Journal of African Law, 55, 2 (2011), 157–180 © School of Oriental and African Studies, 2011.
doi:10.1017/S002185531100009X

Citizenship Rules in Sudan and Post-Secession Problems

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Abstract

Affiliation with a political community or entity has throughout history been important for the purposes of protection and belonging. This article discusses the concept of citizenship in Sudan in light of the Sudanese and Southern Sudanese interim constitutions and relevant laws, taking into consideration the international norms in this regard. It also sheds light on the application of the law and possible scenarios when the South becomes an independent nation. It argues that a set of legal rules that organize nationality issues in Sudan and Southern Sudan are inconsistent with general nationality principles and that, if their provisions remain valid until the fragmentation of Sudan becomes a reality, many post-secession violations will be difficult to avoid. It suggests a series of measures that the main parties to the National Unity Government should take to avert such violations and secure peaceful and neighbourly relations in the years to come.

BASES OF NATIONALITY

Identity and citizenship

A distinction should always be drawn between one's identity and citizenship. Identity can be shared by people belonging to several states while citizenship is shared only by those belonging to one state. In other words, people who share an identity can be spread across several states and equally one state can have people with several different identities living within its borders. An obvious example is the Arabic identity shared by several Arabic speaking and generally Muslim nations in the Middle East and North Africa, who are connected with one history and culture but have different nationalities.

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https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

Nationality therefore expresses a legal relationship between an individual and a state. In this context, the term citizenship is usually used to give the same meaning as nationality.[1]

The modern concept of a state connects enjoyment of some civil rights and freedoms, and subjection to certain duties, to being a member of a state. It is that membership which makes a man or a woman eligible for certain civil rights and freedoms. An example is the right to vote which is only exercised by citizens although there are certain states, such as the United Kingdom, that allow citizens of other states to vote.[2] Although people do not differ on this principle, they do differ on the criteria used to determine whether someone is or can be affiliated with a certain state, ie they follow inconsistent rules to determine who is a citizen of a particular state. The reason why they differ is that international law, before the emergence of international human rights norms, used to leave this area to be covered by domestic constitutions and laws. There are fundamental objective legal rules that are adopted by states to give their nationalities to persons, but arbitrary rules are also wide-spread and followed to nationalize and denationalize individuals mostly for political reasons. This normally happens in times of problems and crises, when laws and legislation are used by the powerful as instruments to weaken rivals and achieve political objectives. In other situations, ethnic, religious or cultural bigotry or gender discrimination can make states lay down legal rules and principles that deliberately exclude people who do not belong to a certain group from holding citizenship of a state.

In many areas around the world, the inability or failure to appreciate or follow this nuance between the concept of nationality and that of identity has caused serious political and security problems. Sudan, where there are Arab-African and North-South identity complexities, is an obvious example. Even before the country's independence in 1956, the Sudanese started fighting because the South felt the policies of the various central governments were exclusionary in terms of identity, as they had Islamic and Arabic tendencies. Initially, it was thought by many inside and outside Sudan that the war was over political and economic power only, but the renowned Sudanese diplomat and academic, Francis Deng, was the first to draw the attention of the Sudanese to the fact that the problem is one of identities and visions: that there is a conflict between the Southern Sudanese African identity and the Northern Sudanese Arab-Muslim identity.[3] Southern Sudanese in Sudan feel

1 B Manby *Citizenship Law in Africa: A Comparative Study* (2nd ed., 2010, Open Society Foundations) at ix, available at: <http://www.afrimap.org/report.php#40> (last accessed 18 February, 2010).

2 This is indeed consistent with the "abstract or pure" concept of human rights. It might lead us at some point in the future to a point where there will be no difference between human rights and civil rights.

3 For further discussion on this point, see F Deng *War of Visions: Conflict of Identities in the Sudan* (1995, Brookings Institute Press).

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

that it is not nationality that determines their status in their country, but identity.

In spite of the controversy, disagreement and wars over the identity of the Sudanese nation, there is no debate or dispute at all, at least in theory, over who is classified as Sudanese. This is indeed something that all leaders of the Sudanese political and military organizations should be credited for. As Alex de Waal eloquently puts it: "[d]espite all the internal wars which the Sudanese people have fought in their search for a collective identity for their nation, and the fact that some ideologies have been inherently discriminatory, no political party has ever mobilized to try to exclude another group from being Sudanese altogether. Sudanese do not disagree on the fact that they *are all Sudanese*".[4]

However, this does not mean that all nationality rules in Sudan are consistent with international human rights conventions. Sudan's Interim National Constitution of 2005 (Interim National Constitution)[5] and nationality laws clearly define a citizen of Sudan. Before discussing the rules provided for in that constitution, one should mention that, before 1948, a Sudanese was any person who was subject to Sudanese jurisdiction.[6]

Federal constitution and laws

The first nationality law in Sudan's legal history was the Sudan Nationality Act 1957 (1957 Act), which was passed one year after the formal declaration of Sudan's independence and amended in 1974.[7] It remained effective until the Sudan Nationality Act 1993 (1993 Act) was passed as a provisional decree.[8] One of the major changes that the 1993 Act made to the previous law was the removal of adopted children from the definition of "children" for the purposes of nationality acquisition.[9] This change followed the tendency of the government to apply Islamic legal principles (Sharia laws) which prohibit adoption as it is practised in the world today.[10] Another amendment was

4 A de Waal "Who are the Sudanese?" *Making Sense of Sudan* (previously *Making Sense of Darfur*) (Social Science Research Council, 14 December 2009), available at: <http://blogs.ssrc.org/sudan/2009/12/14/who-are-the-sudanese/> (last accessed 21 January 2010) (emphasis original).

5 The Interim National Constitution is available at: <http://www.sudan-embassy.de/c_Sudan.pdf> (last accessed 19 January 2010).

6 The Definition of Sudanese Ordinance was passed in 1948. The ordinance abolished the then general rule and practice that anyone who was subject to Sudanese jurisdiction was Sudanese. This ordinance was repealed by the Sudan Nationality Act 1957.

7 This act was the first Sudanese nationality act to satisfy the modern requirements of nationality laws as it contained modern nationality law concepts, norms and principles. It repealed the Definition of Sudanese Ordinance 1948.

8 The act was Provisional Decree no 19 of 1993, pursuant to the provisions of sec 27 of the 5th Constitutional Decree of 1991.

9 1993 Act, sec 3.

