

## A LEGAL CASE FOR THE RIGHT OF SELF-DETERMINATION AND PROPOSED PROCEDURE FOR ITS IMPLEMENTATION

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### Abstract

*Self-determination is the process by which a country determines its own statehood and forms its own government. The right of self-determination is paramount as a crucial aspect of the broader international law. The right of self-determination evinces two cardinal perspectives which are the independence from colonialism and secession from existing sovereign entities. This paper positions the right of self-determination as an inalienable legal right and finds that the quest for secession as evident in Nigeria and Ukraine can be traced to the vagueness and un-clarity of the right of self-determination as contained in the United Nations Charter; a situation which has occasioned conflict in several states where the question of legality of secession remains unanswered. As it has never been enough to assert human rights, without considering the procedure for implementation of rights. The paper recommends a novel and effective legal procedure for implementation of the right of self-determination.*

### 1. Introduction

Most clamors for secession seek their legitimacy from the right of self-determination enshrined in international law. Accordingly, self-determination has been construed as the right of a people to determine their own form of government. Self-determination is defined as ‘the right of each people or nation to freely determine their state affiliation, including the right to forming an independent state, and also to determine the forms of their internal political, economic, social and cultural life, which is guaranteed by international organizations and bodies.<sup>1</sup> Self-determination may be exercised through the establishment of a sovereign independent state, by integration or by association with another state.

However the prevailing view seems to be that the international treaties, which provide for the right of self-determination, were not meant to be used as tools for secessionist groups but designed as legal backing for decolonization.<sup>2</sup> Incidentally no international instrument adequately defines the principle, as the international law community leans towards a constrictive interpretation of the right. The interpretation, as it were, favors a people under foreign domination and not those in sovereign independent states such as Biafra and Ukraine. Both the text and the drafting of the Charter indicate

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<sup>1</sup> D.B. Levin, The Principle of Self-Determination of Nations in International Law, [1962], *SOVIET Y.B INT'L L.* 45, 46.

<sup>2</sup> Article 1(2) of the United Nations Charter of 1945 states that part of the mission of the United Nations: “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...” Article 1 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 also provides for the right to self-determination by which people can “freely determine their political status and freely pursue their economic, social and cultural development.” The international Covenant of economic, Social and Civil Rights (ICESCR) of 1966 contains the same provisions. Nigeria has ratified all these covenants.

that the principle of self-determination applies to decolonization only. Even on a textual reading, one is left with the question why the term “peoples” is used rather than the more precise term “states” if what is intended was simply to recognize the self-determination of states.<sup>3</sup> As it were, the manner in which the self-determination principle was applied during the decolonization period provides useful insight into the meaning of the term “peoples” and what self-determination entails for these peoples. The trend as it were was for all inhabitants of a colonial territory to exercise the right to determine their fate and political independence. Consequently, the traditional interpretation of “people” as employed in the Charter sets out a disadvantage to internally oppressed people in a sovereign state, it is proposed that the term be interpreted in a more modern way instead of the meaning of the term as used in the UN Charter from 1945 and other treaties. Accordingly in the Island of Palmas case, it was submitted that *“a juridical fact must be appreciated in the light of the law contemporaneous with it, and not of the law in force at the time when a dispute in regard to it arise or falls to be settled.”*<sup>4</sup> The call for consideration of contemporary changes in law may have necessitated Helen Quane’s submission that the contemporary definition of “people” must emphasize criteria such as a common history, race, ethnicity and language.<sup>5</sup> It is submitted that by broadening the interpretation of the term “people” as used in the Charter, we would have an interpretation that would be of great interest for Nigeria and Ukraine at this time when a part of the respective states continue to agitate for secession.

Interestingly, international law acknowledges self-determination as an inalienable fundamental human right and as observed by the United Kingdom Permanent Representative to the United Nations in 1983, *“Self-determination is usually referred to these days in the United Nations not as a principle, but rather as an ‘inalienable right’ in other words, it is a right which cannot be taken away. The right is derived principally from the U.N Charter and the Covenants on Human Rights.”*<sup>6</sup> Logically, it is only right to jettison the presumption that the right subsists only to attain freedom from alien colonial oppressors,<sup>7</sup> as there seems to be a point that justifies freedom from internal oppression in an existing sovereign state. More so, it is submitted that the basis of freedom is not a matter that should be crested in statutes, but rather a matter of conscience which gives the oppressed or marginalized an automatic right of organized resistance to the forces of subjugation. After all the theory as justifying the secession of a people from its parent state as a matter of last resort and in situations where the government of the parent state does not legitimately represent the people’s interests has remained constant throughout the 20<sup>th</sup> century and as such the principle of self-determination under international law is conceived from two perspectives as entailing rights to internal and external self-determination depending on the circumstances. The first circumstance is where a people are not colonized and oppressed which makes such people entitled to exercise the right of self-determination through internal means only, such as free association and autonomy. The second is the category of a people who are oppressed or colonized. In this case the people have the right to external self-determination, which they may exercise through

<sup>3</sup> Quane, “The United Nations and the Evolving right of self-determination, p.545.

