

THE RIGHT OF PEOPLE TO SELF-DETERMINATION AND THE PRINCIPLE OF NON-INTERFERENCE IN THE DOMESTIC AFFAIRS OF STATES

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The right of self-determination is the legal attribution of the authority to a people to freely determine their political status in relation to becoming an independent nation. Generally speaking, existing nations find it extremely difficult in most cases to allow a category of people within the geographical sovereignty to expressly determine to secede from their common wealth bond and form a separate independent and sovereign nation. This is so even in the face of glaring marginalization and oppression of the category of people in question. The principle of non-interference in domestic affairs of the United Nations' members strengthens the traditional practice of holding tight to national integrity of the population of a state and regarding any external effort at securing the self-determination of particular people in a state as amounting to interference in the affairs of that state.

Nevertheless, a United Nations' resolution, that is, Resolution 1514 (XV) of 1960¹ states in clear terms that the people of every state have the right to self-determination². This right has worked favourably in the decolonization of African by Europe. It opened the flood gate of nationalistic movements and campaigns which paid off by the grant of independence to the colonized states and allowing the indigenous people to form and run their own governments and set autochthonous administrative machinery in motion as a display of the power of self-determination³.

According to M. Ozden and C.Golay:

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1 The resolution is tagged the declaration on the granting independence to colonial countries and peoples.

2 In the natural sense, self-determination is the right of a group of people exercised corporately as a group and not in any way or individual capacity. This right empowers in dangerous people to have a right to determine their political status and fate.

3 Available @ <http://www.law.cornell.edu/wex/self-determination-international-law> last accessed on 15/02/13.

The right of people to self determination is a pillar of contemporary international law... Since the entry into force of the United Nations Charter in 1945, it has constituted the legal and political basis of the process of decolonization which witnessed the birth of over 60 new states in the second half of the twentieth century. This was a historic victory even if it is coincided with the will of certain great powers to break up the “exclusive preserve” of colonial (primarily European) empire of the time⁴.

It is pertinent to note from the foregoing that the interest of the United Nations in relation to self determination covers a matter of general importance especially to African territories and the African people. Infact, mention is made of self determination in the preamble of the UN Charter⁵. It is submitted that a preamble to any law, statute or treaty is part and parcel of that legal instrument and also equally operative as other operative selections of the said legal instrument. Taking this positive raised by the above argument into consideration, it considered a necessary control ary of rule international law that peoples all over the world are legally found to exercise the right of self-determination that is a determination by a group of people in defined territory to form a government indigenous to their aspirations cause and relate with other already formed sovereign state itself.

To this end, it is submitted further that the United Nations Charter recognizes the right of self determination as a pillar in the promotion of international peace and security. In line with this view colonial administrators allowed many nationalist movements calling for the independence of their countries to have their way in accordance with the provisions of the United Nations Charter. The granting of independence⁶ to colonized states helped douse tensions⁷ and made it possible for peace to reign in the territories. It is to be noted that the UN

4 M. Ozden & C. Golay, *The Right of People of Self Determination* @ <http://www.law.Cornell.edu/wex/self-determination-international-law>, last accessed on 15/02/13.

5 Apart from this mention, the Charter has no other provision relating to self-determination. This does not mean that the UN as at today does not have the mandate to decide on matter of self- determination. Infact, Reso.1514(xv) of 1960 which is on self- determination is a United Nation resolution.

6 Such movements featured mainly in Africa which was the bedrock of European colonialism. Nearly all African countries have got their political independence from their colonial masters.

7 This, no doubt facilitated the maintenance of international peace and security in places where the agitation for independence was assuming a dimension threatening to world peace and security.

General Assembly Resolution 2542(XXIV) of 1969 was predicated on the strength given to the principle of self-determination by the UN Charter. There is, however, an issue that arises from this empowerment of the people which relates to whether the right or grant is solely limited to matters of colonization and decolonization or extend to people of the same nationality whereby a minority of people against the wishes of the majority of people decide to secede and form a separate independent sovereign state⁸. The resolution of this issue is a simple thing if the text of the preamble to the UN Charter is given its ordinary grammatical interpretation. To this end, the right of self determination accrues to any group of people that have the craving to stand as a sovereign state who can also get recognized by other states as such. Even though recognition is a purely political tool used by states to advance their interests in international relations, it has come to be cherished by emerging nations as part of the tool of legitimacy which nations desire to attract to themselves in the event of emergence as new states.

