INTERNATIONAL LAW
AND THE RIGHT TO A NATIONALITY IN
SUDAN

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Summary

Among the many critically important choices that Sudan is facing in the context of the referendums on the status of South Sudan and Abyei are the criteria that will be established to determine citizenship of the new entities. This paper argues strongly that the negotiating parties should reject ethnicity as the basis for determining membership of the new polities and instead adopt the non-discriminatory norms established by international human rights law, providing for citizenship to be granted on the basis of any appropriate connection to the territory, respecting the rights of individuals to opt for the nationality they prefer, and with the default option based on habitual residence.

The fundamental basis of citizenship: what is the vision for the new states in Sudan?

It is not for nothing that the definition of citizenship[1] has been among the most difficult issues to settle in the painful negotiations that led up to the January 2011 referendum on the possible secession of South Sudan. The decision on criteria that result in Sudanese citizens keeping their nationality of the Republic of Sudan or becoming citizens of the new state of South Sudan is not merely a technical matter, but goes to the heart of the vision that the National Congress Party (NCP) and the Sudan Peoples' Liberation Movement (SPLM), the ruling parties in each entity, each have

1 Citizenship and nationality are used as synonyms throughout this paper, both in the sense of 'jinsiyya' in Arabic. See Bronwen Manby, *Citizenship Law in Africa: A Comparative Study*, Open Society Foundations 2nd edition, 2010, for an explanation, and for more detail on many of the issues explored here.

for the continued existence of a smaller Sudanese state, or for the new state of South Sudan (whatever its ultimate name may be). The decision is also urgent, since, all being well, the new state of Southern Sudan will come into existence on 9 July 2011, at the expiry of the Comprehensive Peace Agreement that led to the referendum.

Is the membership of each of the new entities to be determined on the basis of ancestry and perceived identity, excluding those who are not "sons of the soil", on the basis that their loyalty must lie elsewhere – or will it be more inclusive, drawing on the international framework of human rights, the norms of non-discrimination and due process, to imagine a nation that can include all those who have their home on the territory and follow the laws of the land, whatever their ethnic and geographical background? Can Sudanese from north and south overcome the history of decades of civil war, the hostility between different populations that has resulted, the memory of atrocities that are not far in the past? Can their leaders draw rather on the long traditions of commerce and migration, intermarriage and cultural exchange, to articulate a new vision of each country that acknowledges the commonalities of history, however painful it has sometimes been, and the strong linkages that exist today between all the peoples of what is now Sudan and that will remain even when and if the South secedes?

Among many in Sudan and much wider afield – across Africa but also across the world – the instinctive response to the question "who are we, the citizens?" is that "we are the natives, the people who have always been here". Everyone who is not a "native" is therefore a foreigner, or at best a guest. But this "instinctive" response is very poorly adapted to today's world of post-imperial states and global migration, where populations have moved – or been moved – across or within borders that have often changed. No country can hold onto the myth – which was always a myth – that its citizens share

"one blood"; and the dangers of a fixation on loyalty and belonging based on blood and soil were amply demonstrated by the history of 20th century Europe. It was the violence of the 1939-45 world war that provided the shock to the international system that led to the foundation of the international human rights regime that we have today. The complex of UN treaties adopted in the second half of the 20th century that aim to guarantee equal protection of the law and non-discrimination for all come out of a recognition that discrimination on the basis of ethnicity and race had brought genocide and catastrophe. And as the human rights regime developed, the experts and states involved drew also on – and reinforced – the belated rejection of the European subjugation of Africa (and elsewhere) and the second-class citizenship given to the colonised peoples in those territories.

In practice, non-discrimination on ethnic, racial and religious grounds is not only a matter of principle, but also a foundation for a stable state. Exclusion and discrimination sow seeds of political unrest, economic collapse and war. For Sudan, though late in the day, it is not so late that an inclusive definition of citizenship for both north and south cannot be established.

