



International law and the self-determination of South Sudan

Africa has long observed taboos against changing the national boundaries given newly independent countries during decolonisation. Whether or not the boundaries were optimal, African leaders thought that trying to rationalise them risked continent-wide chaos. Ironically, there have been few African border conflicts since independence, but the number of internal conflicts has been high ... The debate over Sudan's future, therefore, clearly could affect all of Africa.¹

INTRODUCTION

On 9 July 2011 South Sudan became the newest independent state in Africa. Given the importance that is accorded to the inviolability of colonial borders in African international relations, as aptly summarised in the quote above, the process of the self-determination of South Sudan has raised questions on discourse about and the practice of self-determination under general international law and, significantly, African regional law. The intention of this paper is to investigate these issues and examine the ways in which South Sudan's assertion of its right to self-determination may shape African regional law vis-à-vis self-determination and the principle of *uti possidetis*. Under this principle, African states have committed themselves to scrupulously respecting and upholding the colonial borders inherited at independence.

This paper identifies at least five forms that the exercise of self-determination may take under recognised international and African law. This assists in establishing the basis for South Sudan's assertion of the right to self-determination and the importance and implications of this for the Sudan,

the region and the rest of Africa. For clarity, the paper also traces the historical trajectory of southern Sudan's quest for self-determination. Importantly, it is shown how South Sudan's assertion of the right to self-determination fits into emerging normative developments in the African Union (AU) and how it helps to identify the limits of state-centric principles of territorial integrity and *uti possidetis vis-à-vis* the fundamental right of self-determination. The overall analysis is particularly valuable for making an informed evaluation of similar claims for self-determination in Africa, including, most importantly, the long-standing quest of Somaliland for recognition as an independent state, albeit in the end many of these issues depend more on politics than just law.

SELF-DETERMINATION UNDER INTERNATIONAL AND AFRICAN LAW

The general international law perspective

To put the discussion in its proper legal context, it is necessary to outline the status of the issue of self-determination under international law and African law. The Charter of the United Nations Organisation² (UN Charter) is the first international legal instrument to enunciate self-determination as a principle of international law.³ Previously, at the time of the League of Nations, self-determination only had the status of a political idea, or 'an imperative principle of action'.⁴

The two instances in which the UN Charter makes reference to this principle are both in the context of developing 'friendly relations among nations'.⁵ Rosalyn Higgins maintains that the principle of self-determination of peoples as referred to in the UN Charter 'seems to be

the rights of the peoples of one state to be protected from interference by other states or governments'.⁶ This implies that the term 'peoples' in the UN Charter signifies the entire populations of the member states of the UN.

The opening words of the UN Charter, 'We the peoples of the United Nations', offer further support for this concept of the term *peoples*. It is evident from this that the term *nations* refers to states and hence *peoples* to those having their own states.⁷ Indeed, this interpretation is also in line with the founding principles of the UN Charter, particularly the principles of the territorial integrity of states⁸ and non-intervention in domestic affairs.⁹ The first and fully accepted understanding of self-determination is thus a reference to the freedom of the population of a sovereign state to determine its internal political order without external interference.

Another understanding of self-determination emerged in the context of the process of decolonisation during the 1960s. In this instance, self-determination evolved from a mere principle of international law into a right of peoples. This is enunciated in the 1960 UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples. Article 2 of this declaration states 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.'¹⁰ Notably the right was seen as applying to peoples under colonial rule, alien subjugation, domination or exploitation, and was thus not universal.¹¹ It established in international law that colonial people or people under alien subjugation, domination or exploitation are entitled to the right to self-determination in the form of independence.

A further refinement took place with the enunciation of the right to self-determination under the 1970 UN General Assembly Declaration on Friendly Relations,¹² which introduces the requirement that states need be representative of all the people in their territories irrespective of 'race, creed or colour'.¹³ This expanded the meaning of self-determination to include a process that allows all sections of the people of a state to be represented in the political process, or to freely participate therein on the basis of equality.

Following the inclusion of the right to self-determination in the corpus of international human rights law in 1960, the stage was set for further evolution. The most important development was contained in 1966 in two UN Covenants, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These covenants accorded the right to self-determination a prime place as common Article 1.¹⁴ Within this framework, probably the most important development was the trend towards recognising and articulating internal self-determination by

virtue of embracing a variety of institutional arrangements and entitlements regulating the relationship between states and sub-national groups.¹⁵ The implication of this is that a section of the population of a state, such as people inhabiting a particular territory or administrative entity sharing the same culture or language, are entitled to some form of autonomous or self-governance status to be negotiated between them and the authorities of the state in which they live.

