The Role of Mediation in the Resolution of the South Sudan Crisis

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ABSTRACT

This paper is a study of the function of mediation as a dispute resolution mechanism in the attainment of independence in South Sudan. The motivation for this paper is an interest in the newly formed state, and a fascination with the manner in which the state was able to transform its situation from conflict to peace. Only a few jurisdictions have been able to secede from their parent states; namely Eritrea from Ethiopia, and the controversial secession of Kosovo from Serbia. This paper is therefore a great opportunity to explore how South Sudan, with the help of other actors was able to secure peace and secession through mediation. It will prove, with accompanying evidence, that without the input of mediation as a conflict resolution mechanism, the birth of South Sudan may not have been possible. It will demonstrate that the Comprehensive Peace Agreement played a central role in securing independence and autonomy through a referendum that expressed the will of the people of South Sudan. It is important to note that any peace process results from conflict and the need for a minority group in a state to be free: hence this paper will concentrate at length in analysing the factors that motivated the war, as well as the need for self-determination. It will also explain why the recognition of the new state of South Sudan has not been debated. The use of mediation and peace agreements has been employed in peace processes in jurisdictions such as Cambodia; and this paper will distinguish the agreements in South Sudan and Cambodia, to determine if South Sudan is unique and had the benefit of learning from previous peace agreements. It will argue that mediation and peace agreements are successful ways of providing lasting peace, self-determination and independence to oppressed minority groups. Moreover, the function of international law in mediation will be illustrated throughout the paper.

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1 INTRODUCTION

The purpose of this paper is to thoroughly analyse and explain the role of mediation in the resolution of the South Sudan crisis. This is because the secession and creation of South Sudan came after a lengthy peace process that employed the use of mediation as a conflict resolution mechanism. The paper will achieve this aim by examining surrounding issues such as the factors that led to the conflict, self-determination and recognition, while highlighting the most important issue which is mediation in South Sudan.

This paper is a combination of extensive research; both descriptive and analytical. The descriptive elements are for information purposes while the analysis serves to question and validate this information and clarify the law on this topic. This article focuses on South Sudan from objective and varied view points and makes informed opinions on existing studies on this subject. Various sources, both primary (for example cases and treaties) and secondary (such as reports and journal articles), have been used in researching the paper.

To start off, this paper briefly explains the factors that caused crisis in Sudan before secession. These include greed, marginalisation, poverty, culture, religion, insecurity and problems with governance. As regards religion, an explanation will be given on the effect of this concept on the demand for independence, and why religion was a factor despite the fact that Sudan had originally been a multi-religious State. Marginalisation is a crucial theme to this section because had the North and the South of Sudan been treated equally, there would have been less discontent and therefore little basis for a feud to occur. Next, this paper reviews the debate on self-determination while defining the notion as well as the origins and legal issues surrounding it. Self-determination in South Sudan was a thorny issue: the reasons for this will be explored. The link between self-determination and secession will be investigated in addition to evaluating whether the use of secession was valid in South Sudan.

This will be followed by a discussion on mediation as a dispute resolution mechanism, including a description of its legal background and key characteristics. This article then examines how key mediators influenced mediation in South Sudan, citing important participants such as the African Union and the international community whose awareness of the conflict was paramount to its resolution. Vital documents such as the Machakos Protocol will be cited to demonstrate their role in the peace process. Emphasis will be placed on the Comprehensive Peace Agreement and an appraisal will be made on its unique traits and the extent of its success in South Sudan. The link between these documents and self-

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determination of South Sudan will also be demonstrated. This section will end with an evaluation of mediation as a conflict resolution mechanism in South Sudan.

In the last part of this paper, recognition of South Sudan will be analysed with a view to asserting its legal effect. An assessment will be made on whether, upon independence and creation of a new state, South Sudan has achieved the relevant recognition. The criteria provided for in the Montevideo Convention will be evaluated and applied to South Sudan. Finally, this article will link the result of mediation to the attainment of independence and recognition of South Sudan, which is an oxymoron because the state gained peace through war. In conclusion, this paper summarises its findings on the role of mediation in resolving the South Sudan Crisis.

2 FACTORS THAT TRIGGERED THE CRISIS IN SOUTH SUDAN

It has been said that conflicts are usually a culmination of unsolved grievances, which arise from factors such as inequality and differences in ethnic identity.[1] The civil war in Sudan lasted nearly as long as the State of Sudan (before secession) had been in existence.[2] The war, Rogier explains, started with the Sudan People's Liberation Movement/ Army (SPLM/A),[3] who wanted a new and equal Sudan that would represent the Sudanese people as a whole and 'ensure all groups equal access to economic and political power'.[4] Amongst the factors that caused crisis in Sudan before secession was greed, marginalisation, poverty, culture, religion, insecurity and problems with governance. These factors are essentially political, economic or cultural.[5] It is crucial to note that the factors discussed below are related, as none of them are 'predominant or even prominent'.[6]

2.1 GREED (CONTROL OF RESOURCES)

[1] Alexander Attilio, 'Geopolitical Explanations of Conflict in the Horn of Africa' (*Organization for Social Science Research in Eastern and Southern Africa (OSSREA)*, 2006) <http://www.ossrea.net/index.php?option=com_content&view=article&id=266&Itemid=55> accessed 5th September 2013

[2] Emeric Rogier, *No more hills ahead? The Sudan's Torturous Ascent to Heights of Peace* (Clingendael Security Paper No 1 Volume 1, The Hague, Clingendael 2005) (hereafter referred to as 'Rogier') v

[3] Rogier (n 2) 18

[4] Ibid

[5] Frances Stewart, 'Root causes of violent conflict in developing countries' (2002) 324 BMJ 7333, 342

[6] James Kurth, 'Religion and Ethnic Conflict: In Theory' (*ORBIS*, March 22nd 2001) <http://www.accessmylibrary.com/article-1G1-73836003/religion-and-ethnic-conflict.html> accessed 5th September 2013

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According to Rogier, state resources were all pooled at the capital, Khartoum, and they benefitted the North more than they did the South.[7]The war was aggravated by the fact that the Government of Sudan needed enough income to support its military, therefore it had to sell some oil:[8] in this way, oil was a source of conflict in the country. Although most of the oil fields were in southern Sudan, the region was land- locked and had to depend on the central government and Egyptian control.[9] The south of Sudan has been described in literature as a region that is at risk of 'being afflicted with the resource curse': this is a problem that faces countries and regions that have many resources but lower development compared to other regions with the same resources.[10] In the Northern region of Sudan, the riches generated by oil were demonstrated better than in the South.[11] Another resource that was as equally important is water: most of the water from the River Nile was controlled by the central government of Khartoum, and the North had fewer problems than the South. Other facilities and infrastructure, such as schools, means of communication and transport networks were better concentrated in the North than the South.[12] Hence, greed affected all kinds of important resources that were necessary in the country.

2.2 POVERTY

Statistics suggest that hunger is a big problem in South Sudan. As of March 2013, for example, there were more than 1.4 million people in need of food aid in South Sudan.[13] The World Food Programme is currently tasked with providing food aid urgently in the Blue Nile

[7] Rogier (n 2) 114

[8] Ibid 80

[9] Bennett J, S Pantuliano, W Fenton, A Vaux, C Barnett and E Brusset, *Aiding the Peace: A Muliti- donor Evaluation of Support to Conflict Prevention and Peacebuilding Activities in southern Sudan 2005- 2010* (2010) ITAD Ltd, United Kingdom <http://www.oecd.org/countries/southsudan/46895095.pdf> accessed 21st March 2013, 24

[10] Ibid

[11] Dalal Mohamed Daoud, 'Factors of Secession: the Case of South Sudan' (Degree of Masters of Arts dissertation, University of Saskatchewan 2012) (hereafter 'Daoud') 55

[12] Daoud (n 11) 54

[13] United Nations Office for the Co-ordination of Humanitarian Affairs, 'Tribes agree to stop fighting in North Darfur' (*Humanitarian Bulletin Sudan*, Issue 09, 25th Feb- 3rd March 2013) <http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA_Sudan_Weekly_Humanitarian_Bulletin_Issue_09_%2825_Feb-5_Mar_2013%29.pdf> accessed 25th March 2013

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and South Kordofan areas after conflict led to a large number of displaced people.[14] A report by Bennett *et al*[15] indicates findings that out of every seven women, one is likely to die from complications pertaining to pregnancy. Maternal mortality rates in 2012 in South Sudan were calculated at around 2054 for every 100000 live births, owing to the fact that, at the time, there were only 12 registered midwives in the entire country.[16] Recent estimates[17] also prove that the rate of literacy in South Sudan (that is, the number of people older than 15 years who can read and write) is 27%. According to the Central Intelligence Agency,[18] the total percentage of literate males is 40%, while only 16% of women can read and write. Most schools in the Sudan were based in the North, whereas the rate of poverty, poor medical services and lack of food were rampant in the South.[19] Poverty is also thought to have been aggravated by the Darfur war and too much dependence on subsistence agriculture as the main source of income in Sudan.[20] It can thus be concluded that poverty was a major cause of concern in South Sudan before its secession, and it still is today. The effects of poverty and conflict are still being felt in terms of hunger and displacement.

2.3 MARGINALISATION

[14] William Lambers, 'Life- saving food needed in Blue Nile, Sudan by May (Photos)' (*Examiner.com*, April 5th 2013) <http://www.examiner.com/article/life-saving-food-needed-blue-nile-sudan-by-may> accessed 10th April 2013

[15] Bennett J, S Pantuliano, W Fenton, A Vaux, C Barnett and E Brusset, *Aiding the Peace: A Muliti- donor Evaluation of Support to Conflict Prevention and Peacebuilding Activities in southern Sudan 2005- 2010* (2010) ITAD Ltd, United Kingdom <http://www.oecd.org/countries/southsudan/46895095.pdf> last accessed 21st March 2013, 20

[16] Rob Dabrowski, 'UK training for South Sudan midwives' (*Midwives Magazine*, 25th April 2012) <http://www.rcm.org.uk/midwives/news/uk-training-for-south-sudan-midwives/> accessed 25th March 2013

[17] Central Intelligence Agency, 'The World Factbook' <https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html> accessed 25th March 2013

[18] Ibid

[19] Bennett J, S Pantuliano, W Fenton, A Vaux, C Barnett and E Brusset, *Aiding the Peace: A Muliti- donor Evaluation of Support to Conflict Prevention and Peacebuilding Activities in southern Sudan 2005- 2010* (2010) ITAD Ltd, United Kingdom <http://www.oecd.org/countries/southsudan/46895095.pdf> accessed 21st March 2013

[20] Daoud (n 11) 17

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Distribution of seats in Sudan's National Assembly[21] is a graphical illustration of the fact that the people of South Sudan were under-represented in the government. Under-representation of a population can make the law and the central government appear to be unjust and invalid to the people concerned.[22] In terms of distribution of seats, the National Congress Party (NCP) occupied 72.8% of the seats, whereas the SPLM/A occupied 22.3%. Northern Opposition Groups took 4.2% of the seats, as opposed to 0.7% that was claimed by Southern Opposition Groups. In southern Sudan, it follows that the government was seen to be ineffective by the Southerners because it failed to recognise their identity and represent them.[23] Not only was the South poorly represented, but minority groups, especially women, children and the youth, were the most affected.[24] Marginalisation and under-representation have been known to incite feelings, in a people, of wanting to withdraw and break away from the society due to frustration caused by stunted growth and development.[25] Scholars also believe that groups that are considered 'backward' are more prone to wanting to secede,[26] compared to 'advanced' groups. Secession becomes more urgent if the complaints of the people go unheeded,[27] as will be demonstrated further below. Evidently, the figures prove that there was very little country-wide equality in the Sudanese government.