1. Introduction

In particular, the principle of self-determination allows a people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. The importance lies in the right of choice, so that the outcome of a people's choice should not affect the existence of the right to make a choice. In practice, however, the possible outcome of an exercise of self-determination will often determine the attitude of governments towards the actual claim by a people or nation. Thus, while claims to cultural autonomy may be more readily recognized by states, claims to independence are more likely to be rejected by them. For some, the only acceptable outcome of self-determination is full political independence. This is particularly true of occupied or colonized nations. For others, the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people's traditional lands free of external interference and incursion is the

8 According to the Vienna Declaration and programme of Action of 1993, all peoples have the right of self determination. By virtue that right they freely determine their political status, and freely pursue their economic social and cultural development

essential aim of a struggle for self-determination. Nevertheless, the right of self-determination is not complete without political independence. And without full political independence of a people, the doctrine of non-intervention is meaningless to them.

2. A Review of United Nations Involvement in Self Determination

The right to self-determination is the cardinal principle in modern international law, binding, as such, on the United Nations as authoritative interpretation of the Charter's norms.⁹ It states that nations based on respect for the principle of equal rights and fair equality of opportunity have the right to freely choose their sovereignty and international political status with no external compulsion or interference¹⁰ which can be traced back to the Atlantic Charter.¹¹ In 1945, the United Nations was born and the issue of self-determination continued to have meaning even from the United Nations Charter. The ratification of the United Nations Charter in 1945 at the end of World War II placed the right of self-determination into the framework of international law and diplomacy. Chapter 1, Article 1(2) of the United Nations Charter states one of the purposes of the United Nations as: "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." Pursuant to self-determination as being part of the purposes of the United Nations, the body continued to expound the doctrine.

On 14 December 1960, the United Nations General Assembly adopted United Nations General Assembly Resolution 1514 (XV) titled Declaration on the Granting of Independence to Colonial Countries and Peoples¹², which provided for the granting of independence to colonial

9 See United Nations General Assembly Resolution 1514.

10 See the Purposes and Principles of Charter of the United Nations, 1945.

11 The Atlantic Charter was signed on 14 August 1941, by Franklin D. Roosevelt, President of the United States of America, and Winston Churchill, Prime Minister of the United Kingdom who pledged The Eight Principal points of the Charter. The principle, however, does not state how the decision is to be made, or what the outcome should be, whether it be independence, federation, protection, some form of autonomy or even full assimilation. Neither does it state what the delimitation between nations should be or even what constitutes a nation. In fact, there are conflicting definitions and legal criteria for determining which groups may legitimately claim the right to self-determination.

12 In Article 5 states: Immediate steps shall be taken in Trust and Non-Self-Governing Territories, or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

countries and peoples and providing an inevitable legal linkage between self-determination and its goal of decolonisation, and a postulated new international law-based right of freedom also in economic self-determination. To monitor the implementation of the above declaration, the General Assembly created the Special Committee referred to popularly as the Special Committee on Decolonization to ensure complete decolonisation in compliance with the principle of self-determination in General Assembly Resolution 1514 (XV). In 1966, the United Nations came up with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 1 of both conventions read: "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."¹³

However, the charter and other resolutions did not insist on full independence as the best way of obtaining self-government, nor did they include an enforcement mechanism. Moreover, new states were only recognized by the legal doctrine of *utipossidetisjuris*, meaning that old administrative boundaries would become international boundaries upon independence even if they had little relevance to linguistic, ethnic, and cultural boundaries. Nevertheless, justified by the language of self-determination, between 1946 and 1960, the peoples of thirty-seven new nations freed themselves from colonial status in Asia, Africa, and the Middle East.¹⁴ Most recently, the United Nation monitored, followed-up and ensured the independence of Southern Sudan. The territoriality issue inevitably would lead to more conflicts and independence movements within many states and challenges to the assumption that territorial integrity is as important as self-determination.¹⁵

Self-determination is also recognized as a right of indigenous peoples in the Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007. The declaration sets

13 See also, the United Nations Universal Declaration of Human Rights which states in article 15 that everyone has the right to a nationality and that no one should be arbitrarily deprived of a nationality or denied the right to change nationality.

14 Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples.

15 Gudeleviciute V., "Does the Principle of Self-determination Prevail over the Principle of Territorial Integrity?", *International Journal of Baltic Law*, Vytautas Magnus University School of Law, (April 2005) Vol. 2, No. 2.

out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. Specifically, it "emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations", "prohibits discrimination against indigenous peoples", and "promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development". Articles 3, 4 and 5 of the declaration read as follows:

- Indigenous 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.
- Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
- Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

3. The Need for Setting International Parameters for The Conduct Of Plebiscite

Plebiscite is a binding or non-binding process of political decision-making, especially relating to a proposed law, constitutional amendment, or significant public issue.¹⁶ Under international law, it is a direct vote of a people to decide a question of public importance, such as union within or outside a country, or a proposed change to the constitution. Two categories of plebiscite dominate: the obligatory constitutional referendum¹⁷ which is always binding; and the

16 For example, in Switzerland, the use of plebiscite in decision-making is very common. On March 3, 2002, a majority of 54.6 percent voted in a national plebiscite in favour of entering the UN. However, because a majority in the cantons was also required, ultimately one canton swung the vote in favour of an accession to the UN. Switzerland's full membership of the UN enjoys an especially high level of legitimacy, as being the first country in which the people themselves voted in favour of entry.

