forgoing, the ensuing discussion examines the practice of the UN in managing protracted secession conflicts in the two case studies: Kosovo and Southern Sudan. The two case studies will be examined in turn.

### **3.2 Kosovo:**

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<sup>104</sup> In accordance with Article 1.1 of the UN Charter

<sup>105</sup> Article 2.7, UN Charter

### 3.2.1 Brief modern historical account

On February 17, 2008, the Kosovo Assembly adopted the Declaration of Independence from Serbia.<sup>106</sup> The Declaration makes reference to, among other things, “years of strife and violence in Kosovo that disturbed the conscience of all civilised people”<sup>107</sup> and expresses gratefulness that in 1999 the world intervened to remove Serbian dominance over Kosovo and placing it under UN interim administration.<sup>108</sup> It declares Kosovo to be an independent, democratic, secular and multi-ethnic republic guided by the principle of non-discrimination and equal protection of the law.<sup>109</sup> It also states that the independence brings to an end the process of Yugoslavia’s violent dissolution.<sup>110</sup>

In stating thus, the Declaration draws on developments in Kosovo’s recent history beginning with the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). Since then Kosovo has demanded secession from Serbia<sup>111</sup> through insurgency. This was marred with grave human rights abuses and critical humanitarian situation in Kosovo at the hands of Serbia prompting the intervention of the North Atlantic Treaty Organisation (NATO) in 1999.<sup>112</sup>

Most importantly, the UN Security Council issued Resolution 1244 which left Serbia with no effective control over Kosovo by establishing UN civilian interim institutions of government pending the final determination of the status of Kosovo either as an independent state or part of Serbia.<sup>113</sup> It is the intervention of the NATO and the adoption of Resolution 1244 that are crucial for purposes of drawing lessons. Accordingly, it is necessary to consider the Resolution both on paper and in practice.

### 3.2.2 UN Resolution 1244 at a glance

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<sup>106</sup> Kosovo Declaration of Independence <[http://www.assembly-kosova.org/common/docs/Dek\\_Pav\\_e.pdf](http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf)>

<sup>107</sup> Above, n 106, Preamble, para 7

<sup>108</sup> As above, n106, para 8

<sup>109</sup> Above n 106, Article 2

<sup>110</sup> Above, n 106, Article 5

<sup>111</sup> Whereas reference in Resolution 1244 is to the Federal Republic of Yugoslavia (FRY), it now properly applies to Serbia. The FRY was transformed into the State Union of Serbia and Montenegro in 2003: see Constitutional Charter of the State Union of Serbia and Montenegro, Article 60. The Constitutional Charter provided for the possibility of secession of Serbia or Montenegro in which case Serbia would be the successor.

<sup>112</sup> For a fairly detailed account, see Vidmar, J. ‘International legal responses to Kosovo’s declaration of independence’ in 42 *Vand. J. Transnat’l L.* 779, 784

<sup>113</sup> UN SC Res. 1244, Annex 2, U.N. Doc S.RES.1244 (JUNE 10, 1999) (Res. 1244). Serbia has since disputed the self proclaimed independence by Kosovo. There is since a request for an advisory opinion on the legality of the unilateral declaration of independence pending before the I.C.J.

Resolution 1244 was adopted under Chapter VII of the UN Charter on June 10, 1999. In the preamble,<sup>114</sup> the Resolution reaffirmed the commitment of all member states to the sovereignty and territorial integrity of the FRY (now Serbia)<sup>115</sup> and other states of the region as set out in the Helsinki Final Act.<sup>116</sup> Yet the Resolutions operative provisions created a situation that is not easily reconcilable with the principle of territorial integrity. The resolution initially demanded that the FRY/Serbia put an immediate and verifiable end to violence and repression in Kosovo. It also demanded that the FRY should begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable.<sup>117</sup> The Resolution further: called for the deployment of "international civil and security presences;"<sup>118</sup> authorized "the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence;"<sup>119</sup> and called upon "member states and relevant international organizations to establish an international security presence in Kosovo".<sup>120</sup>

In accordance with Resolution 1244, the Special Representative of the Secretary-General (SRSG) promulgated a document which vested broad authority in the UN Interim Administration Mission in Kosovo (UNMIK).<sup>121</sup> That document provides as follows under Section I:

"1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.

2. The Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person. Such functions shall be exercised in accordance with the existing laws, as specified in section 3, and any regulations issued by UNMIK.

