INTERNATIONAL LAW, PEACE AGREEMENTS AND SELF-DETERMINATION: THE CASE OF THE SUDAN

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Abstract This article considers whether the 2005 Comprehensive Peace Agreement for the Sudan (the CPA) gives rise to binding obligations for the parties under international law. The legitimacy and effectiveness of the CPA, and the avoidance of a return to bloody civil war, depends significantly on the Agreement giving rise to legal obligations. While it has been held in arbitration that the CPA is not a treaty, this article suggests that it is a binding international agreement and further that there are obligations concerning the outstanding referendum for the people of the Abyei region. The legal issues of the CPA are more complex than they at first appear and they engage deeper and broader questions of the role of international law. The article will suggest among other things that the Sudan situation demonstrates it is difficult to draw immutable general rules in abstraction about the international law relating to peace agreements and to self-determination.

I. INTRODUCTION

The international legal status of the 2005 Comprehensive Peace Agreement for the Sudan (the 'CPA') is a current issue of intense scrutiny and political importance. On 7 February 2011, the South Sudan Referendum Commission announced that the people of South Sudan had overwhelmingly voted in favour of independence in a referendum to exercise their right to self-determination.[1] The President of the Sudan, Omar Al-Bashir, accepted the result and it is expected that South Sudan will declare its independence in July 2011.[2] The importance of the right of self-determination and other commitments in the CPA being respected and fulfilled cannot be underestimated. The Sudan has seen intermittent and bloody civil war for many of the years from independence in 1956 to the conclusion of the CPA in 2005. The collapse of the CPA would likely lead to a return to serious armed conflict. The CPA also

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[1] 'South Sudan backs independence—results' *BBC News Africa* (7 February 2011) http://www.bbc.co.uk/news/world-africa-12379431. It was reported that 98.83 per cent of voters backed independence for the South.

[2] ibid.

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provided for a referendum for the people of the Abyei region, which did not proceed in parallel with the South's referendum as was intended under the Agreement. It is possible that when the Government of South Sudan becomes an independent State, it may seek legal enforcement of the CPA in respect of the Abyei referendum.

This article seeks to address two main issues. First, it seeks to assess the international legal consequences of the CPA, and second, to explore what the CPA and the Sudanese situation reveal about the international law concerning peace agreements and self-determination. In respect of the first issue, a key question is the legal status of the CPA and whether it contains obligations that are binding under international law. A Permanent Court of Arbitration (PCA) panel in 2009 held that the CPA is not a treaty under the Vienna Convention on the Law of Treaties.[3] However the legal status of the CPA was not material to the arbitral panel's decision, and the issue was not explored in any real depth. The panel may also have relied on an implicit but incorrect assumption that peace agreements, such as the CPA, do not usually give rise to any binding international obligations. The legal status of peace agreements is often unclear, as they do not fit well with the rules that apply to treaties. However, each case needs to be considered on its facts, and in light of the relevant international law.

This article will argue that a closer analysis of the CPA and the relevant international law demonstrates that the Agreement gives rise to binding obligations for both of the parties. The factual circumstances of the CPA are different to many other peace agreements. The Government of South Sudan (GoSS) is more than a simple rebel movement. In many respects it has been for some time the de facto government of a significant area of territory and population.[4] The CPA also distinguishes itself in one crucial way from almost all other peace agreements; it contains a very clear recognition of the right to self-determination for the people of South Sudan and the means by which that right is to be determined (the 2011 referendum). As will be demonstrated below, this recognition has legal consequences that go beyond the simple analysis of obligations under the rubric of international agreements, and extends to obligations under customary international law.

In respect of the second broader issue, there are deeper conclusions about international law, peace agreements and self-determination that may be drawn from the Sudanese example. The leading contribution in the area of peace agreements and international law, Christine Bell's *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, demonstrates clearly that

[3] *Government of Sudan v the Sudan People's Liberation Movement/Army*, Final Award at para 427 (Permanent Court of Arbitration 2009) [hereinafter 'Abyei arbitration'] available at http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf.

[4] What is today the GoSS was at the time, and for the purposes of the CPA, the Sudan People's Liberation Movement/Army (SPLM/A).

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peace agreements are ill-suited to the prevailing positivism of international law.[5] But despite this, the positivist legal consequences of the CPA are important for its implementation and compliance. The positivist legal consequences provide a rational basis for decisions of the Sudanese and international actors, and seek to provide standards to prevail over a resort to naked politics and power. This article will argue that principles of international law can and must be applied to the CPA to reach a view on its legality or otherwise.

Underlying the status of the CPA and its commitments is the critical issue of self-determination under international law. The right of self-determination as commonly articulated does not necessary fit well with the case of the Sudan. It is difficult though to draw immutable general rules *in abstracto* for self-determination under international law. As Martti Koskenniemi suggests, the right of self-determination cannot be comprehended in legal discourse in abstraction from the situations in which it is sought to be applied.[6] As this article will argue, the principles must be applied as best possible to the particular situation and without preconception. Further, at the heart of this unresolved interaction between international law, peace agreements and self-determination in the Sudan, lie the implications and competing visions for the future of the Abyei region and people.

In concluding that the CPA contains binding obligations and exploring the broader issues of peace agreements and self-determination this paper will consider the issues in four parts. First, it will set out the nature of the CPA and the parties to the agreement. Second, it will address how the CPA may be seen as an international agreement that gives rise to obligations under international law. Third, the paper will suggest that the CPA gives rise to a right to self-determination under customary international law for the people of Southern Sudan and perhaps also for the people of Abyei. Finally, the paper will conclude with general observations on the CPA, including what the Sudan case reveals about international law, peace agreements and self-determination.

II. BACKGROUND TO THE AGREEMENT AND PARTIES

On 9 January 2005, the ‘Comprehensive Peace Agreement between the Government of the Sudan and the Sudan People’s Liberation Movement/ Sudan People’s Liberation Army’ (CPA) was signed in Nairobi, Kenya.[7] The CPA was the culmination of a number of individual agreements concluded between 2002 and 2005 and a much longer period of reflection and dialogue, which included political groups in Sudan and neighbouring

[5] C Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP, Oxford, 2008).

[6] M Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 ICLQ 245, 264. He notes that the more concrete the norm becomes the more it is controversial.

[7] Available at: http://unmis.unmissions.org/Default.aspx?tabid=515.

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States.[8] The agreement marked the end of more than two decades of war between the South and the Northern central government led by the National Congress Party, a party with a strong focus on Islam and *Sharia* law. The root causes of the war between the South and the North have been said to be related to policies of separate, unequal and sometimes exploitative development.[9] This conflict has also often been described as a religious or 'racial' war between the Christian or Animist South and the Muslim North.[10]

The CPA is a detailed, substantial and lengthy document. It comprises a chapeau, six chapters, two annexures, and a list of corrections (essentially amendments bringing the separate agreements together). The CPA was signed by the First Vice President of Sudan on behalf of the Government of the Sudan, and by the Chairman of the SPLM/A on behalf of the SPLM/A.[11] The Heads of State of Kenya and Uganda,[12] a number of foreign ministers and other senior officials,[13] the Chair of the African Union, the Secretary-General of the Arab League, the UN Secretary-General's Special Representative in Sudan, and a representative of the EU, also signed the CPA as witnesses.[14]

The CPA sought to provide a framework for a ceasefire and achieving peace through a fairer division of power and wealth in Sudan.[15] As its title suggests, the CPA is a truly comprehensive series of agreements covering a wide range of issues.[16] The Agreement created an autonomous Government of Southern Sudan (GoSS), with a Southern constitution based on customary laws and

[8] E Thomas, 'Against the Gathering Storm: Securing Sudan's Comprehensive Peace Agreement' Chatham House (2009) 6, available at http://www.chathamhouse.org.uk/files/12941_0109sudan_r.pdf. The CPA includes the following: The Machakos Protocol (or Chapter I) (July 2002) on broad principles of government and governance; The Protocol on Power Sharing (or Chapter II), (May 2004); The Agreement on Wealth Sharing (or Chapter III) (January 2004); The Protocol on the Resolution of the Conflict in Abyei Area (or Chapter IV) (May 2004); The Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States (or Chapter V) (May 2004); The Agreement on Security Arrangements (or Chapter VI) (25 September 2003); The Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices (or Annexure I) (October 2004); The Implementation Modalities and Global Implementation Matrix and Appendices (or Annexure II) (31 December 2004).

[9] Thomas ibid.

[10] For more explanation, see Thomas ibid referring to DH Johnson, *The Root Causes of Sudan's Civil Wars* (James Currey, Oxford, 2007), and J Spaulding and L Kapteijns in J O'Brien and W Rosebery (eds), *Golden Ages, Dark Ages: Imagining the Past in Anthropology and History* (University of California Press, Berkeley, 1991) discussing the role of underdevelopment and identity in the shaping of Sudan's past.

[11] First Vice President of Sudan, Ali Osman Mohamed Taha, and Chairman of the SPLM/A, Dr. John Garang de Mabior.

[12] The Presidents of Kenya and Uganda signed on behalf of the Intergovernmental Authority on Development (IGAD), the East African regional development organization.

[13] Egypt, Italy, two signatories from the Netherlands, UK and Ireland, USA.

[14] The following individuals witnessed the CPA: HE Hon Mwai Kibaki, HE Hon Yoweri Kaguta Museveni, HE Mr Ahmed Aboul Ghei, Senator Alfredo Mantica (on behalf of both the IGAD Partners Forum and the Government of Italy), HE Mr Fred Racke, HE Ms Hilde F Johnson, Right Hon Hilary Benn, MP, Mr Colin L Powell, HE Mr Alpha Oumar Konare, Hon Charles Goerens, HE Ms Hilde F Johnson, HE Mr Amre Moussa, and Mr Jan Pronk.

[15] Thomas (n 8) 6–7.

[16] For list of component agreements see (n 7).

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values and not on Islamic *Sharia* law (the latter which remained a source of law for the North). Under the CPA, the North and South were both able to maintain distinct military forces in the form of the Sudan Armed Forces and SPLM/A respectively.

The CPA put in place measures for the international monitoring of the ceasefire.[17] The UN Security Council in its resolution 1574 (2004) endorsed the CPA, and its resolution 1590 (2005) mandated a peacekeeping operation in the form of the UN Mission in Sudan (UNMIS). A key goal of UNMIS was and still is to assist the parties in implementation of the CPA.[18] Another major focus of the CPA was the sharing of oil revenues, as Southern Sudan and the Abyei area provide the majority of oil revenues for the Sudan.[19] The CPA also importantly sought a restructuring of the national political system over a six-year interim period to better include the SPLM/A and the interests of South Sudanese people.