Many international law scholars advance the view that self-determination through secession can also be defended under international law where a section of the population of a state is subjected to serious violations of human rights and state authorities have denied the population free exercise to internal self-determination, although its status in the practice of states remains controversial and divisive.¹⁶ In those cases secession is seen as a means for redressing the violence and achieving peace.¹⁷ As will be seen below, the recognition of the right of the people of South Sudan to self-determination can indeed be regarded as an example of such a case.¹⁸ Accordingly, secession as a means to end violence and the subjugation of a section of a state's population to systematic discrimination can be regarded as another mechanism by which self-determination and territorial integrity are mediated.¹⁹

The position of international law on the subject is summed up by the Supreme Court of Canada in the following terms:

In summary, the international law [of the] right to self-determination only generates, at best, a right to external self-determination 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 the government to pursue their political, economic, social and cultural development. In all three situations the people in question are entitled to [the] right to external self-determination because they have been denied the ability to exert internally their right to self-determination.²⁰

African regional law

In Africa the articulation of claims for the right to self-determination is closely linked to the decolonisation process. The Charter of the Organisation of African Unity (OAU Charter)²¹ made an indirect reference to the right of peoples to self-determination in its preamble and principles. In paragraph one of the preamble to the OAU Charter, the Heads of African State and Governments expressed their conviction that 'it is the inalienable right of *all people* to control their own destiny'. In Article 3 of the OAU Charter they further affirmed their adherence to the principle of 'absolute dedication to the total emancipation of African territories which are still dependent'. 'People'

in the first instance was a reference to African peoples who were under colonial domination or those who were systematically suppressed by the practice of apartheid. Judge Fatsah Ouguergouz observed that 'the problems surrounding the right of African peoples to self-determination are thus clearly defined and cannot be stated in terms other than those of "official" decolonisation'.²² From this perspective one can say that the conceptualisation of the term 'people' in the African context has been largely confined to the fight against colonialism and apartheid.²³

There was little interest on the part of African states to allow the application of the right to self-determination to the various groups constituting individual states.²⁴ While affirming the right of peoples under colonial rule or alien domination, the OAU Charter defended the sovereignty and territorial integrity of the state.²⁵ OAU member states expressed their commitment to adherence to the principle of '[r]espect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence'.²⁶ Indeed, immediately after the establishment of the OAU, African states accepted by resolution the application of the principle of *uti possidetis* to affirm the sanctity of Africa's colonially-defined borders. The doctrine of *uti possidetis* was provided for in the 1964 OAU Declaration of Assembly of Heads of State and Government, otherwise known as the Cairo Declaration.²⁷ Since that time the inviolability of colonial borders has been the cardinal principle on which African international relations has been built.

At the level of the OAU, self-determination was thus seen to mean only one of two things. First, the freedom of the totality of the people of a state to pursue its own ends without external interference. In the African context, this was not regarded as being any different from the right of the state to independent existence, as proclaimed in the OAU Charter. It was interpreted as imposing an obligation on the OAU and its member states to refrain from actions that threatened the territorial integrity of a state or its independent existence. Despite their scrupulous adherence to the principle of *uti possidetis*, African governments in practice pursued a policy of mutual interference in each other's affairs, most notably by sponsoring and giving safe haven to rebel movements and dissident groups in neighbouring countries.

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

The adoption of the African Charter on Human and Peoples' Rights²⁸ as the founding human rights instrument in Africa ushered in a new phase creating the legal basis for the evolution of the principle of self-determination in Africa beyond decolonisation. Henceforth it would be possible to give the right of self-determination a dynamic and robust meaning capable of allowing different forms of applications to different sections of society within the framework of independent African states.²⁹

Indeed, this potential was realised through the jurisprudence developed by the African Commission on Human and Peoples Rights, the body charged with the task of monitoring the promotion and protection of rights under the African Charter. In the first case on peoples' rights to come before it, the *Congrès du peuple katangais v. Zaire*,³⁰ the complainant, the president of the Katangese Peoples' Congress, requested the African Commission to recognise, among other things, the independence of Katanga by virtue of Article 20(1) of the African Charter.³¹

Three points should be noted. First, as the Katangese are only a part of the population of the then Zaire, the

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case brought into sharp focus the politically sensitive question of whether peoples' rights apply separately to different sections of society. Second, the Katangese identify themselves as a people and are therefore entitled to the rights of peoples as stipulated in the African Charter. These include the right to self-determination, as defined in Article 20, an issue the African Commission did not contest. Finally, Katanga was a province of Zaire that consisted of different ethnic groups, including the Luba and the Kongo. This raised an important question about when the inhabitants of a particular territory of a state may, notwithstanding their different ethnic composition, qualify to be a people for the purpose of peoples' rights under the African Charter.

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

the population of a state, i.e. the Katangese, which the commission considered to be the pertinent issue in the communication. The commission's analysis and in particular the distinction between the self-determination of *Zaireoise* and the self-determination of Katangese affirmed self-determination as a right of peoples. This largely addresses the fear that peoples' rights would collapse into the sovereign rights of states.³² The right to self-determination, within the framework of the African Charter, is accordingly a right of either the whole people of a state or a section of the population of a state. It is therefore a right that imposes obligations on African states, which are bound to facilitate ways for allowing the exercise of that right by their people/s. Accordingly, the right to self-determination can be invoked either by the people of a state as a whole, or by a fraction of a state's people. Despite its outcome, which denied the Katangese the right to independence, the entertainment of the Katangese case by the African Commission was in itself an affirmation of the recognition of independence as a constituent element of the right to self-determination under Article 20 of the African Charter.