International law and the right to a nationality

The Universal Declaration of Human Rights adopted in 1948 is clear on the foundational nature of nationality for the recognition of other rights. Article 15 provides that "[e]very one has a right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality." The International Covenant on Civil and Political Rights does not discuss the citizenship of adults, but recognises the right of "[e]very child … to acquire a nationality." The UN Human Rights Committee has interpreted states duties under the ICCPR to include

the obligation to "adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born."[2] The Convention on the Rights of the Child also guarantees the right of every child to acquire a nationality, placing a duty on states parties to respect this right. The 1961 Convention on the Reduction of Statelessness, which entered into force in 1975 (though it still has relatively few ratifications), makes it a specific duty of states to prevent statelessness. Article 1 mandates that "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless." Even if a person would not become stateless, the convention forbids denationalisation "on racial, ethnic, religious or political grounds." More broadly on non-discrimination, the International Convention on the Elimination of Racial Discrimination requires that the right to nationality not be denied for discriminatory reasons. The Convention on the Elimination of All Forms of Discrimination against Women provides that women must be granted equal rights with men in respect of citizenship.[3]

At African level, the African Charter on Human and Peoples' Rights, adopted in 1981, does not contain a provision on nationality. However, the African Commission has found that the provision in Article 5 that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status" prohibits attempts to denationalise individuals and render them stateless. Article 12(5) of the African Charter also

2 General Comment No. 17: The Rights of the Child (Art. 24 of the International Covenant on Civil and Political Rights) (1989).

3 Sudan has ratified the ICCPR, ICERD and CRC, but not CEDAW nor the Convention on the Reduction of Statelessness (which nonetheless provide guidance on the accepted international standards in these areas).

contains a specific ban on mass expulsions based on national, racial, ethnic or religious grounds – a ban included in the painful knowledge of expulsions that had already taken place by 1981, when the Charter was adopted. The African Charter on the Rights and Welfare of the Child repeats the provision of the UN Convention on the Rights of the Child on the right of a child to acquire a nationality and also requires states parties to "undertake to ensure that their Constitutional legislation recognises the principles according to which a child shall acquire the nationality of the State in the territory of which he [*sic*] 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."[4]

The sum total of these provisions, and the jurisprudence that has built up in the UN, African, Inter-American and European bodies responsible for the interpretation of the treaties, is to limit state discretion over the grant of citizenship, by requiring measures to

4 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa places strong non-discrimination requirements on states in general, but is weak on citizenship rights, allowing discrimination in the right of spouses to pass citizenship to each other, and allowing exceptions to the equal rights of men and women to pass nationality to their children where 'this is contrary to a provision in national legislation or is contrary to national security interests.' (Art 6(h)). Sudan is a party to the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child, but not to the Protocol to the ACHPR on the Rights of Women in Africa.

reduce statelessness, including the grant of nationality to children who would otherwise be stateless, and by prohibiting discrimination in granting citizenship and the arbitrary deprivation of citizenship. As recently stated by the Inter-American Court of Human Rights:

> "Although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, states' discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions. States are particularly limited in their discretion ... by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness."[5]

State succession

The Sudanese case of state succession is one of transfer of territory rather than dissolution of a state: the Republic of Sudan will be a continuing entity, even when the South secedes. There are important consequences that follow from this legal situation: in particular, all those who currently have Sudanese nationality will continue to hold it until such time as the law of the Republic of Sudan is changed. One of the most important issues will be the determination of the basis on which Republic of Sudan nationality may be withdrawn (if at all) from the new Southern Sudanese.

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5 *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Inter-American Court of Human Rights, 2005.

The principal guidance on the international law in cases of state succession consists of draft articles adopted by the International Law Commission.[6] These are not formally binding, though the UN 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. 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."