10 The Holy Qu'ran, part 21, chap 33, Surat Al-ahzab, verse no 5: "Call them by [the names of] their fathers; this is more equitable with Allah; but if you know not their fathers,

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

that the 1993 Act provided for the grant of nationality to children of unknown parents. In 1994, the Sudan Nationality Act 1994 (1994 Act) was issued, also as a provisional decree. It was later passed into law by the National Assembly on 2 May 1994 and amended in 2005 (the Sudan Nationality Act).[11] The 1998 constitution purported to remove gender discrimination, but the 1994 Act was not amended until the Comprehensive Peace Agreement (CPA) was concluded and the Interim National Constitution was adopted. The basic provisions of the 1994 Act and those of the 2005 amendment will be critiqued in detail later in this article.

Consistent with the modern concept of a state and universal human rights principles, the Interim National Constitution illustrates, inter alia, that nationality is the determinant of rights and duties. It also gives women the right to pass their nationalities to their children. Article 7 of the Interim National Constitution states:

> "(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."

This article essentially repeats article 22 of the repealed 1998 constitution in relation to nationality by descent; however, whereas article 22 provided for an explicit right to naturalize based on residence in Sudan, the Interim National Constitution simply delegates regulation of naturalization to other laws.

Article 7(2) provides for the right of every person born to a Sudanese father or mother to have Sudanese citizenship, whether or not they were born on Sudanese soil. This reflects the principle known as *jus sanguinis* [right of blood]. Historically, this principle often had an ethnic or racial component, whereby citizenship was based on membership of the dominant ethnic, racial or religious group in a country. In Africa, several countries, notably the Democratic Republic of the Congo (DRC), Liberia, Malawi, Sierra Leone and Uganda, still include an explicitly racial or ethnic basis for citizenship.[12]

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contd
then they are your brethren in faith and your friends. And there is no blame on you in that wherein you make a mistake, but [you are answerable for] that which your hearts purpose. And Allah is ever Forgiving, Merciful."

11 Adopted by the National Assembly on 27 June 2005 and signed by the president of the republic on 6 July 2005.

12 For further information, see Manby *Citizenship Law in Africa*, above at note 1 at 42.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

However, in most African countries today, as in most (though not all) other modern legal systems, the *jus sanguinis* principle has lost its ethnic basis: citizenship is granted to those who are born to a parent who is a citizen including, for example, a parent who has acquired citizenship by naturalization and may not be of the same ethnicity, etc, as the dominant group. The Sudanese constitutions of 1998 and 2005 follow this more modern usage.

The provisions of article 7 do not, however, provide for one of the common ways of acquiring nationality, that is, acquisition of nationality based on birth on the territory, also known as *jus soli* [law of soil] in public international law.[13] As we will see, however, the Sudan Nationality Act contains provisions which allow the acquisition of nationality based on birth in Sudan in some circumstances. The *jus soli* principle can be traced back to at least 1608 in English common law, when in *Calvin's* case the court decided that "a person's status was vested at birth, and based upon place of birth - a person born within the king's dominion owed allegiance to the sovereign, and in turn, was entitled to the king's protection".[14] The USA adopted the same principle, as noted in the *Rhodes* case of 1866 by US Supreme Court Justice Noah Haynes Swayne: "[a]ll persons born in the allegiance of the king are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country … since as before the [American] Revolution".[15] The USA retains the principle in its pure form today, whereas the United Kingdom has significantly modified it so that birth on British soil does not guarantee British nationality. Usually, there is an exception for the children of representatives of diplomatic missions born in the countries where their parents serve.[16]

The Interim Constitution of Southern Sudan 2005 (Interim Southern Constitution) defines who a Southern Sudanese is for the purposes of the referendum on self-determination, not for the purposes of acquiring nationality: Southern Sudan is not yet an independent state, and nationality and immigration issues are still organized by federal laws in Sudan and Southern Sudan. Article 9(2) of that constitution states:

> "(2) For purposes of the referendum in sub-Article (1) above, 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 1 January, 1956; or whose ancestry can be traced

13 The USA is well known for following this rule. In Africa, only five countries (Chad, Equatorial Guinea, Lesotho, Mozambique and Tanzania) provide for the rule in their laws. See Manby, id at 36 for further details.

14 77 Eng Rep 377 (1608) at 377.

15 *United States v Rhodes* 27 Fed Cas 785 (1866) at 785.

16 As provided for in art 12 of the Convention on Certain Questions relating to the Conflict of Nationality Law, adopted in April 1930, entered into force on 1 July 1937.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

through agnatic or male line to any one of the ethnic communities of Southern Sudan as in Schedule G herein; 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 1 January, 1956."

The Interim Southern Constitution also repeats paragraphs (1) and (2) of article 7 of the Interim National Constitution verbatim. The only difference is that the former makes a cosmetic change by reversing the two paragraphs.[17]

Article 9(2) of the Interim Southern Constitution was repeated in the South Sudan Referendum Act (Referendum Act), which will be discussed later in this article. The insertion of the provisions of article 9(2) in the Referendum Act sparked huge debate in the Sudanese Parliament between the National Congress Party (NCP) members who wanted a much broader definition, on the one hand, and the Sudan Peoples' Liberation Movement (SPLM) members, who wanted this definition of a Southern Sudan, on the other hand. This was animated by Southern fears of Northerners impacting the vote.

For the whole of Sudan, the effective nationality law today is the Sudan Nationality Act.[18] The 2005 amendment implemented the terms of the CPA and provided details to supplement the Interim National Constitution. Many of the 1994 Act's provisions contradicted article 7 of the Interim National Constitution (and indeed article 22 of the 1998 constitution). Unfortunately, despite the 2005 amendment, the 1994 Act still contains discriminatory provisions, for instance, regarding gender.

Acquisition of Sudanese nationality by birth is organized by sections 4 and 5 of the 1994 Act (as amended). These two sections, which are titled "definition of a Sudanese by birth" and "nationality of deserted infants" respectively, determine the situations where a person could be considered Sudanese by birth:

"4(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

17 Art 48 provides: "(2) Citizenship is the basis of equal rights and duties for all Sudanese in Southern Sudan, subject to art 9(3) of this Constitution. (3) Every citizen in Southern Sudan shall enjoy all the rights guaranteed by this Constitution and the Interim National Constitution. (4) The law shall establish a public registry of every birth, marriage or death in Southern Sudan." The Interim Southern Constitution is available at: <http://www.chr.up.ac.za/undp/domestic/docs/c_SouthernSudan.pdf> (last accessed 21 January 2010).

18 Issued in accordance with sec 27 of the 5th Constitutional Decree 1991.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

male line have been domiciled in Sudan since January 1956 [the date of independence];

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

(3) [added in 2005] 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;

(4) A person born to parents who are Sudanese by naturalization shall be a Sudanese by birth if his or her parents have obtained the Sudanese nationality by naturalization before his or her birth;"

"5: A person first found as deserted infant shall, until the contrary is proven, be deemed to be a Sudanese by birth."