Interestingly, Resolution 1244 does not make an express reference to the right of self-determination. However, it invokes several principles associated with the exercise of this right. In this regard, the Resolution spelled out that the international civil presence in Kosovo was

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<sup>114</sup> Para 10

<sup>115</sup> See n 111 above

<sup>116</sup> Above, n 3

<sup>117</sup> Above, n 112 para 3

<sup>118</sup> As above, n 113, para 5

<sup>119</sup> Above, n 113 para 6

<sup>120</sup> Above, n 113 para 7

<sup>121</sup> On the Authority of the Interim Administration in Kosovo, UN Mission in Kosovo Reg. 1999/1, UNMIK/REG/1999/1 July 25, 1999 available <[http://www.unmikonline.org/regulations/1999/re99\\_01.pdf](http://www.unmikonline.org/regulations/1999/re99_01.pdf)> (accessed 23 October, 2009)



established in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the FRY.<sup>122</sup> The mission was also established to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.<sup>123</sup>

Drawing authority from Resolution 1244, the UN Special Representative also promulgated a document entitled "Constitutional Framework for Provisional Self-Government."<sup>124</sup> Among others, the document provides under 'basic provisions' as follows:

"1. Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.

1.2 Kosovo is an undivided territory throughout which the Provisional Institutions of Self-Government established by this Constitutional Framework for Provisional Self-Government (Constitutional Framework) shall exercise their responsibilities.

1.3 Kosovo is composed of municipalities, which are the basic territorial units of local self-government with responsibilities as set forth in UNMIK legislation in force on local self-government and municipalities in Kosovo.

1.4 Kosovo shall be governed democratically through legislative, executive, and judicial bodies and institutions in accordance with this Constitutional Framework and UNSCR 1244(1999).

1.5 The Provisional Institutions of Self-Government are: (a) Assembly; (b) President of Kosovo."

By repeatedly invoking "self-government" and noting the "unique historic, legal, cultural and linguistic attributes" of the people of Kosovo, the Constitutional Framework clearly adopted the language of self-determination reflected in common Article 1.1 of the ICCPR and ICESCR.<sup>125</sup> Further, it also created an institutional framework for the exercise of self-government. In regard to representation in these institutions, the Constitutional Framework enacted an electoral

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<sup>122</sup> Above, n113, para 10

<sup>123</sup> As above, n 122

<sup>124</sup> UN Mission in Kosovo Reg. 2001/9, (May 15, 2001) at <[www.unmikonline.org/regualtions/2001/reg09-01htm](http://www.unmikonline.org/regualtions/2001/reg09-01htm)>

<sup>125</sup> This article refers to the right of peoples to determine their political status and develop culturally, socially and economically.

system based on democratic principles and stipulated the protection of human rights. The powers vested in the institutions of self-government for the territory of Kosovo are similar to those of authorities of sovereign states. Notable also is the fact that the Constitutional Framework did not countenance the organs of the FRY or Serbia having any authority over the decision making of Kosovo's self-governing institutions.

Thus, although Resolution 1244 states that the aim of the interim administration is that "the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia,"<sup>126</sup> the situation in fact implies Kosovo's autonomy under the interim administration. Indeed, Wilde<sup>127</sup> is correct when he observes that UNMIK effectively assumed what was substantially the federal-type role of the FRY/Serb authorities, because these authorities failed to perform that role in the past. Kosovo thus became an internationally administered territory without being put under the international trusteeship system of Chapter XII of the UN Charter.<sup>128</sup>

It is the foregoing situation that eventually created a grand opportunity for the people of Kosovo to declare independent and sovereign statehood thereby eliminating the sovereignty of Serbia over Kosovo. What is crucial is that this turn of events was facilitated by circumstances obtaining as a result of the direct intervention of the UN when it established a political international administration over Kosovo. The establishment of the international administration in effect terminated the sovereignty of Serbia over Kosovo. A similar, though not identical, establishment obtains in the Southern Sudan which forms the subject of the following discussion.