The basic assumption outlined by the ILC Draft Articles is that the nationality of a successor state will be attributed to persons on the basis of habitual residence in whichever territory is relevant. In addition, 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

6 International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries*, 1999.

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." It is notable that the Draft Articles place lower priority on descent from a national of the state than on habitual residence or birth in the territory: this is probably counter-intuitive to many people, as the only existing firm statements on future nationality in the case of Sudan already illustrate. [7]

Ethnicity and citizenship in comparative African perspective

The referendum criteria

The Machakos Protocol and the Comprehensive Peace Agreement (CPA) provide that "the people of South Sudan have the right to self-determination." This right was enshrined in the interim constitutions for Sudan and Southern Sudan that followed the peace agreement. But who are "the people of South Sudan"? The Interim Constitution for Southern Sudan and the legislation establishing the eligibility for individuals to vote in the referendum on the independence of South Sudan provide two parallel definitions, one based on ethnicity, the other on residence. The Southern Sudan Referendum Act provides that:

7 International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries*, 1999.

> 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;...[8]

Category (1) of these criteria reflects an understanding of citizenship based on descent. Category (2) expands this understanding 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 are accepted as having a voice.[9]

Based on this definition for South Sudan, the criteria for continuing citizenship of the Republic of Sudan would at minimum be based, it is

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8 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.

9 The referendum act also removed the gender discrimination residually present in the original provision in the Interim Constitution for Southern Sudan, which had provided that "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…."

logical to assume, on mirroring criteria: allowing both for permanent residents and for those who are members of "indigenous communities" to remain or become citizens. Although the category based on residence softens the approach, and this is important, a primary framework for citizenship law based on ethnicity would nonetheless not conform to international principles of nondiscrimination, nor accord with the law in place in the majority of other African states. The criteria to vote in the referendum may have relevance to the debate on future nationality law in the two territories, not least because they reflect the instinctive understanding of many people in Sudan of the nature of nationality; but there is no reason in law why the criteria for attributing nationality in either state following secession of the South should follow the referendum voting criteria – and, this paper argues, many reasons why they should not.

Ethnicity in comparative African citizenship law

Most African nationality codes adopted after independence respect the basic UN principles of non-discrimination, at least on the face of the law. Very few African constitutions or nationality laws provide the foundation for their citizenship in an ethnic or racial definition. Those that do are:

- Sierra Leone, Liberia and Malawi: each of these has law providing that only persons "of negro descent" or "of African race" can be citizens by birth; in Liberia people not "of negro African descent" cannot be citizens at all. Some other countries provide for privileged access to citizenship for those of African descent (Mali, Ghana) who would not qualify on the principal criteria, but the basic provisions of the law on citizenship are non-discriminatory.
- Uganda, DRC, Somalia, Swaziland and Nigeria: all have provisions drawing to a greater or lesser extent on ethnic or cultural criteria.

In Uganda, the constitution has a schedule listing the "indigenous communities" who are entitled to nationality by birth. Though DRC's 2006 constitution relaxes previous rules and provides wider access to nationality than before, its first premise is that nationality of origin is granted to "every person belonging to the ethnic groups and nationalities of which the individuals and territory formed what became Congo at independence". Somalia's 1962 citizenship law gives nationality to any person "who by origin, language or tradition belongs to the Somali Nation". Swaziland's law allows, in addition to more standard provisions, for recognition of citizenship on the basis of allegiance to a member of the traditional Swazi leadership, ensuring that those who are not ethnic Swazis find it very difficult to obtain recognition of citizenship. Nigeria also primarily refers to those who are descendants of "a community indigenous to Nigeria", though it allows for children of naturalised citizens to become citizens by birth, removing the discrimination on the second generation (this indigenous preference is also reflected internally, within Nigeria's federal system, with disastrous results[10]).

In other countries, discrimination on the basis of ethnicity is routine in administrative practice relating to citizenship, even if not explicitly enshrined in the terms of the law itself. In Côte d'Ivoire government policy brought increasing difficulties for northerners and Muslims to obtain recognition of nationality from the late 1990s. Though this discrimination was not explicit in the law, the nationality code dating from independence gave nationality to anyone born in the territory "unless both parents are foreigners": who was a "foreigner" was never defined, but came in practice to include many people who

10 See, for example, Human Rights Watch, *"They Do Not Own This Place", Government Discrimination Against "Non-Indigenes" in Nigeria*, 2006.