2.4 CULTURE

[21] Bennett J, S Pantuliano, W Fenton, A Vaux, C Barnett and E Brusset, *Aiding the Peace: A Muliti- donor Evaluation of Support to Conflict Prevention and Peacebuilding Activities in southern Sudan 2005- 2010* (2010) ITAD Ltd, United Kingdom <http://www.oecd.org/countries/southsudan/46895095.pdf> last accessed 21st March 2013, 26, figure 3

[22] Daoud (n 11) 5

[23] El Fatih A Salam, 'The Politicization of Ethnic Sentiments in The Sudan: Implications for Nation- building' (2008) 25 Journal of World Studies 1, 117, 118

[24] Bennett J, S Pantuliano, W Fenton, A Vaux, C Barnett and E Brusset, *Aiding the Peace: A Muliti- donor Evaluation of Support to Conflict Prevention and Peacebuilding Activities in southern Sudan 2005- 2010* (2010) ITAD Ltd, United Kingdom <http://www.oecd.org/countries/southsudan/46895095.pdf> last accessed 21st March 2013, 33, Table 4: Factors causing instability in Sudan as a whole

[25] John R Wood, 'Secession: A Comparative Analytical Framework' (1981) 14 Canadian Journal of Political Science, 111

[26] Aleksandar Pavkovic and Peter Radan, *Creating New States* (Hampshire: Ashgate Publishing Limited 2007) 5

[27] Daoud (n 11) 7

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The conflict occurred between the North, which had mostly Arabic Muslims and the South which comprised a high percentage of Christian and Animist Africans.[28] However, this is not to be confused with a racial issue: Rogier cautions that the conflict was 'cultural-linguistic'[29] as opposed to being racial- based. However, this is debatable since the people of South Sudan viewed themselves as being of a different race[30] than the rest of the population. People of the Northern region preferred to correlate themselves with the Arab world, whereas the people of South Sudan felt affiliated 'with sub-Saharan Africa'.[31] Cultural differences are also seen in the fact that several languages are spoken in Sudan, with English and Arabic being the official languages in the country.[32] The spread of Arabic is accredited to the 'technology of literacy' which facilitated trade and intermarriage.[33]

2.5 RELIGION

The concept of religion is closely linked to national unity.[34] In fact, several people across the world have, at a point in time, accepted and recognised themselves as people of God; rather than dividing themselves along religious lines.[35] There are mixed views on religion as a source of conflict. Some scholars believe that most religious conflicts are mislabelled as such when they are actually socio-economic and political conflicts, while others agree that religion is in itself a fuel for conflict.[36] Religion is rarely a source of war: academics believe that it only escalates conflicts.[37] It all depends, writes Stewart, on 'how people are mobilised'.[38] It is

[28] Rogier (n 2) 5

[29] Ibid 6

[30] Daoud (n 11) 9

[31] Mezzera et al, *Governance Components in Peace Agreements: Fundamental Elements of State and Peace Building?* (Conflict Research Unit- CRU, The Hague, Clingendael 7, Desktop Publishing 2009) (hereafter referred to as 'Mezzera') 87

[32] Daoud (n 11) 22

[33] Ibid 59

[34] Kellas G K, *The Politics of Nationalism and Ethnicity* (London, 2nd Ed, Macmillan Press Ltd 1998) 61

[35] J S Goldstein, *International Relations* (New York, Harper Collins College Publishers 1994) 159

[36] Stewart F, 'Religion versus Ethnicity as a source of Mobilisation: Are there differences?' (2009) MICROCON Research Working Paper 18, 5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495152> accessed 15th April 2013

[37] Andreas Hasenclever and Volker Rittberger, 'Does religion make a difference? Theoretical Approaches to the Impact of Faith on Political Conflict' (2000) 29 M- JIS, 641

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notable that religion was a stumbling block to peace in Sudan.[39] Sharia law was the governing law in the country before the signing of the Machakos protocol:[40] a framework agreement to end the war in southern Sudan. This was obviously a problem because, as aforementioned, the population was not entirely Muslim but was religiously diverse.[41] Religious diversity inspired an atmosphere of resentment due to deeply rooted beliefs; this can be said to have fuelled the conflict in Sudan.[42] As seen above, there was already dissatisfaction among the populace in Sudan because of unfair distribution of resources, so it can be said that religion was a major factor that only exacerbated the already volatile issue.

2.6 INSECURITY

A large percentage of the population of South Sudan was illegally armed with weapons such as firearms: this exacerbated the level of insecurity in the region.[43] The quality of security was also poor and there were insufficient services from the police.[44] Moreover, traditional peaceful methods of resolving issues had been replaced by greed and violence as ways of solving disputes.[45] It was also observed that basic respect for values was overtaken by armed force: this was a sign of insecurity.[46] Further, the absence of an administrative body where the grievances of the people could be solved caused a 'security vacuum'.[47] Coupled with marginalisation and governance problems, insecurity worsened the already volatile

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[38] Stewart F, 'Religion versus Ethnicity as a source of Mobilisation: Are there differences?' (2009) MICROCON Research Working Paper 18, 5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495152> accessed 15th April 2013

[39] Rogier (n 2) 38

[40] Ibid 21

[41] Ibid 114

[42] Frances Stewart, 'Root causes of violent conflict in developing countries' (2002) 324 BMJ 7333, 342

[43] Debay Tadesse, 'Post- Independence South Sudan: the challenges ahead' (2012) ISPI Working Paper No 46 (2) <http://www.ispionline.it/it/documents/WP%2046_2012.pdf> accessed 10th April 2013

[44] J Bennett, S Pantuliano, W Fenton, A Vaux, C Barnett and E Brusset, *Aiding the Peace: A Muliti- donor Evaluation of Support to Conflict Prevention and Peacebuilding Activities in southern Sudan 2005- 2010* (2010) ITAD Ltd, United Kingdom <http://www.oecd.org/countries/southsudan/46895095.pdf> accessed 21st March 2013, 33, Table 4: Factors causing instability in Sudan as a whole

[45] J Douglas, *The Root Causes of Sudan's Civil Wars* (Bloomington, Indiana University Press 2003) 142

[46] Government of Sudan- United Nations Joint Assessment Mission to Darfur (March 18, 2005) Cluster Reports Volume III

[47] Editor, 'The root causes of the Darfur conflict: A struggle over controlling an environment that can no longer support all the people who live on it' (*Sudan Watch*, Friday July 14th, 2006) <http://sudanwatch.blogspot.com/2006/07/root-causes-of-darfur-conflict.html> accessed 5th September 2013

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situation.[48] This therefore means that the implementation of security was a big challenge for the authorities in South Sudan.

2.7 PROBLEMS WITH GOVERNANCE

It has been accepted by various scholars that the Sudan war arose out of governance conflicts.[49] Brinkerhoff[50] writes that most conflicts stem from governance problems. These issues, he elaborates, centre on security, administration and politics, and include the factors listed above. In terms of security governance, he explains that civilian oversight is often a recurring problem.[51] This was a big problem in Sudan along with poor implementation of the law and 'the autocratic rule of the SPLM/A'.[52] Brinkerhoff affirms that the entire population of a country in a post-conflict situation must be included in policy making and policy implementation, in order to ensure that there is good political governance.[53] Darfur is a good example of a catastrophe that arose from a combination of the factors.[54] This conflict, which lasted for around six years, resulted in hundreds of thousands of deaths and more displacements.[55] It is not difficult to deduce that these problems were applicable to the situation in the South Sudan.

From the foregoing analysis, it is clear that the factors that led to the conflict and eventual secession of South Sudan are closely related. For instance, a high concentration of resources and government focus on the North gave rise to increased poverty in the South, which eventually led to frustration and dissatisfaction. Lack of respect for the diversity in culture and religion in the country was a motivating factor for the Southerners to demand equality and freedom.

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[48] Ibid

[49] Government of Sudan- United Nations Joint Assessment Mission to Darfur (March 18, 2005) Cluster Reports Volume III ,89

[50] Derick Brinkerhoff, 'Rebuilding governance in failed states and post conflict societies: core concepts and cross cutting themes' (2005) 25 Public Administration and Development 1, 3

[51] Ibid

[52] Mezzera (n 31) 88

[53] Derick Brinkerhoff, 'Rebuilding governance in failed states and post conflict societies: core concepts and cross cutting themes' (2005) 25 Public Administration and Development 1, 3

[54] Kenneth A Rodman, 'Is peace in the interests of justice? The case for broad prosecutorial discretion at the International Criminal Court' (2009) 22 LJIL 1, 99

[55] Ibid

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3. THE SELF-DETERMINATION OF SOUTH SUDAN

Appreciating the factors discussed above is important because had the North and South of Sudan been treated equally, there would have been little basis for the feud; and therefore no need to employ any methods of conflict resolution. However, it has been explained that the aforementioned factors led to dissatisfaction among the South Sudanese people, and fostered the need for political freedom and self-determination. In this part, this paper will give an in-depth explanation of the role played by self-determination in South Sudan. The aim is to demonstrate the relationship that exists between self-determination, territorial integrity and secession; and the role that self-determination played in paving the way for mediation as a conflict-resolution mechanism in South Sudan.

3.1 WHAT IS SELF-DETERMINATION?

Self-determination is an idea that gives people the liberty to decide on the way they are to be governed politically.[56] As such, all people are entitled to the right of self-determination, by virtue of which they can freely determine their political status and development with due respect from other States.[57] This provision is echoed by the *International Covenant on Civil and Political Rights*[58] and the *International Covenant on Economic, Social and Cultural Rights*[59]. Additionally, the preamble to the 1948 *Declaration of Human Rights* hints that it is necessary to adopt peaceful relations between States[60] in the process of self-determination. Self-determination is also mentioned in both Article 1(2) and Article 55(Chapter 6) of the *Charter of the United Nations*.[61] Both articles define it as a right of the people that should be respected by everyone.

[56] John R Wood, 'Secession: A Comparative Analytical Framework' (1981) 14 Canadian Journal of Political Science, 111

[57] Declaration on Principles of International Law Concerning Friendly Relations and Co- operation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (1970), Principle 5

[58] International Covenant on Civil and Political Rights (16th December 1966) Article 1(1)

[59] International Covenant on Economic, Social and Cultural Rights (16th December 1966) Article 1(1)

[60] United Nations General Assembly, UNGA Resolution 217 (1948) UN Doc A/810, Preamble

[61] United Nations, *Charter of the United Nations*, 24th October 1945, 1 UNTS XVI

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Self-determination can be both internal and external.[62] External self-determination is a concept that allows a state to establish its international status, and relates to territorial integrity.[63] This means that external self-determination must be exercised without meddling from the international community.[64] On the other hand, internal self-determination gives rise to independence of a certain population in an existent country, for the purpose of this paper the South Sudanese minority.[65] Both internal and external self-determination were encouraged in South Africa, and East Timor and Eritrea respectively.[66] Dersso[67] understands self-determination as an idea that gives a people the liberty to 'determine its internal political order without external interference'. Evans, on the other hand, states that self-determination is a method of empowerment because it allows for 'representative self-governance'.[68] It therefore appears that self-determination is a minority right enjoyed by oppressed groups. Self-determination is a right rather than a principle, according to the *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*.[69] The Declaration on Independence is firm on insisting that socio-economic and political factors must not, in any way, be an excuse for delaying self-determination and independence.[70] Hence, this Declaration serves the purpose of demonstrating that self-determination and independence are important legal rights.

