An Analysis of the Concept of ‘Self-Determination’ in International Law:

The Case of South Sudan

by

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Summary

This research intends to investigate the scope and applicability of the concept of ‘self-determination’ outside the context of decolonisation using South Sudan as a case study. Demands for the exercise of the right to self-determination are widespread. These are vehemently resisted by states who view the concept of ‘self-determination’ as a potential source of territorial disintegration. International instruments which provide for the right to self-determination also discourage the impairment of the territorial integrity of states in the name of self-determination. The problem faced in international law is therefore how to balance the right to self-determination with the principle of territorial integrity. The study reveals that the general understanding is that outside the context of decolonisation the right to self-determination may be exercised within the territorial boundaries of a state without compromising the territorial integrity of a state. The internal exercise of the right to self-determination entails human rights protection, participation in the political affairs of the state and autonomy arrangements. This general understanding is however problematic where a state systemically violates the rights of its people and denies them political participation in the affairs of the state. The people of South Sudan found themselves in such a situation from the time when Sudan gained independence from British colonial rule. Despite a number of negotiations with the government of Sudan, the people of South Sudan continued to be marginalised and their rights violated with impunity. They then demanded to exercise their right to self-determination externally and eventually they seceded from Sudan through the framework created by the Comprehensive Peace Agreement of 2005. In the light of the secession of South Sudan from Sudan this study proposes a remedial self-determination approach to the understanding of post-colonial self-determination. In terms of this approach when people are denied the right to exercise their right to self-determination internally, or their rights are deliberately and systemically violated, they may exercise their right to self-determination externally and secede.

Key words: self-determination; secession; South Sudan; Sudan; territorial integrity; decolonisation; Islamisation; post-colonial; gross violations of human rights.
Declaration

I, Prince Charles Zimuto, hereby declare that all the work contained herein is my own original work; that all ideas that are not mine have been duly acknowledged and referenced according to the referencing guide of the University of Fort Hare; and that this dissertation has not been previously submitted in its entirety or in part to any other university towards any other degree.

Candidate: Prince Charles Zimuto

Signature: ______________________

Date: 17 August 2015
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<tr>
<td>ABC</td>
<td>Abyei Boundaries Commission</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<td>CPA</td>
<td>Comprehensive Peace Agreement</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>FFAMC</td>
<td>Fiscal and Financial Allocation and Monitoring Commission</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICERD</td>
<td>International Convention of the Elimination of all forms of Racial Discrimination</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>KPC</td>
<td>Katangese Peoples’ Congress</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<tr>
<td>NCP</td>
<td>National Congress Party</td>
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<td>NIF</td>
<td>National Islamic Front</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>PDF</td>
<td>Popular Defence Force</td>
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<tr>
<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
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<td>SPLA</td>
<td>Sudan People’s Liberation Army</td>
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<td>SPLM</td>
<td>Sudan People’s Liberation Movement</td>
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<td>SPLM B.G.G.</td>
<td>Sudan People Liberation Movement Bahrel Ghazal Group</td>
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<td>SSIM</td>
<td>South Sudan Independence Movement</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
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<td>USSR</td>
<td>Union of Soviet Socialist Republics</td>
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CHAPTER 1
INTRODUCTION

1.1 Background

This research intends to investigate the scope and applicability of the concept of ‘self-determination’ outside the context of decolonisation, using South Sudan as a case study. The origins of self-determination can be traced back to the French Revolution of 1789.\(^1\) It was however in the 20\(^{th}\) century that the concept “gained real currency”.\(^2\) Former American President Woodrow Wilson, in his speech to the American Congress in 1918, warned that: “Self-determination is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril.”\(^3\) In contrast Wilson’s secretary of state said:

“The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late to check those who attempt to put the principle in force. What a calamity that the phrase was ever uttered! What misery it will cause!”\(^4\)

The concept of ‘self-determination’ means different things to different people.\(^5\) Consequently, a number of meanings have been attached to the concept.\(^6\) The concept of ‘self-determination’ has been relied upon by various groups around the world fighting for a wide range of causes.\(^7\) For Woodrow Wilson the concept of ‘self-determination’ meant government by consent.\(^8\) Some scholars support this conception of self-determination arguing that self-determination must be understood as the right to democratic government.\(^9\) Vogel puts this conception as follows:

“The new understanding of self-determination that has emerged may be restated as a right to self-determination that serves the well-being of groups who define themselves as a

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\(^3\) Levy The Internarium: Wilson, Madison, & East Central European Federalism (2007) 130.

\(^4\) Lansing The Peace Negotiations (2005) 100.


people by addressing the conditions under which they live and are governed through an on-going process of negotiation of the terms on which they live with their neighbors.”

The concept of ‘self-determination’ was interpreted during decolonisation as the right to freedom for colonised people. Thus, after World War II, the concept was invoked by colonised peoples in their struggle for independence. As a result, today some states regard the concept of ‘self-determination’ as limited to the granting of independence to colonised peoples. India’s reservation to common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) is noteworthy:

“With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words ‘the right of self-determination’ appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.”

All over the African continent peoples have been demanding the right to self-determination. For instance, pressure groups are agitating for the break-away of Cabinda from Angola, Caprivi from Namibia, Zanzibar from Tanzania, Barots from Zambia and Matabeleland from Zimbabwe, just to mention a few. African heads of states, however, normally place great emphasis on the principle of the territorial integrity of states. They insist on a conception of self-determination which limits the application of self-determination to situations of colonialism,

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14 International Covenant on Civil and Political Rights (1966) UN Doc A/6316.
apartheid and racism. Whenever people agitate for self-determination, states generally become concerned about possible secession and political instability. States will thus oppose any calls for self-determination, resulting in violence of unprecedented levels, in an effort to preserve their territorial integrity. States thus view the concept of ‘self-determination’ as a potential source of territorial disintegration.

Groups agitating for self-determination cite economic, political and cultural marginalization as their grievances. Marginalization and exclusion from meaningful political and economic participation in the affairs of the state is one of the causes of conflict in Africa. In the case of South Sudan, the demand for self-determination was, *inter alia*, based on economic marginalization, exclusion from political participation and the denial of religious freedom of the people of South Sudan. The marginalisation of the people of South Sudan by the central government of Sudan was a continuation of the British colonial policy of treating African ethnic groups as inferior to Arabs. South Sudan, as a result, has never had proper, adequate and modern infrastructure essential for the proper governance of the region.

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The marginalisation of the people of South Sudan led to the rise of rebel movements\textsuperscript{31} and two civil wars which were characterised by slavery, the destruction of social, economic and cultural life, death and displacement of civilians.\textsuperscript{32} By way of example, the second civil war internally displaced thousands of the people of South Sudan and they sought refuge in Khartoum where the government of Sudan in 1992 forcibly drove about 400 000 of them out to the desert, shooting all those who offered resistance.\textsuperscript{33} The people of South Sudan were also captured into slavery by Arab slave raiders and government officials from northern Sudan supported the practice because of the financial reward it brought.\textsuperscript{34}

Ever since the concept of ‘self-determination’ was popularised by Woodrow Wilson, concerns have been raised over the potential of self-determination to cause political instability and defragmentation of states.\textsuperscript{35} Critics have also raised concerns over the lack of a precise definition of the concept of ‘self-determination’.\textsuperscript{36} There is also no consensus among scholars and statesmen regarding the nature of the concept and its applicability outside the decolonisation context.\textsuperscript{37} Outside the context of decolonisation it is important therefore to ascertain what may give rise to a self-determination claim\textsuperscript{38} and what the concept of ‘self-determination’ entitles claimants to.\textsuperscript{39}

\section*{1.2 Problem statement}

The study will be centred on a research problem namely: what is the nature and scope of the concept of ‘self-determination’ in the post-colonial era? The content and application of the

\begin{thebibliography}{99}
\footnotesize
\item Leonardi “Liberation or Capture: Youth in Between ‘Hakuma’, and ‘Home’ During Civil War and its Aftermath in Southern Sudan” 2007 African Affairs 391 394.
\item Abusharaf “Competing Masculinities: Probing Political Disputes as Acts of Violence against Women from Southern Sudan and Darfur” 2006 Human Rights Review 59 61.
\item Rassam “International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach” 2004 Penn State International Law Review 809 810.
\item Simpson “The United States and the Curious History of Self-Determination” 2012 Diplomatic History 675 675.
\item McCracken “Abusing Self-Determination and Democracy: How the TPLF is Looting Ethiopia” 2004 Case Western Reserve Journal of International Law 183 211.
\item Lorca “Petitioning the International: A ‘Pre-history’ of Self-determination” 2014 European Journal of International Law 497 498.
\end{thebibliography}
concept today is controversial. There is a widespread view in international law that self-determination is a concept applicable only to people under colonial and alien domination. The question is therefore, that, is the concept of ‘self-determination’ applicable outside the context of decolonisation? If so, the next question is what is the post-colonial understanding of the concept of ‘self-determination’?

Much of the controversy surrounding the scope and application of the concept of ‘self-determination’ stems from the clash between concept and territorial integrity. The challenge in international law is how to balance the right to self-determination with the principle of territorial integrity. In order to find answers to these questions, the study will investigate the circumstances under which the concept of ‘self-determination’ was exercised in the case of South Sudan with a view to ascertain whether this shows a new understanding of the concept in international law.

1.3 Research questions
This research is an analysis of the concept of ‘self-determination’ in international law using South Sudan as a case study. The following questions will be considered:

1. What is the nature and scope of the concept of ‘self-determination’ outside the context of decolonisation?
2. What are the implications of South Sudan’s secession from Sudan on the scope of self-determination outside the context of decolonisation?

1.4 Hypothesis
Outside the context of decolonisation, self-determination is generally understood to mean the right of any group of people within a state to political, cultural, economic or religious autonomy.

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43 Okoronkwo “Self-Determination and the Legality of Biafra's Secession under International Law” 2002 Loyola of Los Angeles International and Comparative Law Review 63 64.
Where a state engages in systemic human rights violations, self-determination should be understood as empowering peoples to break away from that state. The secession of South Sudan reinforces the view that self-determination may, in instances of gross human rights violations and denial of the right to internal self-determination, lead to secession.

15 Research objectives

The main objectives of this research are:

i. To ascertain the scope nature of the concept of ‘self-determination’ outside the context of decolonisation.

ii. To ascertain the significance of South Sudan’s secession on the post-colonial understanding of self-determination.

iii. To propose a new approach to understanding the concept of ‘self-determination’ outside the context of self-determination.

16 Thesis statement

This study will argue that the concept of ‘self-determination’ is not limited to situations where peoples are colonised or are under alien domination. Limiting the right to self-determination to situations where peoples are colonised or are under alien domination deprives them of a remedy in the face of gross human rights violations by a sovereign state. It will be argued that the concept of ‘self-determination’ has acquired new meaning outside the context of decolonisation.

The concept of ‘self-determination’ can also be invoked in instances where people are denied the right to internal self-determination. The primary argument in this study is that if peoples are


subjected to perpetual gross human rights violations or are denied the right to internal self-determination, they may elect to secede.

## 17 Literature review

Castellino and Gilbert lament that despite the existence of a lot of literature on self-determination, “a precise definition remains elusive.” Similarly, Hehir notes that notwithstanding the increased reliance on the concept of ‘self-determination’ by various groups of people, its meaning and applicability is “problematic”. In the same vein, Barelli argues that ascertaining the meaning and application of self-determination has been made difficult by two reasons, namely; the ambiguity with which the concept is expressed in international legal instruments; and the political and moral considerations which have a bearing on the application of the concept. Titanji, however, argues that in the history of the concept of ‘self-determination’ its meaning and applicability was not disputed during decolonisation and during this period the concept meant freedom from colonialism.

Hannum notes that one of the questions which have sparked debates among scholars is the recognition of the concept of ‘self-determination’ in the post-colonial era. Liss notes that states and courts are unwilling to recognise the application of the concept of ‘self-determination’ beyond decolonisation. Oeter, however, argues that mention of the right to self-determination

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in the ICCPR and the ICESCR is proof that the concept of ‘self-determination’ is applicable outside the context of decolonisation.\footnote{Oeter “Self-Determination” in Simma et al (eds) The Charter of the United Nations: A Commentary (2012) 322.}


El Ouali argues that the new conception of self-determination insists on maintaining the territorial integrity of states by promoting democracy and granting autonomy to people within a state.\footnote{El Ouali Territorial Integrity in a Globalizing World: International Law and States’ Quest for Survival (2012) 305.} Weldehaimanot argues that state practice shows that great importance is placed on the principle of territorial integrity and therefore self-determination has increasingly been regarded as entitling peoples to exercise autonomous functions within the boundaries of their state.\footnote{Weldehaimanot “The ACHPR in the Case of Southern Cameroons” 2012 Sur-International Journal on Human Rights 85 98.} Borgen in the same vein argues that today, external self-determination is widely discouraged.\footnote{Borgen “The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia” 2009 Chicago Journal of International Law 1 8.}

In contrast, Velasco argues that although the new conception of self-determination seems to be in favour of internal self-determination, external self-determination is still possible.\footnote{Velasco “Self-determination and Secession: Human Rights-based Conflict Resolution” 2014 International Community Law Review 75 83.} Knoll relying on the remedial self-determination theory argues that a people may secede if a state denies them the rights associated with internal self-determination.\footnote{Knoll “Fuzzy Statehood: An International Legal Perspective on Kosovo’s Declaration of Independence” 2009 Review of Central and East European Law 361 387.} Similarly Grant argues that where a state

subjects its people to gross violations of human rights and denies them the right to internal self-determination, the people may secede from that state.67

The works cited in this literature review reveal that there is debate around the scope and application of the concept of ‘self-determination’ outside the context of decolonisation. This literature review also highlights that the concept of ‘self-determination’ has an “internal” and “external” dimension. Scholars are not in agreement as to which aspect of the concept of ‘self-determination’ is applicable outside the context of decolonisation. This literature review highlighted that some scholars are of the view that the post-colonial understanding of the concept of ‘self-determination’ is synonymous with internal self-determination. On the other hand it was revealed that other scholars are of the view that the post-colonial understanding of the concept of ‘self-determination’ should be that where peoples are denied the right to exercise their right to self-determination “internally” they may do so “externally”. Consequently it can be said that there is no consensus on the post-colonial understanding of the concept.

1 8 Significance of the study
The study will assist in a proper understanding of the concept of ‘self-determination’ in a post-colonial context. It is hoped that clearly defining the scope and nature of self-determination will help guide states on how to deal with claims for self-determination. This may put an end to the brutal suppression of peoples agitating for self-determination by states.

1 9 Methodology
This study will examine the provisions of various international law treaties relating to the concept of ‘self-determination’. In addition, case law, textbooks and journal articles will be consulted. This study is mainly desktop research. No empirical research will be conducted.

1 10 Scope and limitations of the study
This research will examine the nature and scope of the concept of post-colonial ‘self-determination’ in international law. This will be done by examining a recent exercise of the right

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67 Grant “Regulating the Creation of States from Decolonization to Secession” 2009 Journal of International Law and International Relations 11 29.
to self-determination by the people of South Sudan. Of particular importance are the circumstances which gave rise to the agitation for self-determination, how the peoples of South Sudan exercised their “right” to self-determination and how that has contributed to a new understanding of the concept. To adequately address the issue both the external and internal forms of the concept will be considered.

1 11 Delineations
This research does not concern its self with the debate concerning the definition of “peoples” for the purposes of the exercise of the right to self-determination. The research will not consider whether the various peoples agitating for self-determination all around the world have good cause to do so or not.

1 12 Chapter outline
This study is made up of five chapters. Chapter one is the general introduction of the dissertation. It outlines the background of the study, the problem statement, thesis statement and research questions. It also provides the literature review, methodology and the limitations of the study.

Chapter two discusses the origins and development of the concept of ‘self-determination’. This will be done in order to determine how the concept is applied in international law. The chapter will also focus on how the concept was applied during decolonisation. This is crucial because it will form the foundation of the post-colonial understanding of the concept which will be discussed in chapter four. This chapter is also important in that the relationship between the concept of ‘self-determination’ and other principles of international law such as the territorial integrity of states will be examined. The chapter will examine the concept of ‘secession’ and its implications for the post-colonial understanding conception of ‘self-determination’. This will be done by examining the jurisprudence of national and international courts, provisions of international legal instruments and writings of scholars.

Chapter three will investigate the concept of ‘self-determination’ in the context of South Sudan. This chapter will argue that the exercise of the right to self-determination by the people of South Sudan was prompted by gross human rights violations and the denial of the right to internal self-
determination by the government of Sudan. The chapter will investigate the concept of ‘gross violations of human rights’ in the context of South Sudan. In addition the chapter will outline instances where the people of South Sudan were denied the right to internal self-determination.

The chapter shall also outline and discuss the efforts by the people of South Sudan to end the gross human rights violations perpetrated against them by the government of Sudan. The chapter is crucial in that it outlines the circumstances under which the secession of South Sudan from Sudan occurred. In other words the chapter will present the secession of South Sudan as a practical application of the right to self-determination. This chapter is also important in that it also forms the basis on which the concept of ‘self-determination’ outside the context of decolonisation which is discussed in chapter four must be understood.

Chapter four will establish the post-colonial understanding of the concept of ‘self-determination’. The chapter proposes the remedial self-determination theory approach to the post-colonial understanding of the concept of ‘self-determination’. The argument put forward in this chapter is that the post-colonial understanding of self-determination is generally understood to be synonymous with the right to internal self-determination. This chapter, however, argues that when peoples are denied their right to internal self-determination or where the state commits gross violations of human rights against its people, it ceases to be representative of such people and secession becomes a possible option. Chapter four also argues that the secession of South Sudan from Sudan should be regarded as a practical application of the new understanding of the concept of ‘self-determination’.

Chapter five is the final chapter of the study. The chapter presents the findings and conclusions of the study.
CHAPTER 2

THE CONCEPT OF ‘SELF DETERMINATION’ IN INTERNATIONAL LAW

2 1 Introduction

This chapter examines the concept of ‘self-determination’ as it is applied in international law. The key question in this chapter is what is the meaning of the concept of ‘self-determination’? In order to answer this question, the chapter will examine the jurisprudence of national and international courts, provisions of international legal instruments and writings of scholars in order to ascertain how they address the concept of ‘self-determination’.

The chapter will proceed in six main sections. First, the chapter will investigate the origins and development of the concept. Second, the chapter will focus on how the concept was applied during decolonisation. Third, the chapter will investigate the legal status of self-determination in current international law. Fourth, the chapter will highlight how the concept of ‘self-determination’ has been applied outside the context of decolonisation. Fifth, the relationship between the concept and the principle of the territorial integrity of states will be examined. Sixth, the chapter will examine the concept of ‘secession’ and its implications for the post-colonial conception of self-determination, followed by the conclusion.