never saw themselves as foreigners since they had lived all their lives in Côte d'Ivoire, though their ancestral origins lay to the north of the country -- or within the country but to the north of boundaries that had existed at some point during the colonial period and were moved many years before independence. In Zimbabwe, challenges to the ruling party led to changes in the law that stripped of nationality anyone who had the theoretical entitlement to another nationality, even if they had never actually held that nationality; most of those affected were descendants of migrants from neighbouring Zambia, Mozambique and Malawi. In Madagascar, thousands of people whose origins lie in the Indian subcontinent cannot obtain papers. In Kenya, the Nubians – Sudanese taken to Kenya in the colonial era – and Kenyans of Somali ethnicity as well as many other minor ethnic groups have faced enormous challenges in getting the identity cards and other papers that prove their right to belong. In several west African countries the widely dispersed Mandingo and Fulani (*peul*, in French) are frequently subjected to verbal or physical attack on the grounds that they are not "native".

The best illustrations of the dangers of defining citizenship on the basis of ethnicity lie in DRC and Côte d'Ivoire. At the most extreme, exclusion from the polity on the basis of presumed disloyalty, often determined on the basis of a last name – which has lasted generations in many cases, affecting people who know no other home – breeds resentment and rebellion. As one of those fighting in Côte d'Ivoire stated: "we needed a war because we needed our identity cards". Counter-examples are Senegal or Tanzania, whose citizenship laws and practices are generous, and which have reaped the benefit in social peace. The lesson for Sudan: defining nationality on the basis of ethnicity, or applying discriminatory criteria in practice, is a recipe for trouble. Even if not immediately, the long term consequences are likely to be negative.

What sort of connection to north or south Sudan should provide a right to nationality of either state?

If the negotiating parties agree that ethnicity will *not* be the basis for sorting the current population of Sudan into two groups, on what basis should nationality be granted in the new states? What should be the default position for attributing nationality, and what would be the "appropriate connection" (to put it in the terminology of the ILC Draft Articles on state succession) that gives a person with the right to opt for one or other of the two nationalities (or both, if dual nationality is allowed). The following paragraphs set out what would be the preferred or acceptable positions under international law.

Habitual residence

The starting point for any discussion rests on habitual residence. The assumption in international law, as restated in the ILC Draft Articles, is that in case of state succession a person will be attributed nationality in the place where they are habitually resident (unless they exercise a right to opt for the other nationality, on which more below).[11]

In the first instance this means that people who are habitually resident in the North and have no connection with the South should continue to hold the nationality of the Republic of Sudan without any change to their status. Similarly, current Sudanese nationals who are habitually resident in the South and have no connection with the continuing Republic of Sudan (other than their citizenship on the

11 Note that the type of nationality attributed would be nationality from birth; this rule in cases of state succession must be distinguished from the residence qualification applied for naturalisation as a citizen in 'normal' times.

date of secession) should be automatically given South Sudanese nationality.

In addition, this basic assumption has the important implication that those "southerners" who were displaced during the civil war and are now living in what will remain the Republic of Sudan should retain their Sudanese nationality, absent any expression of their will to the contrary. Similarly those "northerners" resident in the South would become South Sudanese. Although it is apparent that many will find this a challenging assumption, experience has shown that a default position based on any other principle than habitual residence will lead to large numbers of people finding themselves stateless in and/or expelled from their homes, including those who were born there and have never lived anywhere else. If habitual residence is completely unacceptable to the negotiating parties as the default position, then the other criteria suggested by the ILC Draft Articles and other international law should be considered, including in particular the place of birth of the person concerned. There are serious human rights consequences attached to the exclusion that would result from a default position based on highly subjective and discriminatory criteria such as membership of an ethnic group; consequences that may last for decades.

The definition of habitual residence is not fixed in international law, and would thus be up to the parties to determine by negotiation, though there is jurisprudence from various bodies at both international and national levels establishing certain limits on the length of time and other elements that might qualify a person to be treated as habitually resident. Perhaps most relevant in the case of Sudan is a decision of the UN Human Rights Committee in a case about the rights of recently arrived residents of New Caledonia to vote in a referendum on independence of the territory from France. The Committee found in that case that a ten year period of residence

to qualify to vote was not unreasonable.[12] However, as noted above, rights to citizenship following a referendum on independence need not follow the same rules as those established for the right to vote in the referendum itself.