### **3.3 Southern Sudan**

#### **3.3.1 A brief historical account<sup>129</sup>**

Southern Sudan has been part of the Sudan since British colonialism beginning in 1898. However, the colony known as Sudan was initially divided into the South and the North and administered separately until 1946. In that year the colonial authorities changed the policy of

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<sup>126</sup> Above, n 113

<sup>127</sup> Wilde, R. 'From Danzig to East Timor and beyond: the role of International territorial administration', in 95 *Am. J. Int'l L* 583, 595 (2001)

<sup>128</sup> In adopting Resolution 1244, the UNSC acted under Chapter VII, while Kosovo was obviously not a situation in which Chapters XII and XIII could apply: see Bothe, M. & Marauhn, T. 'UN Administration of Kosovo and East Timor: concept, legality and limitations of Security Council-mandated Trusteeship administration', in Tomuschat, C. (ed) (2001) *Kosovo and the international community: a legal assessment* 217, 230-235

<sup>129</sup> This historical account is adopted from a more elaborate history of the Sudan: see PM Holt & MW Daly *A history of the Sudan* (1961)

administration and integrated the two regions under one government. The Southerners felt betrayed by this change because they were largely excluded from the new government whose language was Arabic while Southern Sudanese politicians and bureaucrats were English trained. Further, the initial political structure in the South was as organized as that of the North resulting in the non-representation of Southerners in the various conferences and talks that established the single state of the Sudan. This background seriously impaired the legitimacy of the state of the Sudan.<sup>130</sup>

On the attainment of independence in 1956, the Arab northern government reneged on the promise to create a federal state and successive governments continued to be dominated by the Arab Muslims who viewed Sudan as a Muslim state. This ignited the first civil war which commenced almost immediately after independence. This first civil war ended in 1972 with the signing of the Addis Ababa Peace Accord which, among other things, granted the southerners a degree of self-rule within the greater Sudan.

A second civil war started in 1983 ignited by a combination of factors including the imposition of the Sharia law, the socio-economic neglect of the South, marginalisation from the decision-making process, and the interference by the north in matters that were subject of the southern autonomy.<sup>131</sup> The second war only ended with compromises concluded in 2005 under the landmark Comprehensive Peace Agreement (CPA)<sup>132</sup> between the Sudanese Peoples' Liberation Movement/Army (SPLM/A) (representing Southern Sudan) and the government of the Sudan.

### **3.3.2 The CPA at a glance: current status of the Southern Sudan**

The CPA was signed under the auspices of the Inter-Governmental Authority on Development (IGAD).<sup>133</sup> The CPA comprises a series of agreements signed between the government of Sudan and the SPLM/A,<sup>134</sup> constituting the legal framework governing the current status of Southern Sudan. A few salient features can be highlighted for the present purposes. Firstly, the

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<sup>130</sup> R Machar, *South Sudan: a history of political domination* (2000)

<sup>131</sup> Above n 130, p38

<sup>132</sup> Above, n 1

<sup>133</sup> Established under the Agreement Establishing the Inter-Governmental Authority on Development, IGAD/SUM-96/AGRE-Doc March 26, 1996 Nairobi, Kenya.

<sup>134</sup> These are: Protocol of Machakos, signed on 20 July, 2002 in which the parties agreed on a broad framework setting forth the principles of governance, transitional process and the structure of government as well as on the right to self-determination; Protocol on security arrangements signed on 25 September, 2003; Protocol on wealth sharing of 7 January, 2004; Protocol on power-sharing of 26 May, 2004; Protocol on the resolution of conflict in Southern Kordofan/Nuba Mountains and the Blue Nile states signed on 26 May, 2004; AND Protocol on the resolution of conflict in Abiyei, signed on 26 May, 2004.

CPA recognises that the unity of the Sudan is based on the free will of its people.<sup>135</sup> Secondly, it grants Southern Sudanese autonomy to control and govern affairs in their region and also participate equitably in the national Government of the Sudan.<sup>136</sup> Thirdly, it expressly provides that the people of South Sudan have the right to self-determination which means a right through an internationally monitored referendum for the people of South Sudan to determine their future status by choosing either to remain part of the greater Sudan or secede.<sup>137</sup> The referendum has since been scheduled for 2011.<sup>138</sup>

The recognition that the unity of the Sudan is based on the free will of the people of Sudan is reminiscent of the political theory which bases the existence of the state on the sovereign will of the people. By providing that the people of Southern Sudan have a right to choose unity within the greater Sudan or secede, the current arrangement accords with the Althusian hypothesis. Althusius postulated that the bigger unit of society called the 'state' is a conglomeration of smaller units which become part of the bigger unit by consent. He also stated that such consent is continuous and may be withdrawn at any time by any unit which has the means.<sup>139</sup> To that extent, the present arrangement acknowledges that political power and the sovereignty of a state are federated and severable at the instance of any of the component units (such as Southern Sudan) of the greater polity (such as the Sudan).