2 2 The origins and development of the concept of ‘self-determination’

The concept of ‘self-determination’ is thought to have been conceptualised by former American President Woodrow Wilson. The origins of the concept, however, can be traced back to the French Revolution of 1789. Woodrow Wilson did not invent the term self-determination. Wilson borrowed the term from the Bolsheviks, who saw the concept as an avenue to bring imperial rule to an end. It is noteworthy that Wilson never made his ideas on the concept

70 The Bolsheviks were members of a political party in Russia called the Bolshevik Party formed in 1903. The party played a major role in the Russian Revolution and advocated for the establishment of socialism in Russia. See: https://www.marxists.org/glossary/orgs/b/o.htm (accessed 8 November 2014).
clear. In other words, he avoided providing a precise definition of what self-determination meant and what it entitled the beneficiaries to.

In the period between the French Revolution and the end of World War 1, the concept of ‘self-determination’ was largely regarded as a mere political principle. It is noteworthy that the Covenant of the League of Nations contains no express reference to the right to, or concept of ‘self-determination’. The League of Nations’ handling of the Aaland Islands question in 1920 may also be recalled and applied.

The Aaland Islands (the Islands) had long been regarded as part of Finland although they were mostly inhabited by people of Swedish origin. In the period between 1809 and 1919, the Islands were under the control of Russia. When World War I ended, separatist movements in the Islands indicated that they wanted the Islands to be united with Sweden. Finland responded by thwarting the separatist movements.

In 1920, the Council of the League of Nations, at a meeting held in London, resolved to appoint a Commission of Jurists to give an opinion on the question of the Islands. In its report, the Commission of Jurists refused to recognise the principle of self-determination as a legal rule. The report referred to self-determination as a principle which “plays an important part in modern political thought, especially since the Great War.” However, the report went on to state that:

“The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.”

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74 Covenant of the League of Nations (28 June 1919) 108 LNTS 188.
77 Ibid.
78 Diggelmann 2007 The European Journal of International Law 137.
80 Ibid.
The first international legal instrument to make express reference to the concept of ‘self-determination’ is the United Nations Charter (UN Charter). The words “self-determination” appear in the UN Charter twice. The first reference to the concept of ‘self-determination’ is found in Article 1(2) which provides that the purposes of the United Nations (UN) are 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.”

The second instance where reference is made to the concept of ‘self-determination’ is in Article 55. Article 55 of the UN Charter urges the UN to promote higher standards of living, economic and social development, international, cultural and educational co-operation, respect for human rights without distinction as to race, sex, language, or religion in order to create “conditions necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”

The Universal Declaration of Human Rights (UDHR), the first international human rights instrument to be adopted by the UN makes no express mention of the right to self-determination. The principle is implicitly recognised in Article 21 of the UDHR. The article provides that:

“1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

The next section will discuss the concept of ‘self-determination’ as it was applied during decolonisation. The section will demonstrate that during decolonisation, the concept of ‘self-determination’ became recognised as a legal principle.

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81 Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
82 Article 1 of the Charter of the United Nations.
2.3 Self-determination and decolonisation

The decolonisation period is a useful starting point when trying to ascertain the meaning and applicability of the concept of ‘self-determination’. During decolonisation, self-determination was elevated into a legal principle. The various UN declarations discussed below show how the concept of ‘self-determination’ became increasingly associated with decolonisation and how it became to be accepted as a legal principle.

The United Nations General Assembly (UN General Assembly) in 1960 adopted the Declaration on the Granting of Independence to Colonial Peoples (Resolution 1514 (XV)). Resolution 1514 (XV) came about as a result of the growing concern at the UN over the slow pace at which the decolonisation process was taking place. The preamble of the resolution proclaims “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.” Thereafter the declaration 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.”

The UN General Assembly in 1960 also adopted the Declaration on the Principles, which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73 of the UN Charter (Resolution 1541 XV). Resolution 1541(XV) puts forward three possible outcomes of the exercise of self-determination. These are: emergence as a sovereign independent state; free association with an independent state; or integration with an independent state.

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89 United Nations General Assembly Resolution 1514 (XV), para 2.
90 United Nations General Assembly Resolution 1541(XV), Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information called for under Article 73e of the Charter Resolution A/Res/15/1541 (1960).
91 United Nations General Assembly Resolution 1541(XV), principle VI.
Furthermore, Principle VII of Resolution 1541 (XV) states that “free association should be the result of a free and voluntary choice by the peoples of the territory concerned.” Similarly Principle IX of Resolution 1541(XV) states that “integration should be the result of the freely expressed wishes of the territory’s peoples.”

Finally the United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States (Resolution 2625XXV) adopted by the UN General Assembly in 1970 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.”92

Apart from stating that all peoples have the right to self-determination, Resolution 2625(XXV) also provides a “fourth option” for the exercise of self-determination.93 It states that the emergence into any other political status freely determined by a people is one of the ways of exercising the right to self-determination.94

In sum, it can be said that the UN General Assembly Resolutions 1514(XV), 1541(XV) and 2625(XXV) all require as a prerequisite for the exercise of self-determination, the free expression of the will of the peoples concerned. The resolutions also highlight that the concept of ‘self-determination’ was seen as crucial in order to bring colonialism to an end.

In addition to the UN resolutions discussed above, the jurisprudence of the International Court of Justice (ICJ), is also useful in tracing the development and application of the concept of ‘self-determination’ in the decolonisation context. The case concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)

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notwithstanding Security Council Resolution 276 (1970)\textsuperscript{95} (Namibia opinion) and the Western Sahara, Advisory Opinion\textsuperscript{96} (Western Sahara case) confirm and illustrate the application of the concept of ‘self-determination’ in a colonial context.\textsuperscript{97}

South West Africa, now Namibia, was a German colony from 1884 to 1915. After World War I, Germany was forced to surrender the colony of South West Africa to the Allies. The territory was given to the Union of South Africa to administer under the mandate system of the League of Nations.\textsuperscript{98} When the League of Nations was dissolved, South Africa presented at the UN General Assembly a proposition that it will annex South West Africa.\textsuperscript{99} In response, the UN General Assembly adopted Resolution 2145 (XXI) which terminated South Africa’s mandate.\textsuperscript{100} Thereafter the presence of South Africa in South West Africa was declared illegal by the United Nations Security Council (UN Security Council).\textsuperscript{101}

The UN Security Council adopted Resolution 284\textsuperscript{102} requesting the ICJ to prepare an advisory opinion on the legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276.\textsuperscript{103} The ICJ stated that the purpose of the mandates system was to provide non-self-governing territories, with the necessary guidance so that they may be able to manage their own affairs.\textsuperscript{104} The ICJ went on to state that the principle of self-determination is applicable to non-self-governing territories.\textsuperscript{105}

The ICJ also made reference to Article 73 of the UN Charter which makes provision for member states of the UN accept as a “sacred trust” the responsibility to assist non-self-governing

\textsuperscript{96} Western Sahara, Advisory Opinion 1975 I.C.J Reports 12 (Western Sahara case).
\textsuperscript{98} Mandate of 17 December 1920 for German South West Africa.
\textsuperscript{100} United Nations General Assembly Resolution 2145(XXI), The Question of South West Africa A/RES/2145 (XXI) (1966).
\textsuperscript{104} Namibia Opinion para 46.
\textsuperscript{105} Namibia Opinion para 52.
territories in attaining self-government. The ICJ held that the sacred trust was created in order to promote the self-determination and independence of the peoples of the non-self-governing territories. Consequently, the ICJ held that South Africa should withdraw from the territory of Namibia and that the occupation was a violation South Africa’s international obligations.

From the pronouncements made by the ICJ in the Namibia opinion it is clear that self-determination at that time was a concept applicable to non-self-governing territories and territories under colonial rule. Furthermore, it seems that the ICJ’s view is that the exercise of self-determination and independence of non-self-governing territories go hand in hand or are interrelated. In other words the ICJ understood the concept of ‘self-determination’ to mean achieving a full measure of self-government and ultimately the independence of the entity under the mandate system or colonial rule.

In the Western Sahara case the ICJ had to decide whether at the time of Spanish colonisation, Western Sahara was terra nullius and whether there were any legal ties between Western Sahara and Morocco or Mauritania. Under the League of Nations’ mandate system, Spain was the administering power of Western Sahara. The UN General Assembly in 1966 adopted a resolution in which it requested Spain to hold a referendum with regard to the question of self-determination for the people of Western Sahara. Morocco and Mauritania started making bids for the territory and the referendum had to be postponed.

The UN General Assembly adopted Resolution 3292(XXIX) requesting the ICJ to give an advisory opinion on whether Western Sahara at the time of colonisation by Spain was terra nullius and the nature of the legal ties between Western Sahara, the Kingdom of Morocco and the Mauritanian entity. An ICJ opinion was crucial in order to spell out the rights of Morocco

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106 Ibid.
107 Namibia Opinion para 53.
108 Namibia Opinion para 118.
109 Western Sahara Advisory Opinion para 15.
over the territory of Western Sahara at the time of colonisation so as to enable the UN General Assembly to determine ways in which to speed up the decolonisation of the territory.\textsuperscript{112}

In order to answer the questions before it, the ICJ saw it necessary first, to examine the principles of decolonisation as they are enshrined in the various UN General Assembly resolutions.\textsuperscript{113} The first resolution examined by the Court was Resolution 1514(XV). The ICJ highlighted that Resolution 1514(XV) emphasises the need to bring colonialism to an end and in so doing requires that the exercise of the right to self-determination be freely made by the peoples concerned.\textsuperscript{114} The ICJ went on to examine Resolution 1541(XV) and observed that the provisions of Resolution 1541(XV) also emphasise the free expression of the will of the people who wish to exercise their right to self-determination.\textsuperscript{115} Finally the ICJ examined Resolution 2625(XXV) and also observed that the resolution demands that the will of the peoples concerned must be taken into account in all endeavours aimed at bringing colonialism to an end.\textsuperscript{116} Most importantly, the ICJ went on to define self-determination as “the need to pay regard to the freely expressed will of peoples.”\textsuperscript{117}

After examining the UN General Assembly resolutions dealing with decolonisation the ICJ went on to analyse several resolutions which make specific reference to the decolonisation of Western Sahara. The ICJ began with Resolution 2229(XXI),\textsuperscript{118} which invited the administering power to put in place procedures necessary for holding a referendum so as to enable the people of Western Sahara to exercise their right to self-determination freely. Thereafter, the ICJ focused on Resolution 2983(XXVII), which reaffirms that the UN has the crucial role of facilitating the process whereby the peoples of Western Sahara will freely express their wishes.\textsuperscript{119} The ICJ went on to examine Resolution 3162(XXVIII) which reaffirms the UN General Assembly’s

\textsuperscript{112} Western Sahara Advisory Opinion para 42.
\textsuperscript{113} Western Sahara Advisory Opinion para 52.
\textsuperscript{114} Western Sahara Advisory Opinion para 55.
\textsuperscript{115} Western Sahara Advisory Opinion para 57.
\textsuperscript{116} Western Sahara Advisory Opinion para 58.
\textsuperscript{117} Western Sahara Advisory Opinion para 59.
\textsuperscript{118} United Nations General Assembly Resolution 2229 (XXI) (1966).
\textsuperscript{119} United Nations General Assembly Resolution 2893(XXVII), Question of Spanish Sahara A/RES/2983 (XXVII) (1972).
commitment to ensuring that the principle of self-determination is applied in a manner that will ensure that the wishes of the people of Western Sahara are freely expressed.\textsuperscript{120}

The ICJ observed that Resolution 2229(XXI), Resolution 2983(XXVII) and Resolution 3162(XXVIII) placed huge emphasis on the importance of letting the people of Western Sahara decide their future.\textsuperscript{121} The ICJ also noted that these resolutions were adopted by the UN General Assembly despite the fact that Morocco and Mauritania each insisted that Western Sahara is a part of their respective territories.\textsuperscript{122}

The ICJ went on to discuss Resolution 3292(XXIX), which reaffirms the right of the people of Western Sahara to self-determination\textsuperscript{123} and the need to bring colonialism to a speedy end.\textsuperscript{124} The ICJ highlighted that the UN General Assembly’s position is that when embarking on the process of bringing colonialism to a speedy end, the people of Western Sahara must be consulted and be allowed to express their wishes with regard to their future political status.\textsuperscript{125}

The ICJ found that Western Sahara was not \textit{terra nullius} and that there were some legal ties between the “Mauritanian entity” and the Western Saharan territory.\textsuperscript{126} These ties were, however, found to be of no negative effect on the exercise of self-determination by the people of Western Sahara.\textsuperscript{127} The pronouncements made by the ICJ in the Western Sahara case indicate that self-determination was understood to be entitling all peoples under colonial or alien domination the right to freely choose their future political status.

The next section is going to discuss the legal status of the concept of ‘self-determination’ in international law. The section will investigate whether there is a right to self-determination in international law. If so, the chapter will ascertain the nature or attributes of the right.

\textsuperscript{120} United Nations General Assembly Resolution 3162 (XXVIII), Question of Spanish Sahara A/RES/3162 (XXVIII) (1973).
\textsuperscript{121} \textit{Western Sahara Advisory Opinion} para 64.
\textsuperscript{122} \textit{Western Sahara Advisory Opinion} para 65.
\textsuperscript{123} Third paragraph of the preamble.
\textsuperscript{124} Preamble of the resolution.
\textsuperscript{125} \textit{Western Sahara Advisory Opinion} para 70.
\textsuperscript{126} \textit{Western Sahara Advisory Opinion} para 152.
\textsuperscript{127} \textit{Western Sahara Advisory Opinion} para 162.
2.4 The legal status of the concept of ‘self-determination’ in international law

A significant number of UN General Assembly resolutions make explicit reference to “the right to self-determination”. UN General Assembly Resolutions 1514 and 2625 are significant in that they were both adopted unanimously by the UN General Assembly. Despite the fact that UN General Assembly resolutions are not binding, the unanimous adoption of Resolutions 1514 and 2625 indicates an acceptance by states that there exists a right to self-determination.\(^\text{128}\) UN General Assembly resolutions are also significant in the formation of customary international law.\(^\text{129}\)

Several other international legal instruments also make explicit reference to “the right to self-determination.” To begin with, common Article 1 of the International Covenant on Economic, Social and Cultural Rights\(^\text{130}\) (ICESCR) and the International Covenant on Civil and Political Rights\(^\text{131}\) (ICCPR) 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.”

The Helsinki Final Act adopted at the Conference on Security and Co-operation in Europe\(^\text{132}\) in 1975 also refers to self-determination as a right. The purpose of the Helsinki Final Act was to encourage the promotion of human rights, peace and security amongst the signatory states.\(^\text{133}\) Principle VIII provides that:

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

The African Charter on Human and Peoples’ Rights\(^\text{134}\) makes mention of the right to self-determination in article 20(1). The article provides that:

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131 International Covenant on Civil and Political Rights UN Doc A/6316(1966).
“All peoples shall 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.”

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) mentions the right to self-determination in the context of indigenous peoples. There is very little distinction between article 3 of the UNDRIP and common Article 1 of the ICESCR and the ICCPR besides that in the UNDRIP the holders of the right are indigenous peoples. Article 3 of the UNDRIP provides that:

“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.”

Article 4 further provides that:

“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.”

The Vienna Declaration and Program of Action provides in its Article 2 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.”

Now that it has been established that there exists a right to self-determination in international law, the question is what is the legal status of this right? There is a view in international law that the concept of ‘self-determination’ has the status of a jus cogens norm. It is therefore important to consider what a jus cogens is. Article 53 of the Vienna Convention on the Law of Treaties defines jus cogens as a peremptory norm of international law. A peremptory norm of general international law is one that is:

“accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

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One of the reasons why the concept of ‘self-determination’ is regarded as having the status of a *jus cogens* norm is put forward by Hector Gros Espiell, former Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities as follows:

“In present-day legal theory the idea that self-determination is a case of *jus cogens* is widely supported, whether because it is held that the character of *jus cogens* is an attribute of the principle of self-determination of peoples or because it is considered that this right, being a condition or prerequisite for the exercise and effective realization of human rights, possesses that character as a consequence thereof.”

That self-determination is a *jus cogens* norm is also confirmed by official pronouncements on the protection of fundamental human rights. Self-determination is believed to be part of those fundamental rights which have had the characteristic of *jus cogens* attributed to them by official statements made by government representatives. In that regard the statements made by participants at the UN Conference on the Law of Treaties in 1968 are noteworthy.

The representative of the then Union of Soviet Socialist Republics (USSR) stated that although there may not be consensus on the list of norms that are considered to be *jus cogens*, it cannot be denied that self-determination is a *jus cogens* norm. The representative of Cuba stated that the principles laid down in Article 1 of the UN Charter form part of the rules of *jus cogens*. Similarly the representative of Madagascar stated that peremptory norms can be found in the principles set forth in the UN Charter. The representative of Cyprus stated that self-

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141 Cassese 65.
144 Meetings of the Committee of the Whole: Fifty-Second Meeting: 297.
determination is a norm of *jus cogens* because it is an important component of the principle of sovereign equality of states.\textsuperscript{146}

The Netherlands’ written submission to the ICJ in *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*\textsuperscript{147} (Kosovo Advisory Opinion) is also worth noting. In its submission, The Netherlands stated that:

“The obligation to respect and promote the right to self-determination as well as the obligation to refrain from any forcible action which deprives peoples of this right (to self-determination) is an obligation arising under a peremptory norm of general international law.”\textsuperscript{148}

The concept of ‘self-determination’ also has an *erga omnes* character. The ICJ in the *Case Concerning The Barcelona Traction, Light And Power Company, Limited*\textsuperscript{149} (*Barcelona Traction case*) defined obligations *erga omnes* as obligations of a state towards all other states.\textsuperscript{150} In addition the ICJ stated that obligations *erga omnes* are obligations which “all States can be held to have a legal interest in their protection.”\textsuperscript{151}

It is important to note the pronouncements made by the ICJ in *The Case Concerning East Timor*\textsuperscript{152} (*East Timor case*) and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory opinion*\textsuperscript{153} (*Wall opinion*) on the *erga omnes* character of self-determination. In the *East Timor case* the ICJ was called upon to decide whether there was a breach of the right to self-determination of the people of East Timor by Australia. East Timor was a colony of Portugal. The Portuguese withdrew from the East Timor in 1975 and Indonesia occupied the territory. In 1976 Indonesia incorporated East Timor into its territory.


\textsuperscript{147} *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, 2010 I.C.J. Reports 403 (Kosovo Advisory Opinion).

\textsuperscript{148} Written Statement of the Netherlands, 17 April 2009 paragraph 3.2.

\textsuperscript{149} *The Case Concerning the Barcelona Traction, Light and Power Company, Limited Judgment*, 1970 I.C.J. Reports 3 (*Barcelona Traction case*).

