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THE RIGHT TO A NATIONALITY AND THE SECESSION OF SOUTH SUDAN: A COMMENTARY ON THE IMPACT OF THE NEW LAWS

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SUMMARY

In January 2011, after years of civil war, the people of South Sudan voted overwhelmingly for separation from the Republic of Sudan. The Republic of South Sudan obtained its independence six months later, on 9 July 2011. As part of the process of separation of the two states, people of South Sudanese origin who are habitually resident (in some cases for many decades) in what remains the Republic of Sudan are being stripped of their Sudanese nationality and livelihoods, irrespective of the relative strength of their connections to either state, and their views on which state they would wish to belong to.

A nine month deadline was established for "southerners" resident in Sudan to regularise their status by 8 April 2012. The deadline has now expired and several hundred thousand people who are presumed to have acquired South Sudanese nationality are still resident in the Republic of Sudan, despite a February 2012 agreement between the two states for their "voluntary return". These people now have no recognised legal status in Sudan, exposing them to risk of arrest and detention on immigration charges, and the threat of expulsion to South Sudan. It is likely that some of those treated as South Sudanese nationals by the Sudanese authorities will in fact find themselves without the recognised nationality of either state, leaving them stateless.

On 13 March 2012, the governments of Sudan and South Sudan committed in principle to a framework agreement on respect for the "four freedoms" — of residence, movement, economic activity and property rights — for nationals of the other state living on their territory. This was a positive step which could provide a legal basis for South Sudanese to remain in Sudan and Sudanese nationals to remain in South Sudan. However, further negotiations are required

between the states to ensure that the aspiration of the four freedoms becomes a reality. A signing ceremony by the presidents of the two republics, due to take place in Juba, the capital of South Sudan, on 3 April, was postponed due to ongoing tensions and the eruption of military clashes between the armed forces of the two states along the borders in late March. Until the presidents sign, the agreement is not officially in force.

There has been a consistent lack of political will to resolve the nationality status of people who have a connection to both Sudan and South Sudan: in principle an agreement should have been reached before the date of the January 2011 referendum, or at the latest by 9 July 2011, the date of independence. The failure to reach a bilateral agreement means that each state adopted its own rules.

The South Sudan Nationality Act 2011 entered into force on 9 July 2011. The act drew on the criteria applied in the referendum on independence to attribute South Sudanese nationality to individuals with one parent, grandparent or great-grandparent born in South Sudan, to individuals belonging to one of the "indigenous ethnic communities of South Sudan", and to those who (or whose parents or grandparents) had been habitual residents of South Sudan since 1956, the date of Sudanese independence. The new law allows for dual nationality, and provides equal rights for women and men to pass on their nationality to their children or spouses. The law does not distinguish between persons resident in the Republic of South Sudan and those resident elsewhere (including in the Republic of Sudan), implying that those eligible for South Sudanese nationality by these criteria automatically acquire South Sudanese nationality wherever they live.

A month later, in August 2011, an amendment to the Sudan Nationality Act 1994 was adopted, according to which any individual who, "de jure or de facto", acquires the nationality of South Sudan automatically loses his or her Sudanese nationality. Dual nationality has, however, been permitted with any other country since 1993.

The broad provisions of the South Sudan Nationality Act reduce the possibility of statelessness for those resident in South Sudan; though they do not eliminate it, since not all habitual residents of South Sudan obtain South Sudanese nationality. However, the attribution of nationality even to those resident outside its territory, coupled with the matching terms of the amendments to the Sudanese law which lead to automatic revocation of nationality, mean that many people resident in the Republic of Sudan will have their Sudanese nationality taken away, with all the serious consequences that implies, and without any guarantee that they have acquired South Sudanese nationality in fact.

Moreover, the amendment to the Sudan Nationality Act means that a person with one South Sudanese parent and one who remains Sudanese will lose his or her Sudanese nationality. The amendment is thus in violation of the terms of the 2005 Interim National Constitution of Sudan, which both provides that any individual born to a Sudanese mother or father has an "inalienable right" to enjoy Sudanese nationality, and permits dual nationality. Even children under 18 lose their Sudanese nationality under this rule if the parent with legal custody (usually the father) becomes South Sudanese, against the usual rule where dual nationality is not allowed that a child eligible for more than one nationality should be able to make a choice on reaching majority.

The new laws do not conform with the usual principles applied in international law, that when part of a state secedes to create a new state or to merge with another state, the nationality of the people resident in the territories affected is attributed to one or other of

the two countries on the basis of habitual residence. States are also urged to permit individuals to opt for the nationality of either state if they have an "appropriate connection" to both. Moreover, the criteria established for the referendum on southern independence and the new nationality laws adopted by the two states have explicitly introduced questions of ethnic identity into Sudanese nationality law (of north and south) for the first time.

In practice, individuals of southern origin resident in Sudan are being deprived of their Sudanese nationality without any right to contest the decision: estimates of the number potentially affected range between 500,000 and 700,000 individuals. Although those currently affected are those who are "obviously" South Sudanese in popular interpretation, the amendments to the Sudan Nationality Act could, if applied on the broadest interpretation, lead to loss of Sudanese nationality for a very large category of people, including those with only weak links to South Sudan (a single great grand-parent born in South Sudan) and strong links to the Republic of Sudan. This is the case even if these individuals have in fact made no effort to obtain recognition of South Sudanese nationality; and even if they would have difficulty in proving entitlement to South Sudanese nationality due to their tenuous ties to the state of South Sudan. No explicit procedures are established in the Sudanese law for individuals who wish to do so to renounce a right to South Sudanese nationality and retain Sudanese nationality.

Lack of civil documentation, such as birth certificates or identity papers, is commonplace in both Sudan and South Sudan, making it difficult to provide proof that a parent, grandparent or great-grandparent was born in South Sudan, one condition for acquisition of the nationality of the new state. There are provisions in the South Sudanese regulations to allow witness statements from a broad range of people on behalf of an applicant where documentary evidence is not available, but the nature of displacement during the civil war may make even suitable witness testimony difficult to obtain. Although the amendments to the law do allow for restoration of Sudanese nationality, this is at the discretion of the president. If a person loses Sudanese nationality and is unable to prove South Sudanese nationality, he or she is therefore likely to be rendered stateless.

The loss of Sudanese nationality already carries significant practical consequences. People of South Sudanese origin who have been living in Sudan for decades, or even generations, have now lost the rights and entitlements linked to their Sudanese nationality. Many of these people are in a desperate situation, as they have lost jobs in the public and private sector, and face difficulties in asserting their rights to their homes and other property (the constitution only protects the right to property for Sudanese nationals). Children have been refused entry to schools or treatment by clinics.

The Government of Sudan has indicated that after the expiry of the 8 April 2012 deadline, South Sudanese nationals will be treated as foreigners and the authorities will start to enforce laws relating to the presence of foreigners against them. People who have acquired South Sudanese nationality must "regularise their status" in Sudan to be able to stay.

On 10 April 2012, the Ministry of the Interior of the Republic of South Sudan issued a press release announcing that, in response to the steps taken by the Government of Sudan, all Sudanese nationals were foreigners as of 9 April 2012, and those entering South Sudan would require visas. The press release also stated that Sudanese nationals would be given temporary stay documents free of charge, and time to regularise their status. However, there remains a lack of clarity on who actually will be considered to be Sudanese, as well as a lack of procedures for acquiring residence documents in South Sudan.

UN agencies report that over 350,000 South Sudanese have already returned from Sudan to South Sudan since November 2010. However, more than half a million remain in Sudan, some lacking the means and some without the desire to return to South Sudan. There are serious concerns about the means of livelihood and safety and security of these people, who could be liable to harassment by police or unofficial militias, as well as detention or deportation as foreign nationals once the transitional period has expired.