<sup>4</sup> The Island of Palmas Case (Netherlands v. the USA), p.14

<sup>5</sup> Quane, “The United Nations and the evolving right to self-determination, p.538.

<sup>6</sup> Letter from Sir Anthony Parsons, U.K Permanent Representative to the United Nations in New York, to the President of the Security Council (Apr. 28, 1982), in Geoffrey Martson, United Kingdom Materials on International Law, [1984] BRIT. Y.B. INT’L L. 361, 396.

<sup>7</sup> Alexandre Kiss, The Peoples’ Right to Self-Determination, [1986], 7 HUM. RTS. L. J. 165, 174.

secession from their mother state.<sup>8</sup> The Canadian Supreme court has confirmed that all peoples are entitled to various modes of internal self-determination, but that only some peoples, such as those subjected to conquest, colonization and perhaps oppression, may acquire the right to external self-determination through remedial secession.<sup>9</sup> Thus, the only form of self-determination within a sovereign state generally accepted is internal self-determination which is basically for the protection of minority groups within a state. But, the U.N General Assembly Resolution proclaiming the 'Right of the Peoples and Nations to Self-Determination' expressed the right to self-determination as 'right on independent state existence, national sovereignty and independence.'<sup>10</sup> By implication, the right of self-determination became the fundamental right of the two International Covenants on Human Rights of 1966. Consequently, a proclamation of the right to self-determination implicitly includes the right to secession.

Article 1(2) of the Charter, and article 55 further enumerates some of the actions that should be undertaken by the United Nations, for the creation of conditions necessary for the realization of the principle of self-determination proclaimed under article 1(2). However, without clarifying the meaning and aspects of the principle, or demonstrating the ways and means by which the rights and obligations emanating therefrom are to be effectively put into practice, the realization of the principle cannot be achieved and the conflict in states experiencing secession movements may continue to thrive.

## 2. An analytical stand of the principle from the purview of the United Nations

The objective of the United Nations was to create an organization with greater capacity and power to restore and maintain international peace and security, than its forerunner, the League of Nations, had.<sup>11</sup> The founders had to agree upon many questions during the drafting of the United Nations Charter. The system was constructed out of ruins of the inner-war system and the founders of the Charter sought to take what was valuable from the experience of the League of Nations. First it seemed that the Charter, just like the Covenant of the League of Nations, would be silent concerning any rights of peoples. This was so, regardless of the fact that the principle of self-determination had been embraced by the Allies in several policy documents adopted between 1941 and 1944, the principle did not emerge anywhere in the Dumbarton Oaks Proposal for the Establishment of a General International Organization. When the four Great Powers finally met at the San Francisco Conference by the end of April 1945, they had reconsidered the matter of 'peoples rights' and, instead of a minority system, which was the focus of the League of Nations, the main focus of the United Nations Charter was on the principle of human rights for all. In the end the principle of self-determination was identified as a major objective of the new international organization.<sup>12</sup>

A particular provision of the Charter states one of the aims of the new organization which was to '*develop friendly relations among nations based on the principle of self-determination of peoples, and*

<sup>8</sup> See, e.g. Antonio Cassese, *Self-Determination of Peoples- A Legal Reappraisal* 119 (1995).

<sup>9</sup> See Antonello Tancredi, *Secession and Use of Force* at 68, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* (Christian Walter, Antje Von Ungern-Sternberg, & Kavus Abushov eds., 2014).

<sup>10</sup> G.A Res. 637A (VII) (Dec. 16, 1966).

<sup>11</sup> Cassese Antonio, '*Self-Determination of peoples: A Legal Reappraisal*', Cambridge University Press, New York, 1995, p. 38-41.

<sup>12</sup> Cassese Antonio, '*Self-Determination of peoples: A Legal Reappraisal*', Cambridge University Press, New York, 1995, p. 38-41.

to strengthen universal peace.’ Although various states approved the aim and goals of the organization, some others were more critical and considered the provision as having the potential to promote civil strife and secessionist movements.<sup>13</sup> Yet the committee charged with the responsibility of drafting the Charter concisely agreed that “an essential element of the principle of self-determination is free and genuine expression of the will of the people, which avoids cases of the alleged expression of the popular will, such as those used for their own ends.”<sup>14</sup> Eventually the *principle of equal rights and self-determination of peoples* took shape and was incorporated in a number of places in the final version of the *United Nations Charter*; explicitly, in Articles 1(2) and 55 and implicitly in Articles 73 and 76(b) dealing with colonies and trust territories. Self-determination as an international principle was now considerably strengthened.