All these measures, according to a key phrase in the CPA, were aimed at '[making] the unity of the Sudan an attractive option' to the people of Southern Sudan.[20] Nonetheless the South Sudanese were also provided the opportunity to vote in a referendum on independence which was to be held in January 2011.[21] To monitor the CPA's implementation, the Agreement required the establishment of the Assessment and Evaluation Commission (AEC) which was comprised of the two parties to the CPA and representatives of the United States and four European nations, along with a number of observers.[22]

Since 2005, there have been several bumps in the road of the implementation of the CPA, including the death of the influential Southern Chairman of the SPLM/A Dr John Garang,[23] and later the SPLM's temporary withdrawal from politics and national government in protest concerning the implementation of the CPA including in respect of the Abyei region.[24] In addition, President Omar Al-Bashir was indicted on 14 July 2008 by the International Criminal Court for crimes against humanity and war crimes and later for genocide.[25] Under the CPA, national elections were scheduled for 2009.

[17] Art 2 of the September 2003 Agreement on Security Arrangements requires international monitoring for the ceasefire. The nature of that monitoring is elaborated in arts 14 and 15 of the December 2004 Permanent Ceasefire Agreement: ceasefire institutions would be chaired by the UN, but come under a Ceasefire Political Commission chaired by the parties to the agreement, which means that parties have the final say.

[18] UNMIS, 'UNMIS Mandate' http://www.un.org/en/peacekeeping/missions/unmis/mandate.shtml accessed 11 December 2010.

[19] Thomas (n 8) 19.

[20] Machakos Protocol, July 20, 2002, art 1.5.5 (set out in Chapter I of the CPA (n 7). See also the Chapeau to the CPA.

[21] ibid art 2.5.

[22] ibid art 2.4.

[23] John Garang's death has been cited as the 'first big crisis for the agreement'; see Thomas (n 8) 14. As the report describes, without him, 'unity is less attractive and Southerners are more likely to vote for independence.'

[24] S Healy, *Sudan: Where is the Comprehensive Peace Agreement Heading?* (Chatham House, London, 2008) 2, www.chathamhouse.org.uk/files/10753%20_231107sudan.pdf.

[25] The warrant of arrest lists five counts of crimes against humanity (murder, extermination, forcible transfer and rape), two counts of war crimes (intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and

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These elections were held in 2010 but resulted in little substantial change in national politics, and did not appear to take the parties closer to a workable solution of unity for the Sudan.

The preparations for the referendum for Southern Sudan and Abyei led to disagreements and controversies between the North and South. For many reasons, including the lack of real progress on national reconciliation, the referendum on self-determination for South Sudan became the Agreement's 'centrepiece'.[26] In respect of continuing disagreement over the borders of the Abyei region, which was a precursor for the sharing of wealth from the region, the North and South submitted the dispute to a panel constituted under the Permanent Court of Arbitration in The Hague.[27] The panel reached a pragmatic decision on 22 July 2009 that largely resolved the border issues. Following the outcome of the South Sudan referendum in January 2011, in which the people overwhelmingly voted for independence, it appears that the new independent State of South Sudan will be declared in July 2011.[28] The referendum in respect of the Abyei region was not held concurrently with the South Sudan referendum as intended under the CPA, and at this stage is subject to political negotiations and has been delayed indefinitely.[29]

III. INTERNATIONAL AGREEMENT WITH BINDING OBLIGATIONS?

The term 'peace agreement' does not have a defined legal meaning. It is rather a more descriptive term, a basic definition of which is as follows: '[A] formalised legal agreement between two or more hostile parties—either between two States or a State and an armed belligerent group (sub-state or nonstate)—that formally ends a war or armed conflict and sets forth terms that all parties are obliged to obey in the future'.[30] Aside from this definition's reference to 'legal', which unnecessarily presupposes a legal status, it is a reasonably good

pillaging), and three counts of genocide (genocide by killing, genocide by causing seriously bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction). See International Criminal Court, Case Information Sheet: Case No ICC-02/05-01/09, available online at: http://www.icc-cpi.int/NR/rdonlyres/08B26814-F2B1-4195-8076-B4D4026099EC/282348/bashirEng1.pdf.

[26] Thomas (n 8) 6.

[27] Abyei arbitration (n 3).

[28] See CPA (n 7). According to art 2.5 of the Machakos Protocol in the CPA, the referendum was supposed to be held at the end of the interim period (of six years), which follows the pre-interim period (of six months). The Chapeau to the CPA states that the pre-interim period commences on the signing of the CPA, which was 9 January 2005. *The Interim National Constitution of the Republic of Sudan* (2005), available at: http://www.sudan-embassy.de/c_Sudan.pdf. See ibid and art 222(1) of the constitution, however, states that the referendum shall be held six months before the end of the six-year interim period, as is currently scheduled.

[29] See CPA (n 7). 'Abyei referendum behind schedule' *BBC World Service* (14 October 2010) http://www.bbc.co.uk/worldservice/africa/2010/10/101014_sudan_abyei_referendum.shtml.

[30] L Vinjamuri and AP Boesenecker, 'Accountability and Peace Agreements: Mapping Trends from 1980 to 2006, Geneva, Centre for Humanitarian Dialogue' (2007) available at <http://www.hdcentre.org/publications/accountibility-and-peace-agreements-mapping-trends-1980-2006>. See also discussion of Bell (n 5) 47–53.

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fit with the CPA. It has been said that international law plays two main roles in peace agreements.[31] The first role is that, to the extent that peace agreements form legal documents, the law can be expected to play a role in their implementation or enforcement. The second role concerns regulation and the injection of standards into the peace agreement, such as human rights, the right to self-determination, and the use of force by peacekeepers.

There is a difficulty in the categorization of peace agreements under the traditional law of treaties.[32] This has impacted on how many commentators have viewed the CPA. For example, the Abyei arbitration panel ruled that the CPA was not a treaty. The panel stated the CPA was rather an agreement 'between the government of a sovereign state, on the one hand, and, on the other, a political party/movement, albeit one which those agreements recognize may—or may not—govern over a sovereign state in the near future.'[33] As could be expected, the arbitral panel focussed significantly on the status of the SPLM/A. In this regard, Bell, the leading expert on international law and peace agreements, states:

> Despite appearing to be legal agreements, substantive peace agreements are difficult to place within existing international legal categories as positively understood. Such classification is hampered by the limitations of the categories, especially their unsuitability with regard to accommodating the hybrid subject matter of peace agreements and their mix of state and non-state signatories.[34]

Bell's analysis focuses upon the nature and parties of peace agreements. There is a general assumption that because peace agreements often do not fit the rules of the 1969 *Vienna Convention of the Law of Treaties* (VCLT), they cannot be binding agreements under international law. A closer analysis of both the VCLT and the CPA, however, suggests that there are various reasons that this assumption can be challenged including in the case of the CPA.[35]

A. *Vienna Convention on the Law of Treaties*

As a starting point, it is important to realize that the VCLT, while relevant, does not govern all international agreements that may give rise legal obligations. Agreements which fall outside the VCLT definition of a 'treaty' are regulated by customary international law.[36] This is affirmed in the VCLT preamble, which provides that 'the rules of customary international law will

[31] Bell ibid 8–9.

[32] For a discussion of the difficulty of legal categorization under the traditional law of treaties, see C Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 AJIL 2, 373, 379–381, 395; and Bell (n 5) 127–174.

[33] See (n 1) para 427.

[34] ibid.

[35] ibid.

[36] On the relationship between the VCLT and customary international law, see I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, Manchester, 1984) 5–10.

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continue to govern questions not regulated by the provisions of the present Convention'.

The VCLT defines a 'treaty' as 'an international agreement concluded *between States* in written form and governed by international law'.[37] It emphasizes a formal instrument, defined by formalist criteria, rather than more generally a source of obligation.[38] This definition does not extend to unwritten agreements, nor to agreements between other 'subjects' of international law.[39] As one delegation at Vienna stated, 'the Conference had succeeded in reducing a new and substantial part of customary law to writing; but gaps remained, so that occasionally it was necessary, in the practice of international relations, to fall back on custom'.[40] As the SPLM/A is not a 'State' party to the agreement, the VCLT definition of 'treaty' does not easily cover the CPA.

While this indicates the extent of the VCLT's scope is limited and not comprehensive, it does not resolve the legal consequences for agreements which fall outside its scope. These consequences were addressed in article 3 of the VCLT, which provides:

> *Article 3*
> *International agreements not within the scope of the present Convention*
> The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:
>
> *a*) the legal force of such agreements;
> *b*) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
> *c*) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

The VCLT accordingly does not exclude the possibility of finding binding obligations through the form of an international agreement.[41] It is also clear that the VCLT rules may still be relevant for the interpretation and

[37] Vienna Convention on the Law of Treaties art 2(1)(a), May 23, 1969, 1155 UNTS 331 (emphasis added) [hereinafter VCLT] which adds 'whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

[38] Bell (n 5) 128.

[39] See VCLT (n 37) art 3. It is worthy to note, however, that in a draft of the articles that led to the VCLT definition of a treaty, the International Law Commission defined treaty as 'concluded between two or more States *or other subjects of international law*'. See Yearbook of the International Law Commission, 1962 Vol II, 161 (emphasis added).

[40] United Nations Conference on the Law of Treaties, (2nd Session) Vienna, 9 April–22 May 1969, Official Records, Documents of the Conference, 31st plenary meeting, p 170 (representative of the Swiss Government, the proposer of the preamble language on customary international law).

[41] Bell (n 32) 380.

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implementation of such agreements. While 'international agreement' is not a term with specific legal meaning in the VCLT, in this context it suggests an international class of agreement which may or may not be binding under international law. In this regard, the CPA should be considered through this prism of an 'international agreement' rather than as a treaty, and therefore may be governed by customary international law that is open to development. This was the clear intent of the International Law Commission (ILC) and the Vienna Conference. For as Shabtai Rosenne comments:

> While the effect of these decisions may be to leave the law of treaties with a certain 'open-endedness', as Sir Humphrey Waldock more than once pointed out, the logic of this approach seems inescapable; it is noteworthy that the Vienna Conference made no attempt itself to complete those inevitable gaps in the statement of the law of treaties that emerged from the codification process.[42]

It was a deliberate decision to allow the law to develop in these areas as and when required. Obviously though, any category of binding international agreements that falls outside the definition of 'treaty' will probably be small indeed. Also, generally speaking, the rules in the VCLT will still be highly relevant to this inquiry under customary international law. It is to these more detailed issues that we now turn.

B. Subjects of International Law

As demonstrated above, the VCLT left the door open for development of international agreements between 'other subjects' of international law. This reflected the view that further detailed study was required of other subjects, and a definite position could not be adopted at the time. It is important that even back in the 1950s during the development of the VCLT, it was recognized that non-traditional subjects of international law could enter into international agreements. There are historical examples, for instance, the colonial territories of New Zealand, Australia, India, South Africa and Canada, which were signatories to the Treaty of Versailles and the Kellogg–Briand Pact.[43] Those territories were beneficiaries of the rights and subject to the obligations of those international agreements.

The comments of States on the draft ILC Articles on the Law of Treaties are instructive for demonstrating the openness to other subjects of international law concluding agreements that were binding in nature.[44] For example, in the

[42] S Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (AW Sijthoff, Leiden, 1970) 43.

[43] Treaty Providing for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 94 LNTS 57; UKTS (1929) 29 206.

