The right to self-determination in South Sudan: A critique

Hoda Medhat Elmeligy

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THE RIGHT TO SELF-DETERMINATION IN SOUTH SUDAN: A CRITIQUE

A Thesis Submitted to the
Department of Law

In partial fulfillment of the requirements for the degree of Master of Arts in International Human Rights Law has been approved by

By

Hoda Medhat Elmeligy

June 2016
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THE RIGHT TO SELF-DETERMINATION IN SOUTH SUDAN: A CRITIQUE

Hoda Medhat Elmeligy
Supervised by Professor Jasmine Moussa

ABSTRACT

South Sudan, a new independent state is born in 2011 thanks to the implementation of the right to self-determination. In the case of South Sudan, the right to self-determination evolved gradually until it reached remedial secession that was the only option available to Southerners after the failure of several attempts. Yet, after secession a new type of failure appeared emphasizing how the right to self-determination is deemed as a flawed right. Remedial secession did not remedy South Sudan and failed to respect human rights. A new kind of oppression appears that triggers a failed South Sudan. The thesis will propose that South Sudan continues to be an earned sovereignty as an ongoing process in order to be able to self-govern itself and to become a successful state.
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I- Introduction

After more than two decades of civil wars, a new State was born. In 2011, the southern region of Sudan became an independent state known as South Sudan. The latter came into being after several attempts and agreements that failed throughout the years. South Sudan was able to achieve secession thanks to the right to self-determination. South Sudan is important because of its recent birth in 2011. Furthermore, after independence, there was a hope to finally end oppression but it was quickly renewed with a new type of oppression.

South Sudan has been in conflict with the Northern region for many years. Northerners consider Southerners as a lower race that is needed to work marginalized labor. South Sudan was marked with two long civil wars that started since 1955 and ended with the Comprehensive Peace Agreement (CPA) in 2005. Southerners wanted to have greater autonomy with an equal access of power and resources distributions. Southerners wanted to have the right to internal self-determination (ISD). But gradually, the right to self-determination was not only evolving internationally but it was evolving in the case of South Sudan until it reached secession.

The subject of self-determination in South Sudan is important for human rights because the whole purpose of self-determination is to achieve a respect in human rights. The thesis is important because it shows the failure of ISD when it comes to South Sudan, therefore, ESD was given as the last remedy to correct the past mistakes. However, still after the implementation of ESD, a new type of failure appeared emphasizing how the right to self-determination is deemed as a flawed right.

The paper focuses on South Sudan that has tried several attempts in order to live in a peaceful country. After different efforts to implement ISD, there was no solution other than Remedial Secession. The thesis argues that even after achieving remedial secession, it did not remedy the situation but rather renewed a new type of civil war throughout the whole country which reached an idea of a failed South Sudan. Although, self-determination is not the source of the chaotic situation, yet, secession failed to flourish a successful country which makes a flawed right to self-determination.
The next chapter will discuss the right to self-determination that was first used for decolonization purposes but evolved for meeting the demands of other type of peoples. This is followed by the chapter of South Sudan and how the right to self-determination is expressed in the case of South Sudan. The chapter will emphasize the gradual application of the right to self-determination starting from ISD to ESD. Then chapter IV will discussed a flawed right to self-determination. The chapter will examine remedial secession as the only option because of the language of oppression used by Southerners. The last chapter will conclude the paper that even after achieving secession; it did not remedy South Sudan but rather renewed its conflict.
II- Right to Self-Determination

The limits and the scope of the right to self-determination as a legal concept have been in question for many years. It was originally conceptualized within the context of decolonization. After the decolonization period, the contents of the principle of self-determination were arguably modified. The principle of self-determination eventually took on a human rights dimension. The following analysis addresses the development of the principle of self-determination under international law, following the colonial period.

Chapter II will discuss the development of the right to self-determination under international law. The right to self-determination has been mentioned in several conventions and also arguably exists as a matter of customary international law. This chapter will also identify the “peoples” who have the right to self-determination as well as the various forms of self-determination under international law.

A- Legal Framework of self-determination under International Law

The principle of self-determination was introduced a long time ago but remains controversial. It began with former US President Woodrow Wilson’s intention to sustain a peaceful world at the end of the WWI. The right to self-determination was later affirmed in the United Nations Charter, which mentions the principle of self-determination twice. Article 1 (2) of the Charter highlights the United Nation’s aim “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 elaborates further that the UN maintains “a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” Although, the principle of self-determination was

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2 For more information on this topic, See: Woodrow Wilson’s “Fourteen Points” Speech.
3 U.N Charter art 1, para. 2.
4 Id. art 55.
mentioned twice in the UN Charter, there is no precise explanation of which “peoples” can exercise this right; thus the principle is ambiguous and outdated. International law has borne the responsibility of developing the principle, which is apparent in later conventions that will be explained throughout the chapter.

As human rights became the concern of international law, a number of human rights conventions began including the concept of self-determination. The International Covenant on Civil and Political Rights (ICCPR)\(^5\) states in Article 1(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.”\(^6\) Furthermore, it states that all people have the freedom to determine matters regarding their economic, social and political status without any interference from the external. In other words, they can create their own destiny and path for themselves without any external involvement. Additionally, Article 1(3) explains that: “The States 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.”\(^7\) The concept of self-determination was also mentioned in the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^8\) and in the African Charter on Human and Peoples Rights adopted in 1981. Article 20 (1) of the African Charter states that “All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”\(^9\) These important conventions are early examples of how self-determination began to be viewed as a principle of human rights.

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\(^5\) The ICCPR that was “Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976”.

\(^6\) ICCPR art 1.

\(^7\) Id. art 1, para. 3.

\(^8\) The ICESCR which was “adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976”.

As we have seen, the right to self-determination developed throughout history not only for decolonization purposes but also pursuant to emerging human rights norms. However, before self-determination evolved into this norm, international legal instruments such as the General Assembly (GA) Resolutions 1514, 1541 and 2625, mentioned the principle of self-determination in the context of encouraging decolonization. The language of those resolutions was gradually strengthened until it reached the final idea of having an independent, sovereign state. Moreover, the large number of resolutions adopted, their universal character, and their consistency has arguably led to the development of self-determination as a right recognized in customary international law.

The GA Resolution 1514 (XV) “Declaration on the Granting of Independence to Colonial Countries and Peoples” that was adopted on the 14th December 1960, essentially originates from the principle of self-determination of peoples that is explained in the Charter of the United Nations and is also backed up by many other resolutions of the GA.10 The Resolution claims that “Peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory.”11 This decolonization declaration protects the right of colonies to acquire their sovereignty and enforce the recognition of the concept of the right to self-determination. The GA Resolution 1514 emphasizes the protection of territorial integrity by stating 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 Charter of the United Nations.”12 The declaration further highlights in operative paragraph 2 of Resolution 1514 that all peoples subjected to colonial rule 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.”13

GA Resolution 1541 entitled “Principles which Should Guide Members in Determining whether or not an Obligation Exists to transmit the information called for

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12 Id.
13 Id.
under Article 73 e of the Charter”, adopted on the 15th December 1960, recognizes “the desire for independence is the rightful aspiration of peoples under colonial subjugation and that the denial of their right to self-determination constitutes a threat to the well-being of humanity and to international peace.” Resolution 1541 tries to promote the right to self-determination “in order to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.” This resolution is similar to Resolution 1514 as it persists on the implementation of the decolonization process. GA Resolution 1541 is contradictory since it advocates decolonization while also promoting the protection of territorial integrity. It specifically applies to a “non-self-governing” territory, which has the right to self-determination as recognized under international law.

GA Resolution 2625, “Declaration on Principles of International Law Governing Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations” further developed the scope of the right to self-determination. The resolution permits a “peoples” to freely decide the form of exercising the right to self-determination whether in the creation of a sovereign State, the free association or integration with another independent State or even the emergence into any other political status. It also emphasizes that “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.” The Resolution explains that the practice of the right to self-determination is apparent with the “freely expressed wishes of the territory’s people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes.” Antonio Cassese underlines that such “peoples” have the right to freely express their wishes each time they are at issue. Moreover, GA Resolution 2625 lists several obligations and commitments upon States prohibiting any violation of territorial integrity of other independent States.

17 Supra note 15.
18 Id. at 66-67.
Declaration includes a criterion different from the previous resolutions. It emphasizes the protection of territorial integrity; however, this protection of territorial integrity applies to states “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”19 Furthermore, the words used to express the concept of self-determination are stronger which sets the resolution apart from resolution 1514 and 1541.

The above-mentioned GA Resolutions recognize the right to self-determination, though they include severe limitations on its application. No definition of a “people” was given in the mentioned resolutions, yet the majority of scholars argue that, in the context of decolonization, “people” meant the ones living in the colonized territory. Thus, while Resolutions 1514 and 1541 were aimed at simply encouraging decolonization, Resolution 2625 offers the option of how the right to self-determination can be exercised. Moreover, Resolution 2625 indicates a gradual development of the content of the right to self-determination.

While this existence is noteworthy, queries arise concerning the binding effect of the resolutions. The arguments regarding this matter are varied. Some views argue that GA resolutions barely come into implementation in actual life. Marko Divac Oberg argues that GA resolutions have no binding effect.20 However, this statement can be contested. GA Resolutions can have a durable and effective outcome. According to Kerwin, States respect GA Resolutions as they are generated by the Charter of the United Nations which is “–a treaty binding on all the UN members–any Resolution concerning subjects addressed by the Charter have the authority of the Charter itself.”21 But the Charter itself states that GA resolutions are not binding but they are merely recommendations. This is illustrated in Article 10 of the UN Charter “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to

19 Supra note 16.
the Security Council or to both on any such questions or matters.\textsuperscript{22} However, the Charter emphasizes in Article 12 that if the Security Council is supposed to deal with other types of matters such as disputes or other situations, the GA is not expected to make recommendations regarding the subject unless the Security Council requests it.\textsuperscript{23}

Malcolm Shaw’s opinion lies between these two views. Shaw indicates that GA resolutions are not legally binding and are simply recommendations that reflect the opinions of states on different matters with changeable levels of majority support. However, Shaw acknowledges that the GA adopted many significant resolutions and declarations that cannot be overlooked. So although GA resolutions are not binding in and of themselves, they can create customary international law or can be considered evidence of customary international law, which is binding. The way States vote in the GA and the justifications they provide shape the proof of state practice and their understanding of law.\textsuperscript{24} Additionally, when the majority of States vote for resolutions and declarations on a matter, this underlines a state practice and eventually a binding rule can appear on condition that the required \textit{opinio juris}\textsuperscript{25} can be verified.\textsuperscript{26} In other words, GA resolutions reflect state practice, which is a significant component in the structure of customary international law. Malcolm Shaw argues that the 1960 Declaration on the Granting of Independence to Colonial Countries and People was approved with no opposition and few abstentions, but following numerous resolutions oppose colonialism and call for the implementation of the right to self-determination for the remaining colonies.\textsuperscript{27} Resolutions on the right to self-determination outline customary international law, transforming the principle from a political and ethical concept that is being discussed and negotiated into a legal obligation. Resolutions are able to expedite the process of “the

\textsuperscript{22} \textit{Supra} note 3, art 10.
\textsuperscript{23} \textit{id.} art 10, para.1.
\textsuperscript{25} \textit{Id.} at 84. \textit{Opinio juris} defined as: “Once one has established the existence of a specific usage, it becomes necessary to consider how the state views its own behaviour. Is it to be regarded as a moral or political or legal act or statement? The \textit{opinio juris}, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave a certain way because they are convinced it is binding upon them to do so.”
\textsuperscript{26} \textit{Supra} note 24.
\textsuperscript{27} \textit{id.} at 115-116.
legislation of a state practice and thus enable a speedier adaptation of customary law to the conditions of modern life.”