Arguably the singular appearance of references to the principle in the Charter widened the concept and gave the impression that the principle was applicable to any people anywhere in the world. The provision laid down in Article 1(2) of the Charter nevertheless states that one of the purposes of the United Nations is:

*“...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.”*

Article 55, Chapter IX (International Economic and Social Co-operation) of the Charter, states that one objective for the organization is to create conditions of stability and wellbeing necessary “for peaceful and friendly relations among nations based on respect for the principle of self-determination of peoples.” The article then lists a number of goals in the spheres of economics, education, culture and human rights, stating that the United Nations shall promote these goals. Contextually the United Nations Charter in article 73 and 76(b) under chapters XI and XII respectively, implicitly imbibe member states administering control over territories to promote self-determination of peoples under colonial rule. However, the fundamental question is what effect is the reference to self-determination in articles 1(2) and 55 over other concerns beyond colonial territories?

### **3. The Legal Substance of the Right of Self-Determination in the UN Charter**

Although the two provisions, articles 1 (2) and 55 are vague and ambiguous in their language which sets out a very complicating position of the principle of self-determination as contained in the Charter. The Charter appears to have expressed the meaning in a rather awkward manner so that the signification of peoples seems unclear. Nevertheless, the legal ingredients necessary for the realization of self-determination are adequately stated in article 55, referring to the need for peaceful and friendly relations among nations based on the United Nations to foster human rights for all peoples in order to attain that goal. The article further employs the notion ‘shall promote’ in its phrasing and thus places an obligation on the United Nations to promote, foster and facilitate the objectives set forth in article 55 of the Charter. Primarily the obligation established by the article is valid and not only binds the United Nations but exhibits a binding force on member states through the operation of article 56. Article 56 places a duty

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<sup>13</sup> Ibid

<sup>14</sup> Ibid p.40.

on member states to act conjunctively with the Organization as well as the Charter in order to actualize the objectives set forth in article 55.

Article 6 of the Charter further states thus:

*“A member of the United Nation which has persistently violated the principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendations of the Security Council.”*

Apparently, the initial view seemed to limit self-determination to colonial peoples as conceived from Chapter Xi and XII of the Charter. As such the provisions regarding a general right of self-determination was initially considered to be too vague and indefinite in the wordings and the principle of self-determination was wrongly construed as an ill-defined concept of policy and morality and not as a legal principle.<sup>15</sup> Yet what could be gathered from the collective import of the Charter is the fact that the original intendment was to protect and shield all peoples from oppression of governments whether it be colonial or indigenous. So that the interpretation of the linguistic construction of the provisions should be broadened to reflect the true intention and agenda of the UN.

It is for this that it is submitted here for the review of the UN Charter for purposes of clarifying its context on self-determination. That review is indeed overdue from the period of its enactment. The importance of clarity in legal materials cannot be over emphasized. For one thing, a clear legislation circumvents the difficulty of construing the exact intention of the draftsman. The vague expressions of the provisions on self-determination in the Charter have rather occasioned the doubt whether article 1(2) and 55 establish specific rights and duties under international law. The position has been that the lack of precise definition of the concept of self-determination, from which exact conjectures could be collected, makes it difficult to interpret, apply or execute the principles. It has been submitted that the principle merely possesses a moral and political force as it is important to guide the organs of the United Nations in the exercise of their powers.<sup>16</sup> However, the crucial effect of self-determination and its effect on the human rights of peoples may not permit a dismissal of the principle for want of a clear definition in legislation. Thus, the rather constricted notion that the principle has no force other than political has been extensively opposed. For instance, Professor Lauterpacht wrote that:

*“Any such conclusion that the principle had no legal effect is no more than a facile generalization. For the provisions of the Charter on the subject figure prominently, in the statement of the purposes of the United Nations. Members of the United Nations are under legal obligations to act in accordance with these purposes. It is their legal duty to respect and observe fundamental human rights and freedoms. These provisions are no mere embellishment or an accident of drafting. They were adopted, with the deliberation and after prolonged discussion before and during the San Francisco Conference, as part of the philosophy of the new international system...”<sup>17</sup>*

<sup>15</sup> Gayim Eyassu, *The Principle of Self-Determination: A Study of its Historical and Contemporary Legal Evolution*, Norwegian Institute of Human Rights', (Publication No. 5, Oslo, 1990), p. 21-24.

<sup>16</sup> Ibid

<sup>17</sup> Ibid at p. 23. See also Lauterpacht Hersch, *International Law and Human Rights*, Stevens Sons Ltd, London, 1950.