In addition, sub-section 7(1)(d) of the 1994 Act reduced the time required for a Sudanese resident to become a naturalized Sudanese citizen from ten years, as provided in the 1957 Act (as amended in 1974),[19] to five years. The provisions of this sub-section are in line with the more generous legislation elsewhere on the African continent, and make it much easier for foreigners who reside in Sudan to obtain Sudanese nationality.

The 1994 Act still has no provision for children born in Sudan who would otherwise be stateless to obtain Sudanese nationality, in violation of international norms such as those enshrined in the Universal Declaration of Human Rights 1948, the 1961 UN Convention on the Reduction of Statelessness,[20] the International Covenant on Civil and Political Rights (ICCPR) 1966,[21] the UN Convention on the Rights of the Child (CRC) 1989[22] and the African Charter on the Rights and Welfare of the Child (ACRWC) 1989.[23] Though Sudan is not a party to the Convention on the Reduction of Statelessness, it is a party to all these other treaties. Article 6 of the ACRWC specifically requires states parties "to ensure that their constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws."

The continuing gender discrimination (in that a child of a Sudanese woman has to apply for nationality and does not obtain it automatically) also

19 The 1957 Act (as amended in 1974) is available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b56718> (last accessed 10 March 2010).

20 UN Treaty Series vol 989 at 175, available at: <http://www.unhcr.org/refworld/docid/3ae6b39620.html> (last accessed 9 March 2010).

21 Adopted and opened for signature, ratification and accession by General Assembly res 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with art 49.

22 Adopted and opened for signature, ratification and accession by General Assembly res 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with art 49.

23 OAU doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

contradicts the provisions of the Interim National Constitution and international norms. Nevertheless, children born to Sudanese mothers and alien fathers are partially enfranchised by the 2005 amendment to the 1994 Act. The 1994 Act now stipulates that such children born to a Sudanese mother are entitled to obtain Sudanese nationality by descent whenever they submit an application to the competent authorities. This is the first Sudanese nationality act ever to give this right to children born to alien fathers. This is an improvement on the pre-2005 situation but is still discriminatory, because children of Sudanese fathers acquire nationality automatically while those of Sudanese mothers do not. It is also unclear whether or not this amendment could be applied retrospectively to allow those who were born previously to apply to be recognized as citizens. It is worth noting here that the Child Act 2004 conspicuously provides that "every child born to a Sudanese mother or father shall have a prerogative to enjoy Sudanese citizenship and nationality". This is consistent with the ACRWC, the CRC and the ICCPR.[24] The ACRWC provides that "[e]very child has the right to acquire a nationality". This is to be read in conjunction with article 3 on non-discrimination, which provides that "[e]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his / her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."

In relation to citizenship by marriage, section 8 of the 1994 Act repeats the provisions of the 1957 Act (as amended in 1974), that granted alien women married to Sudanese nationals the right to apply for Sudanese nationality by naturalization if they lived in Sudan for a continuous period of not less than two years from the date of making their applications for acquiring Sudanese nationality.[25] The 1994 Act does not mention alien men who are married to Sudanese women; in common with many other African countries, Sudan does not grant women the right to pass their nationality to their husbands.[26]

Sub-section 4(b)(ii) of the 1994 Act changed the applicable date for a claim to nationality by birth based on the domicile of a male ancestor from 1924 as was stipulated by sub-section 5(1)(a)(ii) of the 1957 Act (as amended) to 1 January 1956, the date of independence. The changed date makes it more generous so far as descendants of "immigrants" between those dates are concerned, although the gender discrimination of the provision has been retained.

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24 Art 56(3) of the ACRWC and art 24 of the ICCPR.

25 Sec 9 of the 1957 Act (as amended in 1974). The president of the republic, upon the recommendation of the minister of interior, was also entitled to exempt alien women married to Sudanese nationals from the two year residency requirement.

26 For detailed analysis on this gender discrimination point, see Manby *Citizenship Law in Africa*, above at note 1 at 45–54.

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Rules in South Sudan

As Southern Sudan is not yet an independent state, the Interim National Constitution and the Sudan Nationality Act should be consulted regarding nationality issues. Nonetheless, it is possible to imagine the definition of a Southern Sudanese in light of the provisions of the Nationality Act of the New Sudan, 2003 (New Sudan Nationality Act).[27] This act provides that a person born before 2003, the date of the entry into force of the act, shall be 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 belongs to one of the tribes of the New Sudan.[28] A person can also be a New Sudan national by descent if he or she, at the time of coming into force of the New Sudan Nationality Act, has been domiciled since April 1994 and his or her ancestors in the direct male line before that date have all been domiciled in the New Sudan. Alternatively, a person can be a New Sudan national by descent if he or she has 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 are also New Sudan nationals by descent if their fathers were New Sudan nationals by naturalization at the time of their birth. The act provides that deserted infants are nationals by descent if they are of unknown parents until the contrary is proved;[29] however, there is no provision for the grant of nationality to an infant who would otherwise be stateless.

A couple of shortcomings can be identified as far as these provisions of the New Sudan Nationality Act are concerned. The first is that the act relates nationality by descent for those born in the New Sudan to being affiliated with a New Sudan ethnic group. This is very obvious from the use of the

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27 Available at: <http://www.splamilitary.net/documents/Nationality%20act%202003.pdf> (last accessed 21 January 2010). This act was adopted by the SPLM in a series of New Sudan legislation. This legislation was being applied in the areas that were under the control of the movement in Southern Sudan, Nuba Mountains and the Blue Nile area. It will probably be applied in the South as formal national legislation, following the vote by the people of the South for an independent state in the referendum. The act is not currently effective as nationality issues are organized by national laws. Nor is there any clear-cut indication that the act will be definitely adopted after the formal declaration of the new state. The reason why this act is discussed here is that all New Sudan laws have been adopted by the legislature in Southern Sudan. A circular issued by the Ministry of Legal Affairs and Constitutional Development states: "In Southern Sudan, all the current laws, National and New Sudan laws shall continue to operate in Southern Sudan till new actions are taken." In addition, it explains that "[a]ll the current laws" shall be interpreted to mean the non-Sharia-based New Sudan Laws. The reason why the New Sudan nationality law is ineffective is because nationality issues are organized by federal laws and legislation. Furthermore, as most of the New Sudan laws were passed by the Southern Sudan legislature into law, there is good reason to believe that it would do similarly with regard to the New Sudan Nationality Act. That is the justification for discussing this law in this article.