\textsuperscript{150} *Barcelona Traction Case* para 33.

\textsuperscript{151} *Ibid.*

\textsuperscript{152} *The Case Concerning East Timor (Portugal v. Australia)*, 1995 I.C.J Reports 90 (*East Timor case*).

\textsuperscript{153} *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* 2004 I.C.J. Reports 136 (*Wall opinion*).
The Security Council adopted Resolution 384 which required all states to respect the right of the people of East Timor to self-determination.\(^\text{154}\) The Security Council also adopted Resolution 389 in which it demanded Indonesia to withdraw from the territory of East Timor.\(^\text{155}\) The UN General Assembly adopted Resolution 32/34 in which the incorporation of East Timor into Indonesia was held to be void since the people of East Timor had not freely exercised their right to self-determination.\(^\text{156}\)

According to Portugal, Australia had failed to observe the right to self-determination of the people of East Timor by concluding an agreement with another state (Indonesia) for the exploitation of resources in the territory of East Timor.\(^\text{157}\) Australia argued that Portugal’s argument meant that the ICJ would have to decide whether the conduct of Indonesia was lawful or not, without Indonesia’s consent.\(^\text{158}\) The ICJ stated that it is not empowered to entertain a dispute between states where those states have not consented to the Court’s jurisdiction.\(^\text{159}\) The ICJ upheld Australia’s argument and held that in order to ascertain whether Australia had violated the right to self-determination of East Timor it has to also rule on the conduct of Indonesia.\(^\text{160}\) It could not however proceed because Indonesia had not consented to the jurisdiction of the ICJ.\(^\text{161}\)

Despite rejecting Portugal’s argument, the ICJ made an important pronouncement on the concept of ‘self-determination’. In that regard, the Court stated that:

“In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court it is one of the essential principles of contemporary international law.”\(^\text{162}\)

\(^{157}\) *East Timor Case* para 10.
\(^{158}\) *East Timor Case* para 24.
\(^{159}\) *East Timor Case* para 26.
\(^{160}\) *East Timor Case* para 28.
\(^{161}\) Ibid.
\(^{162}\) *East Timor Case* para 29.
In the *Wall opinion*, the ICJ was requested by the UN General Assembly to provide an advisory opinion on the legal consequences arising from the construction of a wall by Israel in Palestinian territory. After World War I the League of Nations gave Britain the Mandate to govern the Territory of Palestine. In 1947, after Britain had announced its intentions to terminate the Mandate, the UN General Assembly adopted Resolution 181(II). Resolution 181(II) recommended that the territory of Palestine be partitioned so as to create two independent states, one Arab and the other - Jewish. The Plan of Partition was rejected by Arab states and the Arab population in Palestine and thereafter Israel declared its independence in 1948. In 1967 Israel occupied Palestinian territories which were under the British Mandate.

This led the UN Security Council to adopt a resolution calling upon Israel to withdraw from the Palestinian territories it had occupied. In an attempt to resolve the situation, Israel and the Palestine Liberation Organisation signed several agreements providing for the transfer of powers exercised by the Israeli military to Palestinian authorities. The success of the transfer has been limited by certain events which took place after the signature of the agreements. One of these events is the construction project embarked upon by Israel. In 2002 and 2003, the Israeli Cabinet approved several Government Decisions which provided for the construction of a barrier in parts of the Palestinian Territory and Jerusalem.

The ICJ, referring to its East Timor decision reaffirmed that self-determination was a right *erga omnes*. The ICJ went on to state that the construction of the wall in Palestinian Territory by Israel was a violation of the Palestinian right to self-determination and that Israel had breached its obligation to respect that right. Furthermore, the ICJ called upon Israel to “comply with its obligation to respect the right of the Palestinian people to self-determination.”

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163 The question on which the advisory opinion of the Court was requested is set out in resolution ES-10/14 adopted by the UN General Assembly on 8 December 2003 at its Tenth Emergency Special Session.
166 *Wall opinion* para 77.
167 Ibid.
169 *Wall opinion* para 88.
170 *Wall opinion* para 122.
171 *Wall opinion* para 149.
Importantly the ICJ expressly mentioned that the obligation to respect the right of the Palestinian peoples to self-determination violated by Israel has an *erga omnes* character.¹⁷²

This section has established that there exists a right to self-determination in international law. It has also been established that there is a view that the concept of ‘self-determination’ has the status of a *jus cogens* norm and consequently has an *erga omnes* character. The next two sections will discuss the relationship between the concept of ‘self-determination’ and other principles of international law. The next section will focus on the relationship between the concept of ‘self-determination’ and the principle of territorial integrity.

### 2.5 Self-determination and the territorial integrity of states

The principle of the territorial integrity of states may be defined as the prohibition of the use of force to alter the territory of a sovereign state.¹⁷³ Territorial integrity is one of the principles upon which world peace is heavily dependent.¹⁷⁴ The principle of territorial integrity demands respect for the territorial integrity of sovereign states.¹⁷⁵ The relationship between the concept of ‘self-determination’ and the principle of territorial integrity lies in that external self-determination is essentially a claim to territory.¹⁷⁶ The right to self-determination can also be exercised internally, that is, within the territory of a state and without compromising the territorial integrity of a state.¹⁷⁷

International legal instruments which provide for the right to self-determination prohibit any violation of the territorial integrity of states as well. The UN Charter in Article 2(4) discourages member states from violating the territorial integrity of any state through the use of force or in other ways that are incompatible with the purposes of the United Nations. Resolution 1514(XV) in article 6 provides that the disruption of the territorial integrity of another state goes against the

¹⁷² *Wall opinion* para 155.
¹⁷⁴ Bakker “The Recognition of Kosovo: Violating Territorial Integrity is a Recipe for Trouble” 2008 *Security & Human Rights* 183 184.
purposes and principles of the United Nations. Resolution 2625(XXV) imposes a duty on states to desist from disrupting the territorial integrity of other states.

The preamble of the Charter of the Organisation of African Unity emphasises the willingness of member states of the then Organisation of African Unity (OAU) now African Union (AU) to safeguard their territorial integrity. Similarly, article 2(1) (c) states that one of the purposes of the OAU is to defend the territorial integrity of member states. Article 3(3) also emphasises the need to abide by the principle of the territorial integrity of states by member states of the OAU. The Helsinki Final Act also emphasises the need for respect of the principle of territorial integrity of states. The African Charter on Human and Peoples Rights in article 29(5) states that every individual has the duty to “preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law.”

The 1990 Charter of Paris for a New Europe provides that:

“We reaffirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.”

The Constitutive Act of the African Union spells out the objectives of the AU in article 3. One of the objectives is to “[d]efend the sovereignty, territorial integrity and independence of its member states.”

Article 46(1) of the UNDRIP warns that:

“Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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.”

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178 Helsinki Final Act, principle IV.
180 Constitutive Act of the African Union, objective (b).
Finally, the Vienna Declaration and Program of Action after stating that all peoples have the right to self-determination cautions that:

“This shall not 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 and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.” ¹⁸¹

In Africa, the general view has been that any exercise of the right to self-determination which results in the disintegration of the territorial integrity of a state is undesirable. ¹⁸² This view is not surprising considering the various prohibitions on territorial disintegration referred to above. The outcome of events which took place in Katanga, Biafra and Southern Cameroon are also noteworthy. The African Commission on Human and Peoples’ Rights (African Commission) in Katangese Peoples’ Congress v Zaire ¹⁸³ (Katanga case) and in Kevin Mgwanga Gunme v Cameroon ¹⁸⁴ (Southern Cameroon case) upheld the territorial integrity claims of the states involved.

In 1960, the Katanga region attempted to break away from the Democratic Republic of Congo (DRC), formally known as Zaire. The Katangese Peoples’ Congress (KPC) brought a claim against Democratic Republic of Congo at the African Commission in the Katanga case. The KPC alleged that the Katangese people had been denied the right to self-determination and they wanted the African Commission to recognise the independence of Katanga.

The African Commission stated that it had a duty to uphold the sovereignty and territorial integrity of Zaire. ¹⁸⁵ The African Commission justified this position by highlighting that there

¹⁸¹ Vienna Declaration and Program of Action, para 2.
¹⁸⁴ Kevin Mgwanga Gunme et al v Cameroon, Communication 266/03 (Southern Cameroon case).
¹⁸⁵ Katanga case para 5.
was no sufficient evidence of the violation of human rights before it, serious enough to warrant it to disregard the territorial integrity of Zaire.\textsuperscript{186}

The Katanga case confirms the view that the exercise of the right to self-determination which results in the territorial disintegration of a state is regarded as undesirable. The case is also important in that the African Commission affirmed that self-determination can be exercised internally and in a way that is consistent with territorial integrity of states. The African Commission stated that:

“in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13.1 of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.”\textsuperscript{187}

On the 30\textsuperscript{th} of May 1967, the former Eastern Region of Nigeria declared its independence after attempting to secede from Nigeria.\textsuperscript{188} The Nigerian Federal government responded by launching a full blown war which resulted in the loss of lives and property.\textsuperscript{189} The OAU passed a resolution appealing to the leaders of the secession movement to “co-operate with the Federal authorities in order to restore peace and unity to Nigeria.”\textsuperscript{190} The OAU thus discouraged Biafra’s secession bid and chose to uphold the principle of territorial integrity.\textsuperscript{191} The motivation for the OAU’s response to the conflict has been explained by Amoo who states that the OAU “held the African state’s territorial integrity sacrosanct, and was determined to set a clear precedent against secessionist and irredentist movements in Africa.”\textsuperscript{192}

In the Southern Cameroon case a complaint was lodged with the African Commission by 14 individuals on behalf of the people of Southern Cameroon in 2003.\textsuperscript{193} The complainants alleged

\textsuperscript{186} Katanga case para 6.
\textsuperscript{187} Ibid.
\textsuperscript{190} AHG/Res. 54 (V) Resolution 3 Resolutions Adopted by the Fifth Ordinary Session of the Assembly of Heads of State and Government Held in Algiers, From 13 To 16 September 1968.
\textsuperscript{193} Southern Cameroon case para 1.
that Southern Cameroons have been continuously marginalised in terms of political\textsuperscript{194} and economic participation.\textsuperscript{195} They also alleged that the Republic of Cameroon has engaged in the torture, killing, detention and punishment of those advocating for the self-determination of Southern Cameroon.\textsuperscript{196} The complainants further argued that the conduct of the Republic of Cameroon was a violation of article 20 of the African Charter on Human and People’s Rights and that such violation entitled them to exercise their right to self-determination.\textsuperscript{197}

The African Commission had to decide whether the conduct complained of violated the provisions of the African Charter on Human and People’s Rights and if so, whether the people of Southern Cameroon were entitled to exercise their right to self-determination and in what form. The African Commission placed a huge emphasis on the need to preserve the territorial integrity of Cameroon and discouraged the secession of Southern Cameroon.\textsuperscript{198} The African Commission also stated that in line with its Katanga decision the right to self-determination as provided for in the African Charter on Human and People’s Rights is not capable of being invoked in instances where there is no evidence of gross violations of human rights.\textsuperscript{199} The African Commission then recommended that the grievances alleged by the South Cameroons be addressed through “a comprehensive national dialogue.”\textsuperscript{200}

Closely related to the concept of ‘territorial integrity’ is the principle of \textit{uti possidetis}. The principle of \textit{uti possidetis} provides that the borders of a new state should be the same as those of the territorial unit that preceded it.\textsuperscript{201} In Africa, the concept of ‘self-determination’ has been associated with claims to territory.\textsuperscript{202} The fear of territorial disintegration due to the exercise of the right to self-determination led to the African leaders to uphold the principle of \textit{uti possidetis}.\textsuperscript{203}

\textsuperscript{194} Southern Cameroon case para 8.
\textsuperscript{195} Southern Cameroon case para 9.
\textsuperscript{196} Southern Cameroon case para 18.
\textsuperscript{197} Southern Cameroon case para 184.
\textsuperscript{198} Southern Cameroon case para 190.
\textsuperscript{199} Southern Cameroon case para 199.
\textsuperscript{200} Southern Cameroon case para 203.
\textsuperscript{201} Shaw “Peoples, Territorialism and Boundaries” 1997 \textit{European Journal of International Law} 478 502.
\textsuperscript{202} Hasani “Uti Possidetis Juris: From Rome to Kosovo” 2003 \textit{The Fletcher Forum of World Affairs} 85 89.
The OAU in 1964 adopted Resolution 16(I). In terms of the resolution, member states pledged to “respect the borders existing on their achievement of national independence.” Article 4 of the Constitutive Act of the African Union states that the AU shall function in accordance with the principle of “[r]espect of borders existing on achievement of independence.”

The principle of *uti possidetis* has been applied by the ICJ in resolving territorial disputes most notably in *Burkina Faso v Mali* (Frontier dispute) and in *El Salvador v Honduras* (Land, Island and Maritime Frontier Dispute). In the Frontier Dispute case the government of the then Republic of the Upper Volta (now Burkina Faso) and the government of the Republic of Mali submitted a frontier dispute by agreement to the ICJ. In terms of the agreement the two parties agreed that their dispute be adjudicated in accordance with the principle of “the intangibility of frontiers inherited from colonization.” The dispute brought by the parties required the ICJ to determine the position of the line of the frontier between the Republic of Upper Volta and Mali.

The significance of the judgment lies in its discussion of the principle of *uti possidetis*. Most notably, the ICJ remarked that the purpose of the principle of *uti possidetis* is “to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.” The ICJ acknowledged that the principle of *uti possidetis* clashes with the right to self-determination. The ICJ observed that in order to promote stability, African states deliberately chose to uphold the principle of *uti possidetis*.

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205 Organization of African Unity, AHG/Res.16(I), Border Disputes Among African States.

206 Frontier Dispute (Burkina Faso v Republic of Mali), 1986 I.C.J. Reports 554 (Frontier dispute).

207 Land, Island and Maritime Frontier Dispute (El Salvador v Honduras), 1992 I.C.J. Reports 351 (Land, Island and Maritime Frontier Dispute).

208 Frontier dispute para 1.

209 Frontier dispute para 2.

210 Frontier dispute para 16.

211 Frontier dispute para 20.

212 Frontier dispute para 25.

213 Ibid.
In the *Land, Island and Maritime Frontier Dispute* the Republic of Honduras and the Republic of El Salvador through an agreement signed between them submitted a maritime boundary dispute to the ICJ.\(^\text{214}\) The parties agreed that the colonial boundary should be left intact, but the issue was how to identify that boundary on the ground.\(^\text{215}\) In resolving the dispute, the parties agreed that the ICJ must apply the principle of *uti possidetis*.\(^\text{216}\) The significance of this case lies in that the ICJ emphasised that a territorial boundary created by the application of the principle of *uti possidetis* may not be changed without the consent of the state parties involved.\(^\text{217}\)

In 1991 at the European Conference on Yugoslavia, the Badinter Arbitration Committee was formed to decide on various issues concerning the situation in Yugoslavia.\(^\text{218}\) On the 20\(^\text{th}\) of November 1991, the Badinter Committee was asked by Lord Carrington, Chairman of the Conference on Yugoslavia to give an opinion on whether the Serbian population in Croatia and Bosnia – Herzegovina had the right to self-determination.\(^\text{219}\) The opinion prepared by the Badinter Committee stated that the claims to the right to self-determination should not result in the changing of the boundaries existing at the time of independence.\(^\text{220}\)

The Chairman of the European Conference on Yugoslavia requested another opinion on the status in international law of the boundary between Croatia and Serbia and the boundary between Bosnia-Herzegovina and Serbia.\(^\text{221}\) The Badinter Committee in addressing the question emphasised the importance of respecting the principle of *uti possidetis* and that borders can only be changed by agreement between the parties.\(^\text{222}\)

\(^{214}\) *Land, Island and Maritime Frontier Dispute* para 3.
\(^{215}\) *Land, Island and Maritime Frontier Dispute* para 28.
\(^{216}\) *Land, Island and Maritime Frontier Dispute* para 40.
\(^{217}\) *Land, Island and Maritime Frontier Dispute* para 58.
\(^{220}\) Point 1 of Opinion No. 2 of the Arbitration Commission of the European Conference on Yugoslavia.
\(^{222}\) Point 2 of Opinion No. 3 of the Arbitration Commission of the European Conference on Yugoslavia.
The principle of *uti possidetis* has, however, been described as “disastrous sword of Damocles hanging over the exercise of self-determination, and which serves to protect the *status quo ante*.” While the principle of *uti possidetis* may be crucial to the maintenance of the territorial integrity of states it is important to highlight that the principle is not inviolable. Shaw emphasises this point as follows:

“While it 'freezes' the territorial situation during the movement to independence, *uti possidetis* does not prescribe a territorial boundary which can never be changed. It is not intangible in this sense.”

The next section shall discuss the concept of ‘secession’ in relation to the concept of ‘self-determination’. It will be revealed that by its very nature, secession challenges the principles of territorial integrity and *uti possidetis*.

### 2.6 Self-determination and secession

Secession is concerned with a claim to statehood through breaking away from a sovereign state. The principle of *uti possidetis* has been invoked in order to protect the territorial integrity of states, however, secessionist aspirations continue to exist all around the world.

Three notable forms of secessions exist namely; bilateral, *de facto* and unilateral or remedial secession.

Bilateral secession occurs when a sovereign state consents or grants independence to a seceding entity through negotiation. An example of bilateral secession would be the secession of Montenegro from the state of Serbia and Montenegro. The secession of South Sudan from Sudan is also another example of bilateral secession which was preceded by a referendum. *De facto* secession occurs when a seceding entity declares independence without any consent from the

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225 Shaw 1997 *European Journal of International Law* 495.
226 Cismas “Secession in Theory and Practice: The Case of Kosovo and Beyond” 2010 *Goettingen Journal of International Law* 531 542.
parent state. An example of *de facto* secession would be the *de facto* secession of Somaliland from Somalia.

Remedial secession refers to secession motivated by the gross human rights violations perpetuated by a state on its people. The Supreme Court of Canada in *Reference re Secession of Quebec* (Quebec case) and the ICJ in the *Kosovo Advisory Opinion* discussed the parameters of remedial or unilateral secession.

In the *Quebec case* one of the questions that the Supreme Court of Canada had to consider was whether international law provides for the right to unilateral secession. The Court stated that international law makes no provision for unilateral secession and at the same time it does not expressly prohibit it. It was stated that international law demands that the exercise of self-determination should not compromise the territorial integrity of states.

The Court went on further to mention that where a state has made provision for the exercise of the right to self-determination by its people, its territorial integrity ought to be respected. The Court however noted that there seems to be a view in international law that secession is an option available where a people are denied the opportunity to exercise their right to self-determination within the territory of the parent state.