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[62] Steven Wheatley, 'Democracy, Minorities and International Law (Publication Review, reviewed by Karon Monaghan)' (2007) 2EHRLR, 206

[63] Ibid

[64] The Convention on the Elimination of All Forms of Racial Discrimination (CERD), General Recommendation XXI (Forty- eighth session): Right to Self- Determination (1996) A/51/18, 125, PARA 9

[65] Steven Wheatley, 'Democracy, Minorities and International Law (Publication Review, reviewed by Karon Monaghan)' (2007) 2EHRLR, 206

[66] Marc Weller, 'Settling self- determination conflicts: recent developments' (2009) 20 EJIL 1, 111

[67] Solomon Dersso, 'International law and the self- determination of South Sudan' (February 2012) Institute for Security Studies Paper No. 231, <http://www.issafrica.org/uploads/Paper231.pdf > accessed 21st November 2012, 1

[68] Evans, MD, *International Law* (3rd Edition, Oxford University Press 2010) (hereafter referred to as 'Evans') 230

[69] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Resolution 1514 (1960) GAOR 15th Session Supp 16, UN Doc A/L 323, 66, 67

[70] United Nations General Assembly, UNGA Resolution 1514 (1960) GAOR 15th Session Supp 16, UN Doc A/L 323, 67

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In order to better understand self-determination, the concept of a 'people' must be defined. People are described as a group who identify themselves as such and have similar language, culture, territory, race or religion.[71] In the case of *Reference re Secession of Quebec,*[72] it was ascertained that even if 'people' were a small population of the state, this could not stop them from being able to exercise self-determination. Based on these definitions, it is clear that the population of South Sudan is a people who could exercise self-determination since they have a similar culture, race and religious belief. Another example of a people is the Katangese people who were deemed to have the legal right to establish their political well-being because of their status.[73] Ali[74] argues that, notwithstanding the fact that the nomadic Kurdish people do not have a defined legal personality, they do have a right to self-determination. The right to self-determination was demonstrated in the dissolution of the Yugoslavia.[75] Here, the Badinter Arbitration Committee declared that: first, the minority (Serbian) population deserved the minority and ethnic rights provided for in the Convention on Yugoslavia (1991).[76] Secondly, they also stated that it was mandatory for the international community to support the efforts of minority groups in secession and attainment of independence. It can be said that self-determination is a legal right of the people in a state.

In the *East Timor case (Portugal v. Australia),*[77] self-determination was termed an *erga-omnes* norm. The right to exercise self-determination has been given tremendous statutory importance in principle VIII of the Helsinki Final Act.[78] Principle VIII requires that people who are organised as states should be accorded equal rights as well as self-determination

[71] Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right for People in UNESCO (1990), SNS- 89/ CONF.602/7

[72] [1988] 2 SCR 217, para 124

[73] Communication 75/92, Katangese Peoples' Congress: *Katangese Peoples' Congress v. Zaire*, 75/92, in Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994- 1995, ACHPR/RPT/8th, Annex VI

[74] Hawraman Ali, 'Self- determination for the Kurds?' (2011) Cov LJ 29

[75] Badinter Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia (1992) 31 ILM 1488

[76] Ibid

[77] 1995 ICJ Rep 90

[78] Organisation for Security and Co- operation in Europe, Helsinki Final Act 1975

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rights. Article 20 of the *African Charter on Human and People Rights 1981*[79] emphasises on the absolute character of self-determination. According to this article, oppressed people in a State are entitled to obtain independence using any means that are endorsed by international law. The secession of South Sudan from Sudan arose from a combination of the factors discussed[80] in the foregoing section. It would therefore be correct to say that the need and consequent struggle for self-determination in South Sudan was fair, according to the provisions in the African Charter.

The Commission of Inquiry in the *Aaland Islands case* was of the opinion that the right of self-determination of a (minority) population points to 'the sovereignty of every State which is definitely constituted'.[81] The Committee determined the scope of self-determination to be a vague, unspecific idea that is rooted in fundamental principles of justice and liberty.[82] They expressed that this vagueness gave rise to diverse opinions and interpretations.[83] To most academics, this would hold true. Rosenstock,[84] for instance, writes that in the *Declaration on Friendly Relations*, the provisions on self-determination contain 'tortured phraseology' that is not 'set out in the most logical order', but that is still predictable and workable. The board supported the notion of self-determination in the Aaland Islands as long as the State (Finland) failed in their authority to implement the promises it had made, of justice and fairness.[85] All definitions attached to the right of self-determination mean that this is a vital concept of international law since people are given their own liberty and control as has been explained. However, some academics have argued that this legal principle is only restricted to communities that have been given a prior right to exercise self-determination through passing

[79] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter)

[80] Daoud (n 11) 8

[81] League of Nations, Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question (1920) 3 OJ Spec Supp, 5

[82] League of Nations, The Aaland Islands Question (1921) Doc B7 21/68/106 (English version) (Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs) 27

[83] Ibid

[84] Robert Rosenstock, 'The Declaration on Principles of International Law Concerning Friendly Relations: A Survey' (1971) 65 Am J Int'l L 713, 733

[85] League of Nations, The Aaland Islands Question (1921) Doc B7 21/68/106 (English version) (Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs) 28

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a referendum.[86] This line of thought poses a threat to the absoluteness and superiority of self-determination.

3.2 EFFECT OF SELF-DETERMINATION ON TERRITORIAL INTEGRITY AND THE *UTI POSSIDETIS* PRINCIPLE

Non-self-governing territories, such as South Sudan before independence, are those which have unique cultures and ethnicities from the main territory.[87] Principle IV of Resolution 1541[88] also states that these territories are also apart geographically from the rest of the State. In the *Island of Palmas case*, Judge Huber discussed the notion of territorial exclusivity and maintained that the people in any given territory have an exclusive right to act to protect their territory.[89] It was held in *Reference re Secession of Quebec* that the exercise of self-determination is only permissible within the constraints of territorial integrity.[90] It is important to note that territorial integrity applies in situations where a group of people has not achieved independence.[91] Vidmar[92] states that the legal principle of self-determination 'needs to be squared with the principle of territorial integrity' except when the territory is a colony or trust territory. This means that territorial integrity is supreme and is considered to be above the right of self-determination.

Any compromise of territorial integrity or national unity is strictly forbidden under the General Assembly Resolution 2625.[93] Vidmar[94] also supports the superiority of territorial integrity and quotes Principle 5 of the *Declaration on Principles Concerning Friendly*

[86] Evans (n 68) 232

[87] United Nations General Assembly, UNGA Res 1541 (1960) GAOR 15th Session Supp 16, UN Doc A/4651, Annex, Principle IV

[88] Ibid

[89] (1928) 2 RIAA 829, 838

[90] (1998) 161 DLR (4th(1928) 2 RIAA 829, 838) 385, 438

[91] Malcolm N Shaw, *International Law* (6th Edition, Cambridge University Press 2008) (hereafter referred to as 'Shaw') 523

[92] Jure Vidmar, 'South Sudan and the international legal framework governing the emergence and delimination of new states' (2012) 47 International Law Journal 3, 542

[93] United Nations General Assembly, UNGA Res 2625 (1970) GAOR 25TH Session Supp 28, UN Doc A/8028, 123-4

[94] Jure Vidmar, 'Explaining the legal effects of recognition' (2012) 61 ICLQ 2, 361

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Relations. As regards the Republic of South Sudan, however, Dersso refutes the idea of territorial integrity being superior to self-determination. He writes that territorial integrity and the *uti possidetis* principle will be overpowered and abandoned if the borders of a territory have to be altered for people to achieve self-determination.[95] It is safe to say that the effect of self-determination on territorial integrity is that self-determination is unconditional and will not be compromised. It also appears that self-determination, in this case, is to be applied in a limiting manner subject to territorial integrity and independence.

3.3 SELF-DETERMINATION AND SECESSION IN SOUTH SUDAN

This method of breaking away from states has been described as a right of last resort that is used when grave atrocities that contravene human rights are committed.[96] It is suggested that secession comes from the exercise of free will[97] by the people who decide to break away from the state that is governing them. Once the process of secession is complete, it cannot happen again, therefore there can be 'no secession from secession'.[98] There are three examples of states where secession has been successful: the first is the secession of Eritrea from Ethiopia.[99] The second is the secession of Quebec from Canada, which was accepted because the people of Quebec formed a consensus to break away from the main state of Canada.[100] The third example is the secession of the people in the Southern Sudan region[101] from the main state of Sudan.

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[95] Solomon Dersso, 'International law and the self- determination of South Sudan' (February 2012) Institute for Security Studies Paper No. 231, <http://www.issafrica.org/uploads/Paper231.pdf > accessed 21st November 2012, 8

[96] Allen Buchanan, 'Democracy and Secession' in Margaret Moore (ed) '*National self- determination and Secession'* (1st Ed, OUP 1998) 25

[97] ibid

[98] Badinter Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the dissolution of Yugoslavia 31 ILM 1488 (1992), Opinion No 3, 1499

[99] Dr Babatunde Fagbayibo, 'South Sudan, uti possidetis rule and the future of statehood in Africa' (*AfricLaw*, 26th April 2012) <http://africlaw.com/2012/04/26/south-sudan-uti-possidetis-rule-and-the-future-of-statehood-in-africa/ > accessed 21st November 2012

[100] Marc Weller, 'Settling self- determination conflicts: recent developments' (2009) 20 EJIL 1, 111

[101] Nesrine Malik, 'Sudan's media is being supressed on secession' *The Guardian* (London, Saturday 10th July 2010) <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/10/sudan-media-suppressed-secession-referendum?INTCMP=SRCH > accessed 21st November 2012

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The Sudan People's Liberation Movement/Army (SPLM/A) was formed in order to facilitate a government that would respect the differences that the Southerners had in terms of religion, culture and ethnicity among other factors.[102] Its primary purpose was to ensure the self-determination of all Sudanese people, particularly the Southerners (minority), by suggesting a secular constitution as opposed to the one in force at that time that was based on Sharia-law.[103] Daoud writes that this was a sensitive issue because the movement was opposed to the government and this led to war.[104] The formation of the SPLM/A is a true demonstration of the effort that was made by the South Sudanese to break away and govern themselves.

Several elements come into play when considering whether a claim for secession is genuine. These are: the urgency and nature of the claim, the length of the complaint and the nature of the territorial dispute.[105] On the issue of secession, Ghai raises concerns that self-determination could be harmful to the exercise of secession by cohesive groups within a nation.[106] This, he writes, is because self-determination is mostly fuelled by 'pressures or overwhelming threats'. Weller[107] maintains that self-determination is above secession. Moreover, Lloyd is of the opinion that secession is only a tool that is used to facilitate the process of self-determination and territorial integrity.[108] It can be said, based from different opinions that have been analysed, that self-determination is likely to prosper even at the risk of possible secession by a national group within its territory.