Judicial decisions can also help to explain the legal framework of self-determination. There are number of cases that further develop this legal framework like the Western Sahara case. The first international judicial decision that recognized that “peoples” have a right to self-determination was the Western Sahara Advisory Opinion. It confirms “the right of the population of the Spanish Sahara to self-determination in accordance with resolution 1514 (XV).” The GA acknowledged the right of people of Western Sahara to exercise “free and genuine self-determination; and that the application of self-determination in the framework of such consultation has been accepted by the administering power and supported by regional institutions and international conferences, as well as endorsed by the countries of the area.”

The Western Sahara Advisory Opinion supports Resolution 2625. It highlights that:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.

The Western Sahara Advisory Opinion uses the exact words that were used in Resolution 2625 regarding the creation of the independent State. The principle of self-determination is “defined as the need to pay regard to the freely expressed will of peoples.”

The Court analyzed the resolutions adopted by the GA regarding Western Sahara, including a number of resolutions starting with Resolution 1514 until Resolution 3292. These resolutions are intended to encourage a speed of the decolonization process of the territory and guarantee the freely expressed will of the people of Western Sahara. In other words, it is expected that Western Sahara determine their political status. The Court

28 Id. at 116.
31 Id. at 30.
32 Id. at 33.
33 Id.
34 UN General Assembly, Question of Spanish Sahara, 10 December 1975, A/RES/3458, available at: http://www.refworld.org/docid/3b00f1c03c.html.
stated that it believes that there were no ties that affected the application of Resolution 1514 in the decolonization of Western Sahara. The Court also affirmed the right of the people of Western Sahara to the “principle of self-determination through the free and genuine expression of the will of the peoples of the territory.” The right to self-determination might be “satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it.” However, under specific conditions, the right to self-determination is challenged by other principles. For example the concepts of national unity and territorial integrity of States has also been upheld by resolutions of the GA.

Malcolm Shaw notes that the Court stressed that “the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them.” Unlike Western Sahara, which is considered to be a non-self-governing territory, South Sudan was part of the territory of Sudan its parent state.

In the case of Namibia, South Africa occupied the Namibian territory. As a response, the GA issued a Resolution 2145 stating that the mandate for South West Africa was terminated. Consequently, the Security Council (SC) adopted resolution 276 in 1970, which confirmed the GA resolution, declaring that South Africa’s continued presence in Namibia was illegal and called upon States to act accordingly. Due to the silence of South Africa regarding the resolution, the SC requested an advisory opinion from the International Court of Justice (ICJ) to the question of what are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding SC resolution 276 (1970). The Court declared that the continued presence of South Africa in Namibia is illegal; South Africa is under an obligation to withdraw its administration.

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35 Supra note 30, at 60.
36 Id.
38 Supra note 10.
39 Supra note 24, at 254.
41 Id.
from Namibia immediately and thus put an end to its occupation of the territory. Members of the UN are obliged to recognize the illegal presence of South Africa in Namibia. Members should also refrain from any acts in dealing with the Government of South Africa involving recognition of the legality or providing support or assistance to such existence and administration.

A further step was taken in the case of East Timor including Portugal and Australia in which Portugal asserted that the right of peoples to self-determination as developed by the Charter and UN practice had an *erga omnes* character. The ICJ recognizes that the territory of East Timor remains a non-self-governing territory and its people possess the right to self-determination. The Court was required to rule on the validity of the 1989 Treaty: “Timor Gap” between Australia and Indonesia. However, the ICJ was unable to rule on the validity of the treaty that was due to the nonappearance of Indonesia from the litigation. The legality of Indonesia’s behavior is a requirement in order to rule that Australia violated its obligations to respect Portugal’s status as the administering power.

The Court concluded that Australia’s conduct could not be assessed without first examining the question why it is that Indonesia could not legally have concluded the 1989 Treaty, while Portugal supposedly could have done so. Therefore, the ICJ was unable to exercise its jurisdiction due to the non-representation of Indonesia and not consenting to the jurisdiction of the Court. Consequently, a ruling against Australia could not be made.

### B- Definition of a “People” for the Purposes of Self-Determination

There are many perspectives regarding the definition of “people” for the purposes of the right to self-determination. The definition of “people” is therefore controversial and is constantly challenged.

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42 *Id.* at 46.
43 *Id.*
44 *Supra* note 24, at 255.
46 *Id.*
47 *Id.*
48 *Id.*
Shaw explains that according to GA Resolution 1514, GA Resolution 2625 and the 1966 International Covenants on Human Rights, self-determination is a right of “all peoples.” Shaw does not define the scope of “all peoples”.

According to the “traditional” view, the above-mentioned GA resolutions analyze the right of all colonial territories to achieve independence or to freely choose their status. However, ethnic or other distinct groups within these colonies did not have the right to separate themselves from the “people” of the territory as a whole.

Regarding the word “peoples” in Article 73 of the UN Charter, which defines non-self-governing territories as those “whose peoples have not yet attained full measure of self-government”, it clearly includes groups beyond states and involves at least non-self-governing territories. Resolution 1541 includes a list of concepts to indicate to states whether they should transmit information under Article 73 of the UN Charter on “non-self-governing” territories; consequently, it defines one of the categories of peoples entitled to the right to self-determination. The territories mentioned by the Charter under Article 73 were the territories in 1945 that were the colonial type. As for the Resolution 2625, “all peoples” have the right to self-determination that will be achieved through the promotion of friendly relations and co-operation among States and ending rapidly colonialism. There was no definition provided of “all peoples”.

The definition of “peoples” began to expand beyond the scope of decolonization. The two principal human rights conventions: the ICCPR and ICESCR entered into force in the 1970s. Article 1 (1) of the ICCPR in its direct language proves the universality of the right to self-determination, although the scope of the right is not detailed. However, the fact that “all peoples” is in human rights treaties, may suggest that it aims to have universal applicability suggest a scope beyond decolonization.

49 Supra note 24, at 256.
50 For more information see Legal Aspects of Self-Determination, Encyclopedia Princetoniensis, available at: https://pesd.princeton.edu/?q=node/254.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
In *East Timor*, the ICJ states that both parties to the dispute agreed that the people of East Timor had the right to self-determination and thus emphasized that the population of East Timor is a “people”.

Moreover, in the case of Kosovo, it was assumed without much discussion that there is a “people” of Kosovo: “the strong moral and political duty on the part of the international community ‘extends to the realization of the right of self-determination for the people of Kosovo’ and ‘[t]he people of Kosovo must take over the running of their affairs’.”

The different Resolutions and case studies mentioned above define differently a “people” depending on the historical context and circumstances. The UN does not give any legal justification thus making it an ethical principle.

Haugen claims that the “peoples” who are only a group of persons can exercise the right to self-determination and the size of such peoples can differ significantly. However, every person has the right to participate in this process in shaping the future in any way they wish and emphasizes the significant role of every human being in the process.

Joseph states that “everybody [who] belongs to a ‘people’”, suggesting that secession and ESD are collective rights. While Joseph’s definition of “people” is expansive, Tomuschat argues that there are some requirements for a group to be considered a “people”. He argues that “people” who can be entitled to self-determination, exist only if they live in a separate territory, they are the majority, and they are able to develop their own culture, traditions, language or practice a specific religion. The importance of every human being to express its will is not essentially “by the entire national population of the State that is concerned by a secession, but necessarily by a smaller unit, by a people in the ethnic sense.” Another definition that is proposed by Tomuschat is “every people that first can clearly be distinguished from other peoples by

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57 Id.
61 Id. at 36.
objective ethnic criteria, particularly by culture, language, birth or history.” Tomuschat adds that “the group is the only population or if it forms a clear majority on a territory that is suitable for State-building and where the group has traditionally settled.” The different definitions mentioned above complement each other. But the order in which these definitions are presented above is intended to reach the more detailed definition of “people”. The definitions provided by Haugen and Joseph are very broad and brief without any further detail regarding the criteria of these people. Borgen takes another perspective by explaining that “people” is used to mean the “citizens of a nation-state, the inhabitants in a specific territory being decolonized by a foreign power, or an ethnic group.”

These scholars have different focus and analysis when it comes to the definition of people. Many scholars do not provide sufficient details regarding the criteria of people. Due to the fact that there is no proper definition, it becomes one of the main critiques which emphasizes the weakness of the legal framework and highlights it inadequacy.

C- Self-Determination and Secession under International Law

International law scholars maintain mainly two different views on the principle of self-determination. The two views each shape the extent of the right of a people to exercise self-determination. The mainstream view, which this thesis will refer to as the “traditional” view recognizes two types of self-determination: internal self-determination (ISD) and external self-determination (ESD). ISD applies in non-colonial contexts to minorities, ethnic groups and citizens. In exercising the internal right to self-determination, people “have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” In the non-colonial context, according to the “traditional” view,

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62 Id. at 37.
63 Id. at 37.
65 Supra note 24, at 299.
international law recognizes autonomy, which can be exercised in many different ways. For example, autonomy entails the power of the group to self-govern. ISD is important, as it can be perceived to be a permitted step under international law for some people to exercise their rights without any external interference.

According to the traditional view, the other form of ESD applies in colonial situations only, which eventually leads to secession, independence or the joining of one state with another state. It is the right of people to choose their own sovereignty.

Although, the right to ESD is granted to people under colonial rule or foreign domination, however, it still remains ambiguous. The right to self-determination “has proved inefficient and uncertain at resolving these secessionist conflicts because it does not embrace the possibility of secession outside of the decolonization, and perhaps occupation, paradigms.”

The second view of self-determination is labeled the “modern” view in this thesis. The “modern view” of self-determination argues that “peoples” in the case of massive human rights violations, atrocities and suppression of ISD should be able to pursue secession or to join another state.

1- Internal Self-Determination

Many scholars have examined the right to ISD in a non-colonial context, arguing for the right of “peoples” to obtain a certain level of political representation, self-government or autonomy. The characteristics of ISD are the right of people to choose their own rulers by going through a democratic process to elect a government. In other words, it means having the right to freely choose genuine self-government including the choice of one’s own economy and political regimes. However, there are no indications of how this right should be applied since customary rules on the right to self-determination do not

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detail them. This causes a lack of information regarding the extent of the application of this right. Another definition enshrining the same concept but with different wording is “the choice of a system of governance and the administration of the functions of governance according to the will of the governed.” This statement implies a sense of continuity in the process of ISD and reflects ongoing involvement in the political sphere. It implies an “ongoing right.”

These previous definitions of ISD focus on the right to choose a specific government. A broadened definition of “the principle of self-determination asserts that it is the right of all peoples to freely choose their social, economic, political and cultural future without external interference.” People have the right to choose any type of future they want, without the interference of the outside world. The unity of the economic, social, political and cultural future implies that “people” are allowed to have the right to choose their government freely and follow any kind of development they want at the economic, social and cultural levels. It is their right to shape their own destiny.

To take this a step further, government is not the only right that people should have. Cassese adds that self-determination is “the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime” which implies that “it is an ongoing right.”

Autonomy can be considered as one of the outcomes of the right to ISD. The latter permits people to exercise their rights but at the same time, it restricts them from reaching secession. Philpott explains that democracy and the right to self-determination are closely related. This is because both of them are originated from the value of autonomy. Therefore, autonomy tackles the case for democratic governance and for plebiscitary right to secede. Secession and democracy are linked to the concept of political legitimacy and to outline an explanation of how the three principles fit together in an

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69 Id. at 124.
71 Supra note 68, at 101.
73 Supra note 68, at 101.
75 Id.
institutional moral theory of international law.\textsuperscript{76} He explains that being autonomous implies self-governing and democracy is only the self-government of individuals.\textsuperscript{77} According to Novais, self-determination is the “right of all people to choose the form of government under which they live.”\textsuperscript{78} The principle of ISD therefore acts as a tool in political life and representation.

These authors consider at the right to self-determination as the path to accomplish self-government and autonomy. They make a connection between the right to self-determination with the outcome of the right. This is interesting because it allows us to see how people should be governing themselves by obtaining numerous human rights, collective rights, autonomy, political participation and more. It also includes the concept of democracy.