The Court stated that the government of Canada had facilitated the meaningful participation of the Quebec population in the economic, political and social affairs of Canada and therefore was in compliance with demands of the principle of self-determination. In conclusion, the Court held that under international law the population of Quebec has no right to unilaterally secede from Canada.

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231 Cismas 2010 *Goettingen Journal of International Law* 545.
233 Quebec case para 2.
234 Quebec case para 112.
235 Quebec case para 127.
236 Quebec case para 130.
237 Quebec case para 134.
238 Quebec case para 136.
239 Quebec case para 138.
In the *Kosovo Advisory Opinion*, the ICJ was faced with the task of giving an opinion on the secession of Kosovo from Serbia. Kosovo was an autonomous province in the Republic of Serbia. In 1999, conflicts between Kosovo’s Albanian and Serbian ethnic communities led to the Kosovo war. The North Atlantic Treaty Organisation (NATO) intervened and the war was brought to an end. The UN Security Council adopted Resolution 1244\(^{240}\) through which the United Nations Interim Administration Mission in Kosovo was established to ensure peace and stability in Kosovo. In 2008, Kosovo declared independence from Serbia.

After the declaration of independence, the UN General Assembly adopted Resolution 63/3 requesting the ICJ to give an advisory opinion on whether the declaration of independence was in accordance with international law.\(^{241}\) The ICJ stated that the international community did not prohibit declarations of independence in the context of the exercise of self-determination during decolonisation.\(^{242}\) The ICJ noted that there were also declarations of independence outside the context of decolonisation and state practice in relation to those cases does not reveal a prohibition on declarations of independence.\(^{243}\)

The ICJ went on to highlight that the declarations of independence which have been condemned by the Security Council in the past were condemned because they were made pursuant to the violation of norms of international law with peremptory character.\(^{244}\) The ICJ refused to consider whether the right to self-determination entitled Kosovo to create a new state and whether international law contains a right to secession.\(^{245}\) The Court, however, concluded that international law does not prohibit declarations of independence and that Kosovo’s declaration of independence did not violate international law.\(^{246}\)

\(^{241}\) United Nations General Assembly Resolution 63/3. Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International law A/RES/63/3.
\(^{242}\) *Kosovo Advisory Opinion* para 79.
\(^{243}\) *Ibid*.
\(^{244}\) *Kosovo Advisory Opinion* para 81.
\(^{245}\) *Kosovo Advisory Opinion* para 82 - 83.
\(^{246}\) *Kosovo Advisory Opinion* para 84.
28 Summary

The chapter started off by tracing the origins and development of the concept of ‘self-determination’. The origins of the concept were traced back to the French revolution of 1789. The discussion revealed that during that time, the concept was regarded as a mere political principle. The chapter went on to examine the application of the concept of ‘self-determination’ during decolonisation. During decolonisation the concept was elevated into a legal principle. The discussion also revealed that the concept of ‘self-determination’ became increasingly associated with decolonisation because of the reliance on the concept by national liberation movements and colonised peoples.

The chapter examined the legal status of the concept of ‘self-determination’ in international law. The discussion demonstrated that there exists a right to self-determination international law. A number of international law instruments which make explicit reference to the “right to self-determination” were cited. The discussion also revealed that there is also a view that the right to self-determination has the status of a jus cogens norm. The discussion has also shown that the ICJ has held that the right to self-determination has an erga omnes character.

The chapter also investigated the relationship between the concept of ‘self-determination’ and the concept of ‘territorial integrity’. It was observed that the concept of ‘territorial integrity’ is an equally important principle in international law. Two forms of self-determination were identified. These are external and internal self-determination.

The chapter has argued that the exercise of the right to self-determination in its external form prima facie violates the principle of territorial integrity. It was observed that many international instruments which provide for the right to self-determination also discourage the violation of the territorial integrity of states. An examination of the jurisprudence of the ICJ revealed that the ICJ seems to support the internal exercise of the right to self-determination because it does not violate the principle of territorial integrity.

The chapter went on to examine the nexus between the concept of ‘self-determination’ and secession. It was observed that international law does not prohibit secession. It was however
emphasized that secession may not be permissible where people are not denied the opportunity to exercise their right to self-determination internally, and where people are not subjected to gross human rights violations. The next chapter will discuss the concept of ‘self-determination’ in the context of South Sudan.
CHAPTER 3
SELF-DETERMINATION IN THE CONTEXT OF SOUTH SUDAN

3 1 Introduction
This chapter investigates the concept of ‘self-determination’ in the context of South Sudan. The discussion in this chapter will examine the concept of ‘gross human rights violations’ and its implications for people of South Sudan in the exercise of their right to self-determination. Since the exercise of the right to self-determination by the people of South Sudan occurred outside the context of decolonisation, an understanding of the context in which the secession of South Sudan took place is crucial in order to formulate an understanding of the concept of ‘self-determination’ outside the context of decolonisation.

This chapter is divided into five parts. In the first part the chapter provides a brief background of the political and economic situation in Sudan since independence in 1956. Second, the chapter shall discuss the concept of ‘gross violations of human rights’. Third, the chapter shall investigate the concept of ‘gross violations of human rights’ in the context of South Sudan. Fourth, the chapter shall outline and discuss the peace initiatives which were aimed at solving the South Sudan problem and their significance. Fifth, the chapter shall discuss the concept of ‘self-determination’ in the context of South Sudan. A summary of the findings of the chapter shall conclude the discussion.

3 2 Background of the political and economic situation in Sudan since independence
The government of Sudan, had since independence from British colonial rule in 1956, refused to economically, politically and socially develop the southern part of Sudan which is now South Sudan.247 The marginalisation of the people of South Sudan began when Sudan was under colonial rule and worsened after independence.248 The colonial administration deliberately neglected South Sudan and its people whom it regarded as sub-human, hence at independence South Sudan was an underdeveloped region of Sudan.249

247 McFarland “Africa in Retrospect: Russia, Iran and Chinese Arms Supplies to Sudan” 2010 African and Asian Studies 462 463.
After independence, the new government of Sudan wanted a centralised form of government while the people of South of Sudan demanded a federal system. Britain, the former colonial master granted independence to the country under a centralised form of government, disregarding the demands of the people of South Sudan.

Sudan has been ravaged by two devastating civil wars for the most part of its post-independence period. The first civil war began in 1955 and ended in 1972 while the second civil war began in 1983 and ended in 2005. The causes of the first civil war, which lasted from 1955 to 1972, were linked to the marginalisation of the people of South Sudan by the central government in Khartoum, the capital city of Sudan but war actually began when military officers based in South Sudan revolted against the government of Sudan in 1955. The officers who were mostly from South Sudan, had refused to be transferred to the northern part of Sudan.

The second civil war, which lasted from 1983 to 2005 was sparked by the then President Nimeiri’s revocation of the South Sudan’s autonomy and the imposition of Sharia law on the entire population of Sudan irrespective of the diverse religious convictions of the people of Sudan. Sudan has consequently been labelled the “world's strictest experiment in the implementation of full-fledged Islamic law.”

The intensity of the fighting during the second civil war increased due to the discovery of oil in the southern part of the country. The war resulted in the loss of agricultural production, the

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255 Martin “Sudan’s Perfect War” 2002 Foreign Affairs 111 111.
stoppage of industrial production, loss of oil revenue, the destruction of infrastructure, displacement and the collapse of the health and education systems.\footnote{Mohammed “Economic Implications of Civil Wars in Sub-Saharan Africa and the Economic Policies Necessary for the Successful Transition to Peace” 1999 \textit{Journal of African Economies} 107 137 - 140.}

The next section will discuss the concept of ‘gross human rights violations’ in international law. The section will outline the protections available in international law to people subjected to human rights violations. It will also outline the duty of states in relation to the prevention of gross human rights violations within its territory.

\section*{3 3 The impact of gross violations of human rights}

Every human being is entitled to exercise a set of rights known as human rights or fundamental rights.\footnote{Thoms and Ron “Do Human Rights Violations Cause Internal Conflict?” 2007 \textit{Human Rights Quarterly} 674 683.} ‘Gross human rights violations’ refers to the systemic infringement of international human rights law by states or state institutions.\footnote{Smeulers and Grünfeld \textit{International Crimes and other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook} (2011) 20.} It is generally accepted that, \textit{inter alia}, torture, genocide and slavery constitute gross violations of human rights.\footnote{Ibid.}

The violation of human rights is regarded as one of the direct triggers of conflict.\footnote{Thoms and Ron 2007 \textit{Human Rights Quarterly} 704.} In the African context, article 4(h) of the Constitutive Act of the African Union empowers the African Union (AU) to intervene in a member state in situations of war crimes, genocide and crimes against humanity. A regime which commits gross human rights violations may therefore find its legitimacy challenged.\footnote{Buergenthal “The Contemporary Significance of International Human Rights Law” 2009 \textit{Leiden Journal of International Law} 217 223.} Authoritarian regimes have weak human rights enforcement systems because they believe, \textit{inter alia}, that if they establish effective systems, the human rights violations committed by that regime may be brought to light and in turn threaten the existence of that regime.\footnote{Donoho “Human Rights Enforcement in the Twenty-First Century” 2006 \textit{Georgia Journal of International and Comparative Law} 1 29.}

Human rights law imposes a duty on states to respect, protect and fulfil human rights.\footnote{Cerone “Legal Constraints on the International Community’s Responses to Gross Violations of Human Rights and Humanitarian Law in Kosovo, East Timor, and Chechnya” 2001 Human Rights Review 19 21.} A state has an obligation to refrain from committing human rights violations as well as ensuring that human rights violations do not occur within its territory.\footnote{Katshung “Prosecution of Grave Violations of Human Rights in Light of Challenges of National Courts and the International Criminal Court: The Congolese Dilemma” 2006 Human Rights Review 5 7.} Should human rights violations occur, the state must investigate and, where required, prosecute the perpetrators.\footnote{Ibid.} The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law\footnote{UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.} not only requires the investigation and prosecution of those who commit gross violations of human rights but their punishment if found guilty.\footnote{Principle III, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.} The duty to promote human rights requires states to take measures aimed at making people aware of their rights, for instance, by educating them.\footnote{Sepúlveda The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights (2003) 166.}

The duty of states to prevent gross human rights violations can also be found in UN Resolutions and International Conventions. It is noteworthy that Article 1 of the UN Charter lists the respect for human rights and fundamental freedoms as one of the purposes of the UN.\footnote{Charter of the United Nations 24 October 1945, 1 UNTS XVI.}
In 2001 the United Nations Security Council (UN Security Council) adopted Resolution 1366. Resolution 1366 imposes a duty on member states to prevent the occurrence of gross human rights violations. Article 16(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) places an obligation on states party to the CAT to prevent conduct by public officials or persons acting in an official capacity, which may amount to gross violations of human rights such as cruel, inhuman or degrading treatment within the territory under its jurisdiction.

The next section will outline the gross human rights violations committed against the people of South Sudan by various governments which came into power in Sudan since independence. It will be shown that the people of South Sudan have also been deliberately deprived of the basic necessities which are necessary for human survival. Deprivation in this sense refers to conduct which results in the shortage or inaccessibility of resources, services, opportunities and basic needs.

3.3.1 Gross violations of human rights in South Sudan

Gross human rights violations were committed against the people of South Sudan by the various governments which came into power in Sudan since independence in 1956. The people of South Sudan have been subjected to political and economic marginalisation, forced displacement from their lands, religious and ethnic cleansing, imposition of Sharia law and Islamisation policies by various regimes, which came into power after independence. Also prevalent in South Sudan were arbitrary arrests, enforced disappearances, and the intimidation of journalists and members of opposition political parties. These violations of human rights are discussed below.

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281 Davidsson “Economic Oppression as an International Wrong or as Crime Against Humanity” 2005 Netherlands Quarterly of Human Rights 173 177.
284 Jok “State, Law, and Insecurity in South Sudan” 2013 The Fletcher Forum of World Affairs 69 76.
Slavery is regarded as a gross violation of human rights where by people are stripped of their dignity and freedom – the two qualities which define human beings.\textsuperscript{285} The International Convention to Suppress the Slave Trade and Slavery\textsuperscript{286} defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”\textsuperscript{287} Article 1(2) defines slave trade as:

“all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves”

In 1957 the International Labour Organisation (ILO) adopted the Convention Concerning the Abolition of Forced Labour.\textsuperscript{288} Article 1 discourages the use of forced labour as punishment for expressing opposing political views and as a form of racial, social, national or religious discrimination. Article 4 of the Universal Declaration of Human Rights\textsuperscript{289} (UDHR) provides that “no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” Article 8 of the International Covenant on Civil and Political Rights\textsuperscript{290} (ICCPR) provides that “no one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.”

The government of Sudan legitimised the practice of slavery making it “common-place for women and children to be captured and transported to Arab slave masters in the north.”\textsuperscript{291} The Baggara tribes armed by the government of Sudan to fight the rebel Sudan People’s Liberation Army (SPLA)\textsuperscript{292} engaged in slave raids as spoils of war.\textsuperscript{293} Those captured were subjected to


\textsuperscript{286} International Convention to Suppress the Slave Trade and Slavery 60 LNTS 253.

\textsuperscript{287} Article 1(1), International Convention to Suppress the Slave Trade and Slavery.

\textsuperscript{288} Convention Concerning the Abolition of Forced Labour (ILO No. 105), 320 U.N.T.S. 291.

\textsuperscript{289} Universal Declaration of Human Rights, UN Doc A/810 (1948).


\textsuperscript{292} The SPLA was an armed group formed by people from different tribes of South Sudan to fight the marginalisation of the people of South Sudan. See: Ali, Elbadawi and El-Batahani “Sudan’s Civil War and Why has it Prevailed for so Long?” in Collier and Sambanis (eds) \textit{Understanding Civil War: Africa} (2005) 200.

\textsuperscript{293} Chong “Still Searching for a Redeemer- Enforcing the Human Right of Freedom from Slavery in Africa” 2004 \textit{Singapore Law Review} 138 156.
forced prostitution and forced labour.\textsuperscript{294} Abducted girls were raped, circumcised and sold to \textit{militia} men as sex objects.\textsuperscript{295} Under the National Islamic Front (NIF), the practise of slavery became official government policy used to destroy any aspirations for democratic rule amongst the people.\textsuperscript{296}

There has been no meaningful infrastructure development in the South Sudan since independence.\textsuperscript{297} The civil war in Sudan was mainly caused by the policies of economic marginalisation of the South Sudan by the successive governments which came into power ever since the independence of Sudan.\textsuperscript{298} It was a fight for access to economic resources because religion and ethnicity had been deciding factors when it came to resource allocation.\textsuperscript{299}

There are economic disparities between northern Sudan and South Sudan and these have been increased by the discovery of oil.\textsuperscript{300} When oil was discovered in South Sudan, plans were made to transport the oil via pipeline to northern Sudan instead of building refineries in South Sudan. In outrage the Sudan People’s Liberation Movement (SPLM) and the SPLA attacked and destroyed the pipelines and vowed to fight until equality for all has been achieved in Sudan.\textsuperscript{301}

During the second civil war, the government of Sudan deliberately dropped bombs on civilian targets such as schools, churches, clinics and markets.\textsuperscript{302} These attacks against civilians were authorised by the government of Sudan and carried out by proxy \textit{militias}.\textsuperscript{303}

\begin{itemize}
\item \textsuperscript{294} Bixler “Private Enforcement of International Human Rights Laws: Could a Small Church Group Successfully Combat Slavery in the Sudan?” 2002 \textit{Chicago Journal of International Law} 511 512.
\item \textsuperscript{295} Gassis “Sudan: Country of Terrorism, Religious Persecution, Slavery, Rape, Genocide, and Man-Made Starvation” 2000 \textit{Catholic University Law Review} 905 914.
\item \textsuperscript{296} Lobban “Slavery in the Sudan Since 1989” 2001 \textit{Arab Studies Quarterly} 31 32.
\item \textsuperscript{297} Temin “Sudan Between Peace and War” 2011 \textit{Georgetown Journal of International Affairs} 68 70.
\item \textsuperscript{298} Mohamed “The Problem of Uneven Regional Development in the Northern Sudan” 2006 \textit{The Fletcher Forum of World Affairs} 41 41.
\item \textsuperscript{299} Haynes “Religion, Ethnicity and Civil War in Africa: The Cases of Uganda and Sudan” 2007 \textit{The Round Table} 305 312.
\item \textsuperscript{300} Williamson “Democratic Institutions in Sudan: More than Just a Promise?” 2007 \textit{Wisconsin International Law Journal} 313 322.
\item \textsuperscript{301} Kitissou and Yoon “Africa and Social Capital: From Human Trade to Civil War” 2014 \textit{The Journal of Pan African Studies} 146 159.
\item \textsuperscript{302} Gassis 2000 \textit{Catholic University Law Review} 916.
\item \textsuperscript{303} Sharkey “Arab Identity and Ideology in Sudan: The Politics of Language, Ethnicity and Race” 2008 \textit{African Affairs} 21 38.
\end{itemize}
The bombing of civilians was carried out in rebel-held areas as an effort to counter any possible attacks on oil production facilities by rebel groups.304

Islamisation refers to the various measures put in place to incorporate Islamic principles into a state’s legal, political and social systems.305 In the case of South Sudan it is noteworthy that the majority of the population is Christian and animist.306 When General Ibrahim Abboud came into power in 1958, he introduced the Islamisation policy and through this policy he sought to impose Arabic traditions, language and culture on the people of South Sudan.307 Abboud established six Islamic seminaries and many village Qur’an schools in South Sudan that were transformed into government primary schools.308 The ultimate goal of Islamisation was to establish a Muslim - Arab nation.309 This policy ignored the fact that in terms of religion, the population in northern Sudan practises Islam while the people in South Sudan practise various religions unrelated to Islam.310

Under Nimeiri’s rule (from 1969 to 1985), Muslims made up the entire Ministry of Religious Affairs.311 When Nimeiri announced his plan to make Islamic law the law of the whole of Sudan, the country was plunged into a second civil war.312 The Islamisation policy continued under the current president Omar al-Bashir’s rule who took power in 1989. President Bashir’s NIF regime now National Congress Party (NCP) made it compulsory for everyone to serve in the Popular Defence Force (PDF), an Islamist militia formed in 1989, irrespective of age or profession.313

The plight non-Muslims in Sudan can be summarised as follows:

“non-Muslim minorities in Sudan have been persistently subjected to religious majoritarian tyranny by democratic and authoritarian regimes alike. This tyranny has manifested itself not only in the tireless pursuit of an Islamic state on majoritarian grounds and its surrogate draconian laws, but also in pervasive political, legal, religious, cultural, and social discrimination that has left non-Muslim Sudanese second-class citizens in their own country.”  