3.3.1 THE IMPORTANCE OF SELF-DETERMINATION: WAS IT JUSTIFIABLE IN SOUTH SUDAN?

Self-determination was the foundation of a struggle for independence and the establishment of the state of South Sudan: this right was exercised through voting at a referendum to

[102] Daoud (n 11) 37

[103] Ibid

[104] ibid

[105] Lea Brilmayer, 'Secession and Self- Determination: A Territorial Interpretation' (1991) 16 Yale J Int'l L, 117

[106] Yash Ghai, 'Ethnicity and autonomy: a framework for analysis' in Yash Ghai (Ed), *Ethnicity and Autonomy: Negotiating complete claims in multi- ethnic states* (OUP 2000) 23

[107] Marc Weller, 'Settling self- determination conflicts: recent developments' (2009) 20 EJIL 1, 111

[108] Angela Lloyd, 'The Southern Sudan: a compelling case for secession' (1994) 32 CJTL 419

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determine secession.[109] Article 1 of the *International Covenant on Civil and Political Rights*[110] has termed the right of self-determination a human right that is entitled to all people. Kamanu declares that in any state, the minority are just as important as the majority and that self-determination goes hand in hand with human rights and minority rights.[111] This justifies the use of self-determination by the Southern Sudanese people. Higgins agrees with the use of self-determination where there is territorial integrity, but opposes the tie between self-determination and secession, saying that secession should not be a consequence of self-determination.[112] Her view is challenged by Lloyd who debates that secession was justifiable in South Sudan because it has been provided for in the African Charter.[113] Justification of self-determination in Sudan also came by way of the Machakos Protocol which formed the foundation for the Comprehensive Peace Agreement. The Machakos Protocol declared the right of the southerners to exercise their self-determination and possible secession 'through a referendum to determine their future status'.[114] This referendum became successful in July 2011, when Sudan declared itself as an independent and separate state.[115] Descriptions of self-determination as a fundamental human right and an entitlement to all people serve to demonstrate that the Southern Sudanese people deserved to have fair treatment and to exercise their inherent right of self-determination.

Self-determination in South Sudan has come under criticism for being an unfair process that fostered the economic and political interests of the Northern Sudan majority[116] and therefore ignored the pleas from the Southern Sudanese people for independence and self-governance.

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[109] Xan Rice, 'South Sudan celebrates a sweet day of separation' *The Guardian* (Juba, 10th July 2011) <http://www.guardian.co.uk/world/2011/jul/10/south-sudan-celebrates-independence?INTCMP=SRCH> accessed 22nd November 2012

[110] International Covenant on Civil and Political Rights (16th December 1966) Article 1(1)

[111] Onyeonoro Kamanu, 'Secession and the Right to Self- Determination: An OAU Dilemma' (1974) 12 J Mod Afr Stud 355, 359, 362

[112] Higgins R, *Problems and process: international law and how we use it* (1st Ed, OUP 1994) 117

[113] Angela Lloyd, 'The Southern Sudan: a compelling case for secession' (1994) 32 CJTL 419

[114] Machakos Protocol (Chapter 1) Agreement on Broad principles of Government and Governance, in the *Sudan Comprehensive Peace Agreement* (9 January 2005), Article 1.3

[115] Sadie Gray and Tristan McConnell, 'Jubilation as South Sudan declares Independence' *The Times* (Juba, 9th July 2011) <http://www.thetimes.co.uk/tto/news/world/africa/article3089338.ece> accessed 6th April 2013

[116] Solomon Dersso, 'International law and the self- determination of South Sudan' (February 2012) Institute for Security Studies Paper No. 231, <http://www.issafrica.org/uploads/Paper231.pdf > accessed 21st November 2012, 6

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This would mean that self-determination in South Sudan somehow defeated its own purpose. Notwithstanding the criticism of self-determination, it can be argued that this was a very successful process because it freed the people of South Sudan and gave them the opportunity to create a suitable government for themselves.

Self-determination is thus a fundamental human right in international law that overrides the principle of territorial integrity. Self-determination is not marred by the possibility of secession, but rather, the two principles go hand in hand. Secession is an option that can be used if the people who desire to achieve self- governance choose to break away. The process of self- determination in South Sudan was justified by various agreements as a legal right. Even though it has come under fire for being unfair, self-determination in South Sudan fulfilled its primary purpose of according liberty to the people to determine their own political status.

4. MEDIATION AS A MEANS OF CONFLICT RESOLUTION

The idea of self-determination and possible secession attracted attention from the international community and this led to the need for effective methods of resolving various uncertainties that existed.[117] This part analyses mediation as a dispute-resolution mechanism and applies it to the South Sudan crisis, in order to illustrate the role of mediation in conflict resolution in the country. Key documents that made the mediation process possible are also discussed. These include the Sudan Peace Act, the Machakos Protocol and the Comprehensive Peace Process (CPA).

4.1 WHAT IS MEDIATION?

The system of the UN is supported by three notions: namely collective security, prohibition of the use of force in international law and the amicable resolution of disputes.[118] In regard to peaceful resolution of conflicts, Article 2(3) of the UN Charter requires all the Member States of the United Nations to peacefully resolve disputes 'in such a manner that international

[117] Peter Moszynski, 'Sudan should learn the emerging lessons of Egypt' (*The Guardian*, Tuesday 8th February 2011) <http://www.theguardian.com/global-development/poverty-matters/2011/feb/08/sudan-egypt-lessons-split-democracy> accessed 5th September 2013

[118] Alain Pellet, 'The Charter of the United Nations: A Commentary of Bruno Simma's Commentary (Book Review)' (2003- 2004) 25 Mich J Int'l L, 135

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peace and security and justice are not endangered'.[119] Article 33[120] of the Charter sets out various methods of peaceful dispute resolution; including negotiation, conciliation, enquiry, judicial settlement and mediation. The United Nations Security Council has been criticised since it has not been very successful in implementing Article 33: that is, requiring both parties to settle disputes by peaceful means.[121]

Mediation has been described as a confidential and voluntary process[122] which involves bringing in a third party to help reconcile two differing parties in a peaceful manner. Lall writes that mediation involves the consensual participation of a third party in a conflict, with the ultimate goal of 'assisting in or obtaining its settlement, adjustment or amelioration'.[123] The process of mediation allows the differing parties to dominate and influence all the aspects of the dispute(s), including the desired result and any outstanding issues that are up for consideration.[124] The Permanent Court of Justice, in the case of *Mavrommatis Palestine Concessions (Greece v UK)*,[125] held that a dispute is a controversy about a legal or factual point or 'a conflict of legal view or of interests between two persons'.

The function of a mediator, according to Shaw,[126] is to push the warring parties to accept the suggestions that the mediator brings forward. Mediation has been exemplified by the resolution of the conflict between Russia and Japan, where former President Roosevelt acted as a mediator.[127] According to the New York Times,[128] Roosevelt mediated a peace process

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[119] United Nations, *Charter of the United Nations*, (24 October 1945) 1 UNTS XVI, Article 2(3)

[120] Ibid, Article 33

[121] Christian Tomuschat, 'Article 33' in Bruno Simma et al (eds), *The United Nations: A Commentary* (2nd Ed, OUP 2002) 594

[122] Fiona Colquhoun, Director of CEDR's Employment Initiative, 'Mediation in the workplace- an effective management approach' (*CEDR Articles*, 1st January 2004) <http://www.cedr.com/?location=/library/articles/FC_workplace_mediation.htm> accessed 20th March 2013

[123] Arthur Lall, *Modern International Negotiation: Principles and Practice* (New York and London, Columbia University Press 1966) 12

[124] Fiona Colquhoun, Director of CEDR's Employment Initiative, 'Mediation in the workplace- an effective management approach' (*CEDR Articles*, 1st January 2004) <http://www.cedr.com/?location=/library/articles/FC_workplace_mediation.htm> accessed 20th March 2013

[125] 1924 PCIJ (ser B) No 3 (Aug 30)

[126] Shaw (n 91) 1018

[127] Robert C Kennedy, 'On this Day' (*New York Times*) <http://www.nytimes.com/learning/general/onthisday/harp/0624.html> accessed 20th March 2013

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whereby Japan was made sovereign over Korea, while Russia was given the territory of Sakhalin Island. Bercovitch writes that mediation is a method of intervening in a dispute between two or more groups:[129] he asserts this method is a voluntary, 'non-coercive and non-binding' way to solve social conflict. Merrills' opinion of mediation reveals that it is supplementary to negotiation in that the two methods of dispute resolution go hand In hand.[130] Mediation is thus a peaceful conflict resolution mechanism that does not stand alone, but works together with other means of conflict resolution.

4.2 UNIQUE CHARACTERISTICS OF MEDIATION FROM A LEGAL PERSPECTIVE: WHY MEDIATION IS A PREFERRED WAY OF SOLVING DISPUTES

Mediation is flexible in terms of time and location, which puts the parties in control of the situation.[131] The parties are also able to stipulate how the process will take place based on their specific requirements.[132] This method of conflict resolution applies in almost all legal disputes.[133] The parties involved in the conflict resolution can also control the venue of the process.[134] It is a private means of solving disputes[135] especially in situations where the process is facing a lot of media and world attention, as was the case in South Sudan.[136] Compared to taking the issue to tribunals or international courts, mediation is a quicker and less strenuous process.[137] It is also an inexpensive conflict resolution mechanism when compared with court litigation and arbitration.[138] For instance, a choice to seek mediation

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[128] Ibid

[129] Jacob Bercovitch, *Theory and Practice of International Mediation: Selected Essays* (Security and Conflict Management 6, 1st Edition, Routledge Ltd 2011) 5

[130] John Merrills, 'The Means of Dispute Settlement' in Malcolm D Evans (Ed), *International Law* (3rd Ed, OUP 2010) 563

[131] Susan Blake, Julie Browne & Stuart Sime, *A practical approach to Alternative Dispute Resolution* (2nd Edition, OUP 2012) (hereafter referred to as 'ADR') 304

[132] ADR (n 131) 205

[133] Ibid 204

[134] Ibid 304

[135] Ibid 205

[136] Marina Ottaway and Mai El- Sadany, 'Sudan: From Conflict to Conflict' (*Carnegie Endowment for International Peace*, May 16th 2012) <http://carnegieendowment.org/2012/05/16/sudan-from-conflict-to-conflict/as7w> accessed 25th February 2013

[137] ADR (n 131) 205

[138] Ibid 304

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rather than arbitration could cost around $120,000 while arbitration could cost up to ten times as much.[139] The presence of a third party enables an organised and fair process.[140] Therefore any decisions and conclusions that are made are easier to follow because they involve everyone and are not one-sided.

Decisions in the process of mediation are made voluntarily (unlike in court rulings) so this ensures that good relations are maintained between the parties.[141] Cultural and linguistic disparities are taken care of because the parties can choose a mediator who bridges these differences.[142] These qualities show that mediation is empowering to the parties because they are in control of most aspects during negotiations. This process is peaceful because it facilitates a neutral mediator.[143] Hence, there are likely to be fewer instances of disputes in the future[144] because the cause of the dispute is addressed and solutions offered from an impartial standpoint. The Falklands Islands scenario, per Merrills,[145] is illustrative of the fact that a mediator must be neutral and must have no aim of personal gain. He writes that violence broke out because the mediators were looking out for their own interests[146] as opposed to a peaceful resolution. Having both a neutral location and third party is an advantage because issues concerning legal and jurisdictional disputes are averted.[147] Mezzera *et al* believe that it is easier to achieve unified and cohesive peace if the mediator stays neutral and refrains from compelling the parties to come to a particular decision.[148] Both parties, writes Kleiboer,[149] must be ready to proceed with the accepted mediator in order to

[139] Eileen Carroll and Karl Mackie, *International Mediation- The Art of Business Diplomacy* (2nd Edition, Tottel Publishing 2006) 69

[140] ADR(n 131) 205

[141] Ibid

[142] Ibid 304

[143] Philipp Kastner, 'Towards internalized legal obligations to address justice and accountability? A novel perspective on the legal framework of peace negotiations' (2012) 23 Crim LF (1-3), 193

[144] Ibid

[145] John Merrills, 'The Means of Dispute Settlement' in Malcolm D Evans (Ed), *International Law* (3rd Ed, OUP 2010) 564

[146] Ibid

[147] ADR (n 131) 304

[148] Mezzera (n 31) 36

[149] Marieke Kleiboer, 'Understanding Success and Failure of International Mediation' (1996) 40 J Conflict Resolut 2, 360, 366

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solve a dispute peacefully. There must also be a willing mediator as this is the most vital feature of the mediation process.[150]

Based on its many advantages, mediation is a good option for disputing parties to choose voluntarily.[151] Blake *et al* cite 'practical considerations', for example the need to resolve different complaints, as a reason why mediation is favoured.[152] In this case it was also a result of pressure by the international community as will be explained further. Academics, however, caution that when mediation is employed as a mechanism of conflict resolution, it may not always be successful and it is sometimes easier for it to fail based on all the tasks a mediator has to manage.[153] It is mandatory in international law that mediation is a friendly act according to the Hague Convention of 1907.[154] The process of mediation lasts from when the mediator begins discussions with the differing parties, until past the signing of subsequent peace agreements.[155] Though it is slow, mediation remains a sure method of solving disputes as it occurs over time.