28 New Sudan Nationality Act, sec 5.

29 Ibid.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

word "and" to connect sub-section (1)(a)(i) (which provides that a person shall be deemed a New Sudan national by descent if "he was or his parents, his grand and great grandparents were born in the New Sudan") and sub-section (1)(a)(ii) which also stipulates that he or she must "[belong] to one of the tribes of the New Sudan". In ideal legal and political situations, sub-sections (1)(a)(i) and (ii) of section 5 should be separated from each other in the New Sudan Nationality Act.[30] Basing acquisition of nationality on ethnicity or tribal affiliation by sub-section (1)(a)(ii) is not only contrary to the general nationality principles of non-discrimination but also contradicts the "historical plurality and contemporary diversity"[31] notion upon which the whole New Sudan idea is built. In plain English, the notion emphasizes the indisputable fact that Sudan has always been heterogeneous and that at no point in history was it ethnically, tribally, culturally or religiously homogeneous.

A second shortcoming is that the New Sudan Nationality Act discriminates against women. It does not allow persons born in the New Sudan after the commencement of the act to be New Sudan nationals if they depend upon a female line, even if the members of that female line have lived in the New Sudan since before 1994 or have all been domiciled there.

It is also noteworthy that section 9 of the act grants New Sudan nationality by naturalization to foreigners who reside in South Sudan for ten years and acquire adequate knowledge of a Southern Sudanese language. The law requires a 20 year residency period if the applicant does not have adequate knowledge of a Southern Sudanese language. Although laws vary on the number of years required for naturalization, granting nationality on the basis of residency is the rule in many countries, such as the USA, United Kingdom and the vast majority of countries in Africa, where residing legally for a long period of time is alone a sufficient reason to be eligible for the nationality of those countries, regardless of whether one's ancestors in the direct male or female line were domiciled in those countries for a certain period of time. Obtaining that nationality only requires some procedural legal steps. Section 9 is one of the positive aspects of the New Sudan Nationality Act. In relation to the expected secession and rights of individuals in South Sudan, there are two problems: one is the number of years of residency required for naturalization and the second is that the law might not be applied retrospectively if it is adopted after the South becomes an independent state.

Another point regarding the New Sudan Nationality Act is the requirement that naturalization of an alien, who is a national of a foreign country, is

30 A strong argument could be made that sub-sec (1)(a)(ii) should be deleted altogether to eliminate the need to depend upon ethnicity as a basis for being eligible for New Sudan nationality. Southerners who are currently outside Southern Sudan because of the 25 year civil war would be required by the law to demonstrate that they or their parents were resident in the South for a period that qualifies them to be citizens of the new state.

31 This is a political notion invented by the late Dr John Garang de Mabior, the founder of the SPLM, to address what he calls the "fundamental problem of Sudan": non-recognition of diversity and plurality.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

conditional upon the applicant's renunciation and divestment of him/herself of his or her other nationality.[32] In other words, the act explicitly prohibits dual nationality. If this law were actually applied in Southern Sudan today, many of its provisions would be contrary to the provisions of the Interim National Constitution, which allows dual citizenship. Moreover, it is highly likely that many thousands of people who are Southerners by descent but live in the north would want to retain dual nationality following the referendum. In addition, there are thousands of Southern Sudanese who have acquired the nationalities of the states where they currently live and would wish to obtain the nationality of the new state by descent.

In point of fact, dual or multiple nationality was in the past prohibited by many laws in many countries on the basis that a person could only be loyal to one country at a time, although the concept itself is not now as undesired as it used to be. As people are becoming more mobile than ever before, it is both convenient and realistic to allow them to have dual and multiple nationalities.[33] Today, not including Sudan, 30 African nations allow dual citizenship, although some apply conditions, including that the government must give permission or that a person must be a citizen from birth and not by naturalization; some other countries allow dual nationality only for women who acquire another nationality automatically by marriage.[34] The current federal Sudan Nationality Act does not include provisions with regard to Sudanese nationals who acquire foreign nationalities. The author's understanding is that this allows those who are citizens from birth to maintain their Sudanese citizenship. In such situations, it considers them dual or multiple nationals.[35] Since the Interim National Constitution does not expressly state that those who acquire Sudanese nationality by naturalization cannot retain their previous nationality, the assumption is that the dual nationality permission applies to them as well.

IMPLICATIONS OF THE BREAK-UP OF A STATE

Law on state succession

In public international law, a change of sovereignty over a territory entails several legal consequences. Several questions, including those relating to rights, duties, international claims and the national debt, arise when one state succeeds another's legal responsibilities. Nationality of the affected persons is one of these questions. Statelessness is one of the most serious potential consequences of any state secession or break-up situation. The general

32 New Sudan Nationality Act, sec 9(f).

33 P Malanczuk *Akehurst's Modern Introduction to International Law* (7th ed, 1999, Routledge) at 264.

34 Manby *Citizenship Law in Africa*, above at note 1 at 63.

35 Sec 11(a) and (d) of a draft nationality bill that was presented to the National Assembly in 2002 expressly provided for that. The bill was not passed by the National Assembly into law.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

international law principle in this regard is that the subjects of the predecessor state, who inhabit the territory, automatically lose their old nationality and acquire the nationality of the successor state. How are the "inhabitants" determined? That is a point over which there is much dispute and difference. One criterion to determine inhabitants is birth location. Another is residency. One might argue that both these criteria should be satisfied by someone in order to be a citizen. Experience demonstrates that the conclusion of agreements is the best way to deal with this issue.[36]

Experiences of the arbitrary deprivation of nationality have made the international community take more serious steps to address the problem. These efforts were necessitated by the problems individuals endured in the former Soviet Union, Yugoslavia, Eritrea and Ethiopia.

The International Law Commission has prepared draft articles that specifically address nationality related problems in succession and break-up situations: the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (Draft Articles).[37] Article 1 of the Draft Articles, reiterating article 15 of the Universal Declaration of Human Rights, emphasizes the right to a nationality. It reads: "[e]very 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 nationality of at least one of the States concerned."

The UN Human Rights Council received a report from the UN secretary general in 2009, which, among other matters, addressed the issue of the right to a nationality and arbitrary deprivation of nationality in the context of state succession.[38] The report reiterates the fundamental principles applicable in secession and succession situations from the Draft Articles. One can identify five principles that would be particularly relevant in Sudan's situation. These are: (a) the above-mentioned principle on the right to a nationality that applies in all circumstances; (b) the principle of non-discrimination; (c) the prohibition of the arbitrary withdrawal by the predecessor state of the nationality from those who are entitled to retain it and of the arbitrary refusal by the successor state to grant its nationality to those who are entitled to have it; (d) the right of children born in the territory of the successor state or states to acquire the nationality of that state or those states; and (e) the right of those who have the option to claim the nationality of more than one state to be able freely to

36 Malanczuk *Akehurst's Modern Introduction to International Law*, above at note 33 at 169.

37 Text adopted by the International Law Commission at its 51st session in 1999 and submitted to the General Assembly as a part of the commission's report covering the work of that session (at para 48). The report, which also contains commentaries on the draft articles and is available at: <http://www.unhcr.org/refworld/pdfid/4512b6dd4.pdf> (last accessed 18 February 2010), also appears in *Yearbook of the International Law Commission 1999*, vol II, part two.