The principle of equal rights and self-determination of peoples has been established as a statutory norm conjunctively in both article 1(2) and article 55. The Charter itself is of a universal scope and effect and pronounces valid rights and obligations. The implication therefore is that given to the universality of the Charter as a multilateral international treaty, it can be argued that the principle of self-determination cannot be limited to being a political principle but rather a legal principle.<sup>18</sup> In support of this view, several member states have reaffirmed the legal effect of the principle when the question of the legal status of self-determination comes up in the United Nations.<sup>19</sup>

To further buttress the point above, the representatives of Yugoslavia in 1952 stated that:

*“The equal rights of peoples and their right to self-determination were principles expressly stated in Articles 1(2) and 55 of the Charter and thus constituted as a source of rights for one group and obligations for another. The obligations were neither moral nor political, but legal, since Article 6 of the charter expressly provided for sanctions in the case of non-fulfillment.”*<sup>20</sup>

In addition, Article 1(2) and article 55 of the Charter enumerates some of the actions that should be undertaken by the United Nations, for the creation of conditions necessary for the realization of the principle of self-determination. However, without clarifying the meaning and aspects of the principle, or demonstrating the ways and means by which the rights and obligations emanating there from are to be effectively put into practice, the realization of the principle cannot be achieved.<sup>21</sup>

As earlier mentioned, in the early days of the United Nations the principle of self-determination was viewed upon as being a right for colonial peoples only. This view has been rejected by the majority of the third world which preferred the principle to be generalized.<sup>22</sup> In 1952 the United Nations General Assembly sought to express that all peoples have the right of self-determination as should be reflected on the draft of the International Covenant on Human Rights. It is important to stress that at that time, the principle was argued to have a general effect and not limited to colonial states only.<sup>23</sup>

The General Assembly of the United Nations through several number of resolutions reached at the time, attributed a wider scope to the concept of self-determination, so that it was stretched beyond emancipation from colonial forces. One of the cardinal steps taken was the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV),<sup>24</sup> the two International Human Rights Covenants; the International Covenant on Civil and Political Rights

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Gayim Eyassu, *The Principle of Self-Determination: A Study of its Historical and Contemporary Legal Education*, Norwegian Institute of Human Rights, Publication No. 5, Oslo, 1990, p. 21-24.

<sup>21</sup> Ibid p. 27.

<sup>22</sup> Crawford James, *The Right of Self-Determination in International Law: Its Development and Future, in people's Rights*, Alston Philip (ed.), *Academy of European Law, European University Institute*, (Oxford University Press, 2002), p. 16.

<sup>23</sup> Ibid p. 16-17.

<sup>24</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514 (XV), December 14, 1960.

(ICCPR),<sup>25</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>26</sup> as well as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Resolution 2625 (XXV),<sup>27</sup> the FRD.<sup>28</sup>

By December 14 1960, the practical aspects of the resolve of the UN became operative, so that the United Nations passed the Resolution 1514 (XV) which perhaps is one of the most important resolutions in the development of self-determination. Resolution 1514 (XV) expressed the granting of independence to colonial countries and peoples and was in fact the first pertinent contribution by the General Assembly in developing the principle of self-determination further.<sup>29</sup> The resolution strictly instructed all colonial powers to desist from further preponderance upon peoples and transmit power to such territories and non-self-governing territories which had not yet attained independence. The said transmission of power was to be in accordance with the people's free will and desire. It is instructive to note that the resolution emphasized on independence for peoples who were subject to colonial rule since there were no entities in sovereign states seeking to secede at that time. Perhaps the true intention of the UN would have been clearer if secession was in question at the time. Nevertheless, the proclamation perhaps set out the said Resolution 1514 (XV) as an instrument that represents the political and legal basis for the independence policy of the United Nations for all people including those not under colonial rule.

#### 4. The Significance of the two International Human Rights Covenants of 1966

As it was not sensible to assume that the principle of self-determination was essentially limited to colonial peoples<sup>30</sup> the assembly went further to adopt two key instruments in order to foster a more elaborate view on self-determination. The dimension that the assembly had taken the principle was one of human rights as it adopted the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *International Covenant on Civil and Political Rights* (ICCPR), both of which was adopted on December 16 1966.

The both instruments reflected the exact language of paragraph 2 of Resolution 1514 (XV), the ICESCR, and the ICCPR, where it states;

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

<sup>25</sup> International Covenant on Civil and Political Rights, December 16, 1966, UN General Assembly, Treaty Series, vol. 999, p. 171.

<sup>26</sup> International Covenant on Economic, Social and Cultural Rights, December 16, 1966, UN General Assembly, Treaty Series, vol. 993, p. 3.

<sup>27</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Resolution 2625 (XXV), October 24, 1970.

<sup>28</sup> Malanczuk Peter, Akehurst's Modern Introduction to International Law, 7<sup>th</sup> ed., Routledge, London, 2003, p. 327, and Thurer Daniel, Self-Determination, in R. Bernhardt (ed.) Encyclopedia of Public International Law, Volume IV, North Holland, [2000], p. 366.

<sup>29</sup> Gayim Essau, 'The Principle of self-Determination: A Study of its Historical and Contemporary Legal Education, Norwegian Institute of Human Rights', (Publication No. 5, Oslo, 1990), p. 27-28.

<sup>30</sup> Crawford James, 'The Right of Self-Determination in International Law: Its Development and Future, in People's Rights, Alston Philip (ed.), Academy of European Law, European University Institute', (Oxford University Press, 2002), p. 17.