A disadvantage of this undertaking is that it does not work when the parties' discussions are held in bad faith, or in a manner that limits the mediator in their capacity to play their intercessory role.[156] In order to overcome this, the parties must demonstrate a high degree of willingness and readiness by devoting financial and other resources to ensure that mediators are specially and competently trained and prepared.[157] The Guidance for Effective Mediation adds that mediation must be coherent and inclusive, and demands that any peace agreements that come up must be of a high and fair standard. The parties must also respect and comply with international law, as well as help in coordinating their efforts and those of the

[150] John Merrills, 'The Means of Dispute Settlement' in Malcolm D. Evans (Ed), *International Law* (3rd Ed, OUP 2010) 563

[151] ADR (n 131) 207

[152] Ibid

[153] John Merrills, 'The Means of Dispute Settlement' in Malcolm D. Evans (Ed), *International Law* (3rd Ed, OUP 2010) 564

[154] International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (18 October 1907)

[155] Mediation Support Unit, 'United Nations Guidance for Effective Mediation' (2012) <http://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012(english)_1.pdf> accessed 8th April 2013, 4

[156] Ibid 5

[157] Ibid 7

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mediator.[158] This discussion illustrates that the practice of mediation can only succeed if both the mediator and the warring parties put in their best efforts.

4.3 THE TYPE OF MEDIATION THAT WAS USED IN SOUTH SUDAN

The process of mediation in South Sudan was facilitative.[159] Facilitative mediation is a technique that centres on issues that are in dispute, whereby the mediator aims to offer attractive options to both sides[160] so as to encourage them to come to a mutual solution. Blake *et al* have described facilitative mediation as 'the primary or true form of mediation' where the parties are in control of the process and the mediator is completely neutral.[161]

4.4 KEY MEDIATORS AND THE ROLE THEY PLAYED

4.4.1 IGAD

International and regional bodies are mandated by the Manila Declaration[162] to resolve conflicts in various national and international locations. These organisations are identified by the United Nations Charter which encourages 'settlement of local disputes through such regional arrangements… '.[163] The Intergovernmental Authority on Development, IGAD, was formed in 1986 as the Intergovernmental Authority on Drought and Development (IGADD), but it later became IGAD.[164] The aim of this organisation is to ensure that there is harmony and collaboration in the Eastern African region.[165] The IGAD Declaration of Principles (DoP)[166] was born as a result of the need for self-determination.[167] Sudan's neighbours, as

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[158] Ibid 18

[159] ADR (n 131) 216

[160] Ibid

[161] Ibid

[162] Manila Declaration on the Peaceful Settlement of International Disputes, A/RES/ 37/10 (15 November 1982)

[163] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 52 (2)

[164] K Isaac Weldesellasie, 'IGAD as an international organisation, its institutional development and shortcomings' (2011) 55 JAL 1, 11

[165] Agreement Establishing the Intergovernmental Authority on Development (Nairobi, 21st March 1996) <http://www.igad.int/etc/agreement_establishing_igad.pdf> accessed 8th April 2013

[166] The IGAD Declaration of Principles (*The 1993 Abuja 2 Sudanese Peace Conference*, Nairobi, 20th May 1994)

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mediators, felt that self-determination was the best option because it had previously helped in the separation of Eritrea from Ethiopia.[168] They also championed the idea of a secular state because it would help to diffuse Sharia law as the governing law and therefore promote unity.[169]

Despite the advantages it offered, the DoP was not received well by the Khartoum government, seeing that it posed a serious threat to the governmental scope of power and competence.[170] It failed in its mission to ensure peace because it approached the parties from a one-sided viewpoint,[171] rather than from a stance that would promote compromise. It merely professed the rights of the southern Sudanese people[172] and was 'too narrowly based'.[173] IGAD played an important role of demonstrating that it is easier to proceed with the mediation process in international conflicts where there is authorisation by the central government.[174] It also made it imperative for the central government of Sudan to begin peace talks as the DoP proved that assertions of self-determination were authentic.[175] In light of this, it is easy to see why a mediator must not only be impartial, but also supportive of the main goal.

4.4.2 THE AU

The African Union (AU), which substituted the Organisation of African Unity (OAU), was created on 9th July 2002.[176] Broadly, Article 3 of the African Union Act[177] provides that the main goals of this institution are to increase political, social and economic cooperation and integration in the African continent. Of major relevance to the situation in South Sudan is the objective to 'protect human and peoples' rights in accordance with the African Charter on

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<http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_940520_The%20IGAD%20Declaration%20of%20principles.pdf> accessed 8th April 2013

[167] Rogier (n 2) 39

[168] Ibid

[169] Ibid 21

[170] Mezzera (n 31) 16

[171] Rogier (n 2) 43

[172] Ibid 44

[173] Ibid 44

[174] Ibid 44

[175] Ibid 44

[176] Constitutive Act of the African Union 2001

[177] Ibid, Article 3

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Human and Peoples' Rights'.[178] Naldi and Magliveras predicted that the African Union could achieve its objectives only with the help and collaboration of African leaders.[179] As an African Union mediator, the main role of former President Thabo Mbeki was to come up with a recommendation on the situation in the oil-producing Abyei area, on whether they would remain in Sudan or join the new state of South Sudan.[180] This organisation was important in the process of mediation in South Sudan given that, in fulfilling one of its organisational aims, it provided a mediator to initiate peace between the Sudanese government and the people of South Sudan.

4.5 IMPORTANT DOCUMENTS THAT FACILITATED THE PEACE PROCESS

4.5.1 SUDAN PEACE ACT

This Act, whose cause was to lend support to the Sudan peace process, was signed on 21st October 2002 by the Former President Bush.[181] It gave a power of sanction to the United States government, because the latter had the authority to deny Sudan trade and loans, as well as diplomatic relations in the event that the central Sudan government was not resuming peace talks (on the whole of Sudan)[182] amicably. The United States government doubted that the Sudan central government had upheld their part of the agreement, partly because it was evident that the Darfur crisis was still ongoing.[183] It was expressed that the hopes of the United States and the international community were low on whether the Sudanese government had 'the mutual courage necessary for such an ultimate outcome'.[184] The Memorandum also noted that, despite the commitment of parties to finding a solution, they did not view the situation as a critical one.

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[178] Ibid, Article 3 (h)

[179] Gino J Naldi and Konstantinos D Maliveras, 'The African Union- a new dawn for Africa?' (2002) 51 ICLQ 2, 415

[180] Sudan Tribune, 'South Sudan: African Union Mediator to Make Proposals on Abyei Next Wednesday' (19th October 2012) <http://allafrica.com/stories/201210210679.html> accessed 9th April 2013

[181] Rogier (n 2) 83

[182] Sudan Peace Act 2002, s6(2)

[183] Rogier (n 2) 88

[184] (Sudan Peace Act) *Memorandum of Justification Regarding the Sudan Peace Act Presidential Determination*, Bureau of African Affairs, 21st April 2004

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4.5.2 MACHAKOS PROTOCOL[185]

The provisions of the Machakos Protocol differed from the IGAD Declaration of Principles in that both parties got what they wanted: the northern half of Sudan was governed by Sharia law and southern Sudan by secular law.[186] Following the signing of this protocol, the central government agreed to host a referendum[187] where the Southerners would decide if they wanted to secede. The referendum in Sudan was a culmination of the peace process through mediation, as it is 'one of the key turning points'[188] in any mediation process. As specified in Article 1.3 of the Protocol, the southern Sudanese people had an inherent right to self-determination 'through a referendum to determine their future status'.[189] The interim period before the referendum was also important in deciding the fate of the Sudanese people, owing to the fact that it was autonomous[190] and had the capacity to predict the fate of governments in post-conflict scenarios.[191] A follow-up Act, the Southern Sudan Referendum Act,[192] was strict in advocating for either secession or complete unity.

It can be seen that the Machakos Protocol was effective because it was authoritative in asserting the inherent right of southern Sudan to self-determination.[193] However, it had shortcomings due to the fact that it did not address the fate of any Christian or animist in the North, or any Muslim in the South.[194] Additionally, the conflicting parties both pushed for unity[195] as opposed to secession. As much as the Machakos Protocol was weak in some aspects, it laid the foundation for strengthening the position of the South Sudanese people and in fact, made provisions for a referendum.[196]

4.5.3 COMPREHENSIVE PEACE AGREEMENT 2005

[185] IGAD "Secretatiat on Peace in the Sudan", Machakos Protocol, 20th July 2002

[186] Rogier (n 2) 65

[187] Ibid

[188] Mezzera (n 31) 7

[189] IGAD "Secretatiat on Peace in the Sudan", Machakos Protocol, 20th July 2002, Article 1.3

[190] Interim National Constitution of the Republic of the Sudan, 6 July 2005

[191] Mezzera (n 31) 11

[192] Southern Sudan Referendum Act 2009

[193] Rogier (n 2) 65

[194] Ibid 66

[195] Ibid 67

[196] Machakos Protocol (Chapter 1) Agreement on Broad principles of Government and Governance, in the *Sudan Comprehensive Peace Agreement* (9 January 2005), Article 1.3

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A peace agreement has been described as a formal and binding legal agreement, whose purpose is to end conflict and introduce lasting peace, by creating 'terms that all parties are obliged to obey in the future'.[197] Mezzera *et al*[198] report that civil wars, such as those which occurred in Sudan, are often due to governance failure: therefore, peace agreements should pay more attention to fixing government operations. The Comprehensive Peace Agreement (CPA- also referred to as the Naivasha Agreement[199]) was signed on 9th January 2005 in Naivasha, between the central government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A).[200] It is an umbrella body that contains previous agreements[201] for the promotion of peace in Sudan. Such agreements include chapters, corrections, annexes and previous agreements like the Machakos Protocol, the Protocol on power sharing and the Wealth-sharing Agreement.[202] Arrangements on power sharing were paramount in the Sudanese peace process because they are directly proportional to the long-term success and maintenance of peace and power;[203] and they empowered the Southerners who had previously been marginalised.[204]

The Naivasha Agreement was a culmination of realisations that there could potentially be more income from oil, as well as the deadlocks in the war and negotiations with several parties.[205] As aforementioned, the presence of oil in the North of Sudan was a cause of civil war because it financed the military. In light of this, the government was coerced to agree to peace by the 'prospect of increased oil revenues'.[206] The aim of the agreement was to achieve

[197] Dr L Vinjamuri and AP Boesenecker, 'Accountability and Peace Agreement: Mapping Trends from 1980 to 2006' (*Centre for Humanitarian Dialogue*, 2007) <http://www.hdcentre.org/uploads/tx_news/79Accountabilityandpeaceagreements-Mappingtrendsfrom1980-2006.pdf> accessed 26th March 2013

[198] Mezzera (n 31) 5

[199] Comprehensive Peace Agreement (Sudan, 9 January 2005)

[200] Ibid

[201] Rogier (n 2) 105

[202] Scott P Sheeran, 'International Law, Peace Agreements and Self- Determination: the case of the Sudan' (2011) 60 International and Comparative Law Quarterly, 423

[203] Mezzera (n 31) 32

[204] Ibid 90

[205] Jeffrey Haynes, 'Religion, Ethnicity and Civil War in Africa: The Cases of Uganda and Sudan' (2007) 96 The Round Table: The Commonwealth Journal of International Affairs 390, 315

[206] Rogier (n 2) 80

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a lasting peace by ensuring that resources and power were shared in an equitable way.[207] Following the signing of the CPA, sovereignty was granted to the southern Sudanese people in a new constitution in July 2005; in October 2005, a sovereign Government of South Sudan was formed by the SPLM/A.[208] It can be agreed that this was a step in the right direction because, as seen above, the South was given its own authority that was representative of the people.