38 UN Human Rights Council "Human rights and arbitrary deprivation of nationality: Report of the secretary-general" (14 December 2009) A/HRC/13/34, available at: <http://www.unhcr.org/refworld/docid/4b83a9cb2.html> (last accessed 9 March 2010).

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

decide which of those nationalities they wish to retain in situations of state succession.[39]

Furthermore, the report supports article 18 of the Draft Articles which deals with the deleterious effects of succession on the right of nationality. It enjoins states to exchange information to identify such effects and whenever necessary to engage in negotiations as a way to sort out them and, in particular, prevent statelessness.[40]

Status of "non-indigenous" populations after state succession

The CPA and the Interim National Constitution recognize the inalienable right of the people of Southern Sudan to choose between voluntarily remaining in a united Sudan or opting for an independent state.[41] Following the referendum in January 2011, it is now certain that the South will secede. It is at that point in the history of Southern Sudan that the New Sudan Nationality Act could actually be applied, as the new state will have to adopt its own nationality rules to determine who its citizens are or who could qualify to be one of them in the years to come.

Today, there are thousands of Sudanese residing in Southern Sudan who are ethnically and tribally from the Northern part of the country. The great majority of them are merchants who have been living there for several years. Meanwhile, there are hundreds of thousands of Southern Sudanese who currently live in Northern Sudan; many have never seen Southern Sudan.[42] The fragmentation of Sudan is likely to create challenges to those who might wish to stay in either part. One of these challenges is that the Southerners in the North might lose their citizenship and the Northerners in the South may not acquire citizenship.[43] This would in turn have an impact on Southern Sudanese who are in national service, as they may well lose their jobs following secession, depending on how citizenship is defined.[44] Another challenge is the discrimination that they might face in the future, even if the current laws are amended to conform with universally acceptable nationality rules. In reality, studies demonstrate that many internally displaced persons

39 Id, arts 50–53.

40 Id, art 54.

41 See part A, art 1.3 of the Machakos Protocol, signed at Machakos, Kenya on 20 July 2002, and part 16, art 219 of the 2005 constitution.

42 The exact number of Southern Sudanese in Northern Sudan regions is difficult to ascertain. For information on this, see: <http://www.internal-displacement.org/> (last accessed 8 April 2010).

43 The Interim National Constitution, for instance, ties particular rights (such as freedom of movement and ownership of property) to citizenship, which means that loss of citizenship automatically leads to the inability to exercise certain rights. This also leads to questions about the rights of "legal residents".

44 If Southerners who are currently in national civil service lose their jobs after secession, then there arises a question relating to who is responsible for their pensions (largely a debt and assets issue) and whether the government of Southern Sudan can absorb them into its own civil service, which is not yet fully structured or regulated.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

(IDPs) in and around Khartoum face several human rights violations based on a perception that they are strangers in their own country, because of their cultural and religious differences.

Realization of peace or the division of Sudan into two independent states does not necessarily mean that the Southerners living in the North will return to the South or that the Northerners who live in the South will go back to the North. In a survey of Southerners living in the North asked whether the CPA meant going back to the South, 46 per cent answered no, and 54 per cent answered not necessarily,[45] which means that the majority of the Southern residents in the North might for a variety of reasons decide to remain in the North. They do not think they are residing there temporarily, rather they feel connected to the regions where they stay and do not necessarily think of moving to Southern Sudan if the situation changes. The Sudanese in the North and the South need to recognize this fact and take legal as well as political measures to deal with any human rights related problems that might arise in the aftermath of secession. As a Sudanese anthropologist properly puts it:

> "There is much informal discourse in government circles based on the assumption that ending the war in southern Sudan will mean the automatic return of southern Sudanese people and IDPs to the south. Handling the issue of repatriation requires special attention to the legal and human rights framework that insists on protection of rights of security, development and citizenship, freedom of movement and residence".[46]

In the author's view, the same applies to the Northerners who are residing in the South. There is no indication that all of them will return to the North. Citizenship laws based on ethnic affiliation would, no doubt, make them vulnerable to disenfranchisement. The same measures should, therefore, be taken to ensure that the rights and freedoms of Northerners residing in the South, who may wish to be citizens there in the future, are not violated or derogated from. Furthermore, there is a possibility of igniting and launching ethnically motivated attacks by non-state actors on groups who would be seen as non-indigenous in the North and the South. Government authorities should meet their responsibilities to protect groups from such attacks.

Referenda laws

Some of these problems were partially, but only partially, addressed by the adoption by the Sudanese Parliament of the referenda laws, namely the

45 A Monim El-jak "Identity and urbanism: An exploratory research on Khartoum city as capital for peace and cultural rights" (MA thesis submitted to the American University in Cairo, Department of Anthropology, 2004) at 58.

46 Ibid.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

Southern Sudan Referendum Act 2009 and the Referendum Act of the Abyei Region 2009.[47]

In this context, the Southern Sudan Referendum Act stipulated that, to be eligible for voting in the referendum, one must have been born to at least one parent who belongs to a group or groups indigenous to Southern Sudan[48] or must have been a Southern Sudan resident continuously since 1 January 1956.[49] Any other non-indigenous groups or individuals resident or born in Southern Sudan after 1955 were excluded, obviously for political reasons, from taking part in the historical referendum to determine the future of Southern Sudan.

The Abyei referendum law did not exclude the residents of the region from voting.[50] It provided that a voter must be from the population of Abyei as determined by article 6(1) of the Protocol on the Resolution of Abyei Conflict.[51] Article 6(1)(a) of the protocol names two groups as residents: the Ngok Dinka (the traditional owners of the land); and any other Sudanese residing in the area of Abyei. The rules by which a person would be classified as a resident were to be worked out by the Abyei Referendum Commission.[52] This means that all residents of Abyei could participate in determining the future of the region without discrimination as to ethnical, tribal or religious affiliation.[53]

The question in relation to rights and duties is not only who was entitled to vote in the referenda, but also what will be the consequences of the South Sudan secession? What will happen for non-ethnically Southern Sudanese

47 The first was adopted by the Sudanese Cabinet on 13 December 2009 and by the National Assembly on 29 December 2009. The Abyei Referendum Act was adopted by Parliament on 30 December 2009. The residents of Abyei will have to choose between remaining part of the North or joining the South when it becomes independent.