2. All peoples may for their own ends freely dispose of their natural wealth and resources without prejudices to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.
3. The state parties to the present Covenant, including those having responsibility for the administration of non-self-governing and trust territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

This process of entrenching the principle into the two cardinal instruments on human rights, articulated self-determination as a fundamental human right that is necessary for human existence.<sup>31</sup>

It has been mentioned above that the two instruments on human rights as adopted by the United Nations did express word for word the language of the Resolution 1514 which dwelt on the principle of self-determination. By virtue of this, the two international covenants stretched beyond the colonial context to assert that self-determination is equally a civil and political right as well as an economic, social and cultural right. Its inclusion in the separate untitled Part 1 of each covenant also suggests that the principle is of great significance in the global polity. Thus, a simplistic interpretation of article 1 of the two international human rights covenants provide the hint that the principle goes beyond colonial cases. The phrase '*all people's*' as used in the instruments makes clear the intention of the principle as having a general connotation. A similar provision in paragraph 2 dealing with permanent sovereignty over natural resources illustrates the general context in which paragraph 1 applies, for no one has ever suggested that the principle of permanent sovereignty over natural resources is limited to colonial territories.<sup>32</sup>

## 5. Peace Agreements as a vital component of procedure for Self-Determination

Having situated self-determination within the context of human rights as shown in several international law documents, it is cogent to attempt a review of instances of secession which may form the basis of a prescription of procedure for implementation of the right of self-determination. The case of South Sudan and Kosovo presents unique experiences that could represent a model of procedure.

### *The case of South Sudan*

There were internal conflicts in Sudan at the time which culminated into an elaborate civil war that sprouted international concern. The yearning for self-determination manifested at different levels for different parties in the conflict. Nevertheless, in the end South Sudanese self-determination was not only at the fore but was amply recognized. The country submitted to a referendum the context of which was established in the 2002 Machakos Protocol signed between the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) and enshrined in the 2005 Comprehensive Peace

<sup>31</sup> Thurer Daniel, Self-Determination, in R. Bernhardt (ed.) Encyclopedia of Public International Law, Volume IV, North Holland, 2000, p. 366.

<sup>32</sup> Crawford James, '*The Right of Self-Determination in International Law: Its Development and Future, in People's Rights, Alston Philip (ed.), Academy of European Law, European University Institute*', (Oxford University Press, 2002), p. 27.



Agreement (CPA). The CPA was essentially a product of extensive negotiations and agreement on several commitments designed to foster the unity of Sudan. Yet on 7 February 2011, the South Sudan Referendum Commission announced that the people of South Sudan had overwhelmingly voted in favor of independence in a referendum to exercise their right to self-determination.<sup>33</sup> The importance of the right of self-determination in the CPA was overwhelmingly visible as its collapse would have resulted in a return to armed conflict that had sustained an intermittent civil war from independence in 1956 to the conclusion of the CPA in 2005.

The argument herein takes on the position that the CPA contains obligations that are binding under international law. The reason for making the analysis is to see how agreements can form part of the procedure for self-determination. It is necessary to extrapolate on the position of international law concerning peace agreements because agreements are apparently essential to resolutions for unity or disintegration of a nation. First a Permanent Court of Arbitration (PCA) panel in 2009 held that the CPA is not a treaty under the Vienna Convention on the Law of Treaties.<sup>34</sup> The panel may have relied on an implicit but incorrect assumption that peace agreements, such as the CPA, do not usually give rise to any binding international obligations. The legal status of peace agreements is often unclear; as such instruments do not perfectly synchronize with rules on treaties.

The term 'peace agreement' does not have any particular legal definition and meaning. Nevertheless, in a descriptive sense, the term refers to a formalized legal agreement between two or more hostile parties- either between two states or a state and an armed belligerent group- that formally ends a war or armed conflict and sets forth terms that all parties are obliged to obey in the future.<sup>35</sup> International law is said to play two fundamental roles in peace agreements. The first is to the extent that peace agreements translate into legal documents which creates a basis for implementation under the law. The second perspective to the role of international law in peace agreements is in the area of regulation and introduction of standards in the agreement such as human rights, the right to self-determination and the use of force by peacekeepers.<sup>36</sup> Basically the challenge of construing peace agreements as treaties stems from the nature of actors in such agreement which is reasoned not to be in consonance with the stipulations of the Vienna Convention. For instance, the Abyei Arbitration Panel ruled that the CPA was not a treaty stating that the CPA was rather an agreement between the government of a sovereign

<sup>33</sup> South Sudan backs independence-results, BBC News Africa (7 February 2011) <http://www.bbc.co.uk/news/world-africa-12379431>. It was reported that 98.83 percent of voters backed independence for the South.