As stated earlier, this arrangement was settled under the auspices of IGAD, an inter-governmental organisation. However, the initiative was and continues to be supported and encouraged by the UN. Having determined that the situation in Sudan constitutes a threat to international peace and security, the UN SC adopted Resolution 1590<sup>140</sup> establishing the UN Mission in the Sudan (UNMIS) barely two months after the signing of the CPA.<sup>141</sup> The role and mandate of UNMIS is to support the implementation of the CPA by monitoring and verifying the implementation process. UNMIS also provides technical support for the establishment of the institutions of government for the semi-autonomous Government of the Southern Sudan (GOSS). In that regard, the mandate of UNMIS extends to the monitoring of the referendum to be held in 2011.

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<sup>135</sup> Article 1.1 Machakos Protocol, Chapter 1 of the CPA

<sup>136</sup> Article 1.2, n 135 above

<sup>137</sup> Articles 1.3 and 2.5, n 135 above

<sup>138</sup> The year 2001 marks the end of the 6 year interim period stipulated under Article 2.5, n 135 above. This is reminiscent of democratic secession.

<sup>139</sup> See above n 87

<sup>140</sup> SC Res. 1590/2005: <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/284/08/PDF/N0528408.pdf?OpenElement>> (accessed 17 September, 2009)

<sup>141</sup> UN SC Resolution 1590 was adopted on 24 March, 2005 following the signing of the CPA on 9 January, 2005.

The foregoing depicts the circumstances obtaining in the two case studies chosen for purposes of this study. After examining the role played by the UN and regional bodies in these two situations, the fundamental question remains: what lesson can be drawn from these precedents that can help create a standing and permanent structure under the UN to deal with secession claims. This forms subject of the following section.

### **3.4 Conclusion: drawing lessons from Kosovo and Southern Sudan**

As elaborated in the second chapter of this work, the reactive role played by the UN and other regional initiatives in dealing with secession claims is explicable by the fact that under international law, secession is deemed to be illegal. The illegality is premised on the understanding that the international law principle of territorial integrity of states is a principle of a higher order compared to the right of peoples to self-determination where the latter is interpreted to mean the right to secede. The value of the two case studies is twofold. Firstly, the two cases studies buttress the fact that in proscribing secession, international law is pretentious and unresponsive to the realities on the ground. Secondly, the two case studies constitute precedents for a more reactive role of the international community in dealing with secession claims. For that purpose, a few factors can be highlighted from experiences in the two case studies.

Firstly, in both cases, it is expressly recognised that the peoples of those territories have a right to self-determination. The peoples' right of self-determination in both cases is clearly understood to include the option of peoples of those territories to determine their political status. The political status clearly includes the creation of independent statehood in the both cases.<sup>142</sup> By requiring a democratic referendum in 2011 in Southern Sudan, it is also recognised that independent statehood is a matter of free choice. In recognising this right as accruing to the peoples inhabiting the territories of Kosovo and Southern Sudan, the two cases also add impetus to the conceptualisation that the term 'peoples' includes part of a population of an existing sovereign state. Also implicit in these arrangements is the recognition that sovereignty is severable at the instance of any recognisable constituent part of the population of a state. This, I maintain, is a more realistic depiction of the reality on the ground and therefore a step

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<sup>142</sup> In the Kosovo situation, while the final status was left to be determined by political dialogue, clear steps had been towards the establishment of an independent state: the parent state's sovereignty was expressly terminated by the withdrawal of government authority from the territory of Kosovo; and the establishment of an international administration with powers akin to those of states. Much more so in the Southern Sudan scenario, political status expressly includes the option of secession to be exercised through a democratic internationally monitored referendum.

forward in coming to terms with peoples' demands for total self-governance that inundate the world order with grotesque consequences.

Secondly and more importantly, the two cases reinforce the hypothesis that the international community stands in a better position as an arbiter over secession claims. Realistically, the two parties (secessionists and their parent states) have vested particularised interests which are invariably conflicting. None therefore can be presumed to be fairly objective in determining the propriety of the secession claim. On the other hand, no single state can intervene to resolve the impasse between secessionists and their parent states as this would fall within prohibited interference in the internal affairs of another state. In those circumstances, the stalemate can only be resolved either by securing the consent of the secessionists and their parent states as was the case in Southern Sudan, or indeed by drastic measures such as was the case in Kosovo.<sup>143</sup> Both options are better ways of resolving secession claims because they have a claim to legitimacy to both secessionists and their parent states. Both cases represent steps taken in pursuance of broader objectives of the UN to maintain international peace and security vested in the UN SC. Since the UN member states have agreed to carry out the decisions of the SC in pursuance of that broader objective, such drastic measures as were adopted for Kosovo attain legitimacy in the eyes of the international community. This would most probably not be the case if one state terminated the sovereignty of another state over part of the latter's territory.