For the most part the idea of habitual residence as the default principle has the merit of being conceptually simple. The conceptually complicated question on habitual residence relates to the situation of pastoralists who regularly migrate between the two new states: where is a person habitually resident who is on the move for much of the year across (what has now become) an international border? On what basis can one define habitual residence that allocates members of pastoralist populations to the side of the border that is most acceptable both to them and to the sedentary populations with which they have relations? (More on this below.)

Option for those with an 'appropriate connection' to both territories

The presumption expressed in the ILC Draft Articles is that a person who has an "appropriate connection" to both successor territories should be given the right to choose his or her preferred nationality; this right of option is expressed particularly strongly when the state succession is due to the separation of a part of the territory of a state to create a new state, while the predecessor state continues to exist, as is the case in Sudan.[13] That is, a person habitually resident in north Sudan who also has an appropriate connection to South Sudan should have the right to opt for the nationality of South Sudan. If the person takes no action, he or she should be presumed to remain

12 *Gillot v. France*, Human Rights Committee, U.N. Doc. A/57/40 (2002).

13 *Draft Articles on Nationality of Natural Persons in relation to the Succession of States,* Article 11 and Articles 24-26.

a citizen of the Republic of Sudan. Persons who have an appropriate connection to the territory that will remain the Republic of Sudan and are habitual residents of South Sudan shall have the right to confirm their nationality of the Republic of Sudan. If they take no action, they will be attributed the nationality of the new South Sudanese state.

The parties would have to agree what an "appropriate connection" would be beyond habitual residence: but it should include at minimum birth on the territory (possibly with an exception for pastoralist populations: see below), former habitual residence on the territory, birth or habitual residence of parents (or grandparents) on the territory, and other family connections to the territory (spouse or children with an appropriate connection).

In any event, a child born after the date of the succession of states who has not acquired any other nationality at birth, must according to the international principles have the right to the nationality of the state on whose territory he or she was born. Only a few countries in Africa provide a right to nationality for all children born on the territory without further conditions, but this group forms a majority when combined with those that apply the rule that a child born in the territory who is still resident there at majority, and/or a child born in the territory of one parent who was also born there, becomes a national by right. These provisions avoid at minimum the multi-generational exclusion and statelessness that has destabilised Côte d'Ivoire and DRC: but they need to be effectively implemented in practice and not just written down in law. They should apply equally to the continuing Republic of Sudan and the new state of South Sudan.

The Eritrean option

In Eritrea, the answer given to the question "Who will be an Eritrean?" following the creation of the new state appears at first sight to deploy

the "obvious" answer based on ethnic origin. But the definitions in the law in fact base citizenship rather on the international norm of habitual residence, while providing a cut-off date for automatic citizenship that was far in the past and avoided giving nationality to recent arrivals in the territory. The provisional government in Eritrea adopted a nationality law before the 1993 referendum was held, on the basis of which eligibility to register in the referendum was determined. This law (which is still in effect) gives Eritrean nationality to any person born to a father or mother of "Eritrean origin". However, "Eritrean origin" is then defined without reference to ethnicity, and instead as (descent from) "any person who was resident in Eritrea in 1933".[14] (The equivalent cut-off date in Sudan would presumably be 1956.) Persons who had been residents of Eritrea between 1934 and 1951 could apply for citizenship by simple application with evidence of residence (though persons who had "committed anti-people acts during the liberation struggle" were denied this right). Those who had "entered Eritrea legally and been domiciled in Eritrea for a period of ten years before 1974" could apply for naturalisation, subject to further conditions, including renunciation of any other nationality. Others can similarly naturalise on the basis of residence for at least 20 years. Though restrictive in some ways – the 1933 date is very long ago, while the 20 year regular naturalisation period is very long – many people of "non-indigenous" ethnicity were in practice fully recognised as Eritrean by right through the application of this law. Those who obtained Eritrean nationality in 1993 included many people of mixed parentage, descendants of Europeans who had come to Eritrea during the colonial period, members of groups who had

14 Eritrean Nationality Proclamation (No. 21/1992). A 1933 Italian colonial decree had defined as Eritrean "subjects" all persons (with the exception of Italian "citizens"), residing in the country before the end of 1933.

somehow stayed in Eritrea while *en route* to or from Mecca for the Haj, and so forth.

