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## Between Secession and Federalism: The Independence of South Sudan and the Need for a Reconsidered Nigeria

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## **Between Secession and Federalism: The Independence of South Sudan and the Need for a Reconsidered Nigeria**

*Obehi S. Okojie\**

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## I. INTRODUCTION

In 2010 when the late Colonel Muammar Gaddafi, then leader of Libya, called for the disintegration of Nigeria along religious—Christian/Muslim—lines, he no doubt, touched the nerves of Nigerian political leaders.<sup>1</sup> Nigerian political leaders responded furiously. The Nigerian Senate President, David Mark, was reported to have said Colonel Gaddafi was a “mad man” and Nigeria withdrew its envoy to Libya the very next day.<sup>2</sup> Although Colonel Gaddafi’s reputation may not have helped matters, it is, perhaps, true that the reaction of the Nigerian government reflects the seriousness states attach to the issue of secession. Understandably, it is an issue that concerns state sovereignty and territorial integrity just as it is one that concerns the fundamental principles upon which any state is founded. Yet, the late Colonel was not making his suggestion in a vacuum. He was joining in a series of calls for solutions to the peace and stability issues that confront Nigeria as a state and its people as a nation.

Nigeria is experiencing various challenges to its continued existence as a single nation-state. The persistent religious and ethnic tensions which often culminate in inter-group violence have assumed a worrisome dimension since the return to democratic rule in the country in 1999.<sup>3</sup> As recent developments show,

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1. *Gaddafi Says Nigeria Should Split into Several States*, BBC NEWS (Mar. 29, 2010, 3:08 PM), <http://news.bbc.co.uk/2/hi/africa/8593355.stm>.

2. *Id.*

3. “Inter-group” is understood to mean ethnic and/or religious groups since both types of groups exist in Nigeria. The appropriateness of using the term “inter-group” to describe the nature of conflicts in Nigeria stems from the fact that conflicts in Nigeria sometimes arise between ethnic groups and at some other times between religious groups some of which may be of the same ethnicity. *See generally* Hanne Fjelde & Gudrun Ostby, *Economic Inequality and Inter-Group Conflicts in Sub-Saharan Africa, 1990-2008*, CIS Workshops, CENT. FOR

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this volatile socio-polity has become not only inimical to the prospect of a national community, but has proved to be a potent danger to the country's political unity. Specifically, there has been a rise in armed militias and inter-group violence has caused more than 16,000 deaths since 1999.<sup>4</sup> The emergence of the Islamic militant sect, Boko Haram, and its fatal rampages presents a recent form of violent group attacks in Nigeria. The estimated 164 attacks by Boko Haram since 2009 have resulted in about 935 deaths.<sup>5</sup> That 425 of these deaths were recorded in the year 2011 alone attests to the deteriorating nature of the Boko Haram terror.<sup>6</sup> Boko Haram, which means "western education is a sin" in Hausa language, widely spoken in Northern Nigeria, seeks a replacement of Western systems with those prescribed by Islam.<sup>7</sup> This state of affairs was, perhaps, reaching its climax in Nigeria when on July 9, 2011 South Sudan declared its independence from Sudan.<sup>8</sup>

Given the socio-political similarities between Nigeria and Sudan, the event of South Sudan's independence gave increased impetus to agitations for a reconsideration of the Nigerian union. The clamor for a "Sovereign National Conference," where the peoples of Nigeria would decide the political future of the state, has increased since then giving rise to yet another era of inter-group suspicion and general political unease.<sup>9</sup> The fact that group accommodation continues to elude Nigeria fifty-two years after its independence, and the truth that stability is crucial to the much desired economic development in the country, makes this research timely.

Generally, African states, especially those of the sub-Sahara, share common socio-polities born out of their analogous historical experiences. Still, writers agree that Nigeria and Sudan were peculiarly similar. As was with Sudan, Nigeria is often described along the religious line as a country with a Muslim North and a Christian South.<sup>10</sup> The reality, however, is that conflict issues in

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COMP. & INT'L STUD. (Nov. 10-12, 2011), [http://www.cis.ethz.ch/workshops/Workshop5/Paper\\_FjeldeOstby](http://www.cis.ethz.ch/workshops/Workshop5/Paper_FjeldeOstby) (providing study of economic inequality and violence across large number of countries).

4. See Human Rights Watch, *Country Summary: Nigeria*, HUM. RTS. WATCH, 2 (Jan. 2012), [http://www.hrw.org/sites/default/files/related\\_material/nigeria\\_2012.pdf](http://www.hrw.org/sites/default/files/related_material/nigeria_2012.pdf).

5. "The group (Boko Haram) has claimed responsibility for bombing churches, police stations, military facilities, banks, and beer parlors, in northern Nigeria, as well as the United Nations building and police headquarters in Abuja, the nation's capital." *Nigeria: Boko Haram Widens Terror Campaign*, HUM. RTS. WATCH (Jan. 24, 2012), <http://www.hrw.org/news/2012/01/23/nigeria-boko-haram-widens-terror-campaign>.

6. See Human Rights Watch, *Country Summary: Nigeria*, *supra* note 4, at 1.

7. *Nigeria: Boko Haram Widens Terror Campaign*, *supra* note 5.

8. Mary Beth Sheridan & Rebecca Hamilton, *South Sudan Secedes Amid Tensions*, WASH. POST (July 7, 2011), [http://articles.washingtonpost.com/2011-07-07/world/35236647\\_1\\_abyei-south-sudan-southern-kordofan](http://articles.washingtonpost.com/2011-07-07/world/35236647_1_abyei-south-sudan-southern-kordofan). It is important to clarify from the outset that Sudan as contemplated in this Article refers to pre-July 9, 2011 Sudan when its territory included that of South Sudan. This is to ease the analyses and comparison intended here.

9. See, e.g., Cornelius Omonokhua, *Nigeria: Senator Flays Calls for Sovereign National Conference*, DAILY TRUST (Nov. 4, 2012), <http://allafrica.com/stories/201211040174.html>.

10. INT'L CRISIS GRP., AFRICA REPORT N°113, NIGERIA: WANT IN THE MIDST OF PLENTY 1 (2006),

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Nigeria and the factors which incite them transcend this casual description. As this Article will show, similar experiences in both Sudan and Nigeria have compounded the cleavages in their diversity creating a proclivity for inter-group conflict.<sup>11</sup> However, this Article argues that a percipient look reveals some fundamental areas of divergence between the scenario that played out in Sudan and the Nigerian experience. These distinctions dictate different political futures for the two states. Specifically, while secession seemed always in the offing for post-colonial Sudan, Nigeria's political future had always tilted away from the path of secession.<sup>12</sup>

The independence of South Sudan comes from a series of events including a brutal civil war that lasted intermittently for about fifty years.<sup>13</sup> The crux of the war was a struggle for self-government by the peoples of Southern Sudan who until 2005 were denied a space for self-determination within the Sudanese state. The Comprehensive Peace Agreement ("CPA") signed by the government of Sudan and the Southern Peoples' Liberation Movement/Army ("SPLM/A") in 2005 under the mediation of some international actors provided for an immediate southern autonomy and a referendum to be conducted six years later where the peoples of South Sudan would exercise their right to self-determination by deciding their political future.<sup>14</sup> The declaration of an independent state of South Sudan was the result of the peoples' decision at that referendum to secede.<sup>15</sup> It is in comparison to this that this Article addresses secession in Nigeria.<sup>16</sup>

Consequently, the question that drives this Article is whether Nigeria should follow the secessionist path of Sudan. I am conscious that this question is political and an attempt to give it legal expression will raise the issue whether the secession of any indigenous group from the existing Nigerian state can be

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available at <http://www.crisisgroup.org/~media/files/africa/west-africa/nigeria/nigeria%20want%20in%20the%20midst%20of%20plenty.pdf>.

11. Conflict is understood to mean "a struggle in which the aim is to gain objectives and simultaneously to neutralize, injure, or eliminate rivals." DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 95 (2d ed. 2000).

12. See generally Nosa Osaigbovo, *The Road to Secession*, NIGERIAN TRIBUNE (Dec. 2, 2011), <http://www.tribune.com.ng/index.php/mosaic/32178-the-road-to-secession> (discussing the North's attempt to secede from Nigeria).

13. See Salman M. A. Salman, *South Sudan's Road to Independence: Broken Promises and Lost Opportunities*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 343 (2013).

14. U.S. INST. OF PEACE, SPECIAL REPORT 303: LEARNING FROM SUDAN'S 2011 REFERENDUM 2-3 (2012), available at <http://www.usip.org/files/resources/SR303.pdf>.

15. See *id.*

16. I am, however, not unmindful of the possible option of dissolution of the Nigerian Republic to give birth to geographically smaller republics as was the case with the former Yugoslavia or the former Mali Federation from where Senegal emerged. I am also not unmindful of the possibility of devolution in which case Nigeria may positively grant independence to any part of its current territory. The latter finds legitimacy in the doctrine of state sovereignty while in the case of the former there is no predecessor state whose assent may be relevant to legitimizing the independence of the new states especially where the dissolution is the result of the withdrawal of all or most of the territories that formed that state. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 330, 390-91 (2d ed. 2006).

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justified in international law. Whenever secession is considered, it calls to question the international law principle of self-determination. The principle is basically understood as the right of a group of people to be collectively self-governing.<sup>17</sup> The debate lingers among legal scholars whether an indigenous group within an existing state can, based on this right, secede from the existing state outside the context of decolonization and foreign subjugation.<sup>18</sup> I argue that state practice along with judicial and scholarly opinions support the existence of this right and its availability to an indigenous group to secede from a state where it is oppressed and denied access to government. Eritrea and South Sudan are recent African examples. However, I argue that events in Nigeria, unlike Sudan, do not reach the threshold where this right becomes exercisable by any indigenous group in the state. Therefore, the secession of any indigenous group from the existing Nigerian state cannot be justified under international law. To conceive of secession absent the basic considerations that give rise to the vesting of the right to secede is to face yet another war in Nigeria, as evident in many states where the songs of independence or secession are chanted.

Nevertheless, it is my opinion that events in Nigeria warrant a reconsideration of the political framework to ensure better group accommodation and coexistence. Nigeria is a federal state organized to foster integration. As I elaborate later, the politicization of diversity; the nature of the Nigerian federalism; corruption; and the resulting government dysfunction continue to make inter-group accommodation and co-existence problematic. Thus, these issues form the bane of inter-group conflicts in Nigeria.

Bearing in mind that this Article contemplates Nigeria's future, I rely on contemporary information and data in presenting the analyses. However, I shall make necessary allusions to historical experiences to explicate some socio-political events in the modernity of Nigeria and Sudan. By way of background, Part II explores the similar nature and experiences of Sudan and Nigeria; and the fundamental areas of divergence in those experiences. This part argues that while Nigeria and Sudan may have shared similar experiences, their stories diverge in fundamental respects relevant to finding whether or not the right to secede as an exercise of the right to self-determination arises in Nigeria. Part III examines the legal framework for the right to self-determination and the legal parameters in which a right to secede may arise. This part considers events in Nigeria and examines them under the outlined legal framework for secession in finding that these events do not give rise to the right to secede in the Nigerian context. Finding that the panacea for conflict mitigation lies in the Nigerian political

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17. Margaret Moore, *An Historical Argument for Indigenous Self-Determination*, in SECESSION AND SELF-DETERMINATION 89, 89 (Stephen Macedo & Allen Buchanan eds., 2003).

18. *See generally id.*; *see also* Donald L. Horowitz, *A Right to Secede?*, in SECESSION AND SELF-DETERMINATION, *supra* note 17, at 50. Both articles present opposite arguments and analyses on whether or not the right to secede avails an indigenous group beyond the context of decolonization and alien subjugation.

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system, Part IV examines the Nigerian political framework. Particularly, it examines the Nigerian constitutional federalism and the problems that stand in the way of its efficacy to adequately manage ethno-religious fragmentation, contain inter-group conflict, and ultimately foster a national community. Part V concludes that the time to act in the best regard of diversity management and conflict mitigation in Nigeria is now. This part calls on the Nigerian state to ponder on what options a reconstructed Nigerian federalism should adopt.

## II. BACKGROUND

### A. *Nigeria and Sudan at a Glance*

Sudan, until 2011, was easily the largest country in Africa with a total area of about 2.5 million square kilometers (over 1.5 million square miles).<sup>19</sup> Located in North East Africa, the country, with its capital in Khartoum, bordered nine countries (Central Africa Republic, Chad, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Libya, and Uganda).<sup>20</sup> In 2010, Sudan had a population of 41,980,182.<sup>21</sup> Its official language is Arabic.<sup>22</sup>

Nigeria is a federal republic and its official name is the Federal Republic of Nigeria.<sup>23</sup> The country is divided into thirty-six states and a Federal Capital Territory, Abuja, which is the seat of its federal government.<sup>24</sup> It is located in the Gulf of Guinea in West Africa and bordered by Cameroon to the East, Niger to the North, Chad to the Northeast and the Republic of Benin to the West. While Sudan was the largest country in Africa, Nigeria is the most populous country in Africa. Its official language is English and it has a total area of 923,768 square kilometers (about 574,003 square miles) which makes it a little more than twice the size of California.<sup>25</sup> The country has an estimated population of about 170,123,740.<sup>26</sup>

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19. ENCYCLOPEDIA OF TWENTIETH CENTURY AFRICAN HISTORY 536 (Tiyambe Zeleza & Dickson Eyoh eds., 2003).

20. *Id.*

21. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 602 (2010).

22. *Id.*

23. *The World Factbook: Nigeria*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last updated Feb. 23, 2012).

24. *Id.*

25. *Id.*

26. *Id.*

*Global Business & Development Law Journal / Vol. 26**B. Similar Features and Experiences of Nigeria and Sudan**1. Ethnic and Religious Heterogeneity*

Religious and ethnic pluralism assume a complex pattern in both Sudan and Nigeria.<sup>27</sup> Broadly speaking, Sudan was sixty-five percent African and thirty-five percent Arab.<sup>28</sup> There were at least sixty five ethnic groups in Sudan which were further divided into about 600 tribes.<sup>29</sup> The major groups which covered these ethnic and tribal divisions are the Arab groups settled in the north; the Negroid groups settled in the western parts and the south; and the Hamitic groups (Beja) settled in the east.<sup>30</sup> The multi-linguistic nature of Sudan was a direct function of its multi-ethnicity. The country had a wide range of spoken languages and dialects estimated to be about 100.<sup>31</sup> “Although Arabic is the official language of Sudan, English is predominant in the southern region . . . .”<sup>32</sup> This complex ethnic/tribal pattern was also characterized by religious multiplicity. Islam was the dominant religion and accounted for about seventy percent of the Sudanese population; Christianity, five to ten percent; and other traditional/indigenous beliefs, twenty to twenty-five percent.<sup>33</sup>

Nigeria is equally formed into a complex web of ethno-linguistic heterogeneity. There are about 250 ethnic groups and over 500 indigenous languages in Nigeria.<sup>34</sup> Hausa-Fulani, Igbo, and Yoruba, concentrated in the North, East, and West respectively, are the major ethnic groups. There are hundreds of other minority ethnic groups scattered in the South-South and Middle-Belt (the region between the North and the South) regions of Nigeria. The proportion of the major ethnic groups in relation to the total population of the country is: Hausa-Fulani, twenty-nine percent; Yoruba, twenty-one percent; Igbo, eighteen percent; Ijaw, ten percent; Kanuri, four percent; Ibibio, three and a half percent; and Tiv, two and a half percent.<sup>35</sup> As with Sudan, this ethno-linguistic diversity is further characterized by religious distinctions. Islam (fifty

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27. Ethnicity is understood to mean groups differentiated by color, language, and/or culture. It covers tribes, races, nationalities, and castes.

28. INT’L CRISIS GRP., AFRICA REPORT N°39, GOD, OIL AND COUNTRY: CHANGING THE LOGIC OF WAR IN SUDAN 6 (2002), available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/God%20Oil%20and%20Country%20Changing%20the%20Logic%20of%20War%20in%20Sudan.pdf>.

29. LAWYERS COMM. FOR HUMAN RIGHTS, BESET BY CONTRADICTIONS: ISLAMIZATION, LEGAL REFORM AND HUMAN RIGHTS IN SUDAN 5 (1996).

30. OMER AWADALLA ALI GASMELSEID, FEDERALISM AS CONFLICT-MANAGEMENT DEVICE FOR MULTIETHNIC AND MULTICULTURAL SOCIETIES—THE CASE OF SUDAN 6 (2006).

31. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 29, at 5.

32. *Id.*

33. INT’L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 6.

34. U.S. Embassy in Nigeria, *Nigeria Fact Sheet* (Jan. 2012), available at <http://photos.state.gov/libraries/nigeria/487468/pdfs/Nigeria%20overview%20Fact%20Sheet.pdf>.

35. *Id.*



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percent) is largely practiced in the North and Christianity (forty percent) mainly in the South.<sup>36</sup> There are also numbers of diverse indigenous beliefs (twenty-five percent).<sup>37</sup>

As post-independence events in Nigeria and Sudan show, this heterogeneity has often been the background of a volatile socio-political landscape in both countries. Thus, the nature of conflicts in Nigeria and Sudan can be explained with reference to specific experiences in both states.

#### *2. Slave Trade*

Slave trade contributed to the checkered socio-political history of Sudan and Nigeria. During the Ottoman colonial era in Sudan, slave trade was imposed only on Southern Sudanese Africans and the Northern Sudanese were used as slave raiders, slave agents and soldiers in the search for slaves.<sup>38</sup> The impact of this era on diversity and conflict in Sudan cannot be overemphasized given the mutual reproach it created among the peoples of the North and the South.<sup>39</sup> Similarly, the trans-Atlantic slave trade transformed the relationship among the peoples that now comprise Nigeria. Since the benefits and costs of failure in the trade were so great, relationships among kingdoms at that time became increasingly predatory and violent as they moved into the seventeenth and eighteenth centuries.<sup>40</sup>

#### *3. Colonial Rule*

Both Sudan and Nigeria were former colonies of Britain.<sup>41</sup> Although Sudan had experienced Ottoman (Turko-Egyptian) colonial rule from 1821 to 1885, much of the administrative vestiges that were to have political implications on its socio-polity were left by the Anglo-Egyptian colonialists.<sup>42</sup> Like Sudan, the territories that make up Nigeria were independent kingdoms and empires before colonial presence.<sup>43</sup> The amalgamation of the Northern and Southern protectorates of Nigeria in 1914 gave birth to what is known today as Nigeria.<sup>44</sup> The indirect rule system of government that was synonymous with British

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36. CENT. INTELLIGENCE AGENCY, *supra* note 21, at 602.

37. *Id.*

38. GASMELSEID, *supra* note 30, at 18-19.

39. *Id.* at 6.

40. APRIL A. GORDON, NIGERIAN'S DIVERSE PEOPLES: A REFERENCE SOURCE BOOK 43 (2003).

41. *Nigeria: History*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/414840/Nigeria> (last visited Mar. 27, 2013).

42. *Sudan: History*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/571417/Sudan> (last visited Mar. 27, 2013).

43. *Nigeria: History*, *supra* note 41.