Populations at risk

Among the people potentially adversely affected by the changes in nationality law are:

People of southern ethnicity resident in the north

In practice, it is the people identified as members of one of the "indigenous ethnic communities of South Sudan" who are now being deprived of Sudanese nationality. In principle, they should be eligible for South Sudanese nationality. However, some may have difficulties in meeting the evidentiary requirements for South Sudanese nationality which could in turn lead to a risk of statelessness. Even if they do not become stateless, they face loss of entitlements, assets and livelihoods in Sudan, where their legal status is precarious; or alternatively an uncertain future in South Sudan, where they may never have previously lived.

People with one parent from Sudan and one from South Sudan

Although the Interim National Constitution of Sudan provides that any individual born to a Sudanese mother or father has an inalienable right to enjoy Sudanese nationality, the revisions to the Sudan Nationality Act state that a person with one South Sudanese parent and one who remains Sudanese will lose his or her Sudanese nationality. The constitutional provision should in principle prevail, but it seems that it is the amendment to the nationality law that will be applied by the Sudanese authorities. There is also a substantial risk that minor children will be separated from one or other of their parents under these rules.

People of more complex mixed ancestry

Individuals who have ties on the basis of descent to both the Republic of Sudan and the Republic of South Sudan may be deemed South Sudanese nationals by the Sudanese authorities, but then have difficulties proving that they are entitled to South Sudanese nationality. Since the definition of South Sudanese national includes a person with only one great-grandparent born on the territory, some of those affected could have only very weak ties to the South. This could lead to a risk of statelessness and loss of rights related to nationality in both Sudan and South Sudan.

Members of cross-border ethnic groups

Some ethnic groups are not clearly from Sudan or South Sudan. For example, the Kresh, Kara, Yulu, Frogai and Bigna are all ethnic groups that exist on both sides of the border between South Darfur and Western Bahr el Ghazal state. It remains unclear how such groups will be treated by either government: neither the Transitional Constitution of South Sudan nor the South Sudan Nationality Act provides a list of which communities are included among the "indigenous ethnic communities of South Sudan" nor of the criteria to be deemed a member of one of those communities.

Members of pastoralist communities

There are many pastoralist communities in Sudan who regularly migrate between the territories of what are now the two separate states. Most of these communities are Arabic-speaking and regarded by themselves and others as "from" the Republic of Sudan; however some

of their members may have been born or have a parent, grandparent or great-grandparent born in South Sudan, and thus under the terms of the law have now acquired South Sudanese nationality. It is assumed that most of these people will wish to remain Sudanese, and that Sudan will continue to treat them as its nationals despite the amendments to the law, but some may be resident in the South and wish to exercise their right to South Sudanese nationality. While nationality issues will likely not arise for most, Sudanese nationality could be denied to individuals alleged to be entitled to South Sudanese nationality in certain circumstances, while South Sudan in turn may not recognise their right to be South Sudanese. There are also some smaller Arab pastoralist communities who have been resident in South Sudan, but whose right to vote in the referendum on independence was rejected and whose status today is uncertain. There has been a steady stream of migration by these groups, the Rufa'a for instance, from South Sudan's Upper Nile to White Nile and Sennar States in Sudan, leading to fears of conflict over land use with the settled populations there.

Residents of Abyei

The "Abyei Area" that straddles north and south was supposed to have its own referendum on whether it would join Sudan or South Sudan. This never took place, because the parties were unable to agree on the criteria for determining who should vote in such a referendum. The Republic of Sudan asserts that the territory should remain under its jurisdiction. In principle the Ngok Dinka, whose traditional territory it is, therefore retain their Sudanese nationality. However, individual members of the community face the risk of being treated as belonging to one of the "indigenous ethnic communities of South Sudan", since they are a sub-group of the Dinka, one of the dominant ethnic groups in South Sudan. They may thus lose their Sudanese nationality. At the same time, they do not have any territory to return to in South Sudan. The Misseriya Arab pastoralist communities that historically spent a large part of each year in Abyei are in the same situation as most Arab pastoralists: though most will retain Sudanese nationality, some may be entitled to South Sudanese nationality under the new law of South Sudan, which could potentially lead to challenges to their status.

Members of historical migrant communities

There are hundreds of thousands of people in both Sudan and South Sudan who are descendants of migrants from West Africa, including the Mbororo and Falata. The Mbororo, a sub-group of the Fulani, are traditionally pastoralists whose routes cross both Sudan and South Sudan, as well as Chad, Central African Republic, Democratic Republic of Congo and Cameroon. Falata is a term used in Sudan to refer to all Muslims of West African migrant origin, though many have become integrated into Sudanese society and were granted land by Sudanese governments seeking their support in conflict with the South. Members of these communities had prior to 2005 already faced bureaucratic hurdles in obtaining recognition of Sudanese nationality, and though the situation is not yet clear, may face difficulties in both Sudan and (especially) South Sudan in future.

Residents of third countries without another (non-Sudanese) nationality

It will be particularly difficult for people who have left Sudan, whether as refugees or otherwise, to prove their entitlement to South Sudanese nationality or their right to retain the nationality of the Republic of Sudan. South Sudan has yet to establish documentation procedures in any third countries. Those who have not obtained the nationality of their current state of residence may be at risk of statelessness.

People separated from their families by the war

The long years of war in Sudan have left many displaced people who have been separated from their families and thus from people who can say what their ancestry is. Unaccompanied children, individuals of unknown parentage, and women and children who were abducted during the war will all face particular difficulties in establishing their right to a nationality of either state.

Recommendations

Avoidance of statelessness

The most important way of avoiding statelessness is to ensure that no individual loses his or her Sudanese nationality without acquiring South Sudanese nationality under the laws of South Sudan. Therefore, the Republic of Sudan should not withdraw its nationality from persons resident in the Republic of Sudan unless proof is obtained that South Sudanese nationality has been acquired in fact and not just according to the theoretical interpretation of the law. If Sudanese nationality has been revoked, those persons who are allowed to reacquire it under new provisions in the law should include, at minimum, persons who can show they were refused recognition of South Sudanese nationality.

Non-discrimination

The norms established by the African Charter on Human and Peoples' Rights and other international law prohibit discrimination on the grounds of "race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status" (Art.2 ACHPR). This should be respected in the nationality laws of both Sudan and South Sudan, and in their implementation. Perhaps of most concern currently is the action of the Sudanese authorities to withdraw nationality from individuals on purely ethnic grounds: it is only those who are of South Sudanese ethnicity, but not others eligible for South Sudanese nationality, whose Sudanese nationality is being revoked. At the same time, many of those affected would be eligible to naturalise as Sudanese under the terms of the 1994 nationality law, even as amended, yet this is possibility is not being offered.

Due process

Decisions relating to the nationality status of large groups of people require simple and accessible procedures for recognition or acquisition of nationality and due process protections for revocation of nationality. South Sudan has adopted regulations under its nationality act, which provide for a right to appeal decisions made under the act; but Sudan has yet to adopt regulations that take into account the 2011 amendments to the law. These amendments should introduce accessible procedures for administrative and judicial review of decisions to refuse recognition of or revoke nationality, with specific protection for due process rights including the right to written reasons for the refusal and the right for the individual to be heard.

Respect for existing rights and dual nationality

The provisions of the Interim National Constitution of Sudan and the Transitional Constitution of South Sudan that a person who has one parent with the nationality of that state also has the right to nationality of that state should be respected. Others with an appropriate connection to Sudan, including long-term residents, should also have the right to retain Sudanese nationality. The right to dual nationality, if permitted under national law (as it is in general for both Sudanese states), should not be restricted in the case of one

particular state (as the amendments to the Sudan Nationality Act purport to do in relation to nationals of South Sudan). At minimum, dual nationality between the two states should be permitted during a child's minority, with a right to opt for the nationality of either state on majority; those who are already adults should be given the same right to opt.