It is clear that while the first formulation of the right of peoples to self-determination coheres with the principles of sovereignty and territorial integrity, as well as national unity, the second one, as the African Commission implicitly recognised, raises the question of whether and how the right of peoples to self-determination can coexist with those principles.³³ According to the commission, although the right to self-determination may be exercised in different ways, including independence, it must be 'fully cognisant of other recognised principles such as sovereignty and territorial integrity'.³⁴ In affirming that territorial integrity in principle takes priority over the right to self-determination, the commission declared in the instant case that it was 'obliged to uphold the sovereignty and territorial integrity of Zaire'.³⁵ Consequently, the commission held that in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question, and in the absence of evidence that the people of Katanga were denied the right to participate in government as guaranteed by Article 13 of the African Charter, Katanga was obliged to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of Zaire.³⁶

Despite this finding, the decision of the African Commission nevertheless leaves the possibility of independence wide open. For one thing, independence was listed as one of the ways in which self-determination could be exercised. But the commission did not expound further on the circumstances under which a people could exercise self-determination through independence. The only indication the commission gave was that all the ways of exercising self-determination had to be in conformity

with the principles of sovereignty and territorial integrity.

The question this finding invites is under what circumstances an exercise of self-determination by a people through independence will be in conformity with the principle of sovereignty and territorial integrity of states. Arguably, outside of the colonial context, as in the case of Western Sahara, the only other instance in Africa where independence has been achieved through a referendum and as a means to redress historical and continuing injustices and violations, is South Sudan.³⁷

The formulation of the paragraph quoted above clearly suggests that the requirements in respect of territorial integrity and the sovereignty of states are not absolute. It indicates that the commission might have accepted Katanga's claim for independence had there been concrete evidence of human rights violations that called the integrity of Zaire into question, *and* had Katanga been denied the right of participation under Article 13 of the African Charter. According to this reasoning, a minority within a state can legitimately demand and successfully assert its right to self-determination through independence should it be in a position to show serious human rights violations and denial of its right to participation in the public affairs and administration of the country on an equal basis with others. This clearly links self-determination through independence to the internal democratic processes of states and to the extent to which members of a particular group, or residents of a particular region, are able to enjoy the rights guaranteed under the African Charter on an equal basis with others.

This can be taken as a regional expression of a similar position of international law on self-determination. In the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States,³⁸ the right of *all peoples* to self-determination was declared to be one of the principles of international law. As with the decision of the African Commission, the declaration qualifies this right with the principles of territorial integrity and the political unity of states, as follows:

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a Government representing the whole people belonging to the territory without distinction as to race, creed or colour* ³⁹ (emphasis author's own).

This same formulation is repeated in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993.⁴⁰ After reaffirming the right of all

peoples to self-determination, this declaration links the qualification of respect for territorial integrity and national unity of states to 'States ... possessed of a Government representing the whole people belonging to the territory without distinction of any kind'.⁴¹ As in the decision of the African Commission, both the 1970 UN Declaration and the 1993 Vienna Declaration indicate that where a state does not possess a representative government and denies certain groups of society their democratic rights on grounds of their membership of a particular ethnic group, the principles of territorial integrity and unity of a state would not in that instance prevent such a group from legitimately asserting the right to self-determination, including through independence.⁴²

The formulation by the African Commission of the relationship between self-determination and the territorial integrity of states does, however, seem different from that in the 1970 UN Declaration and the Vienna Declaration in one significant respect. Whereas in the latter two declarations representative government is the general condition for the territorial integrity of states, the African Commission's decision adds the further requirement of a 'violation of human rights that calls the integrity of a state into question', as indicated by the conjunction 'and'. Clearly the threshold for lifting the requirement of respect for territorial integrity of states as determined in the African Commission's decision is higher than in the two international instruments. Not only does there have to be denial of the right to public participation (exclusion from the political processes on the basis of ethnicity or region or any similar ground) and violation of other human rights, but in addition the violation of such human rights should be of such a nature that the integrity of the state is brought into question.⁴³

With respect to external self-determination (secession) or independence, other than people under classical colonial rule, foreign subjugation or domination and people who have suffered violations of such a serious nature that separation is the only solution, international law and practice also accepts certain other situations. The first is if secession is based on a decision made by the entire population of the mother state, or is undertaken with the consent of the mother state.⁴⁴ An example of such a case in the context of Africa is Eritrea. Contrary to conventional wisdom, the legality of Eritrea's independence from Ethiopia first and foremost arises from the recognition of its independence by the authorities of the mother state, Ethiopia. As such it has not created any new legal basis for secession that may be regarded as a precedent for other situations in Africa. Eritrea's secession also did not break new ground on account of the fact that it is merely an affirmation of self-determination applicable to former European colonial territories.⁴⁵

Another case would be where a section of the people of a state inhabiting a particular region or territory secede by virtue of the application of the national law of the mother state. This possibility is provided for under the 1994 Federal Constitution of Ethiopia. Article 39 of the Constitution states that 'nations, nationalities, and peoples have the right to full measure of self-determination, including and up to secession'. Accordingly, if any of the constituent ethnic communities inhabiting a contiguous territory freely decide to separate from the current Ethiopian federation and do so in accordance with the procedures laid down in the constitution, it will be legitimate and acceptable under international law.