44. *Id.*

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colonialism in Africa was common to both Nigerian and Sudanese colonial administrations.<sup>45</sup>

However, colonial rule set the pace for socio-economic imbalance in both countries. The Anglo-Egyptian colonial era in Sudan encouraged the spread of Islamic culture in the North through Egyptian presence in the Condominium, while Christian missionaries developed Christianity and Western culture in the South. Much of the education and economic investments were concentrated in the North of Sudan while the colonialists relied on Christian missionaries for education and economic development in the South.<sup>46</sup> The result was a lopsided development leading to what has been called the “northern superiority complex” in Sudan.<sup>47</sup> This was also the case in Nigeria where colonial administration discouraged Christian missionaries from the North thereby concentrating western education in the South.<sup>48</sup> The idea at the time was to maintain the sanctity of Islam and the traditional order which was then a leftover of the Caliphate primacy in the North.

#### 4. *Oil Resource*

Oil is the major resource in Sudan and Nigeria. It accounts for about eighty percent of budgetary revenues in Nigeria<sup>49</sup> and was instrumental to the economic boom that was experienced in Sudan from 1999 when oil exportation began.<sup>50</sup> Like Sudan, the oilfields in Nigeria are in the South. The failures of successive Nigerian governments to encourage genuine power sharing have sparked dangerous rivalries between the center and the thirty-six states over revenue from the country’s oil.<sup>51</sup> The oil resource problem is most acute in the oil rich, but desperately poor Niger Delta, where between 2006 and 2010, the Movement for the Emancipation of the Niger-Delta (“MEND”) and other armed militias waged a violent campaign against the federal government and foreign oil companies.<sup>52</sup> Although agitations in the Niger-Delta are less violent today, the demands by the peoples of the region for local control of the Niger-Delta’s oil wealth remains. It is significant that the burgeoning campaigns for the reconsideration of the Nigerian political union coincide with the location of the oilfields in the country.

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45. *Id.*; *Sudan: History*, *supra* note 42.

46. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 29, at 10.

47. GASMELSEID, *supra* note 30, at 48-49.

48. INT’L CRISIS GRP., AFRICA REPORT N°168, NORTHERN NIGERIA: BACKGROUND TO CONFLICT 5 (2010), available at [http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/168 Northern Nigeria - Background to Conflict.pdf](http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/168%20Northern%20Nigeria%20Background%20to%20Conflict.pdf).

49. *The World Factbook: Nigeria*, *supra* note 23.

50. *Id.*

51. INT’L CRISIS GRP., AFRICA REPORT N°119, NIGERIA’S FALTERING FEDERAL EXPERIMENT (2006), available at <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/Nigerias%20Faltering%20Federal%20Experiment.pdf>.

52. *Id.*

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These campaigns emanate from the southern groups in Nigeria while the northern groups remain adamant to the idea of reconsidering the Nigerian political union. There is a deep sense of alienation and dissatisfaction felt by the groups in the South especially of the littoral Niger-Delta region. The feeling is that their environment is degraded and their wealth explored to support the federal government and the northern states.<sup>53</sup> The arbitrary execution of the activist, Ken Saro Wiwa and others from the Ogoni area of the Niger-Delta in 1995, who demanded a greater share in oil revenues and environmental protection by the Sani Abacha military regime, caused Nigeria's suspension from the Commonwealth of Nations<sup>54</sup> and continues to be a source of bitterness among the groups in the Niger-Delta.

"The situation in Sudan was complicated by the discovery of oil in the southern provinces during the 1970s . . . ."<sup>55</sup> President Jafaar Nimeiri's attempt to redraw the internal boundaries of the country to bring the oilfields in the South within northern boundaries caused a deterioration in the tension in Sudan and provided additional motivation for conflict and war.<sup>56</sup> Given the failure of this attempt, Nimeiri subsequently resorted to an arrangement where the oil drilled in the South were refined in the North.<sup>57</sup> The denial of Southern Sudanese access to their resource and the massive displacement of the southern groups settled around the oilfields by General Omar al Bashir to allow oil exploration increased bitterness among the southern groups.<sup>58</sup> The resulting feeling of oppression and alienation associated with oil exploration in Sudan propelled the Sudanese civil war and ultimately southern independence. On the other hand, the returns from oil exploration gave Khartoum a reason to continue its resistance to a southern secession.<sup>59</sup>

#### 5. *Military Rule*

As with most African states, Sudan and Nigeria have experienced their share of military intervention in politics by way of *coup d'état*, which has not only contributed to socio-political instability in the countries, but has also derailed consistency in economic policies. Government in Sudan has, since independence in 1956, oscillated between military dictatorships and civilian parliamentary

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53. *Id.*

54. *E.g., Nigeria, The Columbia Electronic Encyclopedia, 6th ed.*, INFOPLEASE, <http://www.infoplease.com/encyclopedia/world/nigeria-history.html> (last visited Mar. 27, 2013).

55. Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L. L. & POL. 425, 432 (2003) (citation omitted).

56. *See id.*

57. INT'L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 12.

58. *Id.*

59. *See id.* at 13.

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coalition governments.<sup>60</sup> Post-colonial military rule in Sudan provided the unchecked powers that were employed arbitrarily especially in the oppression of the southern groups.

The first military coup in Nigeria (January 15, 1966), whether or not it was so intended, had an ethnic flavor. It was largely masterminded by military officers of Igbo origins with a number of prominent Hausa-Fulani casualties including the then Prime Minister of Nigeria, Alhaji (Sir) Abubakar Tafawa Balewa, and the then Sarduana of Sokoto, Alhaji Ahmadu Bello.<sup>61</sup> The then Governor-General of Nigeria, Dr. Nnamdi Azikiwe, and the Premier of the Eastern region, both prominent Igbo leaders, survived the coup.<sup>62</sup> There was also the killing of prominent politicians from other regions of the country and the emergence of the then commanding officer of the Nigerian Army, General Johnson Aguiyi Ironsi, of Igbo origin, as Head of State.<sup>63</sup> The Hausa-Fulani, who saw this as an attack against them, reacted six months later in what took the form of a “revenge coup.”<sup>64</sup> These coups and the subsequent catastrophic Nigerian civil war, which they directly precipitated, remain major post-colonial events that delved devastating cleavage on ethnic and religious dichotomy in Nigeria.<sup>65</sup>

*C. Fundamental Differences Between the Nigerian and Sudanese Experiences*

The analogous nature and socio-political experiences of Sudan and Nigeria are far-reaching to justify an allusion to the recent secession of South Sudan in the discourse of Nigerian’s stability, group coexistence, and political future. However, as already indicated, the stories diverge in fundamental respects that are crucial to the consideration of secession in both states. With rudimentary factors such as evolution of the state, state actions, and the presence of a “target people” within an existing state becoming increasingly central to secession in contemporary international law, it is only reasonable to give these issues their due consideration.

*1. Evolution of the States*

Although Sudan and Nigeria evolved from British imperialism, the agenda of the colonialists as reflected in their policies in the two states were significantly different. From the amalgamation of the northern and southern protectorates of Nigeria in 1914, the colonial intention, mostly based on economic and

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60. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 29, at 10.

61. *Nigeria: History*, *supra* note 41.

62. See *Nnamdi Azikiwe*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/46875/Nnamdi-Azikiwe> (last visited Mar. 27, 2013).

63. TOYIN FALOLA & MATTHEW M. HEATON, *A HISTORY OF NIGERIA* 116 (2008).

64. *Id.* at 118

65. *Id.* at 119.

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infrastructural efficiency, was to create a single state of diverse peoples.<sup>66</sup> The reverse was the case with British-Sudan where the colonial authorities moved to create two separate and distinct states of the North and South.

“Like many colonial creations, Sudan amalgamated territories and peoples that had never previously been a coherent entity.”<sup>67</sup> The most extensive indication that Sudan was not a coherent union, nor was it thought as such by its peoples and the colonialists, was evident in the Anglo-Egyptian colonial era. The Anglo-Egyptian condominium saw Britain take management over Southern Sudan, leaving the North under nominal Egyptian rule.<sup>68</sup> One major policy of this administration was the Southern Policy of 1917,<sup>69</sup> which “closed off” the south of Sudan.<sup>70</sup> The ultimate aim was to create a new political entity or merge the southern territory with other British colonies in Africa—Uganda and Kenya—who the British rulers thought were more similar.<sup>71</sup> On the other hand, Northern Sudan was to be annexed to Egypt in cognizance of the latter’s historical ties with the former.<sup>72</sup> Consequently, there was the establishment of a new military task force in the South, comprised of southerners to replace the northern military;<sup>73</sup> the declaration of English as the official language in the South, and a promotion of local languages as opposed to Arabic as a *lingua franca*; a denial of northerners’ entry into the South unless permitted; the discouragement and reduction of inter-marriage between the North and the South; and a replacement of Friday with Sunday as the weekly holiday in the South.<sup>74</sup>

The growth of Sudanese nationalism in the years leading to World War II increased the prospect of a Sudanese independence. With pressure from Egypt, Northern Sudanese elites and British-French-Egyptian politics over the Suez Canal, Britain was prepared to sacrifice the agenda of a separate independence for South Sudan<sup>75</sup> despite opposition from British colonial officers working in the South and Southern Sudanese groups.<sup>76</sup> Southern agitations for self-government

66. *Nigeria: History*, *supra* note 41.

67. INT’L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 7.

68. *Id.* at 8.

69. Legitimized by the promulgation of the Closed District Ordinance of 1921 and the Passports and Permits Ordinance of 1922 was promulgated to allow access from other parts of Sudan to South Sudan only with the permission of the authorities.

70. INT’L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 7.

71. PETER PIGOTT, CANADA IN SUDAN 88 (2009); *see also* GASMELSEID, *supra* note 30, at 24.

72. Angela M. Lloyd, Note, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT’L L. 419, 440 (1994).

73. This was significant for the role it played in the first phase of the civil war. The refusal of the Southern soldiers to handover to the Northern troops towards the end of British rule (the mutiny of Torit, 1955 in Equatoria) was one of the direct causes of the first phase of the Sudanese civil war which lasted seventeen years.

74. GASMELSEID, *supra* note 30, at 23.

75. Lloyd, *supra* note 72, at 440-41.

76. FED. RESEARCH DIV., LIBRARY OF CONG., SUDAN: A COUNTRY STUDY 29-31 (Helen Chapin Metz ed., 4th ed. 1992).

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increased, culminating in a violent conflict in 1955 some months before Sudanese independence on January 1, 1956.<sup>77</sup> The rebellious southern troops mutinied in August 1955 killing several northerners, government officers, and army officers.<sup>78</sup> Assurances from the North and the British colonialists that the South would be allowed some form of autonomy became an empty promise when, at the dawn of independence, the northerners sought to circumvent this understanding. For instance, “in September 1956, the Legislative Assembly appointed a committee to draft a national constitution; only three of the forty six members were southerners. The southern delegation walked out in protest after its repeated calls for a federal constitution were outvoted.”<sup>79</sup> In spite of the government’s suppression, the southern groups convinced of their demand for self-government regrouped in remote areas to continue their agitation mostly by guerilla warfare.<sup>80</sup> By 1958 they, had from exile, formed the Sudan African National Union which petitioned the United Nations and the Organization of African Union (now African Union or “AU”) on their right to self-determination.<sup>81</sup>

In marked difference to the Sudanese notion of two separate states, Nigeria was regarded as one political entity by its peoples and the colonial authorities since the 1914 amalgamation. British-Nigeria was administered as a single unified state of different regions. There was no colonial agenda to separate the peoples of Nigeria,<sup>82</sup> nor was there any indication on the part of the Nigerian peoples that they were so separate and distinct and as such required separate independence.<sup>83</sup> Events leading to independence did not entail separate independence agitations; rather, they were in the nature of determining a suitable political structure that would meet the ends of peaceful coexistence.<sup>84</sup>

After British conquest of the territories now comprising Nigeria, the earliest form of administration was indirect—through the already well-established local administrative institutions. The idea was to maintain order and promote continuity so that the imperialist ends could be achieved without rancor.<sup>85</sup> The first British Governor-General of Nigeria, Lord Fredrick Lugard, was pro-central in his administrative form and ideology.<sup>86</sup> Consequently, he sought uniformity in

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77. *Id.*

78. *Id.* at 31-32.

79. INT’L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 9.

80. FED. RESEARCH DIV., *supra* note 76, at 31-32.

81. INT’L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 9.

82. *See* FALOLA & HEATON, *supra* note 63, at 110-34.

83. *Nigeria: History*, *supra* note 41.

84. *Id.*

85. FALOLA & HEATON, *supra* note 63, at 112.

86. *Id.* at 68.

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the administrative structure, thus reinforcing indirect rule in the South<sup>87</sup> to bring it in conformity with the nature of administration in the north.<sup>88</sup>

Nationalism in colonial Nigeria was in two major phases—before and after World War II—neither of which included agitations for separate group independence. First, as more Nigerians acquired western education, there emerged a Nigerian elite class shortly after the amalgamation.<sup>89</sup> The imperial ideology of African inferiority soon caused a mutual reproach between the colonial authorities and these elites that snowballed into nationalist agitations in the 1920s.<sup>90</sup> The immediate result of these agitations was the adoption of the 1922 Clifford's Constitution which allowed a limited Nigerian representation in the newly formed legislative council.<sup>91</sup> Agitations at the time were to refute the idea of African inferiority and to press for greater representation in the colonial government.<sup>92</sup> Increase in awareness, the emergence of trade/labor unions, and the effects of the new but vibrant Nigerian press gave increased impetus to nationalism in the following years which continued to see increased Nigerian representation in the colonial administration.<sup>93</sup> However, with increased political participation, the peoples of Nigeria were identified as not only divided along ethnic lines, but were also deeply ethnocentric.<sup>94</sup> The dominant groups in Nigerian politics at the time were the Igbo, the Yoruba and the Hausa-Fulani.<sup>95</sup>

Second, post-World War II, there was a willingness to end colonialism led by the United Nations. This promised independence for Nigeria and nationalism shifted from greater participation to agitations for self-government. The consideration then was a political structure that would unite an ethno-religiously divided Nigeria. This explains the adoption of three different constitutions between 1946 and 1954.<sup>96</sup> Although the 1946 Richards Constitution, which introduced regionalism, was arbitrarily imposed, the drafting of the subsequent 1951 Macpherson Constitution included Nigerian nationalists, some of who preferred a system that would unite Nigeria.<sup>97</sup> It may surprise many today that, for instance, the National Council of Nigeria and the Cameroons ("NCNC"), a political party led by one of Nigeria's foremost nationalists in history, Dr.

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87. Especially in the decentralized and chief-less southeast societies where Lord Lugard created the position of warrant chiefs in a bid to find a symbol of authority that was comparable or similar to the Emirs of the North and the Obas of the West. FALOLA & HEATON, *supra* note 63, at 69.

88. *Id.*

89. *Id.* at 77.

90. *Id.* at 82.

91. *E.g.*, Itse Sagay, *Nigeria: Federalism, the Constitution and Resource Control*, URHOBO WAADO, <http://www.waado.org/nigerdelta/essays/resourcecontrol/sagay.html> (last visited Mar. 27, 2013).

92. FALOLA & HEATON, *supra* note 63, at 84.

93. FED. RESEARCH DIV., *supra* note 76, at 38-40.

94. *Id.*; *see also* FALOLA & HEATON, *supra* note 63, at 152.

95. FALOLA & HEATON, *supra* note 63, at 152.

96. *Id.* at 90-93; *see also* FED. RESEARCH DIV., *supra* note 76, at 44.

97. TOYIN FALOLA, *THE HISTORY OF NIGERIA* 90-92 (1999).

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Nnamdi Azikiwe, preferred a central structure to the Richards Constitution's regionalism on the grounds that it would unite rather than divide Nigeria.<sup>98</sup> It was in response to such feelings that the Macpherson Constitution established a relatively more central form of government in 1951 for purposes of national integration.<sup>99</sup> The people of Nigeria, who although were conscious of their distinct ethnic and religious identities, never evinced an intention for, nor did they positively demand, separate independence.<sup>100</sup> The understanding that a single, unified political entity was formed by the 1914 amalgamation continued through independence and afterwards.<sup>101</sup>

Professor Eghosa E. Osaghae argues that nationalists who participated in creating the political structures that emerged in Nigeria at independence were forced to work within the framework dictated by the imperialists and as a result they could not opt out of the "union."<sup>102</sup> With the greatest respect to the Professor, this argument does not defeat the proposition that the peoples of Nigeria did not intend separate independence. Nor does the argument suffice to debunk the claim that positive demands for separate states may have been relevant to the political structure that became the outcome of Nigeria's independence. There are at least two issues which explain the point being made here.

First, the position of the United Nations, which was the international champion of decolonization, was to defer to the wishes of the colonized people as much as it was possible.<sup>103</sup> The advisory opinion of International Court of Justice ("ICJ") in *Western Sahara* avows for this position.<sup>104</sup> Although this opinion antedates Nigeria's independence, it is reflective of the prevalent attitude in the wake of decolonization, especially state practice founded in UN Resolution 1514.<sup>105</sup>

Second, had Nigerians decisively intended separate states, they acquired the needed sovereignty upon the attainment of self-government to decide their future as such. The British colonial style, and indeed under the international law

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98. *Id.* at 90.

99. *See id.* at 92 (the McPherson Constitution retained the three-region structure of the Richards Constitution, but gave the north equal representation to the other two regions combined).

100. *See generally id.* at 90-93.

101. *See id.* at 68.

102. Eghosa E. Osaghae, *Federalism and the Management of Diversity in Africa*, 5 IDENTITY, CULTURE & POL., no. 1 & 2, 2004 at 162, 165-66 (2004), available at <http://www.codesria.org/IMG/pdf/eghosa.pdf>.

103. *See* ANTONIO CASSESE, SELF- DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 76-79 (1995).

104. The court stated that:

The validity of the principle of self-determination, defined as the need to pay regard to freely expressed will of the peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.

*Western Sahara*, Advisory Opinion, 1975 I.C.J. 33, para. 59 (Oct. 16).

105. S.C. Res. 1514, U.N. Doc. S/RES/1514 (Nov. 13, 2003).



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principle of sovereignty, was to “nurture” the colony into self-government from where it was entitled to decide its future.<sup>106</sup> The scenario that played out in Sudan explains this position. Nationalism in the North of Sudan, as independence approached, was divided along whether to emerge as an independent state or to merge with Egypt.<sup>107</sup> The Chairman of the Commission tasked to resolve this issue, Mr. Eden, reported the following to the House of Commons in England on November 15, 1951:

Having attained self-government it will be for the Sudanese people to choose their own future status and relationship with the Kingdom and with Egypt. *His Majesty’s Government consider that the attainment of self-government should immediately be followed by active preparations for the ultimate goal of self-determination.* They will support the Governor-General in his efforts to ensure that the Sudanese people shall be able to exercise their choice in complete freedom and in the full consciousness of their responsibilities.<sup>108</sup>

The point being made here is far from finding justification for the arbitrary joining of territories, as was the character of colonialism; rather, it is that the groups in Nigeria, if at all they felt otherwise, nevertheless acquiesced to the colonial amalgamations that gave birth to Nigeria.<sup>109</sup> The only time groups in the East made a positive move for a separate independence was in 1967, and at that time, tribal nerves had become too charged that the underlying issues at play were driven more by ethnic vengeance than by pragmatic political considerations.<sup>110</sup> More so, the emergence of military rule at the time had robbed the socio-polity of the avenue for robust deliberations and popular consultations that is crucial to the issue of secession.<sup>111</sup> The result was a thirty-month war that claimed well over 500,000 lives.<sup>112</sup>

### *2. Religion and the State*

As Donald L. Horowitz writes, “[w]hether and when a secessionist movement will emerge is determined mainly by domestic politics, by the relations of groups and regions within the state.”<sup>113</sup> The nature of conflicts in divided societies around the world illustrate that the role of the state with respect

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106. UMOZURIKE OJI UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 145-48 (1972).