Dispute resolution mechanism

The governments of the Republic of Sudan and the Republic of South Sudan should create a mechanism for resolving cases of uncertain or disputed nationality jointly and ensure that no individual is left without a nationality.

Protection of children's rights

Clear procedures should be put in place to determine the nationality of and provide appropriate protection to unaccompanied children or children of unknown parentage, and for the protection of the unity of the family.

Procedures for providing access to documentation and regularising status of non-nationals

The governments of both states should collaborate to ensure that potential South Sudanese nationals have the ability to access South Sudanese nationality documentation if they are resident in the Republic of Sudan. The Republic of Sudan should adopt procedures that respect due process enabling those individuals who do lose their Sudanese nationality to acquire legal residence in Sudan. South Sudan should also put in place procedures for nationals of Sudan resident in its territory who have not obtained South Sudanese nationality to obtain legal residence.

Respect for rights of nationals of the other state

The elaboration of a detailed "four freedoms" agreement between the two states, as envisaged under the 13 March 2012 framework agreement on freedom of movement, residence, economic activity and property ownership, would greatly reduce the negative effects of the changes in nationality law on nationals of each state resident in the other. The final version of such an agreement should ideally entitle residents of the other state to retain access to public services to which they were previously entitled as Sudanese. However, even the framework agreement has yet to be signed by the presidents of each state and enter into force. Significant political will and commitment to implementation will be required by both governments in order for the four freedoms to become a legal reality.

Extended transitional period

Given the many difficulties associated with determination of nationality for those people with potential eligibility for both Sudanese and South Sudanese nationality, the parties should extend the deadline for the determination of the nationality status of those affected (primarily those who are considered as South Sudanese nationals and are resident in the Republic of Sudan), ideally for a period of up to several years following the date of independence of South Sudan.

Distinction between transitional and ongoing provisions of the South Sudanese Nationality Act

The difficulties caused by automatic attribution of South Sudanese nationality would be reduced if there were a clearer distinction between those born before or after 9 July 2011. Currently, the law attributes South Sudanese nationality by birth to any person with

a parent, grandparent or great-grandparent born in South Sudan or belonging to one of the "indigenous ethnic communities" of South Sudan, whenever or wherever he or she was born. In addition, it is provided that a person born after the act came into force is South Sudanese if his or her father or mother was a South Sudanese national (including by naturalisation) at the time of the birth. The problem of ethnic discrimination and automatic withdrawal of Sudanese nationality would be progressively reduced if the law provided rather that the attribution of nationality based on ancestry applied only to those born before the independence of South Sudan. For those born after the entry into force of the act, the automatic attribution of nationality on the grounds that a parent, grandparent or great grandparent was born in South Sudan should apply only to those themselves also born in South Sudan (those born outside the country could be given a right to apply for nationality if desired), while the attribution of nationality on ethnic grounds should be removed altogether, in line with international norms of non-discrimination.

General principles of nationality law to reduce the risk of statelessness

More than half of Africa's countries provide the right to their nationality not only to a person with one parent who is a national, but also to a person born on the territory of a state with one parent also born there, or a person born on the territory and still resident there at majority. Experience shows that such rules create a more inclusive state, and reduce tensions along the lines of ethnicity, religion and culture. Both Sudan and South Sudan should adopt these principles for those born on their territories on or after 9 July 2011. At minimum, they should include provisions in national law reflecting the terms of the African Charter on the Rights and Welfare of the Child, to provide that a child shall acquire the nationality of the State in the territory of which he or she has been born if, at the time of the child's birth, he or she is not granted nationality by any other State in accordance with its laws.

HISTORY OF NATIONALITY LAWS IN SUDAN

The majority of what formed the Republic of Sudan until 2011 was under Ottoman-Egyptian rule during the 19th century. In the 1880s, a rebellion under the leadership of Mohammed Ahmed, the self-proclaimed mahdi or redeemer of the Islamic world, created a nationalist and Islamic government. The mahdist rebellion was in turn defeated in 1899 and replaced by British-Egyptian condominium. The condominium was headed by a governor-general theoretically appointed by the Egyptian khedive with British consent, but was under effective British control. Egyptian independence in 1922 led to the withdrawal of Egyptian troops from Sudan, although the condominium continued (as did the presence of British troops in Egypt and Sudan). From 1924 onwards, Sudan was governed as two separate provinces, kept administratively quite segregated, with controls on movement between them. From the mid-1940s, as a degree of self-government was given to Sudan, and a legislative assembly and executive council were established in 1948, the south began to be integrated into the central government's administrative and political structures — in which southern politicians complained of marginalisation.

Under the British-Egyptian condominium, a Sudanese was any person who was subject to Sudanese jurisdiction. From 1948, the Definition of Sudanese Ordinance defined a Sudanese as "every person of no nationality [thus excluding British, Egyptian and other nationals] who … is domiciled in Sudan and (i) has been so domiciled since 31 December 1897, or else whose ancestors in the direct male line since that date have all been so domiciled" or who is the wife or widow of such a person.[1]

1. Definition of "Sudanese" Ordinance, 15 July 1948, Laws of the Sudan 1956, Vol.1, Title 1, sub-title 5. For the purposes of British nationality law, Sudan was simply a foreign country, with no protectorate or other status giving the British government extra-territorial jurisdiction over British subjects (although some condominium passport holders were treated as British protected persons, this was as a matter of royal prerogative rather than statutory right). See Fransman's British Nationality Law, 3rd edition, Bloomsbury, 2011, pp.1284-1285.

The 1952 Egyptian revolution led to the abrogation of the condominium treaty with Britain, followed by an Anglo-Egyptian agreement for a process leading to Sudanese self-government; Sudanese nationalists in turn unilaterally declared their own independence in late 1955. The proposed self-government statute was hastily adopted as the Sudan Transitional Constitution 1956.

The 1956 Transitional Constitution did not provide for nationality, and legislation was adopted to replace the 1948 Ordinance with the first real nationality law, the Sudan Nationality Act 1957. This Act, amended several times [2], remained in effect until 1993. It provided that a person was Sudanese if he (sic) was born in Sudan or his father was born in Sudan and he or his direct male ancestors had been resident in Sudan since 31 December 1897 (prior to the defeat of the Mahdist forces). This date was later amended to 1 January 1924, when Sudan had been reorganised administratively into two provinces. Naturalisation was possible based on a 10-year residence period and other conditions, including adequate knowledge of Arabic and renunciation of any other nationality; a child born after the act came into effect was a national if his father was a national (whether naturalised or by descent); and a woman married to a Sudanese man could naturalise based on two years residence.[3]

Very shortly after independence, southern army officers rebelled against the Khartoum government. Though the mutinies were quickly suppressed, they marked the start of a civil war that escalated in the early 1960s, after southern demands for a federal system were decisively rejected by Khartoum in 1958, and continued to 1972. In 1972 the Addis Ababa peace agreement temporarily ended the civil war, with the grant of a degree of autonomy to the south, enshrined in a new 1973 constitution for Sudan. In 1983, the war was reignited as the autonomy of the south was revoked. In 1989 the latest in a series of coups d'état in Khartoum brought Brigadier Omar al-Bashir to power as chairman of the Revolutionary Command Council for National Salvation, a body with both legislative and executive powers. In 1993, the Revolutionary Command Council was replaced by an appointed Transitional National Assembly (TNA), made up of members of the National Islamic Front (NIF) led by Dr. Hassan al-Turabi; Bashir became president of the new government.

The military government replaced the 1957 Nationality Act with a new law, initially adopted as a provisional decree in 1993, and then amended by the TNA and enacted as the 1994 Sudan Nationality Act (SNA).[4] The 1994 SNA remains in force in the Republic of Sudan, as amended in 2005 (following the adoption of the Interim National Constitution), and again in 2011 (following the secession of South Sudan).