In 1983 special courts were established and these extended the application of Sharia law to non-Muslims and the people of South Sudan. Sharia is a set of laws which govern most aspects of the life of a Muslim. Sharia law and the Sharia penal code are derived from the Quran – Islam’s holy book. The application and scope of Sharia law differs from one society to another because of the different interpretations of the Quran. The sanctions for various criminal offences under Sharia law include stoning, limb amputation and cane lashes. Women’s rights under Sharia law are prone to violation due to practices such as arranged marriages and female genital mutilation which are permitted under Sharia law. Under Sharia law a Muslim is not permitted to marry a non-Muslim.

The people of South Sudan were also excluded from meaningfully participating in the political affairs of Sudan. In 1954, of the 800 posts that were made available in the public service, only four junior positions were allocated to people of South Sudan. The government of Sudan

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316 Nmehielle “Sharia Law in the Northern States of Nigeria: To Implement or not to Implement, the Constitutionality is the Question” 2004 Human Rights Quarterly 730 737.  
319 Nmehielle 2004 Human Rights Quarterly 753.  
awarded important political positions to Arabs from northern Sudan, thus marginalising blacks from South Sudan.  

When Nimeiri came into power he established a one party state. Under Nimeiri’s rule, Sudan did not conduct any free and democratic elections. In 1983, an organisation known as the State Security Organisation was also established and was responsible for the arrest and torture of members of the opposition political parties. Similarly president Bashir came into power through a coup which overthrew a democratically elected government and his goal has been to stay in power by any means.

Ethnic cleansing refers to the forced removal of a certain ethnic group of people often through the use of violence from certain territory based on the belief that they do not deserve to occupy that territory. Similarly, religious cleansing is the forcible removal of a religious group from a certain territory. The government of Sudan on many occasions forcibly displaced whole communities in South Sudan from their lands in order to carry out oil extraction and related activities. The people of South Sudan were not only displaced in order to make way for oil extraction. The Dinka cattle herders, Ingessana farmers and Rizeigat camel herders were forcibly removed from their land to make way for commercial agriculture. Internal displacement is a situation where the people displaced are forced to move and settle somewhere else within the territorial boundaries of their state. Forceable displacement from ancestral land deprives the

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327 Medani “Sudan” 2006 Yearbook of Islamic and Middle Eastern Law 323 335.
328 Natsios “Beyond Darfur Sudan's Slide Toward Civil War” 2008 Foreign Affairs 77 82.
331 Matthews “Sudan’s Humanitarian Disaster. Will Canada live up to its Responsibility to Protect?” 2005 International Journal 1049 1051.
affected people of their freedom of residence. Civilians are usually forced to leave their homes because of military strategies or because of the implementation of a displacement policy.

The internal displacement of people from their lands or places of residence is prohibited in international law. Additional Protocol II of 1977 to the 1949 Geneva Conventions (Additional Protocol II) applies, if the thresholds in article 1 are attained, to armed conflict arguably such as the two civil wars, which occurred in Sudan. Article 17 of Additional Protocol II prohibits the displacement of civilians except in instances where their security is at risk or where such displacement is for military reasons. Article 17 further provides that in the event that civilians are displaced, measures must be taken to secure their well-being and living conditions. Principle 6 of the Guiding Principles on Internal Displacement prohibits the arbitrary displacement of people from their places of residence.

Members of the Janjaweed militia destroyed crops and livestock belonging to non-Muslims in the South Sudan. Destroying crops and looting livestock was carried out in order to make the people of South Sudan abandon their villages. The Bashir regime deliberately blocked UN food aid relief to famine-hit areas in South Sudan resulting in about 2.6 million people being in danger of starving.

Hunger has a negative effect on the economic productivity of the people affected. Hunger impedes on the exercise of human rights because without food one cannot live and consequently

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338 Janjaweed is an armed group which receives arms, training and supplies from the government of Sudan and are used as proxy forces to fight rebel groups in Sudan. See: Brosché and Rothbart Violent Conflict and Peacebuilding: The Continuing Crisis in Darfur (2013) 60.
339 Sackellares “From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict” 2005 Wisconsin Women’s Law Journal 137 158.
341 Brownback “End the Suffering in Sudan” 1999 Mediterranean Quarterly 1 2.
cannot enjoy human rights. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to be free from hunger. Article 25(1) of the UDHR provides that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.” Article 14 of Additional Protocol II prohibits the starvation of civilians as a military strategy.

Viewed holistically, the above actions of the various regimes that ruled Sudan amounted to gross human rights violations targeted mainly against the people of South Sudan. The next section discusses the various peace initiatives undertaken to bring an end to the two civil wars in Sudan and the gross violations of human rights. The section will also discuss why they all failed to bring peace and stop the gross violation of human rights in Sudan.

3.4 Peace initiatives to solve the South Sudan problem
3.4.1 The 1972 Addis Ababa Peace Agreement
A number of agreements were signed in an effort to bring peace to Sudan and end the human rights violations committed against the people of South Sudan but the failure to honour commitments resulted in prolonged instability in the country. The first civil war came to an end with the signing of the Addis Ababa Peace Agreement in 1972.

The Addis Ababa Agreement was important to the people of South Sudan in that Article 4 established a self-governing region within Sudan. The region which was named the Southern Region was comprised of three Provinces namely; Bahr El Ghazal, Equatoria and Upper Nile. The establishment of this autonomous region was significant in that international law recognises that autonomy is one of the ways of giving effect to the internal aspect of self-determination.

The people of South Sudan had always wanted to govern themselves and the Addis Ababa Agreement provided them with that opportunity.

Article 6 provided that Arabic shall be the official language of the Sudan while English was to be used in South Sudan. Article 32 guaranteed the citizens resident in South Sudan the right to equal education and employment opportunities, commerce and the freedom to practice any profession of their choice. Article 32 also provided that no law shall adversely affect these rights on the basis of race, tribal origin, religion, place of birth, or sex.

Despite bringing peace to Sudan, the Addis Ababa Peace Agreement collapsed because it was not able to address the problems of underdevelopment, economic and political marginalisation of the people of South Sudan.348 Nimeiri breached the provisions of the Addis Ababa Peace Agreement by re-drawing the northern border so that the oil fields in the south could be in the northern territory.349 Nimeiri also revoked the autonomy granted to the Southern Region under the Addis Ababa Peace Agreement resulting in the resumption of the civil war.350

3 4 2 The 1986 Koka Dam Agreement

Nimeiri was ousted from office in 1985 and elections were held in 1986 but the SPLM did not take part, citing that an agreement must be reached on the need for political transformation before elections could be held.352 The interim administration which took over the government after Nimeiri did not yield to these demands and elections took place in northern Sudan while in South Sudan 37 constituencies out of 68 did not take part in the elections.353 After the elections the National Alliance for National Salvation, an organisation which had played an important role

349 Maystadt, Calderone and You “Local Warming and Violent Conflict in North and South Sudan” 2014 Journal of Economic Geography 1 3.
350 Cockett 77.
352 Willis and El Battahani ‘‘We Changed the Laws’: Electoral Practice and Malpractice in Sudan since 1953’’ 2010 African Affairs 191 207.
353 Ibid.
in ousting the Nimeiri regime, entered into talks with the SPLA and these talks led to the negotiation and adoption of the Koka Dam Agreement in 1986.\textsuperscript{354}

The Koka Dam Agreement was entered into between the National Alliance for National Salvation and the SPLM.\textsuperscript{355} The preamble of the Koka Dam Agreement stated that the agreement was brought about as a result of the recognition by the signatories that there is a need to create a New Sudan in which everyone enjoys fundamental human rights and freedoms. The preamble also called for the holding of a National Constitutional Conference as one of the steps to be taken in order to create the New Sudan.

It was agreed that before the National Constitutional Conference is held, the parties must, \textit{inter alia}, declare their commitment to discuss the problems of Sudan; the state of emergency must be lifted and the “September 1983 Laws” must be repealed.\textsuperscript{356} The proposed agenda for the National Constitutional Conference included, \textit{inter alia}, the question of religion; human rights issues; the system of governance; uneven-development; and the issue of natural resources.\textsuperscript{357}

The proposed National Constitutional Conference never took place and in 1989, the NIF led by the current Sudanese president Omar Al Bashir seized power.\textsuperscript{358} Ever since the NIF came into power, the human rights violations levelled against the government include the promotion of slavery, torture, and ethnic cleansing.\textsuperscript{359} Human rights abuses by successive regimes in Sudan were common place but under the NIF regime, human rights violations spiked.\textsuperscript{360} In response to the regime’s marginalisation policies and human rights violations, the people of the South Sudan and the SPLA staged more uprisings against the central government.\textsuperscript{361}

\textsuperscript{354} Lata Structuring the Horn of Africa as a Common Homeland: Conflict Resolution Through Multi-dimensional Self-determination (2004) 149.
\textsuperscript{355} Preamble of the Koka Dam Agreement.
\textsuperscript{356} Point 2, Koka Dam Agreement.
\textsuperscript{357} Point 4, Koka Dam Agreement.
\textsuperscript{358} Edozie “Sudan’s Identity Wars and Democratic Route to Peace” in Saha (ed) Perspectives on Contemporary Ethnic Conflict: Primal Violence or the Politics of Conviction? (2006) 244.
\textsuperscript{360} Woodward US Foreign Policy and the Horn of Africa (2006) 43.
\textsuperscript{361} Schmidinger “Tyrants and Terrorists: Reflections on the Connection Between Totalitarianism, Neoliberalism, Civil War and the Failure of the State in Iraq and Sudan” 2009 Civil Wars 359 372.
For the first time, the SPLM insisted on the right of the people of South Sudan to self-determination at the first Abuja Sudanese Peace Negotiations. The SPLM called for the establishment of democracy, equality, the rule of law, autonomy and the separation of state and religion, insisting that failure to meet these demands would entitle the people of South Sudan to secede.

The demands made by the SPLM were significant in that there is a link between gross human rights violations and external self-determination which may give rise to secession. The prolonged gross violation of human rights may provide the legal basis for a people to exercise the right to external self-determination. When a government does not respect the human rights of its people, it cannot insist on the territorial integrity of the state when its people choose to exercise their right to self-determination. The territorial integrity of states will only be inviolable if a government respects the human rights of its people and represents the whole population without discrimination.

The first Abuja Sudanese Peace Conference was held on 26 May to 4 June 1992 in Abuja, Nigeria. The parties at the Abuja Peace Conference were the government of Sudan and the SPLM. At the end of the Abuja Sudanese Peace Conference, the parties agreed that Sudan is a country with different cultures, languages, and religions and arrangements must be made to accommodate such diversity. The parties also agreed that national wealth must be distributed

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362 The 1992 Abuja Sudanese Peace Negotiations:
364 Lesch “The Impasse in the Civil War” 2001 Arab Studies Quarterly 11 12.
368 Ibid.
369 Title of the 1992 Abuja 1 Sudanese Peace Negotiations communiqué.
370 Ibid.
371 Point 2 of the 1992 Abuja 1 Sudanese Peace Negotiations communiqué.
equally and in order to ensure such equitable distribution of wealth, a Revenue Allocation Commission must be established.\textsuperscript{372}

The second Abuja Sudanese Peace Conference was held from 26 April to 17 May 1993.\textsuperscript{373} The parties to the conference were the SPLM and the government of Sudan.\textsuperscript{374} At the end of the conference, the parties agreed that peace must be achieved through negotiation.\textsuperscript{375} The parties further agreed that there must be devolution of powers between the central and state governments and equal representation in the central government.\textsuperscript{376} The parties could, however, not agree on the application of Sharia law. The government of Sudan insisted that Sharia law must remain the source of legislation in Sudan.\textsuperscript{377} It is this disagreement on the application of Sharia law which led to the collapse of the Abuja Sudanese Peace Negotiations.\textsuperscript{378} Despite the failure of the negotiations, various issues raised by the parties at the second Abuja Sudanese Peace Negotiations, however, informed some of the principles outlined in the IGAD Declaration of Principles.\textsuperscript{379}

\textbf{3 4 4 The 1994 IGAD Declaration of Principles}\textsuperscript{380}

The IGAD Declaration of Principles was signed in 1994 between the government of the Republic of the Sudan, the Sudan People’s Liberation Army-United and the SPLM.\textsuperscript{381} This was a declaration of principles that would guide the parties in trying to resolve the Sudan conflict.\textsuperscript{382} Principle 2 provides for the right of self-determination of the people of South Sudan to determine their future status through a referendum. This was significant in that the right to self-

\begin{footnotesize}
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\item[\textsuperscript{372}] Point 4 of the 1992 Abuja 1 Sudanese Peace Negotiations communique.
\item[\textsuperscript{373}] Title of the 1992 Abuja 2 Sudanese Peace Negotiations press statement.
\item[\textsuperscript{374}] Title of the 1992 Abuja 2 Sudanese Peace Negotiations press statement.
\item[\textsuperscript{375}] Point 3(1) of the 1992 Abuja 2 Sudanese Peace Negotiations press statement.
\item[\textsuperscript{376}] Point 3(5) of the 1992 Abuja 2 Sudanese Peace Negotiations press statement.
\item[\textsuperscript{377}] Point 4(a) of the 1992 Abuja 2 Sudanese Peace Negotiations press statement.
\item[\textsuperscript{379}] Leach \textit{War and Politics in Sudan: Cultural Identities and the Challenges of the Peace Process} (2012) 199.
\item[\textsuperscript{381}] Preamble of the IGAD Declaration of Principles.
\item[\textsuperscript{382}] \textit{Ibid.}
\end{itemize}
\end{footnotesize}
determination is based on the idea that people within a state must be free to decide their own social, economic, and political affairs.\textsuperscript{383}

Principle 3 of the IGAD Declaration of Principles outlines seven important sub-principles which were to be affirmed by the parties. The first sub-principle called for the recognition and accommodation of ethnic, religious, racial and cultural diversities found in Sudan. The second sub-principle demanded that there be laws which guarantee the political and social equality of all the people of Sudan.

The third sub-principle stated that the rights of self-administration in the form of a federation, autonomy or any other arrangement must be affirmed. This was important in that autonomy is one of the ways of exercising the right to self-determination.\textsuperscript{384} Secession and independence are thus not the only outcomes of the exercise of self-determination.\textsuperscript{385} Autonomy can be defined as “the power of a sub-state region to regulate its own affairs by enacting legal rules but without a transfer of sovereignty.”\textsuperscript{386}

The fourth sub-principle called for the establishment of a democratic state where religious freedom will be fully guaranteed. This was significant in that democracy helps facilitate the exercise of self-determination through encouraging participation in the political affairs of the state.\textsuperscript{387} The fifth sub-principle provided for the equitable division of wealth amongst all citizens of Sudan. The sixth sub-principle stated that a new constitution must make provision for the inclusion of human rights. The last sub-principle provided for the constitution and the laws of Sudan to make provision for independence of the judiciary.

\textsuperscript{386} Anderson “Secession in International Law and Relations: What are we Talking About?” 2012 \textit{The Loyola of Los Angeles International and Comparative Law Review} 343 388.
\textsuperscript{387} Al Attar and Thompson “How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination” 2011 \textit{Trade, Law and Development} 65 89.
Principle 4 provided that should no consensus be reached in terms of applying the sub-principles outlined in principle 3 highlighted above, the people of South Sudan shall be entitled to determine their political future which includes opting for independence, through a referendum. Mancini argues that a provision in a country’s constitution which provides citizens of a state with an option to secede is significant in that it may prompt the state to stop ignoring the demands of marginalised people within its territory.\textsuperscript{388} The IGAD principles were, however, not a legally binding document but principles which were to guide the peace negotiations to end the civil war in Sudan.\textsuperscript{389}

\textbf{3 4 5 The 1996 Sudan Political Charter}\textsuperscript{390}

The 1996 Sudan Political Charter was concluded in Khartoum between the government of Sudan, the South Sudan Independence Movement (SSIM) and the Sudan People Liberation Movement Bahrel Ghazal Group (SPLM B.G.G.). The parties agreed that the people of South Sudan shall determine their political status through a referendum at the end of an interim period.\textsuperscript{391} The parties also acknowledged the cultural diversity in Sudan.\textsuperscript{392} Freedom of religion was also affirmed and it was agreed that no religion must be imposed on any citizen of Sudan.\textsuperscript{393} Social development was made a priority and it was agreed that the government of Sudan shall make arrangements for confidence building and the speedy alleviation of poverty, ignorance and illiteracy.\textsuperscript{394} It was also agreed that power and national wealth shall be equitably distributed amongst all citizens of Sudan.\textsuperscript{395}

The 1996 Sudan Political Charter has been criticized for being a sham in that it was intended to lure the opposition parties to sympathise with the government of Sudan and isolate the SPLM.\textsuperscript{396} It is noteworthy that the SPLM was not part of the 1996 Sudan Political Charter.

\begin{footnotesize}
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\item \textsuperscript{388} Mancini “Secession and Self-determination” in Rosenfeld and Sajó (eds) \textit{The Oxford Handbook of Comparative Constitutional Law} (2012) 482.
\item \textsuperscript{389} Keller “Understanding Conflicts in the Horn of Africa” in Sriram and Nielsen (eds) \textit{Exploring Sub regional Conflict: Opportunities for Conflict Prevention} (2004) 40.
\item \textsuperscript{391} Article 3 of the 1996 Sudan Political Charter.
\item \textsuperscript{392} Article 7 of the 1996 Sudan Political Charter.
\item \textsuperscript{393} Article 8 of the 1996 Sudan Political Charter.
\item \textsuperscript{394} Article 9 of the 1996 Sudan Political Charter.
\item \textsuperscript{395} Article 10 of the 1996 Sudan Political Charter.
\item \textsuperscript{396} Khalid \textit{War & Peace in the Sudan} (2012) 337.
\end{itemize}
\end{footnotesize}
Despite affirming the freedom of religion, the Sudan Political Charter provided that *Sharia* was to be a source of law.\textsuperscript{397} The provision on the proposed referendum for the people of South Sudan was an open ended provision which made no mention of specific dates on which the referendum was to be held.\textsuperscript{398}

3 4 6 The 1997 Sudan Peace Agreement\textsuperscript{399}

On 21 April 1997 an agreement encompassing a wider group of opposition parties in Sudan and the government of Sudan was signed.\textsuperscript{400} The preamble to the agreement states that the parties are fully aware that the unity of the Sudan can only be achieved as a result of the free choice of the people of Sudan and not through force or coercion. It was agreed that a referendum shall be held for the purpose of enabling the people of South Sudan to exercise the right to self-determination.\textsuperscript{401}

The Sudan Peace Agreement also affirmed the right of the people of South Sudan to freely determine their political future, economic, social and cultural development.\textsuperscript{402} It was agreed that a referendum shall be held in order to enable the people of South Sudan to exercise their right to self-determination before the end of an interim period.\textsuperscript{403} In exercising their right to self-determination, the people of South Sudan were to choose between unity and secession.\textsuperscript{404} This provision was significant in that the right to choose between unity and secession provides a remedy for the gross violation of their rights of people within a state.\textsuperscript{405}

\begin{footnotesize}
\begin{enumerate}
\item Article 6 of the 1996 Sudan Political Charter.
\item Khalid 339.
\item The 1997 Sudan Peace Agreement:  
\item The Sudan Peace Agreement which is also known as the Khartoum Peace Agreement was signed between the government of Sudan; the South Sudan United Democratic Salvation Front (UDSF) comprising of: (a) the South Sudan Independence Movement (SSIM); (b) The Union of Sudan African Parties (USAP); (c) the (SPLM); (d) the Equatoria Defence Force (EDF); and (f) the South Sudan Independence Group (SSIG). See the heading of the agreement.
\item Chapter 1, B General Principle 4: 4 of the 1997 Sudan Peace Agreement.
\item Chapter 7, Principle 10.1 of the 1997 Sudan Peace Agreement.
\item Article 10.2 of the 1997 Sudan Peace Agreement.
\item Article 10.3 of the 1997 Sudan Peace Agreement.
\item Brewer “To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion” 2012 *Vanderbilt Journal of Transnational Law* 245 276.
\end{enumerate}
\end{footnotesize}
Sudan has been under undemocratic rule for the most part of its post-colonial existence. One of the characteristics of democracy is the presence of a constitution which guarantees fundamental human rights and the rule of law. Such a constitution is important in that it enables the meaningful exercise of the right to self-determination. The protection of human rights is therefore an important aspect of the exercise of the right to self-determination.