There is a very clear connection between democracy and self-determination. Democracy is an important trait in the characteristics of a governing system. The criterion of government has been shaped by the development of the legal right to self-determination.\textsuperscript{79} Malcolm Shaw explains that “the traditional exposition of the criterion concentrated upon the stability and effectiveness needed for this factor to be satisfied, while the representative and democratic nature of the government has also been put forward as a requirement.”\textsuperscript{80}

If secession and ESD are not an option then States must guarantee that the human rights of “peoples” are respected and to offer local autonomy if it is suitable but if the state fails to meet the ISD then according to the “modern view” the “peoples” concerned can declare a right to ESD: a right to secession.\textsuperscript{81} According to this view, democracy is perceived as a form of ISD, while secession is considered as a form of ESD, which is the

\textsuperscript{76} Id. at 24.
\textsuperscript{77} Id. at 17.
\textsuperscript{78} Rui Alexandre Novais, An unfinished process: the Western Sahara as A Post-Scriptum of the colonial period, AFRICANA STUDIA., No. 12, 2009, at 63.
\textsuperscript{79} Supra note 24, at 205.
\textsuperscript{80} Id.
\textsuperscript{81} Jan Klabbers, The Right to Be Taken Seriously: Self-Determination in International Law, JOHNS HOPKINS UNIVERSITY PRESS., Feb. 2006, at 204.
right of a “peoples” to govern themselves, instead of being governed by another, repressive group.\footnote{Supra note 74.}

### 2- External Self-Determination

ESD is a revolutionary concept that is intended to free people. For Lenin, the right to self-determination is “established as a general criterion for the liberation of peoples.”\footnote{Supra note 68, at 14.} The exercise of the right to ESD can result “in the independence of the self-determining unit as a separate state.”\footnote{Supra note 72, at 438.} ESD is defined as: “the right of peoples to be free from alien subjugation, domination and exploitation. A right of ESD may be manifested by secession.”\footnote{Supra note 59, at 41.} The goals of a state’s secession involve international recognition as an independent state. Manger highlights that secession involves “a right to establish an independent state and to be recognized by the international community.”\footnote{Leif Manger, \textit{Anthropological Reflections on the Breakup of Sudan}, INT’L J. OF MIDDLE EAST STUD., 44.2, 2012, 327.} Manger does not further analyze the right to secession.

Recognition is considered to be a purely political act that has little connection with international law.\footnote{Supra note 66, at 302.} This can be seen in how states are guided by politics and their own tactical benefit. Based on the practice of these states, it does not essentially reflect their understanding of the law although they might claim that they are fully consistent with the law, but choose to look for their own benefits or base their arguments on some illegal actions taken by the secessionist entity. However, a seceding entity is deemed successful when the parent state recognizes it.\footnote{Michael Hechter, \textit{The Dynamics of Secession}, Sage Publications, Ltd, 1992, at 267.}

According to the “traditional view”, the right of ESD applies to “peoples” in colonial situations only, and can eventually lead to secession or to their joining another state. Although, international law recognizes the right to self-determination for colonized people, it also recognizes and respects territorial integrity. Murswiek highlights the “apparent contradiction between the right of peoples to self-determination and the
sovereignty of States.\textsuperscript{89} Armbruster has a similar perception. He believes that if international law guarantees the sovereignty of existing States, it will not allow a breach of this sovereignty under the name of the right to self-determination.\textsuperscript{90} Shaw follows the same idea explaining that apart from any recognized colonial situations, the right to self-determination does not apply to an already independent state that would justify the option of secession.

The “modern” view supported by authors such as Sarah Joseph conceptualizes the right to self-determination as a “sliding scale of different levels of entitlement to political emancipation, constituting various forms of ISD up to the apex, the right of ESD, which vests only in exceptional circumstances. Different 'peoples' are entitled to different 'levels' of self-determination.”\textsuperscript{91} The author goes further by assuming that there could be other circumstances including gross human rights violations, persecution and more that are not restricted only to colonial situations. Moore also supports the “modern” view. Moore proposes that if “democracy is popular sovereignty, government by the people, then secession might be seen simply as the effort of various peoples to govern themselves, to be politically self-determining in the most literal sense, by forming their own states.”\textsuperscript{92} According to this perspective, democracy justifies the plebiscitary right to secede that is the right of a majority within any part of the territory of a state to choose if they wish to form their own separate state, even if the majority of the state as a whole is against this independence.\textsuperscript{93} Peaceful secessions are ideally the better option for facilitating the process.

The main goal of any secession movements is to enable the political agreement under which they are presently included aiming to found a new politically independent

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state. However, this desire has both an internal and external aspect. On the internal dimension, the secession movement looks for all the privileges within the boundaries of the affected territory which usually accompany political independence, such as control over the economy, political rights, foreign affairs, culture and a military force. As for the external dimension, a secede entity looks for international recognition as it wishes to be treated as a sovereign state, to be fully represented by the U.N, but also to receive all the rights and privileges accorded independent sovereign states. It is believed that both dimensions are linked as significant achievement of either set of goals will often result in accomplishment of the other. In order to control its territory and people, the secession movement must influence the parent state to renounce its control over the secessionist territory. There needs to be an efficient control over the territory. The efficient control is required to achieve both the internal dimension of being able to successfully form the future of the people and their territory and the external dimension is the recognition by other states.

Other authors perceive the right to secession as a remedial right only that groups are permitted to have if seceding is considered to be the last option for serious injustices committed by the state against them. This concept will be examined in the last Chapter.

However, very few people take the opposite position to those who completely deny a right of secession because international law significantly values the stability of the states and the protection of territorial integrity. Tomuschat reflects this argument in stating that “only that State which respects the right of self-determination merits the protection of its territorial integrity. But if the right of self-determination gives a people the right of secession, then we ought to conclude that the State concerned should have to accept the

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95 Id.
96 Id.
97 Id. at 528.
98 Id.
99 Id. at 529.
100 Id. at 538.
secession."¹⁰¹ Yet, international law is sometimes silent on secession from the mother state. These concepts will be examined in the following section and the last Chapter.

3- Remedial Secession, Sovereignty and Territorial Integrity

Whether or not there is a right to ESD resulting in secession as remedy for massive human rights violations and for suppression of ISD remains controversial. Secession is defined as the elimination of a specific part of the territory within a state from the jurisdiction of the state.¹⁰²

As mentioned above, the “traditional” view rejects the possibility of remedial secession. The UN has used a language in its resolutions that does not seem to welcome the principle of secession. The wording in resolutions and declarations advocate the right to secession in colonial situations. The right to self-determination was tackled on an “ad hoc basis, particularly in relation to the threat of secession.”¹⁰³

The Declaration on Decolonization claims that “any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”¹⁰⁴ Therefore, the right of secession is rigidly refuted. This is explained as a way “to protect the territorial framework of the colonial period in decolonization process and to prevent a rule permitting secession from independent states from arising.”¹⁰⁵ State practice and the practice of the UN therefore arguably reject the right of secession outside the colonial context, while underlining Tomuschat argues that sovereignty or territorial integrity of States is in contrast with right of self-determination, as sovereignty protects territorial integrity, and the right of self-determination is probably targeting territorial change.¹⁰⁶

Another view states that international law has not explicitly stated the legality or illegality of remedial secession. According to this view, secession is considered “neither

¹⁰¹ Supra note 60, at 24.
¹⁰⁴ Supra note 11.
¹⁰⁵ Supra note 24, at 256.
¹⁰⁶ Supra note 60, at 35.
legal nor illegal under international law, but a legally neutral act the consequences of which are regulated internationally.”

As for the “modern” view, this advocates a right to remedial secession on an exceptional basis when ISD fails. The Supreme Court of Canada in Secession of Quebec was asked whether Quebec had a right to secede from Canada. It declared that “[t]he recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination.” Furthermore, it adds that the principle of self-determination can enable people to secede from a state on an exceptional basis “when the rights of the members of the people are violated in a grave and massive way.”

The Supreme Court of Canada also stated that:

The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond “convention” and is considered a general principle of international law…

The International law principle of self-determination has evolved within a framework of respect for territorial integrity of existing states…

The international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.

The ICJ has tackled the issue of secession, but unfortunately it has failed to expand a normative structure on secession. The ICJ issued an advisory opinion on Kosovo’s declaration of independence in February 17, 2008 emphasizing this declaration of independence was not in violation of international law. Kosovo claimed to have the right to have their own state “either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” On the other hand, “the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the

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108 Supra note 56.
109 Id.
111 Supra note 66.
territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order.”

In other words, Serbia claimed that Kosovo did not have the right to have its own state because of the territorial integrity.

There were debates regarding the extent of the right to self-determination and the existence of remedial secession. The Kosovo Advisory Opinion highlights that many states raised the principle of “remedial secession” in the sense that they argued that Kosovo was allowed secede and create an independent state due to the human rights violations as well as other abuses that were perpetrated by the Serbian authorities.

The ICJ recognized this argument but refrained itself from responding by explaining that “the extent of the right of self-determination and the existence of any right of “remedial secession” are beyond the scope of the question posed by the General Assembly.” The ICJ states that the question put forward it by the General Assembly was: “whether or not the declaration of independence is in accordance with international law.” It therefore circumvented the issue by stating that, in order to respond to the GA’s question, “the court need only determine whether the declaration of independence violated either general international law or the lex specialis created by SC Resolution 1244 (1999).” The latter resolution adopted by the SC required then the Federal Republic of Yugoslavia to resolve the grave humanitarian situation and to terminate the armed conflict happening in Kosovo. The ICJ explained how international law developed aiming to give independence for the people of non-self-governing territories and people under alien oppression, control and domination. To conclude, the Court highlighted that the adoption of the declaration of independence of Kosovo did not violate general international law and SC Resolution 1244. Brewer also emphasizes that Kosovo’s declaration was not forbidden by the legal structure introduced by Resolution 1244.

113 Id. at 29.
114 Id. at 39.
115 Id. at 3.
116 Id. at 19.
117 Id. at 31.
118 Id. at 30.
Outside the framework of discussions of legality, many scholars advocate remedial
secession on other grounds. International law ignores the reality of some people who
experience gross human rights violations in non-colonial contexts. Some scholars believe
that secession might be perceived as an expression of natural right to be free from
oppression.

Crawford highlights that

“Metropolitan State forcibly denies self-determination to the territory in question, this primary option
is not available. In such cases the principle of self-determination operates in favour of the statehood of the
seceding territory, provided that the seceding government can properly be regarded as representative of the
people of the territory.”¹²⁰

The principle of self-determination is based on the free choice of the people. Crawford underlines that this self-determination is based on the free and effectual choice
of the people within the concerned territory. If the people have the right to choose, secession does become a problem. However, Crawford does not give much information
regarding the type of people who have the right to secession. Doehring, on the other hand, explains that the right to secession exists if an ethnic group is discriminated against
because of its features.¹²¹ Still, the right to secession cannot be easily implemented in
every case of discrimination because there are still options of stopping the discrimination
exerted by the State government. However, if this discrimination is relentless and
ongoing for many years, people try to look for another alternative. For instance, if the
ethnic group’s human rights are being severely violated by State authorities, the right to
secession could be applicable. In other words, “intolerable discrimination of a people
because of its specific characteristics can endanger the existence of this people in the
sense already described and therefore legitimize secession.”¹²² Still, there are other
measures that are not categorized as “discrimination” but result in the threat of people’s
existence which can eventually give rise to a right of secession.

The right to secession must exist in order to save people from these violations and to
offer them autonomy, cultural rights and more. Some believe that international law

¹²⁰ James Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW, Oxford University Press, Second Edition,
2006, at 387.
¹²¹ Supra note 60, at 26.
¹²² Id. at 27.
should recognize secession when the physical existence of the human beings is threatened by major violations of basic human rights. There is a connection between the right to secession and the ISD as secession is deemed to be an event that should involve many other rights such as the autonomy, government and many rights characterized in ISD.