[44] See generally, International Law Commission, Analytical Guide, Law of treaties, plenary discussions under 'H Reports of the International Law Commission', available at: http://untreaty.un.org/ilc/guide/1_1.htm.

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UN Sixth Committee debate on the ILC draft Articles, the United Kingdom commented that:

> It [the United Kingdom] observes that many States and territories exist which possess less than full sovereignty but which have, in certain cases, enabled themselves to conclude treaties with foreign States by treaty instruments and similar means. It notes that these means are not mentioned in the [relevant] article or in the commentary.[45]

Whilst perhaps primarily focussed on decolonization, in the same UN Sixth Committee debate the United States recognized that entities on the verge of statehood must be able to enter into binding international agreements:

> Unless paragraph 1 [on other subjects of international law] is given a wider meaning than that attributed to it in the commentary, the United States Government considers that it will constitute a narrow limitation on areas emerging to independence. To limit the scope of the term 'other subjects of international law' to international organizations, the Holy See and cases such as an insurgent community would, in its view, be too restrictive; for colonies and similar entities given some measure of authority in foreign relations, especially when approaching statehood, should not have to be in a state of insurgency to be capable of concluding a valid international agreement. . . . [I]t would be paradoxical if at the present time areas approaching independence could not be encouraged by being entrusted with authority to conclude agreements in their own names.[46]

Since the time of these debates, the position of international organizations in treaty law has become much clearer. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was concluded in 1986. While this Convention is not yet in force, with subsequent practice it is clear that today international organizations are subjects of international law, and are capable of entering into international agreements.[47]

The choice of wording of 'other subjects of international law' in the VCLT does lead to some problems. It may not be fully reflective of what this was intended to address, and nor does it reflect well the customary international

[45] International Law Commission, Special Rapporteur on the Law of Treaties, 'Fourth Report on the Law of Treaties' (19 March, 25 March and 17 June 1965) UN Doc A/CN.4/177, 17 (by Sir Humphrey Waldock), http://untreaty.un.org/ilc/documentation/english/a_cn4_177.pdf.

[46] ibid.

[47] See CC Joyner, *International Law in the 21st Century: Rules for Global Governance*, (Rowman & Littlefield, Lanham, 2005) 24 ('Various categories of actors participate in today's interdependent world of complex transactions and global telecommunications. These actors are subjects of international law—that is, they possess *international legal personality*, or the legal capacity that conveys certain entitlements and obligations arising from international legal rules. States are foremost among these participants, but also included are international organizations, transnational groups, multinational corporations, private associations, and even the individual persons.')

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law of today.[48] As is well known 'subjects' is now a significantly contested concept in international law, and has given way somewhat to the idea of 'international legal personality' and 'participants' in the international legal system.[49] The latter two concepts were developed in response to the need to more accurately reflect the functioning and reality of international law. In this regard, a major issue in the context of peace agreements is the legal status of non-state actors which are parties. This issue has an impact on whether an agreement can be seen as binding under international law. As Bell comments:

> Political settlements designed to end protracted civil conflict will of necessity turn on agreements entered into between parties with no international legal standing and leaders with no clear internal political standing . . . Nevertheless, the international community has clearly manifested a desire to accept the parties to these and similar agreements as capable of binding the communities in whose name they enter into political settlements. Even though these parties are not states and are not subjects of international law in the traditional sense, the international community treats their agreements as the legal equivalent of treaties.[50]

There is a great spectrum of peace agreements and given developments in international law certainly not all the non-States that participate will have 'no international legal standing'.[51] There is more flexibility in the notion of subjects than is perhaps often accepted. Even in 1949 the International Court of Justice (ICJ) referred to that flexibility and stated in the *Reparations* case that '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and *their nature depends upon the needs of the community*.'[52]

[48] See Bell (n 32) 380 (it 'leaves a grey area . . . that has assumed far greater importance than . . . in 1969); Rosenne (n 42) 10–33.

[49] For example, see Bell ibid 383–384; C Bell (n 5) 130–135; Rosenne ibid; R Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford, 2004) 39–55 (Higgins notes at 49–50 that 'the whole notion of 'subjects' and 'objects' has no credible reality, and, in my view, no functional purpose', and adds that 'there are no 'subjects' and 'objects,' but only participants. Individuals are participants, along with states, international organizations . . ., multinational corporations, and indeed private and non-governmental groups.'); R McCorquodale, 'The Individual and the International Legal System,' in M Evans, *International Law* (2nd edn, OUP, Oxford, 2006) 307–332; Restatement of the Law (Third), Foreign Relations Law of the United States, 68–72 (1986); A Clapham, Human Rights Obligations of Non-State Actors (2006) 79; J Alvarez, 'Are Corporations "Subjects" of International Law?' Santa Clara Journal of International Law (forthcoming) 7–10, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1703465##; cf I Brownlie, *Principles of Public International Law* (2003) 57; P Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, London, 1997) 91.

[50] D Whippman, 'Treaty-Based Intervention: Who Can Say No?' (1995) 62 U Chi L Rev 607, 641.

[51] See Bell (n 32) 381, for an elaboration of a number of peace agreements.

[52] International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion [1949] ICJ Rep 174, 178 (emphasis added).

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Some parties to peace agreements will be more capable of concluding international agreements than others. At one end of the spectrum there are simple military groups or insurgents. This could include the Revolutionary United Front (RUF) that attacked the government and civilians in Sierra Leone. At the other end, there are cases like Palestine and Kosovo (prior to its declaration of independence and the ICJ advisory opinion), where the entity in question has an established political and governmental system that is territorially defined. The latter examples have a much greater claim to having 'international legal personality' in the international system. They therefore also have a greater claim to being a 'subject of international law' for the limited purpose of an international agreement. As John Quigley asserts in respect of the Palestinian Authority, such 'movements have made agreements with states under circumstances suggesting that the state understood it was contracting with another subject of international law'.[53] This is also consistent with a more flexible approach that is focused, as the ICJ stated, on 'the needs of the [international] community'.

Even in peace agreements with simple insurgent or rebel groups as parties, there have been mixed views about such groups' potential to conclude a binding international agreement. As is well known, there is now also significant literature and argument that rebel movements or groups may be subject to the obligations of the law of armed conflict, and even international human rights law.[54] This sentiment was better demonstrated in the ILC's original drafting of article 3 of the Law of Treaties, which reflected the view that 'other subjects of international law referred, inter alia, to insurgent communities to which a measure of recognition has been accorded.'[55] If such insurgent groups are obliged by the law of armed conflict and human rights (a challenging issue that this article does not explore), it would not be a large step to suggest they may have a limited capacity to conclude binding international obligations with a State.

In this regard, the Special Court for Sierra Leone Appeals Chamber in the *Kallon* case found that the Lomé Peace Agreement between the Government

[53] See J Quigley, 'The Israel-PLO Interim Agreements: Are They Treaties?' (1997) 30 Cornell Int'l L J 717, 733; P Malanczuk, 'Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law' (1996) 7 EJIL 485.

[54] This is a large area of research. For example, see S Sivakumarah, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 2, 369. This author discusses agreements between armed opposition groups and the government to respect certain IHL rules. See also A Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford, 2006); Bell (n 5) 130. Bell refers to, by way of example, Common art 3 of the 1949 Geneva Conventions (75 UNTS 31; 75 UNTS 85; 75 UNTS 135; 75 UNTS 287); Additional Protocol I to the Geneva Conventions (1977) 1125 UNTS 3; Additional Protocol II to the Geneva Conventions (1977) 16 ILM 1442; Declaration on the Granting of Independence to Colonial Countries and People, UN GA Res 1514 (XV) (1960) (referring to 'national liberation movements'); ICCPR 999 UNTS 171, article 1; ICESCR, 993 UNTS 3, article 1.

[55] Yearbook of the International Law Commission (1962) 161.

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and insurgent group was not a treaty under international law.[56] However, Antonio Cassese has criticized the Court's characterization of the agreement as not constituting a treaty, and said that it should have been determined to be internationally binding.[57] While it is not necessary for present purposes to determine the correctness of this decision, including based on the RUF's legal status, the case needs to be understood in its context. A finding of any international legal character may have given weight to the blanket amnesties that the Lome Agreement contained on which the defence of the accused sought to rely. A further example is the agreement signed in Mozambique in 1974 between Portugal and the Front for the Liberation of Mozambique, which has been since said to be binding under international law.[58] This latter case reflects well the sentiment of the United States above on emergence of such entities as legitimate actors for concluding binding agreements in international law.

The issue of recognizing an entity less than a State under international law has also raised questions in the context of self-determination. Fitzmaurice stated that: '[I]t is scarcely possible to refer to an entity as an entity unless it already is one, so that it makes little juridical sense to speak of a claim to *become* one, for in whom or what would the claim reside? By definition, "entities" seeking self-determination are not yet determined internationally.'[59] Yet this reasoning is circular and precludes the effective operation of international law. As Crawford recognizes, there is nothing self-contradictory in an entity having a limited status, consisting primarily of the right at some future point to opt for some more permanent status.[60] This is part of the underlying basis of the need for some flexibility in international law in relation to the concept of subjects.

C. Reciprocity

There is also a central role for reciprocity in the construction and interpretation of international agreements. That is, if one party is bound by an agreement, then so should be the other party. As Bell notes 'rejecting the legal status of both the non-State group and the peace agreement may result in the argument that the state is bound while the non-State actors are not'.[61] However in some circumstances the reverse also may be true, where a

[56] *Prosecutor v Morris Kallon and Brima Buzzy Kamara*, Special Court for Sierra Leone, SCSL-2004-15- AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, at para. 42 (Appeals Chamber, 13 March 2004).

[57] A Cassese, 'The Special Court and International Law: The Decision Concerning the Lome Agreement Amnesty' (2004) 2 J Int'l Crim Just 1133–1135. Cassese referred to the detailed, careful text of the agreement, the references to the Constitution of Sierra Leone, the authoritativeness of the text in the two different languages, the provisions on implementing and supervising mechanisms, those on dispute settlement. For Bell's discussion of the *Kallon* case, see (n 5) 140.

[58] Quigley (n 53) 719.

[59] Fitzmaurice, in Institut de Droit International, *Livre du Centenaire*, 233.

[60] J Crawford, *The Creation of States* (2nd edn, OUP, Oxford, 2007) 124.

[61] Bell (n 32) 387.

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non-state is denied the capacity to enter into binding international obligations but nonetheless may have other related obligations under international law. In this regard, it is recognized that the commitments made by a group such as the SPLM/A will bind should it subsequently become an independent State. The law of State responsibility provides clearly that political and armed groups may be bound *retroactively* by prior conduct if they become a new State. The ILC Articles on State Responsibility in article 10(2) provide: 'The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.'