From 1983 to 1998, Sudan had no constitution until the government of Sudan under President Al Bashir adopted the 1998 Sudan Constitution, which was the second constitution of Sudan since independence. Article 2 of the 1998 Sudan Constitution provides that Sudan is a Federal Republic and the federal system of government shall ensure public participation in the government of states and fairness in the distribution of power and resources. This was important in that the right to self-determination can be exercised through allowing people to participate in the political affairs of their state and other matters which affect them. Article 139(3)(g) provides that South Sudan shall be governed under a transitional federal system and cease after the exercise of the right of self-determination.

The 1998 Sudan Constitution also provided for the rights to life; nationality; freedom of movement; religion; freedom of expression; freedom of association; preserve culture; to acquire property; privacy; to be free from arbitrary detention; litigate; a fair trial; life and the right to approach the Constitutional Court to enforce rights set out in the Constitution.

407 El-Tigani “Solving the Crisis of Sudan: The Right of Self-determination versus State Torture” 2001 Arab Studies Quarterly 41 45.
413 Article 20 – 34 of the 1998 Sudan Constitution.
Constitutional reforms were significant in that they addressed some of the causes of the civil war and they also were regarded as capable of guaranteeing the unity of Sudan.\textsuperscript{414}

Despite guaranteeing a number of rights, some aspects of the 1998 Constitution are worth noting. Islamic law still remained the source of legislation.\textsuperscript{415} Article 132 empowered the President to suspend any of the rights provided for in the Constitution.

3 4 8 The Comprehensive Peace Agreement\textsuperscript{416} 

The Comprehensive Peace Agreement (CPA) brought to an end the fighting between the rebels in South Sudan led by SPLM and the Sudan government now led by the National Congress Party – a party notorious for its adherence to and enforcement of Sharia law.\textsuperscript{417} The CPA encompasses the Machakos Protocol; the Protocol on Power Sharing; the Protocol on the Resolution of the Abyei Conflict; the Protocol on the Resolution of the Conflict in the Two States of Southern Korfodan and Blue Nile; and the Protocol on Security Arrangements. These agreements are examined in turn.

The Machakos Protocol was signed at Machakos, in Kenya on the 20\textsuperscript{th} of July 2002 between the government of Sudan and the SPLM/A.\textsuperscript{418} The parties agreed that the unity of Sudan must be a priority and that the problems faced by the people of South Sudan can be resolved within that framework.\textsuperscript{419} This was significant in that it reflected the general understanding of self-determination which emphasises that people must be free to determine their political, social and economic status within the territorial boundaries of their states.\textsuperscript{420}

\textsuperscript{414} Aalen “Making Unity Unattractive: The Conflicting Aims of Sudan’s Comprehensive Peace Agreement” 2013 Civil Wars 173 174.  
\textsuperscript{415} Article 65 of the 1998 Sudan Constitution.  
\textsuperscript{417} Sheeran “International Law, Peace Agreements and Self-Determination: The Case of the Sudan” 2011 International and Comparative Law Quarterly 423 426.  
\textsuperscript{418} Preamble of the Machakos Protocol.  
\textsuperscript{419} Article 1.1 of the Machakos Protocol.  
The Machakos Protocol also affirmed the right to self-determination of the people of South Sudan.\textsuperscript{421} The parties agreed that at the end of a six year interim period an internationally monitored referendum must be conducted through which the people of South Sudan shall choose between unity and secession.\textsuperscript{422} The option for secession was important when one considers that secession may provide an avenue for bringing gross violations of human rights to an end.\textsuperscript{423}

The Protocol on Power Sharing was signed at Naivasha, Kenya on 26 May 2004 between the government of Sudan and the SPLM.\textsuperscript{424} The parties agreed that there shall be a decentralised system of government in Sudan.\textsuperscript{425} The agreement also provided that a population census and elections must be conducted throughout Sudan.\textsuperscript{426} The agreement also established a government of national unity responsible for the proper functioning of the state and the formulation and implementation of policies.\textsuperscript{427} The agreement also established the government of South Sudan which was to have its own legislative, executive and judiciary and constitution.\textsuperscript{428}

The Protocol on Wealth Sharing was signed at Naivasha, Kenya on 7 January 2004 between the government of Sudan and the SPLM.\textsuperscript{429} The parties agreed that the government of national unity must ensure the equitable distribution of wealth amongst the whole of Sudan.\textsuperscript{430} The agreement established the National Land Commission whose function was to resolve any land disputes between the parties.\textsuperscript{431} The agreement also established the National Petroleum Commission responsible for the management of the petroleum sector.\textsuperscript{432} The Fiscal and Financial Allocation and Monitoring Commission (FFAMC) was established to ensure the equitable distribution of revenue.\textsuperscript{433}

\begin{footnotesize}
\begin{enumerate}
\item Article 1.3 of the Machakos Protocol.
\item Article 2.5 of the Machakos Protocol.
\item Farer “The Ethics of Intervention in Self-Determination Struggles” 2003 Human Rights Quarterly 382 404.
\item Title of the Protocol on Power Sharing.
\item Article 1.5.1.1 of the Protocol on Power Sharing.
\item Article 1.8 of the Protocol on Power Sharing.
\item Article 2.5 of the Protocol on Power Sharing.
\item Article 3 of the Protocol on Power Sharing.
\item Title of the Protocol on Wealth Sharing.
\item Article 1.2 of the Protocol on Wealth Sharing.
\item Article 2.6 of the Protocol on Wealth Sharing.
\item Article 3.2 of the Protocol on Wealth Sharing.
\item Article 8 of the Protocol on Wealth Sharing.
\end{enumerate}
\end{footnotesize}
The Protocol on the Resolution of the Abyei Conflict was signed at Naivasha, Kenya on 26 May 2004 between the government of Sudan and the SPLM. The agreement accorded Abyei special administrative status. The agreement provided that the people of Abyei will also vote in a referendum and choose whether to retain the special administrative status granted to it or to be part of Bahr el Ghazal. The agreement also established the Abyei Boundaries Commission (ABC) which was to demarcate the borders of Abyei.

The Resolution of the Conflict in Southern Kordofan/Nuba Mountains and Blue Nile States was signed on 26 May 2004. The preamble acknowledges that the CPA needs to address the problems faced by the Southern Kordofan and Blue Nile states. The parties agreed that the people of the Southern Kordofan/Nuba Mountains and Blue Nile states must be consulted on the CPA. It further provided that the CPA would be adopted as the final settlement of the conflict if it is endorsed by the legislature of that particular state.

The Protocol on Security Arrangements was signed at Naivasha, Kenya on 25 September 2003 between the government of Sudan and the SPLM. The parties agreed to disarm a proportional number of their armed forces. It was agreed that the remaining forces must be redeployed to other areas. The parties also agreed that there must be no armed group affiliated to the signatory parties that will be allowed to operate outside the two forces.

The next section will discuss the secession of South Sudan from Sudan.
3.5 The secession of South Sudan

On 9 July 2011 South Sudan became independent after the results of the referendum held on 9 January 2011 revealed that the people of South Sudan overwhelmingly voted for secession. The referendum was conducted in accordance with the provisions of the CPA and the secession of South Sudan is thus considered a “rare example” of secession in accordance with a domestic agreement. The vote for secession instead of unity has been attributed to the continuing tension between the central government and the people of South Sudan. Johnson noted that the people of South Sudan observed the way in which the provisions of the CPA were being disregarded by the central government and they drew the conclusion that under a united Sudan, their conditions would not change.

In 2009, Salva Kiir Mayardit, President of the government of South Sudan in protest of the alleged lack of fairness in oil revenue division withdrew from the government of national unity. It was further alleged that the government of Sudan refused to disarm its militia based in South Sudan. The government of Sudan was also accused of delaying the release of funds required for conducting the national census which was a prerequisite for elections to take place as stipulated in the CPA.

In order to understand the concept of ‘self-determination’ in the context of South Sudan, the pronouncements made in three important cases are worth noting. In Reference re Secession of Quebec the Supreme Court of Canada held that the right to external self-

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446 Vidmar “South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States” 2011 Texas International Law Journal 541 553.
447 Curless and Rodt “Sudan and the not so Comprehensive Peace” 2013 Civil Wars 101 113.
448 Johnson “New Sudan or South Sudan? The Multiple Meanings of Self-Determination in Sudan’s Comprehensive Peace Agreement” 2013 Civil Wars 141 150.
determination can be only invoked in extreme cases.\textsuperscript{453} An example of one such case is when people are denied the opportunity to exercise their right to self-determination internally.\textsuperscript{454}

Similarly, in \textit{Katangese Peoples' Congress v Zaire}\textsuperscript{455} (\textit{Katanga case}) the African Commission on Human and Peoples’ Rights’ (African Commission) held that where there is no evidence of gross human rights violations, people cannot agitate for external self-determination.\textsuperscript{456} Again in \textit{Kevin Mgwanga Gunme v Cameroon}\textsuperscript{457} (\textit{Southern Cameroon case}), the African Commission held that the exercise of external self-determination is only permissible where there are gross violations of human rights and the denial of people to participate in their government.\textsuperscript{458}

The cases discussed above indicate that the secession of South Sudan was in line with the idea that where a state commits gross human rights violations against its people, such people may choose to exercise their right to external self-determination and secede.\textsuperscript{459} In other words, the right to external self-determination arises where a government deliberately violates the fundamental rights of its people.\textsuperscript{460}

The provisions of the CPA were important in that they provided the people of South Sudan with the right to exercise their right to self-determination internally and in the event that gross violations of human rights continued, the CPA provided the people of South Sudan with the option to exercise their right to self-determination externally.\textsuperscript{461} The gross violations of human rights did continue to take place after the signing of the CPA and the people of South Sudan went on to exercise their right to self-determination in its external form through a referendum held in 2011 and seceded from Sudan.

\begin{thebibliography}{9}
\bibitem{Quebec453} \textit{Quebec case} para 126.
\bibitem{Quebec454} \textit{Quebec case} para 134.
\bibitem{Katangese455} \textit{Katangese Peoples' Congress v Zaire}, Communication 75/92 (Katanga case):
\bibitem{Katangese456} \textit{Katanga case} para 6.
\bibitem{Kevin457} \textit{Kevin Mgwanga Gunme v Cameroon}, Communication 266/03.
\bibitem{Southern458} \textit{Southern Cameroon case} para194.
\bibitem{Sheeran461} Sheeran 2011 \textit{International and Comparative Law Quarterly} 444.
\end{thebibliography}
3.6 Summary

The objective of this chapter was to investigate the concept of ‘self-determination’ in the context of South Sudan. To begin with the chapter gave an outline of the political and economic situation in Sudan since independence from British colonial rule in 1956. It was noted that post-colonial Sudan has been characterised by two civil wars which caused a lot human suffering. During these two civil wars, the government of Sudan committed gross violations of human rights against the people of South Sudan.

This chapter revealed that the concept of ‘gross violations of human rights’ refers to the serious violations of fundamental human rights by the state or state agents. It was highlighted that the state has the duty to investigate prosecute and punish gross violations of human rights. Despite the prohibition of violations of human rights, and the duty imposed on state by international law to investigate prosecute and punish gross violations of human rights, the discussion revealed a number of human rights violations committed against the people of South Sudan by the government of Sudan. It was noted, inter alia, that the people of South Sudan were deliberately enslaved by Arab slave raiders from northern Sudan. The people of South Sudan were displaced as a result of the civil wars and as a result of deliberate policies so that they make way for oil extraction activities. Civilians and civilian targets in South Sudan were deliberately bombed by the government of Sudan.

This chapter revealed that numerous peace initiatives where negotiated in order to bring peace to Sudan and end the human rights violations against the people of South Sudan. A common feature of the peace agreements was the insistence on the right of the people of South Sudan to exercise the right to self-determination in its internal form. Despite such agreements, the government of Sudan continued violating the rights of the people of South Sudan.

In a referendum provided for by the CPA the people of South Sudan voted for secession from Sudan in 2011. The chapter revealed that the people of South Sudan seceded because they were denied the opportunity to meaningfully exercise their right to internal self-determination and that the government of Sudan continued to commit gross human rights violations against them. The next chapter is going to discuss the post-colonial conception of self-determination.
CHAPTER 4
THE POST-COLONIAL CONCEPTION OF SELF-DETERMINATION

41 Introduction
This chapter seeks to establish the post-colonial conception of self-determination. A remedial self-determination approach to the post-colonial understanding of the concept of ‘self-determination’ is proposed. The argument in this chapter is that generally, a post-colonial understanding of self-determination is normally associated with internal self-determination. However, when internal self-determination does not work or where there are gross violations of human rights, secession remains an option. The chapter also argues that the secession of South Sudan should be regarded as a practical application of the concept.

The chapter begins by considering whether the concept of ‘self-determination’ is applicable outside the context of decolonisation. The next section considers the continuum of self-determination in particular, the relationship between internal self-determination and external self-determination. The study will thereafter discuss whether there is a new understanding of the concept of ‘self-determination’ in international law outside the context of decolonisation. This will be done by examining the scope of internal self-determination and external self-determination outside the context of decolonisation. The study also will discuss the remedial self-determination theory and propose a new conception and application of the right to self-determination. In conclusion, the summary of the findings of the chapter will be outlined.

42 The applicability of self-determination in a post-colonial scenario
As discussed in chapter one of this study the application of self-determination in a post-colonial context has been the subject of debate in international law. In chapter two it was highlighted that self-determination has evolved from being a political principle into a legal concept in international law. The parameters of the concept, however, remain controversial especially in a post-colonial context. For instance, as noted in chapter one, self-determination is often thought to be confined to colonial situations because of its widespread reliance during

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462 Section 1 2. See also: Spector “Negotiating Free Association Between Western Sahara and Morocco: A Comparative Legal Analysis of Formulas for Self-Determination” 2011 International Negotiation 109 112.
463 Section 2 3.
decolonisation. A starting point to determine the applicability of the concept of ‘self-determination’ outside the context of decolonisation would be the reservations made by states to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the responses by other states thereto in so far as they relate to the right to self-determination.

As already noted in chapter one, India declared that the right to self-determination as outlined in the ICCPR and the ICESCR, is only applicable to peoples under foreign domination. Bangladesh made a similar declaration concerning common Article 1, of these instruments, stating that:

“It is the understanding of the Government of the People's Republic of Bangladesh that the words "the right of self-determination of Peoples" appearing in this article apply in the historical context of colonial rule, administration, foreign domination, occupation and similar situations.”

In response to the declarations by India and Bangladesh, France objected stating that the “reservation attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination.” Germany also objected to India’s reservation on the basis that:

“The right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination.”

The Netherlands noted that:

“Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.”

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466 International Covenant on Civil and Political Rights, UN Doc A/6316(1966).
468 See 1 1 above.
470 Ibid.
471 Ibid.
Pakistan noted that India’s declaration is “incompatible with the object and purpose of the Covenants.”473 Sweden stated that attaching conditions not provided for in international law to the concept of ‘self-determination’ “could undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.”474 In sum the objections to India and Bangladesh’s reservations indicate that a number of states recognize that the concept of ‘self-determination’ extends beyond the colonial context.

Reference to “internal” self-determination by states and in international law also indicates that the concept is applicable outside the context of decolonisation.475 Had the concept been only applicable to decolonisation, no mention would have been made of internal self-determination since during decolonisation the concept was applied in its external form.476 It is also noteworthy that common Article 1 of the ICCPR and the ICESCR do not refer to colonialism as a condition for a demand for the enjoyment of the right to self-determination.

Furthermore, reference to self-determination in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act)477 also indicates that the concept is applicable outside decolonisation.478 At the time of the adoption of the Helsinki Final Act, there was no country in Europe under colonial domination. Consequently, it cannot be said that the right to self-determination as it appears in the Helsinki Final Act was incorporated in order to address issues relating to self-determination in a colonial context.479

McCorquodale and Hausler have noted that while self-determination is often associated with decolonisation, state practice shows that the concept is applicable outside the decolonisation context.480 They put forward the example of the unification of Germany and the dissolution of

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472 Ibid.
473 Ibid.
474 Ibid.
476 Ibid.
477 Conference on Security and Cooperation in Europe: Final Act of Helsinki, 1 August 1975.
478 Raic Statehood and the Law of Self-Determination 231.
479 Ibid.
the Soviet Union to justify their argument.\textsuperscript{481} Both events occurred outside the context of decolonisation and in both instances, reliance was made on the right to self-determination. Another case in point which occurred outside the context of decolonisation is the so called “velvet divorce” relating to the peaceful dissolution of Czechoslovakia into the Czech Republic and Slovakia.\textsuperscript{482}

East and West Germany were re-united in 1990. The Treaty on the Final Settlement with Respect to Germany\textsuperscript{483} made reference to the right to self-determination as the basis of that unification. The relevant part provides that:

“the German people, freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a state so that they will be able to serve the peace of the world as an equal and sovereign partner in a united Europe.”\textsuperscript{484}

In 1991, an extraordinary ministerial meeting on European Political Cooperation, was held in Brussels. The meeting adopted the Declaration on Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union.\textsuperscript{485} The Declaration states that:

“The Community and its member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.”\textsuperscript{486}

General Comment 12 on Article 1 of the ICCPR,\textsuperscript{487} adopted by the Human Rights Committee (HRC) in 1984, requires state parties to describe in their reports to the HRC measures taken to

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\textsuperscript{481} Ibid.  \\
\textsuperscript{482} Toth “From Uneasy Compromises to Democratic Partnership: The Prospects of Central European Constitutionalism” 2011 \textit{European Journal of Law Reform} 80 81.  \\
\textsuperscript{483} Treaty on the Final Settlement with Respect to Germany: \texttt{http://usa.usembassy.de/etexts/2plusfour8994e.htm} (accessed 7 July 2014).  \\
\textsuperscript{484} Treaty on the Final Settlement with Respect to Germany para 11.  \\
\textsuperscript{485} Declaration on Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union reprinted in Hill and Smith \textit{European Foreign Policy : Key Documents} (2000) 282.  \\
\textsuperscript{486} Declaration on Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union para 3.  \\
\textsuperscript{487} Human Rights Committee, General Comment No. 12 (1984) HRI/GEN/1/Rev.9 (Vol. I).
\end{flushleft}
facilitate the exercise of self-determination within their states. This requirement indicates the applicability of the right to self-determination outside the decolonisation context.