It is notable from the foregoing exposition of general international law, and the law and practice of Africa that, outside of the colonial context, the exercise of self-determination through independence or secession *per se* is neither legal nor illegal. In other words, the law is silent on the subject. Nevertheless, both general international law and African regional law indicate that such an exercise of self-determination is subject to considerations of the territorial integrity of states and the principle of *uti possidetis*. These may be overridden only as a measure of last resort in cases of serious human rights violations of a nature that call into question the integrity of a state, or where secession takes place with the agreement of the mother state.

THE SELF-DETERMINATION OF SOUTH SUDAN

The struggle of South Sudan for self-determination has a history longer than any other such struggle in Africa. It is rooted in the Sudan's pre-colonial, colonial and post-colonial political and socio-economic antecedents.⁴⁶ The most recent origins lie in the independence of Sudan from Anglo-Egyptian rule, and southern resistance to the manner in which they were united with the north and placed under northern domination through both deceit and force.

Like many other African countries, it was only after the establishment of British colonial rule in late 19th century that the Sudan region came into existence as a political entity. Prior to this time, north Sudan with its riverine heartland as its main locus of authority experienced distinct historical, political and cultural development in which the Arab element, originating in migration and settlement, achieved dominance. At this time, the main contact between the northern and southern regions involved invasion of the south by Arab adventurers, first for the purpose of collecting ivory and later for slave-raiding. The establishment of the Turkiya regime (1821–1885), which claimed authority over the whole of the Sudan although it occupied no part of the south until the 1870s,

and the Mahdiya regime (1895–1898) reinforced the south's relationship to the north as a place that northern rulers and traders raided to collect ivory and to capture slaves.⁴⁷

This history of invasion, slave-raiding and natural resources plundering in the south formed the pre-colonial historical basis for the Sudan's north-south division and the quest for self-determination by the southerners. The division also had racial and cultural dimensions. Because of Arab migration and the policies of the Turkiya, north Sudan identifies with Arab culture and Islam. However, the south is very different. According to Dunstan Wai, '[a]lthough the peoples of Southern Sudan belong to various ethnic and tribal groups, they are all racially akin to tropical Africa and identify culturally with Africanism ... Their religion is indigenous to Africa while most of the educated elites are Christians.'⁴⁸

Although the establishment of British colonial rule, more accurately Anglo-Egyptian rule, in 1898 ended the assault on the southern people, it reinforced the gulf between the north and the south as different policy approaches were pursued vis-à-vis the two regions.⁴⁹ Missionary education was encouraged in the south and the southern Sudan was declared off limits to north Sudanese under the Passports and Permits Ordinance Act of 1922. The division was further reinforced by the adoption of the Southern Policy in 1930, which defined educational, socio-cultural, linguistic and administrative development for the south separately from the north. All Egyptian and northern Sudanese Muslim officers and troops were removed from the south, and were replaced by an Equatoria Corps, the 'Equats', which comprised only locally-recruited southern Sudanese under British officers. English was the language of command.⁵⁰

In terms of socio-economic development and participation in administration, colonial policy entrenched the marginalisation of the south. Almost all industrial projects and the predominant share of investment in infrastructure and development went to the northern Sudanese provinces and Kassala province in eastern Sudan. Political and educational institutions in the north received the greatest share of support. While the colonial administration facilitated the participation of northern Sudanese in administration, there was no such policy in the south.⁵¹

The subsequent reversal of the Southern Policy by the British in an effort to avoid the union of the Sudan and Egypt resulted in the union of the socio-economically and politically marginalised and underdeveloped south with the historically and politically dominant north. In the years leading up to the Sudan's independence in 1956, southern demands for safeguards against northern domination were dishonoured. 'This became clear,' wrote Mahmood Mamdani, 'as the key safeguards in the transitional process – the Sudanisation Committee, meant to create a national

civil service, and the Constitutional Committee, meant to create a national political framework – were subverted by this (the riverine Arab) elite.'⁵² With no southerners serving on the Civil Service Committee, all senior posts were allocated to those with experience, namely the northern Arab elites. Only six of 800 posts vacated by the British went to southerners. The Constitutional Committee's 46 members included just three southerners. The latter committee's refusal to discuss federalism, a demand of the southern members, led to the southern withdrawal from the committee.

Self-determination in the Sudan was thus applied in a way that accorded priority and supremacy to northern (Arab) nationalism with no regard for southern interests and aspirations. Accordingly, '[w]hereas [a riverine Muslim elite in the North] inherited the colonial state upon independence, [a missionary-educated Christian elite in the South] felt so cut off from access to the state that it took recourse to armed struggle'.⁵³ The breaking point came when northern officials demanded that southern troops be moved out of their southern bases to be replaced by northern troops. When soldiers in Torit refused to move to the north in August 1955, it resulted in a 'mutiny' that turned into a revolt, marking the first phase of the south's armed struggle in support of its demand for the right of self-determination.

The government in Khartoum responded with armed repression. Blaming the south's resistance on British colonial practices, it sought to counter the situation by implementing a homogenising nation-building process. However, nationalism and national integration were equated with Arabisation and Islamisation. The military government that came to power after the toppling of the Sudan's first prime minister, Ismail al-Azhari, declared that there must be 'a single language and a single religion for a single country'. Arabic became the official language for all government activities, including schooling, and Friday replaced Sunday as the official public holiday in the south. All religious gatherings outside churches were banned in 1961 and all foreign missionaries were expelled in 1962. The government sponsored the building of mosques and Islamic schools, and chiefs were coerced to convert to Islam.