Tomuschat stresses that the right to secession must exist “if it does not seem possible to save the existence of a people, which is the holder of the right of self-determination in a certain territory, except by secession from the existing State.”

On the other hand, some scholars reject remedial secession on practical, humanitarian and other grounds. The common practice is to restrictively interpret articles on the right to self-determination with regards to the principle of sovereignty. This is because secession results in the redrawing of the territorial borders. Sterio explains that secession could therefore consequently result in “global chaos caused by an incessant redrawing of boundaries.” Moreover, secession can have many consequences on the population and the territory such as statelessness that would occur after separation.

Chinkin and Wright highlight the:

Political cohesion sufficient to exercise a right of self-determination is generally defined in terms of language, religion, race, or ethnic origin. This can in turn lead to irredentist claims, aggressive practices toward “others” (who may be long-term neighbors as in Bosnia-Herzegovina), and violent fragmentation within any wider sense of Community. Serbia’s intransigent pursuit of “self-determination” has directly led to this “people’s” increasing isolation from the rest of the international community. But a “self” cannot solely consist of territories, boundaries, and political instruments.

As shown, the right to self-determination has evolved throughout history. It first started for decolonization purposes until it reached human rights norms. The concept of people was not well established under international law, however, the principle also expanded beyond decolonization. The different views of the right to self-determination have also developed. However, the “modern” view is interesting for this thesis because this was how South Sudan expressed its self-determination. Although, secession is not clear under international law because of its contradiction with the principle of sovereignty, yet, it must exist to rescue people. But there still needs to be a guarantee that after the implementation of ESD, the rights categorized under ISD should be applied.

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123 Id.
124 Supra note 66.
125 Supra note 103, at 156.
The next chapter will analyze the right to self-determination in South Sudan.
South Sudan is an interesting case study to examine due to its recent birth in 2011. A new country was born after many attempts to establish peace. This chapter will discuss the history of conflict between the South and North of Sudan. The path to self-determination for South Sudan was marked by two lengthy civil wars, serious atrocities and severe humanitarian crises. Following, the adoption of the Comprehensive Peace Agreement (CPA) in 2005 paved the way for the secession of South Sudan. This chapter will analyze whether South Sudan achieved genuine ISD in 2005 and consequently its entitlement to exercise ESD or secession under international law.

A- History of the conflict

The conflict between Sudan and South Sudan has been for many years. This conflict was characterized by two entities struggling against each other for eliminating discrimination and injustice.

1- Ethnic and cultural difference between the North and South: A legacy of discrimination and repression

South Sudan and Sudan share a history of conflict that lasted for more than two decades and that was brought to an end in 2011. This conflict can be explained through the many ethnic differences existing between the Southerners and the Northerners that triggered injustices and discrimination by the North against the South.

There are great cultural differences between North and South Sudan. Historically, the Southern part of Sudan was distinguished by the African tribes known as the Nilotes that are composed of three principal groupings: Dinka, Nuer and the Shilluk; the Nilo-Hamites and the Western Sudanic tribes. The Dinka tribe is considered to be the largest and most dominant tribe politically and economically. Every tribe in the South had its own culture, language and traditions.

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126 Salman M. A, Salman, South Sudan Road to Independence: Broken Promises and Lost Opportunities, Pac. MCGEORGE GLOBAL BUS. & DEV. L. J., 22-07-2013, at 346.
127 Id.
As for the northern part of Sudan, it was distinguished by the Arab tribes known as the Shaygya, Ja’ali amongst others. The Western and Easter parts of Sudan comprised some African tribes in Darfur and Nuba Mountains.\(^\text{128}\)

The main differences between both the North and the South are religious, ethnic, linguistic and cultural. The Northerners consider themselves to better than Southerners. Northerners believe that they are “Muslims who lay claim to some form of Arab descent, and the South Sudanese are Africans who practice their own African beliefs mixed with Christianity.”\(^\text{129}\) Northerners perceived Southerners to be a lower race. Many reports highlight how the South Sudanese deem themselves black, while northerners consider themselves to be Arab and treat blacks as second class.\(^\text{130}\) Northerners needed Southerners for the labor. In other words, they were needed for the jobs that Northerners did not do. The common contact they had “was through the slave trade, when the North Sudanese Arabs made many incursions into South Sudan in search of loot and people to enslave.”\(^\text{131}\) The need for Southerners for such work, eventually “weighed against converting them to Islam, which would have ruled out their use as slaves.”\(^\text{132}\)

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\(^{128}\) See: Sudan: Darfur returning “to past patterns of violence”, Integrated Regional Information Networks (IRIN), Jan. 28, 2011, available at: http://www.refworld.org/docid/4d4a52681a.html. The government of Sudan (GOS) was accused of marginalizing and sidelining the Darfuris through ongoing economic and political marginalization and massive human rights violations. Consequently, two rebel groups were created: the Sudan Liberation Movement known as the SLA and the Justice and Equality movement known as the JEM that launched a rebellion against the GOS due to the constant discrimination against African ethnic groups. 

See: Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan, Human Rights Watch, May, 7, 2004, A1606, available at: http://www.refworld.org/docid/412ef69d4.html. The Janjaweed, a militia group armed and supported by the Sudanese government have been used to target the African ethnic groups in Darfur, more specifically civilian populations of the African Masalit, Fur and Zaghawa ethnic groups. This eventually led to thousands of killing, millions of internally displaced people and others who fled to neighboring countries. Another conflict that also started earlier in South Kordofan but increased in 2011 where the Sudanese Armed Forces are fighting against the Sudan People’s Liberation Movement- Northern Sector (SPLM-N). These attacks eventually lead to significant loss of life, arbitrary arrests, forced displacement and more.


\(^{131}\) Supra note 129.

Furthermore, the economic development between the two divisions was an additional difference intensifying other discrepancies. The marginalizing and unfair actions led to discrimination against Southerners, perceived as a lower race.

2- The period leading up to Sudan’s independence in 1956

The violent conflict between the North and South of Sudan started before Sudan’s independence from joint British and Egyptian rule in 1956. Egyptians established in 1823 Khartoum as their headquarters. Sudan was developed in ivory and slaves trade. There was a plan to extend Egyptian influence all over Sudan. Sir Samuel Baker and Charles Gordon launched a vigorous campaign to end slave trade. But Muhammad Ahmad known as Mahdi, wanted to end the Egyptian influence and purify Islam in Sudan. Mahdists defeated Britain and Egypt which led to their decision to abandon Sudan. In 1890s, British decided to gain control over Sudan, the power of Mahdists was destroyed. Although, Sudanese opposed colonial rule, British continued to control the government of Sudan. In 1924, British established a rule of isolating Southern Sudan with a different administration than North Sudan. This could be as an early interpretation of British of two different features in one Sudan. Southerners formed the Liberal party and held a conference which would include all Southerners educated in Juba to address the relations between the North and the South. The North feared the triggering of revolutionary ideas against them. Although, North Sudan warned against this conference, yet, the warnings were ignored and Juba Conference was held in 1947 where a resolution calling for a federal system of government for Southern Sudan was adopted. This demand was presented to the North, but was ignored. In the 1948 elections, the Independence Front favored the establishment of an independent republic;

134 Id.
135 Id.
136 Id.
137 Id.
138 Id.
139 Supra note 126, at 352.
therefore in 1952 after the revolution in Egypt, Britain and Egypt agreed to prepare independence.\(^{140}\)

Sudan got its independence on the 1 January 1956. Yet, in order for Sudan to obtain independence in 1956 from the United Kingdom and Egypt, Northern Sudan felt the necessity to simply tranquilize the South’s conflict. In other word, North Sudan did not accept the South’s demands but it had to embrace these demands in order to argue for their independence and to act as a unified state. Sudan became independent on January 1, 1956.\(^{141}\)

### 3- First Civil War: 1955 to 1972

Ongoing tensions led to brutal civil wars in the South that lasted intermittently for about fifty years. The first civil war was from 1955 until 1972 between the North Sudan and Southern rebels. The Southerners wanted greater autonomy for South Sudan. In other words, Southerners wanted ISD. The unequal distribution of resources and power between the North and South, as well as the forceful implementation of the Islamic Sharia law were the main reasons for conflict. For these reasons, the conflict intensified in many areas in the South as it gradually reached a full-fledged war.

Southerners rejected life under the Northerners due to constant discrimination, atrocities and persecution. There was a continuous non-fulfillment of promises made to the Southerners before 1956. Southerners were under-represented from the political arena in the whole “claimed” unified Sudan. The northern Sudanese purposely expelled Southerners in order to prevent them from any impact they could have in decision-making. Furthermore, due to the lack of representation of Southerners in the government, Southerners did focus on a specific tribe to be represented in the government but rather sought to advance anyone of South Sudanese origin. There was distrust and discontent due to this under-representation. The only solution for Southerners was to organize and unite to strengthen their position.

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\(^{140}\) Supra note 133.  
\(^{141}\) Supra note 126, at 353.
Some perceived that British domination was replaced by northern Arab domination as a new system of “internal colonialism”. However, Sudan was not “colonizing” South Sudan in the original sense of this word but rather it was exploiting its people and their resources. John Garang de Mabior a rebel leader from the South was calling in the name of a unified country that would incorporate diverse people. A state where there will be no exploitation in any sense. Garang’s faction has been entrusted to shaping a united, secular Sudan.

The first civil war ended with the conclusion of the 1972 Addis Ababa Agreement, which offered significant regional autonomy to the South on internal affairs. The Agreement involved several protocols to manage the regional autonomy of the Southern regions, including administrative arrangements for the interim period until the foundation of institutions; amnesty and judicial arrangements; and cease-fire arrangements. This allowed Southern Sudan to achieve significant autonomy, an integral component of ISD, which involved full authority and control over their local issues. This enabled Southern Sudan to practice their culture and customs. However, Southerners were still not content with their representation in the political arena. They were also not autonomous regarding economic matters as Northern government was still controlling and exploiting them. The agreement succeeded with the allowance of an autonomous government and this eventually stabilized the region for many years until the hostilities restarted with the second civil war. This led to the break of the second civil war.

4- Second Civil War: 1983 to 2005

In 1983, the second civil war rapidly ignited. President Nimeiri extended Islamic Law, known as Sharia law, to the whole country, making it the main basis for legislation and Arabic the official language. Nimeiri violated the principles of the Addis Ababa peace agreement which ended the peace allowed and enjoyed under the agreement.

144 Supra note 126, at 364.
Fighting occurred because of different themes: self-determination, the role of religion and resources. A method of “forceful Islamization and Arabization of non-Muslims and non-Arabs were seen as the only basis for national unity.”\(^{145}\) The federal government was interested solely in implementing the Islamic agenda through the use of repression. According to one source, the “north Sudanese occupying army resorted to brute force, and those who resisted conversion to Islam were shot on sight and survivors either forced to surrender or to flee to neighboring African countries.”\(^{146}\) Southerners’ rejection of *Sharia law* was because they felt that they would never social, economic, political and cultural rights in a court of law.\(^{147}\) The problem with implementation of *Sharia law* with non-Muslims is that it compels to respect of the Islamic beliefs. *Sharia law* and Islam are inseparable, both underlining the will of God. *Sharia law* is not recognizing the human right of people related to the Universal Declaration of Human Rights that every human has the right to freedom of thought, conscience and religion but also to change their belief or religion. This eventually limits non-Muslims to speak against Islam or reject it. Therefore, Christians are persecuted as their places of worship are targeted and sometimes killed or even imprisoned for being perceived as disbelievers. *Sharia law* was harshly applicable in Sudan and it did not grant minorities their rights. *Sharia law* in Sudan is treating citizens in an equal manner; however, Christians are not welcomed to practice their religion freely as they are indirectly compelled to become Muslims.

Sudan wanted to homogenize and eliminate any cultural, religious and ethnic differences between the North and South. The federal government compelled the South to live under these conditions in the hope that these different features would disappear. The plan was to little by little erase the Southerner’s identity and force them to integrate within a homogenous Sudan and was accompanied with a lack of economic development and marginalization of the South. The idea is to keep one unified Sudan with continuous oppression over Southerners. This precipitated eruption of the second civil war in 1983.