107. *Id.* at 146-47.

108. *Id.* at 147 (emphasis added).

109. *Id.* at 146-47.

110. *See generally id.*

111. INT’L CRISIS GRP., AFRICA REPORT N°119, *supra* note 51, at 2.

112. *Id.*

113. HOROWITZ, *supra* note 11, at 230.

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to religion is at the heart of peace and stability, especially in religiously plural settings.<sup>114</sup> Both Nigeria and Sudan have seen religious politicization ignite and propel conflict.<sup>115</sup> As Emmy Irobi and Anthony O. Agwuele point out, “[a]nother major cause of conflict in Nigeria is the politicization of religion, namely, the fusion of religion and politics.”<sup>116</sup> While this is true, it is imperative to stress that the nature of religious politicization in Nigeria assumes a dimension distinct from what was the case in Sudan.<sup>117</sup> Successive Nigerian governments have been neutral to religion in consonance with the apparent secular posture of the country’s successive constitutions.<sup>118</sup> However, as Francis M. Deng points out, post-independence Sudanese governments have been persistent in their efforts to “Arabize” or “Islamize” the country, which was hitherto administered as two separate entities by British colonialism.<sup>119</sup>

As already said, the two colonial eras in Sudan created a socio-economic imbalance between the North and South which resulted in a “northern superiority complex.”<sup>120</sup> This complex, coupled with the numerical preponderance of Islam in the North and indeed the entire Sudan, resulted in a religious and cultural majoritarianism that was inordinately pursued through the machinery of state powers in Sudanese nation building.<sup>121</sup> Having experienced two short-lived civilian coalition governments, a November 1958 coup brought Major-General Ahmad Abboud to power.<sup>122</sup> “Gen[eral] Abboud launched a controversial effort to accelerate ‘Islamisation’ of the [S]outh through an aggressive proselytizing campaign.”<sup>123</sup> In 1964, he expelled all western missionaries in the South of Sudan.<sup>124</sup> His repression forced thousands of southerners into exile where they, more than before, began to unionize as resistance groups and a renewed civil war in the mid-1960s was not far away.<sup>125</sup>

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114. See generally Andrew Wimmer, Lars-Erik Cederman, & Brian Min, *Ethnic Politics and Armed Conflict: A Configurational Analysis of a new Global Dataset*, 74 AM. SOC. REV. 316, 316-17 (2009).

115. PIGOTT, *supra* note 71, at 2; INT’L CRISIS GRP., AFRICA REPORT N°168, *supra* note 48, at 2.

116. Emmy Irobi & Anthony O. Agwuele, *The Relevance of Rotational Presidency in Managing Ethnic Conflicts in Nigeria*, in HEMISPHERES STUDIES ON CULTURES AND SOCIETIES NO. 22 33, 35 (Jerzy Zdanowski et al. eds., 2007), available at [http://www.iksio.pan.pl/images/publikacje/Hemispheres/do\\_nr\\_30/hemispheres22.pdf#page=35](http://www.iksio.pan.pl/images/publikacje/Hemispheres/do_nr_30/hemispheres22.pdf#page=35).

117. FRANCIS M. DENG, CUSTOMARY LAW IN THE MODERN WORLD: THE CROSSFIRE OF SUDAN’S WAR OF IDENTITIES 6-7 (2010); Jeremiah Shola Omotola, *Secularism and the Politics of Religious Balancing in Nigeria*, [http://www.irmgard-coninx-stiftung.de/fileadmin/user\\_upload/pdf/Cultural\\_Pluralism/Religion/Essay.Omotola.pdf](http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/Cultural_Pluralism/Religion/Essay.Omotola.pdf) (last visited Feb. 20, 2013).

118. Omotola, *supra* note 117.

119. DENG, *supra* note 117, at 6-7.

120. GASMELSEID, *supra* note 30, at 49-50.

121. Omotola, *supra* note 117 (Arabs of the North felt superior to the Africans of the South due to their association with slavery, which was fueled by the disparate treatment by the British early in their rule).

122. INT’L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 8-9.

123. *Id.* at 9.

124. FED. RESEARCH DIV., *supra* note 76, at xxiv.

125. *Id.*

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This was the socio-political setting when President Jaafar Nimeiri became President of Sudan in 1969 after a coup.<sup>126</sup> A failed communist coup in Sudan in July 1971 disturbed Sudan-Soviet relations leading to the Soviets withdrawing their support for the Sudanese government in the civil war.<sup>127</sup> The economics of continuing the war without Soviet support motivated President Nimeiri to address the war.<sup>128</sup> The result was the signing of the Addis Ababa Agreement between Khartoum and the peoples of South Sudan, which gave the latter regional autonomy.<sup>129</sup> It was against this background that the first permanent Constitution of Sudan, which reflected secularism, was adopted in 1972.<sup>130</sup>

However, this turned out to be temporary when President Nimeiri, in a sudden reversal, promulgated the 1983 September Laws adopting *Shari'a* and its penal sanctions in a renewed bid to Islamize the entire Sudan.<sup>131</sup> This time his immediate motives were to pacify the Islamic Brotherhood with whom he had found reconciliation and a renewed alliance.<sup>132</sup> There was also the need to weaken southern coherence and formidability in order to forestall their resistance to his attempt to bring the newly found oil in some parts of the South within the boundaries of the North.<sup>133</sup> When Nimeiri was overthrown in 1985, the succeeding government of Lieutenant General Swar al-Dhahab instituted a peace process, which, however, could not resolve the "*Shari'a* question."<sup>134</sup> The subsequent transition government showed deference to the demands of the SPLM/A and set the motion in place for a National Constitutional Conference.<sup>135</sup> The government showed its commitment to peace by expelling members of the National Islamic Front ("NIF") in the cabinet.<sup>136</sup> The NIF responded by supporting a coup on June 30, 1989, which brought General Omar al-Bashir to power.<sup>137</sup> Since the northern Islamic supremacists never accepted the September Laws as true *Shari'a* and had played a supportive role in the coming to power of General al-Bashir, it became a crucial part of the latter's agenda to upgrade and reinforce the laws to properly reflect *Shari'a*.<sup>138</sup>

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126. INT'L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 9-10.

127. *Id.* at 10-11.

128. *Id.*

129. *Id.* at 11.

130. *Id.*

131. The Penal Code was rewritten to include the punishments of flogging, amputation, and crucifixion. Constitutional provisions that were contrary to Islamic laws were suspended. *See* LAWYERS COMM. FOR HUMAN, *supra* note 29, at 14-15.

132. *Id.* at 15.

133. Kobrin, *supra* note 55, at 432.

134. INT'L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 14.

135. *Id.*

136. *Id.*

137. *Id.*

138. DENG, *supra* note 117, at 7; INT'L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 14.

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In tandem with the aspirations and objectives of the NIF, General Bashir has long declared his government an Islamic one committed to establishing an Islamic state,<sup>139</sup> augmenting the regular police with the ad-hoc Morality and General Discipline Police to deal with offences of morality, which are largely dictated by Islamic injunctions.<sup>140</sup> Feeble attempts at peace under General Bashir continued to fail with Islamic law again being the crux of deadlock until January 2005, when the CPA was signed.<sup>141</sup>

General Bashir ruled mainly by constitutional decrees and promulgations until 1998 when his government adopted a constitution.<sup>142</sup> Prominent among the provisions of the Constitution regarded by non-Muslims as unacceptable included Article 10, which imposed *Zakat*<sup>143</sup> as a financial duty on the entire country without a limitation to Muslims, and Article 65, which gave “Islamic Law” supremacy by placing it alongside “consensus of the nation”, “the Constitution” and “custom” as the fundamental sources of legislation “*which no law can contravene*.”<sup>144</sup> Several other articles of the Constitution were seen as problematic in view of the religious diversity of Sudan.<sup>145</sup>

While the foregoing identifies a Sudanese state marked by religious and cultural fundamentalism,<sup>146</sup> the Nigerian case has largely seen religious politicization take the form of individuals who sometimes conspire to whip up religious sentiments mostly for political gains.<sup>147</sup> Religion started to rear its head in the public sphere of post-independence Nigeria in constitutional deliberations.<sup>148</sup> *Shari'a* created tensions during the constitutional convention that founded the 1979 Constitution. The request of the Muslim delegation at the time was the establishment of a *Shari'a* court of appeals at the federal judicial level.<sup>149</sup>

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139. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 29, at 3.

140. *Id.* at 22.

141. *Bashir Aide Challenges Opposition to Declare Stance on Sharia Laws*, SUDAN TRIBUNE (Nov. 11, 2012), <http://www.sudantribune.com/spip.php?article44497>.

142. Article 1 declares “the State of Sudan is an embracing homeland, wherein races and cultures coalesce and religions conciliate. Islam is the religion of the majority of the population. Christianity and customary creeds have considerable followers.” CONSTITUTION OF SUDAN (1998), art. 1, *available at* <http://www.sudanembassy.ca/Docs/THE%20CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20THE%20SUDAN%201998.pdf>; *Omar Hassan Ahmad al-Bashir*, SUDAN TRIBUNE, <http://www.sudantribune.com/+OMAR-HASSAN-AL-BASHIR,126+> (last visited Feb. 20, 2012).

143. The word literally means “Alms” and is regarded as one of the pillars of Islam. The practice involves giving to charity for self-purification.

144. CONSTITUTION OF SUDAN (1998), art. 10.

145. These include: Articles 4, 18, 24. CONSTITUTION OF SUDAN (1998) (for example, Article 4 indicating God is supreme, and Article 18 requiring those serving the State to worship God and stick to Muslim scripture).

146. CONSTITUTION OF SUDAN (1998); LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 29, at 3.

147. *See* Juwayriya Badamasiyu & Ahmed Adam Okene, *Shari'ah Implementation in a Democratic Nigeria: Historical Background and the Quest for Developmental Legality*, 4 J. POL. & L. 144, 147 (2011), *available at* <http://www.ccsenet.org/journal/index.php/jpl/article/viewFile/12005/8428>.

148. *Id.*

149. *Id.* (indicating the desire of Christian politicians in the 1988/89 Constituent Assembly a total abrogation of Shari'ah law in the constitution created social tension).

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This issue defied resolution at the deliberations and so “the Supreme Military Council (“SMC”), the highest ruling body of the military regime then, arrived at a compromise by retaining the provision for the establishment of the *Shari’ah* court for any state, which required it.”<sup>150</sup> Debates over *Shari’a* were even more fierce in the 1988/89 Constituent Assembly and this time the Armed Forces Ruling Council (“AFRC”), the successor to the SMC, intervened by making issues of *Shari’a* non-debatable in the Assembly.<sup>151</sup> The 1994/95 and the 1998 Constitutional Conferences were less acrimonious.<sup>152</sup> The latter, while largely adopting recommendations of the 1994/95 Constituent Assembly, is the basis for the current Nigerian Constitution of 1999.<sup>153</sup> In 1986, the Nigerian Head of State, General Muhammad Buhari, controversially secured a Nigerian membership at the Organization of Islamic Conference (now Organization of Islamic Cooperation or “OIC”).<sup>154</sup> The issue generated deep tension among Christians and Muslims culminating in a conflagration that spread across many cities in Northern Nigeria.<sup>155</sup>

The expansion of *Shari’a* from personal law into the criminal justice system by some northern states immediately after the transition to civil rule in 1999 saw the federal government maintain a position that the expansion was incompatible with the constitutional right of freedom of religion.<sup>156</sup> The implementation of *Shari’a* has been limited to the adopting states that incidentally are the Muslim majority states and, individually, it has been applied to adherents of Islam.<sup>157</sup> Beyond the fact that the incident did not distort the federal government’s neutrality on religion, it was far from being a foisting of *Shari’a* on the entire Nigeria.<sup>158</sup> It is worthy of note that even some Muslim dominated states in the North and Middle-Belt have resisted the implementation of the law.<sup>159</sup> Boko Haram and its extremism present the most recent affront to freedom of religion that the federal government of Nigeria continues to grapple with.<sup>160</sup>

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150. *Id.*

151. *Id.*

152. *Id.*

153. Badamasiuy & Okene, *supra* note 147, at 147.

154. FED. RESEARCH DIV., *supra* note 76, at 81.

155. Irobi & Agwuele, *supra* note 116, at 39-40.

156. INT’L CRISIS GRP., AFRICA REPORT N°168, *supra* note 48, at 1.

157. *Id.*

158. Rotimi T. Suberu, *Reinventing the Architecture of Nigerian Federalism*, 12 BROWN J. WORLD AFF. 139, 145 (2005-2006).

159. These states include Nasarawa, Kogi, Taraba, Adamawa, and Kwara. *See id.*

160. *See supra* Part I.

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State actions in relation to a particular group within the state, usually in the nature of human rights violations and oppression, are another area where the experience in Nigeria differs from that of Sudan. I will elaborate on this further in the next part since it is directly implicated in assessing whether a right to secede has arisen in Nigeria. However, it suffices to mention here that unlike Nigeria, the Sudanese government was characteristic of making specific groups within the state targets for human rights violations and oppression.<sup>161</sup> Perhaps, it is significant on this score that the war between Khartoum and the groups in Southern Sudan was quickly followed by violent conflict between Khartoum and the peoples of the Darfur region.<sup>162</sup>

*D. Conclusion*

Analogous experiences have contributed to the volatile socio-political landscape in Nigeria and Sudan. Thus, they illuminate the nature of conflicts in both states. However, the fundamental areas of divergence in these experiences, as depicted above, form a crucial background to considering the issue of secession in both states. The focus of this Article is not to appraise the legality of South Sudan's secession. Nonetheless, the above background offers a perspective to understanding the exigency behind that secession and is key to explaining the specific factors taken into account in assessing the legality of secession in Nigeria. Specifically, it explains why the precedent of South Sudan's secession is inapplicable to Nigeria and gives color to the factors that are considered below in finding that secession cannot be justified in Nigeria.

**III. THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW**

Secession evokes the international law principle of self-determination.<sup>163</sup> Under that principle, an indigenous group forming part of an existing state may secede from the state as a matter of right where it is the subject of oppression, gross human rights violations, and is denied access to government for self-rule within the state.<sup>164</sup> This section examines the legal framework for secessionist self-determination and applies the principles that become evident to the Nigerian

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161. Jacob K. Lupai, *Islamic Constitution No Solution to Marginalization and Oppression in Nation*, SUDAN NEWS AGENCY (Mar. 15, 2012), <http://www.southsudannewsagency.com/opinion/articles/islamic-constitution-no-solution-to-marginalization-and-oppression-in-nation>.

162. *Id.*

163. Karen Parker, *Understanding Self-Determination: The Basics*, ASS'N FOR HUMANITARIAN LAW (Aug. 2000), <http://www.guidetoaction.org/parker/selfdet.html>.

164. CASSESE, *supra* note 103, at 119-20.

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case. Specifically, the idea here is to answer the question whether the right to secede has vested on any indigenous group in the Nigerian state.

#### A. *The Legal Framework of the Principle of Self-Determination*

To put it simply, “the principle of self-determination asserts that it is the right of all peoples to freely choose their social, economic, political and cultural future without external interference.”<sup>165</sup> The principle has its practical roots in the American Declaration of Independence (1776) and the French Revolution (1789), which ended the notion that individuals were properties of the king to deal with as he pleased.<sup>166</sup> However, the principle was popularized by former U.S. President, Woodrow Wilson who, in his thoughts for lasting peace in Europe in the early twentieth century, conceptualized self-determination as a corollary of popular sovereignty, which generates the right of peoples to freely choose their government.<sup>167</sup> The principle has evolved considerably since then, assuming relatively different meanings in the course of its transformation.<sup>168</sup>

Of importance here is the nature of the principle under contemporary international law as founded post World War II. The UN Charter proclaims that some parts of the UN purposes—to develop friendly relations among nations<sup>169</sup> and to promote international economic and social cooperation<sup>170</sup>—shall be based on respect for self-determination.<sup>171</sup> There is no exact definition and scope of the principle in any international instrument.<sup>172</sup> The result is that even though there has been a considerable body of practice based on the principle, its exact scope and applicability remains arguable.<sup>173</sup>

However, the applicability of the principle of self-determination presupposes the existence of a self-determining unit of people linked with territory.<sup>174</sup> Chapters XII and XIII of the UN Charter recognize trust territories as self-determining units entitled to self-government or independence.<sup>175</sup> Similarly,

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165. Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-determination in the Balance*, 2 TULSA J. COMP. & INT’L L. 129, 129 (1999).

166. CASSESE, *supra* note 103, at 11.

167. *Id.* at 13, 19.

168. Diane F. Orentlicher, *International Responses to Separatist Claims: Are Democratic Principles Relevant? in SECESSION AND SELF-DETERMINATION*, *supra* note 17, at 19, 21 (explaining self-determination’s limited effect post-World War I).

169. U.N. Charter art. I, para. 2.

170. U.N. Charter art. 55.

171. CASSESE, *supra* note 103, at 119-20.

172. Parker, *supra* note 163 (explaining the UN Charter and ICJ’s varying definitions).

173. CRAWFORD, *supra* note 16, at 115.

174. *Id.* at 116-17 (noting the principle, as explained by Chapter XI of the UN Charter, applies to territories whose people have not yet attained a full measure of self-government, territorial disputes, and to only defined territories).

175. U.N. Charter art. 76.

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Chapter XI acknowledges that non-self-governing territories are entitled to self-government since it places on member states administering such territories the obligation to develop self-government in those territories.<sup>176</sup> By subsequent state practice expressed through UN General Assembly (“UNGA”) Resolution 1514 (XV) of 1960, colonies were recognized as non-self-governing and as such entitled to a right to self-determination.<sup>177</sup> Yet, whether the right continues beyond decolonization or alien subjugation to avail indigenous peoples who form part of an existing state is still the subject of debates among international law scholars.<sup>178</sup>

However, it suffices for the analysis relevant here to say that self-determination has been designated a right by important international instruments.<sup>179</sup> The International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic Social and Cultural Rights (“ICESCR”) provide in their common Article 1 (1) that “[a]ll peoples have the right of self-determination.<sup>180</sup> By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>181</sup> Similarly, the UN General Assembly Resolution 2625(XXV) adopted in 1970, titled Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations), declares the right of “all peoples” to self-determination and places a duty on states to respect this right in accordance with the UN Charter.<sup>182</sup>

Any doubt that may remain that the right to self-determination transcends decolonization has been laid to rest at least in the African context.<sup>183</sup> This position

176. U.N. Charter art 73. Contained in Chapter XI headed “Declaration Regarding Non-Self-Governing Territories,” requires UN member states administering non-self-governing territories to develop self-government and to assist them in developing free political institutions.

177. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 274, Advisory Opinion, 1971 I. C. J. 6, 31 (June 21) *aff’d in* Western Sahara, Advisory Opinion, 1975 I. C. J. 12, 31-33 (Oct. 16).

178. *See generally* Horowitz, *supra* note 18.

179. *See generally* International Covenant on Civil and Political Rights, part 1, art. 1, para. 1, 999 U.N.T.S. 171, 173; *see* International Covenant on Economic, Social and Cultural Rights, part 1, art. 1, para. 1, 993 U.N.T.S. 3, 5.

180. *See* International Covenant on Civil and Political Rights, pt. 1, art. 1, para. 1, Mar. 23, 1976, 999 U.N.T.S. 171; *see* International Covenant on Economic, Social and Cultural Rights, pt. 1, art. 1, para. 1, Jan. 3, 1976, 993 U.N.T.S. 3.

181. International Covenant on Civil and Political Rights, pt. 1, art. 1, para. 1, Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, pt. 1, art. 1, para. 1, Jan. 3, 1976, 993 U.N.T.S. 3.

182. The Declaration states that “[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.” G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 124 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

183. African Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58 (1982), *available at* <http://www.unhcr.org/refworld/type,MULTILATERALTREATY,OUA,,3ae6b3630,0.html>.



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is fortified by the African Charter on Human and Peoples Right (“ACHPR”).<sup>184</sup> Generally remarkable for its unique expansion of human rights, Article 19 of the Charter states that “[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights.”<sup>185</sup> Nothing shall justify the domination of a people by another.<sup>186</sup> In addition, Article 20 puts it beyond doubt that the right to self-determination continues to avail “oppressed peoples” post-decolonization.<sup>187</sup>

These provisions of the Charter are crucial to an understanding of the right to self-determination in Africa.<sup>188</sup> Perhaps taking into account the experiences of the continent and the continuous dominion of peoples therein at the drafting of the ACHPR, the OAU saw it exigent to make explicit that the right to self-determination exists beyond decolonization.<sup>189</sup> While paragraphs 1 and 3 of Article 20 refer to “all peoples,” paragraph 3 refers to “colonized or oppressed peoples.”<sup>190</sup> The latter language makes clear that beyond colonized peoples, the right to self-determination avails all “peoples” who are oppressed.<sup>191</sup> It is only logical that colonization presupposes foreign rule while, peoples may be “oppressed” by indigenous governments for which reason they are availed the right to self-determination under the said provisions.<sup>192</sup> The African Commission on Human and Peoples’ Right confirmed this position in a case brought pursuant to Article 20—*Katangese Peoples’ Congress v. Zaire* when it noted that “[a]ll peoples have the right to self-determination.”<sup>193</sup>

The exercise of the right to self-determination can result “in the independence of the self-determining unit as a separate state.”<sup>194</sup> In fact, most

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184. *Id.* pt. 1, art. 20.

185. *Id.* pt. 1, art. 19.

186. *Id.*

187. Article 20 of the Charter provides:

- (1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
- (2) Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
- (3) All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

*Id.* pt. 1, art. 20.

188. *See id.*

189. *See id.*

190. *Id.*

191. *Id.*

192. *See generally id.* pt. 1, art. 19-20.

193. *Katangese Peoples’ Congress v. Zaire*, Comm. No. 75/92 (African Commission for Human and Peoples’ Rights 1995) in Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights (1994–1995), ACHPR/RPT/8th, Annex VI, para. 3 (1995).

194. CRAWFORD, *supra* note 16, at 128.

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secessionist movements base their claims on the right to self-determination.<sup>195</sup> Consequently, the right to secessionist self-determination is subject to qualification.<sup>196</sup> For as Edward McWhinney observes, “the mere fact of iteration, or reiteration, of the principle of self-determination amounts to the beginning of a legal problem solving process rather than its conclusion.”<sup>197</sup> The Supreme Court of Canada summarized the position when it stated in *Re Secession of Quebec* that, “international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states . . . . Where this is not possible a right of secession may arise.”<sup>198</sup> Rightly so, for it is common knowledge that the exercise of a legal right is mostly limited at that point where it infringes on the right of another.<sup>199</sup> Since an exercise of the right to self-determination may in some cases result in secession, it sometimes collides with the principle of state sovereignty and territorial integrity.<sup>200</sup> The latter, which finds expression in the maxim, *Uti Possidetis*, is also protected by international law.<sup>201</sup> Needless to say, this underscores the “safeguard clauses” for territorial integrity contained in virtually all the international instruments already discussed.<sup>202</sup>

Even within the domestic context, the existence of democracy within a state has been used to explain that a unilateral right to secede may undermine majority rule—a cardinal principle of democracy.<sup>203</sup> “Secession, [i]n this view, is legitimate only as a remedy, where particular forms of ‘just cause’ exist—such as historic grievances or discriminatory treatment not redressable within the existing state . . . .”<sup>204</sup> International practices evince the need to find a balance between the right to secessionist self-determination and the right of a state to maintain its territorial integrity employing an assessment of the available contextual facts.<sup>205</sup>

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195. See Parker, *supra* note 163 (linking self-determination to the de-colonization process).

196. See *id.* (arguing self-determination has been reduced to political rhetoric).

197. EDWARD MCWHINNEY, SELF-DETERMINATION OF PEOPLES AND PLURAL-ETHNIC STATES IN CONTEMPORARY INTERNATIONAL LAW: FAILED STATES, NATION-BUILDING AND THE ALTERNATIVE, FEDERAL OPTION 6 (2007).

198. Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 122 (Can.).

199. See *id.*

200. Evan M. Brewer, *To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion*, 45 VAND. J. TRANSNAT'L L. 245, 248 (2012).

201. See generally CASSESE, *supra* note 103, at 190-93.

202. Brewer, *supra* note 200, at 248.

203. Vicki C. Jackson, *Comparative Federalism and Comparative Transnational Discourse*, 2 INT'L J. CONST. L. 91, 117-18 (2004).

204. *Id.* at 118.

205. Brewer, *supra* note 200, at 248.

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The result, therefore, is that secession as an exercise of the right to self-determination is case-specific.<sup>206</sup>

The question that arises at this juncture is—at what point is the self-determining unit entitled to exercise a right to secede? This question has been the subject of a number of international law instruments and opinions—judicial and scholarly.<sup>207</sup> Article 20(2) of the ACHPR provides that colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.<sup>208</sup> The Declaration on Friendly Relations, having proclaimed the right to self-determination, states that:

Nothing in the foregoing paragraph shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.<sup>209</sup>

The African Commission on Human Rights declared in *Katangese Peoples' Congress v Zaire* that:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government . . . the Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.<sup>210</sup>

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206. Press Release, General Assembly, Most of World's Population No Longer Lives Under Colonial Rule, but United Nations Decolonization Mission Still Unfulfilled, Fourth Committee Told as Debate Begins, U.N. Press Release GA/SPD/371 (Oct. 8, 2007).

207. See G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 124 (Oct. 24, 1970); see *Katangese Peoples' Congress v. Zaire*, Comm. No. 75/92 (African Commission for Human and Peoples' Rights 1995) in Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (1994–1995), ACHPR/RPT/8th, Annex VI (1995); see Reference re Secession of Quebec [1998] 2 S.C.R. 217 (Can.).

208. African Charter on Human and Peoples' Rights, pt. 1, art. 20, para. 2, June 27, 1981, 21 I.L.M. 58 (1982), available at <http://www.unhcr.org/refworld/type,MULTILATERALTREATY,OAU,,3ae6b3630,0.html>.

209. Declaration on Friendly Relations, *supra* note 182, at pmbl.

210. *Katangese Peoples' Congress v. Zaire*, Comm. No. 75/92 (African Commission for Human and Peoples' Rights 1995) in Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (1994–1995), ACHPR/RPT/8th, Annex VI, para. 6 (1995).

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Similarly, the Supreme Court of Canada opined that:

the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.<sup>211</sup>

The Court then found that such circumstances had not arisen in Quebec.<sup>212</sup>

The principle that can be deciphered from the above statements of international law is that for a people to be entitled to a right to secessionist self-determination, a threshold standard must be reached.<sup>213</sup> In other words, there must be just cause.<sup>214</sup> On this score, Antonio Cassese, having found that the Declaration on Friendly Relations implicitly authorized secession, suggested that the following conditions existing cumulatively might give rise to the right to secede: when the central authorities of a sovereign state (1) persistently refuse to grant participatory rights to a group; (2) grossly and systematically trample on their fundamental human rights; and (3) deny the possibility of reaching peaceful settlement within the frame work of the state structure.<sup>215</sup>

*B. Has the Right to Secessionist Self-Determination Vested on Any Indigenous Group in Nigeria?*

The major process through which most Nigerians have envisaged the reinvention of the Nigerian political framework is the convening of a “Sovereign National Conference” (“SNC”).<sup>216</sup> Although the calls for an SNC gathered renewed momentum with South Sudan’s independence, agitations for an SNC are not novel to the extant Nigerian democracy. The issue emerged in the Nigerian socio-polity in the early 2000s.<sup>217</sup> Those advocating for an SNC are some elites of specific ethnic groups—Yoruba, Igbo, and other minority groups in the Niger-

211. Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 137 (Can.).

212. *Id.*

213. See Declaration on Friendly Relations, *supra* note 182, at 124; see Katangese Peoples’ Congress v. Zaire, Comm. No. 75/92 (African Commission for Human and Peoples’ Rights 1995) in Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights (1994–1995), ACHPR/RPT/8th, Annex VI, (1995); see Reference re Secession of Quebec [1998] 2 S.C.R. 217 (Can.).

214. Jackson, *supra* note 203, at 118.

215. CASSESE, *supra* note 103, at 119-20.

216. *Understanding the Sovereign National Conference (SNC)*, OPEN MIND FOUND., <http://www.openmindfoundation.com/index.php/understanding-the-sovereign-national-conference-snc/> (last visited Feb. 20, 2013).

217. Suberu, *supra* note 158, at 149-50 (explaining Nigeria’s history as a country of widely different peoples and tribes, as well as the amalgamation of North and South Sudan).

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Delta region of Southern Nigeria.<sup>218</sup> These elites suggest that the SNC will provide an occasion to evaluate the desirability of the Nigerian political union.<sup>219</sup> Consequently, the federal government of Nigeria views the idea of an SNC with suspicion, and this constitutes one of the reasons it continues to resist convening the same.<sup>220</sup> This suspicion is, perhaps, not unconnected with the fact that the elites who advocate for an SNC incidentally belong to the indigenous groups that have evinced the greatest dissatisfaction with the Nigerian state.<sup>221</sup> Specifically, among the Yoruba, the minorities of the Niger-Delta, and the Igbo, there have been the emergence of armed militias who confront the state based on their politico-economic dissatisfactions.<sup>222</sup> It is no accident, perhaps, that the groups who see an SNC as unnecessary are from the northern parts of Nigeria—the only part of Nigeria that has no trace of crude oil.<sup>223</sup> The Movement for the Actualization of a Sovereign State of Biafra (“MASSOB”), a movement with membership of some Nigerians of Igbo origin, seeks secession.<sup>224</sup> From this analogy, although it may not have been expressly articulated, the potential secessionist groups in the Nigerian state are the Yoruba, Igbo, and the minority groups in the South-South region—all of the southern part of Nigeria.<sup>225</sup>

#### 1. *The Peoples and Territories of Nigeria*

As already said, whether a right to secede arises is one of assessment,<sup>226</sup> and that assessment proceeds from the notion that there exists a self-determining unit of people linked with territory.<sup>227</sup> Perhaps, this is because the collective and remedial nature of the right presupposes the existence of a “people” who can lay claim to a territory over which they can exercise sovereignty.<sup>228</sup> As Hurst

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218. *Id.* at 150.

219. *Id.*

220. *Id.*

221. *Id.* at 148.

222. INT’L CRISIS GRP., AFRICA REPORT N°119, *supra* note 51, at 1.

223. *See generally id.* (explaining the absence of secession talks in Northern Nigeria because of the oil resource).

224. *Id.*

225. *See id.*

226. Press Release, General Assembly, Most of World’s Population No Longer Lives Under Colonial Rule, but United Nations Decolonization Mission Still Unfulfilled, Fourth Committee Told as Debate Begins, U.N. Press Release GA/SPD/371 (Oct. 8, 2007).

227. CRAWFORD, *supra* note 16, at 116-17; U.N. Charter art. 73, 76; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 274, Advisory Opinion, 1971 I.C.J. 6, 31 (June 21) *aff’d in* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31-33 (Oct. 16).

228. *See* CRAWFORD, *supra* note 16, at 116-17; U.N. Charter art. 73, 76; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 274, Advisory Opinion, 1971 I.C.J. 6, 31 (June 21) *aff’d in* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31-33 (Oct. 16).

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Hannum suggests, implicit in the idea of self-determination is the subjective and objective elements.<sup>229</sup> While the subjective identifies the group's belief of distinctness, the objective element identifies the outward marks of that distinctness.<sup>230</sup> International instruments have avoided defining "people" for the purpose of self-determination, and there has also been no judicial opinion finding a universal meaning for the term.<sup>231</sup> Yet, the Supreme Court of Canada in *Re Secession of Quebec* offered an insight to what may constitute "people" for the purpose of self-determination when it took the view that "people" may include only a portion of the population of a state and that to hold that "people" means the entire population of a state would be duplicative since the relevant instruments which proclaim the right also emphasize the need to protect the territorial integrity of states.<sup>232</sup>

The mere fact that the groups contemplated here and, indeed, those that make up Nigeria today existed politically in some form of statehood before colonial amalgamations shows their peoplehood and historical claim to territory that it appears almost superfluous to attempt any further illustrations.<sup>233</sup> Like Sudan, the ethnic groups that comprise today's Nigeria are not only distinct by a relatively diverse culture and language, they are also geographically separated.<sup>234</sup> Much so that one time British Governor-General of Nigeria, Hugh Clifford, described the peoples of Nigeria as a "collection of self contained and mutually independent Native States, separated from one another . . . by vast distances, by differences of history and traditions, and by ethnological, racial, tribal, political, social and religious barriers."<sup>235</sup>

Historians trace the earliest evidence of human existence in Nigeria to around 9000 BCE in the western region.<sup>236</sup> By 1500, the groups that constitute modern Nigeria had moved significantly from a decentralized political setting to centralized states in the form of kingdoms and emirates.<sup>237</sup> Among these states were Ile-Ife (Ife) to the west of Nigeria; Benin in the Niger-Delta area; kanem-Bornu to the northeast; and smaller Hausa states scattered around the north-central savannah.<sup>238</sup> The Igbo and other ethnic groups that constitute the former eastern region of Nigeria have occupied their territories for well over 3,000

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229. HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION* 30 (1990).

230. *See id.*

231. Javier Leon Diaz, *Minority Rights: Status and Scope* JAVIER LEON DIAZ (2002), [http://www.javier-leon-diaz.com/docs/Minority\\_Status1.htm](http://www.javier-leon-diaz.com/docs/Minority_Status1.htm).

232. Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 124 (Can.).

233. FALOLA, *supra* note 97, at 18-19.

234. M.G. Kaladharan Nayar, *Self-Determination Beyond the Colonial Context; Biafra in Retrospect*, 10 TEX. INT'L L. J. 321, 324 (quoting Hugh Clifford in F. SCHWARZ, *NIGERIA: THE TRIBES, THE NATION, OR THE RACE—THE POLITICS OF INDEPENDENCE* 3 (1965)).

235. *Id.*

236. FALOLA, *supra* note 97, at 18.

237. *Id.* at 22-24; *see also* FED. RESEARCH DIV., *supra* note 76, at 6-7.

238. FALOLA, *supra* note 97, at 22-24.

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years.<sup>239</sup> The Igbo, Yoruba, and the other minority groups in the Niger-Delta region are distinct in language, culture, history, and ancestral beliefs.<sup>240</sup> In addition, they are conscious of their identity and their distinctness from other groups in the Nigerian state.<sup>241</sup> Their territorial concentrations have also not been affected by immigrations or emigrations. Today, in discussions among Nigerians, it is still very common to describe the territories of these groups by reference to their ethnic presence, Igbo-land, Yoruba-land, Benin-land, and so on.<sup>242</sup> Having found that the groups that can potentially be associated to secessionism in Nigeria constitute units of self-determination,<sup>243</sup> the task is to determine whether the right to secede has vested on any of them.

### 2. *Participation in Government and Marginalization*

According to the last resort theory of secession, the right to secessionist self-determination may only accrue when a people are not allowed to achieve self-determination internally—within the existing state by access to government.<sup>244</sup> Nigeria is a federal republic of thirty-six states and 774 local governments.<sup>245</sup> The Yoruba occupy six states to the West. The Igbos have five states to the East while, six states of the South-South region are home to different minority groups.<sup>246</sup> Thus, the sub-federal units are ethnically mixed for the minority groups and homogenous for the majority groups.<sup>247</sup>

Nigeria practices a variant of the U.S. democratic presidential system.<sup>248</sup> At the center, the president is at the apex of the executive hierarchy, and the legislature is bicameral, divided into the Senate and the House of Representatives.<sup>249</sup> Each of the thirty-six states has three Senators while, in the case of House of Representatives members, the entire country is divided into 360 constituencies with each constituency producing a House of Representative

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239. UMOZURIKE, *supra* note 106, at 260.

240. *See generally* FALOLA, *supra* note 97.

241. *See generally id.*

242. *See generally id.* at 19-27 (describing other early ethnic groups and their characteristics).

243. *See supra* Part III.B.

244. *See* Allen Buchanan, *Theories of Secession*, U. SAN DIEGO, DEP'T PHIL., <http://philosophyfaculty.ucsd.edu/FACULTY/RARNESON/Courses/BuchananTheoriesofSecession.pdf> (last visited Feb. 20, 2013).

245. *Nigeria Overview*, MINORITY RTS. GROUP INT'L, <http://www.minorityrights.org/5757/nigeria/nigeria-overview.html> (last visited Feb. 20, 2013).

246. *See id.*

247. *Id.*

248. *See* CONSTITUTION OF NIGERIA (1999), *available at* <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>.

249. *Id.* §§ 4(1), 5(1)(a).

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member.<sup>250</sup> Therefore, the Yoruba, Igbo, and the groups in the South-South region are represented in the national legislature.<sup>251</sup>

Each sub-state in the union has a governor wielding the highest executive powers in that state.<sup>252</sup> The legislative powers of states are exercised by the House of Assembly of each state that is constituted by a delegate from each state constituency.<sup>253</sup> The state constituencies are mapped out from the states in such a way that each state has in its House of Assembly three or four times the number of representatives it has in the Federal House of Representatives.<sup>254</sup> The number of House of Assembly members for each state is a minimum of twenty-four and a maximum of forty.<sup>255</sup> Consequently, all groups in Nigeria including the Yoruba, Igbo, and the minorities of the South-South also have sub-national self-government.<sup>256</sup>

Moreover, the federal character policy for ethno-religious balancing has ensured that in all post-colonial republics in Nigeria, candidates for the major political offices have emerged from different ethnic groups or regions such that at no time in a civilian dispensation have the principal offices been occupied by persons from the same ethnic origin.<sup>257</sup> Accordingly, political parties employ an informal “zoning” formula in which case they rotate the presidential candidacy between the North and South and other elective offices among the ethnic groups.<sup>258</sup> There has been a president of Yoruba origin in Nigeria.<sup>259</sup> The Igbo has produced a Vice President,<sup>260</sup> and on more than one occasion has produced the Senate President,<sup>261</sup> the most senior national legislator and the third highest

250. *Id.* §§ 48-49.