In order to implement their shared objective of national unity, it was acknowledged that the Sudan People's Liberation Movement/ Army (SPLM/A) would take control of the southern region of Sudan while the central government retained control of the northern region.[209] Academics would agree that this means that unity could only be achieved by creating a single system that would be democratic and fair.[210] There are several advantages to decentralising power in the manner that it was done after the signing of the CPA. Brinkerhoff[211] writes that it encourages peace and fosters the need for stronger unity. He believes that giving autonomy and control to authorities other than the central authority results in less conflicts which can be more easily controlled. Thirdly, he agrees that equal redistribution of resources promotes greater accountability and dilutes central power. Therefore it is evident that the CPA was beneficial to the southern Sudanese for the above reasons.

4.5.3.1 THE UNIQUENESS OF THE COMPREHENSIVE PEACE AGREEMENT

The Comprehensive Peace Agreement is one of a kind because although it is not considered to be a treaty, its provisions were binding on the signatories,[212] that is, the authorities in the North and South of Sudan. Sheeran observes that this treaty is binding in spite of the fact that

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[207] Scott P Sheeran, 'International Law, Peace Agreements and Self- Determination: the case of the Sudan' (2011) 60 International and Comparative Law Quarterly, 423

[208] Bennett J, S Pantuliano, W Fenton, A Vaux, C Barnett and E Brusset, *Aiding the Peace: A Muliti- donor Evaluation of Support to Conflict Prevention and Peacebuilding Activities in southern Sudan 2005- 2010* (2010) ITAD Ltd, United Kingdom <http://www.oecd.org/countries/southsudan/46895095.pdf> last accessed 21st March 2013, 20

[209] Rogier (n 2) 106

[210] Mezzera (n 31) 90

[211] Derick Brinkerhoff, 'Rebuilding governance in failed states and post conflict societies: core concepts and cross cutting themes' (2005) 25 Public Administration and Development 1, 3

[212] Scott P Sheeran, 'International Law, Peace Agreements and Self- Determination: the case of the Sudan' (2011) 60 International and Comparative Law Quarterly, 423

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one of the parties was considered a rebel movement: quoting several authors, he insists that these groups must observe international law.[213] In this scenario, both the central government of Sudan and the Sudan People's Liberation Movement/Army were bound by the Agreement prior to secession, and the South Sudan government was bound even after secession.[214] The agreement is also unique in that it contains a power and wealth-sharing agreement, which is a rarity and features in a very small percentage of peace agreements.[215] This agreement demands that oil revenues and all other resources be shared equally between the Government of National Unity and the Government of South Sudan (the half-half formula),[216] after two percent of these revenues has been given to the Abyei area.[217] The Naivasha Agreement also preceded the 'internationally monitored' referendum which was a turning point in the history of Sudan, particularly the people of the southern region (now South Sudan).[218] It is most likely that the CPA was successful since it confirmed the 'equitable representation of the people of South Sudan in both Legislative Chambers'.[219]

In order to further explore the unique character of the Comprehensive Peace Agreement, this Agreement should be compared to the 1991 Paris Peace Agreement of Cambodia.[220] The Comprehensive Peace Agreement affirmed, as part of its provisions, the right of self-determination for the people of South Sudan.[221] Similarly, the accords that accompanied the Paris Peace Agreement sought to 'resurrect Cambodia's sovereignty' by setting requirements that facilitated for the democracy and independence of the Cambodian people.[222] Implementation of the CPA was both national and international in nature, and was overseen by the United Nations Mission in the Sudan, UNMIS, under resolution 1590.[223] The peace

[213] Ibid

[214] Ibid

[215] Lotta Harbom, Stina Hogbladh and Peter Wallensteen, 'Armed Conflict and Peace Agreements' (2006) 43 Journal of Peace Research, 624

[216] Mezzera (n 31) 94

[217] Rogier (n 2) 117

[218] IGAD "Secretatiat on Peace in the Sudan", Machakos Protocol, 20th July 2002, Article 2.5

[219] Comprehensive Peace Agreement (Sudan, 9 January 2005), Article 2.2.2.1

[220] Lotus Revolution and National Transition Council, (NTC) Paris Peace Agreement (Cambodia, 23rd October 1991)

[221] Rogier (n 2) 65

[222] Steven Ratner, 'The Cambodia Settlements Agreements' (1993) 87 American Journal of International Law, 10

[223] UN Security Council Resolution 1590 (24TH March 2005) UN Doc S/RES/1590

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process accompanying the Paris Peace Agreement was also sanctioned by the Security Council in its Resolution 745.[224]

However, these two situations are different, given that the United Nations in Cambodia took over governmental authority in the country, as opposed to merely operating as an assistant organisation to the peace process.[225] In Cambodia, the Paris Peace Agreement set out to promote peace by putting the central government back in power: this was unlike the CPA in Sudan that sought to unify the people while maintaining the integrity of both the central government and the Southern Sudan people.[226] UNMIS, furthermore, was successful in its mission in Sudan.[227] The same cannot be said for UNTAC in Cambodia, since it did not decentralise power or create an environment that was conducive for a strong economy and a stable governmental authority.[228] Moreover, the United Nations was focused on rescuing Cambodia from complete economic downfall.[229] In contrast, the Comprehensive Peace Agreement regarded the economy of Sudan highly and, as evidenced by the Protocol on Wealth Sharing, placed the protection and good use of natural resources at its pinnacle.[230] Thus, it is arguable that the economic regulations of the CPA were much stronger than those of the Paris Peace Agreement.

4.5.3.2 CONTRIBUTION OF COMPREHENSIVE PEACE AGREEMENT TO INTERNATIONAL LAW

Overall, international law is important in peace agreements because it sets guidelines to which these agreements should adhere, and ensures that their provisions are carried out effectively and lawfully.[231] The lesson derived from the conflicts in South Sudan and in

[224] UN Security Council Resolution 745 (1992) UN Doc S/RES/ 745

[225] Alexandros Yannis, 'The concept of suspended sovereignty in international law and its implications in international politics' (2002) 13 EJIL 5, 103

[226] Mezzera (n 31) 44

[227] United Nations Mission In the Sudan (UNMIS), 'UNMIS closes as South Sudan becomes world's newest country' (*UNMIS*, 9th July 2011) <http://www.un.org/en/peacekeeping/missions/unmis/> accessed 2nd April 2013

[228] Mezzera (n 31) 45

[229] Ibid 29

[230] Ibid 29

[231] Dr L Vinjamuri and AP Boesenecker, 'Accountability and Peace Agreement: Mapping Trends from 1980 to 2006' (*Centre for Humanitarian Dialogue*, 2007)

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Cambodia is that peacekeeping should be accompanied by peace building, as well as restructuring the entire society on a social, economic and institutional level.[232]In relation to governance, it is useful to note that comprehensiveness and specificity are vital determinants of how successful a peace process is likely to be.[233]

The Comprehensive Peace Agreement depicted the will and dedication by both parties to include the South and represent them better in the government.[234] The Agreement was comprehensive on the surface because it specified a plan that could be implemented country-wide.[235] Yet this argument has been disapproved by Mezzera *et al*,[236] who argue that the Naivasha agreement was not actually comprehensive, as inclusiveness was neither genuine nor equal, and the provisions allowing for this were unclear. The authors criticise the CPA for lacking long-term sustainability because it was not supported by important individuals who may have felt left out from the negotiations.[237] Peace agreements are generally problematic in themselves as they often present a situation that demands a delicate balance between ensuring stability and maintaining long-term peace.[238] Mezzera *et al* write that this is a lesson that South Sudan could have adopted from the conflict in Cambodia.

This agreement has also been faulted for concentrating on the feud between the North and the South, while largely ignoring the Darfur crisis.[239] Most signatories preferred to act in their own interests to retain power, so inclusiveness did little to promote long-term success.[240] The CPA has been criticised for failing to address core issues like justice and accountability.[241] This owes to the fact that the CPA failed to make strong and unanimous decisions.[242] It is

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<http://www.hdcentre.org/uploads/tx_news/79Accountabilityandpeaceagreements-Mappingtrendsfrom1980-2006.pdf> accessed 26th March 2013

[232] Mezzera (n 31) 35

[233] Ibid 31

[234] Ibid 16

[235] Ibid 91

[236] Ibid 16

[237] Ibid 91

[238] Ibid 31

[239] Rogier (n 2) 106

[240] Ibid 137

[241] Philipp Kastner, 'Towards internalized legal obligations to address justice and accountability? A novel perspective on the legal framework of peace negotiations' (2012) 23 Crim LF (1-3), 193

[242] Daoud (n 11) 64

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particularly vague and unconvincing in relation to its description of human rights and freedoms.[243] Part 1, 1.6.2[244] is imprecise on how the rights and freedoms are to be implemented. In addition, uncertainty concerning implementation of rights and freedoms calls into question the success of the Agreement; considering that, following the crisis in Darfur, the Agreement did not appoint any commission to bring alleged perpetrators to justice.[245] It is interesting to note that, similar to the CPA, the Paris Peace Agreement in Cambodia also failed to set up a commission to deal with equitable and fundamental human and political rights.[246] Both jurisdictions also largely ignored the interests of some members of their population, so they suffered a 'lack of a secure and politically neutral environment'.[247] More importantly, another weakness of the CPA is that it did not provide for the consultation of the Southern people in Nuba, Southern Blue Nile and Abyei during the negotiations.[248]

It has already been established that the Comprehensive Peace Agreement was successful, but on the downside, there is evidence of lack of peace and inequality post-independence.[249] This has been exemplified by recent conflicts between the armies of Sudan and South Sudan, mostly centred on the fact that oil is now produced in South Sudan: this has had a drastic effect on the resources of Sudan.[250] Both Ottaway and El- Sadany acknowledge that the CPA has, on one hand, prevented conflict while fuelling it on the other hand. As of February 2013, there was an international dispute between the governments of South Sudan and Sudan with the former claiming that the latter had stolen its oil.[251] This dispute resulted in Sudan selling

[243] Rogier (n 2) 108

[244] Comprehensive Peace Agreement (Sudan, 9 January 2005), part 1(Article 1.6.2)

[245] Rogier (n 2) 108

[246] Mezzera (n 31) 17

[247] Ibid 18

[248] Ibid 92

[249] PaanLuel Wel, 'January 9th 2012: The 7th Anniversary of the CPA Between the Government of the Sudan and the SPLM/A' (*PaanLuel Wel*, January 9th 2012) <https://paanluelwel2011.wordpress.com/2012/01/09/the-12th-anniversary-the-cpa-between-the-gos-and-the-splma/> accessed 9th April 2013

[250] Marina Ottaway and Mai El- Sadany, 'Sudan: From Conflict to Conflict' (*Carnegie Endowment for International Peace*, May 16th 2012) <http://carnegieendowment.org/2012/05/16/sudan-from-conflict-to-conflict/as7w> accessed 25th February 2013

[251] Emma Farge and Ulf Laessing, 'REFILE- Sudan sells disputed oil from S Sudan after talks fail' (*Reuters*, February 4th 2013) <http://www.reuters.com/article/2013/02/04/sudan-oil-idUSL5N0B0FKP20130204> accessed 9th April 2013

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the oil, an action which could be viewed as a breach of the peace agreement by the international community.[252] Most academics would take sides in favour of South Sudan, because the country is legally entitled to the oil as a natural resource.[253] Article 3(2) of the Protocol against the Illegal Exploitation of Natural Resources[254] applies to this situation. It legally authorises any State whose natural resources have been taken forcefully to recover this resource and to receive sufficient compensation. This disagreement was later resolved subject to various agreements between the two states.[255]

One possible reason why there was a conflict over oil is because, prior to secession, there was no final agreement that considered what would happen with issues surrounding oil revenue compensation in case of this occurrence.[256] Other problems that have come about after secession, owing to a weak economy, are more hunger and conflicts in the Blue Nile and South Kordofan areas.[257] These observations are all proof that as much as the Comprehensive Peace Agreement is considered a success, it is also superficial in some aspects and this had led to more problems.