As the result of significant amendment and redrafting, the final wording of article 10 above was not the object of principled opposition from States.[62] The resulting provision also had a foundation in significant arbitral case law.[63] The ILC was careful not to try to define 'insurrectional movement' including by reference to international legal personality. In fact, as observed by Pieter Kooijmans, the international legal personality of the insurrectional movement is most likely to be the result of a peace agreement internationalized by the participation of the UN or a regional organization.[64]

The objective and effect of article 10(2) appeal to common sense, as it encourages such groups to act more responsibly, through a mixture of legal continuity and potential accountability. As indicated above, the GoSS in recent years has acted in many respects as a de facto government separate from Khartoum. As Southern Sudan will in future become an independent State, under this legal principle prima facie the GoSS may be retrospectively bound by the terms of the CPA and other obligations. If the GoSS may be held to its formal commitments made prior to becoming an independent State, it may follow that this should be conditioned by reciprocity. In short, if the GoSS was bound by the CPA after becoming a State, the Government of the Sudan should also in principle be bound.

D. The Constitutional Nature of the CPA

Peace agreements do not sit comfortably with the international law assumption of the separation of international and national legal spheres. Many peace

[62] See 'State Responsibility, Comments and Observations received from Governments', A/CN.4/515, 19 (19 March 2001) at 25. See also Yearbook of the International Law Commission (1980), Vol II 87–106.

[63] For a detailed discussion of the case law see J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge, 2002), commentaries on art 10 at 116–120; O De Frouville, 'Attribution of Conduct to the States: Private Individuals', in J Crawford, A Pellet and S Olleson (eds), *Law of International Responsibility* (OUP, Oxford, 2010) 249.

[64] PH Kooijmanns, 'The Security Council and Non-State Entities as Parties to Conflicts' in K Wellens, *International Law: Theory and Practice: Essays in Honour of Eri Suy* (Martinus Nijhoff, The Hague, 1998) 333–340.

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agreements contain aspects of both constitutional and international law. However, from the standpoint of international law, it is the international legal terrain in which the relevance of a peace agreement must be assessed. There is a view supported by some commentators, and perhaps by the Sudanese Government, that the CPA is a national rather than international agreement.[65] Under this view, its legal force and validity is said to be *solely* a question of national and constitutional law. It has been argued that the intention of the CPA was to 'constitutionalize' the areas of agreement between the parties.[66] In many respects, this would appear to be the case. For example, the CPA provides that the Sudanese constitution 'shall be the Supreme Law of the land'.[67] Further, the 2005 Interim National Constitution (the Constitution) recognizes incorporation of the CPA into national law at both the general and specific levels. The Constitution in section 25 provides:

> *Incorporation of the Comprehensive Peace Agreement*
>
> 25. The Comprehensive Peace Agreement is deemed to have been duly incorporated in this Constitution; any provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution.

However, it is clear this general 'constitutionalizing' of the CPA's implementation has not occurred in practice. As one commentator has observed, '[t]hroughout the years to come, the two signatories of the CPA consistently ignored the legal consequences of 'constitutionalizing' the CPA they had drafted'.[68] That this occurred is not so surprising, as framing peace agreements as constitutions can tend to have a negative effect on compliance.[69] The power structures of a peace agreement will often include one party in a dominant position as the incumbent government.

The CPA is not really suitable for implementation solely under national law. This is for legal as well as practical reasons. In terms of political governance, the CPA and Constitution both recognize 'the autonomy of the Government of Southern Sudan'.[70] The CPA also provides that the 'people of South Sudan have the right to control and govern affairs in their region'.[71] The Constitution itself recognizes that 'the linkage between the national government and the states in Southern Sudan shall be through the government of Southern Sudan'.[72] The CPA and Constitution set up the GoSS as existing

[65] See M Bockenforde, 'The Abyei award: Fitting a Diplomatic Square Peg into a Legal Round Hole' (2010) 23 LJIL 2, 555; J Matus, The three areas: a template for regional agreements, Conciliation Resources (2006), http://www.c-r.org/our-work/accord/sudan/three-areas.php ('The *Comprehensive Peace Agreement* (CPA) is a national agreement negotiated by two parties . . .').

[66] Bockenford ibid 563.

[67] Machakos Protocol (n 20) art 3.1.1.

[68] Bockenforde (n 65) 560.

[69] Bell (n 5) 152.

[70] CPA (n 7) Machakos Protocol, art 1.2; Constitution, (n 26) art 25(a).

[71] ibid.

[72] The Interim National Constitution of the Republic of Sudan (2005), art 26(1)(a).

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within the federal structure, though not as a federal state within the broader structure, but rather as de facto government almost in parallel to Khartoum.

There is also a question of efficacy and realities. The CPA establishes a number of arrangements that leave the GoSS as essentially independent from Khartoum except for a high-level political connection. The CPA and Constitution provide for a sharing of the oil revenues, the maintenance of separate armies, and even expressly authorizes the GoSS to raise loans internationally independent of the central Government. For all these reasons, it was never possible to imagine that the CPA would be exclusively implemented through the Sudanese Constitution and national law. In its totality, the CPA does not establish a constitutional process as the controlling framework between the two parties, rather in some respects the converse appears to be true. The Constitution may be seen to defer to the requirements of the CPA in form and subsequent practice. Most importantly, in terms of dispute resolution between the Parties, the CPA's mechanisms are preserved as pre-eminent, and not subject to the national courts of the Sudan.[73] At the very least, the CPA can be seen as a continuum, whereby the initial focus on unity, governance and human rights is constitutional, and the latter focus on self-determination and other issues is international.

The Abyei arbitration agreement between the parties provided that the applicable laws to resolve the dispute were the CPA and the Constitution and general principles of law and practice 'as the Tribunal may determine to be relevant'.[74] While the arbitration panel made the statement that the CPA was not a treaty, in substance it treated the CPA as a binding international agreement. As one author noted:

> Considering that the dispute at hand was a national and not an international one, and taking into account the fact that the applicable law was primarily constitutional law, it is surprising that the arbitrators predominantly referred to general principles and practices of international law as being relevant.[75]

Again, in this particular context it is not so surprising. As would be expected, it is very uncommon for a dispute based mainly in national and constitutional law to be arbitrated by the Permanent Court of Arbitration.[76] Given the international law context of the CPA, including in relation to Abyei, it is natural that that the arbitrators predominantly referred to general principles and practices of international law. Further, it was not only the arbitrators, but also

[73] In the CPA there are no general binding dispute resolution procedures. As stated above, while the Constitution states that the law of the Sudan is 'supreme', the CPA is also clear that the Constitution incorporates the provisions of the CPA.

[74] Abyei arbitration (n 3) 153 (para 425).

[75] Bockenforde (n 65) 555, 564.

[76] As the Permanent Court of Arbitration's self-description provides: 'Its [the PCA's] caseload reflects the breadth of PCA involvement in international dispute resolution, encompassing territorial, treaty, and human rights disputes between states, as well as commercial and investment disputes, including disputes arising under bilateral and multilateral investment treaties.' Available at: http://www.pca-cpa.org/showpage.asp?pag_id=1027.

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the parties, that relied extensively on international law concepts.[77] The Abyei arbitration was not between 'constitutional' parties, but rather the Government of Sudan and the GoSS as almost two de facto distinct international entities. In this arbitration, the GoSS acted much more like a government and legitimate political entity on parallel footing with Khartoum, than anything like a simple insurgent group or movement or a sub-component federal State of the Sudan.

E. Intention of the Parties

As the preceding discussion indicates, it is difficult to see the CPA solely as an agreement to be implemented at the national level. It is clearly an agreement with both a constitutional and international legal character. This conclusion leads to a central question of whether the CPA can be seen as binding under international law or is rather a non-binding political instrument. That an agreement is 'governed by international law' is a key requirement of the definition of a 'treaty' under the VCLT.[78] While prima facie this requirement is somewhat circular, it is evidenced by an intent to create obligations under international law.[79] The ICJ has noted that this intent is what distinguishes treaties from agreements that are governed by domestic law.[80]

The intent of the parties is an elusive concept and reliance must naturally be placed on objective criteria to the extent possible.[81] That intent must be gathered from the terms of the instrument itself and the circumstances of its conclusion, and not simply from what the parties say afterwards was their intent.[82] As the ICJ stated in the *Qatar v Bahrain* case in rejecting Qatar's evidence of a lack of intent on its behalf to conclude an international agreement, 'nor could any such [Qatari] intention, even if shown to exist, prevail over the actual terms of the instrument in question.'[83]

For a number of reasons, it appears difficult to argue that the parties here intended the CPA to be a non-binding political instrument. First, a full range of peremptory treaty language is clearly and consistently used in the agreement—'parties', 'shall', 'agree', 'agreement', 'obligations', 'equally authoritative' and so on.[84] From a practical perspective, this use of language is seen

[77] Abyei arbitration (n 3) paras 429–432.

[78] See the definition of a treaty in the VCLT (n 37) art 2(1)(a).

[79] A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP, Cambridge, 2007) 20.

[80] *Temple of Preah Vihear* case [1961] ICJ Rep 26, 31–32; 33 ILR 48.

[81] Bell (n 5) 128; see M Koskenniemi, *From Apology to Utopia* (CUP, Cambridge, 1989) 300, on the difficulty in determining intention.

[82] Case *Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* [1994] ICJ Rep 112, paras 28–29. Schacter at 297.

[83] ibid para 29. The Court held that there was not any evidence before it which would justify deducing Qatar did not intend to conclude, and did not consider it had concluded, an international agreement. Further, the Court said 'nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question.'

[84] See Foreign and Commonwealth Office, 'Treaties and MOUs: Guidance on Practice and Procedures' (2nd edn, 2004) 15–16; Aust (n 79) 33.

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as a significant factor in determining the binding nature of an agreement between States.[85] A non-binding agreement, such as the Helsinki Final Act, will deliberately use language such as 'participant', 'will', 'accept', 'arrangement' and so on.

The CPA's provisions also evidence a general intent by the parties to be legally bound. For example, it provides that 'all the obligations and commitments specified in the CPA shall be binding in accordance with the provisions thereof'.[86] It is also provided that the parties shall 'refrain from any form of unilateral revocation or abrogation of the Peace Agreement.'[87] These are provisions that would usually indicate an objective intent to be bound. Furthermore, nowhere was there any statement in the CPA making clear that the agreement was not internationally binding, as can be found for example in the Helsinki Final Act.[88]

The CPA was signed on behalf of the Sudanese Government by the Vice-President of the Sudan, and for the SPLM/A by its Chairman (the most senior official). While not signed by the Head of State, Head of Government or Foreign Minister for the Sudan,[89] this may not be determinative of the CPA being seen as a non-binding agreement under international law. The three senior office holders indentified in the VCLT—the Head of State, Head of Government or Foreign Minister—are not an exhaustive definition of those who may bind a State without full powers. There is room for the practice of a State and circumstances to displace this presumption. The VCLT provides that a person might bind a State in signing a treaty where 'it appears from the practice of the States concerned *or from other circumstances* that their intention was to consider that person as representing the State for such purposes'.[90]

Furthermore, in practice full powers are not provided on a regular basis. In Anthony Aust's *Modern Treaty Law and Practice*, he states: 'The ability to dispense with production of full powers is important for bilateral treaties.'[91] Aust observes that the general practice today is to dispense with full powers for bilateral treaties provided that the other party has not requested them.[92] In such an important matter as the CPA, and with such extensive high-level international involvement, it may be difficult for the Sudanese Government to argue that the Vice-President did not have any power to bind the Government.