251. *See id.*

252. *Id.* § 5(2)(A).

253. *Id.* §§ 4(6), 90, 117(1).

254. *Id.* § 91.

255. *Id.* §§ 91-92, 112-113.

256. *See id.* §§ 4(6), 5(2)(A), 90, 91, 117(1).

257. The policy ensures that diversity is taken into account in political formations. It is derived from § 14 (3) of the Constitution which provides that “[t]he composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.” §14(4) extend the policy to the sub-states and Local Governments. *See also id.* §§ 147(3), 318.

258. Ayo Awopaju, Olufemi Adelusi & Ajinde Aluwashakin, *Zoning Formula and the Party Politics in Nigerian Democracy: A Crossroad for PDP in 2015 Presidential Election*, 2 RES. ON HUMAN. & SOC. SCI. 11, 15 (2012).

259. *Olusegun Mathew Okikiola Aremu Obasanjo: What a Humble Beginning!*, OSUN DEFENDER, <http://www.osundefender.org/?p=78717> (last visited Feb. 20, 2013).

260. Dotun Ibiwoye, *Igbo Have No Leaders—Ben Obi*, VANGUARD (Jan. 26, 2013), <http://www.vanguardngr.com/2013/01/igbo-have-no-leaders-ben-obi/>.

261. Tony Edike, *2015: President of Igbo Origin Is Achievable, Says Ekweremadu*, VANGUARD (Nov. 11, 2012), <http://www.vanguardngr.com/2012/11/2015-president-of-igbo-origin-is-achievable-says-ekweremadu/#sthash.vH8I44HD.dpuf>.



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national office in Nigeria.<sup>262</sup> The current President of Nigeria is from the South-South region of Nigeria.<sup>263</sup> Members of the Judiciary are appointed by the President on the recommendation of the National Judicial Council.<sup>264</sup> The Yoruba, Igbo, and the groups in the South-South have all produced high-ranking members of the national judiciary. Members of these groups continue to run for different elective offices in line with their aspirations under the platform of various political parties in Nigeria. It becomes pertinent to note for this purpose that the Supreme Court of Canada, in finding that the right to secede has not vested in Quebec,<sup>265</sup> noted the fact that its people occupied prominent positions in the government of Canada and that they were equitably represented in the executive, legislature, and judiciary.<sup>266</sup>

Post-colonial military rule usurped the political space for political participation and representative government.<sup>267</sup> Sporadic coup plots in the post-independence polity caused fear and distrust among military officers who were vicious for power.<sup>268</sup> This, in turn, caused high-ranking military officers to cling to ethnic and religious affiliations for trust and safety. The result was the emergence of a northern military oligarchy.<sup>269</sup> Thus, while the four military governments of 1966-79 were headed by a southern Igbo Christian, northern minority Christian, northern Hausa-Fulani Muslim, and southern Yoruba Christian, respectively, the four military governments of 1984-99 were headed by northern Muslims only.<sup>270</sup> The return to multiparty democracy in 1999 has provided the space for political evolutions of the groups.<sup>271</sup> It is then instructive to note that the right to self-determination, in its internal sense as founded under contemporary international law, admits various forms of self-government (including regional self-government, autonomy, and so on) organized within an

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262. See CONSTITUTION OF NIGERIA (1999), §§ 50(1)(A), 53.

263. Goodluck Johnathan, NIGERIAN NAT'L NEWS, [www.nnn.com.ng/?page\\_id=324](http://www.nnn.com.ng/?page_id=324) (last visited Feb. 28, 2013).

264. CONSTITUTION OF NIGERIA (1999), § 231(1).

265. Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 138 (Can.).

266. *Id.* at paras. 135-36.

267. Ogidan P. Damilola, *Military Disengagement from Politics in Nigeria: General Abdulsalami Abubakar and the Short Transition*, GREENTHESIS (Oct. 23, 2012), <http://greenthesis.wordpress.com/2012/10/23/military-disengagement-from-politics-in-nigeria-general-abdulsalami-abubakar-and-the-short-transition/>.

268. Said Adejumobi, *Guarding the Guardian? The Obasanjo Regime and Military Reform in Nigeria, Development Policy Management Reform*, DPMN BULL., <http://www.dpmf.org/images/military-reform-said-sept-2001.html> (last visited Feb. 20, 2013).

269. *Id.*

270. See generally FALOLA, *supra* note 97, at 115-95.

271. Ayokunle Olumuyiwa Omobowale, *Disorder and Democratic Development: The Political Instrumentalization of Patronage and Violence in Nigeria*, 5 AFR. J. POL. SCI. INT'L REL. 283 (2011), available at <http://www.academicjournals.org/ajpsir/fulltext/2011/June/Omobowale.htm>.

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existing state.<sup>272</sup> It is only when this becomes impracticable that secession becomes an option.<sup>273</sup>

### 3. *Oppression and Gross Human Rights Violations*

Due to military incursions into the post-independence political era in both Nigeria and Sudan, dictatorship and its attendant relegation of the rule of law characterizes a better part of post-independence governance in these states. However, while Nigeria transitioned to civilian democracy in 1999,<sup>274</sup> Sudan experienced a continuation of military rule when President al-Bashir, a military dictator, declared himself President of Sudan in 1993.<sup>275</sup> These events have had their respective effects on the socio-political landscapes that unfolded in both states. It is instructive to recall at this juncture that implicit in Cassese's suggestions of factors that may give rise to a right to secede, is the fact that the human rights violations by the central government should target the self-determining group.<sup>276</sup> While Nigeria and Sudan experience human rights violations, the extent, pattern, and nature are significantly different. Human rights violations and oppression in Sudan were grievous, systemic, and discriminatory, with the government unconscionably targeting specific groups. As discussed below, however, human rights violations in Nigeria assume a dimension that differs from the Sudanese experience.

Generally, two developments provide a spectacle for considering oppression and human rights violations in Sudan—southern resistance to Islamization and the subsequent Darfur crisis.<sup>277</sup> However, only the former is relevant to the analysis intended here since it is directly linked to the independence of South Sudan. The recurrent issue of the state-backed Islamization policy polarized the peoples of Sudan into the Muslim and non-Muslim groups.<sup>278</sup> The approach of the Sudanese government to this issue, which in itself was a consequence of the government's impunity for basic human freedoms, was repressive and arbitrary.<sup>279</sup> The result was gross human rights violations and oppression.<sup>280</sup> The

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272. CASSESE, *supra* note 103, at 124-25.

273. *See* Reference re Secession of Quebec [1998] 2 S.C.R. 217, paras. 122 (Can.).

274. Omobowale, *supra* note 271.

275. *Omar Hassan Ahmad al-Bashir*, *supra* note 142.

276. CASSESE, *supra* note 103, at 119-20.

277. HUMAN RIGHTS WATCH, SUDAN, OIL AND HUMAN RIGHTS 37, 90 (2003), *available at* <http://www.hrw.org/sites/default/files/reports/sudanprint.pdf>.

278. *Id.*

279. *Id.*

280. It is worthy of note that the 1998 Constitution of Sudan, which gave way to the interim constitution incorporating the CPA, contained some basic civil and political rights. *See* CONSTITUTION OF SUDAN (1998), §§ 20-34. However, these constitutional rights were rendered idle by the style of successive Sudanese post-independence governments to act under the cover of a state of emergency and/or a suspension of the constitution.

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ensuing conflict culminated in the declaration of *Jihad* (Holy War) by the current Sudanese government on the peoples of Southern Sudan who formed the bulk of the non-Muslim group.<sup>281</sup> This removed any ambiguity that may have remained as to the government's perception and approach to the war. Consequently, in May 1996 Human Rights Watch reported that "[t]he [Sudanese] government's approach to the war [was] divisive: its aim appear[ed] to be a military victory in which the dominant Islamic and Arabic culture is imposed on militarily defeated non-Islamic and non-Arabic speaking southern and other peoples."<sup>282</sup> This division set the stage for greater human rights violations that accompanied oil exploration that commenced in Sudan in 1999.<sup>283</sup> The existing reproach made the government perceive the southern peoples as a threat to oil exploration in the South.<sup>284</sup> As a result, it employed brute force to displace the centuries-long residents of the oilfields, the Nuer, Dinka, and other Southern Sudanese population, destroying civilian lives and property to provide security for the foreign oil explorers.<sup>285</sup> Its tactics included indiscriminate aerial bombardment, the use of famine and the use of armed militias, among others.<sup>286</sup> Consequently, in 2002, Sudan was the first and only state in the genocide watch list of the Holocaust Museum's Committee of Conscience based in Washington, D.C.<sup>287</sup> Upon the signing of the CPA, Khartoum continued to target southerners residing in the North for persecution and marginalization.<sup>288</sup>

It should be noted that although the ICCPR allows for a state to derogate from its obligations under the Covenant in public emergencies posing a threat to the life of the nation, it excludes a number of rights from those a state can so derogate.<sup>289</sup> These include the right to life and freedom from torture, inhumane, or degrading treatment.<sup>290</sup> The African Commission on Human and Peoples' Right confirmed this position when it noted that the occasion of war did not justify Chad Republic to derogate from its ACHPR obligations.<sup>291</sup> Sudan is a signatory to the ACHPR.<sup>292</sup>

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281. Section 12 (1) of The Constitutional Decree No. 13 provides that *Jihad* is the duty of the National Armed Forces (Sudan's Army). See LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 29, at 24-25.

282. HUMAN RIGHTS WATCH, BEHIND THE RED LINE: POLITICAL REPRESSION IN SUDAN (1996), available at <http://www.hrw.org/legacy/reports/1996/Sudan.htm>.

283. HUMAN RIGHTS WATCH, SUDAN, OIL AND HUMAN RIGHTS, *supra* note 277, at 36.

284. *Id.*

285. *Id.*

286. INT'L CRISIS GRP., AFRICA REPORT N°39, *supra* note 28, at 4.

287. *Id.*

288. Amnesty Int'l, *Human Rights Violations Surrounding the South Sudan Referendum*, AI Index AFR 64/002/2011 (Jan. 11, 2011), available at <http://www.amnesty.org/en/library/asset/AFR54/002/2011/en/866b3a87-50e5-4431-9748-f0b6356e542b/afr540022011en.pdf>.

289. International Covenant on Civil and Political Rights, art. 4, Mar. 23, 1976, 999 U.N.T.S. 171.

290. *Id.* art. 4(2), 7.

291. Commission Nationale des Droits de l'Homme et des Libertés/Chad, Comm. No. 74/92 (African Commission for Human and Peoples' Rights 1995) in Eighth Ordinary Session of the African Commission on Human and Peoples' Rights (1994-1995), para. 21 (1995), available at <http://www1.umn.edu/humanrts/>

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In Nigeria, the transition to civil rule in 1999 was greeted with much expectation and hope.<sup>293</sup> Unfortunately, successive civilian governments have not met these expectations.<sup>294</sup> The entire Chapter IV of the Nigerian Constitution is devoted to the provision of civil and political rights,<sup>295</sup> while Chapter II (Fundamental Objectives and Directive Principles of State Policy) is replete with elaborate provisions on socio-economic rights.<sup>296</sup> The latter are, however, non-justiciable and remain mere state aspirations.<sup>297</sup> Nevertheless, human rights violations continue unabated in Nigeria. There appears to be unanimity among international human rights groups on the nature and extent of the major human rights issues that inhibit the democratic process in Nigeria.<sup>298</sup> These violations can be subsumed under two major issues—police brutality and the government’s failure to adequately redress human rights violations.<sup>299</sup>

Nigeria currently has a central police force where all police officers in the country serve irrespective of ethno-religious group origin or membership.<sup>300</sup> Before colonialism, the groups that now comprise Nigeria used youth groups for policing and law enforcement.<sup>301</sup> A formal and regimented police force was established with the advent of colonial rule.<sup>302</sup> The practice of colonial administrators was to draft police officers to areas far from their ethnic origins to bridge the deep ethnic loyalty they thought could be counterproductive to their exploitative ends.<sup>303</sup> Thus, from its colonial inception the nature of the Nigerian

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africa/comcases/74-92.html.

292. *Ratification Table: African Charter on Human and People’s Rights*, AFR. COMM’N ON HUM. & PEOPLE’S RTS., <http://www.achpr.org/instruments/achpr/ratification/> (last visited Feb. 20, 2013).

293. Omobowale, *supra* note 271.

294. *See generally id.* (examining the instrumentalization of patronage and violence in Nigeria’s democratic structure).

295. CONSTITUTION OF NIGERIA (1999), §§ 33-46.

296. *Id.* §§ 13-24.

297. *Id.* § 6(6)(e).

298. *See generally* A.A. Idowu, *Human Rights, Democracy and Development: The Nigerian Experience*, 8 RES. J. INT’L LEGAL STUD. 27 (2008), available at <http://notunprojonmo.com/wp-content/uploads/2012/03/Human-Rights-Democracy-and-Development-The-Nigerian-Experience.pdf>.

299. *See* Human Rights Watch, *Country Summary: Nigeria*, *supra* note 4, at 2; *see also* HUMAN RIGHTS WATCH, “REST IN PIECES”: POLICE TORTURE AND DEATHS IN CUSTODY IN NIGERIA (2005), available at <http://www.hrw.org/sites/default/files/reports/nigeria0705.pdf> (addressing the failure of Nigerian authorities to halt the human rights violations of the Islamist group Boko Haram); *see also* Brief for the ECOWAS Court of Justice as Amicus Curiae, SERAP & Ors v. The Federal Republic of Nigeria & Ors, ECW/CCJ/APP/10/10 (2012), available at <http://www.amnesty.org/en/library/asset/AFR44/005/2012/en/fc14a92d-ed7b-4fc4-aff9-2ac353c71405/af440052012en.pdf>; *see also* U.S. DEP’T OF STATE, HUMAN RIGHTS REPORTS 2010 NIGERIA (2010), available at <http://www.state.gov/documents/organization/160138.pdf>.

300. *See* Samuel A. Onimisi, *Rehash: The Nigeria Police Force!*, LEADERSHIP (May 2, 2012, 8:41 AM), [http://www.leadership.ng/nga/samuel\\_onimisi/15393/2012/02/05/rehash\\_nigeria\\_police\\_force.html](http://www.leadership.ng/nga/samuel_onimisi/15393/2012/02/05/rehash_nigeria_police_force.html).

301. HUMAN RIGHTS WATCH, BEHIND THE RED LINE, *supra* note 282, at 9.

302. HUMAN RIGHTS WATCH, “REST IN PIECES,” *supra* note 299, at 10.

303. *See id.* at 9-10.

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Police was antagonistic and confrontational.<sup>304</sup> Today, police violations in Nigeria include torture, extortion, arbitrary arrest, excessive periods of pre-trial detention, and extra-judicial executions.<sup>305</sup> Other security agencies do not fare better. Corruption in government and in the bureaucratic hierarchy of the police force, underfunding due to long years of neglect resulting in lack of resources, inadequate laws, inadequate police training, and increase in crime rate due to unemployment<sup>306</sup> provide new reasons for the poor human rights records of the Nigerian Police.<sup>307</sup> However, these human rights violations do not target any group for oppression.<sup>308</sup> A 2005 study by Human Rights Watch is of particular relevance on this score since it covered major cities in the North, East, and West of Nigeria being homes to different ethno-religious groups: Kano, Enugu, and Lagos respectively.<sup>309</sup> The incidents and nature of human rights violations by the police were basically the same in all the locations, and in respect of those targeted the report had this to say: “[o]rdinary criminal suspects who have been detained and accused of crimes ranging from petty theft to armed robbery and murder are those most vulnerable to torture and death in custody.”<sup>310</sup>

Equally worrisome is the failure of successive Nigerian Governments to adequately redress incidents of gross human rights violations.<sup>311</sup> Most large-scale human rights violations since 1999 have been the result of inter-group violence and killings.<sup>312</sup> Violent conflicts have erupted causing massive fatalities in Plateau State, a sub-state in Nigeria, between “settlers” and aborigines of the state with respect to socio-political benefits.<sup>313</sup> The same state continues to be the center of inter-communal clashes resulting in massive civilian fatalities.<sup>314</sup> Political opportunism among politicians who mobilize or whip up ethnic and/or religious sentiments for their political gains, create acrimony among political parties, politicians, and their loyalists, resulting in inter-group violence.<sup>315</sup> For instance, the national elections of 2011 polarized the country along ethno-religious lines

304. *Id.* at 10.

305. U.S. DEP’T OF STATE, *supra* note 299.

306. For instance, the Nigerian Police Force Order 237 (Rules for Guidance in Use of Firearms by Police) provides problems of incompatibility with human rights standards. That Order allows the Police to shoot a suspect or detainee who attempts to escape or avoid arrest.

307. HUMAN RIGHTS WATCH, *BEHIND THE RED LINE*, *supra* note 282, at 11-13.

308. *See id.*

309. *See id.* at 7-8.

310. *Id.* at 29.

311. HUMAN RIGHTS WATCH, *A HUMAN RIGHTS AGENDA FOR NIGERIA’S 2007 GENERAL ELECTIONS AND BEYOND 2* (2007), available at <http://www.hrw.org/legacy/backgrounder/africa/nigeria0207/nigeria0207web.pdf>; CASSESE, *supra* note 103, at 119-20.

312. *Nigeria: Post-Election Violence Killed 800*, HUM. RTS. WATCH (May 17, 2011), <http://www.hrw.org/news/2011/05/16/nigeria-post-election-violence-killed-800>.

313. *Nigeria: New Wave of Violence Leaves 200 Dead*, HUM. RTS. WATCH (Jan. 27, 2011), <http://www.hrw.org/news/2011/01/27/nigeria-new-wave-violence-leaves-200-dead>.

314. *Id.*

315. INT’L CRISIS GRP., *AFRICA REPORT N°81, LESSONS FROM NIGERIA’S 2011 ELECTIONS 3-9* (2011).

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and a conflagration ensued when groups in the north of Nigeria started a protest against the loss of a northern candidate at the presidential elections to a candidate of southern origin.<sup>316</sup> About 800 people that cut across all groups were reported dead.<sup>317</sup> “Federal and state authorities fail to break the cycle of violence by failing to hold the perpetrators of these crimes accountable.”<sup>318</sup> This failure on the part of the government extends to extra-judicial killings by security forces in a bid to quell violent inter-communal clashes.<sup>319</sup> Recommendations or reports of committees set up by federal and state governments to investigate incidents of inter-group violence yield little or no result since neither prosecution of suspects nor compensation of victims are the outcome of such investigations.<sup>320</sup> Corruption, political nepotism, the underlying culture of impunity caused by long years of military rule and an over-burdened judiciary account for the failure of government and its agencies to adequately act in the best regards of human rights,<sup>321</sup> rather than the desire to oppress or subjugate particular groups.