<sup>34</sup> Government of Sudan v the Sudan People's Liberation Movement/Army, Final Award at para 427 (Permanent Court of Arbitration 2009), available at [http://www.pca-cpa.org/upload/files\\_Abyei%20Final%20Award.pdf](http://www.pca-cpa.org/upload/files_Abyei%20Final%20Award.pdf).

<sup>35</sup> L Vinjamuri and AP Boesenecker, 'Accountability and Peace Agreements: Mapping Trends from 1980 to 2006, Geneva, Centre for Humanitarian Dialogue' (2007) available at <http://www.hdcentre.org/publications/accountability-and-peace-agreements-mapping-trends-1980-2006>. Accessed 12/12/2024.

<sup>36</sup> E Thomas, 'Against the Gathering Storm: Securing Sudan's Comprehensive Peace Agreement' Chatam House (2009) 6, available at [http://www.chathamhouse.org.uk/files/12941\\_0109sudan\\_r.pdf](http://www.chathamhouse.org.uk/files/12941_0109sudan_r.pdf). The CPA includes the following: The Machakos Protocol (or chapter 1) (July 2002) on broad principles of government and governance; The Protocol on power sharing (or chapter ii), (May 2004); The Agreement on Wealth Sharing (or chapter iii) (January 2004); The Protocol on the Resolution of the Conflict in Abyei Area (or Chapter iv) (May 2004); The Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States (or Chapter v) (May 2004); The Agreement on security and cease arrangements (or Chapter vi) (25 September 2003); The Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices (or Annexure 1) (October 2004); The Implementation Modalities and Global Implementation Matrix and Appendices (or Annexure ii) (32 December 2004).

state, on the one hand, and a political movement on the other hand. The arbitral panel focused on the status of the parties and as Bell submits;

*Despite appearing to be legal agreements, substantive peace agreements are difficult to place within existing international legal categories as positively understood. Such classification is hampered by the limitations of the categories, especially their unsuitability with regard to accommodating the hybrid subject matter of peace agreements and their mix of state and non-state signatories.*<sup>37</sup>

The above view by Bell instigates the assumption that peace agreements do not conform with the Vienna Convention on the Law of Treaties (VCLT) which equally give rise to the presumption that peace agreements cannot be binding under international law. Yet a cursory view of the VCLT and the CPA, suggests that there are various reasons that this assumption could be challenged. The VCLT defines a 'treaty' as 'an international agreement concluded between states' but in the draft of the articles that led to the VCLT definition of a treaty, the International Law Commission defined a treaty as 'agreement concluded between two or more states or other subjects of international law.'<sup>38</sup> The issue nonetheless lies in the fact that the convention stipulates that agreements which fall outside the VCLT definition of a treaty shall be regulated by customary international law. However, the convention did not resolve legal consequences for agreements which fall outside its scope. Yet emphasis is on other subjects of international law. More so Article 3 of the convention did not disparage other forms of agreement where it stated that the fact that the present convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect the legal force of such agreements; the application to them of any of the rules set forth in the present convention to which they would be subject under international law independently of the convention and the application of the convention to the relations of states as between themselves under international agreements to which other subjects of international law are also parties. In a wider scope, the term other subjects of international law may exist within the gaps created by the convention. More so the term 'international agreement' does not have a precise definition under the convention to strictly mean 'treaties' and may be interpreted to mean an agreement between a body and a state. In this regard, the CPA should be considered through this prism of an 'international agreement' rather than as a treaty. After all back in the 1950's during the development of the VCLT, it was recognized that non-traditional subjects of international law could enter into international agreements. There are historical examples, for instance, the colonial territories of New Zealand, Australia, India, South Africa and Canada, which are signatories to the Treaty of Versailles and the Kellogg-Briand Pact.<sup>39</sup> Those territories benefitted from the rights encapsulated in those agreements. Further, various state commentaries on the draft ILC Articles on the Law of Treaties are instructive for demonstrating the openness to other subjects of international law reaching agreement that were binding in nature.<sup>40</sup>

<sup>37</sup> C Bell, 'Peace Agreements: Their Nature and Legal Status' [2006] 100 *AJIL* 2, 373, 379-381, 395; and Bell (n 5) 127-174.

<sup>38</sup> Year Book of the International Law Commission, 1962 Vol II, 161.

<sup>39</sup> Treaty providing for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 94 LNTS 57; UKTS (1929) 29 206.