In reaction of the second civil war, John Garang declared the birth of the Sudan People’s Liberation Army/ Movement (SPLA/ SPLM). With the escalation of the civil

\(^{145}\) *Supra* note 142, at 107.
\(^{146}\) *Supra* note 129, at 13.
\(^{147}\) *Id.* at 7.
war, the goal for North Sudan was not to enforce law and order but rather to get rid of the “infidels” and to expand Islam in the South. Moreover, the conflict increased due to the “discovery of natural and mineral resources, especially oil, in Southern Sudan.” The war was finally brought to a conclusion with the 2005 CPA. This Agreement was quickly considered to be a step towards the right to self-determination for South Sudan.

B- The CPA, internal self-determination and secession

Many initiatives were offered in order to end the civil war. In 2005, the Comprehensive Peace Agreement (CPA) was concluded as a peace treaty between the North and South to end one of Africa’s longest civil wars and to establish political stability. The CPA offered a point of change acknowledging immediate southern autonomy and the right to self-determination after six years from its conclusion, following a referendum to decide the South’s political future. This meant that for the first time, South Sudan would have the choice to either remain in a unified Sudan or to choose secession, under Article 1(5) of the CPA. According to this provision, at the end of a six-year interim period, a referendum would be organized by the Government of Sudan (GOS) and the SPLM/A in which the South would either vote for the unity of Sudan or for secession.

The CPA included a collection of agreements signed between the GOS and Government of Southern Sudan (GoSS) such as: the Machakos Protocol, the Agreement on Security Arrangements; the Agreement on Wealth Sharing; the Protocol on Power Sharing; the Protocol on the Resolution of Conflict in Southern Kordofan and Blue Nile States; and the Protocol on the Resolution of Conflict in the Abyei Area.

All of the mentioned Protocols were designed to maintain peace between the GOS and the GoSS. However, the Machakos Protocol is the only document that focuses on the right to self-determination for South Sudan with the option of secession or unity. It states in Article 1(3) that “the people of South Sudan have the right to self-determination, inter

alia, through a referendum to determine their future status.”\textsuperscript{150} For the first time, the Protocol acknowledged the diversity of Sudan highlighting that it is “a multi-cultural, multi-racial, multi-religious, and multi-lingual country, and confirmed that religion would not be used as a divisive factor.”\textsuperscript{151} This diversity had been an ongoing impediment to a unified Sudan.

Throughout the six-year interim period, the CPA included a number of rights that can be categorized as a form of ISD. South Sudanese people were allowed to exercise ISD through the “right to control and govern affairs in their region and participate equitably in the National Government.”\textsuperscript{152} Southerners were granted autonomy and the right to choose their own government with the introduction of the GoSS that included a regional legislature; an executive branch and a judiciary.\textsuperscript{153} In 2005, \textit{Sharia Law} was suspended in the South. English replaced Arabic as the medium of administration and instruction.\textsuperscript{154} The conclusion of the CPA allowed many Southerners to return with safety and dignity to their country of origin. Although the death of the SPLM leader John Garang in 2005, led to a precarious situation in Abyei, South Kordofan and the Blue Nile, there is no record of grave human rights violations against Southerners by the Sudanese authorities after the conclusion of the CPA unlike the period during the civil wars. The CPA was perceived as a stronger agreement than the previous Addis Ababa. Both agreements were offering Southerners the right to ISD. However, the CPA put allowed a forceful implementation of ISD.

During the period between 2005 and secession in 2011, the CPA attempted to offer South Sudan ISD. However, at the same time, it was perceived as a failure to Southerners. The CPA failed to fully implement the Wealth Sharing Agreement due to the non-fulfillment of the equal distribution of the oil revenue. Southerners were not in full control of their own resources. This could clearly be seen in the absence of oil

\begin{itemize}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Supra} note 126, at 396.
\item \textsuperscript{152} Machakos Protocol, 20 July 2002.
\item \textsuperscript{153} \textit{Supra} note 149.
\end{itemize}
revenues derived from southern oil fields that were not given to the Southerners.\textsuperscript{155} The fact that South Sudanese were not allowed to manage the oil industry and the monetary policy management that remained under the Sudanese authorities’ control underlines the lack of autonomy exerted over their resources. This was perceived to eventually threaten economic growth of the country as well as the principle of autonomy that is an important characteristic of ISD. The agreement required that the wealth of Sudan be fairly shared in order to enable each level of government to fulfill its legal and constitutional duties and responsibilities.\textsuperscript{156}

On the other hand, the CPA was perceived as playing another negative role. It did not hold accountable the people who committed serious human rights abuses and war crimes during the two long civil wars. The CPA acts as a document allowing Southerners to be autonomous, but it also compelled them to forget years of suffering without holding accountable any individual.

South Sudan seceded in 2011 under the terms of the CPA. The idea of the right to self-determination was enshrined in the CPA in the sense that Southerners would first have the right to ISD and then later can vote if they wish for the right to ESD: secession. The CPA has succeeded to maintain peace between the South and the North, and it also allowed to later guaranteeing the exercise of the right to self-determination. The CPA played the role of a temporary ceasefire. Yet, South Sudan started to see secession as unavoidable according to what is known as remedial secession. The CPA and the Addis Ababa Agreement did not allow Southerners to fully exercise ISD. South Sudan was partially denied the right to exercise freely ISD therefore it was allowed to exercise its right to ESD. In other words, the lack of access of the right to ISD in many ways compelled South Sudan to see secession the next possible step. Remedial secession was allowed in order to remedy the situation of South Sudan because it did not enjoy fully rights under the CPA. The right to self-determination was exercised gradually by South Sudanese.


\textsuperscript{156} Supra note 149.
Sudan. This is ostensible in the implementation of the first option of ISD and then later ESD.

New policies were essential to achieve respect and equality of South Sudanese. Southerners believed that it was about time to exercise ESD in order to end these injustices. Secession was opposed by the GOS as it insisted on a unified Sudan. GOS counter-argued that “the whole country exercised the right to self-determination in 1955, and opted for independence and unity of the country.”\textsuperscript{157} Thus, any talk of a separation was not to be considered.

Southerners voted in the referendum in favor of independence and therefore South Sudan was born on July 9, 2011.\textsuperscript{158} For the first time, South Sudan exercised its right to ESD. Consequently, South Sudan was recognized by States and also became a member of the UN.

The SPLM is the main agent that played a significant role in insisting on acquiring of the right to self-determination. The road was not easy due to the continuous rejection of the Northerners of the right to self-determination and goal of maintaining its unity with the South. The SPLM wanted the full implementation of self-determination in “its full legal, constitutional and political cover.”\textsuperscript{159} Southern Sudanese started to be perceived under international law as distinct people who were allowed to the right to external self-determination.

\textbf{C- The right to external self-determination/ secession under international law}

There are different perspectives that analyze the case of South Sudan and its quest for self-determination. On the one hand, some views go against that the exercise of the right to self-determination in the case of South Sudan since it does not meet the traditional criteria of the right to self-determination under international law. On the other hand, other scholars believe that South Sudan was correct in exercising the right to secession due to the constant injustices and discrimination perpetrated on its population. International law

\textsuperscript{157} \textit{Supra} note 126, at 359.

\textsuperscript{158} \textit{Supra} note 66, at 296.

\textsuperscript{159} \textit{Supra} note 126, at 385.
is ambiguous because it does not include an affirmative right of secession, yet at the same time, it does not unambiguously forbid secession.

1- Against Secession

As explained in the previous chapter, the right to self-determination is interpreted in a very limited way by most mainstream international law scholars. Some analysts examine the right to self-determination in its very traditional conception. According to this view, in the non-colonial context, self-determination allows only for ISD, such as autonomy and self-government, to operate. In the colonial context, self-determination applies in the sense of ESD: secession or independence.

According to this view, the right to self-determination does not apply to the case of South Sudan because it was not under colonial domination. ESD or secession is deemed as a tool of decolonization and has very little application beyond that condition. The language of the right to self-determination in the non-colonial context only includes self-government and autonomy but not secession. Therefore, the legal framework does not endorse the application of the right to self-determination in the case of South Sudan.

Some scholars also argue that remedial secession is likely to have a negative effect on the prevention and decline of armed conflict.160 This concept will be further examined later in the thesis. There are five arguments that are against remedial secession: “increased incentives for secessionism and minority persecution; not requiring the consent of the predecessor state for secession, which has been a condition for peaceful secession historically; vulnerability of such a system to exploitation by regional hegemons and irredentist governments; practical problems with implementation and enforcement; and unintentional undermining of efforts to increase internal self-determination.”161 Critics argue that the application of a remedial secession system would also likely weaken political negotiations in order to attain greater ISD for people and minorities in numerous ways.162

160 Supra note 107, at 151.
161 Id. at 156.
162 Id. at 159.
Moreover, secession of South Sudan seems to be a problematic topic due to the different views whether in accepting or rejection the right to secession. The UN Secretary-General Ban-Ki-Moon explained in January 2010 that it was essential to “work hard” to prevent South Sudan’s secession.\(^{163}\) Secessionist movements are the fear of any State since they can trigger civil war in the country with the eventual split of the country.\(^{164}\) Some scholars believe that the right to secession should not be easily recognized because such recognition would encourage secessionist violence.\(^ {165}\)

However, the right to secession should not be the only option for all states. It needs to be analyzed on a case-by-case basis. There needs to be a reflection on any decisions before offering the option of the right to secession because it depends on the “profile” of every country, it depends on the possibility of implementation or non-implementation, it depends on the possible outcome of every country and the acceptance of the population. However, the right to secession must act for the best interest of the country.

### 2- In favour of secession

The birth of South Sudan is controversial in international law. In order to make the traditional conception of self-determination applicable to South Sudan, some scholars have tried to argue that South Sudan existed under a form of colonial domination. For example, D’Agoot argues that the conflict was perceived as a forgotten war of decolonization.\(^ {166}\) The South viewed itself as being exploited by the North. Vidmar disagrees with D’Agoot. He argues that South Sudan became independent owing to the official acceptance of the central government to hold a referendum. The circumstances of South Sudan is not a subject of decolonization as D’Agoot highlights but is rather a situation of a consensual emergence of a new state outside the colonial context.\(^ {167}\)

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\(^{164}\) Id.


\(^{166}\) Supra note 142, at 104.

On the other hand, other researchers argue that the right to ESD applies in the case of South Sudan according to the “modern” view of self-determination which argues that in some cases, a “peoples” outside the colonial context may secede. According to this view, due to the constant serious atrocities, basic human rights violations, suppression and prevention of ISD, the right to self-determination/ secession can be applicable to South Sudan. Moreover, since Sudan did not include Southerners within the decision-making process, consequently the right to remedial secession might be triggered. Many scholars affirm that the right to self-determination is legally applied to people who are subject to discrimination, harm and persecution and therefore, secession is the remedy to their situation. Roethke illustrates the concept of remedial secession which considers the right to secession under international law applicable when “peoples” are unable to exercise their right to ISD.\(^{168}\) This theory hypothesizes that if “peoples” are victim to serious violations of human and civil rights by the state, consequently, “international law recognizes the right of the afflicted group to secede from the offending state.”\(^{169}\)

These violations could clearly be seen in the two decades of civil war between the North and the South of Sudan, the unequal economic distribution and the unequal access to political power.