17 See for example, article 66 of the Southern Sudan Referendum Act, 2009 (English trans. 2010). Available at <http://saycsd.org/doc/SouthernSudan>, accessed on February 26, 2013, which paved the

consultation exercises initiated by government or parliament, which is mostly non-binding because the consultation exercises initiated by government or parliament is an institutional package and as a dynamic process, can restrict the power of existing institutions.

Plebiscite is a feature of direct democracy. In direct democracy, the peoples' opinions are sought on every question of national importance relating to their governance. The success or failure of direct democracy cannot be measured simply by concrete political outcomes. Direct democracy is a process for political decision-making, which offers the maximum possible participation of the general public in the decision-making process within modern societies, which are organized into states. This participation should be seen as a human right. Within the framework of other fundamental human rights, the recognition of the human right to political co-determination is not dependent on whether the results of plebiscites, either in general or in particular, satisfy one's own personal interests. Such a judgment would in fact reflect a fundamentally anti-democratic attitude. The actual outcomes of direct democracy must therefore be judged against this background. Political awareness/keeping up-to-date with political events and issues is more likely to be advantageous under direct democracy, since one can then play a constructive part in plebiscites. Negative attitudes towards taxation and tax avoidance itself are probably less prevalent under direct democracy, as one has the possibility of sharing in the decisions on public spending and any tax increases have to be approved by the public. It therefore becomes necessary to make very clear what are the advantages which accrue to a modern representative democracy from a combination of indirect and direct institutions, as against the traditional and dominant model of a purely parliamentary democracy. This is especially true for the European Union, where national governments act as European lawmakers and therefore occupy a dual position of power and, thus, such core concepts of democracy as accountability, transparency and participation cannot be met in a satisfying manner. Complementing indirect democracy by adding direct forms of co-determination can be considered as "social innovation with beneficial economic consequences." The benefits of this social innovation include: reduced alienation from politics, greater legitimacy and transparency, a

way for a binding referendum, leading to the successful independence of Southern Sudan on July 9, 2011.

greater identification of citizens with the policies introduced and an increased capacity for learning in civil society. Plebiscite is actually linked to an increase in per capita income and the efficiency of tax regimes evidenced in lower taxes and less tax avoidance. Direct, democracy can raise the quality of life of a society provided that well-designed procedures have been chosen. But in order to achieve these positive effects, plebiscitary processes must meet basic requirements of “freedom” and “fairness”. Free and fair has become the catchphrase of the plebs, but what actually constitutes a “free and fair” plebiscite?

Basically, there is a common understanding that the monitoring of plebiscite must relate to the whole process, not merely to the events of the actual election day(s). The preconditions for democratic plebiscite must also not be ignored, leading Elklit and Svensson to the following definitions:¹⁸

- Freedom contrasts with coercion. It deals primarily with the “rules of the game”, such as the legal/constitutional basis and the timing;
- Fairness means impartiality and involves consistency, i e., the unbiased application of rules and reasonableness; the not-too-unequal distribution of relevant resources among competitors.

In practice these definitions lead us to more concrete monitoring parameters.

Freedom:

- a) The ability to initiate a plebiscitary process: Broad access not restricted to governing majorities increases freedom.
- b) The binding/consultative effect of a decision: Non-binding votes create potential for manipulative actions.
- c) The risk of invalidation of a vote by turnout and approval thresholds: High turnout requirements of up to 50% have undemocratic effects, as non- and ‘no’-voters are counted together. Voter abstention is actually promoted instead of avoided.

Fairness:

18 See generally, Bruno K., “The European Challenge from French Revolution to European Integration Facts, Views, and Prospects”, *International Symposium on Initiatives, Referendums, and Direct Democracy* (2003). Available at en.wikipedia.org, accessed on February 26, 2013.

- a) The disclosure of donations and spending in a plebiscite campaign: This is the first step; a second is to apply spending limits; a third step is to introduce “affirmative action.”
- b) The access to public media ahead of a plebiscite: There should be voluntarily agreed standards of fairness in the print media as well as free air hours/minutes to designated campaign organisations in a plebiscite process.
- c) The role of government and civil servants in a plebiscite debate: This should be based on the principle of neutrality.

The experience in a lot of countries is that plebiscite devices do not work very well because their design is not user-friendly, with high thresholds and the exclusion of important issues from the process. There are neither legal obligations to hold a plebiscite, nor are there insurmountable legal obstacles in the way of citizens’ plebiscite, as a result the political room for manoeuvre is completely wide open. There is therefore, the need for setting international standard for the conduct of plebiscites.