In 1963 the soldiers who had been involved in the abortive revolt in 1955 and who had fled to neighbouring countries during the brutal armed repression of the revolt founded the first Anya-Nya guerrilla army and launched a series of coordinated attacks against government outposts in the south. The Anya-Nya struggle continued with increasing intensity through the first military government of General Ibrahim Aboud (1958–1964) and the second democratic period (1964–1969). This first civil war ended in 1972 with the signing of the Addis Ababa Agreement during the second military regime headed by

General Mohammed Numeiri. The agreement guaranteed southern Sudan regional self-government status within the Republic of Sudan. Self-government was established in south Sudan under Sudan's 1973 Constitution.

Despite administrative weaknesses and implementation problems,⁵⁴ self-governance went some distance in satisfying the quest of southerners for having a say in the management of their own affairs and self-determination. However, the southern government survived only until 1983, when the Numeiri government's Republican Order No. 1 (1983) reduced the status of southern Sudan to three weak and powerless administrative regions.

The second armed struggle started in the same year in opposition to the abrogation of the Addis Ababa Agreement, systematic discrimination practices, denial of equal rights and the imposition of sharia law on all of the Sudan.⁵⁵ This second war led to the death of close to two million southerners, the displacement of further millions of people and the destruction of the region's modest physical infrastructure.

Considering the repeated violations of democratic principles and agreements, as well as the long history of socio-economic, political and cultural oppression and marginalisation, it became clear that the conflict would only end upon acceptance of the south's claim to self-determination. This principle was fully accepted in 1994 when a Declaration of Principles was signed. Negotiated and supported by the Horn of Africa's Inter-Governmental Authority on Development (IGAD), the declaration paved the way for years of negotiations on a comprehensive peace agreement.

The signing of the Comprehensive Peace Agreement (CPA) in 2005, which created a democratic basis for sustainable peace, was a momentous development for the Sudan and indeed Africa, and brought to a conclusion one of Africa's longest civil wars. For the people who had endured two decades of war and for the Sudan as a whole the signing of the agreement was a huge achievement. However, the root causes of the north-south conflict would only be addressed if all the terms of the CPA were implemented fully. Understandably, therefore, the focus of much of the discussion on the CPA was on implementation processes and timelines.

With self-determination having evolved into a fundamental right and principle, its repeated violation mobilised the people of south Sudan into staging an armed struggle against the established system in the Sudan. As it inspired the armed struggle of the south, self-determination was also the foundation on which the CPA was built, and the relationship between the people of south Sudan on the one hand and the central government and north Sudan on the other hand has now been permanently redefined.

An important question that needs to be asked is what

the implications of the right to self-determination are for the main actors in the Sudan, for the peoples of the Sudan and South Sudan, for the sub-region and ultimately for the continent. This is important not only because of the novelty of the form that the application of the right to self-determination has been given under the CPA, but also the precedent it may set for the continent when addressing the internal conflicts that have become a dominant feature of the post-Cold War period.

It should be clear from this exposition on the struggle for self-determination by the people of South Sudan that in many ways it reflects the evolving conceptualisation and application, particularly outside the classical colonial context, of the right to self-determination. The new state of South Sudan manifests the application of self-determination in its evolved formulation in terms of both its history and struggle, as well as by the repeated failure of the government to respect a negotiated settlement. It represents a case of self-determination through independence that came about as a result of serious human rights violations and denial of the right to participate in public affairs and the running of the country on an equal basis. With the interim period having ended without 'making unity attractive to the South', the south Sudanese overwhelmingly voted to separate from the rest of the country in January 2011.

IMPLICATIONS BEYOND SUDAN

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

As noted above, the jurisprudence of the African Commission on Human and Peoples' Rights has developed a framework that, upon the fulfilment of certain conditions, recognises independence as a legally legitimate option. Given that southern Sudan suffered serious injustices at the hands of successive Sudanese governments, that its people were forced to raise arms in their own defence, that the region negotiated the Comprehensive Peace Agreement of 2005, and that the south entered into a transitional arrangement with the north to give unity a chance, it became the first test case for implementing

evolving African law vis-à-vis self-determination and the principle of territorial integrity.

The case of South Sudan clearly establishes that respect for the territorial integrity of African states and the principle of *uti possidetis* is no longer absolute and unconditional. Rather, where circumstances are of such a nature that the quest for self-determination by a section of a state's population can only be rectified by a redefinition of colonially drawn borders, the application of these principles will for the purposes of the law be suspended. This evolution in African regional law, as well as the support of African states for the independence of South Sudan, is also a manifestation of the normative shift from the concept of state security, which gives premium to sovereignty, territorial integrity and non-intervention, to human security, which under the Constitutive Act of the AU guarantees the right of the AU to suspend the principle of non-intervention and intervene in a member state in grave circumstances such as the committing of war crimes, genocide and crimes against humanity.