48 In the particular context of Sudan, there is no dispute or disagreement about the tribes that are considered "indigenous" to South Sudan. Even from the names, it is very easy to distinguish a Southern Sudanese from a Northern Sudanese. However, there is a problem regarding ethnic and tribal groups that are cross-border with Uganda, Central African Republic etc. A similar example is the situation of cross-border Banyarwanda in both Uganda and the DRC, where people have said that they are not "indigenous" even though historically the Rwandan kingdom stretched into both Uganda and the DRC. Another group that could face serious problems and difficulties is people of mixed parentage: those whose mothers are Southerners and their fathers are Northerners and vice versa.

49 Southern Sudan Referendum Act, sec 25.

50 There is, however, a clear ethnic bias in the Abyei referendum law as the Ngok Dinka were privileged over other residents. There is a reason for this: Abyei consists of the nine Dinka Ngok kingdoms. It is interesting to mention that the Misseriya used the argument of citizenship to challenge the privileging of the Dinka Ngok.

51 Referendum Act of the Abyei Region, sec 25.

52 Id, sec 6(1)(b).

53 Recognizing someone as a resident and allowing them to vote in Abyei is connected to their status in the South as and when it separates. In law, there is a strong relationship between staying or living for a long time in a certain place and rights and duties.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

in Abyei after separation, should the Ngok Dinka and the other residents of Abyei decide to be part of Southern Sudan? What are the measures that could be taken to avert human rights violations in such situations? What about the groups that are not considered indigenous in the rest of Southern Sudan? What will be the status of the Southern Sudanese in the North?

Danger of mass expulsions

It is not easy to predict the exact impact of the breakup of Sudan and the aftermath of the Abyei referendum on the rights and freedoms of Northerners who might not be willing to leave the South, or of the Southerners who might wish to remain in the North. In addition to any problems that will arise because of ethnic or tribal based nationality laws in Southern Sudan, there are problems that could be predicted and lessons that could be learned from the Eritrea-Ethiopia experience, where thousands were expelled from Ethiopia to Eritrea and vice versa. It is probably important to note here that, upon Eritrea's independence in 1993, the two nations had friendly relations because of the common struggle that both the Eritrean People's Liberation Front and the Tigrean People's Liberation Front led and endured, with the former aiming to liberate Eritrea and the latter seeking to depose the authoritarian Mengistu regime.[54] One lesson that the Sudanese people need to take from this is that current statements made by NCP and SPLM politicians that no expulsions or problems will happen should not be taken as guarantees for the future.[55]

Mass expulsion, which for some of the expelled also means deprivation of their citizenship, is the most common post-secession human rights violation.[56] One of the main arguments of the Ethiopian government for justifying the expulsion of persons of Eritrean descent was that 99.5 per cent of Eritreans resident in Ethiopia registered and voted for an independent, sovereign state. Ethiopian nationality laws do not allow dual nationality. So the Ethiopian government argued that, by voting for independence, the Eritreans and

54 H Byrne "Eritrea and Ethiopia: Large-scale expulsions of population groups and other human rights violations in connection with the Ethiopian-Eritrean conflict" *Question and Answer Series* 1998–2000 (2002, INS Resource Information Centre) at 8. See also B Manby *Struggles for Citizenship in Africa* (2009, Zed Books) at 96; and discussion on state succession in Manby *Citizenship Law in Africa*, above at note 1 at 21–23 .

55 In January 2010, the Sudanese president addressing a southern rally in Khartoum said that, if the South separates, Southerners living in Khartoum would not be expelled. The president of Southern Sudan stated on 19 January 2010 that "the north and south will continue to be economically and politically connected whatever the choice of the people of Southern Sudan".

56 Mass expulsion is strictly prohibited under international law principles and rules, even under occupation circumstances. For example art 49 of the Geneva Convention of 1949 stipulates, among other things, that: " Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

Ethiopians of Eritrean origin lost their Ethiopian nationality by renunciation.[57] It was Eritrea's argument, however, that Eritreans and Ethiopians of Eritrean heritage could not have done so because Eritrea did not then exist. In fact the award of the Eritrea-Ethiopia Claims Commission decided that they acquired dual nationality, therefore agreeing with Eritrea's argument.[58] The Sudan Nationality Act, as mentioned above, permits dual nationality, which will make it difficult for the government in Northern Sudan to invoke the argument used by Ethiopia as there would be no legal basis for it. The New Sudan Nationality Act, however, prohibits dual nationality. Authorities in Southern Sudan, if they were to adopt a similar act on citizenship, could possibly expel or deport Northerners residing in the South on this basis or on the basis that they do not belong to any of the Southern Sudan indigenous groups, unless they were born and resident in one of the Southern territories before 1 January 1956.

Another argument that could be relied upon to expel individuals is national security. This is of course a very vague ground that governments could use to expel or deport any unwanted individuals. It could also be used by the North or the South, especially if relations become tense. In such situations, political decisions, without attempting to make any legal arguments, could be made to expel individuals or groups of people defined by their ethnicity. Article 12(5) of the African Charter on Human and Peoples' Rights (African Charter) specifically prohibits the "mass expulsion of non-nationals", defining mass expulsion as "that which is aimed at national, racial, ethnic or religious groups".

There are many other egregious violations that usually occur as a result of expulsions. Expulsions are normally carried out in an inhumane manner, property of the expelled is looted or illegally confiscated and their businesses are dissolved, and before expulsion the targeted groups can be illegally detained sometimes for several months without any legal right to challenge their detention. Furthermore, the separation of family members, loss of jobs without any rights and lack of any legal or social protection, are common violations that the expelled undergo in breakup experiences. The African Commission on Human and Peoples' Rights has ruled in several cases that denial of nationality violates article 5 of the African Charter regarding human dignity.[59]

Status of the president and vice president

An equally complicated problem with regard to nationality acquisition and rights can be seen from reading article 69(2) of the Interim National Constitution, which deals with the tenure of the office of the president and

57 *Referendum '93: The Eritrean People Determine Their Destiny: Report of the Referendum Commissioner of Eritrea* (1993, The Red Sea Press Inc) at 183, 188 and 193, cited in Byrne "Eritrea and Ethiopia", above at note 54 at 10.

58 Manby *Citizenship Law in Africa*, above at note 1 at 22.

59 Id at 25.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

the first vice president if the people of the South opt not to remain part of Sudan. The sub-article reads: "In the event of a vote for secession by the people of Southern Sudan, the President of the Republic shall continue in office if he / she is from the North; however, if the President is from the South he / she shall be deemed to have resigned and the First Vice President shall assume the office of the President of the Republic to complete the tenure to the next elections."

The problem comes to mind if one thinks of the nomination for president by the Popular Congress Party of Abdalla Deng Nhial, a Southerner who has lived for decades in the North, and who might choose to remain in Khartoum following secession. Had he won the elections in April 2010 and decided to remain a citizen of Sudan, would he still be deemed to have resigned? This sub-article probably gives one of the explanations why the SPLM nominated Yasir Saeed Arman, who is from the North, to run for president in 2010 as the candidate of the dominantly Southern movement. A literal interpretation of the constitution would lead us to a conclusion that Arman would continue in office if he won, even following secession.