Despite the initiatives to Islamicise Sudan in other ways, the 1993 nationality decree was very similar to the 1957 law in relation to the grant of nationality by birth, providing that a person born before the act came into effect was a national from birth if he or his father was born in Sudan and he or his paternal ancestors were resident in Sudan since 1924. No religious or linguistic criteria were applied, even in relation to the conditions for naturalisation. In addition, in part to accommodate the foreign Islamist activists invited by Dr. Turabi to settle and do business in Sudan, the period required for a resident in Sudan to become a naturalized Sudanese citizen was reduced from ten years to five years, and the prohibition on dual nationality was removed. The new law also reduced the grounds on which nationality could be taken away by the executive compared to the 1957 Act.[5]

2. In 1959, 1970, 1972, 1963, 1970, 1972, 1973 and 1974.
3.Sudanese Nationality Act 1957, Section 5(1) and Section 9.

4. Provisional Decree No. 18 of 18 August 1993, amended and approved by Transitional National Resolution No.59 of 3 May 1994, and signed into law by the president on 17 May 1994. 2. In 1959, 1970, 1972, 1963, 1970, 1972, 1973 and 1974.
5. Sudanese Nationality Law 1993, sections 4, 7, 10, and 11.

The amendments made when the 1993 provisional decree was adopted as the 1994 law included a change to the applicable date for a claim to nationality by birth based on domicile of a male ancestor from 1924 to 1 January 1956, the date of independence; it retained gender discrimination in the transmission of nationality to children and to spouses. Section 4 provided that:

(1) With regard to persons born before the coming into force of this Act, a person shall be a Sudanese by birth:

> *(a) if he or she has acquired a certificate of Sudanese nationality by birth before the entry into force of the 1994 Act;*
>
> *(b) (i) if he or she was born in Sudan or his or her father was born in Sudan, and (ii) if he or she was resident in Sudan at the time of coming into force of this Act and he/she or his/her ancestors in the male line have been domiciled in Sudan since 1 January 1956;*

(2) A person born after the coming into effect of this Act shall be a Sudanese by birth if at the time of his birth his father was a Sudanese citizen by birth;

(3) A person born to parents who are Sudanese by naturalization shall be a Sudanese by birth if his or her parents have obtained Sudanese nationality by naturalization before his or her birth.[6]

6.In addition, Section 5 provided: "A person first found as deserted infant shall, until the contrary is proven, be deemed to be a Sudanese by birth." Section 8 deals with marriage. Note that the available English translation of the 1994 law is based on an incorrect version in Arabic that had an critical omission in section 4(2), stating that "a person born after the ratification of this act shall become a citizen by birth at the time of his birth". The official Arabic version makes clear that the father must be a citizen.

While naturalisation was permitted under the 1994 law on the basis of five years residence, it remained discretionary (including conditions related to mental competency and good moral character, as well as residence, though not to knowledge of Arabic).[7] A woman married to a Sudanese man (but not vice versa) could be naturalised on the basis of two years residence in Sudan with her husband.[8] The amendments added back in some of the grounds for depriving nationality from a person who had obtained it by naturalisation, including "an act or words outside Sudan showing his non-allegiance or hatred of Sudan."[9] The 1994 law also removed adopted children from the definition of children; this was the only provision overtly relating to government adherence to Islamic legal principles, which do not recognise adoption in its modern form.[10]

In 1998 a new constitution was adopted, following a 1997 peace agreement between the government and the Sudan People's Liberation Movement (SPLM). It was drafted through a process that allowed for some public debate, though the final version was closely edited by the executive. The TNA became an elected National Assembly, and the NIF created the National Congress Party, headed by President Bashir, as its formal political arm and the only legally recognised party in the country. The constitution represented a step towards a more inclusive idea of nationality, in particular by removing gender discrimination in nationality by descent — a reflection of Dr. Turabi's relative accommodation to calls for greater recognition of women's rights, compared to other Islamist leaders. Article 22 provided that:

Everyone born of a Sudanese mother or father has the inalienable right to Sudanese nationality, its duties and obligations. Everyone who has lived in Sudan during their youth or who has been resident in Sudan for several years has the right to Sudanese nationality in accordance with the law.

7. Section 7.
8. Section 8.
9. Section 11(1)(d).
10.See Nasredeen Abdulbari, "Citizenship Rules in Sudan and Post-Secession Problems", Journal of African Law Vol.55, No.2, 2011, pp.157-180.

This provision was not, however, translated into an amended version of the 1994 nationality law, which continued to discriminate on the basis of gender.

The civil war resumed, however, with brutal effects, exacerbated by efforts to exploit oil deposits discovered in the south; peace negotiations resumed in 2002 and finally brought the war to an end in 2005, with the adoption in Kenya of the Machakos Protocol, outlining the terms of a peace treaty, and subsequently a detailed Comprehensive Peace Agreement (CPA). The CPA provided for a five year transition period, during which the south would have a degree of autonomy, followed by a referendum on independence. Meantime, however, a further rebellion had broken out in 2003 in Darfur, in the west of northern Sudan.

THE CPA AND THE SECESSION OF SOUTH SUDAN

The 2005 Comprehensive Peace Agreement provided that "the people of South Sudan have the right to self-determination." This right was enshrined in the interim constitutions for Sudan and the territory of Southern Sudan that followed the peace agreement.

In relation to Sudanese nationality during the five-year transitional period before the referendum on independence, the Interim National Constitution of Sudan 2005 repeated the gender-neutral rules of the 1998 constitution for the transmission of nationality to children, and explicitly allowed dual nationality, but delegated rules on naturalisation to legislation.[11] In particular, Article 7(2) stated:

> *Every person born to a Sudanese mother or father shall have an inalienable right to enjoy Sudanese nationality and citizenship.*

The 1994 Sudan Nationality Law was also amended in 2005, in response to the CPA and the adoption of the Interim National Constitution, and for the first time gave the child of a Sudanese woman and foreign father the right to apply for nationality (although not the automatic conferral of nationality by operation of law, as for the child of a Sudanese father).[12]

11. Article 7 of the 2005 Interim National Constitution of Sudan: (1) Citizenship shall be the basis for equal rights and duties for all Sudanese; (2) Every person born to a Sudanese mother or father shall have an inalienable right to enjoy Sudanese nationality and citizenship; (3) The law shall regulate citizenship and naturalization; no naturalized Sudanese shall be deprived of his/her acquired citizenship except in accordance with the law; (4) A Sudanese national may acquire the nationality of another country as shall be regulated by law.
12. The 2005 amendment added a new subsection (3) to Section 4 of the Nationality Act, to provide that: "A person born to a mother who is a Sudanese by birth shall be eligible for the Sudanese nationality by birth provided that he or she submits an application to become a Sudanese national by birth".

The Interim Constitution for Southern Sudan, meanwhile, and the legislation establishing the eligibility for individuals to vote in the referendum on the independence of South Sudan provided two parallel definitions for the "people of South Sudan", one based on ethnicity, thus permitting people of southern origin or descent resident in the north — whether displaced by the war, or employees in the Sudanese state or economy — or in other countries to vote; the other on residence, thus allowing those (many fewer in number) people of northern origin or descent resident in the south to be heard also. It stated:

> *For purposes of the referendum … a Southern Sudanese is:*
>
> *(a) any person whose either parent or grandparent is or was a member of any of the indigenous communities existing in Southern Sudan before or on January 1, 1956; or whose ancestry can be traced through agnatic or male line to any one of the ethnic communities of Southern Sudan; or*
>
> *(b) any person who has been permanently residing or whose mother and/or father or any grandparent have been permanently residing in Southern Sudan as of January 1, 1956….*[13]

The Southern Sudan Referendum Act 2009 repeated these provisions in very similar language, but removed the reference to agnatic (patrilineal) descent, providing that:

> *The voter shall meet the following conditions:*
>
> *1) be born to parents both or one of them belonging to one of the indigenous communities that settled in Southern Sudan on or before the 1st of January 1956, or whose ancestry is traceable to one of the ethnic communities in Southern Sudan; or,*
> *2) be a permanent resident, without interruption, or any of whose parents or grandparents are residing permanently, without interruption, in Southern Sudan since the 1st of January 1956;…* [14]

13.Interim Constitution of Southern Sudan, Article 9.
14.Southern Sudan Referendum Act, 2009, section 25, unofficial translation. The other criteria are: "3) have reached 18 years of age; 4) be of sound mind; 5) be registered in the Referendum Register". Similar criteria are provided for the referendum on the status of Abyei: see further below.