While to date the CPA has not been registered with the UN Secretary-General pursuant to article 102 of the UN Charter this also is not determinative. Many binding international agreements are not registered with the

[85] Aust ibid 33.
[86] See CPA (n 7) xii, para (1).
[87] ibid art 2.6 of the Machakos Protocol.
[88] Final Act of the Conference on Security and Cooperation in Europe, Final clauses (1974), at 59, available at: http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.
[89] VCLT (n 37) art 7(2)(a).
[90] ibid art 7(1)(a).
[91] Aust (n 79) 7.
[92] ibid. Aust notes though it is only prudent to seek confirmation of the willingness to dispense with them.

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United Nations, and the key consequence is that such agreements cannot be invoked before the ICJ. However the CPA requires the Agreement to be 'lodged' with the United Nations and with the African Union.[93] In comparison, while the Helsinki Final Act had required that it be 'transmitted' to the Secretary-General, it was also made express that the Act was 'not eligible for registration under Article 102 of the Charter of the United Nations'.[94]

In addition, for establishing intent it is important to look at the subsequent behaviour of the parties to the CPA. As Oscar Schachter notes, when the 'parties make representations or offer criticism about conduct at variance with the undertakings in the agreement, the idea of a commitment is reinforced, even if it is labeled as political or moral.'[95] In this sense, it is important that both of the parties to the CPA have on numerous occasions accused the other of violating the CPA. This adds further support to the objective intent that the parties consider the obligations as being binding on themselves.[96]

Finally, the Abyei arbitration provides further support for the parties' treatment of the CPA as binding under international law. The Abyei arbitration panel stated that 'the Parties appreciated that the determination of the boundaries of the Abyei Area was, *in posse*, an international legal exercise' and the 'Parties' chosen method and forum for settling the dispute also manifests their intention to have international law apply'.[97] In fact, as indicated above, both parties relied heavily on international law in their arguments to the arbitration panel,[98] which further reinforced the international legal nature of the Agreement.

F. Third States and International Organizations

It is also important to see how the agreement has been held out to the international community, and the involvement of the international community in

[93] The CPA also provided that copies be lodged with the IGAD Secretariat in Djibouti, the League of Arab States and the Republic of Kenya. See CPA (n 7) Chapeau, item (4).

[94] See (n 70).

[95] See O Schachter, 'The Twilight Existence of Non-Binding International Agreements' (1977) 71 AJIL 296, 298.

[96] See, for example, P Clottey, 'Sudan's Ruling Party Accuses SPLM of CPA Violations' *Voice of America* (12 December 2010) http://www.voanews.com/english/news/africa/Sudans-Ruling-Party-Accuses-SPLM-of-CPA-Violations-111763174.html (describing how a prominent member of Sudan's National Congress Party accused the SPLM of violating the CPA by declaring support for secession.); Sudan's NCP Says It Is Prepared For 'Plan B'Against The South' *Gurtong* (28 November 2010). http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/4448/Sudans-NCP-says-it-is-prepared-for-Plan-B-against-the-South.aspx (describing how a leading member of the NCP warned the South of 'repercussions if it violates the [CPA].'); T Tadesse, *South Sudan says Khartoum is reneging on CPA deal*, Reuters, (25 August 2009) http://www.reuters.com/article/idUSTRE57O3LC20090825 (describing that the South's Minister for Cooperation accused the NCP of trying to 'sabotage and betray' the right of the people of South Sudan to self-determination. This official claimed that any delay of the referendum would be a 'clear violation' of the CPA.)

[97] See (n 3) para 249.

[98] idid paras 432, 433.

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implementing the CPA. In this regard, Bell comments that features such as oversight mechanisms, security guarantees and binding arbitration reveal an 'internationalized' dimension to an agreement, and support the argument that the parties presumed to have agreed that the matters covered are no longer exclusively within their concern.[99] The CPA has a prevalence of such internationalized features which help to suggest a binding agreement.

The CPA contains numerous examples of commitments by international actors in support of the implementation of the Agreement. In the CPA's chapeau the two parties recognize the integral role of the international community in the peace process. They appeal to the 'Regional and International Community' as well as other States that have witnessed the agreement to 'provide and affirm their unwavering support to the implementation of the CPA'.[100] As pointed out above, those formally signing the CPA as witnesses included Kenya and Uganda (on behalf of the IGAD), the African Union, the European Union, the League of Arab States, the United Nations, Egypt, Italy, the Netherlands, Norway, the United Kingdom and the United States. The inclusion of such third party signatories may provide some aspects of the form of an international treaty where this may otherwise not be complete[101] and also contribute the international 'legalizing' of the agreement.

These third party States and international organizations undertook specific roles in implementing the CPA. There are various examples of this in the Agreement. It requires the IGAD and other States, as part of the Assessment and Evaluation Committee, to monitor implementation of the CPA during the Interim Period.[102] In the CPA's Annex II, which details the implementation modalities, the responsible 'executing body' includes the parties and also the IGAD and the international community.[103] The Wealth Sharing Protocol of the CPA provides for international representatives on a National Petroleum Commission.[104] The Security Arrangements Protocol provides that the parties agree to an 'internationally monitored ceasefire'.[105] The Abyei Protocol in the CPA also provides for international monitors to be deployed to the Abyei region to ensure implementation of the ceasefire agreements.[106]

The United Nations has a significant role in the implementation of the CPA. The UN Mission in Sudan (UNMIS) is responsible for monitoring the implementation of the Agreement for a period of six years up to, and including, the referendum in 2011.[107] The UN peacekeeping presence will continue in the region beyond July 2011. The Security Council has also reaffirmed the CPA on numerous occasions, and urged the parties to 'respect and abide by'

[99] See Bell (n 32), 385, 394, 402, 407–410; see also generally, Bell (n 5) ch 3.
[100] CPA (n 7) Chapeau, xiii.
[101] Bell (n 5)178.
[102] CPA (n 7) Machakos Protocol, at 3, art 2.4.1.
[103] ibid.
[104] ibid. Wealth Sharing Protocol, art 3.3.
[105] ibid. Security Arrangements Protocol, art 2.
[106] ibid. Abyei Protocol, art 7.3, art 7.4.
[107] UN Security Council Resolution 1590, 24 March 2005; CPA ibid Ceasefire Agreement, art 15.

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the Agreement. Such Security Council resolutions can be seen as a mechanism to entrench peace agreements into the international legal order.[108] All of which supports the assertion that the obligations contained in the Agreement are binding.[109]

It may also be legitimate for some third States to consider that the CPA has conferred benefits upon them which are enforceable under international law. The VCLT provides that an enforceable right arises for a third State 'if the parties to the treaty intend the provision to accord that right [. . .] to the third State . . . and the third State assents thereto'. In the case of a benefit, the VCLT indicates that a third State's 'assent shall be presumed so long as the contrary is not indicated'.[110] The participation of third States in the implementation monitoring bodies provided in the CPA could be seen as such an enforceable right. There is no doubt that the implementation of the CPA is of material benefit to a number of States in particular Kenya and Uganda. If a Sudanese civil war were to reignite, there would again be cross border refugee flows and significant negative impacts for those two countries.

G. *Self-determination*

The CPA is very clear on the right to self-determination for the people of South Sudan. This is an international obligation that is evident from the Agreement, and there is in fact a surprising amount of detail on the right and its implementation. The CPA provides that: '[T]he people of South Sudan have the right to self-determination, *inter alia*, through a referendum to determine their future status.'[111] It sets out the details for the 'internationally monitored referendum' for the people of South Sudan to either vote to adopt the system of government established under the CPA or secede as an independent State.[112] This is significant because the right to secede, as an expression of the right to self-determination, is often separated from the recognition of the right to self-determination itself.[113] The CPA provides that upon an affirmative referendum vote, the ability of the South to secede is an unequivocal right under the CPA, and one to which the North is bound. This clearly places it further along the 'legal' spectrum than a mere political declaration. As Bell comments, the more precise the obligations in an agreement are articulated, the more difficult they are to ignore.[114]

[108] Bell (n 5) 155.

[109] For example, see Security Council resolution 1919 (29 April 2010), para. 8. This argument supports that the agreement is potentially binding has also been used in respect of Israel and the PLO. See Quigley (n 52) 738.

[110] See (n 37) art 36(1).

[111] CPA (n 7) Machakos Protocol, art 1.3.

[112] ibid art 2.5.

[113] The right to succession is often separated from right to self-determination. For example, see J Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 1, 186.

[114] Bell (n 5) 395.

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Related to the South's right of self-determination, is the right provided to the people of the oil-rich Abyei region to choose to be part of the North or the South.[115] After the result of the South's referendum, it is in effect a choice of incorporation between two separate States. This is the part of the CPA's implementation that is currently causing the most significant friction. Despite the desire and efforts of the GoSS to carry out the Abyei referendum, the process was frustrated and the referendum eventually delayed.[116] One key issue has been the ongoing dispute related to determining the 'people' of Abyei eligible to vote in the referendum. In particular there is an issue over whether in addition to the resident Dinka Ngok, the nomadic Arab Messiriya should be included, as the latter have a traditional right to graze their cattle and move across the area.[117] Abyei presents not only a problem for the CPA parties but also for the UN presence, which will continue to be required to provide UN peacekeeping. For the UN, a difficult legal issue will present itself regarding whether the bilateral status of forces agreement for the UN peacekeeping presence in Abyei will address the authority and consent of the North, the South, or both.

As pointed out consistently by the Government of the Sudan, the CPA also clearly emphasizes that 'the unity of Sudan . . . is and shall be the priority of the Parties and that it is possible to redress the grievances of the people of South Sudan and to meet their aspirations within such a framework.'[118] While this is clearly related to the right to self-determination, it is difficult to suggest that this is a normative statement that may curtail that right and the prescription for a referendum in the CPA. It could only do so in the most extreme of circumstances of bad faith by the GoSS. The CPA may also be best seen as offering to the South a form of greater internal self-determination, and should this not resolve the differences after the interim period, the CPA provides a right of external self-determination. This process for achieving peace reflects a legal continuum or movement in the CPA from the constitutional and national to the international. The legal consequences of recognizing in the CPA a 'right to self-determination' and referendum must have been very clear to both parties and others involved.[119] 'Self-determination' is a term with a specific meaning and consequence in international law, as recognized

[115] CPA (n 7) Abyei Protocol, art 1.3, art 8.2.
[116] See (n 28).
[117] Abyei protocol, art 1.1.3.
[118] ibid Chapeau, art 1.1.
[119] In fact, Ali Ahmed Karti, the Minister for Foreign Affairs of Sudan, recently commented that allowing the South its right to self-determination; as outlined in the CPA, was 'among the more daring decisions taken in Africa.' This indicates that the government of Sudan recognized that the inclusion of the right to self-determination in the CPA had serious legal implications and was not merely a statement of intention. See 'Full, Timely Implementation of Sudan's Comprehensive Peace Agreement Essential to National, Regional Stability, Security Council Presidential Statement Says', Security Council 6425th Meeting (16 November 2010), available at: http://www.un.org/News/Press/docs/2010/sc10086.doc.htm.