The cycle extends to the violent campaign of Boko Haram.<sup>322</sup> The sect, beginning with the meaning of its name—“western education is a sin”—has waged a war on everything that signifies western civilization, the Nigerian state, and all who stand on the way of its fundamentalism.<sup>323</sup> Therefore, it is a group of insurgents, and its war is against the state.<sup>324</sup> This is evident from its attack on the UN building and the Police Headquarters, both in the state’s capital, Abuja. According to Human Rights Watch, “[s]uspected Boko Haram members, often riding motorcycles and carrying Kalashnikov rifles under their robes, have gunned down numerous Christian worshipers, police officers, and soldiers, and assassinated local politicians, community leaders, and Islamic clerics who oppose the group.”<sup>325</sup>

*C. Conclusions on Secession in Nigeria*

It should be recalled once more that Cassese’s suggestions as given above include factors that should exist cumulatively.<sup>326</sup> Therefore, the self-determining group having been identified must also be such that the group is not allowed representation or access to government and must be the subject of oppression and

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316. *Nigeria: Post-Election Violence Killed 800*, *supra* note 312.

317. *Id.*

318. *Nigeria: New Wave of Violence Leaves 200 Dead*, *supra* note 313.

319. *Id.*

320. *Id.*

321. HUMAN RIGHTS WATCH, A HUMAN RIGHTS AGENDA, *supra* note 311, at 2.

322. *See Boko Haram*, ISVG, [http://vkb.isvg.org/Wiki/Groups/Boko\\_Haram](http://vkb.isvg.org/Wiki/Groups/Boko_Haram) (last visited Apr. 1, 2013).

323. *Id.*

324. *Id.*

325. *Nigeria: Boko Haram Widens Terror Campaign*, *supra* note 5.

326. CASSESE, *supra* note 103, at 119-20.

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gross human rights violations by the central government.<sup>327</sup> There are peoples linked with territories (self-determining units) in Nigeria including the Yoruba, Igbo, and the groups in the South-South.<sup>328</sup> However, the assessment above shows that the right to secede has not vested in any of these groups since none of them can claim to be under attack or the subject of oppression or persecution by the state as was the case in Sudan. Even more is the fact that all these groups have a form of self-government and continue to be represented in government at all levels.<sup>329</sup>

Finding that secession cannot be legally justified in Nigeria and that inter-group violent conflict continues to destabilize the Nigerian socio-polity fifty-two years post-independence supports the truth that a reconsideration of Nigeria's internal political system is apposite and crucial to inter-group accommodation and coexistence. It is to this that I now turn.

#### IV. CONSTITUTIONAL FEDERALISM AS A MECHANISM FOR CONFLICT MANAGEMENT

##### A. *Contextualizing the Problem of Inter-Group Conflict in Nigeria*

Inter-group conflict, as already evident, is not only a bane of socio-political problems in Nigeria, it has assumed a dimension that threatens the country's unity.<sup>330</sup> This problem can be explained in light of the consistent patterns its direct causes have exhibited over time.<sup>331</sup> Inter-group conflicts have erupted from what is generally referred to in Nigeria as the "national question."<sup>332</sup> Closely related to the issue of "national question" is a clash of identities, cultures, and aspirations. Differences in groups' cultures and aspirations or priorities, which were hitherto suppressed by the guns of the military era, are gaining increased salience with the return to democracy in 1999.<sup>333</sup> The *Shari'a* issue is bi-dimensional since it reflects both the problem of "national question" and a clash of groups' aspirations in Nigeria.<sup>334</sup> For instance, debates about the role *Shari'a* should play in the Nigerian state continue to generate tensions between Muslims and Christians, on the one hand, and among Muslim sects in Nigeria, on the other

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327. *Id.*

328. *Nigeria Overview*, *supra* note 245.

329. *See History*, EMBASSY FED. REP. NIGERIA, <http://www.nigerianembassy.or.kr/nigeria/history.asp> (last visited Feb. 19, 2013).

330. *See generally* INT'L CRISIS GRP., AFRICA REPORT N°113, *supra* note 10, at 1.

331. *See generally id.*

332. "National Question" in Nigeria is used in reference to "how to structure the state so that every ethnic or religious group and every Nigerian as an individual becomes a stakeholder." INT'L CRISIS GRP., AFRICA REPORT N°113, *supra* note 10, at 2.

333. *Id.* at 15.

334. Eyene Okpanachi, *Ethno-Religious Identity and Conflict in Northern Nigeria*, CETRI (Jan. 10, 2012), <http://www.cetri.be/spip.php?article2470>.

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hand.<sup>335</sup> In the year 2000, the expansion of *Shari'a* from personal law into the penal system of some states in the northern parts of Nigeria resulted in violent Christian-Muslim conflict in Kano and Kaduna states, which left thousands of people dead.<sup>336</sup>

Violent inter-group conflicts have also been the result of unhealthy political competitions and rivalries among groups in Nigeria, especially with regards to who controls the center.<sup>337</sup> Consequently, national elections remain bitterly contested and highly volatile.<sup>338</sup> For instance, the aftermath of the national presidential elections in 2011 was a conflagration that pitched some northern groups against some southern groups due to protests by the northern groups that a candidate from the north lost at the presidential election.<sup>339</sup> The issue of national census also continues to spark tensions. Since socio-political benefits are tied to population, groups perceive the census figures as yet another mechanism for certain groups to secure socio-political dominance and undue economic benefits.<sup>340</sup> Consequently, the latent problems underlying inter-group conflicts in Nigeria can be unbundled to include: the “national question;” a clash in groups’ identities and aspirations; and inter-group rivalry and competition.

*B. Constitutional Federalism*

Experts of federalism concede that, as with most legal or social concepts, federalism has different definitions.<sup>341</sup> However, Peter Schuck defines federalism as “a system that divides political authority between a nation-state and sub-national polities within its territory so that both the national and sub-national polities directly govern individuals within their jurisdiction, and that confers both national and sub-national citizenship.”<sup>342</sup> Implicit in the foregoing, and indeed in virtually all definitions of federalism, is that a federal structure must involve a distribution of powers between at least two levels of government.<sup>343</sup> To that extent, Nigeria is a federal republic and currently has the longest surviving federal system in Africa where the predominant tendency is to regard federalism as synonymous to disunity or disintegration.<sup>344</sup> It is a preponderant notion among

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335. INT’L CRISIS GRP., AFRICA REPORT N° 168, *supra* note 48, at 11-15 (2010).

336. *Id.* at 13.

337. *See Nigeria: Post-Election Violence Killed 800*, *supra* note 312.

338. *Id.*

339. *Id.*

340. ROTIMI T. SUBERU, FEDERALISM AND ETHNIC CONFLICT IN NIGERIA 13-14 (2001).

341. Polycarp Onwubiko, *National Security: Can Nigeria Have a Different Definition of Federalism?*, VANGUARD (Jan. 27, 2013), <http://www.vanguardngr.com/2013/01/national-security-can-nigeria-have-a-different-definition-of-federalism/>; *see* Peter H. Schuck, *Federalism*, 38 CASE W. RES. J. INT’L L. 5, 5 (2006).

342. Schuck, *supra* note 341, at 5.

343. *Id.* at 6.

344. Dean E. McHenry, Jr., *Federalism in Africa: Is it a Solution to, or a Cause of, Ethnic Problems?*, FEDERO, [http://www.federo.com/pages/Federalism\\_in\\_Africa.htm](http://www.federo.com/pages/Federalism_in_Africa.htm) (last visited Apr. 1, 2013).



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legal and social science scholars that federalism is one system apposite for multi-cultural states.<sup>345</sup> Since the theoretical emphasis is always on context rather than form,<sup>346</sup> the system possesses the attribute of flexibility, which ensures its adaptability to intricate political dispensations that may be relevant to inter-group conflict mitigation.<sup>347</sup>

There is no doubt that the adoption of federalism in Nigeria has, to an extent, contained ethno-religious fragmentation, conflict and other socio-political problems.<sup>348</sup> Specifically, that Nigeria has not experienced another full-fledged war since 1970 is, to a large extent, attributable to its federal practice.<sup>349</sup> Multi-state federalism in Nigeria has, on the one hand, provided the diverse ethnic peoples an avenue for self-determination through self-government, and on the other hand, it has addressed the issue of disparity, which disturbs many federal systems including the Nigerian federalism of the first republic (1960-66).<sup>350</sup> With the emergence of democracy, ethnic groups, especially those in the minority, have access to government. Similarly, there has been a more robust site for group deliberations, which has helped to create a common front against dictatorial tendencies.<sup>351</sup> For instance, it was the political process and especially the public outrage of all groups at public and private forums that forestalled the inordinate ambition of President Obasanjo to remain as president beyond his constitutionally guaranteed term in the periods leading to the 2007 elections.<sup>352</sup>

What is more, the political scientist, Rotimi Suberu has identified that it was the Nigerian federal structure that helped defuse what he called the “*Shari’a* bomb.”<sup>353</sup> He explained that the federal system ensured that the implementation of the law in some northern states recently did not develop into a foisting of Islamic theocracy on the entire country.<sup>354</sup> Unfortunately, however, post-1999 events in Nigeria show that the Nigerian federalism falls short of addressing group fragmentation and the issues that underlie inter-group conflict in the country.

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345. Schuck, *supra* note 341, at 8.

346. Lovise Aalen, *Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: The Case of Ethiopia*, 13 INT’L J. MINORITY & GROUP RTS. 243, 244 (2006).

347. *Id.*

348. Andrew F. Clark, *The Crisis of Nigerian Federalism*, H-NET (Mar. 2003), <http://www.h-net.org/reviews/showpdf.php?id=7324>.

349. *See generally* INT’L CRISIS GRP., AFRICA REPORT N°113, *supra* note 10; Clark, *supra* note 348.

350. Clark, *supra* note 348.

351. INT’L CRISIS GRP., AFRICA REPORT N°113, *supra* note 10, at 16.

352. *Id.*

353. Suberu, *supra* note 158, at 145.

354. *Id.*

*Global Business & Development Law Journal / Vol. 26**C. Theories for Constitutional Engineering in Divided Societies*

There are a plethora of theories for constitutional engineering for divided societies.<sup>355</sup> However, these theories are variations of two broad schools of thought—namely, consociation and integration.<sup>356</sup> Leading these schools of thought are two renowned scholars—Arend Lijphart and Donald Horowitz, respectively.<sup>357</sup> Both scholars developed their theories from democracy.

Consociational democracy is expressed by the presence of four strategic principles: grand coalition, segmented autonomy, mutual veto, and proportional representation (“PR”).<sup>358</sup> According to Lijphart, coalition and autonomy are complementary and form the basic characteristics of consociation.<sup>359</sup> Coalition, also called power-sharing, refers to the partnership (or cooperation) among leaders of the different groups in the national government which should deal with issues of common concern.<sup>360</sup> Segmented autonomy requires that the groups be segmented and bestowed with the decision-making capacity such that different groups decide on internal matters concerning them.<sup>361</sup> The mutual veto is a guarantee against dominance in the national decision-making process.<sup>362</sup> By virtue of majority rule—a principle of democracy—minorities may not be able to impact state decisions.<sup>363</sup> An arrangement for mutual veto will ensure minorities’ congruence to major decisions affecting them.<sup>364</sup> PR should then be the basic standard for political formations and representations in the national bureaucracy.<sup>365</sup>

Consociation rejects leaving the polity to the dictates of majority rule, but finds that the groups should be autonomous and treated equally at the center where they are represented based on proportionality.<sup>366</sup> Lijphart emphasizes his preference for the parliamentary system of government and its collegial decision-making cabinet over the one-man presidential system, which utilizes a mere advisory cabinet.<sup>367</sup> The idea is that the collegial decision-making executive in the

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355. See Arend Lijphart, *Consociation and Federalism: Conceptual and Empirical Links*, 12 CAN. J. POL. SCI. 499, 500 (1979); see HOROWITZ, *supra* note 11, at 613-17.

356. See Lijphart, *supra* note 355, at 500; see HOROWITZ, *supra* note 11, at 613-17.

357. See Lijphart, *supra* note 355, at 500; see HOROWITZ, *supra* note 11, at 613-17.

358. Lijphart, *supra* note 355, at 500.

359. *Id.*

360. Eghosa E. Osaghae, *Managing Multiple Minority Problems in a Divided Society: the Nigerian Experience*, 36 J. MODERN AFR. STUD. 1 (1998), available at <http://intractableconflict.org/vky/hb-readings/multiple-minorities.pdf>.

361. Lijphart, *supra* note 355, at 500.

362. *Id.* at 501.

363. *Id.*

364. *Id.*

365. *Id.*

366. Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 100 (2004).

367. *Id.* at 101.

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parliamentary system is crucial to the formation of effective coalitions by the groups, or where the groups are not easily identifiable, by the political parties.<sup>368</sup> Lijphart contemplates that autonomy may be achieved through federalism, where the groups are geographically separated, or decentralization of powers, where the groups are geographically mixed.<sup>369</sup> To this end, he notes that the federal structure should comprise relatively small component units to guarantee homogeneity, and powers should be generously decentralized.<sup>370</sup>

On the other hand is the Horowitz integration model, which conceives of a state where the groups are allowed to freely integrate at the national level while regulating the actions of politicians to ensure that they act towards ethnic accommodation.<sup>371</sup> Both theories recognize, however, that there should be some form of decentralization of powers to the component groups.<sup>372</sup> But while consociation envisages homogenous sub-states,<sup>373</sup> the integration model holds further that where homogenous states cannot be achieved because groups are geographically mixed, heterogeneous states should be created if the purpose is to reduce tension at the center.<sup>374</sup>

Nevertheless, Horowitz finds some assumptions of consociation problematic in practical terms.<sup>375</sup> To Lijphart's suggestion that cooperation among political leaders in European states has produced stability in spite of heterogeneity, he contends that diversity in Europe is not as extensive as the ascriptive group divisions in Africa or Asia.<sup>376</sup> He argues that the reliance on cooperation among group leaders for coalitions is problematic because deeply-divided societies rarely consist of groups having allegiance to any specific leadership,<sup>377</sup> and in any case, the assumption that such leaders will always act in the best interest of ethnic accommodation is unsafe.<sup>378</sup> Alternatively, he contends that politicians can only be sure to act towards conflict prevention if the structures so induce them.<sup>379</sup> For such an inducing structure, he focuses on the electoral system.<sup>380</sup> According to him, electoral mechanisms that provide incentives for groups to work together (integrate) will produce moderate representatives beneficial to all.<sup>381</sup> Lijphart counters that this proposition will lead to majority rule—domination of

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368. *Id.* at 103.

369. *Id.* at 104-05.

370. *Id.* at 105.

371. HOROWITZ, *supra* note 11, at 613-17.

372. *Id.* at 617.

373. *Id.*; see also Lijphart, *supra* note 366, at 105.

374. HOROWITZ, *supra* note 11, at 613-17.

375. *Id.* at 570-71.

376. *Id.* at 571-72.

377. *Id.* at 573.

378. *Id.* at 564.

379. *Id.* at 573.

380. *Id.*

381. *Id.* at 184-96.

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minorities who will rise up in their own defense with time.<sup>382</sup> Integration prefers a presidential system of government since it allows for “one man” and not “one ethnic group” (where political parties are ethnically derived) to control executive powers.<sup>383</sup>

*D. The Nigerian Constitutional Model of Integration*

Nigeria operates an integration model of constitutional federalism.<sup>384</sup> It embraced, at least constitutionally, the system in 1979 when it adopted a variant of the U.S. model of presidential federalism.<sup>385</sup> In consonance with Horowitz’s postulations, Nigeria currently has thirty-six homogenous and heterogeneous sub-states. This is due to group mixture in some parts of the country and homogenous concentration in other parts. The president is both the head of state and government. He appoints an advisory cabinet. Consequently, there is no place for coalition governments in the executive—a fundamental requirement of consociation.<sup>386</sup> Rather, in unison with Horowitz’s theory of electoral regulation, the constitution adopts two mechanisms to ensure cooperation among political leaders; namely, that the president must have at least one-quarter of the total votes cast at the election in each of at least two-thirds of all the states in the federation and the federal capital territory.<sup>387</sup> Second, for a political party to be registered, it is required that its membership be open to all citizens irrespective of place of origin and that its name, symbol, or logo does not contain any ethnic or religious connotation giving an impression that its activities are limited to any particular part of the country.<sup>388</sup> The purpose of this, according to Horowitz, is to provide incentives for politicians to integrate on a cross-ethnic basis and thus imbibe inter-ethnic accommodation and approach to politics, which in turn will ultimately produce moderate representatives.<sup>389</sup>

It is significant that in the 2003 general elections in Nigeria, the People’s Democratic Party (“PDP”) won thirty-two of the thirty-six State Houses of Assembly and sixty-two percent of the total presidential votes for its southern Christian candidate, General Olusegun Obasanjo (retired).<sup>390</sup> While this gives an indication of effective integration, it is equally significant that the All Nigerians

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382. *Id.* at 566.

383. *Id.* at 205.

384. See generally Broadus N. Butler, *The 1979 Constitution of the Federal Republic of Nigeria and the Constitution of the United States of America: A Historical and Philosophical Comparison*, 30 HOWARD L. J. 1025 (1987).

385. See generally *id.*

386. Lijphart, *supra* note 366, at 103.

387. CONSTITUTION OF NIGERIA (1999), §§ 133-34.

388. *Id.* §§ 222, 223(b), (e).

389. See HOROWITZ, *supra* note 11, at 613-17.

390. Festus C. Nze & Paul King, *Nigeria*, in HANDBOOK OF FEDERAL COUNTRIES 228, 235 (Ann L. Griffiths ed., 2005), available at <http://www.forumfed.org/libdocs/FedCountries/FC-Nigeria.pdf>.

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Peoples' Party ("ANPP") led by a northern Muslim, General Muhammadu Buhari (retired) won all seven of the State Houses of Assembly elections in the conservative Muslim states of the North.<sup>391</sup> This has been interpreted as, perhaps, reinforcing ethno-regionalism.<sup>392</sup> The question then is why has the attempt at integration not effectively managed diversity or secured ethnic accommodation in Nigeria? Many observers agree that the answers to this question lie in the history of the Nigerian presidential federalism.

#### *E. Origins of the Nigerian Federalism*

Nigeria inherited its federalism from British colonial rule after consultations with Nigerians at the time indicated a preference for regional autonomy and political space.<sup>393</sup> Consequently, the four Constitutions that prescribed political arrangements—from 1946 to the first military coup in 1966—concentrated powers into the three regions in which the country was divided.<sup>394</sup> The system of government was parliamentary as a result of colonial legacy.<sup>395</sup> The three regions—East, West, and North that made up the federal system at this time were territorially delimited along the lines of the three major ethnic groups—the Igbo, Yoruba, and Hausa-Fulani respectively.<sup>396</sup> Since the three political parties in the country at the time were also ethnic-based, the center became a battle-field for ethnic competition and rivalry.<sup>397</sup> The northern region dominated the national government through its numerical strength.<sup>398</sup> In fact, that region was almost twice the size of the other two regions put together.<sup>399</sup>

The result was that issues like national census and elections became problematic and incited chaos as the western and eastern regions felt cheated by the northern dominance and what seemed to be its hegemony.<sup>400</sup> With the agitations of minority groups for political space, the political tension deteriorated rapidly, having its repercussions on virtually every sphere of the country's national and sub-national life.<sup>401</sup> This was one of the major reasons for the first military intervention in Nigerian politics through the January 15, 1966 coup.<sup>402</sup> The military adopted a unitary system as a panacea for inter-ethnic rivalry and

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391. *Id.*

392. *Id.*

393. INT'L CRISIS GRP., AFRICA REPORT N°119, *supra* note 51, at 2.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. Ema Orji, *Issues on Ethnicity and Governance in Nigeria: a Universal Human Rights Perspective*, 25 FORDHAM INT'L L. J. 431,441-42 (2001).