Another interesting observation is the incorporation of the right to self-determination in municipal law. The incorporation into municipal law is an indication that self-determination is applicable in a post-colonial era. Article 39(1) of the constitution of Ethiopia expressly states that “every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.” The 1996 Constitution of the Republic of South Africa provides that:

“The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage; within a territorial entity in the Republic or in any other way, determined by national legislation.”

The discussion in this section revealed that some states are of the view that self-determination is a concept applicable in situations of colonialism and alien domination. In other words the concept of ‘self-determination’ is not applicable in post-colonial situations. It was however argued that state practice shows that the concept of ‘self-determination’ is applicable outside the context of decolonisation. The next section will consider the continuum of self-determination, in particular, the relationship between internal and external self-determination outside the context of decolonisation.

4 3 The continuum of self-determination: the relationship between internal self-determination and external self-determination

As noted in chapter one, international law distinguishes between internal and external self-determination. The comments made by the Committee on the Elimination of Racial Discrimination (CERD) in General Recommendation 21 of 1996, are noteworthy:

488 Human Rights Committee, General Comment No 12 para 6.
491 Section 235 of the Constitution of the Republic of South Africa.
492 Section 17.
“In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, decent, national, or ethnic origins. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.”493

The internal and external self-determination dichotomy is also highlighted in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations494 (Friendly Relations Declaration).495 The Friendly Relations Declaration emphasizes that a state is required to facilitate the meaningful participation of its people in the political, social and economic affairs of the state and if the state complies with those obligations, the people may not challenge the territorial integrity of the state.496

The internal and external self-determination dichotomy is important in that it highlights that the right to self-determination calls for the protection of the territorial integrity of states while simultaneously insisting that states must not violate human rights of peoples within its territory.497 Junngam describes the position as follows:

“Nowadays, there is also a common understanding that people can determine their destiny within their existing state framework. This is not to say that people are captives of their territorial states, but the territorial integrity of their states is critical to their survival.”498

496 Friendly Relations Declaration para 7.
497 Hilpold “The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question” 2009 Austrian Review of International and European Law 259 300.
This section set the foundation for the examination of the post-colonial conception of self-determination by arguing that there is a relationship between internal and external self-determination. It was argued that the self-determination continuum calls for the protection of territorial integrity of states while at the same time demanding that states promote human rights of its citizens. The next section will examine the scope of internal self-determination.

4 4 The scope of internal self-determination

Internal self-determination provides a platform for human rights protection, democracy and self-government. Senaratne explains the link between human rights and internal self-determination as follows:

“Viewed from a human rights perspective, in particular, "internal self-determination" is considered to be a manifestation of all the rights embodied in the 1966 International Covenant on Civil and Political Rights.”

Internal self-determination also provides for the right of peoples to take part in the political affairs of their state. Macklem argues that by emphasizing freedom of choice, the concept of ‘self-determination’ envisages a democratic form of government. Consequently a state which establishes democratic system of government gives effect to the right to internal self-determination. The right to internal self-determination also posits that people should be given the power to govern themselves.

From the brief discussion in the current section it can be said that the protection of human rights, meaningful participation in the political affairs of the state and autonomy are components of the right to internal self-determination. In the following sub-sections, these elements of the right to internal self-determination will be discussed in turn.

500 Senaratne “Beyond the Internal/External Dichotomy of the Principle of Self-Determination” 2013 Hong Kong Law Journal 463 470.
4.4.1 Human rights

Hilpold argues that common Article 1 of the ICCPR and the ICESCR forms the legal basis of the link between self-determination and human rights.\(^{505}\) Similarly, Kuokkanen argues that the preferable conception of self-determination can be found in the human rights regime established by the ICCPR and the ICESCR.\(^{506}\) Pentassuglia captures the human rights dimension of self-determination as follows:

“...In sum, a human rights-based understanding of self-determination of the whole people is assumed to inform, by implication, the scope and reach of sovereignty principles as well as the role of the state itself in contemporary international law, thereby promoting democracy and peace within and among societies.”\(^{507}\)

In its General Comment number 12 on Article 1 of the ICCPR, the HRC observed that:

“The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”\(^{508}\)

The link between human rights and self-determination is significant especially when one considers that in Africa, human rights violations often result in armed conflict or civil unrest.\(^{509}\) Sudan is a case in point. As highlighted in chapter three, the people of South Sudan were subjected to gross human rights violations by the different governments, which came to power in Sudan since independence in 1956.\(^{510}\) In response, the people of South Sudan took up arms against the government of South Sudan resulting in two devastating civil wars.\(^{511}\) It is noteworthy that the second civil war came to an end because of the signing of the Comprehensive Peace Agreement (CPA) whose provisions promised, \textit{inter alia}, the protection and promotion of human rights of the people of South Sudan.\(^{512}\)


\(^{506}\) Kuokkanen “Self-Determination and Indigenous Women’s Rights at the Intersection of International Human Rights” 2012 \textit{Human Rights Quarterly} 225 228.


\(^{508}\) Human Rights Committee, General Comment No. 12 para 1.


\(^{510}\) Section 331.

\(^{511}\) Section 3 2.

\(^{512}\) Section 3 4 8.
Democracy and meaningful participation in the political affairs of the state

Democracy can be defined as “a political system which is based on choice, competition, respect for human rights, and the rule of law.”\textsuperscript{513} The rule of law refers to the framework put in place to promote legal certainty and to prevent abuse of power by the state and its organs.\textsuperscript{514} Democracy is also an element of the right to internal self-determination\textsuperscript{515} and it facilitates the meaningful participation of peoples in the political affairs of the state.\textsuperscript{516} Article 25 of the ICCPR which forms the legal basis for the right to democratic governance\textsuperscript{517} provides for the right of citizens to participate in the political affairs of the state. Former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya’s observations based on the Draft Declaration on The Rights of Indigenous Peoples are noteworthy:

“the new conception of self-determination recognizes the freedom of individuals and groups to form associations and to collectively pursue their own destinies under conditions of equality within the framework of the states within which they live.”\textsuperscript{518}

Democracy as an element of the right to internal self-determination requires, \textit{inter alia}, that there be a constitution which entrenches rights which facilitate and promote democracy such as the right to life, equality, freedom of speech and association and the right to vote.\textsuperscript{519} At some point in its history, Sudan was a state without a constitution.\textsuperscript{520} The most notable constitution promulgated in Sudan was the 1998 Sudan Constitution which provided for various fundamental rights.\textsuperscript{521} Despite the existence of such rights, human rights violations against the people of South Sudan never ceased, in fact they continued right up to and beyond the signing of the CPA in 2005.\textsuperscript{522}

\textsuperscript{514} Reiter “Towards the Rule of Law or the Rule of the Boots? A Liberal Perspective on Democracy and Human Rights” 2014 \textit{US-China Law Review} 404 405.
\textsuperscript{515} Park 2006 \textit{International Journal on Minority and Group Rights} 74.
\textsuperscript{517} Varayudej “A Right to Democracy in International Law: Its Implications for Asia” 2006 Annual Survey of International & Comparative Law 1 8.
\textsuperscript{519} Seshagiri “Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law” 2010 \textit{Harvard International Law Journal} 553 561.
\textsuperscript{520} For instance between 1983 and 1998. See section 3 4 7.
\textsuperscript{521} Section 3 4 7.
\textsuperscript{522} Section 3 5.
Since the right to internal self-determination requires that people participate in the government of their state, it is only a democratic system of government which can guarantee or facilitate such participation.\textsuperscript{523} Consequently, a state violates the right to self-determination of its people when it denies them political participation in the affairs of the state.\textsuperscript{524} Governments must therefore be representative of its people without discrimination on the basis of race, colour, national or ethnic origin.\textsuperscript{525} As noted in chapter three Sudan has been under authoritarian rule for most of its post-colonial existence. Since independence in 1956, the government of Sudan denied the people of South Sudan meaningful participation in the political affairs of Sudan thus violating their right to internal self-determination.\textsuperscript{526}

\textbf{4 4 3 Autonomy}

That autonomy is one of the elements of the right to self-determination was confirmed in \textit{Kevin Mgwanga Gunme et al v Cameroon}\textsuperscript{527} (\textit{Southern Cameroon case}) where the African Commission on Human and Peoples’ Rights (African Commission) in deciding whether the people of Southern Cameroon had the right to external self-determination, stated that autonomy is one of the many ways in which peoples may exercise their right to self-determination.\textsuperscript{528} As highlighted in chapter three, autonomy refers to an arrangement where a particular region within a state is given the powers of self-government.\textsuperscript{529} These arrangements may provide a particular region with the power to govern or decide, \textit{inter alia}, on issues of municipal government, taxation, land, culture and religion.\textsuperscript{530}

\textsuperscript{525} Cirkovic “An Analysis of the IC Advisory Opinion on Kosovo's Unilateral Declaration of Independence” 2010 \textit{German Law Journal} 895 908.
\textsuperscript{526} Mampilly \textit{Rebel Rulers: Insurgent Governance and Civilian Life During War} (2011) 134.
\textsuperscript{527} \textit{Kevin MgwangaGunme et al v Cameroon}, Communication 266/03 (\textit{Southern Cameroon case}).
\textsuperscript{528} \textit{Southern Cameroon case} para 191.
\textsuperscript{529} Section 3 4 4. See also: Dinstein “Autonomy Regimes and International Law” 2011 \textit{Villanova Law Review} 437 437.
Autonomy as an element of internal self-determination promotes the distribution of power to the people so that they may be able to participate in the government of their region.\textsuperscript{531} Autonomy arrangements therefore align the government of the autonomous region with the wishes of the people belonging to that territory.\textsuperscript{532}

As already indicated in chapter three of this study, at independence in 1956 the people of South Sudan wanted a system of government which would guarantee them autonomy in the new Sudan.\textsuperscript{533} At the end of the first civil war in 1972 under the Addis Ababa Peace Agreement, autonomy was granted to South Sudan.\textsuperscript{534} In violation of the Addis Ababa Agreement, the then president of Sudan, Nimeiri revoked this autonomy.\textsuperscript{535} In pursuit of their right to self-determination, the people of South Sudan demanded the restoration of autonomy, threatening to secede if the demand for autonomy was not met.\textsuperscript{536} It was only in 2005 when the CPA was signed that autonomy in the form of an establishment of the government with its own legislative, executive and judiciary and constitution was granted to the people of South Sudan.\textsuperscript{537} The autonomy arrangement was however frustrated by tensions between the central government and the government of South Sudan regarding compliance with various provisions of the CPA.\textsuperscript{538}

This section revealed that human rights protection, democracy and meaningful participation in the political affairs of the state and autonomy are elements of internal self-determination. Most importantly, the discussion revealed that the people of South Sudan were denied all elements of the right to internal self-determination. The next section will investigate the scope of the right to external self-determination.

\textsuperscript{531} Nordin and Witbrodt “Self-Determination of Indigenous Peoples: The Case of the Orang Asli” 2012 \textit{Asia Pacific Law Review} 189 200.
\textsuperscript{533} Section 3 2.
\textsuperscript{534} Section 3 4 1.
\textsuperscript{535} Section 3 4 1.
\textsuperscript{536} Section 3 4 3.
\textsuperscript{537} Section 3 4 8.
\textsuperscript{538} Section 3 5.
4 5 The scope of external self-determination

External self-determination refers to the right of peoples to decide their status in relation to other states in the international political order.\(^\text{539}\) The Supreme Court of Canada in *Reference re Secession of Quebec*\(^\text{540}\) (*Quebec case*) described the scope of external self-determination as follows:

“In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.”\(^\text{541}\)

External self-determination claims often arise where certain groups within a state are marginalized or denied the right to participate in the political system of their country.\(^\text{542}\) External self-determination claims may also arise due to the adoption of discriminatory policies by a state.\(^\text{543}\)

Minor violations of human rights cannot, however, trigger an external self-determination claim.\(^\text{544}\) An example of human rights violations which may trigger an external self-determination claim are those which occurred in South Sudan. Human rights violations committed by the government of Sudan against the people of South Sudan have been labeled as one of the “worst cases of human rights catastrophes.”\(^\text{545}\) That seems to be an appropriate label especially considering that in chapter three of this study it was highlighted that the people of South Sudan were forcibly displaced from their homes, they were subjected slavery, religious

\(^{539}\) Cirkovic 2010 *German Law Journal* 909.
\(^{541}\) *Quebec case* para 138.
and ethnic cleansing, Sharia law was imposed on them despite the fact that a majority of the people of South Sudan are Christian and animist.\textsuperscript{546}

The underlying theme in most claims for external self-determination is the systemic violation of human rights of the minority by the majority.\textsuperscript{547} The question is whether self-determination can be interpreted to permit its external manifestation, that is, secession, where a state violates the rights of peoples within its territory.\textsuperscript{548} In order to answer that question, the next section will propose a new understanding of self-determination based on the remedial self-determination theory.

\textbf{4 6 Towards a new understanding of self-determination: Remedial self-determination theory}

The remedial self-determination theory is modeled on the Friendly Relations Declaration which makes the protection of the territorial integrity of a state dependent upon the equal representation of the people belonging to the sovereign state.\textsuperscript{549} Thus the Friendly Relations provides the basis for the exercise of external self-determination where peoples are subjected to discrimination and gross violation of human rights.\textsuperscript{550}

According to the remedial self-determination theory peoples may secede where a state denies them the right to exercise their right to internal self-determination.\textsuperscript{551} The remedial self-determination theory regards secession as an option of last resort where there is evidence of violations of human rights by a state.\textsuperscript{552} In order to trigger the application of this theory, there

\textsuperscript{546} Section 3 3 1.
\textsuperscript{547} Burke and Panina-Burke “Eastern and Southern Ukraine's Right to Secede and Join the Russian Federation” 2015 Russian Law Journal 33 53.
\textsuperscript{552} Jovanovic “National Self-Determination as a Legitimate Way Towards European Union - The Case of Former Yugoslavia” 2002 International Journal on Minority and Group Rights 71 78.
must be evidence of violations of human rights which may justify the secession of a particular group and such violations should not be capable of being abated without secession.\textsuperscript{553}

An example of such a situation can be seen in the case of South Sudan where the government of Sudan under the National Islamic Front (NIF) regime deliberately committed human rights violations against civilians in South Sudan.\textsuperscript{554} In the case of South Sudan, secession was the only avenue capable of resolving the human rights violations committed by the government of Sudan against the people of South Sudan.\textsuperscript{555} It is noteworthy that the people of South Sudan during the 1992 Abuja Peace Negotiations called for the recognition of their right to internal self-determination and insisted that if the government of Sudan fails to meet those demands, they will agitate for external self-determination.\textsuperscript{556} This demand was consistently made by the people of South Sudan in the various peace initiatives, agreements which followed, most significantly, the CPA.\textsuperscript{557} Human rights violations continued to take place even after the signing of the CPA and the people of South Sudan had no other option but to vote for independence in the referendum which was conducted in terms of the provisions of the CPA.\textsuperscript{558}

The application of the remedial self-determination theory can also be exemplified by the events which led to the declaration of independence by Kosovo in 2008.\textsuperscript{559} Kosovo was a province in the former Socialist Federal Republic of Yugoslavia (SFRY).\textsuperscript{560} In 1974, Kosovo was granted autonomy within Yugoslavia.\textsuperscript{561} Kosovo’s autonomy was revoked by the then president

\textsuperscript{553} Dickinson “Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet” 2009 \textit{Arizona Journal of International & Comparative Law} 547 554.
\textsuperscript{554} Apsel “On Our Watch: The Genocide Convention and the Deadly, Ongoing Case of Darfur and Sudan” 2008 \textit{Rutgers Law Review} 53 56.
\textsuperscript{555} Raore “Do Ethnic Minority Communities Have a Right to Secede? An Analysis of Secession, the Principle of Self-determination and the Creation of States in International Law” 2011 \textit{Hong Kong Journal of Legal Studies} 147 177.
\textsuperscript{556} Section 3 4 3.
\textsuperscript{557} Section 3 4 8.
\textsuperscript{558} Section 3 4 8.
\textsuperscript{560} Cerone “The International Court of Justice and the Question of Kosovo’s Independence” 2011 \textit{ILSA Journal of International & Comparative Law} 335 336.
Slobodan Milosevic in 1989 and Kosovar Albanians tried to regain their autonomy. Milosevic responded by suppressing the call for restoration of autonomy by force.

The situation in Kosovo quickly became one of gross violations of human rights of Kosovar Albanians. Serbian forces embarked on an ethnic cleansing campaign targeted at Kosovo Albanians. It is reported that approximately 75% of the Albanian Kosovars were displaced due to the violence which ensued. In 1999 the draft Rambouillet Accords proposed an end to the violence and the restoration of autonomy which Serbia refused to sign. After efforts to resolve the conflict failed the North Atlantic Treaty Organisation (NATO) launched airstrikes against Serbia from March 1999 to June 1999. Serbia responded to NATO bombings by launching a counter attack on Albanian civilians in Kosovo. Serbia’s quest to suppress the calls for restoration of autonomy thus became more violent.