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expressly and implicitly in the ICJ's *Timor Leste*, *Western Sahara* and *Namibia* cases.[120]

The recognition of the right of self-determination is a key factor that distinguishes the CPA from many other peace agreements. It changes the inherent nature of agreement and its legal consequences. In the *South West Africa* advisory opinion, the ICJ found that the League Mandate for Namibia (effectively a General Assembly resolution) was a 'treaty' under international law.[121] The reasoning for the Court's conclusion was not well fleshed out, but arguably was a purposive interpretation of international law to ensure that South Africa was required to fulfil its obligations under the mandate. This key aspect of the ICJ's decision has not been subject to any significant challenge.

Given the recognized *erga omnes* character of the right of self-determination under customary international law in the decolonization context,[122] (the application of which is discussed further below) providing for this right in the CPA might be seen to create an obligation that is owed to third States. The Articles on State Responsibility confirm the right of States to assert standing for claims in respect of *erga omnes* obligations as they are 'owed to the international community as a whole.'[123] As mentioned above, the VCLT also recognizes that a treaty may create a beneficial right for third States through a presumed acquiescence to that right. If the right is of an *erga omnes* character, it is not clear whether this will satisfy the requirement of a 'right' for a third State under the VCLT.[124] There are particular members of the international community that naturally may wish to seek to assert standing to enforce this right, such as neighbouring States and members of the IGAD. This should be consistent with the CPA's nature given the interest, standing and implementation roles that have been given to such third party States.

[120] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion*) [1971] ICJ Rep 16, para 52; *Western Sahara (Advisory Opinion*) [1975] ICJ Rep 12, para 54–59; *East Timor (Portugal v Australia*) (1995) ICJ Rep 90, paras 31, 27.

[121] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections* [1962] ICJ Rep 319, 330 ('[The Mandate] is an instrument having the character of a treaty or convention . . .').

[122] International Law Commission, Articles on State Responsibility (n 63), commentary to art 40, para 5; *East Timor* case (n 120) para 29 ('In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable').

[123] International Law Commission, Articles on State Responsibility (n 63) art 48(1)(b).

[124] It has been suggested that certain types of treaties, for example international canal treaties, should be seen not as contracts having effect for third parties, but rather as instruments intended to establish legal effects valid *erga omnes*. Lord McNair distinguishes the 'predominantly contractual type of treaty whose main object is to create obligations (both rights and duties) *in personam*', as distinguished from 'dispositive' or 'constitutive or semi-legislative treaties. See Lord McNair, *The Law on Treaties* (reissued 1986) 255–256. The ILC considered this broader approach and rejected it, stating in 1966 that article 36 'goes as far as is possible at present'. See Yearbook of the International Law Commission (1966) Vol II, 231.

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H. Hybrid obligations of the CPA

One challenge to finding that the CPA is a binding international agreement is the hybrid nature of the obligations it contains.[125] As discussed above in the context of the constitutional and international, while the CPA contains numerous obligations of an international nature, there are also many obligations of a national character. As Bell points out, such hybrid obligations in peace agreements 'address both the external position of the State on the international realm, and the internal constitutional structure of the State'.[126] The latter can include obligations relating to power sharing arrangements, national elections, amendments to the constitution, and so on. However, the hybrid nature of the CPA's obligations do not disqualify it from being a binding international agreement. The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement), for example, contained a mixture of international and national-level obligations.[127] Despite this it was considered a valid treaty as between the three States of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (now Serbia and Montenegro).[128]

The Dayton Agreement is unique and was born out of very particular circumstances, but it serves to demonstrate that international law can be flexible when required. The Dayton Agreement provided for an international ceasefire, peacekeeping and international boundaries, as well as for elections and a constitution for the new State of Bosnia and Herzegovina.[129] While accepted as being internationally legally binding, the Dayton Agreement at the time of its conclusion was entered into by sub-state federal entities that became States substantially on the basis of the agreement itself.[130] As mentioned above, the 1974 Mozambique peace agreement between Portugal and the Front for the Liberation of Mozambique is another example of an agreement that has been considered to be binding under international law.

The Dayton Agreement shares some key characteristics with the CPA that are not common to most peace agreements. While many peace agreements mix the constitutional and international aspects in unequal or limited portions, the Dayton Agreement and CPA both contain highly significant constitutional and international elements, in terms of both constitutional changes *and* undertakings of an international law character.[131] This can be explained in part by the fact that both agreements involved serious internal armed conflict within a State but contained commitments that also either led or had the potential to lead to new States under international law.

[125] See Bell (n 32) 391, for discussion of the 'hybrid' nature of peace agreements.
[126] Bell (n 5) 149.
[127] Dayton Agreement, 21 November 1995, see UN Doc S/1995/999.
[128] Aust (n 79) 101; P Gaeta, 'The Dayton Agreements and International Law' (1996) 7 EJIL 147.
[129] See (n 127) eg see Annex 3 (Elections) and Annex 4 (Constitution).
[130] This view is also taken by Bell (n 5) 14; Bell (n 32) 380.
[131] Bell also refers to the peace agreements related to New Caledonia and Bougainville (Papua New Guinea) as providing for a postponed right of self-determination. See Bell (n 5) 213.

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The VCLT provides no guidance on the issues raised by such hybrid agreements. The crude but effectual answer is that when asserted as an international agreement, not all the provisions will necessarily have the character of obligations under international law. This is a logical extension of general principles of treaty interpretation. The ICJ has recognized that some terms of a treaty may not by their nature be binding under international law, for example, if they are too general.[132] The Abyei arbitration panel also recognized this challenge for the CPA, and stated it was 'sensitive' to the extent which the relevant principles and practice of international law 'must be adapted to the specific context of this dispute'.[133] Further, the fact that different mixes of obligations are contained in the CPA's sub-agreements may assist in applying international or national law. For example, the Machakos Protocol deals with the international issue of self-determination, while the Power Sharing Protocol deals with national issues such as constitutional, political and electoral matters.

This general approach to the CPA is also consistent with the 'legalization' thesis in relation to peace agreements. The concept of legalization is promoted by some as more useful to understanding an agreement's legal status than deciding if it hard law or soft law.[134] This approach provides an alternative theory to the traditional positivist model, whereby an agreement's legal status can be analyzed by a broader concept of legalization.[135] The theory analyzes: (i) how 'legal' the nature of the obligation is, rather than the entire instrument; (ii) the precision with which it is drafted; and (iii) the delegation to a third party of the power to interpret and enforce the agreement.[136] The degree to which a peace agreement can be considered 'legal' is therefore the result of a consideration of all three factors. Bell has developed this overall approach further, and proposed an 'embryonic *lex pacificatoria*' that she states deserves consideration as a new form of law concerning peace agreements.[137]

I. Termination

Accepting that the CPA is a binding international agreement will also help to address the significant issues concerning its termination. These will become more relevant upon declaration of independence by the South, particularly since the Abyei issue is likely to remain outstanding. The CPA is very light on detail regarding its termination and expiry, and does not contain all that which

[132] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America* (Preliminary Objection) [1996] ICJ Rep, 803 at 820. (The Court stated concerning the treaty in question: 'Its Article 1 has, as already observed, been drafted in terms so general that by itself it is not capable of generating legal rights and obligations.')

[133] See (n 3) para 435.

[134] Bell (n 5) 137–138.

[135] For more detailed discussion, see Bell (n 32) 385–386, referring to the work of KW Abbott, RO Keohane, A Moravcsik, A-M Slaughter and D Snidal in 'The Concept of Legalization' (2000) 54 Int'l Org 401.

[136] ibid.

[137] Bell (n 32) 407–409.

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is necessary to deal with unresolved issues. In this regard, the VCLT general rules provide an essential structure for the full implementation and eventual termination of the CPA. The VCLT provides that parties may terminate an agreement in accordance with its provisions or by mutual consent.[138] Where there are no express provisions on termination, denunciation or withdrawal, these actions will not be permitted unless evident from the parties' intent or implied from the agreement.[139]

The application of the VCLT general rules could provide greater clarity to the situation after the South's independence. The CPA contains no provisions on termination, denunciation or withdrawal. At the end of the interim time period on 9 July 2011, if all the CPA's obligations have been implemented it would be possible for the CPA to terminate and expire. However should any of the obligations be outstanding, for example, the exercise of the rights of the people of Abyei, the CPA could only lawfully terminate on the agreement of both parties. Otherwise, the one party may insist on the fulfilment of the outstanding obligations. To terminate the CPA will not provide a solution as it would leave unresolved the issue of Abyei, or at least resolve it in favour of whomever is in factual control. The reality also is that the CPA will continue to be relevant after the South's independence, but at some point it will have to be terminated and perhaps other arrangements concluded between the North and South.

IV. CUSTOMARY INTERNATIONAL LAW

An inquiry separate to whether the CPA is a binding international agreement is the question of obligations under customary international law. As Aust notes '[e]ven if an instrument is not itself binding in international law, that does not make it impossible for legal rights and obligations to be derived from it.'[140] For the CPA, this is because if not binding it still may be evidence of significant State practice and *opinio juris*. The CPA may be declaratory in nature and give rise to independent obligations under customary international law.

In this regard, it is important to understand that the Southern Sudanese people's right of self-determination discussed above should not be seen as depending only on the CPA's status as an internationally binding agreement. The assertion of the right of self-determination is often controversial and highly contested. However, the status of the right under customary international law is not the most challenging issue, rather the difficulties lie in determining situations where and peoples to whom the right clearly applies. As one commentator has said, the right can be 'a shibboleth that all pronounce

[138] See (n 37) art 54.

[139] ibid art 56(1)(a).

[140] A Aust, 'Theory and Practice of Informal International Instruments' (1986) 35 ICLQ 787, 807.

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to identify themselves with the virtuous'.[141] In this regard, for the CPA some distinction should be kept in mind between establishing a legal right and the legal character and consequences of that right.

The CPA recognizes clearly and explicitly that the South Sudanese people have the external right of self-determination, including the right to exercise their free will to become an independent State. As suggested above, the Agreement provides more than once that: '[T]he people of South Sudan have the right to self-determination, inter alia, through a referendum to determine their future status.'[142] The CPA also sets out detailed mechanisms for implementing the right, including timing of a referendum and monitoring procedures.[143] In this manner it merely evidences the existence of the legal right (a material source) rather than the source of the right itself (a formal source). In short, the CPA may crystallize the right of the South Sudanese under customary international law. The reasons for this conclusion are set out in more detail below.