401. *Id.* at 443.

402. *Id.* at 443-44.

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tension.<sup>403</sup> However, the subsequent military government that came to power after the July 29, 1966 coup reverted to federalism and, in a failed bid to avert the civil war, divided the three regions into twelve states in 1967.<sup>404</sup> The aftermath of the war, which was basically a struggle for secession, inculcated a precautionary consciousness in the military regimes that followed and there was a deliberate and systematic effort to concentrate powers at the center.<sup>405</sup> Nigeria, thus, became a federation in form, but unitary in terms of the vertical distribution of powers.<sup>406</sup> Consequently, unlike the coming together of sovereignties as with the U.S. model of federalism, the Nigerian federalism was historically non-aggregative being one where powers were devolved to the sub-national units from a hitherto unitary structure.<sup>407</sup> In other words, the sub-states have always had such powers that the national government felt comfortable to devolve.

*F. The Need to Reconsider the Nigerian Federal System*

The idea here is not to identify the numerous problems that confront Nigeria. Rather, it is to identify some basic issues in the Nigerian federal system that have circumvented its efficiency in the management of group fragmentation and specifically the root causes of inter-group conflicts in the country.

*1. Distribution of Powers*

Horowitz himself notes that where there are sub-ethnic cleavages in homogenous sub-states, devolution of a “generous” share of powers will likely reduce conflict at the center.<sup>408</sup> Festus Nze and Paul King similarly find that a cardinal principle of federal arrangements is that powers “should be so weighted as to maintain a fair balance between the national and regional governments.”<sup>409</sup> They, however, conclude that Nigeria has over time breached this principle, and, as such, it is run as a unitary state masqueraded as federal.<sup>410</sup> By section 4(2) of the Nigerian Constitution, the national government has exclusive powers over any of the items contained in the Exclusive legislative list and a concurrent jurisdiction with sub-states over items in the Concurrent List where its laws prevail in cases of inconsistencies.<sup>411</sup> Concentration of powers in the national

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403. *Id.* at 444.

404. INT’L CRISIS GRP., AFRICA REPORT N°119, *supra* note 51, at 2.

405. *Id.*

406. *Id.*

407. Suberu, *supra* note 158, at 139.

408. HOROWITZ, *supra* note 11, at 613-14.

409. Nze & King, *supra* note 390, at 234 (quoting B.O. NWABUEZE, FEDERALISM IN NIGERIA UNDER THE PRESIDENTIAL CONSTITUTION 2 (1983)).

410. *Id.*

411. The Exclusive list contains sixty-eight items including: the accounts of the federal government and

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government as a means to foster national integration has been noted as one of the major causes of militant ethnic nationalism, conflict and political disorder in sub-Saharan Africa.<sup>412</sup> In Nigeria, it minimizes the depth of group loyalty and affinity in the country.

“Asymmetrical federalism in general makes special dispensations possible, but more possible at the periphery than near the center . . . .”<sup>413</sup> Post-colonial experience in Nigeria shows that the national government cannot represent a coalescence of the diverse, and often conflicting, aspirations of the different ethno-religious groups. Rather, centralization has caused groups to imbibe the feeling that only the national government can placate their plight, and so they direct their agitations as such bypassing the sub-state authorities. The result is that most ethnic and religious tensions transcend the sub-national level. The Boko Haram saga illustrates this point.<sup>414</sup> Another example is the agitation for Islamic banking by some Muslim elites. If states shared any competence over banks or banking that agitation would probably have been limited within the confines of particular state polities and not spark a country-wide Christian/Muslim tension, as was the case. Consequently, federalism in Nigeria has not fully achieved conflict quarantine as Horowitz contemplates.<sup>415</sup>

Over-centralization of powers at the national level has also occasioned the continued presence of most of the socio-political problems that led to the collapse of the first republic and the subsequent civil war. Particularly, the national government for its might remains attractive and thus, continues to be a battlefield for ethno-religious groups.<sup>416</sup> Politicians who aspire to become benefactors for their ethnic groups recognize that such ambitions can only be achieved at the center.<sup>417</sup> Consequently, national elections remain very problematic often culminating in violence, while national policies such as revenue allocation, rotational presidency, national census, and creation of new sub-federal units (states and local governments) are tensely contested along ethno-religious lines.<sup>418</sup> This chauvinism has heralded a “race to the presidency” situation in Nigeria

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of the offices, courts and authorities thereof; aviation, including airports; bankruptcy and insolvency; banks, banking, bills of exchange; defense, police, marriage including Islamic and customary marriages, criminal records, labor, nuclear energy, water, broadcasting and television transmission, posts, telegraphs and telephones, mines and minerals, including oil fields, oil mining, evidence, insurance and so on while the Concurrent List includes items like allocation of revenue, antiquities and monuments, archives, collection of taxes, electoral laws, electoral powers and so on. CONSTITUTION OF NIGERIA (1999), § 4(5), sched. II pt. I, pt. II.

412. Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE J. INT'L L. 51, 53 (2003).

413. Donald L. Horowitz, *The Many Uses of Federalism*, 55 DRAKE L. REV 953, 960 (2007).

414. Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy—Agricultural Tariffs and Subsidies*, 9 U. ST. THOMAS L.J. 5, 20 (2011).

415. Horowitz, *supra* note 413, at 960.

416. Suberu, *supra* note 158, at 142.

417. *Id.* at 148.

418. SUBERU, *supra* note 340, at 9-15; *see also* Suberu, *supra* note 158, at 147-49.

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where every group seeks to assert itself at the center to avoid domination.<sup>419</sup> Without minimizing the intention to restore the pre-colonial religious order in the northern part of Nigeria that may have remotely driven the recent *Shari'a* expansion by some northern states, it is perhaps true that its immediacy had a political undertone.<sup>420</sup> With the shift of the presidency to a southern Christian in 1999, it became exigent for the Muslim North who had controlled federal powers since 1984 to find a basis for a renewed alliance and unity in order to guarantee their formidability in future presidential elections.<sup>421</sup>

Over-centralization of powers has also resulted in a seeming struggle between the national government and those of the sub-states. The emergence of the Nigeria Governors' Forum, an organization of Nigerian state governors in 1999, and other like national and regional alignments was necessitated by the need to find a common front against the hegemony and dominance of the federal government.<sup>422</sup>

With the creation of multi-federal sub-states and the increase in oil revenues came the restructuring of the revenue formula in Nigeria in the 1960s.<sup>423</sup> The former order of transferring revenue to the place of derivation was abandoned for a central revenue formula, where revenues are transferred from the oil rich regions of the South to a Federal Account for redistribution to all sub-federal units.<sup>424</sup> The resulting fiscal reality where sub-units obtain over eighty percent of their revenue from the central government has been described as a violation of one cardinal condition of fiscal efficiency, namely, that "the government that enjoys the pleasure of spending money must first experience the pain of extracting the money from the tax payers."<sup>425</sup> The result is lack of fiscal responsibility giving rise to unbridled corruption at the sub-federal tiers of governance and an absence of true sub-federal autonomy.<sup>426</sup> This has also led to over dependence on oil especially as sub-states do little or nothing to generate internal revenues.<sup>427</sup> Since the sub-units have become conduits for accessing central revenues, group agitations for the creation of more component units in the federation has soared and is always on the front burner of agitations that heat up the socio-polity.<sup>428</sup>

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419. Suberu, *supra* note 158, at 148.

420. Irobi & Agwuele, *supra* note 116, at 35.

421. *Id.*

422. See BACKGROUND, NIGERIA GOVERNORS' FORUM, [http://nggovernorsforum.com/page\\_strip/background/#.UXN97sqXTHI](http://nggovernorsforum.com/page_strip/background/#.UXN97sqXTHI) (last visited Mar. 23, 2013).

423. Suberu, *supra* note 158, at 143.

424. *Id.*

425. *Id.* at 148-49.

426. *Id.* at 149.

427. *Id.* at 148.

428. SUBERU, *supra* note 340, at 14-15. However, I note that given the very volatile nature that oil and the revenue sharing formula has now assumed in Nigeria, the auspices of federalism which makes special dispensations possible allows for a special treatment for oil and the revenue generated there-from especially as



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### 2. *The Federal Character Principle and Indigeneity*

The constitutionally-derived federal character principle, which ordinarily may be hailed as a sublime means for ethno-religious balancing and a compensation for over-centralization, continues to attract controversies as to the appropriate modalities for its implementation.<sup>429</sup> Perhaps even more problematic is the policy of indigeneity which is a corollary of the federal character principle.<sup>430</sup> Indigeneity finds sub-state “citizenship” status derivable from origin rather than residence or birth in that sub-state.<sup>431</sup> This practice is implicit in the constitutional provision, which ties the federal character principle to indigeneity, as defined above.<sup>432</sup> Consequently, state and local government authorities adopt policies that discriminate against non-indigenes with respect to socio-political benefits.<sup>433</sup> Specifically, since the right to access benefits at all levels of the federation is tied to origin from a specific state or local government area, as opposed to being born or resident therein, most “settlers,” who may not be able to trace their origins elsewhere, are discriminated against in political appointments, access to education, and other government derived benefits.<sup>434</sup> There has been a number of inter-communal violence resulting from conflicts between indigenes (aborigines) and the so called “settlers” within the sub-federal units.<sup>435</sup> Policies against non-indigenes have reduced the space for the enjoyment of a national citizenship especially with the proliferation of sub-states.<sup>436</sup> In light of this, it becomes incongruous to imagine benign integration in a democratic Nigeria where people are confined to their units of origins for socio-political evolution. More so, it is difficult to reconcile the indigeneity provision or the discrimination that attends it with the constitutionally guaranteed rights of freedom from discrimination, freedom of movement, and freedom to own property anywhere in Nigeria.<sup>437</sup>

### 3. *Corruption*

No matter how cursory it may be, one cannot attempt a prognosis of any problem in Nigeria without taking note of the corrosive effect of corruption. Virtually all observers both within and outside Nigeria agree that corruption is a

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sub-federal units need time to development revenue alternatives.

429. Suberu, *supra* note 158, at 150.

430. *See* CONSTITUTION OF NIGERIA (1999), § 14.

431. Suberu, *supra* note 158, at 149.

432. CONSTITUTION OF NIGERIA (1999), §§ 147(3), 318.

433. INT’L CRISIS GRP., AFRICA REPORT N°119, *supra* note 51, at 12-13.

434. *Id.*

435. *Id.*

436. Suberu, *supra* note 158, at 149.

437. CONSTITUTION OF NIGERIA (1999), §§ 41-43.

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major bane of socio-political problems in Nigeria.<sup>438</sup> Ethnic loyalty matched with apathy towards the Nigerian state, especially in the immediate post-independence era, caused political leaders to perceive the center as an avenue to benefit their ethnic groups in the quest for political might and dominance.<sup>439</sup> The result was unimaginable corruption (by way of misappropriation, looting, and embezzlement of public funds) and nepotism, especially with the profligacy that came with the oil boom of the 60s and 70s.<sup>440</sup> The clandestine attitude of the military era and its utter disregard for due process further foisted on Nigeria a floodgate of impunity and financial recklessness. Four main factors contribute to the persistence of corruption in Nigeria today: ethnic loyalties, economic adversity, lack of honest leaders, and government control of the economy.<sup>441</sup> According to a popular Nigerian magazine, *Time*, the World Bank in 2006 indicated that Nigeria had lost over \$300 billion to corruption since its independence in 1960.<sup>442</sup> The paralyzing effect of corruption has caused unimaginable economic disparity, leaving a significant number of citizens feeling forlorn and alienated. This directly contributes to the socio-political restiveness, especially as discontented and unemployed youths are readily available to turn deliberations concerning ethnicity or religion into inter-group violence and killings.<sup>443</sup> Corruption has also caused a general administrative and bureaucratic paralysis in virtually all institutions of state leading to an inability of the system to respond adequately to issues whether of economic or socio-political concern. This dysfunction has created the laxity for all manner of anti-social extremism to thrive.

*G. Other Constitutional Models in Africa*

Two constitutional models in Africa alternative to the Nigerian integration model are worth some consideration, namely those of Ethiopia and South Africa.<sup>444</sup> These states, like Nigeria, are composed of ethno-religious heterogeneity.<sup>445</sup>

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438. See INT'L CRISIS GRP., AFRICA REPORT N°119, *supra* note 51, at 1.

439. Suberu, *supra* note 158, at 147-49.

440. See INT'L CRISIS GRP., AFRICA REPORT N°119, *supra* note 51, at 1; Suberu, *supra* note 158, at 143.

441. Okechukwu Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 N.Y.U. J. INT'L L. & POL. 397, 410 (2002).

442. Alex Perry, *New Hope for Nigeria*, TIME (Apr. 25, 2011), <http://www.time.com/time/magazine/article/0,9171,2065187,00.html>.

443. Oko, *supra* note 441, at 401.

444. It should be emphasized from the outset that the intention here is not to appraise or examine the practical workings of these constitutional models in the management of conflict for as evident in the case of Nigeria, several factors outside the constitutional design conspire to dictate how the federal system adapts to the socio-political realities of a state especially one with a nascent democracy. This article also does not consider the ideological controversies that trail these constitutional designs. The intention is to identify and highlight some innovative provisions on conflict prevention contained in these constitutional models with a view to presenting some examples/options that may be relevant to Nigeria. Additional research will be necessary to evaluate how certain socio-political factors outside the constitutional design intervene on the adaptability and

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In their recent history, Ethiopia and South Africa faced circumstances that warranted a consideration of how to engineer their constitutions to manage group fragmentation, ensure ethnic accommodation, and mitigate conflict. The result in both states in the mid-1990s was the adoption of federalism, consociational democracy, constitutional recognition of diversity, and a constitutional allowance for separate ethno-cultural evolutions. The constitutional recognition of ethnicity in these constitutions is significant for, as Selassie confirms, it was uncommon for ethnic diversity to receive official recognition in the pre-1990s political systems in Africa on the grounds that it embellished division and separatism.<sup>446</sup> Thus, these models represent the post-colonial beginning of state attempts at constitutionally recognizing diversity in Africa.

Lijphart suggests that for a federal state to be a consociation, it must possess the four qualities of consociation and, must have, in addition: a written constitution; a bicameral legislature at the national level; a division of powers between the federal and component states; pluralism as a nature; and democracy.<sup>447</sup> Ethiopia and South Africa satisfy the latter five conditions and, in varying degrees, satisfy the four characteristics of consociation.

#### 1. *Ethiopia*

The Federal Republic of Ethiopia (“FDRE”) practices an unprecedented ethnic federalism. The ethnic groups are segmented into nine autonomous states for self-government such that the demarcation of sub-national state territories coincides with specific ethnic groups.<sup>448</sup> Each of these largely homogenous states variously termed “nations,” “nationalities,” and “peoples” are the primary means for expressing cultural, political, and linguistic identities of the major ethnic groups in the country.<sup>449</sup> Interestingly, and in marked distinction to what obtains in most liberal constitutions where sovereign powers are proclaimed to reside with the entire people of the state, it is in these nations, nationalities, and peoples

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responsiveness of the political systems in Ethiopia and South Africa to their respective socio-political challenges including group fragmentation. The curiosity for the constitutional designs of these countries stems from the fact that they are among the very few countries in Africa with federal constitutions. Although South Africa does not describe itself as a federation, its constitution contains the hallmarks of federalism. More so, as sub-Saharan African states, Ethiopia and South Africa are characterized by extensive pluralism comparable to that of Nigeria.

445. *The World Factbook: Ethiopia*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html> (last updated Mar. 26, 2013); Christina Murray & Richard Simeon, *Recognition without Empowerment: Minorities in a Democratic South Africa*, 5 INT’L J. CONST. L. 699, 703 (2007).

446. Selassie, *supra* note 412, at 53.

447. Arend Lijphart, *Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories*, 15 J. FEDERALISM 3, 5 (1985).

448. CONSTITUTION OF ETHIOPIA (1996), art. 46-47, available at [http://www.ethiopiaembassy.eu/pdf/Constitution\\_of\\_the\\_FDRE.pdf](http://www.ethiopiaembassy.eu/pdf/Constitution_of_the_FDRE.pdf).

449. Selassie, *supra* note 412, at 54.

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that the sovereign powers of the Ethiopian state reside.<sup>450</sup> The FDRE Constitution ascribes to nations the unconditional right to self-determination, including the right to secession.<sup>451</sup> The state and religion are declared separate and each is prohibited from interfering in the affairs of the other.<sup>452</sup> By virtue of Article 5(1), all Ethiopian languages are given equal recognition.<sup>453</sup> While Amharic is the working language of the national government, each component of the federation is constitutionally allowed to choose its own working language.<sup>454</sup> This forms a part of the larger intention to foster, mobilize, and promote separate group ethno-cultural priorities in a democratic Ethiopia.<sup>455</sup> Therefore, by Article 39(2), every group has the right to promote its own culture and preserve its history.<sup>456</sup> Consequently, the constitution creates a confluence between affective (bound by emotions) and political communities (bound by a common decision making process).<sup>457</sup> By ascribing the affective community with some measure of political significance, the constitution provides a means for achieving one of the main potentials of federalism in Africa—“accommodating ethnic diversity and fostering the values imbedded in ethnic community.”<sup>458</sup>

Powers are distributed between the national government and those of the sub-states in a relatively decentralized form.<sup>459</sup> The federal government has legislative capacity over economic and social development, national standards and basic policy criteria for health and education, defense, federal police, foreign policy, foreign commerce, declaration of a state of emergency, immigration and granting of passports, copyright, standards for measurement and calendar, and possession and bearing of arms, while the sub-national units have powers in all areas not listed within federal legislative competence.<sup>460</sup> Consequently, the constitution provides a vertical balance of powers by creating a legislative demarcation where national powers are limited to issues of national concern leaving the sub-state authorities with extensive powers to pursue their respective aspirations or matters of internal concern.<sup>461</sup> This differs from the Nigerian case where the constitution seeks to retain state powers in the federal government leaving the sub-states as mere agents of execution rather than autonomous federal entities.<sup>462</sup> Similarly, the

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450. CONSTITUTION OF ETHIOPIA (1996), art. 8(1).

451. *Id.* art. 39.

452. *Id.* art. 11.

453. *Id.* art. 5(1).

454. *Id.* art. 5(2)-(3).

455. *Id.*

456. *Id.* art. 39.

457. Selassie, *supra* note 412, at 58-60.

458. *Id.* at 57.

459. CONSTITUTION OF ETHIOPIA (1996), art. 51-52.

460. *Id.*

461. *See id.*

462. Suberu, *supra* note 158, at 148.

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allowance for separate sub-national constitutions is significant, since it is likely to constitute a source of mobilization for the sub-national groups; this is in line with the principle of self-determination, the protection of which is an obvious aim of the constitution.