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

CONCLUSION

In this paper I have explored the vexing question of the right to self-determination in Africa with particular reference to developments under both general international law and African regional law regarding the tension between self-determination and the territorial integrity of states. Focusing on the case of South Sudan, which has come about as a result of a factual and legal situation that emerged from years of devastation from civil war and high-level peace efforts, the paper examined the various mechanisms available under international law for resolving the conflict between self-determination and the territorial integrity of states. Although this conflict has not been conclusively settled under international law, it was noted that scholarly writings and regional law recognise that the principle of territorial integrity of states is not absolute. Indeed, the case of South Sudan is illustrative of this recognition on the part of African states and potentially offers the first test case for applying these normative developments in practice. This applies to both internal and external self-determination.

Although its application to instances involving claims

for self-determination will vary from case to case, I have indicated that addressing these cases will not automatically be a matter of either self-determination or territorial integrity. In some cases the conflict could be resolved through the application of what the African Commission on Human and Peoples' Rights called 'a variant of self-determination' within the boundaries of the state. This could entail the negotiation of a particular form of internal self-determination to suit the specific circumstances of the case. This is the preferred option in both international law and African region law. In other cases, the conflict may be resolved by allowing a part of a state's population to determine its independence through a process that follows agreed procedures. The January 2011 referendum and the consequent secession by South Sudan is a clear example of such an instance.

Self-determination is not an event, but rather a continuous process. Neither South Sudan's referendum nor its declaration of independence on 9 July 2011 can fully encompass the right of southern Sudanese to self-determination. Although these constitute important elements of the exercise of this right, the full realisation of self-determination requires the provision of the necessary legal, institutional and political guarantees that enable the southern Sudanese to select freely a government of their choice, and that such a government is in a position to protect their personal security, consolidate peace and stability, and duly account for its activities and decisions. This government would also need to create the conditions that would enable citizens to utilise the resources of the country, rebuild the physical infrastructure, achieve sustainable and equitable socio-economic development, and provide social services over time. It is thus imperative that South Sudan undertakes an all-inclusive and genuinely participatory process of constitution-making to establish the legal and political framework and the human rights guarantees necessary for the citizens to pursue their right to self-determination on an ongoing basis.⁵⁶

Clearly, the achievement of independence by South Sudan marks the fulfilment of only one aspect of the long and hard struggle for self-determination by its people. If the experience of neighbouring Eritrea is anything to go by, what happens after independence in terms of satisfying the population's democratic and socio-economic needs (internal-self-determination) is as important, or perhaps even more important, than the exercise of the right to self-determination through independence. There is a clear need for the international community to increase its support to the people of South Sudan at this formative stage. Such support will help to ensure that the necessary conditions are created for the southern Sudanese to realise fully their right to self-determination.