A. Self-determination under Customary International Law

The right reflected in the CPA corresponds to the right of self-determination that exists under customary international law. This is the right that derived from the broader decolonization process and which is often referred to as the external right of self-determination.[144] This right has been recognized expressly and implicitly in number of ICJ decisions, in the *Namibia*, *Western Sahara*, and *East Timor* cases.[145] The ICJ's recognition of the right arises from the provisions of the UN Charter, the General Assembly's declarations concerning decolonization and its implementation, and the ICCPR and ICECSR.[146] Such a summary description should not, however, be taken to suggest that self-determination is a clear concept in international law. As Crawford notes:

> A legal principle of self-determination is an analogy. In practice since 1945 there has been a considerable elaboration of the legal consequences of the principle of self-determination for particular territories; but the question of the ambit of self-determination, the territories to which it applies, has arguably remained as much a matter of politics as law. Much of the emphasis in practice has been on the

[141] V van Dyke, 'Self-determination and Minority Rights' (1969) 13 Int'l Studies Q 223.
[142] CPA (n 7) Machakos Protocol, para 1.3 at 2, para 1.3 8.
[143] ibid 8.
[144] M Weller, *Escaping the Self-Determination Trap* (Brill, NL, 2008) 34.
[145] See (n 122).
[146] See the UN Charter, art 1(1) and art 76(b); Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res 1514 (XV) (14 December 1960); International Covenant on Economic, Social and Cultural Rights (1966), art 1(3); International Covenant on Civil and Political Rights (1966), art. 1(3); the Friendly Relations Declaration (1970), UNGA Resolution 2625 (XXV) 24 October 1970, Principle 5.

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> application of the principle to territories to which it has come to apply either by a form of recognition or by agreement pursuant to treaty arrangements.[147]

The rulings of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), which in substance applied the right of self-determination to the federal units of the former State of Yugoslavia, are a good example of the contextual application of the principle.[148] There is little by way of general precedent that can or necessarily should be drawn from this example. The legitimacy of applying self-determination to this federal context derived from a general acceptance both in law and fact of its application. The violent dissolution of the State of Yugoslavia and ongoing conflict was the background context that provided a foundation for such legitimacy.

The right of self-determination as reflected in the CPA conforms in the necessary respects with the general view under customary international law. The key limitations on the right under customary international law have been territorial unity of States and the principle of *uti possedetis*.[149] As one commentator has said, 'the 'free will' of populations can only exist within boundaries that have been colonially defined'[150] The principle of *uti possodetis* thus has been described by the ICJ as follows:

> The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen as not a mere practice contributing to the gradual emergence of the a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope. . . . The essence of the principles lies in its primary aim of securing respect for the territorial boundaries that moment when independence is achieved.[151]

This approach to the right has been accepted and defended by African States and others.[152] Yet despite the clarity of the ICJ's pronouncement, it is somewhat of a *post hoc* assumption that *all* decolonization in Africa preceded along the lines of clear-cut territorial units, of which subcomponent territories no matter how distinct were not able to become States in their own right. French Equatorial Africa, for example, contained four sub-territories that have given rise to four States—Gabon, Middle Congo (now the Republic of the Congo),

[147] Crawford (n 60) 115.

[148] Opinion No 2, Arbitration Commission, EC Conference on Yugoslavia (11 January 1992) 92 ILR 167.

[149] *Frontier Dispute Case* (*Burkina Faso v Republic of Mali*) [1986] ICJ Rep 554, paras 20–25; The Friendly Relations Declaration, ibid, the declaration provides that: 'Nothing in the foregoing paragraphs shall be construed as authorizing . . . any action which would dismember or impair, totally or in part, *the territorial integrity or political unity* of sovereign and independent States' (emphasis added); see generally H Ghebrewebet, *Identifying Units of Statehood and Determining International Boundaries: A Revised Look at the Doctrine of 'Uti Possidetis' and the Principle of Self-Determination* (Peter Lang, Oxford, 2006).

[150] Weller (n 144) 37.

[151] *Frontier Dispute Case* (n 149) paras 21, 23.

[152] Weller (n 144) 38.

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Oubangui-Chari (now the Central African Republic) and Chad.[153] The Governor-General of French Equatorial Africa was based in Brazzaville, at the time in Middle Congo, and had deputies in each of the territories.[154]

The right of Southern Sudan is not inconsistent with the right of self-determination in the decolonization context and the principle of *uti possedits*. This is evidenced by the colonial history of the North and South prior to independence. While perhaps not commonly known it is not the case that present-day Sudan was an unequivocally unified and distinct colonial territory prior to its independence. The United Kingdom with the assistance of Egypt took forcible control of the Sudan in 1898.[155] Subsequent to that, as Hurst Hannum states:

> The north and south were essentially administrated as two separate entities for over four decades under British rule. British troops had to contend with southern uprisings in the late 1920s, and the British administration prohibited most contacts between the north and south. From 1922, Southerners could not travel to the north without a special permit, and vice versa. Islam and the use of Arabic were banned in the south, while the activities of Christian missionaries were encouraged. The British considered options of granting independence separately to the south to either Kenya or Uganda. However, Egyptian and northern Sudanese pressure succeeded in keeping the two regions together as a united country. A conference was arranged in 1947 at Juba to approve the decision to unify the Sudan, under the assumption that unity was the only desirable solution.[156]

The construction of a united Sudan with a single national legislature was a development of the transition process to independence.[157] Not only was Southern Sudan a distinct territorial unit, but prior to independence there was already fighting and resistance in the South against the imposed influence of the North.[158]

It could be argued that the situation of Southern Sudan shares similarities with that of Kosovo. In the academic literature the emergence of Kosovo has been linked to the idea of 'remedial' self-determination.[159] This concept is obviously relevant to situations where a central government persistently and systematically represses a territorially and constitutionally recognized segment of its population. Under such an approach, it is the persistent and discriminatory exclusion from governance and participation in society that give rise to a right of remedial self-determination.[160] This is supported by

[153] F Ansprenger, *The Dissolution of the Colonial Empires* (Routledge, London, 1989) 103.
[154] ibid.
[155] H Hannum, *Autonomy, Sovereignty, and Self-Determination* (1990) 309. Hannum draws this historical analysis at 308–327 from inter alia RA Gray, History of the Southern Sudan 1839–1889 (1961) and PM Holt and MW Daly, *The History of the Sudan* (Longman, London, 1979).
[156] ibid 309–310.
[157] R Collins, *A History of Modern Sudan* (CUP, Cambridge, 2008) 56–61.
[158] See discussion of the conflict in Collins ibid 65–67.
[159] For example, see Weller (n 144) 59–69.
[160] ibid.

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Crawford who states it is at least arguable that, in extreme cases of oppression, international law allows remedial succession to discrete people with a State.[161] As he terms it, the 'safeguard clauses' in the Friendly Relations Declaration and the 1993 Vienna Declaration and Programme of Action on Human Rights recognize this, even if indirectly.[162]

A number of the judges in the ICJ's *Kosovo* advisory opinion acknowledged that this remedial claim underpinned the Kosovo declaration of independence.[163] Judges Cançado Trindade and Yusuf in separate opinions acknowledged that there could be such exceptional cases which may legitimize a claim to external self-determination.[164] Both judges set out relevant criteria, for example, Judge Yusuf referred the 'existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government.'[165] Judge Yusuf also referred to decisions by the Security Council to intervene as an additional criterion.[166] While the extent and nature of the academic commentary on Kosovo remains yet to be seen, it is safe to assume that aspects of that commentary will paint Kosovo as a case of remedial self-determination, as foreshadowed by Weller, and indicated in the separate ICJ opinions of Judges Cançado Trindade and Yousef.

In terms of implementation, the detailed processes prescribed by the CPA fulfil that which is required under customary international law. As the ICJ put it in the *Western Sahara* case, the exercise of the right 'requires a free and genuine expression of the will of the peoples concerned'.[167] This is the essence of the referendum agreed in the CPA. It also raises the question of whether recognizing the right to a referendum for the Abyei people gives rise to a right of self-determination under international law. Generally it is more challenging to see a customary international law analysis fitting the Abyei region and people. The CPA does not provide a right of external self-determination to Abyei, at least as it is commonly understood in customary international law.

[161] See Crawford's discussion (n 60) 118–119. See also the Canadian Supreme Court, *Quebec Succession* case (1998) 115 ILR 585, at paras 132–135.

[162] ibid.

[163] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion)* (2010), the Court did not take a position on the relevance of this claim, see para 83. By contrast, see separate opinion of Judge Trindage Cancado, para 175, declaration of Judge Simma, para 6, separate opinion of Judge Yusuf, para 16, separate opinion of Judge Sepulvada Amor, para. 35, available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4.(Judge Trindade Cancado states: 'It is immaterial whether, in the framework of these new experiments, self-determination is given the qualification of 'remedial', or another qualification. The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.')

[164] ibid.

[165] ibid. Judge Yusuf also states that '[a]ll possible remedies for the realization of internal self-determination must be exhausted before the issue is removed from the domestic jurisdiction of the State . . .'

[166] ibid.

[167] See (n 120) 32.

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However, the commitments made under the CPA in respect of Abyei could be also seen in the context of the international human rights conventional law. The *internal* right of self-determination, set out in articles 2 of the ICCPR and ICESCR, would seem to be relevant. By both sides to the CPA granting this right to the Abyei people and constitutionalizing it, to renege could be seen as a violation of international human rights law as between the State (North or South) and the Abyei people. This is consistent with Jan Klabbers' alternative approach that self-determination be seen 'as a procedural right; that is, entities have a right to see their position taken into account whenever their futures are being decided.'[168] As Klabbers notes, this is a 'more open-textured principle'[169] and one that may not amount to a right to autonomy or to secede.

It could also be argued the CPA's commitment to the people of Abyei has a basis in remedial self-determination. The Dinka Ngok people of Abyei have also suffered at the hands of the North, and recently the Sudanese Armed Forces and Arab Misseriya militia. These two latter groups' actions towards Dinka Ngok civilians in May 2008 were reported to be responsible for destruction of much of the town of Abyei, displacement of 60,000 civilians, and death or disappearance of more than 100 civilians.[170] In the context of the modest size and population of Abyei this was very significant.

Both parties to the CPA chose to provide the people of Abyei with a democratic choice in the form of a referendum, and to make a legal commitment whether this was constitutional or international. There may be an international responsibility that attaches to the failure to fulfil that commitment, based in either international human rights law and internal self-determination, the violation of the CPA, or a broader and contextual view of the right of self-determination.

B. *Erga Omnes and Jus Cogens*

The status of the South's right of self-determination under customary international law, and the right's corresponding potential *erga omnes* and *jus cogens* character, are also significant.[171] This provides a legal foundation that goes beyond the CPA, and embeds the commitment deeper into the international legal order. It also suggests that it would have been lawful for the GoSS to assert independence any time from which the referendum results had been confirmed and verified. The CPA is not clear on the point of timing of

[168] J Klabbers, 'The Right to be Taken Seriously: Self-determination in International Law' (2006) 28 Human Rights Quarterly 1, 189.

[169] ibid 198–199.

[170] See Human Rights Watch, 'Abandoning Abyei: Destruction and Displacement' (July 2008); OCHA situation report No 20 for reporting period 28 June to 4 July 2008, 'South Sudan—Abyei Displacement' (2008).