According to this view, remedial secession should apply in the event that people experience massive, severe violations of human rights that are widespread and systematic. The right to self-determination applies in the case of South Sudan as a remedial secession for people who have faced massive human rights violations and been deprived of ISD. The civil wars that lasted for decades ultimately led the government of Sudan to accept the holding of a referendum on the secession of South Sudan. Southerners wanted to be independent and exercise the right to self-determination due to the violation of their basic human rights. The reasons that lead a “people” to decide to secede are because the parent state, in this case, Sudan is discriminating against the people in the territory in a manner which hinders the life of Southerners. The discrimination and the oppression can take the form of political, economic, cultural or


\(^{169}\) *Id.*
And in actuality, secession might be the best option for oppressed people. In other words, it might be probably the only manner for the discriminated people and territory to safeguard itself.\(^\text{171}\) The mechanism for secession was embedded in the 2005 CPA and the constitutional arrangement that was concluded from this agreement.\(^\text{172}\) Vidmar points out that South Sudan “further affirms that such constitutional provisions tend to be implemented exceptionally, as a political compromise and an interim solution aimed at peaceful settlement of the contested entity’s legal status.”\(^\text{173}\)

The right to secession in South Sudan was enabled by the consent of the Sudanese state. Southerners had faced considerable discrimination and harm for many years. Frankel highlights the point that the heavier oppression and discrimination, the more weight an investigatory body should give the secessionist claim.\(^\text{174}\) Some scholars compare the case of South Sudan to Kosovo. However, unlike Kosovo, South Sudan was created with the authorization of Sudan the parent State.\(^\text{175}\) Because South Sudan was born with the approval of Sudan, its parent state, consequently its legal status under international law was not a matter of argument.

Furthermore, South Sudan was able to legally prove that Sudan, the parent state permitted the application of the right to self-determination thanks to all the conventions that were signed and ratified by Sudan. This right, enshrined in several international conventions, strengthened the position of South Sudanese to demand their recognized right to self-determination. The International Covenant on Civil and Political Rights (ICCPR) was ratified by Sudan on the 18\(^{\text{th}}\) of March 1976. Sudan also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the 18\(^{\text{th}}\) of March 1986. The African Charter on Human and Political Rights was also signed by Sudan on the 3\(^{\text{rd}}\) of September 1982 and ratified on the 18\(^{\text{th}}\) of February 1986. The concept of self-determination is also reflected in Article 1 (2) and Article 55 of the UN

\(^{170}\) Supra note 94, at 553.
\(^{171}\) Id.
\(^{172}\) Supra note 167, at 553.
\(^{173}\) Id.
\(^{174}\) Supra note 94, at 553.
\(^{175}\) Id.
Charter, which Sudan is a party to. The signature and ratification of the mentioned legal documents compels Sudan to abide by the right to self-determination as a principle of human rights.

To conclude, the conflict between Sudan and South Sudan lasted for more than two decades. The First Civil war, Southerners wanted to gain autonomy due to the unequal distribution of resources and power. The first civil war was brought to an end with the Addis Ababa Agreement that was able to maintain peace for many years. The mentioned agreement authorized Southerners to have the right to ISD by having full authority and control over their local issues. Yet, the agreement failed which led to the burst of the second civil war. The latter was accompanied with a forceful implementation of Sharia law aiming to forcefully eliminate cultural, religious and ethnic differences. The Sudanese purpose was to establish a unified Sudan with one identity. As a result, the CPA in 2005 put an end with a forceful application of the right to ISD. However, as the Addis Ababa Agreement and the CPA failed to fully implement the right to ISD, therefore, remedial secession or the ESD was deemed as the only option. The right to self-determination is gradually applied in the case of South Sudan, starting from ISD to ESD. The following chapter will examine a flawed right to self-determination.
IV- A flawed right to self-determination

The right to self-determination in international law was used to justify decolonization. This could be underlined with the dating of the Resolutions that were adopted mentioning the right to self-determination. During the 1960’s and 1970’s, many States were either obtaining their independence or through the process of independence. Although international law is silent on secession, one has to know that self-determination has developed. Self-determination is a path that should have a positive outcome. The CPA was supported to be fully endorsed embracing the right to self-determination. However, only few states expressed concern regarding the impact of secession on other self-determination movements in Africa and worldwide.176

A- Beyond secession

1- Secession of South Sudan

Chapter II explained the “modern view” of self-determination which was the main source of secession of South Sudan. The massive human rights violations and atrocities were ongoing in the South. Moreover, the suppression of ISD gave no option for South Sudanese but to fight for secession. These characteristics led South Sudan to eventually pursue its secession through the “modern” view of remedial secession, triggered by ESD. People have the right to secede only as a remedy to escape severe human rights violations. Secession means that there is a resistance and antagonism against the government. The purpose of secession at this point is not to remove the government but rather to take away a part of the territory and establish their own government.

South Sudan has demonstrated to the world how victimized it was for all these decades and that they needed to find a solution in order to be able to live peacefully. This independence was perceived as a milestone event and a bright opportunity to establish a South Sudanese state. South Sudanese used the language of international human rights

law by emphasizing how their basic human rights were violated. International law was used as a language to highlight their oppression. The purpose of this language of human rights is to have access to the right to self-determination since it will act as a human right including several human rights. It is believed that by achieving secession, all the human rights will be respected. South Sudan assumed that with secession, peace and stability will be established. The right to self-determination should not be perceived as an easy option but rather a respected ongoing option.

Although South Sudan was a new country, many reports underline the fact that despite this secession, South Sudan is marked by ongoing conflict and corruption. Reports show inter-tribal violence happening all over the country with different rebel militias fighting against the government of South Sudan.

2- Theories of secession

The perception suggested by Moore is the Remedial Right Only Theory of secession. This theory embraces that the right to secede, as a general right, rather than a particular right founded by negotiation or by explicit constitutional requirements, occurs only in reply to serious and continuing grievances that will finally make the right to secede similar to the right to revolution.177

Buchanan offers two types of theories of secession. The first one is the Remedial Right Only Theories or also known as the primary right to secede where he argues that people have fully the right to secede if they suffered specific injustices. Secession is justified as a remedy for these violations. Buchanan emphasizes that a group has the right to secede if either the physical survival of the members is endangered by events of the state or if it suffers infringements of other basic human rights or its earlier sovereign territory was unfairly taken by the state.178 The second theory Buchanan offers is the “Primary Right Theories” which entails that there is a general right to secede that is not only remedial.179 He explains that the Primary Right Theories affirms that certain groups

177 Supra note 74, at 25.
178 Supra note 102, at 230.
179 Id. 224.
can have a (general) right to secede in the absence of any injustice.\textsuperscript{180} Therefore, it also implies that a group can have a (general) right to secede from a perfectly just state that that does exert injustices.\textsuperscript{181} Such theories do not need as a required provision of a group’s having the right to secede, that it has been subject to injustices.\textsuperscript{182} Some support this theory because it is perceived as the theory of the moral right to secede.\textsuperscript{183} Buchanan identifies two types of Primary Right Theories which is the “Ascriptive Group Theories” and the “Associative Group Theories.”\textsuperscript{184} The “Ascriptive Group Theories” states that a certain group has the right to secede on the basis of a shared culture, language, history, or shared aspiration for comprising its own political entity.\textsuperscript{185} As for the “Associative Group Theories”, it highlights that groups have the right to secede on the basis of the expressed voluntary preference of a sufficient proportion of the members of the group that the group shape its own state.\textsuperscript{186} In other words, “Associative Group Theories” do not specifically require that a group have any shared ascriptive characteristic such as ethnicity or culture, even as a necessary condition for having the right to secede.\textsuperscript{187} These theories do not necessarily demand that a group with the right to secede has been treated unjustly or that it share ascriptive characteristics, while a logical theory of this type would require that the group have sufficient resources and territory to be able of forming a viable state.\textsuperscript{188} One can merge an Acriptive Group Theory or Associative Group Theory of the general moral right to secede with the perception that international law must recognize only a remedial right to secede in cases of injustices.\textsuperscript{189}

A group should have the right to secede no matter how varied they are. To go a step further, a group has the right to secede just in case it has the power to bring it about that it has the claim-right to trigger a state that will have jurisdiction in the territory, and it has

\textsuperscript{180} Allen Buchanan,\textit{ Theories of Secession},\textsc{ Phil. & Pub. Aff.}, Vol. 26, No.1, at 35.
\textsuperscript{181} Id. at 40.
\textsuperscript{182} \textit{Supra} note 102, at 224.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} \textit{Supra} note 181, at 38.
\textsuperscript{186} \textit{Supra} note 102, at 224.
\textsuperscript{187} \textit{Supra} note 181, at 38.
\textsuperscript{188} \textit{Supra} note 102, at 224.
\textsuperscript{189} Id. at 225.
the freedom to conduct a plebiscite that could give it this claim-right.\textsuperscript{190} Although, Buchanan theory: “Primary Right Theories” is interesting because it allows people to secede without having a specific justification, yet, this theory in real life is not easily applicable. This is due to the silence of international law on secession and sometimes the discouragement to implement secession explained in Chapter II. However, South Sudan did not have to apply this theory because it had sufficient reasons to claim the right to self-determination. Due to the gross human rights violations in South Sudan, remedial Right Only Theories applies since the sources of secession were based on injustices. Southerners had specific reasons that pushed them for arguing for secession. Remedial Right Only Theories is similar to the same ideas of the second view of self-determination, labeled as the “modern view”. Both theories permit the right to self-determination when it comes to South Sudan due to their same characteristics for the reasons leading to secession. Furthermore, both theories insist that they are based on the gross human rights violations, atrocities, suppression, persecution and more. The foundations of these theories have a hidden message in calling for ending these atrocities and to respect human rights. It is therefore expected that South Sudan will defend human rights and flourish as a successful state since it based its secession on the language of human rights.

B- Political Development after secession

1- South Sudan Constitution\textsuperscript{191}

After the independence of South Sudan, new measures were intended to be applied in the course of this secession. The Transitional Constitution for the Republic of South Sudan (TCRSS) was promulgated in 2011. It includes significant terms regarding citizens’ rights such as the right to own property, the right to freedom of movement and residence and the right to vote. The TCRSS is dynamic in the sense that it offers a protection to the citizens of South Sudan. It also offers extensive rights that are taking into consideration the issues of citizenship, political violence and discrimination happening before secession. South Sudan recognizes international law as lawful source.

\textsuperscript{190} Id. at 227.

This is illustrated in TCRSS in Article 5(d) stating that the Sources of legislation in South Sudan shall be “any other relevant source.” Furthermore, according to Article 9(3): “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill”. According to the right to participate in the political process and vote Article 26(1) states: “Every citizen shall have the right to take part in any level of government directly or through freely chosen representatives, and shall have the right to nominate himself or herself or be nominated for a public post or office in accordance with this Constitution and the Law.” Article 26(2) states that “every citizen shall have the right to vote or be elected in accordance with this constitution and the law.” With regard to freedom of movement and residence, Article 27(1) asserts that every citizen has the right to freedom of movement and right to choose his/her residence unless for reasons of public health and safety, it should be regulate by law. Article 28(1) covers the right to own property, as it states that every person shall have to obtain or own property as regulated by law. Still, the constitution is very wide as it also offers rights to women, the right of South Sudanese to have access to health care and education.

It is essential to highlight that the constitution is equal to all citizens. The principle of ethnicity is not enshrined in law. This eventually doesn’t empower any tribe over the other. The TCRSS offers a protection of ethnic rights to practice their customs, beliefs and languages. The freedom of speech and press was also offered to South Sudanese citizens, although, it was not respected before. Therefore, the constitution is perceived successful. However, the TCRSS gives extensive powers to the executive. The president cannot be impeached and has the authority to fire state authorities and suspend the

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192 Id.
193 Id.
194 Id.
195 Id.
196 Id.
197 Id.
199 Id.
parliament.\footnote{Freedom in the World 2013 - South Sudan, Freedom House, Jun. 3, 2013, available at: http://www.refworld.org/docid/51aefab143.html.} Although, an interim constitution was passed, yet, a short of skilled personnel is unable to rule the country. The weaknesses of the SPLM and the fragility of the agreement are becoming severely apparent.\footnote{Princeton N.Lyman, Sudan-South Sudan: The Unfinished Tasks, American Foreign Policy Interests: J. NAT’L COMMITTEE AM. FOREIGN POL’Y, 2013, at 335.}

Yet, despite the fact that South Sudan got its independence, it is connected to the North socially and economically.\footnote{Supra note 198, at 21.} This eventually triggers a country that lacks its independence in its real sense.