4. An Appraisal of The Role of United Nations in The Southern Sudan Independence

Independence is not an entitlement under international law, not even where clearly supported by the will of the people at an independence referendum.¹⁹ Nevertheless, unilateral secession is not prohibited and foreign states may decide to grant recognition to an entity that is seeking independence unilaterally.²⁰ In such circumstances, recognition may have constitutive effects. In practice, however, foreign states tend to be very reluctant to grant recognition to unilaterally declared independence.²¹ The situation is different where the emergence of a new state is consensual, that is, where the parent state agrees to a

19 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082, at 124 (Oct. 24, 1970).; Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 18.

20 Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, para. 155 (“Although there is no right, under the Constitution or at international law . . . this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community . . .”).

21 For example, the declaration of the Republic of Biafra.

part of its territory becoming a separate state.²² The parent state thereby waives its claim to territorial integrity and the emergence of a new state is then merely acknowledged by the international community. The parent state may waive its claim to territorial integrity politically, by an explicit endorsement of the declaration of independence by the seceding state, or by adopting underlying domestic legislation that provides for a clear mechanism for secession.²³ Article 1 of the Montevideo Convention on Rights and Duties of States provides: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) [the] capacity to enter into relations with the other States.”²⁴ These qualifications have acquired the status of statehood criteria under customary international law. Practice shows that meeting these criteria is neither necessary nor sufficient for an entity to become a state. Indeed, a state does not emerge automatically and self-evidently when the Montevideo criteria are met.²⁵ If states could emerge automatically, independence would need to be an entitlement under international law. Outside of colonialism, this is not the case. In the United Nation Charter era, self-determination has become codified as a human right under international law²⁶ and an entitlement of all peoples, not only those subjected to colonialism.²⁷ However, as Gregory Fox argues, in the process of decolonization “the only territorial relationship to be altered

22 After a lengthy civil war, Eritrean independence was accepted by the Transitional Government of Ethiopia, which came to power with the help of the Eritrean pro-independence movement. *Id.* at 402–03. Eritrea was admitted to the United Nations on May 28, 1993. G.A. Res. 47/230, U.N. Doc. A/RES/47/230 (May 28, 1993). Although the internal political situation in Ethiopia at that time was very complicated, it is nevertheless notable that from the perspective of international law Eritrea became independent upon the previous consent of its parent state.

23 See for example, article. 60, Constitutional Charter of the State Union of Serbia and Montenegro, Feb. 4, 2003.

24 Article 1, Convention on Rights and Duties of States, December 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 18.

25 See Hersch Lauterpacht, “Recognition in International Law”, 66 (1948) (arguing that if one accepts that a state can emerge automatically and self-evidently when the statehood criteria are met, one needs to accept the rather awkward proposition that a state exists “as soon as it ‘exists’”). Cited in Vidmar J., “South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States”, *Texas International Law Journal*, Vol. 47, Issue 3, Pp. 541 – 559. Available at www.academia.edu, accessed February 27, 2013.

26 Article, International Covenant on Civil and Political Rights, December 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 ; article 1, International Covenant on Economic, Social and Cultural Rights, December 16, 1966, Treaty Doc. 95-19, 933 U.N.T.S. 3.

27 See Dinah S., “Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon”, 105 *AM. J. INT’L L.* 60, 60 (2011) (arguing that the right of self-determination has a universal(i.e., non-colonial) scope, yet relevant sources of international law make it clear that this right is not a synonym for a right to secession). Cited in Vidmar J., “South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States”, *Texas International Law Journal*, Vol. 47, Issue 3, Pp. 541 – 559. Available at www.academia.edu, accessed February 27, 2013.

was that with the metropolitan power. Achieving independence . . . did not come at the expense of another sovereign state's territory or that of an adjacent colony."²⁸ Outside of colonialism, the right of self-determination needs to be squared with the principle of territorial integrity. The Declaration on Principles of International Law, which forms a part of customary international law, provides for the following limitation on the right of self-determination: Nothing in the foregoing paragraphs referring to the right of self-determination shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.²⁹

In this vein, the Supreme Court of Canada in the Quebec Case held that the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.³⁰

This research work is here considering the role played by the United Nations in the independence of Southern Sudan. However, the essence of the above introduction is to have an overview of the complexity in achieving independence. This will help us to establish the nexus and appreciate this discussion on the independence of South Sudan.

28 Gregory F., "Self-Determination in the Post-Cold War Era: A New Internal Focus?", 16 *MICH. J. INT'L L.* 733, 736 (1994). Cited in Vidmar J., "South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States", *Texas International Law Journal*, Vol. 47, Issue 3, Pp. 541 – 559. Available at www.academia.edu, accessed February 27, 2013.