<sup>40</sup> International Law Commission, Analytical Guide, Law of Treatise, Plenary discussions under 'H Reports of the International Law Commission', available at [http://untreaty.un.org/ilc/guide/1\\_1.htm](http://untreaty.un.org/ilc/guide/1_1.htm). Accessed 5/12/2024

Another point to the eligibility of non-subjects of international law concluding agreements is the United Kingdom's position in the UN Sixth Committee debate on the ILC draft articles. The United Kingdom commented that *'it observes that many states and territories exist which possess less than full sovereignty but which have, in certain cases, enabled themselves to conclude treaties with foreign states by treaty instruments and similar means'*...<sup>41</sup> In the same UN Sixth Committee debate, the United States recognized that entities on the verge of statehood must be able to enter into binding international agreements.<sup>42</sup>

Since the time of the debate, the matter concerning non-state actors and international organizations concluding agreements with states with binding effect is much clearer. The Vienna convention on the Law of Treaty between States and International Organizations concluded in 1986 notwithstanding, current practice makes it clear that today international organizations are subject of international law. As such the vagueness of the term 'other subjects of international law' in the VCLT may have been cured. As Bell comments:

*"...the international community has clearly manifested a desire to accept the parties to these and similar agreements as capable of bonding the communities in whose name they enter into political settlements. Even though these parties are not states and are not subjects of international law in the traditional sense, the international community treats their agreements as the legal equivalent of treaties"*.<sup>43</sup>

Thus, the CPA was of an international legal character and bound the Sudan and its Southern component. It was crucial to the peace of Sudan and the secession of South Sudan. The Sudan model therefore provides an example of how internal secession can be undertaken. It characteristically outlines the need for an agreement between the state and the seceding entity which should underscore areas that may result to further conflict if not settled. As such a peace agreement that promises a right of self-determination, which fits as a right under international law and concluded between a state and an entity, should by its nature lead to binding obligations.

### *The Secession of Kosovo*

Kosovo became an independent territory of Serbia within the Socialist Federal Republic of Yugoslavia after World War II. There was a quest for diplomatic negotiations between Kosovo and Serbia after a prolonged armed struggle. There was the Rambouillet meeting held in France in 1999 which was attended by representatives of Kosovo, Serbia, the United States and some other European countries. The peace and independence talks lasted for about a month, with each side presenting their case and suggestions to end the conflict. The outcome of the meeting was a pact with majority support that offered independence and autonomy to Kosovo.

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<sup>41</sup> International Law Commission, Special Rapporteur on the Law of Treaties, 'Fourth Report on the Law of Treaties' (19 March, 25 March and 17 June 1965) UN Doc A/CN.4/177, 17 (by Sir Humphrey Waldock), [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_177.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_177.pdf). Accessed 5/12/2024

<sup>42</sup> See the International Law Commission Reports, Ibid.

<sup>43</sup> D Whippman, 'Treaty-Based Intervention: Who CAN SAY No?' [1995] 62 *U Chi L Rev* 607, 641.

There was a joint collaboration between Kosovo and the United Nations as well as the European Union and the United States of America to establish a plan for the independence of Kosovo. It is significant to note that Russia opposed the plan for Kosovo's independence in so far as Serbia had not agreed to cede Kosovo. Nevertheless, core institutions were set up for Kosovo's constitutional framework. The International Court of Justice responded that Kosovo's declaration of independence did not violate the general international law and thus legalized the secession of Kosovo.

What could be gleaned from the above instances is that a pattern for negotiation and agreement between a parent and seceding entity has worked in the past and the United Nations will generally rely on established agreements to foster secession as a pragmatic response to conflict resolution.

## 6. Statehood and the Principle of Recognition

The implementation of an agreement between an entity and a parent state will mean that a state has emerged. However, the Montevideo Convention on Rights and Duties of States provide a definition for a state: 'the state as a person of international law should possess the following qualifications: a permanent population; a defined territory; a government and capacity to enter into relations with other states.'<sup>44</sup> An entity that breaks out of a state and meets the Montevideo criteria may have attained statehood by international law standard. Such an entity upon attaining statehood may have become a territory of its own. After all the 'concept of territory is defined by geographical areas separated by borderlines from other areas and united under a common legal system.'<sup>45</sup> One may argue that a seceding entity may lack a popular government and therefore fails to meet the international law requirement of statehood. However, it has been submitted that the mere existence of a government does not suffice if it does not have effective control over territory and population.<sup>46</sup> Musgrave defines the requirement of control as exclusive control over territory.<sup>47</sup> However, the requirement of control over territory is not strictly applied in the sense that 'a state does not cease to exist when it is temporarily deprived of an effective government'<sup>48</sup> which may occur during a civil war. More so, the decision to secede which usually follows a process of elections or referendum is a permanent and serious decision and cannot be considered to be temporary. Thus, the requirement of control is strictly applied when a part of a population of a state decides to form a new state.

A further requirement for statehood in article 1 of the Montevideo Convention is connected with the legal concept of recognition by other states. The capacity to enter into relations with other states depends on whether or not the new state is recognized. However, the fact of recognition is often ignored<sup>49</sup> as it is reasoned that the political existence of the state is independent of recognition by the other states.<sup>50</sup> Consequently, where an entity attains statehood without recognition, the implication is that a new state comes into existence even before recognition. Thus, recognition simply implies the willingness of existing states to enter into relations with the new state as an equal member of the international

<sup>44</sup> Montevideo Convention on the Rights and Duties of States (1933, Montevideo), entered into force in 1934, article 1.