3rd country residents

The situation of current or former Sudanese citizens who are resident in third countries is somewhat more complex. International law would have no problem in principle with provisions that exclude from the discussions those who have obtained the nationality of the country where they are now resident (or another country): it would be up to the two states to determine which of these people they allow to have their nationality (provided the rules did not discriminate on the basis of sex, race, ethnicity, religion, etc). If they do not have the nationality of a third country then similar rules should apply as to those who are resident within the borders of the current Republic of Sudan (north or south) and have appropriate connections to both new territories: they should have the right to opt for the nationality of South Sudan or (and, if dual nationality is allowed) to retain their nationality of the Republic of Sudan. More difficult is the case of people who have not obtained a third nationality but do not express any will: the least problematic assumption from an international law perspective, given difficulties of proof of last place of habitual residence, would be for them to be presumed to retain the nationality of the Republic of Sudan.

Dual nationality

Historically, dual nationality was discouraged in international law. One of the earliest international conventions dealing with nationality, the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, was aimed as much at minimising dual citizenship as at providing that everyone had a nationality, by harmonising citizenship practices among states. However, the trend today is very much in the opposite direction. While at the time of

independence from colonial rule most African states did not allow dual nationality, today 33 countries in the continent allow their nationals to hold another passport (a few of these only for those who are citizens by birth, a handful of them requiring permission of the authorities). Among those countries that have changed the rules in the last 20 years to allow dual nationality are Angola, Burundi, Republic of Congo, Djibouti, Gabon, Gambia, Ghana, Kenya, Mozambique, Rwanda, São Tomé and Príncipe, Sierra Leone, and Uganda – as well as Sudan; in several other countries the issue is actively under discussion.

New states are always more nervous about the idea of dual nationality. Sudan after the likely state succession is no different in this regard. It seems unlikely, though not impossible, that the negotiating parties will agree to the idea of dual nationality for those who could in theory have the right to citizenship both in the continuing Republic of Sudan and in South Sudan. However, since the 1994 citizenship law Sudanese in general have had the right to hold two passports – though it is not known how many have taken up this possibility. In any event, given that the citizenship law of the Republic of Sudan will remain in force until amended, those who become nationals of South Sudan are likely to have dual nationality with the Republic at least for a while, unless South Sudan requires renunciation of previous nationalities.

In many ways, continued acceptance of dual nationality would be the best outcome, legally speaking, for the two states. There would remain difficulties around negotiating border issues or movement of pastoralists (see below), but agreements on these points should in principle be easier to reach where legal status is not an issue. There are various options on dual nationality: obviously it makes no sense for *everyone* who is currently Sudanese to have the right to nationality of both successor states, while a right to dual nationality for all those

who are eligible for Southern Sudanese nationality is not likely to be accepted by the Republic of Sudan. The most plausible version would probably be for individuals to opt for or be attributed a primary nationality when they have an appropriate connection to both states, including the withdrawal of the nationality of the Republic of Sudan from those who acquire Southern Sudanese citizenship, but then allow them also to apply for naturalisation in the other state according to the normal processes of law – which provides a greater level of control and comfort for each party on issues of state security. More generously, those with an appropriate connection to both states could be presumed dual nationals from the time of secession of the South.

In the case of Eritrea's secession, the 1992 nationality law provided that those who already had another nationality (and who had therefore in principle ceased to be Ethiopian, since Ethiopia's law did not allow dual nationality) were allowed to keep their other nationality. For those born or acquiring Eritrean nationality since 1993, dual nationality is only allowed with permission of the authorities. Ethiopia's failure to amend its 1930 nationality law following the referendum in order to confirm the status of people who could be regarded as of Eritrean origin but who chose to remain in Ethiopia, was the source of major problems when war broke out. Around 75,000 of those with a presumed right to Eritrean nationality were expelled, 15,000 more than those who had registered to vote in the referendum (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[15] in fact acquired dual nationality.