29 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082, at 124 (October 24, 1970).

30 Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, para. 126.

South Sudan's path to independence followed from the legal regime established under the Comprehensive Peace Agreement.³¹ The Comprehensive Peace Agreement resulted from the efforts of the regional peace initiative to end the civil war.³² The Comprehensive Peace Agreement is comprised of texts of previously signed agreements and protocols.³³

The Machakos Protocol specified "that the people of South Sudan have the right to self-determination . . . through a referendum to determine their future status."³⁴ The Machakos Protocol further established a six-year interim period at the conclusion of which the internationally monitored referendum would take place.³⁵ The parties later also agreed on the implementation modalities of the permanent ceasefire and security arrangement.³⁶ This agreement not only made references to self-determination and the independence referendum but also regulated technical details pertaining to South Sudan's departure from the common state in case of a decision for independence.³⁷ After the adoption of the Comprehensive Peace Agreement, Sudan promulgated a new interim constitution that granted substantive autonomy to Southern Sudan.³⁸ The Constitution further specified that a referendum on the future status of Southern Sudan would be held six months before the end of the six year interim period.³⁹ The United Nations facilitated all these agreements and at the same time spearheaded the peacekeeping efforts in Sudan.

31 Comprehensive Peace Agreement Between the Gov't of the Republic of Sudan and the Sudan People's Liberation Army, January 9, 2005, <http://www.sd.undp.org/doc/CPA.pdf>.

32 The signing of the Agreement was witnessed by African Union, Egypt, European Union, Inter-Governmental Authority on Development, Italy, Kenya, League of Arab States, Netherlands, Norway, Uganda, United Kingdom, United Nations, United States.

33 These were: the Machakos Protocol (July 20, 2002), the Protocol on Power Sharing (May 26, 2004), the Agreement on Wealth Sharing (January 7, 2004), the Protocol on the Resolution of the Conflict in Abyei Area (May 26, 2004), the Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States (May 26, 2004), the Agreement on Security Arrangements (September 25, 2003), the Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices (December 31, 2004), and the Implementation Modalities and Global Implementation Matrix and Appendices (December 31, 2004).

34 Article 1.3, Machakos Protocol, July 20, 2002, *in* Comprehensive Peace Agreement, *supra* note 17.

35 *Ibid.*, art. 2.5. The six-year period started at the time of conclusion of the Comprehensive Peace Agreement.

36 *See* Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities, G.O.S.-S.P.L.M/S.P.L.A., Dec. 31, 2004, *in* Comprehensive Peace Agreement, *supra* note 17.

37 *Ibid.*, articles 17.8, 20.1, 20.2, 21.2.

38 Article 2, Interim National Constitution of the Republic of Sudan, July 6, 2005,

39 *Ibid.*, article 222(1).

To intensify the peace efforts and build on the momentum of the progress made by the signing of the Agreement on Wealth Sharing⁴⁰ and the Protocol on Power Sharing⁴¹ at the talks held in the Kenyan city of Naivasha, the United Nations Security Council, on the recommendation of the Secretary-General, established a special political mission—the United Nations Advance Mission in the Sudan (UNAMIS).⁴² UNAMIS was mandated to facilitate contacts with the parties concerned and to prepare for the introduction of an envisaged United Nations peace support operation.⁴³

On January 31, 2005, 22 days after the signing of the Comprehensive Peace Agreement in Nairobi, the United Nations Secretary-General recommended to the Security Council the deployment of a multi-dimensional peace support operation, consisting of up to 10,000 military personnel and an appropriate civilian component, including more than 700 police officers.

The United Nations Mission in the Sudan had their components focusing on four broad areas of engagement.⁴⁴ As UNAMIS, the Mission would be dealing with a broad range of issues; the Secretary-General stressed the importance of a joint, integrated strategy among the UN agencies, funds and programmes in order to successfully implement the Comprehensive Peace Agreement.

The referendum question was initially indicated in the Interim Constitution by providing that the people of Southern Sudan would either “(a) confirm unity of the Sudan by voting to sustain the system of government established under the Comprehensive Peace Agreement and this Constitution, or (b) vote for secession.”⁴⁵ The referendum rules were subsequently specified by the Southern Sudan Referendum Act on

40 *Loc. Cit.*, note 19.

41 *Loc. Cit.*, note 19.

42 See the Security Council resolution 1547 (2004) of June 11 2004.

43 The Secretary-General then appointed Jan Pronk as his Special Representative for the Sudan and head of UNAMIS, who led United Nations peace making support to the IGAD-mediated talks on the North-South conflict, as well as to the African Union-mediated talks on the conflict in Darfur, a region in the western part of the Sudan.