<sup>45</sup> Thomas D. Musgrave, *'Self-determination and National Minorities'*, (Oxford: Clarendon Press, 1997), p. 180.

<sup>46</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Seventh Revised Edition (Routledge, 1997), p. 77.

<sup>47</sup> Ibid n. 682, p. 180.

<sup>48</sup> Peter Malanczuk, *ibid*, n. 683, p. 77.

<sup>49</sup> Ibid, n. 683, p. 79.

<sup>50</sup> Article 3 of the Montevideo Convention.

community. Granting formal recognition to a state is a unilateral act left to the political discretion of states.<sup>51</sup> As such the requirement for recognition must not subsist to scuttle the avowed right of self-determination. What is important is that an entity show cooperation with existing states in a way that assures the survival of that break away entity. Essentially recognition of a new state- which often occurs regardless of the mode of emergence- can be viewed as a key requirement for statehood after secession.

## 7. Proposed Legal Procedure for Self-Determination

Having acknowledged that self-determination includes the rights of a people to emerge into statehood from an existing state, it is essential-in order to prescribe a legal procedure- to reflect on the effect of agreements as well as international recognition on an entity desirous of attaining statehood. It has been noted that the Sudan concluded an agreement which essentially fostered secession of the Southern Sudan and equally established some measure of peace in the polity. The importance of such international agreements cannot be over emphasized. It is submitted that it should be considered pertinent for a seceding entity to propose an agreement for disintegration in which all matters that may result to reluctance by the parent state to permit secession will be resolved. This paper has shown that peace agreements are legal instruments which can be enforced under international law. It is submitted that the rationale of the argument is that an agreement between a seceding entity -which meets the criteria for statehood- and a parent state is capable of being construed as a treaty. Treaties are instruments of international law and thus should be enforceable under the law. It is equally important to stress that an entity that seeks to gain state recognition by exercising its rights to self-determination should nonetheless meet a couple of formal criteria set down by the Montevideo Convention, particularly as it relates to the capacity of self-governance.

Thus, states may not recognize an entity where it is deemed incapable of governing itself by universally acceptable and democratic standards. After all, it can be observed that the capacity of self-government equally affects the ability of a state to enter into international relations with other states. It is therefore proposed that the true test for secession should be recognition of the ability of a newly formed state to govern itself which invariably portends its capacity to enter into international relations for the welfare of the state.

The exercise of the right of self-determination by a people therefore should be in substantial conformity with the Montevideo convention and recognition granted to consolidate the status of the state and foster its relations with other states. As a matter of procedure, it should be immaterial whether a substantial number of existing states recognize the new state. To set majority recognition as a yardstick will be to politicize the process of recognition. It is submitted that recognition be limited to such number of states that may be reasonably considered essential for the welfare of the newly formed state. Thus, a declaration by authorities of the seceding entity is required to be predicated on the ability of the entity to govern itself. Any state from the international community may express its recognition of the entity provided that such recognition is hinged on a visible and assured capacity of the seceding entity to govern itself. Once assured that the criteria for self-government have been met, a new state is formed. The paramount consideration for secession therefore is the ability to govern which is essential to the survival of the human population of that entity. A practical way to ascertain that capacity of self-rule is

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<sup>51</sup> Ibid, n. 683, p. 85.



by conducting a referendum<sup>52</sup> which essentially elucidates the willingness of a people to secede and their loyalty to the interim authorities conducting the secession.

## 7. Conclusion and Recommendation

It has been shown that the vague expressions of the UN Charter on self-determination cannot displace a right considered fundamental and inalienable such as the right of self-determination. More so, an analysis of the Charter and other international law documents revealed that the true intention of the drafters of the provisions on self-determination was for the right to be applicable to all peoples and not limited to people under colonial rule. This means that oppressed people or an entity may determine their political, economic and social fate in so far as they come within the purview of a people and criteria for statehood as stipulated by the Montevideo Convention. In addition, it was considered necessary-in order to avert conflict- that an entity enter into an agreement with the parent state for resolution of issues which nonetheless could hinder secession. Indeed, such agreement culminates into a treaty and can then form the basis for implementation by the UN.

Thus, it is recommended that the first step towards exercising the right to external self-determination by an entity will be to propose a peace agreement with the parent state in which all controversial matters will be resolved. Thereafter the entity must be in substantial conformity with the Montevideo Convention in the area of characteristics of statehood and particularly the capacity for self-rule. The entity may then make a declaration of its statehood and seek the recognition of such number of states as may be necessary for it to survive if it stands on its own. Thus, it is submitted that the above should represent the way in which a state is to emerge by an act of secession. This procedure will strengthen the principle of self-determination as an inalienable human right that accrues to all people.

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<sup>52</sup> Referendum is a general vote by the electorate on a single political question which has been referred to them for a direct decision. See Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/referendum>. accessed 16/12/2024.