NOTES

1. John R Bolton, Crisis Point Ahead, *The Washington Times*, 27 September 2010, <http://www.washingtontimes.com/news/2010/sep/27/crisis-point-dead-ahead> (accessed 29 September 2010).
2. See Charter of the United Nations of June 26, 1945, UNTS No. 993, 3, Articles 1(2) and 55. Its enunciation in this text is generally associated with the independence or freedom of a *people* from external domination or interference.
3. See A Cassese, *Self-determination of Peoples: a legal reappraisal*, Cambridge: Cambridge University Press, 1995, 19–33.
4. *Ibid.*, 26.
5. Article 1(2) of the UN Charter stipulates that one of the purposes of the UN is ‘... to develop friendly relations among nations based on the principle of equal rights and self-determination of peoples ...’. Similarly, Article 55 requires the UN to promote higher standards of living, solutions to health and cultural problems, and universal respect for human rights in order to create conditions necessary for peaceful and friendly relations among nations based on equal rights and self-determination of peoples.
6. Rosalyn Higgins, Self-determination and Secession, in Julie Dahlitz (ed.), *Secession and International Law*, The Hague, TMC Asser Press, 2003, 23.
7. ‘We cannot ignore,’ maintains Higgins, ‘the coupling of “self-determination” with equal rights and it was equal rights of states that was being provided for.’ (Emphasis in the original.) *Ibid.*
8. UN Charter, Article 2(4).
9. UN Charter, Article 2(7).
10. The declaration limited the scope of the right to self-determination to colonial territories by providing that, ‘Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the United Nations’. *Ibid.*
11. As the African jurist U Oji Umzurike maintains: ‘[T]he resolution does not offer false hope to minorities within states, for it expressly refers to “alien subjugation” as an essential qualification to “peoples” in “all peoples have the right to self-determination”.’ UO Umzurike, *Self-determination in International Law*, Hender, Connecticut: Archon Books, 1972, 72. Also see Héctor Gros Espiell, *The Right to Self Determination: implementation of United Nations resolutions*, United Nations, 1980, para. 60, who also states that ‘the right does not apply to peoples already organised in the form of a State which are not under colonial rule and alien domination, since resolution 1514 (XV) and other United Nations instruments condemn any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country’.
12. Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex to General Assembly Resolution 2625 (XXV), UN General Assembly Organisation, 25th Session, Supp. No. 28 121, UN Doc. A/8028 (1970).
13. The declaration insists that nothing about the right to self-determination can affect ‘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 a government representing the whole people belonging to the territory without distinction as to race, creed or colour’ [emphasis added].
14. This article provides as follows:
 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.
 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
 3. The States Parties to the present Covenant, including those having responsibility for the administration of non-Self-Governing and trust territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.
15. See Committee on the Elimination of Racial Discrimination (CERD) General Recommendation No. 21: Right to Self-determination, adopted on 23 August 1996, para 4. For details on internal self-determination see C Tomuschat (ed), *Modern Law of Self-determination*, The Hague: Kluwer Academic Publishers, 1993, in particular the contributions by O Kimminich, P Thornberry, A Eide, P Allot, A Rosas and J Salmon; see also L Hannikainen, ‘Self-determination and Autonomy in International Law’ in M Suksi (ed), *Autonomy: applications and implications*, The Hague: Kluwer Law International, 1998, 97–124; more specifically with respect to minorities see Cassese, *supra* note 3, 350–359; K Henrard, *Devising an Adequate System of Minority Protection: individual human rights, minority rights and the right to self-determination*, The Hague: Martinus Nijhoff Publishers, 2000, 306–314; G Pentassuglia, State Sovereignty, Minorities and Self-Determination: a comprehensive legal view, *International Journal on Minority and Group Rights* 9 (2002), 303–324, 313; SC Roach, Minority Rights and an Emergent International Right to Autonomy: a historical and normative assessment, *International Journal on Minority and Group Rights* 11 (2004), 411–432.
16. See in this regard the advisory opinion of the ICJ entitled Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, which was delivered on 22 July 2010. There was a separate opinion by Judge Yusuf, para. 11.
17. See, for example, J Dugard and D Raic, The Role of Recognition in the Law and Practice, in MG Kohen (ed.), *Secession: international law perspectives*, Cambridge: Cambridge University Press, 2006, 109.
18. See Angela M Liyod, The Southern Sudan: a compelling case for secession, *Columbia Journal of Transnational Law* 32 (1994), 419.
19. ICJ Advisory Opinion, 22 July 2010.
20. *Reference re Secession of Quebec* (SCR) 2(1998), 217, par. 138; also in *International Legal Materials*, 1998, 1340 & 1373, <http://scc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.pdf> (accessed 15 June 2011).
21. The Charter of the OAU was adopted at the Heads of African State and Government Conference in Addis Ababa, Ethiopia, on 25 May 1963. *Reprinted in International Legal Materials* 2 (1963), 766.
22. Fatsah Onguergouz, *The African Charter on Human and Peoples’ Rights: a comprehensive agenda for human rights and sustainable democracy in Africa*, The Hague: Kluwer