The first set of criteria reflects an understanding of nationality based on descent and ethnicity. The second set expands this understanding in line with the existing provisions of the Sudanese nationality law, to include people who are or have been permanently resident in the territory, providing an important non-discriminatory basis for recognition as a voter in the South Sudanese referendum and future citizen: "northerners" resident in the South were accepted as having a voice.

The question of how the people would be allocated the nationality of either the Republic of Sudan (RoS) or the Republic of South Sudan (RoSS) following independence of the South was supposed to have been resolved in negotiations between the National Congress Party government of Sudan and the SPLM administration of Southern Sudan in advance of the referendum on independence, which took place on 9 January 2011; or, at the latest, before the 9 July 2011 official independence of the RoSS after the positive referendum vote. Extensive suggestions to resolve the question of nationality of those who might have a claim to belong to either state were made to the parties by expert advisers working with the office of the UN High Commissioner for Refugees and the African Union (AU) High Level Implementation Panel led by former president Thabo Mbeki of South Africa. However, the parties failed to reach any agreement.

NEW NATIONALITY LAWS IN 2011

While the stalled negotiations on nationality were supposed to resume between the parties after the secession of South Sudan, this did not happen. Both states moved separately to introduce laws to determine who would become the citizens of the new Republic of South Sudan and who would remain citizens of the Republic of Sudan. The RoSS passed a new Nationality Act, 2011; and the RoS adopted amendments to the existing Sudan Nationality Act (SNA) 1994, providing for loss of Sudanese nationality by those who acquired the nationality of South Sudan. While there was no need for it to do so, the new RoSS law drew on the provisions of the referendum law to introduce an ethnic definition into Sudanese nationality law for the first time. Despite conflicts over the vision for the Sudanese state, and bureaucratic impediments placed in the way of some groups, previous legal definitions of Sudanese nationality had not been given an ethnic, racial or religious content, and were rather founded on the idea of birth and residence in the country.

Republic of South Sudan

The Transitional Constitution of South Sudan, adopted in 2011 pending the appointment of a commission to draft a final constitution, does not include transitional provisions relating to nationality, but repeats the wording of the 1998 and 2005 constitutions of the Republic of Sudan, that: "Every person born to a South Sudanese mother or father shall have an inalienable right to enjoy South Sudanese citizenship and nationality", and explicitly permits dual nationality.[15] The provision for gender equality departed from the SPLM's previous efforts to define membership of the territory of Southern Sudan.[16]

Article 8 of the new South Sudanese Nationality Act (SSNA), adopted in June 2011 just before the secession of South Sudan, provides that:

(1) A person born before or after this Act has entered into force shall be considered a South Sudanese National by birth if such person meets any of the following requirements—

> *(a) any parents, grandparents or great-grandparents of such a person, on the male or female line, were born in South Sudan; or*
> *(b) such person belongs to one of the indigenous ethnic communities of South Sudan.*

(2) A person shall be considered a South Sudanese National by birth, if at the time of the coming into force of this Act—

> *(a) he or she has been domiciled in South Sudan since 1.1.1956; or*
> *(b) if any of his or her parents or grandparents have been domiciled in South Sudan since 1.1.1956.*

(3) A person born after the commencement of this Act shall be a South Sudanese National by birth if his or her father or mother was a South Sudanese National by birth or naturalization at the time of the birth of such a person.

(4) A person who is or was first found in South Sudan as a deserted infant of unknown Parents shall, until the contrary is proved, be deemed to be a South Sudanese National by birth.

15. Transitional Constitution of the Republic of South Sudan, Article 45: (1) Every person born to a South Sudanese mother or father shall have an inalienable right to enjoy South Sudanese citizenship and nationality. (2) Citizenship is the basis of equal rights and duties for all South Sudanese. (3) Every citizen shall enjoy all the rights guaranteed by this Constitution. (4) The law shall regulate citizenship and naturalization; no naturalized citizen shall be deprived of his or her acquired citizenship except in accordance with the law. (5) A South Sudanese national may acquire the nationality of another country as shall be prescribed by law. (6) A non-South Sudanese may acquire the nationality of South Sudan by naturalization as shall be prescribed by law.

16.In 2003, the SPLM adopted a Nationality Act as one of the Laws of the New Sudan, applied in the areas under its control. The Act provided that a person born before 2003, the date of the entry into force of the Act, was a New Sudan national by descent if he or she was or his/her parents or his/her grand and great grandparents were born in the New Sudan provided that he or she belonged to one of the "tribes of the New Sudan". A person could also be a New Sudan national by descent if he or she, at the time of coming into force of the new Nationality Act, was domiciled since April 1994 and his or her ancestors in the direct male line had all been domiciled in the New Sudan. Alternatively, a person could be a New Sudan national by descent if he or she had acquired and maintained the status of a New Sudan national by uninterrupted domicile. In addition, persons born after the ratification of the New Sudan Nationality Act would be also New Sudan nationals by descent if their fathers were New Sudan nationals by naturalization at the time of their birth. The Act provided that deserted infants or of unknown parents would be presumed nationals by descent until the contrary was proved. The Act is downloadable from the UN Sudan Information Gateway at http://www.unsudanig.org/docs/The%20Nationality%20Act,%202003.pdf, accessed 4 January 2012.

The law also provides for acquisition of nationality by naturalization based on 10 years' residence (longer than the five years applied in the north since 1994) and other conditions. By contrast with the SNA, the SSNA provides that either a man or a woman married to a South Sudanese national may acquire his or her spouse's nationality after five years' residence in South Sudan (Article 13).

South Sudan adopted regulations on the implementation of the SSNA in December 2011. Importantly, the regulations provide procedures to permit both administrative and judicial appeal from decisions of the minister made under the act.

Republic of Sudan

On 19 July 2011, the National Assembly of the Republic of Sudan adopted amendments to the Sudan Nationality Act 1994 in relation to the deprivation of nationality of those who become citizens of the RoSS. These amendments entered into force on 10 August 2011 following signature of the President of the Republic of Sudan. The amendments added two sub-articles to Article 10 of the SNA on loss of nationality:

> *10(2) Sudanese nationality shall automatically be revoked if the person has acquired, de jure or de facto, the nationality of South Sudan.*
>
> *10(3) Without prejudice to Section 15,[17] Sudanese nationality shall be revoked where the Sudanese nationality of his responsible father[18] is revoked in accordance with section 10(2) of this Act.*

Dual nationality with the RoSS is thus not allowed, although dual nationality with any other country has been permitted since 1994. This is in violation of international norms of non-discrimination on grounds of national origin.[19] Moreover, while international law gives states discretion to decide whether to permit dual nationality or not, the usual practice is at minimum to permit a child to hold dual nationality, with the requirement to opt for one or the other after the age of 18.[20]

The law provides no process to allow a person to argue that he or she has not obtained the nationality of South Sudan; nor to renounce any such right in order to remain a citizen of the Republic of Sudan. However, an additional Article 16 is also added, which states that:

> *Without prejudice to Article 10(2), the president may upon application restore nationality to any individual whose nationality was revoked or withdrawn.*

The period of residence to be able to naturalise a citizen has been increased from five to ten years, and is now required to be "lawful and continuous", while two additional conditions for naturalisation have been added to require that the person be of sound mind and have a lawful way of earning a living.[21] These revisions appear designed to make it more difficult for South Sudanese to naturalise.