After several efforts to resolve the Kosovo situation with no success Kosovo declared independence from Serbia on 17 February 2008. The declaration of independence was significant in view of the conception that a state which engages in human rights violations and denies its people the right to internal self-determination cannot insist on the inviolability of its territorial integrity. The declaration of independence is also significant in that in line with the

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562 Jamar and Vigness “Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence” 2010 German Law Journal 913 915.
563 Vidmar “Democracy and Regime Change in the Post-Cold War International Law” 2013 New Zealand Journal of Public and International Law 349 373. At that time he was president of Serbia after the SFRY had disintegrated and Kosovo was now a province under Serbia.
remedial self-determination theory in that it was triggered by the continued systemic violation of human rights of the people of Kosovo by Serbia.\textsuperscript{573}

The United Nations General Assembly (UN General Assembly), on 8 October 2008 adopted Resolution 63/3 requesting the International Court of Justice (ICJ) to give an advisory opinion on whether the declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in accordance with international law.\textsuperscript{574} In its opinion in \textit{Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo}\textsuperscript{575} (Kosovo Advisory Opinion) the ICJ held that the declaration of independence did not violate international law.\textsuperscript{576} The decision of the ICJ removes any doubts on whether a group in a post-colonial context may secede from a sovereign state.\textsuperscript{577}

The separate opinions of Judge Trindade and Judge Yusuf are noteworthy. Judge Yusuf in his separate opinion described the post-colonial conception of the right to self-determination as follows:

“the right of self-determination chiefly operates inside the boundaries of existing States in various forms and guises, particularly as a right of the entire population of the State to determine its own political, economic and social destiny and to choose a representative government; and, equally, as a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against.”\textsuperscript{578}

Judge Yusuf indicated that external self-determination is allowed only under exceptional circumstances and such circumstances exist when the following are present: discrimination; persecution of peoples on the basis of the racial or ethnic origins; denial of political participation

\textsuperscript{573} Muharremi “Kosovo’s Declaration of Independence: Self-Determination and Sovereignty Revisited” 2008 Review of Central and East European Law 401 421.
\textsuperscript{574} United Nations General Assembly Resolution 63/3. Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International law A/RES/63/3.
\textsuperscript{575} Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. Reports 403(Kosovo Advisory Opinion).
\textsuperscript{576} Kosovo Advisory Opinion para 84.
\textsuperscript{578} Kosovo Advisory Opinion, Separate Opinion of Judge Yusuf para 9.
and denial of autonomy or self-government. He also cautioned that the presence of these circumstances does not necessarily entitle people concerned to exercise their right to external self-determination but rather, all efforts at exercising the right to internal self-determination must first be exhausted before peoples may lay claim to the right to external self-determination.

Judge Trindade highlighted that the Kosovo situation should be understood to imply that states cannot insist on the inviolability of their territorial integrity where they systemically violate human rights of their people through acts such as ethnic cleansing, discrimination and forced displacement. The concept of ‘self-determination’ can thus be applied to end the violation of human rights:

“The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.”

The Canadian Supreme Court’s pronouncement in the Quebec case is regarded as “the most prominent judicial pronouncement which underpins the theory of remedial secession.” The Canadian Supreme Court indicated that the right to self-determination is normally exercised in its internal form. Only in the “most extreme cases” and under “carefully defined circumstances” will the right be exercised in its external form which will ultimately result in secession. An example provided by the Canadian Supreme Court was in a situation where “a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.” Another case may include the deliberate and continuing violations of human rights by the state or its organs against a specific group of peoples within that state.

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579 Kosovo Advisory Opinion, Separate Opinion of Judge Yusuf para 16.
580 Ibid.
581 Kosovo Advisory Opinion, Separate opinion Judge Trindade para 176.
582 Kosovo Advisory Opinion, Separate opinion Judge Trindade para 175.
584 Quebec case para 126.
585 Ibid.
586 Quebec case para 134.
The underlying theme in the two cases above is that where a state ceases to represent its people without discrimination and violates the rights of its people with impunity, such people may secede.\textsuperscript{588} The theory of remedial self-determination is modeled on the premise that a people may secede if they are denied the right to internal self-determination.\textsuperscript{589} The Kosovo case in particular illustrates, in line with the remedial self-determination theory, that where the population of a state is systemically oppressed they may secede.\textsuperscript{590} Moore describes the position as follows:

“It is difficult to deny that a group that has been the victim of widespread violations of basic human rights or the target of a genocidal campaign has a right to secede. This is relatively uncontested, since it is grounded in the widely accepted view that the state's authority and political legitimacy are forfeited when it commits such injustices.”\textsuperscript{591}

The cases also illustrate that a peoples may secede as a last resort after exhausting the solutions provided for by internal self-determination.\textsuperscript{592} This is significant because in certain instances internal self-determination may not be an effective remedy to deal with the systemic violation of human rights.\textsuperscript{593} The argument put forward by this section is that the secession of South Sudan should be viewed as the practical application of the remedial self-determination theory. The discussion in this section has argued that where internal self-determination is denied, external self-determination is justified.

\textbf{4.7 Summary}

The chapter focused on the applicability of the concept of ‘self-determination’ in a post-colonial context. It was observed that due to the widespread reliance on the concept of ‘self-determination’ during decolonisation, there became a view that the concept is only applicable in the decolonisation context. The chapter, however, found evidence of the application of self-determination outside the context of decolonisation.

\textsuperscript{588} Wilson “Self-Determination, Recognition and the Problem of Kosovo” 2009 \textit{Netherlands International Law Review} 455 472.
\textsuperscript{589} Miller “Sovereignty 2010: The Necessity of Circling the Square” 2010 \textit{Vienna Journal on International Constitutional Law} 624 631.
\textsuperscript{590} Roth “New Developments in Public International Law: Statehood, Self-determination, and Secession” 2011 \textit{National Taiwan University Law Review} 639 653.
\textsuperscript{592} Seshagiri 2010 \textit{Harvard International Law Journal} 584.
\textsuperscript{593} Weldehaimanot “The ACHPR in the Case of Southern Cameroons” 2012 \textit{Sur-International Journal on Human Rights} 85 95.
It was observed that international law distinguishes between internal and external self-determination. The chapter argued that the distinction is crucial in that it attempts to reconcile the interests of both the state and its peoples. This discussion thus revealed that the self-determination continuum provides peoples a safeguard for human rights violations while also providing a safeguard for the territorial integrity of states.

The chapter also examined the scope of internal self-determination. Three elements of the right to internal self-determination were identified, namely human rights protection, autonomy, democracy / political participation. It was argued that internal self-determination can be manifested through the protection of human rights, granting autonomy or facilitating meaningful participation in the political affairs of a state or the establishment of democratic practices and institutions. It was however, revealed that the people of South Sudan were denied the right to internal self-determination by the government of Sudan.

Next, the chapter sought to investigate whether a people such as those of South Sudan may secede on the basis that they have been denied the right to internal self-determination. In order to answer this question, the chapter argued that if viewed through the lens of the remedial self-determination theory, a people who have been denied the right to internal self-determination or have been subjected to gross human rights violations may secede from the parent state. It was argued that the secession of South Sudan should be seen in this light.
CHAPTER 5
CONCLUSION
The main focus of the study was to investigate the post-colonial understanding of the concept of ‘self-determination’ using South Sudan as a case study.\textsuperscript{594} The study had three main objectives. The first objective was to ascertain the scope nature of the concept of ‘self-determination’ outside the context of decolonisation. In order to understand the post-colonial conception of self-determination the study in chapter two provided a legal background of the concept of ‘self-determination’ and the study as a whole. It was noted that the concept of ‘self-determination’ was initially regarded as a political principle.\textsuperscript{595} It was only in 1945 that the concept of ‘self-determination’ was expressly mentioned in a major international legal instrument.\textsuperscript{596} Thereafter the concept started to be recognised as a legal principle because liberation movements relied on it in achieving independence for colonised peoples.\textsuperscript{597} In current international law self-determination is considered to be a right.\textsuperscript{598} In fact numerous international legal instruments make reference to the “right to self-determination.”\textsuperscript{599} Some scholars go as far as arguing that the concept has the status of a \textit{jus cogens} norm and consequently the concept of ‘self-determination’ has an \textit{erga omnes} character.\textsuperscript{600}

In the context of decolonisation, the general understanding was that self-determination entitled peoples under colonial rule to political independence.\textsuperscript{601} Oppressed peoples could determine their political status by either emerging as a sovereign independent state; or freely associate with an independent state; or integrate with an independent state or emerge into any other political status that they wished to.\textsuperscript{602}

Outside the context of decolonisation, self-determination has to be balanced with the principle of the territorial integrity of states.\textsuperscript{603} The scope and content of the concept of ‘self-determination’

\textsuperscript{594} Section 1.3.
\textsuperscript{595} Section 2.2.
\textsuperscript{596} Section 2.2.
\textsuperscript{597} Section 2.2.
\textsuperscript{598} Section 2.4.
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\textsuperscript{602} Section 2.3.
\textsuperscript{603} Section 1.2.
is controversial. The controversy relates to the conflict between the right to self-determination and the concept of ‘territorial integrity’. It was, however, observed that legal instruments providing for the right to self-determination also discourage the violation of the principle of territorial integrity. This is not surprising since external self-determination results in the violation of the territorial integrity of a state. Peoples all over the African continent for instance in Angola, Namibia, Zambia and Zimbabwe, are agitating for the exercise of their right to self-determination. States, on the other hand, are quick to suppress calls for self-determination because they associate the concept with territorial disintegration. The right to self-determination can however be exercised without impairing the territorial integrity of states. The chapter observed that the general view in Africa is that any exercise of the right to self-determination, which results in the violation of the principle of territorial integrity, is not permissible.

The exercise of the right to self-determination may result in the secession of a region from and independent state. An important observation was that secession is neither permitted nor is it prohibited in international law. It was, however, noted that there seems to be consensus in international law that where a government facilitates the meaningful exercise of the right to internal self-determination, peoples may not be allowed to secede from a sovereign state.

The second objective of this study was to ascertain the significance of South Sudan’s secession on the post-colonial understanding of self-determination. Chapter three thus investigated the concept of ‘self-determination’ in the context of South Sudan. The study identified instances where the government of Sudan engaged in the deliberate and systemic violation of human rights of the people of South Sudan. These include, slavery, forced displacement, political and

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604 Section 1 2.  
605 Ibid.  
606 Section 2 5.  
607 Ibid.  
608 Section 1 1.  
609 Ibid.  
610 Section 2 5.  
611 Ibid.  
612 Section 2 6.  
613 Ibid.
economic marginalisation, religious and ethnic cleansing, and the imposition of Sharia law and policies of Islamisation on non-Muslims in South Sudan.\textsuperscript{614}

The people of South Sudan were on numerous occasions, engaged in negotiations with the government of South Sudan in order to try an end these gross violations of human rights.\textsuperscript{615} The outcome of these negotiations was the signing of several agreements which promised, \textit{inter alia}, human rights protection, economic development and equal political participation.\textsuperscript{616} The situation of the people of South Sudan, however, continued to worsen and they began agitating for external self-determination.\textsuperscript{617}

The Comprehensive Peace Agreement (CPA) signed in 2005 between the main opposition party, the Sudan People’s Liberation Movement (SPLM) and the government of Sudan promised once more to solve the problems of South Sudan within the territorial framework of Sudan within an interim period.\textsuperscript{618} Quite significantly it also provided the people of South Sudan the option of voting for secession at the end of that interim period.\textsuperscript{619} At the end of the interim period the people of South Sudan voted for secession because of the realisation that they will continue being viewed as second class citizens in the country of their birth by the government of Sudan.\textsuperscript{620}

The significance of the secession of South Sudan lies in that it was an example of the exercise of self-determination outside the context of decolonisation. The exercise of the right to self-determination by the people of South Sudan is also significant in that they first sought to exercise their right internally – thus without threatening the territorial integrity of Sudan. Only when internal self-determination failed to resolve their grievances did the people of South Sudan

\textsuperscript{614} Section 3 3 1.
\textsuperscript{615} Section 3 4.
\textsuperscript{616} \textit{Ibid}.
\textsuperscript{617} Section 3 4 3. The people of South Sudan, represented by the Sudan People’s Liberation Movement started agitating for the right to self-determination at the 1992 Abuja Peace Negotiations, arguing that should the government of Sudan fail to meet their demands for democracy, the rule of law and autonomy they will be entitled to secede from Sudan.
\textsuperscript{618} Machakos Protocol, Principle 1.1.
\textsuperscript{619} Article 2.5.
\textsuperscript{620} Section 3 5.
agitate for the exercise their right to self-determination in its external form and consequently voted for secession in the referendum provided for under the CPA.\textsuperscript{621}

The third objective of this study was to propose a new approach to understanding the concept of ‘self-determination’ outside the context of self-determination. It is noteworthy that the discussion in chapter four revealed that the concept of ‘self-determination’ is not limited to situations of colonial or alien domination.\textsuperscript{622} The concept is also applicable outside the context of decolonisation.\textsuperscript{623} The secession of South Sudan from Sudan supports that contention as well.

The general understanding of the concept of ‘self-determination’ is that outside the context of decolonisation, the concept is applicable in its internal form. Internal self-determination entails the exercise of civil and political rights within the territorial framework of a state.\textsuperscript{624} Consequently the exercise of the right to internal self-determination does not result in the impairment of the territorial integrity of a sovereign state. The scope of internal self-determination has three elements namely human rights protection, democracy or participation in the political affairs of the state and autonomy.\textsuperscript{625}

The question raised by this discussion was what solution is available to peoples such as those in South Sudan, where they are denied their right to internal self-determination or where they are subjected to gross human rights violations? A further question is in such cases should the principle of territorial integrity be upheld over the right to self-determination? These questions are important especially when one considers that the exercise of external self-determination results in the territorial disintegration of a state.

In light of the secession of South Sudan from Sudan the chapter proposed the remedial self-determination theory as the solution where peoples are denied their right to internal self-

\textsuperscript{621} Section 3.5.
\textsuperscript{622} Section 4.2.
\textsuperscript{623} \textit{Ibid}.
\textsuperscript{624} Section 4.4.
\textsuperscript{625} \textit{Ibid}.
determination. The chapter also presented the remedial self-determination theory as the new approach to the post-colonial understanding of the concept of ‘self-determination’.\textsuperscript{626}

In terms of the remedial self-determination theory, peoples may secede if they are denied the opportunity to exercise their right to external self-determination internally or when they are subjected to gross human rights violations.\textsuperscript{627} It must be emphasised that the exercise of the right to self-determination should be an option of last resort.\textsuperscript{628} The conclusion of this study is that the scope and application of the concept of ‘self-determination’ outside the context of decolonisation should be understood as allowing external self-determination where people are denied their right to internal self-determination. Such was the case for the people of South Sudan.

\textsuperscript{626} Section 4 6.  
\textsuperscript{627} \textit{Ibid.}  
\textsuperscript{628} \textit{Ibid.}
BIBLIOGRAPHY

Cases


Frontier Dispute (Burkina Faso v Republic of Mali), 1986 I.C.J. Reports 554.

Kevin Mgwanga Gunme v Cameroon, Communication 266/03.

Land, Island and Maritime Frontier Dispute (El Salvador v Honduras), 1992 I.C.J. Reports 351.


Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136.


The Case Concerning East Timor (Portugal v. Australia), 1995 I.C.J Reports 90.


International instruments

Additional Protocol II of 1977 to the 1949 Geneva Conventions 1125 UNTS 609.


Charter of the United Nations, 24 October 1945, 1 UNTS XVI.


Conference on Security and Cooperation in Europe: Final Act of Helsinki, 1 August 1975.


Covenant of the League of Nations (28 June 1919) 108 LNTS 188.
International Convention to Suppress the Slave Trade and Slavery 60 LNTS 253.
Opinion No. 2 of the Arbitration Commission of the European Conference on Yugoslavia.
Opinion No. 3 of the Arbitration Commission of the European Conference on Yugoslavia.
Resolutions Adopted by the Fifth Ordinary Session of the Assembly of Heads of State and Government Held in Algiers, From 13 to 16 September 1968. AHG/Res. 54 (V).
United Nations General Assembly Resolution 1541(XV), Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information called for under Article 73e of the Charter Resolution A/Res/15/1541 (1960).


United Nations General Assembly Resolution 63/3, Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law A/RES/63/3.


Internet sources

Katangese Peoples' Congress v Zaire, Communication 75/92:


Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13. A/ES-10/248 24 November 2003:


The 1992 Abuja Peace Negotiations:


The 1996 Sudan Political Charter:


The 1997 Sudan Peace Agreement:


The 1998 Sudan Constitution:


The Addis Ababa Agreement on the Problem of South Sudan:

The Comprehensive Peace Agreement:

The IGAD Declaration of Principles:

The Koka Dam Agreement:

The reservations and responses of states with regards to the right to self-determination as it is enshrined in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights:

Treaty on the Final Settlement with Respect to Germany:
http://usa.usembassy.de/etexts/2plusfour8994e.htm (accessed 7 July 2014).


UN Conference on the Law of Treaties - Fifty-Second Meeting:


Textbooks


95


Working papers


Journal Articles


Brownback, S “End the Suffering in Sudan” 1999 Mediterranean Quarterly 1 – 6.


Curless, G and Rodt, AP “Sudan and the not so Comprehensive Peace” 2013 Civil Wars 101 – 117.


Grant, TD “Regulating the Creation of States from Decolonization to Secession” 2009 Journal of International Law and International Relations 11 – 57.


Jamar, H and Vigness, MK “Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence” 2010 German Law Journal 913 – 928.

Johnson, DH “New Sudan or South Sudan? The Multiple Meanings of Self-Determination in Sudan’s Comprehensive Peace Agreement” 2013 Civil Wars 141 – 156.


Lesch, AM “The Impasse in the Civil War” 2001 Arab Studies Quarterly 11 – 29.


Martin, R “Sudan's Perfect War” 2002 Foreign Affairs 111 – 127.


Maystadt, JF; Calderone, M and You, L “Local Warming and Violent Conflict in North and South Sudan” 2014 Journal of Economic Geography 1 – 23.

McCracken MJ “Abusing Self-Determination and Democracy: How the TPLF is Looting Ethiopia” 2004 Case Western Reserve Journal of International Law 183 – 222.


Medani, AM “Sudan” 2006 Yearbook of Islamic and Middle Eastern Law 323 – 350.


Natsios, A “Beyond Darfur Sudan's Slide Toward Civil War” 2008 Foreign Affairs 77 – 93.


Nmehielle, VO “Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question” 2004 Human Rights Quarterly 730 – 759.


Raore, TJA “Do Ethnic Minority Communities Have a Right to Secede? An Analysis of Secession, the Principle of Self-Determination and the Creation of States in International Law” 2011 Hong Kong Journal of Legal Studies 147 – 179.


Schmidinger, T “Tyrants and Terrorists: Reflections on the Connection between Totalitarianism, Neoliberalism, Civil War and the Failure of the State in Iraq and Sudan” 2009 Civil Wars 359 – 379.

Senaratne, K “Beyond the Internal/External Dichotomy of the Principle of Self-Determination” 2013 Hong Kong Law Journal 463 – 496.


Simpson, B “The United States and the Curious History of Self-Determination” 2012 Diplomatic History 675 – 694.


Temin, J “Sudan between Peace and War” 2011 Georgetown Journal of International Affairs 68 – 75.


Wilson, G “Self-Determination, Recognition and the Problem of Kosovo” 2009 Netherlands International Law Review 455 – 481.