[171] See ILC Articles on State Responsibility (n 63) *East Timor* case (n 120); *Case concerning the Barcelona Traction, Light and Power Co Ltd (New Application: 1962) (Belgium v Spain) (Second Phase)* (1970) ICJ Rep 3, paras 33–34.

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independence after the referendum, but the Sudanese Constitution seems to impose a six month period before the formal declaration of independence. It appears that the GoSS has been restrained and politically prudent in waiting to declare formal independence. However, given the status of the right involved, it is difficult to see that a GoSS declaration of independence immediately after the referendum results were confirmed could have been anything other than lawful. At the international level, the Sudanese Constitution could not have served to override the recognition of independence under international law.[172]

The legal character of the South Sudanese people's right to self-determination is also relevant to the consequences of legal obligations. As the right to self-determination in the decolonization context may be seen as a norm *jus cogens* there is a duty on other States, in accordance with the Articles on State Responsibility, not to recognize a 'serious breach' and to cooperate to bring any breach to an end.[173] A serious breach is one that 'involves a gross or systematic failure by the responsible State to fulfil the obligation'.[174] If, for example, the people of Southern Sudan had been denied the right of self-determination under customary international law, and a 'gross failure' to fulfil the obligation was attributed to the Government of the Sudan, this may mean that States that entered into contracts (or permitted their companies to do so) in relation to oil from the South could be violating their obligations under international law. This has parallels with the legal issues raised in exploitation of resources of Western Sahara.[175]

In summary, the CPA makes it very difficult for the Sudanese Government not to recognize the right of self-determination of the people of South Sudanese under customary international law. The CPA provided a clear foundation that the right was considered to exist for the people of South Sudan, and set the parameters for its exercise consistent with international law.

V. CONCLUSIONS

As is clear from much of the foregoing discussion, the CPA was an agreement that was intended to be implemented. Its obligations are set out in significant detail, and determine what tasks need to be accomplished and the timeframe, the parties responsible for accomplishing them, and the methods for ensuring their implementation. A key question is therefore whether the CPA was meant to be binding and enforceable under international law. As described above,

[172] International Law Commission, Articles on State Responsibility (n 63) art 3 (which makes clear that a State's internal law cannot override its international law obligations).

[173] ibid art 40 and art 41.

[174] ibid art 40(2).

[175] This perspective is somewhat consistent with the UN Legal Counsel Hans Corell's legal advice on exploitation of resources of Western Sahara. See Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, 12 February 2002, S/2002/161, paras 24–25.

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there are international agreements that create a strong expectation of compliance under international law. Despite lacking the formal status of a treaty or recognition by an international tribunal as being legally binding, this does not mean that the commitments in such an agreement 'need not be observed or that the parties are free to act as if there were no such agreement.'[176]

Not all peace agreements can be considered binding, nor should all such agreements necessarily be intended to be internationally enforceable. However, it would be dangerous to exclude all peace agreements between States and other entities from falling into the category of binding international agreements as positively understood. '[T]here are cases in which the nature and object of the agreement must be governed by international law', said Louis Henkin, even if the agreement is not expressly formulated as a treaty or obviously designed to be legally binding under a traditional treaty analysis.[177] The shortcoming in the CPA's international legal form, particularly the status of the SPLM/A, is compensated by the Agreement's particular obligations and how they are crafted. Further, the arguments above illustrate that the agreement between a potential 'State in waiting' and a State must have a different status. This is especially so when considering the international nature and participation of the CPA, the right to self-determination, and that obligations that may accrue to the GoSS from past conduct once independence is formally declared.

A strict legal formalist or positivist may consider that identifying the CPA's legal status as binding under international law is a bridge too far. This view however is flawed for several reasons. It lacks a deeper appreciation of the relevant international law in particular the 'open textured' nature of international law relating to both peace agreements and self-determination. As this paper demonstrates, a strong basis in positivist law can be made out that the CPA is legally binding. International law must strive to be as coherent or complete system as is possible using the rules and principles available. The legitimacy and effectiveness of an agreement such as the CPA depends in large part on its legal status.

It is necessary also to give credence to the widespread expectation and intention that the CPA is to be fulfilled. To do otherwise would lead to an unjust situation, for example, as the North could benefit from the CPA but would not necessarily have to deliver on its commitments.[178] In relation to South Africa's rejection of its UN mandate obligations for Namibia, for example, the ICJ stated '[o]ne of the fundamental principles governing the

[176] Schachter (n 95) 298.

[177] L Henkin, R Crawford Pugh, O Schachter, H Smit, *International Law: Cases and Materials* (Sweet & Maxwell, London, 1980) 154 ('some agreements not intended to be binding by the parties need to be construed as such because of their particular 'international' nature').

[178] CPA (n 7), Wealth Sharing Protocol, art 5.6. (Under the CPA, the Sudanese Government receives 50 per cent of the oil revenues derived from South Sudan, the other 50 per cent is provided to the GoSS.)

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relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.'[179] The Sudanese civil war was brought to a close due to the commitments made by both parties in the CPA including to self-determination and the referenda. The parties must be bound by these commitments and unable to now denounce them unilaterally.

The strict legal formalist or positivist view further underestimates the contextual nature of international law, and overestimates the concreteness of international law outside the context of peace agreements and self-determination. Bell for example states that peace agreements do not fit the normal categories of law, and '[i]n making them fit we make choices about the nature of law and politics and the relationship between the two'.[180] While this is true, that applies to some extent to all of international law, and is not unique to the issue of peace agreements. As Higgins and Schachter, among others, have suggested, the application and interpretation of international law involves the promotion of common goals and international values.[181] While courts, tribunals and arbitral panels do not tend openly to refer to such goals and values, it is obvious that they play a role in their decisions.[182] In a region as volatile as the Sudan, with a history of war and conflict, the implementation of the CPA is the best hope of avoiding further serious conflict. To find international legal obligations in the CPA is the credible interpretation, and it is also clearly the interpretation most appropriate to the goals of international law and society. As is the case generally for international law, the lack of obvious international mechanisms of enforcement of the CPA in no way defeats the legal character of its undertakings.

If an international legal proceeding was brought with the central issue of the CPA's legal status, it would be unfortunate for a tribunal to rule it is simply a national agreement or an agreement not intended to give rise to any international obligations. To determine that this is a national instrument, enforceable under national Sudanese law only, at this juncture would make it largely a dead letter. While the panel in the Abyei arbitration held that the CPA was not a treaty, its legal status was not a significant issue in the panel's decision. Both parties had submitted themselves voluntarily to the arbitral jurisdiction, and

[179] *South West Africa* case (n 120) 16.

[180] Bell (n 5) 22.

[181] Higgins (n 49) 1–2 ('The role of law is to provide an operational system for securing values that we all desire—security, freedom, the provision of sufficient material goods'); O Schachter, 'The Place of Policy in International Law' (1972) 2 Ga J Int'l & Comp L 5, 8 ([I]t is evident that the body of [legal] norms involves more than rules . . . they embody policies and social values . . . [t]heir function in the legal process is to express the ends to be attained').

[182] Higgins ibid 3–5 (Higgins states that: 'Reference to 'the correct legal view' or 'rules' can never avoid the element of choice (though it may seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law.'); Koskenniemi states that: 'as every national judge knows . . . [t]here is always choice and policy involved in law application, the relevant norms being open-textured and open to exceptions.' See M Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 Mich J Int'l L 455, 474.

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both parties submitted that international law was relevant to interpretation. As such, the panel did not need to grapple with this challenging issue of legal status, and it is natural that it was not explored in any depth.

Further, a peace agreement that promises a right of self-determination, which fits the scope of the right under customary international law, will by its nature lead to binding obligations. The binding nature is emphasized by the fact that the right concerned in this case may even be seen as both a norm *jus cogens* and *erga omnes*, and gives rise to interests with a legal basis for other States. The very reason for the evolution of *erga omnes*, which was influenced by the Namibia cases, was to remedy the problem that the beneficiary of a right of self-determination may not have an obvious means to enforce a right which has been clearly recognized. As is now seen in the law of State responsibility, the concept of *jus cogens* requires that States may not recognize serious violations of such a norm, and have an obligation to assist in bringing about an end to that violation. In this regard, the issue of finding binding obligations in the CPA is a much broader one about the effectiveness of international law.

The CPA was meant to be binding and implemented by the two parties. It is in fact crucial to the peace of the region that the CPA not be unravelled, as it would lead to further bloody war, conflict and suffering. The intertwined relationship between the North and South will not end in July 2011 and principles to govern that relationship will still be required. While the factual circumstances and agreement are unusual, international law must be able to find a solution to this situation. There are strong grounds in positivist international law to suggest that the CPA gives rise to binding obligations for both parties. To deny the international legal character of the CPA, would be to deny the efficacy of this agreement and the solution that it represents.

International law has always provided an implicit guarantee underwriting the CPA. As the parties and the external actors have progressed through the CPA's processes, from the constitutional and national to the international, it is natural the role of international law has become more important and pronounced. If the agreement cannot be effected under national law, then international law must be available for that purpose. Elements of the CPA, such as the right to self-determination, are constructs of international law and go beyond the scope of national law. Ambiguity about the binding status of the commitments in the CPA will undo the intent of the agreement, and future agreements in other such contexts, thereby depriving international law of the positive role it should play. The willingness of the North to go along with the pending independence of the South is an implicit recognition that it is legally bound. While it is true this accords to the political reality, including other States' positions, the CPA's commitments have played a major role in shaping that reality.

It may be that politics prevails in attempting to resolve the outstanding Abyei issue, but the law already provides for a solution. The United Nations,

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its Member States, and in particular the Security Council, should respect and enforce the undertakings of the CPA. In the absence of a legal solution, the primary criteria may end up being factual control, as for example in Kashmir and Western Sahara. Were such *realpolitik* to prevail, it may well lead to further tension, armed conflict, suffering and violations of human rights. As Judge Ammoun in his concurring opinion in the ICJ *Namibia* case said, the right to self-determination had been written 'with the blood of peoples'.[183] This is certainly the case for the Sudan and a reality is difficult to ignore.

Finally, this article has sought to demonstrate that it is difficult to draw immutable general rules *in abstracto* from the international law relating to peace agreements and self-determination. As Crawford states '[f]rom the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law.'[184] While this must be recognized and taken into consideration, we have to still apply the positivist tools that we have available to reach some kind of solution. The principles of law must be applied as best they can to a particular situation. In terms of self-determination, the situation of the Sudan, and perhaps others like Kosovo, are best not described as *sui generis* in international law. This connotes the idea of the exception to the rule, which does not fit well with the contemporary contexts of either peace agreements or self-determination. However this does not mean that international law is any less important to resolving these issues. Rather it means that international lawyers should avoid the temptation to overly prescribe the rules of international law that apply to peace agreements and self-determination. We should instead strive to create a dynamic but coherent international legal order, and to harness the power of international law to play a positive role in the relations of States and protection of human rights. In the case of the Sudanese conflict, this role is now focussed on the birth and nurture of a new State and the objective of greater respect for the human rights of the people of all parts of the Sudan.

[183] Nambia Advisory Opinion (n 120) 69.

[184] Crawford (n 60) 110.

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