### 2- Accession to International human rights treaties


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;\footnote{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html.} Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;\footnote{Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, UN General Assembly, 9 January 2003, A/RES/57/199, available at: http://www.refworld.org/docid/3de6490b9.html.}

Discrimination; ICCPR; Optional Protocol to the ICCPR; Second Optional Protocol to ICCPR, aiming at the abolition of death penalty; ICESCR; Optional Protocol to the ICESCR; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution an child pornography; Optional Protocol to the Convention on the Rights of the Child on a communication procedure; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; International Convention for the Protection of all Persons from Enforced Disappearance; Convention on the Rights of Persons with Disabilities; and finally the Optional Protocol to the Convention on the Rights of Persons with Disabilities.\textsuperscript{210}

On the one hand, South Sudan has ratified the mentioned convention highlighting its international consent to be bound by these treaties. South Sudan is consequently is deemed to be legally bound internationally by the mentioned treaties. On the other hand, South Sudan did not sign several significant conventions. The reason that could be behind the non-signature of the ICCPR is because it enforces on State Parties numerous legally binding obligations including various human rights and freedom of speech as well as expression. The ICESCR includes several rights related to: education, labor, environment, health, cultural rights, housing and most importantly the right to self-determination. It seems that South Sudan wanted to prevent the signature and ratification of the ICCPR and ICESCR for one main reason: the right to self-determination. Due to the presence of several ethnic groups in South Sudan that are already in conflict with each other, South Sudan fears that any of these ethnic groups can raise the principle of the right to self-determination. Furthermore, South Sudan is divided into different states in which some tribes are dominating some areas. This could also be an additional reason for some tribes to look for the implementation of the right to self-determination.

Moreover, the non-signature and ratification of the above mentioned treaties is putting South Sudan today to act against the aims and purposes of these treaties. Although, South Sudan’s human rights violations are recognized worldwide, yet, the non-
signature of the mentioned treaties is aiming to prevent the violation of the legal documents.

3- **A struggle for power accompanied by human rights violations**

South Sudan achieved its secession in 2011. Some believe that the case of South Sudan is considered to represent the most recent successful implementation of an earned sovereignty approach to conflict resolution.\(^{211}\) South Sudan attained sovereignty due to the conflict; however, some perceive that sovereignty or secession does not signify to be the best approach to resolve conflict. Furthermore, according to this source released in 2011, it was early to draw such a conclusion right after secession.

One of the reasons that led South Sudan’s constitution to be disappointing is because of the power struggle which led clashes to take place between the forces of President Salva Kiir, his supported SPLM/A and Nuer-based militia loyal to his Vice President Riek Machar. The latter announced that he would challenge Kir for the presidency of the party in 2014 and of the country in 2015. This has eventually triggered a crisis because this presidency would be strongly opposed by the majority Dinka.\(^{212}\) The crisis is strengthened because of two biggest tribes in South Sudan are fighting over presidency. Consequently, Kiir dismissed Machar, his entire cabinet and the secretary-general of the SPLM for being perceived as disloyal and encouraging rebellion.\(^{213}\)

Reports emphasize the failure of the Government of South Sudan (GoSS) to secure its citizens. This is apparent with the “very weak rule of law institutions and insufficient attention by GoSS authorities to rule of law issues [giving] rise to an environment of impunity, particularly for soldiers who [viewed] themselves as “liberators” of the South and above the law.”\(^{214}\) They committed serious crimes against humanity such as beatings, sexual violence, arbitrary detention and more.

Following the struggle of power, a crackdown on human rights was triggered. Since the conflict started on 15 December 2013 until today, South Sudan severely returns to

\(^{211}\) *Supra* note 176, at 140.
\(^{212}\) *Supra* note 202.
\(^{213}\) *Id.*
civil war accompanied with terrible human rights abuses and violations categorized under international law. These violations occur every day by government forces and armed groups. The continuing human rights violations, abuses of human rights law and humanitarian law get worse day after day which violates the right to life in the sense that South Sudanese can die if they remain in South Sudan. A large number of the population has been displaced because of the conflict. According to the UN Office for the Coordination of Humanitarian Affairs, around two million people were displaced overall, with around 500,000 as refugees in neighboring countries.\footnote{Human Rights and Democracy Report - South Sudan, United Kingdom: Foreign and Commonwealth Office, 12 March 2015, available at: http://www.refworld.org/docid/551a52fa15.html.} An interim report was released on 15 March 2014 by the South Sudan Human Rights Commission noting the wide scale and intolerable violations of the right to life and the disruption of the livelihoods of hundreds of thousands of civilians in addition to the disorder of social services provision.\footnote{South Sudan - Country of Concern: latest update, United Kingdom: Foreign and Commonwealth Office, 31 March 2014, 31 March 2014, available at: http://www.refworld.org/docid/54c60c8b4.html.} The report is also calling for the identification of the perpetrators to be held accountable. The right to life is enshrined in Article 3 of the Universal Declaration of Human Rights (UDHR) and in Article 6 of ICCPR. Yet, South Sudan did not sign and ratify the ICCPR. However, according to Article 11 of the TCRSS states “every person has the inherent right to life, dignity and the integrity of his or her person which shall be protected by law; no one shall be arbitrarily deprived of his or her life.”\footnote{Supra note 191.} South Sudan can be held accountable because of the violation of the Article 11 of the TCRSS.

Moreover, ethnic violence has intensified within different southern regions. Ethnic groups fight over cattle and land. This leads the SPLA army to engage in major human rights violations. Many reports emerged of SPLA participating in severe human rights violations such as burning villages, attacking civilians and supporting one side against the other.\footnote{Supra note 202, at 336.} The UN peacekeeping force, UNMISS released a report that civilians were caught up in the violence and also directly targeted, frequently along ethnic lines.\footnote{UN envoy on sexual violence warns rapes in South Sudan will ‘haunt’ generations, UN News Service, 6 October 2014, available at: http://www.refworld.org/docid/5433d3364.html.}
Civilians were facing much harm such as killing, rape, theft, looting and destruction of property, which has eventually contributed to the displacement of more than 400,000 people.\textsuperscript{220} Human rights violations were conflict-related abuses by government security forces, opposition forces and Rebel militia groups (RMGs), and finally opposing ethnic communities, involving ethnically targeted killings of civilians as well as ethnically targeted discrimination and violence that is accompanied by abuse, extrajudicial killings, mass displacement of civilians, terrorization and other inhuman treatment of civilians including arbitrary arrest, detention, abductions, child recruitment and sexual violence.\textsuperscript{221}

Since the outbreak of the conflict, many crimes were committed that are considered to be grave violations of international humanitarian law and can be categorized sometimes as crimes against humanity or war crimes. Moreover, violence erupted between members of the President Guard Force (PG), known as the Tiger Division. Some reports indicated PG members of Dinka tribe try to disarm PG members of Nuer tribe.\textsuperscript{222} This underlines a target to eliminate Nuer and unify Dinka to fight for the same goal. Reports emphasize Dinka members of the PG and other security forces targeted killings of Nuer civilians all over the city.\textsuperscript{223}

Other human rights violations are also occurring encouraged by a corrupted government. This is illustrated with harsh prison conditions; lack of access to justice or corruption in the justice sector; extended pre-trial detention; restriction on freedom of speech, press, privacy and association; abduction related to ethnic conflict.\textsuperscript{224} Women and children are the most vulnerable people facing harm. Conflict-related sexual violence was widespread throughout South Sudan as women became targets of revenge.\textsuperscript{225} The SPLA, police, opposition forces, and RMGs reportedly tortured and raped women.\textsuperscript{226} The government attempted to take some initiatives to found investigative committees for

\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Id.}
human rights violations, however, these attempts did not lead to punishments, prosecutions or responsibility.\textsuperscript{227} Children are forcefully recruited to become child soldiers by both government forces and anti-government forces. UNICEF underlines that almost 10,000 children are fighting in the war, with around 70 percent recruited by the White Army, a civilian force fighting for the opposition.\textsuperscript{228}

Many reports underline the harm that human rights advocates face in South Sudan. This could be seen with American nongovernmental organizations (NGOs) like the International Republican Institute and the National Democratic Institute that have been harassed.\textsuperscript{229} The government purposely restricted, harassed and attacked international organization workers and NGOs workers. The situation gets worse because of the SPLM government’s refusal to permit the UN Mission in South Sudan (UNMISS) to have full access to the area or carry out investigations.\textsuperscript{230} These characteristics make South Sudan and Sudan as oppressive rules. This is illustrated with the reports underlining that South Sudan is a derivative of Sudan and what is happening in the South is a copycat of Sudan.\textsuperscript{231} Since the eruption of conflict in 2013, the government attempted to influence media coverage of the conflict and even sometimes threatening those who tried publishing or broadcasting the opposition’s view of events.\textsuperscript{232} The government tries to hide the reality of South Sudanese aiming to prevent any criticisms from states.

The situation of the country has been very critical as there must be an immediate peace agreement, cease-fire required to end the conflict. There is an urgent need to make compromises aiming to establish a comprehensive agreement of South Sudan, the war-torn country. In February 2015, “Areas of Agreement” was signed between Salva Kiir and the rebel leader Riek Machar in Addis Ababa aiming to have a future transitional government of national unity.\textsuperscript{233} The UN Secretary-General Ban Ki-Moon urged Salva Kiir and Riek Machar to enable peace to thrive by putting the interests of their people

\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Supra note 202, at 336.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Supra note 221.
ahead of their own.234 In March 2015, the two sides failed to agree on power-sharing agreement, although the UN Security Council adopted a system for imposing sanctions on those who prevent the way to peace.235

The situation remained the same. Owing to the threat of sanctions, in August 2015, President Salva Kiir signed a power-sharing agreement to put an end to the country’s civil war. The Secretary-General highlights that the agreement should be translated into a guarantee to end of violence, suffering and terrible human rights violations witnessed throughout the conflict.236 Although, the peace agreement gave hope that violence will little by little disappear, this was not the case. Reports underline that government army would come to look for rebels but during this process they kill civilians, rape and abduct hundreds of women and girls.237

Therefore, the implementation of the peace deal emphasizes its weaknesses. The CPA and other peace agreements had a specific target: end the conflict. The CPA acting as the first peace agreement was supposed to establish a system of government by replacing and amending the imbalances of the past.238 However, as it was previously discussed, the failed peace process and the internal strife in South Sudan illustrate still severe weaknesses in the implementation of the CPA. The struggle of power leads to an armed conflict which eventually highlights the weakness of a ruling system and lack of sense of belonging to a shared nation. Consequently, this tore South Sudan apart and human rights abuses and violations are likely to continue.

4- Criticism of Remedial Right Only Theory

Although the Remedial Right Only Theory seems to act as a savior for many people facing harm, still, it can act as a failed theory. Antonio Cassese proposes that international law has historically been unsighted to the demands of ethnic groups,

235 Supra note 233.
237 Supra note 233.
national, religious, cultural or linguistic minorities.\textsuperscript{239} International law refrains from granting any right of ISD or ESD to these groups but also fails to offer any substitute remedy to the present plight of so many of them.\textsuperscript{240}

As it could be seen throughout history, the human rights violations that were apparent before secession are still present after secession. Before attaining independence, Southerners were living in corruption and abuse. Even after the CPA, there was a suppression of ISD. Therefore, ESD was perceived as a remedial exercise due to the absence of ISD. South Sudan believed that due to the unjust exploitation and persistent violations of human rights, no remedy except self-determination is possible. The remedial right only theory emphasizes the right to secede as a result of violations of other rights. Therefore, the remedial right to secession can be justified legally and morally. South Sudan is considered as an example of “remedial secession” because it simply attained peaceful secession, promising an end to resolve horrific conflict. However, with the implementation of “remedial secession”, the situation remains the same which emphasizes the weak role of remedial secession.