The Constitution prescribes a parliamentary system of government with a bicameral legislature—the House of Peoples’ Representatives and the House of Federation.<sup>463</sup> In fulfillment of consociational proportionality, Article 54 provides that the House of Peoples’ Representatives shall be composed of a maximum of 550 members, and at least twenty of those membership seats are reserved for minority nationalities.<sup>464</sup> Its functions consist of legislative, financial, deliberative, informative, and representative subjects.<sup>465</sup> Membership in the House of Federation is largely determined by the sub-states’ councils within the constitutional parameters that allows for proportional representation.<sup>466</sup> Each nation is entitled to a member and an additional one member for every one million of its population.<sup>467</sup>

The President is the head of state and is nominated by the House of Representatives.<sup>468</sup> His election is by two-thirds majority of a joint session of both legislative houses.<sup>469</sup> The office of the President is mainly ceremonial. The Prime Minister is the head of government and must be elected from among members of the House of Representatives.<sup>470</sup> He, together with the Council of Ministers, holds the highest executive powers of the state.<sup>471</sup> “Powers of government shall be assumed by the political party or a coalition of political parties that constitutes a majority in the House of Peoples’ Representatives.”<sup>472</sup> This coincides with consociational coalition, which Lijphart suggests can assure inter-ethnic cooperation and accommodation through its collegial decision making.<sup>473</sup>

The FDRE, like Sudan and Nigeria, is multi-ethnic and religiously plural.<sup>474</sup> Of the about eighty ethnic groups, the Amhara, Tigray, and Oromo constitute the majority.<sup>475</sup> Ethiopian statehood dates back to centuries of intermingling among

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463. CONSTITUTION OF NIGERIA (1999), art. 53.

464. *Id.* art. 54(3).

465. *Id.* art. 55.

466. *Id.* art. 61(2)-(3).

467. *Id.* art. 62(3).

468. *Id.* art. 69, 70(1).

469. *Id.* art. 70.

470. *Id.* art. 72-73.

471. *Id.* art. 72.

472. *Id.* art. 73(2).

473. Lijphart, *supra* note 447, at 5.

474. Its ethnic distribution is: Oromo 34.5%, Amara 26.9%, Somalie 6.2%, Tigraway 6.1%, Sidama 4%, Guragie 2.5%, Welaita 2.3%, Hadiya 1.7%, Affar 1.7%, Gamo 1.5%, Gedeo 1.3%, and others 11.3%. *The World Factbook: Ethiopia*, *supra* note 445.

475. Selassie, *supra* note 412, at 61-62.

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the groups.<sup>476</sup> However, with the fall of its monarchy and the emergence of military rule in 1974, the problem of national integration, political legitimacy, ethnic mobilization, and identity soon became burning issues in its nation building.<sup>477</sup> The ethnic content of these socio-political challenges was the dominance of the Amhara, which the other groups resented as eclipsing the fusion of ethnicities which the state was meant to represent. The result was the emergence of armed liberation struggles led primarily by the Tigray People's Liberation Front ("TPLF") and the Oromo Liberation Front ("OLF").<sup>478</sup> The main claims of these groups were neglect and marginalization.<sup>479</sup> The Marxist military regime that ruled the country from 1974-91 allowed for ethnic expressions and subsequently granted autonomy to five out of thirty administrative regions.<sup>480</sup> With this freedom for ethnic expression came the opportunity for ethnic politicization and agitation especially as the granted autonomy was a mere delegation rather than a constitutional guarantee.<sup>481</sup> With the activities of the TPLF and the OLF, the situation degenerated into a violent conflict which was exacerbated by the struggle for independence by Eritrea.<sup>482</sup> Consequently, the idea of ethnic federalism came into the political process of the FDRE in 1991 when the Ethiopian People's Revolutionary Democratic Front ("EPRDF")—a coalition of four ethnic based parties—came into power.<sup>483</sup> The EPRDF saw ethnic federalism as the only way to restructure the socio-political system to protect the hitherto oppressed groups, assure their self-determination, and enhance popular political participation in a post-military rule Ethiopia.<sup>484</sup> The pro-consociation model of constitution was consequently adopted in 1994.<sup>485</sup>

## 2. *South Africa*

South Africa, like most sub-Sahara Africa states is multi-ethnic and religiously diverse.<sup>486</sup> One issue that was topical as South Africans envisaged their transition from minority rule—apartheid to democracy in the early 1990s—was a constitutional framework for diversity management in a post-apartheid

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476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.* at 63.

480. Aalen, *supra* note 346, at 246.

481. *Id.*

482. Eritrea subsequently gained independence in 1993 after a UN monitored referendum. *See* Tom Pätz, *Ethiopia*, in HANDBOOK OF FEDERAL COUNTRIES, *supra* note 390, at 136, 138.

483. *Id.* at 137-38.

484. *Id.*

485. *Id.* at 137.

486. The ethnic composition is: black African 79%, white 9.6%, colored 8.9%, Indian/Asian 2.5%. *The World Factbook: South Africa*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (last updated Mar. 26, 2013).

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South Africa.<sup>487</sup> Federalism was considered at this time with mixed feelings.<sup>488</sup> One of the major parties in the struggle against apartheid, the African National Congress (“ANC”), perceived federalism as potentially dispersing national powers that it felt was crucial to post-apartheid restructuring.<sup>489</sup> However, support for federalism by other major parties and the fears of minority groups of a potential black African majoritarianism and dominance ensured the adoption of a federal-type structure with an elaborate Bill of Rights contained in Chapter 2 of the Constitution.<sup>490</sup> It was the prediction of some observers that with the abrogation of apartheid, ethnic divisions among groups would become more prominent.<sup>491</sup> Writers in recent scholarship, however, observe that events in South Africa, almost two decades after apartheid, continue to defy this prediction. They attribute this development partly to the country’s constitutional design for diversity management.<sup>492</sup>

Although it nowhere describes itself as a federation, like Nigeria and Ethiopia, South Africa practices constitutional federalism, which originated from the Interim Constitution of 1993.<sup>493</sup> The current National Constitution of 1996 adopted the provisions of the Interim Constitution with few exceptions and segments the country into nine heterogeneous sub-national units called provinces.<sup>494</sup> Although it has been said that the heterogeneity in states is to avoid separate developments that the former Bantustan system—or “ethnic homeland” system—stood for,<sup>495</sup> it is also true that the non-geographical concentrations of the various groups contributed to the heterogeneity in provinces. These provinces, as in the case of Ethiopia, are designed to be autonomous with constitutional authority to adopt their own respective provincial constitutions subject to approval of the Constitutional Court.<sup>496</sup> However, the national government retains the powers to set national standards and norms for the provinces to follow.<sup>497</sup> By adopting a provincial constitution, the provinces may modify the default executive-legislative structures and processes for provinces

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487. See Murray & Simeon, *supra* note 445, at 708.

488. *Id.*

489. Janis Van Der Westhuizen, *South Africa*, in HANDBOOK OF FEDERAL COUNTRIES, *supra* note 390, at 310, 312.

490. Murray & Simeon, *supra* note 445, at 708.

491. DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA?: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 44-45 (1991).

492. Murray & Simeon, *supra* note 445, at 699.

493. Jonathan L. Marshfield, *Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution*, 41 VAND. J. TRANSNAT’L L. 585, 590 (2008).

494. S. AFR. CONST., 1996, § 103, available at <http://www.info.gov.za/documents/constitution/1996/index.htm>.

495. See Westhuizen, *supra* note 489, at 313.

496. S. AFR. CONST., 1996, §§ 103, 104, 144.

497. *Id.* § 146.

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contained in the national constitution.<sup>498</sup> There is also provision for a third federal “sphere” (level)—local government—which unlike most federal systems is a distinct federal sphere and is not subsumed under provincial jurisdiction.<sup>499</sup>

The inter-relation among the vertical constituent “spheres” is based on cooperation rather than competition.<sup>500</sup> There is no rigid separation of tasks or areas of authority.<sup>501</sup> There are only few “exclusive” provincial powers contained in Schedule 4.<sup>502</sup> The more critical issues are covered in the concurrent list—where both the national and provincial governments can legislate.<sup>503</sup> In cases of conflicts between national and provincial laws with respect to Schedule 4, the constitution provides specific cases where national laws shall prevail over provincial legislation.<sup>504</sup> These specific cases relate to the need for uniformity, the occasion of certain necessities, or, where the provincial law is prejudicial to other provinces or the national government in economic, health and security policies.<sup>505</sup> There are also specified cases where national legislation may prevail over provincial constitutions.<sup>506</sup> For instance, where the subject of legislation is one determined by the national constitution to require a national legislation.<sup>507</sup> This constitutional arrangement reflects an extensive decentralization of powers which grants the provinces the political competence to set and pursue priorities relevant to its subjects.

Nonetheless, fiscal federalism in South Africa is centralized and revenue generated nationally among the national, provincial, and local spheres of government are distributed by national legislation based on equity, national interest, economic disparities among provinces, and other such criteria that are based on need.<sup>508</sup> Borrowing powers of the sub-tier governments are also subject to national legislations.<sup>509</sup> To foster cooperation among the various spheres of government, the constitution provides that spheres of government involved in an intergovernmental dispute must make “reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must

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498. *Id.* §§ 142-43.

499. *Id.* ch. 3.

500. *Id.*

501. Westhuizen, *supra* note 489, at 313.

502. Include issues like parks, recreation, cemeteries, markets, abattoir, street trading, refuse and waste and so on. S. AFR. (INTERIM) CONST., 1993, sched. 4, available at <http://www.info.gov.za/documents/constitution/93cons.htm>.

503. However, national laws can “prevail” over provincial laws in cases of conflict where there is need for uniformity or the issue is one which the province may be unable to address. S. AFR. CONST., 1996, §§ 146-47, sched. 5.

504. *Id.* § 146.

505. *Id.*

506. *Id.*

507. *Id.* § 147.

508. *Id.* §§ 213-14.

509. *Id.* § 230.



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exhaust all other remedies before it approaches a court to resolve the dispute.”<sup>510</sup> Where a court is not satisfied with the attempt at extra-judicial settlement, it may refer a dispute back to the organs of state involved.<sup>511</sup>

The South African Constitution provides for parliamentary democracy with a bicameral legislature made up of the National Assembly (“NA”) and the National Council of Provinces (“NCOP”).<sup>512</sup> In accordance with Lijphart’s idea of proportionality, the constitution provides that the NA “should” result in proportional representation and the NCOP is comprised of ten delegates from each province.<sup>513</sup> The President is elected from the NA as the head of state and government and appoints his/her entire cabinet except a maximum of two from the NA.<sup>514</sup> However, the lack of a coalition (as envisaged by consociation) in the executive cabinet in recent times has been attributed to the popularity of the ANC, which continues to dominate elections in post-apartheid South Africa.<sup>515</sup> Yet, to guide against national dominance over the provinces in the integrated policy formations at the center, the second chamber of parliament, the NCOP, made up of ministers of provincial governments, play a role in national legislating.<sup>516</sup> In case of national legislations directly affecting provinces, each delegate votes as a block on instructions from their provincial legislature, and the NA can only overturn its decision by a super majority.<sup>517</sup> Although Lijphart prescribes homogeneity in sub-states, it appears that the latter provision of the ten delegates constituting a block when voting on issues directly affecting the provinces gives the heterogenous province some form of homogeneity at the national legislature.<sup>518</sup> The prospect for coalitions in the national cabinet was more enhanced in the 1993 Interim Constitution, which produced a government of national unity. By sections 84 and 88 of that Constitution, any party that won twenty percent of the seats in the NA was entitled to produce the Vice President, and any party with five percent of the seats in the NA was entitled to be represented in the cabinet.<sup>519</sup> However, with that transition era now gone, the South African government currently reflects a Westminster parliamentary model.<sup>520</sup>

South African federalism, like that of Nigeria, is devolutionary—sub-units were preceded by a unitary structure. However, recognizing the need to create

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510. *Id.* § 41(3).

511. *Id.* § 41(4).

512. *Id.* § 42.

513. Lijphart, *supra* note 355, at 501.

514. S. AFR. CONST., 1996, §§ 83, 86, 91.

515. Murray & Simeon, *supra* note 445, at 715.

516. *Id.* at 723-24.

517. *Id.* at 723.

518. Lijphart, *supra* note 366, at 96.

519. S. AFR. (INTERIM) CONST., 1993, ch. 5.

520. Murray & Simeon, *supra* note 445, at 716.

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space for separate ethno-cultural evolutions and to guarantee the rights of minorities especially with the white population now out of power, the South African constitution allows for ethnic identification, preservation and advancement.<sup>521</sup> Thus, the South African constitution joins that of Ethiopia in affirming diversity, accommodating ethnic interests and promoting separate ethno-cultural advancement. The difference is that while the constitution of Ethiopia is built on ethnic federalism, using the ethnic groups as the units of self-determination, the South African model rejects ethnic groups as distinctive federating units and ascribes to them no political power.<sup>522</sup> The Constitution guarantees ethnic self-determination<sup>523</sup> and by section 6 it provides for eleven official languages in the country of which the national and states governments may adopt any two as its official languages.<sup>524</sup> There is religious freedom, the observance of which may be conducted at state or state-aided institutions.

*H. Relevance of the Ethiopian and South African Constitutional Models to Nigeria*

As indicated above, additional research will be required to examine the practical successes—adaptability and responsiveness—of the Ethiopian and South African constitutions to the socio-political realities in those countries, for factors beyond design which influence the working of a constitution have not been taken into account here. Nonetheless, these constitutions offer some potential for group co-existence and conflict mitigation for a similarly divided state like Nigeria.

First, to counteract the problem of over-centralization and national dominance, which pose serious challenges to the Nigerian political system, the South African and Ethiopian constitutions offer two alternative options for balancing the vertical distribution of powers. On the one hand, is the quite typical Ethiopian model of restricting the powers of the federal government to issues of national concern, while leaving the sub-states with powers to address issues that are of internal concern. On the other hand, is the German style, an integrated federalism model that is practiced in South Africa where both the national and sub-national governments both play a role in national and provincial lawmaking, the modality of which is dependent on whether the subject of legislation is one affecting the provinces directly, or the nation as a whole. Perhaps, this innovation became attractive in South Africa since there was the desire to avoid the notion of separate developments that was associated with the apartheid era. In other

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521. S. AFR. CONST., 1996, § 1.

522. Selassie, *supra* note 412, at 53.

523. S. AFR. CONST., 1996, § 235.

524. Apart from English, the other ten official languages are indigenous. *Religious Freedom in South Africa*, BERKELEY CENTER, <http://berkeleycenter.georgetown.edu/essays/religious-freedom-in-south-africa> (last visited Mar. 1, 2013).

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words, the fear that provinces would develop separately from one another necessitated an integrated legislature—where legislative jurisdictions are not rigidly separated—to ensure cooperation and balance.

Second, closely related to power distribution between the national and sub-national governments is the issue of sub-national constitutions. Where powers are adequately distributed vertically in a federal system, the role of a sub-national constitution cannot be over-emphasized. As Schuck tells us, constitutionalism is one form of “glue” for nations-peoples.<sup>525</sup> The current federal set up in Nigeria, where the attempt is to foster diverse group aspirations by a single document, perhaps, underrates the depth and nature of diversity in the country. Sub-national constitutions derived from a framework provided by a national constitution as with Ethiopia, and South Africa, can give political significance to sub-states, to allow for effective group mobilization within sub-state polities and thus foster separate groups’ aspirations and priorities.

Third, as said above, the Ethiopian and South African constitutions officially recognize diversity. The Ethiopian constitution allows for separate ethno-cultural and political evolutions by using the groups as units for self-government. South Africa recognizes diversity and allows for separate ethno-cultural development and preservation, but grants no political powers to the groups. The Nigerian constitution aligns with the typical African approach to diversity, in which case it sorts to disguise or transcend group division in the name of national unity and integration. Events in Nigeria post-1999 show conflicts in the respective groups’ aspirations. Dramatic increase in inter-group conflicts in the last decade proves that differences in groups’ aspirations were only suppressed by the dictatorship of the military era. If the hope is for democracy to continue to legitimize the political machinery in Nigeria, then the expectation should be that its attendant freedom will continue to foster divergent or even conflicting groups’ aspirations. The current challenge is found in the attempt to address conflicting group aspirations by a single government (the federal government). Chances that the federal government can respond to the various priorities of the groups without leaving one group dissatisfied are slim.

Fourth, the parliamentary system of government provided by the Ethiopian and South Africa constitutions contemplates a coalition of groups in the executive arm of government. The presidential system of government as practiced in Nigeria, may not, by itself, be problematic where, as in the case of Nigeria, it includes a broadly representative legislature and a multi-party electoral system. However, with over-centralization of powers at the national level, the presidency has become symbolic of political might rather than of unity and continues to exacerbate unhealthy competition and rivalry among the groups. Where the sub-states have the powers to guarantee respective group aspirations and politico-economic developments, the result would be for politicians to be less

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525. Schuck, *supra* note 341, at 6-7.

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attracted to the center, and thus, the political tussle is likely to disperse and become localized in several local polities. Socio-political tensions that might emanate from such sub-state polities can be better managed since the sub-states are comprised of either homogenous groups or relatively few heterogeneous groups.

V. CONCLUSION

The considerations for assessing whether a group can exercise its right to self-determination by way of secession serve two purposes. First, as has been considered here, they serve to legitimize secession under the international law principle of self-determination. Second, these considerations serve to draw the recognition of the international community to the justification and exigency for a group to exercise its right to self-determination. The role of the international community cannot be exaggerated in issues of secessionist self-determination for, as Horowitz points out, whether a secessionist movement will achieve its aims is determined largely by international politics, the balance of interests, and forces beyond the state.<sup>526</sup> The role of the international community to the independence of Eritrea and South Sudan further proves this proposition. To envisage secession without these considerations is to face yet another war in Nigeria as was the case with the Nigerian civil war, the civil war of Sudan, and many other states in Africa where there are armed struggle for independence.

The current case by case approach of the Nigerian Government to the issue of ethno-religious tension and conflict neglects the root causes of the problem. The attempt in Nigeria to suppress ethnic and other group affiliations and loyalty under the guise of national integration has, over the years, proved to be pretentious of the country's socio-political realities. The events that have unfolded in the country since the return to civil rule make it difficult to hope that the federal government would surmount the trajectory of divergent group aspirations and priorities and ultimately foster national integration.

With African leaders recently, in 2010, at the 5th International Conference on Federalism held in Addis Ababa, committing to federalism pacesetting, states like Nigeria hold the mantle of hope for an era of power devolution and democratic consolidation in Africa. They constitute the spectacle through which federalism and other prodemocracy type political structures will be viewed if not measured in a region coming from inordinate authoritarianism and repressive dictatorship. However, no system of government will command optimism in Africa if, in practical terms, it does not adequately manage ethno-religious fragmentation, contain intergroup conflict, and ultimately foster socio-economic development. At this point, where more than its predecessor, the AU, is showing greater commitments to democracy and good governance, Nigeria, as one of the

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526. HOROWITZ, *supra* note 11, at 230.

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few federations in Africa, should be concerned with what reforms to adopt in the hope of achieving sublime inter-group accommodation, peaceful co-existence, and conflict mitigation. This should form the beginning of further thoughts on political alternatives for stability and group coexistence in Nigeria and indeed Africa.