- Law International, 2003, 251.
23. See S Kwaka Nyameke Balay, Changing African Perspectives on the Right to Self-determination in the Wake of the Banjul Charter on Human and Peoples' Rights, *Journal of African Law* 29 (1985), 147.
 24. There were, however, some African states that accorded recognition to Biafra after it declared its independence from Nigeria. These were Tanzania, Zambia and the Ivory Coast.
 25. See Article 2(2) (c).
 26. Article 3(3).
 27. See 1964 OAU Resolution on Border Disputes among African States, OAU document AHG/Res. 16(I), reprinted in Ian Brownlie's *Basic Documents on African Affairs*, Oxford: Clarendon Press, 1971, 360.
 28. The African Charter on Human and Peoples' Rights, 27 June 1981, OAU/Doc. CAB/LEG/67/3/Rev.5 (1981). The African Charter, also referred to as the Banjul Charter, was adopted on 27 June 1981 at the 18th Assembly of Heads of State and Government of the OAU held in Nairobi, Kenya and entered into force on 21 October 1986.
 29. For an early analysis, see S Kwaw Nyameke Blay, Changing African Perspectives on the Right to Self-determination in the Wake of the Banjul Charter on Human and Peoples' Rights, *Journal of African Law* 29 (1985), 147.
 30. Katanga Case, Communication 75/92, 8th Annual Activity Report (1994–1995).
 31. *Ibid.*, para. 1.
 32. RE Howard expressed the view that 'what peoples' rights appear to refer to is the rights of sovereign states'. See Howard, *Human Rights in Commonwealth Africa*, New Jersey: Roman and Littlefield, 1986, 6. Similarly, RN Kiwanuka cautioned that 'peoples' rights might initially be treated as state rights and then degenerate into sectarian, class, government and clique rights'. Kiwanuka, The Meaning of 'People' in the African Charter on Human and Peoples' Rights, *American Journal of International Law* 82 (1988), 97.
 33. Some, such as Will Kymlicka, argue that there is an inherent tension between recognition of self-determination of minorities within states and the territorial integrity of states. He posits that '[t]he more that federalism (one of the modes of implementing self-determination within states) succeeds in meeting the desire for self-government, the more it recognises and affirms the sense of national identity amongst the minority group, and strengthens their political confidence. Where national minorities become politically mobilised in this way, secession becomes more feasible, even with the best-designed federal institutions.' Kymlicka, Federalism, Nationalism, and Multiculturalism, in Dimitrios Karmis and Wayne Norman (eds.), *Theories of Federalism: a reader*, New York: Palgrave Macmillan, 2005, 269–292, 286. Others such as Yash Ghai disagree and maintain the opposite view that self-determination of minorities within sovereign states actually prevents secession. Yash Ghai, *Ethnicity and Autonomy: a framework for analysis*, Cambridge: Cambridge University Press, 2000, 1–28, 23–24.
 34. Katanga case, para. 4.
 35. *Ibid.*, para. 5. This view reflected the observation of the ICJ that the interpretation of the right to self-determination in the context of Africa takes account of the inviolability of territories inherited at independence. See ICJ Reports, *Burkina Faso v. Mali frontier dispute*, 1986, paras. 25, 567.
 36. Katanga case, para. 6.
 37. Czechoslovakia is an example of a country where its parts gained independence by agreement. In Africa, Eritrea's independence, although factually related to military victory, was legally and politically not inconsistent with the principles of sovereignty and the territorial integrity of Ethiopia only because Eritrea received the blessing of that state. The exercise of self-determination through independence was also possible in the case of South Sudan because of the Comprehensive Peace Agreement signed between the Sudan Peoples Liberation Movement/Army (SPLM/A) and the government of Sudan.
 38. General Assembly Resolution 2625 (XXV) UN GAOR, 25th Session Supp. No. 28 121, UN Doc.A/8028 (24 October 1970).
 39. *Ibid.*, section on the Principle of Equal Rights and Self-determination of Peoples, para. 7.
 40. UN Document A/CONF.157/23.
 41. *Ibid.*, Part I, para. 2.
 42. In relation to the 1970 UN Declaration, H Hunnum stated that the mere fact that a democratic, non-discriminatory voting system results in the domination of the political life of a state by an ethnic majority in a particular state does not mean that the state is unrepresentative in the terms of the declaration. A state will not, however, be considered representative where it formally excludes a particular group on the basis of race, creed or colour. H Hannum, Self-determination in the Post-colonial Era, in D Clark and R Williamson (eds.), *Self-determination: international perspectives*, Houndmills: MacMillan Press, 1996, 12–44, 19.
 43. Arguably, those violations that may bring the territorial integrity of a state or its sovereignty into question are the ones listed under Article 4(h) of the Constitutive Act of the AU, or ones similar to them.
 44. See Antonio Cassese, *Self-determination of Peoples*, Cambridge: Cambridge University Press, 1995, 144.
 45. See Edmund Keller, Remaking the Ethiopian State, in I William Zartman (ed.), *Collapsed States: the disintegration and restoration of legitimate authority*, Boulder, CO: Lynne Rienner Publishers, 1995.
 46. See generally Dunstan M Wai, *The African-Arab Conflict in the Sudan*, New York: African Publishing Company, 1981.
 47. For many people in the south this period is regarded as a time of disaster. Francis Deng noted that '[t]he Dinka refer to the Turko-Egyptian and the Mahdist periods as the time "when the world was spoilt" ... It is considered to have been a universal calamity – a breakdown of society itself.' Francis Mading Deng, *Dynamics of Identification: a basis for national integration in the Sudan*, Khartoum: Khartoum University Press, 1973, 29.
 48. *Ibid.*, 19.
 49. See Oliver Albino, *The Sudan: a southern viewpoint*, London: Oxford University Press, 1970, 16–23.
 50. Robert O Collins, *A History of Modern Sudan*, Cambridge: Cambridge University Press, 2008, 35.
 51. Albino noted that only in 1942 was the first southerner allowed to sit for the civil service examination. Albino, *The Sudan*, 21–22.
 52. Mahmood Mamdani, *Darfur, Politics and the War on Terror*, London: Verso, 2009, 178.
 53. *Ibid.*, 177.
 54. For details about this see Lam Akol, *Southern Sudan: colonialism, resistance and autonomy*, Trenton, NJ: Red Sea Press, Inc., 2007, Chapter 14.
 55. See generally Douglas H Johnson, *The Root Causes of Sudan's Civil Wars*, Oxford: James Carrey, 2003, 59.
 56. In fact, the process followed in South Sudan for drafting the transitional constitution has been anything but satisfactory. The lack of consultation and inclusiveness in the process has caused huge disappointment among the public and the nascent opposition groups. See *Southern Sudan Monitor*, May 2011, 3–4, www.saferworld.org.uk.

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ABOUT THIS PAPER

One of the cornerstones of African regional law and politics has been the principle of *uti possidetis*, by virtue of which African states decided in the 1964 Cairo Declaration that colonially drawn African borders were sacrosanct and non-negotiable. To negotiate the tension between this principle and the internationally recognised right of all peoples to self-determination, the preferred approach of African states and the now defunct Organisation for African Unity has been to give precedence to the former over the latter. The purpose of this paper is to address the fundamental questions that South Sudan's quest for independence has raised about discourse on and the practice of self-determination vis-à-vis the principle of *uti possidetis* under general international law and, significantly, African regional law. Drawing on emerging legal developments redefining the relationship between *uti possidetis* and self-determination, the paper shows how the case of South Sudan illustrates the emergence of a new human security-based approach for negotiating the tension between these principles and the opportunity this presents for a principled response to other claims for self-determination on the continent.

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