South Sudan is deemed as one of the weakest and most underdeveloped countries facing constant challenges. Since secession, no efficient responsibility was taken regarding crimes, killings, abductions, sexual and gender-based violence (SGBV) and more serious human rights violations accompanied with humanitarian law violations. These gross human rights violations strengthen the conflict every day that is due to the persistent tensions between the two antagonist factions.

During South Sudan’s referendum, Sudanese officials expressed that the decision to support South Sudan’s right to self-determination is a mistake because it will not be governable and will be torn apart by ethnic divisions which will eventually lead to a failed state.\textsuperscript{241} The president Salva Kiir encountered this challenge before the referendum and right after secession by utilizing oil revenue offered under the CPA and calling for

\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Supra} note 202.
patriotism by bringing all the opposing militias and ethnic groups to be in a united front that lasted before and the referendum and early independence.  

South Sudan is similar to most African states in facing a common issue which is building a more inclusive political community that respects unity in diversity, upholds the role of law and practices democracy in governance.  

This is significantly important because South Sudan had the intentions to build up a political community as President Salva Kiir shows. The promises were extraordinary but quickly broke out into open civil war. South Sudan has specifically failed to accommodate the diverse peoples, to maintain law and democracy to rule the country. South Sudan has reached another extreme level of failure in very little time after secession. Consequently, ethnic violence indicates the discouraging task of structuring an inclusive political community that respects the differences in Sudan. Although, the TCRSS intended to have equality among South Sudanese citizens no matter their tribe is, yet, it tremendously failed. The conflict started from the biggest powers Salva Kiir and Machar that later encouraged the spread all over the country. The inspiration of unity was not fully enforced as there should have been more methods and measures taken in order to integrate different tribes into society and teach them to co-exist.

These characteristics create a dangerous South Sudan with a corrupted government that lost control and did not succeed to implement the essential duties and responsibilities of a sovereign state. It is not shocking to see that in 2013, the Fund for Peace graded South Sudan near the top states in danger of becoming failed countries. The significant problems in South Sudan are owing to “South Sudan’s own weaknesses in governance, in its lack of respect for human rights, and in the need for transformational reform of what is still a liberation army—and a fragile coalition at that—into a transparent and accountable civilian government.”

Yet, one has to note that self-determination is not the reason for the continuing catastrophic situation in South Sudan, yet, the establishment of South Sudan was fragile.

\[242\] *Id.*

\[243\] *Supra* note 198, at 7.

\[244\] *Id.* at 20.

\[245\] *Supra* note 202, at 336.

\[246\] *Id.*
before secession. In other words, South Sudan did not address the challenges existed long-before it attained secession. One could say that the parent state Sudan failed to remedy these challenges before independence. And since the human rights situation remains the same with different actors: Southerners exercising these violations, thus the exercise of secession did not “remedy” the harmful situation. Remedy must imply a sense of “cure” to the past experience of the population, but South Sudan is faced today with the same experience faced by the actors themselves.

Hence, it is not correct to talk about “remedial secession” when it comes to the case of South Sudan. The state continues to demonstrate itself as a failed state as it was previously explained. Although, peace agreements are attempted to be implemented, yet, their failure aggravates the disastrous situation. This triggers a country where some believe that it should not have been established in the first place due to its incapacity to rule itself.

C- Towards establishing a better South Sudan

Although, South Sudan had a peaceful secession, yet, South Sudan failed to establish an efficient government and a qualified army to rule the country after secession. Establishing a new country, gaining the trust of the population and establishing security in the country is not an easy task after secession. Billions were spent on peacekeeping, humanitarian aid by the US and other countries.\textsuperscript{247} The government of South Sudan needs to act and be capable to manage the presence of diverse tribes, the establishment of democracy and equality among citizens. Failing to handle the rule of law will lead to severe instability in the country.

South Sudan needs to save its population. The type of theory that was applied on South Sudan should not be the concern of the world, but rather the implementation of the basic human rights, the right to life should be thriving. ESD should aim to establish good conditions that would allow for a respectful life.

1- Towards a more coherent theory of external self-determination

\textsuperscript{247} Id. at 337.
The right to self-determination under international law is not clearly defined and imprecise. Additionally, international law did not offer a rational guidance on how to deal with secession. The lack of coherent guidance on secession under international law undermines the principle. More importantly, international legal doctrine and practice did not recognize a right to secede.\textsuperscript{248} International law has not been invoked effectively to block secession either; nor has it offered a principled characteristic between legitimate and illegitimate secession.\textsuperscript{249} Therefore, international law is emphasizing its imperfection. Although international law did not prevent secession, yet, international law seems to disfavor secession and fears its implications. Approaches toward secession are habitually negative or ambivalent at best.\textsuperscript{250} This right was used as a tool by promoting it worldwide in order to obtain its legal approval.

South Sudan implemented its right to secession because international law could not avoid the right to secession. However, in the case of South Sudan, international law did not explain whether secession was legal or illegal. On the one hand, one can say that the referendum can be interpreted as a first step to legitimate secession. On the other hand, this cannot be fully confirmed due to the lack of information regarding the legitimacy of secession under international law. Therefore, the right to self-determination is perceived as a flawed right. It seems that there is no intention of changing any behavior.

Some perceived that the secession of South Sudan would complicate the conflict. Johnson stresses that the independence of South Sudan would not resolve the problems but it would rather complicate the issues facing their allies and neighbors.\textsuperscript{251} It seems that South Sudan was unsure of the consequence of secession. However, they witnessed and lived what unity has brought them.\textsuperscript{252} In other words, Southerners wanted to try another type of unity that would gather the Southerners only.

Secession creates a new state by totally splitting up from an existing state. It eventually results in consequences. The outcome of secession can be many threats and prices such as “violence, economic instability, new institutions for the new state, family

\textsuperscript{248} Supra note 74, at 15.  
\textsuperscript{249} Id.  
\textsuperscript{250} Id. at 14.  
\textsuperscript{251} Supra note 238, at 148.  
\textsuperscript{252} Id. at 149.
dislocation, and creation of new minorities.”

This was actually the case of South Sudan. Preventing violence and establishing a sense of stability will require founding new institutions. Establishing new institutions with new rules will purposely correct the mistakes of the past. It is noted that secessionist attempts and the efforts of states to oppose them have led to harsh economic disorder and huge human rights violations.

Moreover, ethnic minorities gained independence only to subject their own minorities to the similar persecutions they previously suffered from. For these reason, so-called “remedial secession” should be limited according to the following:

The right to self-determination must be analyzed as a justification to secession. This is in situation where there is no less severe way to free a people from oppression by other. International human rights law includes restrictions on rights to protect other rights and to defend general interests of society.

Secession is not easy and it incorporates “major structural and institutional change to a state and to the international community of states, it makes sense that the costs of transition and the potentially lasting effects on individuals and groups within the original and the breakaway states be created only if no less drastic means is available.”

2- A respect of human rights

The literature on the right to self-determination tries to argue that it exists as a matter of international law. But none of the authors goes further than this right. None of these authors mentions how the right to self-determination could lead to safety, stability and peace that would eventually enable South Sudanese to live there. There needs to be a “future” after this right to secession. Some believe that economic capability should thus be an essential requirement for a group’s secession to be allowed. Although South Sudan is wealthy thanks to its oil, petroleum, natural resources and more, yet, South Sudan.

Amandine Catala, Remedial Theories of and Territorial Justification, J. PHI, at 79.

Id.

Supra note 74, at 14.

Id.

Supra note 15, at 82.

Id.

Id.

Id.

Supra note 253.
Sudan is incapable to rule its economy which leads it to be one of the most underdeveloped and weakest states.

If the South Sudanese chose to respect this right and use it for their own advantage, then they should have respected the rights of the South Sudanese after independence. It is not about the claim to have this right; it is about the characteristics and the outcomes of the rights that will eventually have to be respected by the leaders who fought for this right. The right to self-determination must be perceived as a right that contains a “continuous” path that does not stop after secession. In other words, the right to ESD should be about the respect of ISD after secession.

The right to self-determination was used to relieve the pain of South Sudanese who have been suffering for so many years at the hands of the Sudanese authorities. Still, the application of right to self-determination has led to many negative consequences in the case of South Sudan. This right should offer a feeling of peace and safety to the people who wish for it; however, in reality it is a right that requires many efforts to guarantee the right after independence. International law has failed to deal with these consequences. South Sudan has taken significant steps in order to establish a legal framework aiming to promote human rights. However, the human rights situation is deteriorating as there are still atrocities, human rights violations and the features of the ISD are being violated. In other words, although South Sudan is party to these international treaties, human rights violations are constant, as mentioned, which indicates a gap between international obligations and their application. South Sudan has international obligations towards its citizens that are not being respected in the first place.

To conclude, the “modern” view was the main source of secession of South Sudan. Since ISD was not effective, there was no other option than remedial secession. Southerners used the language of human rights by emphasizing their sufferings and the violations exerted over them. Southerners manipulated the right to self-determination for justifying secession and not to achieve the human needs, security and welfare of the citizens. Furthermore, the Remedial Right Only Theory supported South Sudan. The latter had sufficient reasons to justify their secession. After achieving secession, some
international conventions were ratified that were rapidly disregarded due to the human rights violations and struggle of power. Human rights were forgotten, if not ignored. The Remedial Right Only Theory and the “modern” view composed a flawed right to self-determination due to the continuous negative outcomes after secession. The right to secession/ theory/ view should not be the objective but rather the implementation of the basic human rights should be the objective.
V- Conclusion

The right to self-determination in the case of South Sudan has led to conflict and bloodshed. Once the South Sudanese acquired this right to secession, other rights have been violated. This reflects the critique put forward by Moore that secession, even in the lawful exercise of self-determination, often itself results in massive violations of human rights. In other words, once secession is achieved, international law seems to stop without shaping the outcome of this secession. Self-determination is deemed to be an accepted concept, however, the application of the right to self-determination particularly in cases of secession is criticized due to the fact that it is not perceived as an ongoing right but rather a right that is recognized only internationally and has a dead point once secession is achieved. Therefore, the right to self-determination is a flawed right.

This thesis proposes that South Sudan should be a development of an earned sovereignty approach. Earned sovereignty is bridging two approaches the “sovereignty first” and “self-determination first” approaches. Earned sovereignty “has been aided in its development by the increasing efforts of international organizations and powerful states to undertake global conflict management, including a willingness to aid states in conflict resolution and undertake institution building in conflict-affected areas.” Earned sovereignty is characterized by three principal elements: shared sovereignty, institution building and a determination of final status. Earned sovereignty approach was implemented before secession as North and South Sudan were engaged in a sovereignty-based conflict. The purpose of it was to end the conflict that included massive human rights violations. The internationalization of human rights facilitated the creation of a more favorable environment to comprehend stable democracies. The approach seeks to reestablish security, support institution building and democracy in war torn territories. The 2005 CPA was the first step of

262 Id. at 3.
263 Id. at 4.
264 Id. at 3.
265 Id. at 9.
earned sovereignty with the power sharing of several agreements, self-government and determination of political status by either ongoing unity or split of two independent states via the referendum.

South Sudan has been considered as a successful use of the approach to resolve the conflict. The approach ended many years of armed conflict between the North and South Sudan. During the six-year interim, earned sovereignty succeeded in maintaining peaceful coexistence between the two parties. The approach should be an ongoing process in South Sudan. International organizations and powerful states should share sovereignty with South Sudan to build trust and confidence. Shared sovereignty will enable the exercise of some sovereign functions and authority over the territory as well as some international institutions may exercise the same. The institution building will permit South Sudan with the international community to develop political and economic developments. South Sudan is essentially required to build new institutions for self-government or to modify those in existence. Shared sovereignty and institution building will prepare South Sudan to self-govern itself in order to be recognized as an independent successful state and not as a failed state.

266 Supra note 176, at 140.
267 Id. at 132.
268 Id. at 142.
269 Id. at 135.
270 Id. at 136.