Avoidance strategies

As Southern Sudan's secession becomes closer every day, it is highly important that the NCP and the SPLM start to take necessary measures to avoid the occurrence of these or any other violations. In particular, unresolved issues that might lead to uneasy relations or even war in the future should be addressed as they increase the possibility of mass expulsions or deportations and any other post-secession, citizenship-related violations. In addition, the two parties should develop (in Southern Sudan) and adjust (in Northern Sudan) their citizenship rules. They should also agree on: issues related to property and land for those who will move from the North to the South and vice versa; the status of foreign nationals, including their right to hold property; and the protection of human rights and fundamental freedoms of minorities[60] in the North and South Sudan. The South Sudan Referendum Act requires the parties of the CPA to negotiate with the aim of reaching an agreement on post-referendum issues and arrangements to be witnessed by the countries and international organizations that witnessed the CPA.[61]

60 Examples of rights and freedoms that are of particular significance to minorities are religious rights and access to education.

61 Sec 67(3) of the act provides: "The parties of the CPA shall enter into negotiations aiming to achieve an agreement on post-referendum substantive issues to be witnessed by the organizations and countries signatories to the CPA such as: (a) nationality; (b) currency; (c) public service; (d) position of Joint Integrated Units, National Security and Intelligence; (e) International Agreements and Conventions; (f) assets and Debts; (g) oil fields, production, transport and export of oil; (h) contracts and Environment in oil fields; (i) water; (j) property; (k) [and] any other issues to be agreed upon by the two parties."

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

One measure that the two parties could seriously consider is signing an agreement between Sudan and the South, similar to the 1976 Wadi El-Nil Agreement (Nile Valley Agreement) and the 2004 Four Freedoms Agreement, both between Sudan and Egypt. The former agreement granted Sudanese nationals the right to enter and exit Egypt without obtaining visas. It also gave them unrestricted access to employment, education, healthcare and ownership of property. The second agreement provides that the two countries will partially return to the 1976 agreement, which had lapsed. In addition, it requires the governments of the two countries to treat each other's citizens like their own citizens regarding freedom of movement, freedom of residence, freedom of work and freedom to own property.[62] Regardless of the problems that the 2004 agreement faces vis-à-vis its implementation, it is a good framework for dealing with any citizenship-related problems that individuals might face in the aftermath of the secession of Southern Sudan.

NATIONALITY DOCUMENTS

The issuance of nationality and citizenship documents and certificates as a matter of right for citizens is an important aspect of any political system that maintains human dignity and respects human rights. This means, among other things, that nationality documents should be given to those who meet the legitimate requirements that make a person qualify for nationality without any unnecessary conditions or obstacles such as the imposition of unreasonable fees. On the other hand, no person should be deprived of their citizenship because of their political affiliations or position, which also implies that naturalizing certain ethnic or tribal groups for illegitimate political reasons or objectives, such as changing the demographical map of a region, is against internationally acceptable nationality and citizenship rules and practices.

In Sudan, obtaining nationality certificates was not easy simply for bureaucratic reasons, not because the right to nationality itself was denied. Today, in many areas, especially in Khartoum and the other major Sudanese cities, obtaining nationality and other related documents takes only a few hours for those who meet the requirements set out by the law. This is one of the positive things that one notices in Khartoum when it comes to nationality certificates and passports.

In Southern Sudan, the situation is, however, rather different, even in the major cities. There, people still find it difficult to obtain passports and nationality documents due to poor roads and extreme poverty, as the following illustrates: "I have my Sudanese passport though getting it wasn't easy, one has to first acquire a nationality card and then apply for it, and by the way, my fellow

62 F Azzam *A Tragedy of Failures and False Expectations* (2006, American University in Cairo) at 10, cited in Y Ahmed *The Prospects of Assisted Voluntary Return among the Sudanese Population in Greater Cairo* (2006, American University in Cairo) at 19.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

poor countrymen and those who have no relatives and no access to the Southern Capital, Juba (in terms of transport fee and poor roads to make it to the capital) are unable to get [passports] as it is only here in Juba in the whole South where they are issued".[63]

However, there is a problem relevant especially to Darfur that has not received enough attention from the international community or from Sudanese civil society organizations. This problem is two-fold: first, the arrival of several non-Sudanese Arab groups from Chad, Niger, Mauritania and the Central African Republic in Darfur and their retrospective naturalization by the Sudanese authorities in some areas in West Darfur;[64] secondly, problems that certain Sudanese tribal groups face in Darfur to obtain nationality certificates and passports.

The newcomers in West Darfur occupy the villages of the IDPs who are currently residing in the IDP camps throughout the region, that is, they have taken over the homes of the former original occupants. There is no doubt that people move from one place to another for humanitarian, economic or security reasons. Movement has also become one of the main characteristics of modern life. There is nothing wrong with that as long as the relevant internationally acceptable rules are complied with. In fact, most immigration laws grant asylum and refugee status and ultimately citizenship to aliens on the basis of humanitarian and security reasons, or on grounds of habitual residence. Thus, it is not this movement from other countries to Darfur in itself that is unacceptable. In the view of the author, Sudan is still vast enough to accommodate millions of people from Chad, Niger, the Central African Republic and any other places, and so is Darfur. What is not acceptable in Darfur's particular context is the naturalization of these groups by government authorities to allow them to vote in elections and, in the long term, to change the demography of the region.

In other places in Africa, similar laws and practices have caused major political problems, fuelling conflict for many years. For example, in the DRC, laws and political decisions have been made to allow certain groups of people to become citizens for political considerations. For instance, laws were passed in 1972 to give citizenship by origin to Banyarwanda who had arrived in the country after 1908. Later in 1995, the transitional parliament adopted a resolution by which it considered all Banyarwanda to be foreigners, a decision only revoked as part of the peace agreement that led to a new nationality law and constitution in 2004 and 2006.[65] Here, it becomes apparent how naturalization or denationalization by political decisions could be

63 Manby *Struggles for Citizenship in Africa*, above at note 54 at 117.

64 See "Darfur: Abductions, sexual slavery, forced labor" (report published by the Darfur Consortium in December 2008) at 13.