44 Those areas of engagements include good offices and political support for the peace process; security; governance; and humanitarian and development assistance.

45 Article 222 (2), Interim National Constitution of the Republic of Sudan, July 6, 2005,

December 31, 2009.⁴⁶ The Act repeats the general references to self-determination and the independence referendum, which were previously invoked in the Comprehensive Peace Agreement and the Constitution. It further repeats the referendum choice provided for by the Constitution, that is, either “confirmation of the unity of the Sudan by sustaining the form of government established by the Comprehensive Peace Agreement and the Constitution, or . . . secession.”⁴⁷ Article 41 of the Act specified the referendum rules and made specific provisions for the required quorum as well as the winning majority:

(2) The Southern Sudan Referendum shall be considered legal if at least (60%) of the registered voters cast their votes.

(3) The referendum results shall be in favour of the option that secures a simple majority (50% +1) of the total number of votes cast for one of the two options, either to confirm the unity of the Sudan by maintaining the system of government established by the Comprehensive Peace Agreement or to secede.⁴⁸

The referendum ballot was clear and simple; in accordance with the Constitution and the Southern Sudan Referendum Act, it provided for two options: “unity” or “secession.”⁷³ The referendum rules were thus clear in terms of both the question and the winning majority. Moreover, Article 66 of the Southern Sudan Referendum Act specified that the referendum decision would be binding: The option approved by the people of Southern Sudan by a majority of 50% + 1 of valid votes cast in the referendum in accordance with the present Act, shall supersede any other legislation and shall be binding to all the State bodies as well all citizens of Southern and Northern Sudan. At a referendum held between January 9 and 15, 2011, the option for secession was given the overwhelming support of 98.83%, at a turnout of 97.58%. South Sudan declared independence on July 9, 2011. International recognition followed promptly, and on July 14, 2011, South Sudan became a member of the United Nations.⁴⁹ South Sudan’s path to independence was marked by a lengthy civil war, atrocities, and a grave humanitarian

⁴⁶ The Southern Sudan Referendum Act (2009, trans. 2010). Available at <http://saycsd.org/doc/SouthernSudan>, accessed on January 15, 2013.

⁴⁷ *Ibid.*, articles. 4–5.

⁴⁸ *Ibid.*, articles. 41.

⁴⁹ G.A. Res. 65/308, U.N. Doc. A/RES/65/308 (July 14, 2011).

situation. However, these circumstances did not create a right to independence under international law.⁵⁰

In terms of international law, South Sudan did not become an independent state until the central government formally agreed to hold a binding referendum on independence at which secession was supported by an overwhelming majority. Unlike the example of Kosovo, South Sudan is a state created with the approval of the parent state. The mechanism for secession was rooted in the 2005 Comprehensive Peace Agreement and the constitutional arrangement that resulted from this agreement. South Sudan is thus a rare example of a right to independence being exercised under domestic constitutional provisions. Its example further affirms that such constitutional provisions tend to be implemented exceptionally, as a political compromise and an interim solution aimed at peaceful settlement of the contested entity's legal status.⁵¹

The Sudanese authorities were responsible for the referendum process. In a statement issued by the Security Council President in New York on 6 January 2011, members of the Security Council said that they “welcome the Sudanese parties’ reaffirmation of their commitment to full and timely implementation of the Comprehensive Peace Agreement (CPA), including their commitment to respect the outcome of the southern Sudan referendum, and appreciate, in this regard, the statements by President Omar al Bashir during his visit to Juba on 4 January 2011 and by Vice-President Salva Kiir in his 3 January 2011 New Year message. The members of the Council reaffirm full support for the efforts of the parties.” The members of the Security Council further welcomed “the progress made towards the holding of a peaceful and credible southern Sudan referendum that reflects the will of the people and commend in particular the work of the Southern Sudan Referendum Commission.”⁵²

⁵⁰ In any event, it can be said that decades of violence and oppression created political circumstances in which Sudan accepted South Sudanese independence. Secession still was not an entitlement under international law; it clearly followed from domestic constitutional provisions.

⁵¹ See generally, Vidmar J., “South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States”, *Texas International Law Journal*, Vol. 47, Issue 3, Pp. 541 – 559. Available at www.academia.edu, accessed February 27, 2013.

⁵² See Sudan Referendum Fact Sheet, January 7, 2013. Available at <http://www.unrec.org/eng/conflicts/sudan.htm>, accessed on February 27, 2013.

Under the leadership of the Secretary-General, the United Nations provided technical and logistical assistance to the Comprehensive Peace Agreement parties' referendum preparations through support from its peacekeeping missions on the ground in Sudan, as well as the good offices function provided by the Secretary-General's panel aimed at ensuring the impartiality, independence and effectiveness of the process, and by the United Nations Integrated Referenda and Electoral Division (UNIRED). During the week of polling, the United Nations Secretary General's three members Panel⁵³ visited referendum centres in eight states, and the Panel's staff monitored the process in all Southern states and across the North.