4.6 IS MEDIATION AN EFFECTIVE METHOD OF RESOLVING CONFLICTS?

There are many ways in which the practice of mediation can be made more effective. Generally, the process of mediation can be improved by harmonising some characteristics like 'impartiality and neutrality of the mediator'.[258] Several challenges to the practice of mediation have been identified by the United Nations Secretary General.[259] He finds that

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[252] Ibid

[253] International Conference on the Great Lakes Region (ICGLR), Protocol Against the Illegal Exploitation of Natural Resources (30th November 2006) Article 3

[254] Ibid, Article 3 (2)

[255] Ian Timberlake, 'South Sudan oil exports to resume' (*The Australian*, April 7th 2013) <http://www.theaustralian.com.au/remote/check_cookie.html?url=http://www.theaustralian.com.au/business/breaking-news/south-sudan-oil-exports-to-resume/story-e6frg90f-1226613922079> accessed 9th April 2013

[256] Rogier (n 2) 117

[257] Earl W Gast, 'A year after South Sudan's Independence, A Needless War of Attrition between South Sudan and Sudan' (*The Blog*, 7th September 2012) <http://www.huffingtonpost.com/earl-w-gast/south-sudan-independence_b_1659681.html> accessed 9th April 2013

[258] ADR (n 131) 306

[259] United Nations General Assembly (UNGA) 'Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution: Report of the Secretary- General' UN GAOR 66th Session Agenda item 34(a) UN Doc A/66/811 (2012)

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many conflicts have been marred by violence and humanitarian challenges that arise from varied objectives and unspecified participants: these could result in overwhelmed mediators who have to balance issues concerning justice, wealth and power sharing and security.[260] In order to foster and improve training and share the burden faced by mediators, the United Nations has partnered with governmental and non-governmental institutions, such as the African Union and the Crisis Management Initiative.[261]

Secondly, the challenge of overwhelmed mediators regularly results in a need for better trained and specialist mediators, who can endure a slow process despite the risk of the entire undertaking being dubbed as a failure by the international community.[262] In response to this challenge, the United Nations ensures that mediators are now equipped with better training and knowledge by the Department of Political Affairs; through the provision of a Special Envoy Briefing Package that keeps mediators up to date with new techniques.[263]Thirdly, it can be argued that in a lot of cases, international mediators are preferred over local mediators.[264] For example, it has already been mentioned that in South Sudan, General Lazaro Sumbeiywo and former South African President Thabo Mbeki led the process of mediation. Although local mediators often have fewer resources and might be viewed as biased,[265] they should be used in more situations because they have better local knowledge and contacts in the society where the dispute is centred.[266] Fourthly, more men than women are involved in the mediation process.[267] In this respect, the Security Council Resolution 1325 on women, peace and security[268] has played an important role in demanding for the inclusion of as many women as men during mediation. It is obvious that the United Nations has made a tremendous effort to improve mediation in dispute resolution.

[260] Ibid paras 12- 13

[261] Ibid paras 44- 45

[262] Ibid para 14

[263] Ibid para 36

[264] United Nations General Assembly (UNGA) 'Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution: Report of the Secretary- General' UN GAOR 66th Session Agenda item 34(a) UN Doc A/66/811 (2012), par 16

[265] Ibid

[266] Ibid

[267]Ibid, para 17

[268] United Nations Security Council (UNSC) Res 1325 (2000) UN Doc S/RES/1325 (2000)

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4.7 DID THE PROCESS OF MEDIATION WORK IN SOUTH SUDAN?

Mediation was successful in South Sudan despite the fact that there was, at the time, an on-going war in Darfur that lasted between 2003 and 2009.[269] However, several factors come into play in determining whether a mediation process has been successful. Kleiboer[270] supports the view by Bercovitch that a certain amount of time must pass before mediation is considered successful. The reason for this is that a long enough period is effective in encouraging any wars to end permanently.[271] This time must be relatively short nonetheless to ensure that the conflict is amenable to mediation.[272] Lazaro supports the Kleiboer view on timing,[273] saying that proper timing is vital in the success of the mediation process. This view is also advocated by Merrills,[274] who maintained that timing is a crucial aspect of mediation.

Secondly, Kleiboer asserts that mediation is dependent on the status of the mediator.[275] According to the author, the character of a good mediator 'derives from his reputation, track records, and special expertise, but also from organizational factors'. The main mediator in the southern Sudan conflict was the General Lazaro Sumbeiywo who was seen to possess the good qualities of a mediator,[276] without which mediation may not have been achieved. His neutral approach as a mediator was supported by the international community, particularly the United States, the United Kingdom, Uganda and Eritrea.[277]

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[269] Kenneth A Rodman, 'Is peace in the interests of justice? The case for broad jurisdictional discretion at the International Criminal Court' (2009) 22 LJIL 1, 99

[270] Marieke Kleiboer, 'Understanding Success and Failure of International Mediation' (1996) 40 J Conflict Resolut 2, 360

[271] Mezzera (n 31) 7

[272] Marieke Kleiboer, 'Understanding Success and Failure of International Mediation' (1996) 40 J Conflict Resolut 2, 360, 363

[273] MCL Lazaro, 'The effectiveness of International Mediation: The current debate' (Postgraduate LLM dissertation, University of La Sabana) 8

[274] John Merrills, 'The Means of Dispute Settlement' in Malcolm D. Evans (Ed), *International Law* (3rd Ed, OUP 2010) 564

[275] Marieke Kleiboer, 'Understanding Success and Failure of International Mediation' (1996) 40 J Conflict Reolut 2, 360, 372

[276] Rogier (n 2) 57

[277] Ibid

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Thirdly, the success of a mediation process relies on clear identification of the parties.[278] In the Sudan scenario, the parties were the government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A).[279] As has been previously mentioned, the southern Sudanese people had difficulties with being recognised as a people who deserved self-determination rights. Whether mediation is a success also depends on the kind of conflict being addressed.[280] Bercovitch and Houston concede that problems concerning resources and ethnicity are more susceptible to successful mediation than principles-based problems,[281] because, they explain, the latter are very sensitive and rooted in strict ideologies. This view is echoed by Lazaro,[282] who is of the opinion that cultural similarities are likely to encourage successful mediation, whereas differences are likely to hinder it. In the Sudan, the bone of contention was self-determination stemming from different opinions from issues such as religion, and under-representation in the central government.

Kleiboer notes that external pressure from other institutions, countries and parties could be a motivating factor to achieve success through mediation.[283] In this case, the pressure came from the international community as aforementioned. If Independence is to be taken as the threshold of success in this situation, it can be said that the process was highly successful as South Sudan gained independence and self-government.[284] This discussion is illustrative of the fact that despite several obstructions in the peace process, these stumbling blocks did not hinder the main goal of independence for South Sudan.

This paper has demonstrated that mediation is a voluntary, flexible and user-friendly practice that empowers the disputing parties and gives them control. It has also established that

[278] Marieke Kleiboer, 'Understanding Success and Failure of International Mediation' (1996) 40 J Conflict Resolut 2, 360, 365

[279] Comprehensive Peace Agreement (Sudan, 9 January 2005)

[280] Marieke Kleiboer, 'Understanding Success and Failure of International Mediation' (1996) 40 J Conflict Resolut 2, 360, 364

[281] J Bercovitch and A Houston, 'The study of International Mediation: Theoretical Issues and Empirical Evidence' in J Bercovitch (ed), *Resolving International Conflicts: The Theory and practice of mediation* (US, Lynne Renner Publishers 1996) 24-5

[282] MCL Lazaro, 'The effectiveness of International Mediation: The current debate' (Postgraduate LLM dissertation, University of La Sabana) 12

[283] Marieke Kleiboer, 'Understanding Success and Failure of International Mediation' (1996) 40 J Conflict Resolut 2, 360

[284] Daoud (n 11) 78

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mediation is preferred to other methods because it is practical and relatable, and it ensures long-lasting success. It is evident from the foregoing discussion that regional organisations (IGAD and the African Union) and treaties such as the Sudan Peace Act and the Machakos Protocol had a key function in the success of mediation and the peace process in South Sudan. It is also clear that Kenya played a key role in the peace process and the ultimate birth of South Sudan: the Kenyan government, under presidential order, sent a mediator (General Lazaro Sumbeiywo), and the country was also the location of the signing of the Comprehensive Peace Agreement. The achievement of mediators, such as General Sumbeiywo, is impressive as they fulfilled their duty in resolving the conflict whilst maintaining a peaceful atmosphere in the country.

It is fair to say that no peace agreement is without its pitfalls. Nevertheless, the advantage of the Comprehensive Peace Agreement in giving independence and secession to South Sudan largely triumphs over its shortcomings. The CPA was a solution to bring peace up to the secession of the south of Sudan. It can be argued that the reason for the success of the CPA is because it was respected by the central government and it empowered the local people. This is a very daunting task which seems achievable by only an effective and authoritative agreement. Mediation played an important role in empowering the people of South Sudan and was successful in granting them the rights they had been denied. The United Nations has sought to improve the quality of mediation in other situations by ensuring that there is sufficient training and gender equality. In order to ensure lasting peace in South Sudan, more efforts will be necessary at both national and international levels.

5. RECOGNISING THE STATE OF SOUTH SUDAN

Thus far, this paper has explained the way in which statehood was achieved: by concentrating efforts of various actors, both national and international. This section is an analysis of whether South Sudan, upon independence and secession, has received recognition of statehood. It begins by defining the idea of a state as defined in international law, and applying it to the state of South Sudan.

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5.1 DEFINING A STATE

The concept of a state was determined in the Montevideo Convention 1933.[285] Article 1 of this convention lays out four main tests for determining statehood. These are '(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states'.[286] The criterion of a permanent population is flexible in that there are no restrictions upon the least possible number of people required.[287] To illustrate this, the islands of Tuvalu and Nauru have permanent populations of less than twenty thousand people each, and they both qualify in this criterion.[288] Nomadic people can also constitute a permanent population, as in the Kurdish people who are recognised as being a permanent population in their territory.[289] The population of South Sudan has been permanent since before the secession occurred, as the people clearly identified and set themselves apart from the Northerners.[290]

In regard to a defined territory, the General Assembly confirms that a territory can consist of different people who make up its population.[291] It was held, in the case of *Deutsche Continental Gas-Gesellschaft v Polish State*,[292] that a territory must be sufficiently certain, especially in the event that it is not very accurate. For example, both the state of Israel and Palestine do not have a defined territory due to uncertainty concerning their borders, but this does not stop them from claiming statehood.[293] Although South Sudan initially had a few issues with its border, especially because of the Abyei issue,[294] it still is considered a state.