65 For further discussion, see Manby *Struggles for Citizenship in Africa*, above at note 54 at 66–80.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

used as a tool to achieve political objectives against citizens who oppose their government.[66]

The Sudan Nationality Act requires, among other conditions, that aliens should reside for at least five years to qualify for naturalization, unless the president of the republic or the minister of interior decides otherwise.[67] In a country in the throes of ethnic and identity wars, it is extremely hard to believe that the naturalization of aliens who increase the number of one of the main parties to the conflict can be done in good faith, especially when the newcomers have been allowed to occupy the lands, farms and gardens of IDPs. They have been granted nationality documents without any delay. In this regard, a resident of Deleij village in West Darfur, who spoke to the author on condition of anonymity, said that he had seen thousands of newcomers, women, men and youth who came from Chad and other African countries, lining up for voter registration after obtaining their citizenship documents.[68] In the meanwhile, groups that are classified as antagonistic to the government encounter problems in obtaining nationality certificates and passports. They are asked to go to Khartoum to obtain such documents there, although government authorities know they cannot afford to travel to Khartoum to do so. Many in Darfur believe that the aim is to prevent these groups from participating in elections. Another explanation is that the government wants to make it difficult for those who plan to travel outside Sudan with documents from Darfur, as that helps those who might want to seek security and protection in other countries. The problem of the newcomers and their naturalization should be one of the main issues for any future political solution to the Darfur crisis if it is not possible to address it before the start of any serious peace negotiations.

It is important to note here that voter registration and naturalization should be distinguished. Although related, voter registration is not the same thing as naturalization. In Cote d'Ivoire, for instance, foreigners were allowed to register as voters and vote in national elections from 1980 until 1995.[69] In such situations, the nationality issue becomes less important.

CONCLUSIONS

The current federal nationality laws in Sudan, although not completely consistent with general international rules and principles on the grant of nationality, are not based on ethnic or tribal affiliation. The New Sudan Nationality

66 According to sec 9 of the 1994 Act, the president of the republic, on the recommendation of the Ministry of Interior, has a discretionary power to naturalize anybody notwithstanding the provisions of the act.

67 Sec 7(1)(c).

68 E-mail correspondence and a short document sent by e-mail on 25 January 2010. This supports the report released by the Darfur Consortium (above at note 64) and claims made by Darfurian political groups and some international organizations.

69 Manby *Struggles for Citizenship in Africa*, above at note 54 at 83.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

Act and to some extent the Southern Sudan Referendum Act have detracted from this by containing provisions in which ethnic or tribal affiliation determines rights. In both the North and the South, nationality laws discriminate against women as they are either silent on the subject or expressly prevent women from passing on their nationality and passports to their alien husbands. The 2005 amendment to the 1994 Act enfranchises children who are born to Sudanese mothers and alien fathers, though still not without discrimination, in that they must apply for nationality. It has reduced one of the most common forms of discrimination against women in Africa, although it requires further amendment to establish that children of female citizens have an automatic right, which would remove the final bureaucratic hurdle that still allows state officials to place obstacles in the way of a child's right to nationality.

As far as the post-secession situation is concerned, the New Sudan Nationality Act, if formally adopted after the secession, can disallow thousands of Northerners who live in the South citizenship of the new state, with potentially very serious consequences for the stability of the new polity.[70] In the North, although the current law does not give any room for expulsions on ethnic or tribal grounds, political decisions might be taken to do so, as has happened in other countries, including Ethiopia and Eritrea under similar circumstances. Constitutional provisions such as article 69(2) of the Interim National Constitution, if literally interpreted, will prevent Southerners from occupying senior political positions in the new Northern state. Children born to mothers from the North and fathers from the South and vice versa might not be able to obtain citizenship in the North, depending on the discretionary power of the competent nationality authorities. In the South, they would not be able to do so when it becomes a state. To avoid these and many other problems and violations, the two main parties to the National Unity Government should take the following measures before secession becomes a legal reality:

- All political disputes between the NCP and the SPLM relating to the implementation of the CPA should be resolved through negotiations. The two parties should continue engaging in dialogue no matter how enormous the differences and difficulties are.[71] The Eritrea-Ethiopia experience has demonstrated that mass expulsions could happen in times of conflict or war relations.

70 This may also make the new Southern state vulnerable to criticism, particularly at a time when it may be looking for state recognition from the community of nations and membership in key human rights and other international originations and institutions. The political leadership in Southern Sudan will very likely be very sensitive to world opinion once it is in the process of being an emerging state looking for state recognition.

71 As required by sec 67(3) of the South Sudan Referendum Act.

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- Provisions that relate citizenship to ethnicity and tribal affiliation should be removed from the New Sudan Nationality Act if it is adopted by the South after secession. This will assist in resolving nationality problems that Northerners residing in the South after January 1956 or in the New Sudan after 1994 (if the act comes into effect) might encounter.
- A political agreement must be reached and concluded between the two parties on the status of Northerners in the South and Southerners in the North. In this regard, one possible solution is for Sudan and the South to sign an agreement similar to the Four Freedoms Agreement concluded between Sudan and Egypt in 2004. Another possible solution would be to sign a common citizenship agreement.[72] The Four Freedoms Agreements allows Sudanese and Egyptian citizens in either country to move, work, own property and reside as if they were in their own country.
- Nationality rules applicable to state secession should be applied. Individuals should be allowed to maintain or acquire the nationality of Sudan or Southern Sudan depending on to which one they have a stronger connection. If they are equally connected to them, they should be allowed to have the nationality of both.
- If a person does not take any action to opt for the nationality of the new state in the South or that of Sudan if they live in the South, the law should attribute to them the nationality of the state where they are habitually resident, ie Southerners who are habitual residents of the North should retain their current Sudanese nationality and, by the same token, Northerners who are habitual residents of the South should be granted the nationality of the South when it becomes independent.[73]
- Both states need to allow dual nationality, including of the other state to help those who would qualify for the citizenship of both of them have dual citizenship.
- The New Sudan Nationality Act should be applied retrospectively to allow non-Southern Sudanese groups who have resided in the South for many years to obtain the nationality of the new state since the New Sudan Nationality Act residency requirement for naturalization is relatively long.
- If citizens will have to move to their original regions or the regions of their ancestors, then individuals should be granted sufficient time to dispose of their properties and move in a humane way.
- A separate agreement should be reached and concluded on the status of the non-Southern tribes in Abyei if it becomes part of the South, or that of the Southern tribes in the event that it becomes part of the North.

72 de Waal "Who are the Sudanese?", above at note 4.
73 Manby *Citizenship Law in Africa*, above at note 1 at 12.

https://doi.org/10.1017/S002185531100009X Published online by Cambridge University Press

In a nutshell, the breakup of what is today Africa's largest nation is not going to be as easy and peaceful as many of us think if several issues are not tackled as a matter of urgency. Regarding rights of ordinary citizens in particular, laws should be amended, agreements must be concluded, and political decisions have to be made to make their lives easy, consistent with the relevant international human rights and nationality norms and principles which oblige governments and states to maintain and respect human dignity in all situations.

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