Nearly 340 UNIRED staff (two-thirds of them were UN Volunteers) worked to support the South Sudan Referendum Commission (SSRC) at the headquarters and Juba levels, as well as at the state and county levels in southern Sudan, and in five areas⁵⁴ in the North where there are concentrations of southern Sudanese. The UN, in cooperation with its international partners, also provided other financial and logistical support to the referendum process.⁵⁵ The UN used its air assets to transport materials to and from remote and isolated referendum centres. Distribution of materials was a key challenge to the SSRC given the size of the country and the lack of infrastructure in some areas. UNIRED provided assistance by distributing referendum materials from Khartoum and Juba to the state capitals and onwards to the county level in Southern Sudan. In Southern Sudan, 1.2 million kg of materials⁵⁶ were delivered via domestic flights funded by the UN Development Programme. During the referendum process, UNMIS flights delivered some 30,000 kgs of material to 50 remote drop-off points serving 473 referendum centres in southern Sudan.⁵⁷ UN Police serving with UNMIS trained thousands of Sudanese police throughout the country on

53 The Panel was comprised of Benjamin Mkapa, a former President of Tanzania; António Monteiro, a former Minister of Foreign Affairs of Portugal; and Bhojraj Pokharel, a former Chairman of the Election Commission of Nepal.

54 Those areas included Khartoum, Kassala, El Fasher, Kadugli, and Ed Damazin.

55 The support included procurement and transportation of registration and polling kits, registration books and cards, training materials, voter education material, office furniture and equipment, and vehicles (including cars and motorbikes) throughout Sudan.

56 The materials included voter education posters, stationery, IT equipment, manuals, training kits, polling materials.

57 See Sudan Referendum Fact Sheet, January 7, 2013. Available at <http://unmis.unmissions.org/>, accessed on February 27, 2013.

referendum security.⁵⁸ UN Police also served on referendum security committees to provide advice and support to the Sudanese police.⁵⁹

It was only on May 31 2011, that the UN Secretary-General transmitted a letter from the Government of Sudan to the Security Council announcing the Government of Sudan's decision to terminate the presence of UNMIS as of July 9, 2011.⁶⁰ Then on the said July 9, 2011, the mandate of the United Nations Mission in Sudan (UNMIS) ended following the completion of the six-and-a-half-year interim period set up by the Government of Sudan and Sudan People's Liberation Movement during the signing of the Comprehensive Peace Agreement on January 9 2005.

5. Examining Self Determination as a Tool for the Protection of Human Right

The principle of self-determination is prominently embodied in Article I of the Charter of the United Nations. Earlier it was explicitly embraced by United States President Woodrow Wilson, by Lenin and others, and became the guiding principle for the reconstruction of Europe following World War I. The principle was incorporated into the 1941 Atlantic Charter and the Dumbarton Oaks proposals which evolved into the United Nations Charter. Its inclusion in the United Nations Charter marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among states. It is recognized as a right of all peoples in the first article common to the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966, which both entered into force in 1976.⁶¹

The right to self-determination of peoples is recognized in many other international⁶² and regional⁶³ instruments. It has been affirmed by

58 17,600 officers in Southern Sudan and 4,500 in Northern Sudan were trained.

59 Sudan Referendum Fact Sheet, January 7, 2013, *op. cit.*, note 51.

60 S/2011/333.

61 Paragraph 1 of this common Article provides that all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

62 Such as the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States adopted by the UN General Assembly in 1970

the International Court of Justice in the *Western Sahara case*⁶⁴ and the *East Timor case*⁶⁵, in which its *erga omnes* character was confirmed. Furthermore, the scope and content of the right to self-determination has been elaborated upon by the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination. The inclusion of the right to self-determination in the International Covenants on Human Rights and in the Vienna Declaration and Programme of Action, referred to above, emphasizes that self-determination is an integral part of human rights law which has a universal application.⁶⁶ At the same time, it is recognized that compliance with the right of self-determination is a fundamental condition for the enjoyment of other human rights and fundamental freedoms, be they civil, political, economic, social or cultural. The interrelatedness of individual human rights and the collective right of a people to self-determination are clear to the people involved in struggles for self-determination. In most cases, the individual human rights abuses are a consequence or a symptom of a more fundamental problem, often a conflict over the exercise of self-determination. Those abuses are unlikely to end until the underlying cause is addressed.⁶⁷ The United Nations has called the right to self-determination a prerequisite to the enjoyment of all other human rights. To separate the two issues is, therefore, artificial and not helpful.⁶⁸ This interrelatedness is also clear with respect to the practice of population transfer, which often violates the human rights of peoples transferred but also of the people into whose

63 Such as the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe in 1975, the African Charter of Human and Peoples' Rights of 1981, the Conference on Security and Co-operation in Europe Charter of Paris for a New Europe adopted in 1990.