As of 9 April 2012, the existing Nationality Certificate Regulations 2005 of the Republic of Sudan had not been updated to take into account the amendments to the SNA.

17.Section 15 of the Sudan Nationality Act reads "If Sudanese nationality is revoked from the responsible father of a minor under the provisions of section 10 the minor shall not lose his Sudanese nationality save if he is or was the national of any country other than Sudan according to the laws of that country." i.e. the provision is designed to prevent the child becoming stateless as a result of loss of Sudanese nationality.
18."Responsible father" is defined in the SNA as "the father or the mother if guardianship was transferred to her by order of a competent court or if the child was born as a result of an unlawful relationship". Custody decisions are made in accordance with the Muslim personal law where one of the parents is a Muslim, otherwise the courts will apply the customary rules of the relevant community.

19.For example, Article 2 of the African Charter on Human and Peoples' Rights.
20.See also the 1997 European Convention on Nationality, which requires states to allow multiple nationality at least for children (Articles 14-16). This is the practice in the laws of many African countries that do not allow dual nationality (for example, in Kenya, before the adoption of the 2010 Constitution).
21.Article 7 of the 1994 Act, as amended 2011.

THE IMPACT OF THE NEW NATIONALITY LAWS

The lack of an agreed framework between the two states to resolve the status of persons who may be eligible for the nationality of both states creates serious problems for the persons affected, including the possibility that many individuals will become stateless. Even where a person is not left stateless, the automatic deprivation of Sudanese nationality from persons resident in Sudan who may be considered as nationals under the law of South Sudan but do not wish to claim South Sudanese nationality, is not in conformity with international law principles of due process or international norms relating to nationality in cases of state succession.

Republic of South Sudan

South Sudan's nationality law is broadly drafted to provide nationality by birth to people who belong to ethnic groups traditionally resident in South Sudan, those with parents, grandparents or great-grandparents who were born in South Sudan, and those whose ancestors have been resident in the territory since 1956. Although the implementation of the law is in its infancy, in principle most — though not all — of those habitually resident in South Sudan who desire to do so should be able to obtain recognition of South Sudanese nationality under this law; either by birth or, if resident for more than ten years, by naturalisation.

Nonetheless, the ethnic definition of nationality in Article 8(1)(b) of the SSNA could create problems for the future on both sides of the border with South Sudan. Which groups in fact form the "indigenous ethnic communities of South Sudan"? Do they include cross-border groups, pastoralists who spend only part of the year in the South, or descendants of immigrants from other parts of Africa such as the pastoralist Mbororo? Arguments over these issues have led to bloodshed in a number of African countries. The definition of "indigenous ethnic community" is even more complex for those not resident in South Sudan, including not only the Ngok Dinka of the Abyei Area (which the Government of Sudan claims is Sudanese, and the Government of South Sudan claims is South Sudanese), but many others, especially for those of mixed ethnic descent. In practice, moreover, those with only weak links to South Sudan who have always lived in the north of Sudan (including even those individuals of mixed parentage, especially those with a South Sudanese mother and Sudanese father) may have difficulty in proving entitlement to South Sudanese nationality and obtaining the relevant documentation.

These problems would have been reduced if the provisions of Section 8(1)(a) and (b) of the SSNA —that a person "shall be considered a South Sudanese national…" if he or she has a parent, grandparent or great-grandparent born in South Sudan or belongs to one of the "indigenous ethnic communities" of South Sudan — were transitional measures only and did not apply equally to those born before or after the independence of South Sudan, whether inside or outside its territory. In the particular political context of the secession of South Sudan, the definition of voting rights in the independence referendum and the post-independence attribution of nationality on the basis of commonly understood ethnic definitions or ancestral connection to the territory may have had some advantages. However, ethnically-based definitions of belonging have a tendency to create long-term political problems. It would be better if, for those born after independence, the attribution of nationality on the basis of ethnic identity (Section 8(1)(b)) were removed; while the attribution of nationality on the basis of an ancestor born in the territory (Section 8(1)(a)) were applied only to those who themselves are also born on the territory, after independence. Those born outside the RoSS since independence, but with ancestors born in the territory, could instead be given the right to apply for South Sudanese nationality if they wish. As the

law stands, the RoSS is effectively imposing its nationality on people born and resident outside its territory who may not wish to claim it — a particularly problematic imposition for those who have a possible claim on another nationality in a country where dual nationality is not allowed. A person may renounce South Sudanese nationality (under Section 15(1) of the SSNA), but the initial attribution may still have problematic consequences.

Republic of Sudan

The language of the new article SNA 10(2), with its provision for automatic loss of nationality if a person has obtained South Sudanese nationality "de jure or de facto" raises serious concerns of lack of respect for due process and the creation of statelessness. The RoS authorities have effectively been given the power to interpret the SSNA to decide for themselves when a person has acquired South Sudanese nationality, whether or not a person has taken any steps to obtain recognition of South Sudanese nationality in practice, or indeed wishes to do so. This will in principle be the case even if a person has just one great-grandparent born in South Sudan. The RoS authorities are not bound to seek further confirmation from the South Sudanese authorities, and the individual concerned is given no right to challenge this determination. Moreover, under new SNA Article 10(3), even children are not allowed to hold dual nationality with South Sudan, except perhaps in the case where they have a Sudanese father and South Sudanese mother.

It is also unclear what the conditions and procedures for reacquisition of Sudanese nationality under Article 16 will be. Reinstatement of Sudanese nationality is at the discretion of the President of the Republic of Sudan and the conditions are not specified. It is unclear whether individuals will be able to reacquire nationality on the basis that they have been refused recognition of South Sudanese nationality

and have therefore become stateless. Further, the reliance on presidential discretion for reacquisition of nationality raises the risk of discrimination on grounds of religion or political opinion where only those from approved backgrounds are allowed to reacquire nationality.

There may be the theoretical right of a person who is attributed South Sudanese nationality under the SSNA to renounce South Sudanese nationality and naturalise as a Sudanese national. However, there is no clarity as to the way in which the naturalisation provisions under Article 7 of the SNA will be applied to South Sudanese nationals who were living as citizens in the north of Sudan prior to the secession of South Sudan. Will they be able to acquire Sudanese nationality upon showing proof of ten years lawful residence as a Sudanese citizen? What will be their situation if they renounce South Sudanese nationality and are then not successful in their application to naturalise?

Further, the SNA does not provide for any specific right of appeal against a decision to withdraw Sudanese nationality. In principle there is a right to an administrative appeal against a decision of the civil registrar,[22] as well as the possibility to apply for judicial review[23] or to challenge a decision affecting a person's human rights before the Constitutional Court.[24] However, the administrative appeal is not independent and does not respect the same standards of due process as a court hearing; while judicial review or an application to the constitutional court are likely to be inaccessible to the vast majority of affected individuals.

22.Article 9 of the Civil Registration Act 2011.
23.Administrative Justice Act 2005 article 1 : any decision issued by the President of the Republic, the Cabinet or the national minister can be challenged before the Supreme Court judge - Article 2: any decision issued by any public authority other than the previously mentioned can be challenged before the Appeal Court judge.
24.Article 78, Interim National Constitution of the Republic of Sudan: any person aggrieved by a decision from the Cabinet or the national minister can contest that decision before either the Constitutional Court in issues related to violation of the constitution, bill of rights, system of governance or the CPA, or before the competent authority or court in other legal issues.

The combined effect of the SNA amendments is thus purportedly to give the power to the Sudanese authorities to arbitrarily deprive someone of Sudanese nationality, including persons who have a Sudanese parent (and thus under the constitution an "inalienable right" to Sudanese nationality), as well as persons who have only a very weak connection to South Sudan and whose entire life and livelihood is based in Sudan. In addition, the amendments create a risk of statelessness in cases where the Sudanese and South Sudanese authorities disagree about whether South Sudanese nationality has been acquired. The extent of that risk will depend on how in practice the provisions of the SSNA are interpreted by both the Government of Sudan and the Government of South Sudan.