This was despite the fact that Ethiopian law did not then and still does not allow dual nationality. Although the situation for people of Eritrean ancestry in Ethiopia has improved since the adoption of a new nationality law in 2003, many in practice still face difficulties in establishing their nationality.

Withdrawal of nationality

When it comes to the provisions for withdrawal of Republic of Sudan nationality, there is a difficult balance to be struck between due process protections, political acceptability and practicality of implementation. While international law contains strong guarantees against the arbitrary deprivation of nationality, it is not practical to require the Republic of Sudan to carry out an individual procedure for the withdrawal of nationality from every single person who becomes South Sudanese. The default position should probably be that, even if dual nationality is allowed in principle, those persons who are presumed to have become South Sudanese on the basis that they are habitual residents of South Sudan and have no connection to the north lose their Republic of Sudan nationality on the date of secession. If dual nationality is allowed automatically on the date of secession, the question of withdrawal would not arise for those with an appropriate connection to both territories. If dual nationality is not allowed, or

15 That is, among other things, they had in fact registered as Eritrean nationals under the 1993 nationality proclamation (and were not simply qualified to do so).

if it is allowed only after choosing a dominant nationality and then applying for naturalisation of the other state, automatic withdrawal would apply also to those who are habitually resident in the South and have an appropriate connection to the North but have not confirmed their intention of retaining Republic of Sudan nationality during the transitional period allowed. Those who are habitually resident in the north and do not opt for the nationality of the South would not have their nationality withdrawn. In any case, however, there should be a fallback provision that if a person whose nationality of the Republic of Sudan has been withdrawn claims that this was unlawful he or she must have the right to appeal the withdrawal in the courts of the Republic of Sudan. In addition or alternatively, there could be an appeal to a joint adjudication mechanism set up by both new governments to determine cases where nationality is in doubt.

The ILC Draft Articles (and other principles of international law) clearly provide that the Republic of Sudan may not withdraw its nationality from those habitually resident in the north of Sudan who have an appropriate connection to the South (ie especially the former IDPs resident in and around Khartoum), unless they have in fact opted for the nationality of the South and only at the time they acquire the new nationality. Similarly, the Republic of Sudan may not withdraw its nationality from people habitually resident in a third state who were born in or, before leaving Sudan, had their last habitual residence in the Republic of Sudan or who have any other appropriate connection with the Republic of Sudan. In any event, they may not do so without verifying that the person has another nationality.

Pastoralists: Habitual residence, appropriate connections and grazing rights

The Abyei referendum criteria

The Abyei Protocol of the CPA and the Abyei Area Referendum Act 2009 provide for a separate referendum for the Abyei area, to determine whether it remains a special administrative region of north Sudan or becomes part of South Sudan. Those who can vote in this referendum are:

> (a) Members of the Ngok Dinka Community;
>
> (b) Other Sudanese residing in Abyei Area in accordance with the criteria of residency,
>
> as may be determined by the Commission according to section 14(1) of this Act [establishing the powers of the Abyei Area Referendum Commission]; ...[16]

Thanks to deep political disagreements between the negotiating parties, the Abyei Area Referendum Commission referred to has never been set up, so that the residence criteria have not been established; nor other issues related to border demarcation, wealth sharing and voter registration agreed.[17] Accordingly the Abyei referendum was

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16 Abyei Area Referendum Act, 2009, Section 24. As for the referendum on the status of the rest of South Sudan, the other criteria are "(c) Not less than 18 years of age; (d) Of sound mind; (e) Registered in the Referendum Register."

17 The Abyei Protocol also provided for the delineation of Abyei to be undertaken by an international panel of experts, the Abyei Boundary Commission. A Commission was formed and submitted its report to the Sudanese government in 2005, which, however, refused to accept them. The SPLM agreed in 2008 to the referral of the issue to the Permanent Court of Arbitration (PCA) in The Hague. In July 2009, the PCA redrew the boundaries of Abyei. The ruling was accepted by both parties.

not held at the time of the general referendum on the status of South Sudan.