64 (1975) I.C.J. Rep.12

65 (1995) I.C.J. Rep. 90.

66 That the right to self-determination is part of so called hard law has been affirmed also by the International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples brought together by UNESCO from 1985 to 1991. It came to the conclusion that (1) peoples' rights are recognized in international law; (2) the list of such rights is not very clear, but also that (3) hard law does in any event include the right to self-determination and the right to existence, in the sense of the Genocide Convention.

67 In South Africa, for example, most human rights abuses were the direct result of the apartheid system which denies the Black people of the country their right to self-determination. In Tibet and East Timor, authorities arrest and/or torture individuals and terrorize others because of their support of the struggle for independence.

68 See Self-Determination in Relation to Individual Human Rights, Democracy and the Protection of the Environment, Conference Report of Unrepresented Nations and Peoples Organisation International Conference, The Hague (1993) Pp. 12 – 13. Available at www.unpo.org, accessed on February 27, 2013.

territories settlers are being transferred.⁶⁹ Population transfer not only violates human rights in this manner, the practice also undermines the right to self-determination, and by intentionally manipulating and changing the demographic composition of the territory whose indigenous people claim the right to self-determination. Individual human rights and the group rights of minorities, religious groups etc. are closely linked to the right to self-determination in other ways also.⁷⁰ This principle of the equal right of self-determination of all peoples and the need to protect all minorities, is enshrined in the Unrepresented Nations and Peoples Organisation Covenant, 1991.⁷¹

Similarly, a recognition of a people's right and ability to act as a separate entity entails also an obligation of that entity to respect universal norms of human rights of the individuals under its authority. The right to self-determination though is a collective right which belongs to a whole people, is also a right possessed by the individual belonging to that people. A violation of the right of the people, is therefore a violation of the individual's right also.⁷²

6. Recommendation/Conclusion

A people can be said to have realised its right to self-determination when they have either (1) established a sovereign and independent state; (2) freely associated with another state or (3) integrated with another state after freely having expressed their will to do so. This is, however, meaningless if external intervention pervades. Thus, the right of self-determination puts upon states not just the duty to respect and promote the right, but also the obligation to refrain from any forcible action which deprives peoples of the enjoyment of such a right. In particular, the use of force to prevent a people from exercising their right of self-determination is regarded as illegal and has been consistently condemned by the international community. The obligations

69 See Human Rights Dimensions of Population Transfer, Conference Report of Unrepresented Nations and Peoples Organisation International Conference, The Hague (1992) P.2. Available at www.unpo.org, accessed on February 27, 2013.

70 For example, if a people claims the right to self-determination for itself, it should recognize the same right to other peoples, even if they share the same state.

71 See the preamble and article 5 of the Unrepresented Nations and Peoples Organisation Covenant, 1991.

72 In this context, it even be stressed that women's rights are equal to those of men, although women are rarely given the same opportunity to exercise their rights to the fullest.

flowing from the principle of self-determination have been recognised as *erga omnes*, namely existing towards the whole international community.

The concept of self-determination is a very powerful one. As Wolfgang Danspeckgruber puts it: "No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination." It evokes emotions, expectations and fears which often lead to conflict and bloodshed. Some experts argued that the title holders should be or are limited in international law. Others believed in the need to limit the possible outcome for all or categories of title holders. Ultimately, the best approach is to view the right to self-determination in its broad sense, as a process providing a wide range of possible outcomes dependent on the situations, needs, interests and conditions of concerned parties. The principle and fundamental right to self-determination of all peoples is firmly established in international law. It would be mutually beneficial for states, claimant peoples and all others whose rights are engaged by a self-determination claim if states were to recognise the capacity of the human rights approach to transform their relationship to the concept of self-determination. With the development of human rights cultures in domestic settings, international legal standards on self-determination and human rights bear greatly enhanced positive potential.

In sum, "National aspirations must be respected; people may now be dominated and governed only by their own consent. Self-determination is not a mere phrase; it is an imperative principle of action. . . ." ⁷³ By extension the term self-determination has come to mean the free choice of one's own acts without external compulsion. All peoples have the right to self-determination. By virtue of that right they shall determine their political status and freely pursue their economic, social and cultural development. ⁷⁴

73 Woodrow Wilson in his famous self-determination speech on February 11, 1918 after he announced his Fourteen Points on January 8, 1918.

74 The Supreme Court of Canada in the Quebec Case [1998] 2 S.C.R. 217, para. 126, held that the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.