Access to documentation and proof of nationality

Access to nationality documentation is likely to be a challenge for all South Sudanese nationals in the short term, since the South Sudanese authorities only introduced procedures for issuing nationality documentation in January 2012 and will require some time to reach even all citizens living in the Republic of South Sudan. Those with a right to South Sudanese nationality living outside the new country may face even greater challenges as establishment of diplomatic representations and introduction of procedures for obtaining documentation overseas may take some time to introduce.

A significant concern is that access to South Sudanese nationality documentation may be restricted for the many South Sudanese living in the Republic of Sudan, home to the largest population of South Sudanese outside South Sudan. It is likely that consular representation may be limited to Khartoum, while the continuing tense relations between the two states mean that cooperation around issues of nationality determination is doubtful. Since South Sudanese will most likely require nationality documentation in order to obtain residence permits in the Republic of Sudan, this could also hinder their ability to legalise their stay in the Republic of Sudan.

UNICEF estimates that only one third of children under five born within the borders of the two states had obtained birth registration as of 2009, and around one fifth of those in rural areas.[25] These statistics are likely to be worse in South Sudan than in Sudan, though disaggregated statistics are not currently published. Given that proof of entitlement to South Sudanese nationality may depend on showing that a parent, grandparent or great-grandparent was born in South Sudan — while retention of Sudanese nationality may depend on showing that they were not — the low rate of birth registration will create challenges for many people in obtaining recognition of their nationality of either state. The RoS has started a campaign to improve birth registration in Sudan, but there are also concerns that those of southern ethnicity are being excluded from this process.[26]

Regulations adopted by the RoSS under the SSNA attempt to address this problem by providing that, where documentary evidence is not available, the authorities should take witness statements into consideration, including from traditional authorities, religious leaders, relations of the applicant, or "any other persons of good standing". However, people displaced by the war may have lost touch with anyone able to vouch for their origins, and therefore face particular difficulties with proving nationality, even if witness statements are accepted.

25. UNICEF, State of the World's Children 2011, Table 9: Child Protection.
26."Civil Register General Administration Workshop: Birth Registration for Better Future and Rights for Children", Sudan Vision Daily, 8 February 2012; "Editorial: Stateless in Sudan", Sudan Vision Daily, 8 February 2012.

AGREEMENT ON "VOLUNTARY RETURN"

On 12 February 2012, the governments of the Republic of Sudan and the Republic of South Sudan signed a "Memorandum of Understanding on the Return of the Nationals of South Sudan", in which they agreed a "Charter of Voluntary Return" (Article 2), providing that:

> *The return of Southerners currently residing in the territories of the Republic of the Sudan should take place on their own free will based on adequate knowledge of the circumstances and conditions prevailing in their original home areas.*

Further articles laid out specific provisions relating to provision of information, timetable, means of return, border crossing points, etc.

The definitions section of the MoU stated that :

> *For the purposes of this agreement, the phrase "nationals of South Sudan" means and refers to all southern citizens who reside within the territories of the Sudan.*

The MOU did not, however, refer to the laws of either country to clarify this definition, nor did it provide any mechanism to resolve cases where the person's status as a national of either or both states is in doubt. It was stated to expire at the end of the transitional period following the secession of South Sudan, on 8 April 2012.

The MOU was endorsed by the African Union, in a press release in which the "Chairperson of the Commission commends both Parties for taking important joint decisions aimed at facilitating safe and dignified voluntary returns, and urges them to ensure that the MoU is implemented in full."[27]

Aid agencies, however, called on Sudan to extend the deadline for southern Sudanese to leave the country. One group warned it could create a "logistical nightmare and humanitarian catastrophe", and others noted that some 11,000 would-be returnees had already been stranded for months at Kosti, a way station just north of the border with South Sudan, and others in camps on the outskirts of Khartoum.[28] Even if the transitional period is (retrospectively) extended, there remains a lack of clarity on who exactly will be regarded as South Sudanese and assisted to return.

27."The African Union urges Sudan and South Sudan to expeditiously complete the ongoing discussions on nationality and related matters", Press Release, 17 February 2012.

28."Sudan and South Sudan Sign Return Deal, But April Deadline 'Massive Logistical Challenge' says IOM", International Organisation for Migration, 14 February 2012; Emma Batha, "Deadline for southerners to leave Sudan is impossible - aid groups", AlertNet, 22 February 2012; "Sudan—South Sudan: Southerners running out of options", IRIN, 16 February 2012.

THE "FOUR FREEDOMS" AND THE SITUATION OF SOUTHERNERS RESIDENT IN THE NORTH

The Government of Sudan stated that southerners resident in the north must "regularize their status" in Sudan by 8 April 2012, nine months after the date of the 9 July 2011 referendum. However, the means for doing so are wholly unclear. While the senior government officials stated that "there are absolutely no deportation plans for Southerners after April",[29] others threatened expulsion of those identified as "unwanted".[30] The situation for people in Sudan who may be believed to have acquired South Sudanese nationality is clearly precarious.

Southerners resident in the north have been dismissed from employment in the civil service and in the private sector, have had their children refused registration in school, and treatment in public health clinics.[31] Under the Interim National Constitution of Sudan 2005 (still in force), the right to property is only protected for citizens,[32] and people of southern origin are now facing difficulties in buying or selling immovable property — hindering their ability to remain in Sudan, but also to realise funds to relocate to South Sudan, should they wish. Official rhetoric surrounding the status of "southerners" has been hostile, even if active plans to follow through are not in place. Khartoum State announced that it is establishing evacuation camps for moving "foreigners who live illegally in Khartoum", while the popular committees at neighbourhood level were instructed to draw up lists of foreign residents and report violators.[33] Officials indicated that those "southerners" still in Sudan as of 9 April would be dealt with as foreigners, whether or not the "four freedoms" agreement was concluded.[34]

An Arabic language daily newspaper reported in January 2012 that the Khartoum North Court had sentenced a man and woman with a Sudanese father and South Sudanese mother who had sought to obtain identity cards to one month imprisonment and a fine for providing incorrect information regarding their nationality, on the grounds that they were no longer entitled to Sudanese documents since they had become South Sudanese.[35]

On 13 March 2012, representatives of the two governments signed a long-awaited "Framework Agreement on the Status of Nationals of the Other State and Related Matters" in the presence of former president of Burundi Pierre Buyoya representing the African Union. The agreement, modelled on a similar 2004 agreement between Sudan and Egypt known as the "four freedoms" agreement, provided that :

> *In accordance with the laws and regulations of each State, nationals of each State shall enjoy in the other State the following freedoms:*
>
> *(a) Freedom of residence;*
> *(b) Freedom of movement;*
> *(c) Freedom to undertake economic activity;*
> *(d) Freedom to acquire and dispose of property.*

The agreement would establish a "joint high level committee" to "oversee the adoption and implementation of joint measures relating to the status and treatment of nationals of each State in territory of the other State". The parties also committed to further negotiations to

29. Al-Obeid Murawih, spokesman for the Ministry of Foreign Affairs, quoted in "Sudan—South Sudan: Southerners running out of options", IRIN, 16 February 2012.
30. Vice President al-Haj Adam Yusif quoted by al-Jareeda, 7 March 2012.
31. "Sudan—South Sudan: Southerners running out of options", IRIN, 16 February 2012.
32. "Every citizen shall have the right to acquire or own property as regulated by law." Interim National Constitution of Sudan, 2005, Article 43 (1).
33. "Camps to Evacuate Illegal Foreigners in Khartoum State", Al Sudani, 1 February 2012; Al-Sahafa, 23 February 2012.
34. Al-Ray al-Aam, 2 April 2012.
35. Al Intibaha, 4 January 2012.

elaborate on these freedoms, which could in principle greatly improve the situation of "southerners" in Sudan, in particular by removing the requirement to obtain specific permission to remain in the country on an individual basis. However, very poor relations between the two governments further worsened in late March, with the outbreak of open hostilities between the two states in the oil-rich border territory of Heglig. A signing ceremony for the four freedoms agreement by the presidents of the two republics, due to take place in Juba, the capital of South Sudan, on 3 April, was cancelled. Until the presidents sign, the agreement is not officially in force.