[285] Montevideo Convention on the Rights and Duties of States (1933) 165 LTNS 1966

[286] Ibid, Article 1

[287] James Crawford, 'Islands as sovereign nations' (1989) 38 ICLQ 2, 277

[288] Ibid

[289] Hawraman Ali, 'Self determination for the Kurds?' (2011) Cov LJ 29

[290] Mezzera et al, *Governance Components in Peace Agreements: Fundamental Elements of State and Peace Building?* (Conflict Research Unit- CRU, The Hague, Clingendael 7, Desktop Publishing 2009) 87

[291] UNGA Res 1541 (1960) GAOR 15th Session Supp 16, UN Doc A/4651, Annex, Principles I and II

[292] (1929) 5 AD 11

[293] Joseph H H Weiler, 'The birth of Israel and Palestine- the ifs of history, then and now' (2011) EJIL 621

[294] Emeric Rogier, *No more hills ahead? The Sudan's Torturous Ascent to Heights of Peace* (Clingendael Security Paper No 1 Volume 1, The Hague, Clingendael 2005) 117

Electronic copy available at: https://ssrn.com/abstract=2622115

Not only is the state divided ethnically and culturally from Sudan, but it also geographically and territorially separate: it is bordered by several neighbouring countries.[295]

The criterion of a government is immensely important because the other Montevideo requirements are dependent on it.[296] The court, in the *Aaland Islands* case,[297] declared that the Islands had, in 1918, a government that was stable and well-founded. In practice, Somalia is constituted to be a state albeit a failed one,[298] because it has a government. In South Sudan, the Government of South Sudan (GoSS) was established after the signing of the Comprehensive Peace Agreement,[299] so it was in existence before secession. It is clear that South Sudan succeeds in this category. Capacity to enter into relations with other states involves two concepts: independence and recognition.[300] Concerning independence, Austria in the *Austro-German Customs Union Case*,[301] was regarded as an independent state that had the right to set up its customs union. The court made this decision because Austria had complete control of economic, social and political matters in the country.

5.2 RECOGNITION OF SOUTH SUDAN BY THE INTERNATIONAL COMMUNITY

There are two schools of thought on the issue of recognition: the constitutive and the declaratory theories. The constitutive theory is the idea that a state can only achieve 'statehood' subject to recognition by other states and organisations.[302] This is illustrated by the recognition of the new states that came about after the dissolution of the former Yugoslavia; particularly Croatia, Macedonia and Slovenia (although Macedonia initially had problems with recognition by other states).[303] The European Council pledged, in a

[295] Debay Tadesse, 'Post- Independence South Sudan: The challenges ahead' (2012) ISPI Working Paper No 46 (2) <http://www.ispionline.it/it/documents/WP%2046_2012.pdf> accessed 10th April 2013

[296] James Crawford, *The Creation of States in International Law* (2nd Ed, OUP 2006) 56

[297] Aaland Islands case (1920) LNOJ Special Supp 3, 3

[298] Aaron Cooper, 'Somali piracy: a legal maelstrom' (2012) 17 Cov LJ 2, 83

[299] Bennett J, S Pantuliano, W Fenton, A Vaux, C Barnett and E Brusset, *Aiding the Peace: A Muliti- donor Evaluation of Support to Conflict Prevention and Peacebuilding Activities in southern Sudan 2005- 2010* (2010) ITAD Ltd, United Kingdom <http://www.oecd.org/countries/southsudan/46895095.pdf> last accessed 21st March 2013, 20

[300] Rich R, 'Recognition of states: the collapse of Yugoslavia and the Soviet Union' (1993) 4 EJL 36

[301] PCIJ, Series A/B, No 4 (1931)

[302] Cedric Ryngaert and Sven Sobrie, 'Recognition of states: international law or realpolitik? The practice of recognition in the wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 LJIL 2, 467

[303] Jure Vidmar, 'Explaining the legal effects of recognition' (2012) 61 ICLQ 2, 361

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guideline, [304] to recognise new states if they respected the United Nations Charter requirements, minority rights and territorial integrity, as well if they refrained from the use of force. In this way, the European Council confirmed and upheld the traditional requirements prevented by the Montevideo Convention.

Another example is the recognition of Kosovo as a state, which is disputable, even though recognition concerning its declaration on independence has been validated.[305] The situation in Kosovo is complicated as concerns government and international relations. [306] It is not considered free from the authority of other governments,[307] so clearly, the state has not properly met the Montevideo Convention criteria. The state of South Sudan has legally been accepted by the United Nations as its 193rd Member State.[308] Evidently, acceptance by other states is vital in the recognition of an entity as a state.

The declaratory theory states that an entity can be a state irrespective of whether other states agree on this.[309] It demands that a state comes into existence upon factual considerations such as a certain territory, an established government, a permanent population and an ability to engage in international relations.[310] This theory is thus more relatable to the criteria of the Montevideo Convention. Legally, recognition is often construed as a declaratory action.[311] A disadvantage of the declaratory theory is that states that fail to measure up to the Montevideo Convention requirements are sidelined and their statehood is not taken into consideration: hence they are not subject to any protections and sanctions that are usually granted to states.[312] An example of this is the state of Israel, which, according to factual considerations,

[304] European Council, Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16th December 1991), Recognition of States- Annex I

[305] Cedric Ryngaert and Sven Sobrie, 'Recognition of states: international law or realpolitik? The practice of recognition in the wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 LJIL 2, 467

[306] Jure Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) 42 Vandebilt Journal of Transnational Law, 779

[307] Ibid

[308] United Nations Security Council (UNSC) Res 1999 (2011) UN Doc S/RES/1999 (2011)

[309] Ibid

[310] R Sloane, 'The Changing Face of Recognition in International Law: A Case Study of Tibet' (2002) 16 Emory ILR 107, 118

[311] Jure Vidmar, 'Explaining the legal effects of recognition' (2012) 61 ICLQ 2, 361

[312] Cedric Ryngaert and Sven Sobrie, 'Recognition of states: international law or realpolitik? The practice of recognition in the wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 LJIL 2, 467

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is a state but it goes unrecognised by some states.[313] Vidmar agrees that South Sudan is a state legally and factually with the 'approval of the parent state'.[314] Additional requirements for statehood are centred on restrictions on the use of force and racism, as well as respect for independence and self-determination of minority groups.[315] South Sudan fulfils these criteria, given that its entire creation is based on the factors listed above. According to Rich, the concept of recognition involves more political than legal considerations.[316] It can be concluded that the declaratory theory, like the Montevideo criteria, is based on facts and requirements, while the constitutive theory is more legal.

South Sudan as a state was also recognised by the Comprehensive Peace Agreement before it came into existence: this Agreement advocates for equality of 'the people of South Sudan' in Parliament.[317] The Machakos Protocol, Framework Agreement on Wealth Sharing and the Security Arrangements Agreement recognised that the Southern Sudanese people were under a separate governing system from the Northerners.[318] The debate above is enough clarification that recognition is important, but not essential to the existence of a state. The effect of recognition in a state depends, firstly, on the creation of a state, in a way that states can legally exist with or without recognition.[319] Secondly, this effect depends on secession and territorial integrity, both of which can shift declarative recognition to constructive recognition.[320] In other words, a state can still be legally and politically sovereign regardless of whether other states and international bodies recognise it as such.

This section has determined that recognition is a major part of the identity of a State. However, a state can exist and exert sovereignty over its territory despite not being given official recognition by some states. South Sudan is a state because it has a permanent population and certainty of territory, as well as its own central government. The country is also able to enter into international agreements with other states and organisations, given that

[313] Ibid

[314] Jure Vidmar, 'Explaining the legal effects of recognition' (2012) 61 ICLQ 2, 361

[315] James Crawford, *The Creation of States in International Law* (2nd Ed, OUP 2006) 107- 155

[316] Rich R, 'Recognition of states: the collapse of Yugoslavia and the Soviet Union' (1993) 4 EJL 36

[317] Comprehensive Peace Agreement (9 January 2005) Article 2.2.2.1

[318] Mezzera et al, *Governance Components in Peace Agreements: Fundamental Elements of State and Peace Building?* (Conflict Research Unit- CRU, The Hague, Clingendael 7, Desktop Publishing 2009) 95

[319] Jure Vidmar, 'Explaining the legal effects of recognition' (2012) 61 ICLQ 2, 361

[320] Ibid

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it achieved independence through a unified referendum and it has been recognised by most countries and the United Nations. This paper supports the idea that constitutive and declaratory theories can be merged into recognition- this is relevant to South Sudan, because it is a state both legally, by acceptance into the United Nations, and factually because it meets the Montevideo requirements.

6 CONCLUSION

Although religion has been perceived as being a motivating factor in fuelling the South Sudan conflict, this paper has proved that the conflict in South Sudan was not a religious one, but rather a conflict against domination of the Southerners by the central government. This paper has identified the factors that caused the crisis in Sudan before secession as greed, marginalisation, poverty, culture, religion, insecurity and problems with governance and shown them to be so deeply rooted that it is convincing to say that the civil war in Sudan was inevitable. The need for self-determination in South Sudan was realised because of this combination of factors that led to the war.

The importance of key documents in the mediation process, particularly the Comprehensive Peace Agreement, cannot be underestimated. These agreements have been shown to have culminated in the independence and eventual secession of South Sudan. The Comprehensive Peace Agreement (CPA) played a pivotal role in mediation as it secured autonomy and independence for South Sudan. Regional and international organisations also provided suitable and qualified mediators. The CPA provided for independence and self-determination which are embedded in international law. On the other hand, the peaceful nature of mediation stemmed from the United Nations Charter. In this way, international law had a central function in mediation through the CPA. However, the process of mediation faced gender and training challenges. Many current world conflicts can learn from South Sudan and involve more well-trained local mediators as well as more women. Despite the success of the Comprehensive Peace Agreement, the situation in South Sudan has not been rosy because there has been unrest concerning oil and oil revenues. This tension has been assisted by provisions on illegal exploitation of natural resources.

As seen in this paper, South Sudan was very successful in attaining statehood and being recognised because there was both consent by the parent state; and acceptance by the

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international community. There was also respect for the inherent right of self-determination. This is in contrast to Kosovo whose statehood was disputed because it declared its own secession in the absence of parental consent from Serbia.

The South Sudan situation is unique because it proved that secession can be a peaceful process. Nevertheless, this peace was obtained after years of civil conflict. South Sudan is a therefore a success story that has been made possible by years of conflict and periods of negotiations and compromises on both sides. For instance, the central government had to give up their autonomy in South Sudan. This was in order to ensure compliance with international law that demands for respect for minority rights, and for peace to prevail. Of critical importance is that the CPA is constitutional in nature due to the binding provisions it contains. This seems to be the reason why it was respected by all parties. Due to this, the CPA was able to deliver on its aims and rescue the country from continued chaos.

This paper has succeeded in analysing the role of mediation in South Sudan: to achieve lasting peace and independence in the country. The article serves to demonstrate that without mediation, the creation of the state of South Sudan may not have been possible. South Sudan is a state, both legally and factually. In conclusion, this paper argues that mediation played a key role in the resolution of the South Sudan crisis, as it resulted in the creation of the newest State in the world.

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