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<sup>143</sup> The CPA is emblematic of consent, while the termination of Serbia's sovereignty over Kosovo and the subsequent establishment of an international administration akin to a state represent the latter option.

## CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Conclusions

The world is experiencing an era where violent internal conflicts arising from demands for total self-government are on the rise. The incidence of secession wars has paralysed efforts at improving the poor standards of living for most of the world population as more and more resources are being diverted towards settling secession wars. It is an era when the world needs to reflect on the most viable and economically sound solutions to this phenomenon as a common responsibility.

This will have to be done in the backdrop of an international legal position which does not countenance secession as a variant mode of peoples' exercise of their right to self-determination, itself also part of international law. The foregoing discussion has demonstrated that the grotesque wars of secession are as a result of this confused and fictitious legal position. It has been demonstrated that the law relied on for the proposition that international law does not allow secession is equivocal in its nature. The equivocal stance of the law demonstrates the lack of bold consensus on a subject as glaring and current as secession claims. As a result, the entire subject of secession is almost relegated to particularistic political interests of states faced with secession claims as well as those that may have vested interest in the secession of any region from its parent state.

On a further note, I have also demonstrated that the current position does not resonate with the reality on the ground. The reality on the ground is best depicted by the Althusian postulation of the basis and nature of a state. Althusius hypothesised that state is a sum total of component social units which become part of the state by consent. He also postulated that such consent is continuous and may be withdrawn by any of the recognisable component social units of the states. In stating so, Althusius countenanced the idea that state sovereignty is federated in nature and therefore severable along the social groups that constitute the state. The current position of the international law on secession is fictitious because it fails to reflect this reality. It supposes that once the consent to be governed has been delegated to the state, it is irrevocable. Rather, as I have argued, the reality is to the contrary. Attempts to impede peoples to withdrawal their consent from the state they have been part of only leads to the people adopting other means for reclaiming their consent. As is well known such means have been and continue to be armed struggles that leave many innocent lives massacred.

Furthermore, I have also highlighted that the supposed supremacy of the international law principle of territorial integrity is the very reason the international community has failed to discharge the common responsibility to protect human life which in my view must supersede any concerns about territorial integrity.

As a precursor to more viable solutions, I have brought to the fore recent developments in Kosovo and Southern Sudan. Generally, the two precedents buttress the point that maintenance of peace and security and the protection of human life are proper objectives that must be subject of a common global responsibility. Specifically, both cases are precedents for the proposition that self-determination inevitably includes the right of peoples to secede from an existing sovereign state. Further, both cases ground the interpretation that peoples for purposes of self-determination may include part of the population of an existing sovereign state inhabiting an identifiable territory.

#### **4.2 Recommendations**

It is necessary as a starting point that the law of self-determination must be developed in such a way that it is clarified. This will help map out the rights and obligations of both secessionists and their parent states. This is a crucial starting point because the current problems are undeniably partly attributable to the vagueness of the law of self-determination. Such a development must also resonate with the realities that inundate the world order. Secession claims will continue to crop up as long as states are composed of distinct identifiable groups that can come together and create a pool of resources for purposes of an armed struggle for total self-government.

Further, in developing the law of self-determination, the role of the international community can be properly grounded and defined. As can be learnt from the case of Kosovo, this will go a long way to prevent violent conflicts and the consequent loss of innocent lives. As can be learnt from Southern Sudan, where there will be an internationally monitored and supervised referendum, this will legitimise the option of secession in the eyes of both parent states and secessionists since such a referendum will be an agreed mode of exercising the right to secede. For this purpose, it is necessary that the law should recognise and grant the international community the responsibility to regulate and deal with secession claims.

The foregoing suggestion can best be provided for in an international treaty on the law of self-determination which:



- allows secession as a variant form of the peoples' right to self-determination;
- expressly provides that part of a population of an existing state may constitute 'peoples' for purposes of secession claims;
- delegates the responsibility of managing secession claims to an international body preferably under the UN which may further delegate to a regional body;
- gives the option of secessionists seeking the intervention of such a body in a quasi-judicial mode to adjudicate over the claims (which allows the parent state to respond to such claims);
- allows the international community preferably under the UN to intervene where violent conflict has already erupted.

It is my considered view that such a regime will be a more efficacious way of dealing with secession claims peacefully than the current position.

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