On 10 April 2012, the Ministry of the Interior of the RoSS issued a press release announcing, "in response to procedures issued by the Government of the Republic of the Sudan concerning the status of South Sudanese in the Republic of Sudan", that "all nationals of the Republic of Sudan are declared foreigners as of 9th April 2012", and those entering South Sudan would require visas.[36] The press release also stated that Sudanese nationals would be given temporary stay documents free of charge, and time to regularise their status". However, there remains a lack of clarity on who actually will be considered to be Sudanese.

36. "Status of Sudanese Nationals in the Republic of South Sudan", Press Release, Ministry of the Interior, Republic of South Sudan, 10 April 2012.

INTERNATIONAL LAW ON NATIONALITY AND STATE SUCCESSION

In situations of state succession, where the sovereignty over territory is transferred from one state to another, the concerned states have an obligation in international law to ensure that statelessness is prevented. This is the corollary of the right of every individual to a nationality as enshrined under Article 15(1) of the Universal Declaration on Human Rights.[37]

The basic presumption in international law on the nationality of persons with the nationality of the territories affected by state succession is the following:

> *In the absence of agreement to the contrary, persons habitually resident in the territory of the new State automatically acquire the nationality of that State, for all international purposes, and lose their former nationality, but this is subject to a right in the new State to delimit more particularly who it will regard as its nationals.*[38]

This customary law presumption is restated in the comprehensive "Draft Articles on Nationality of Natural Persons in Relation to the Succession of States" adopted in 1999 by the International Law Commission (ILC), an inter-governmental body established under UN auspices in 1948.[39] Until they are formally adopted by the UN General Assembly, these draft articles are not formally binding, though the

37. Article 15 Universal Declaration of Human Rights.
38. James R. Crawford, The Creation of States in International Law, 2nd Ed (2006), p.53. See also , Ruth Donner, The Regulation of Nationality in International Law, 2nd Ed, 1994, Chapter V ("Nationality and state succession"); and ; Paul Weis, Nationality and Statelessness in International Law (2nd Ed.), 1979, Chapter 11 ("Effect of territorial transfers on nationality").
39 International Law Commission, Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries, 1999. (Annex to UNGA Res. 55/153, 12 Dec. 2000).

General Assembly has invited governments to take their provisions into account when dealing with the issues and they do provide authoritative guidance on the accepted norms of international law in this area.[40]

Article 1 reflects the understanding of customary international law that:

> *Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned.*

Further articles provide that states must take "all appropriate measures" to prevent statelessness arising from state succession, and that persons shall not be denied the right to retain or acquire a nationality through discrimination "on any ground."

In addition to presuming that nationality will be attributed to persons on the basis of habitual residence in that state, the ILC Draft Articles provide that states "shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned." In particular, a state shall grant a right to opt for its nationality to persons who have an "appropriate connection" with that state if they would otherwise be stateless. The commentary on the Draft Articles explains that a right to opt has been common practice in many cases of state succession, and that it can help to resolve problems of attribution of nationality where jurisdictions overlap. An "appropriate connection" can mean habitual residence, a legal connection with one of the constituent units of the predecessor state (this refers primarily to membership of one of the units of a former federal state that is being split up), or birth in the territory of a state concerned. But "in the absence of the above-mentioned type of link between a person concerned and a State concerned further criteria, such as being a descendant of a person who is a national of a State concerned or having once resided in the territory which is a part of a State concerned, should be taken into consideration."

In relation to those persons who had the nationality of the predecessor state but are not resident in the territory whose sovereignty is transferred, the customary law position is not clear. However, the ILC Draft Articles have a specific section relating to the type of state succession when there is "separation of part or parts of the territory" while the predecessor state continues to exist — as is the case in the Sudans. Article 25 provides that the predecessor state shall withdraw its nationality from those of its former nationals qualified to acquire the nationality of the successor state, if they are resident in the successor state and under certain other circumstances, provided that they do in fact acquire its nationality. However (in contrast to the situation in Sudan), it may not withdraw nationality from persons who have their habitual residence in its own territory. Article 26 states that:

> *Predecessor and successor States shall grant a right of option to all persons concerned [...] who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.*

The only regional human rights system to have adopted specific treaties in the area of nationality is the Council of Europe, where the 1997 Convention on Nationality and the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession elaborate on these rules, again based on the principle that everyone who had the nationality of the predecessor state should have the right to nationality of one or another of the successor states if he or she would otherwise become stateless.[41] The Convention on the Avoidance of Statelessness in Relation to State Succession creates specific obligations for

40. The most recent resolution in this series is UN General Assembly Resolution 66/92, "Nationality of natural persons in relation to the succession of States", distributed 13 January 2012.

41. Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, Article 2—Right to a Nationality. "Everyone who, at the time of the State succession, had the nationality of the predecessor State and who has or would become stateless as a result of the State succession has the right to the nationality of a State concerned in accordance with the [provisions of the treaty]."

predecessor and successor states, prohibiting the predecessor state from withdrawing nationality if the person would become stateless.[42]

Within Africa, practice has varied. In the case of Eritrea's secession and the subsequent war between Eritrea and Ethiopia, the Ethiopian government expelled around 75,000 people allegedly of Eritrean nationality, 15,000 more than those who had registered in Ethiopia to vote in the referendum on Eritrean independence (around half a million people of Eritrean origin were believed to live inside the new boundaries of Ethiopia at that time). Condemning the arbitrary nature of many of these expulsions, the Eritrea-Ethiopia Claims Commission, set up by the comprehensive peace agreement of December 2000 that ended the war between the two countries, found that:

> *Taking into account the unusual transitional circumstances associated with the creation of the new State of Eritrea and both Parties' conduct before and after the 1993 Referendum, the Commission concludes that those who qualified to participate in the Referendum[43] in fact acquired dual nationality. They became citizens of the new State of Eritrea pursuant to Eritrea's Proclamation No. 21/1992, but at the same time, Ethiopia continued to regard them as its own nationals.[44]*

This was despite the fact that Ethiopian law did not then and still does not allow dual nationality.

42. Article 6 – Responsibility of the predecessor State: "A predecessor State shall not withdraw its nationality from its nationals who have not acquired the nationality of a successor State and who would otherwise become stateless as a result of the State succession."
43. That is, among other things, they had in fact registered as Eritrean nationals under Eritrea's 1993 nationality proclamation (and were not simply qualified to do so).
44. Award of the Eritrea-Ethiopia Claims Commission in Partial Award (Civilian Claims: Eritrea's Claims 15, 16, 23 & 27–32), award of 17 December 2004, para.51, available at the website of the Permanent Court of Arbitration, which acted as registry for the process, http://www.pca-cpa.org/showpage.asp?pag_id=1151.

Rights of non-nationals

The ILC Draft Articles provide that habitual residents "shall not be affected by the succession of states" and that states "shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto." Also relevant is Article 12 of the International Covenant on Civil and Political Rights, which provides that every person has the right to enter his or her "own country". The Human Rights Committee, responsible for monitoring the treaty, has interpreted "own country" to include "at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien" (which in the case of Sudan would clearly include "southerners" resident in the north who are no longer citizens of the Republic of Sudan).[45]

45. See Committee on Human Rights, General Comment No. 27: Freedom of movement (Art.12): 02/11/1999; CCPR/C/21/Rev.1/Add.9: "20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them…."