In practice, the people whose "residence" has been controversial for the purposes of the Abyei referendum are the mainly pastoralist Misseriya Arabs, who traditionally migrate to Abyei for a part of every year, though the "home base" for most of them is in North Sudan. The Sudanese government argues that the Misseriya are residents of Abyei for the purposes of the referendum; but their status is disputed by the SPLM and the Ngok Dinka community. The status of other non-Ngok Dinka as residents of Abyei has been less contentious.

International principles

There is an almost total lack of international law or national precedent relating to the determination of nationality of pastoralist or nomadic groups, even in Africa, where migratory pastoralism is very common.[18] This paucity of law and jurisprudence is reflected in the difficulties that many pastoralist groups whose grazing territory is transboundary or close to national borders have had in establishing citizenship in any particular country. Many of these communities live, in effect, outside the legal framework of citizenship and its attendant rights and responsibilities.

In principle, the rules governing the attribution of nationality to

18 The Council of Europe adopted a rather general Recommendation in 1983 that urged member states to facilitate the recognition of nationality for nomadic populations. The Recommendation suggested the following criteria for consideration in establishing a link on the basis of which nationality should be granted: whether the state is "the state of birth or origin" of the person concerned or the "state of origin" of his or her immediate family; whether it is the state of habitual residence or frequent periods of residence of the person (provided the residence is not unlawful); and the presence in the state of members of the person's immediate family. Committee of Ministers Recommendation No. R. (83)1, 22 February 1983.

the pastoralist groups in Sudan should ideally follow rules that are similar to those for the rest of the population; and they should avoid definitions of citizenship that follow ethnic boundaries, since such rules tend to create statelessness for individuals whose ethnicity is not clear cut, as well as to harden identities in a way that can be used as the basis for conflict. Though the technicalities pose some challenges, they are by no means insurmountable: the fundamental difficulties here are political.

It is in the case of migratory groups that the right to opt for one or other nationality would perhaps be most useful, as the ILC says, to help resolve "problems of attribution of nationality to persons concerned falling within an area of overlapping jurisdictions of States concerned."[19] An automatic right to dual nationality would, legally speaking, resolve these questions even more easily; but, as noted above, is likely to be politically unacceptable.

In any event, there will be a need to define both habitual residence and the other "appropriate connections" that could give a right to opt for the nationality of either state with the position of migratory pastoralist groups in mind. There will also be a need to define the location of habitual residence that would be dominant (assuming that a person who migrates might be argued to have several habitual residences) in the absence of an expression of will, and thus the attribution of nationality on a default basis according to the rules described above.

For the purposes of opting for one or the other nationality, it seems reasonable to provide a definition of habitual residence that provides relatively generous accommodation to the particular situation of migratory groups. Thus, rather than requiring a continuous period

19 Note 6 to Draft Article 11.

of residence, the definition of "habitual residence" could include a cumulative period of residence over several years, reflecting the fact that a particular person may have developed stronger ties and wish to identify with the place visited for the majority of the year on an annual basis, rather than the place that is their home, their "dar". Under this definition, it is possible that a person (and not just a pastoralist migrating between the two states with livestock) could be "habitually resident" in *both* successor states in Sudan (this is not at all in conflict with international legal precedent on the same issue). The other "appropriate connections" applicable in the case of migratory pastoralist groups would also need some modification. In international law, and in practice in similar cases of state succession, birth on the territory is presumed to form an appropriate connection. In the case of pastoralist groups, a provision that birth on the territory alone forms such a connection may prove to be unacceptable to those communities where the pastoralists are just "passing through". It may therefore be necessary to provide a definition of appropriate connection that combines birth with a minimum residence requirement (as in the case of habitual residence perhaps a cumulative residence requirement) before any right to opt for nationality is conferred.

The attribution of nationality is more difficult if a person who has two habitual residences, one each side of the border, does not in fact take steps to opt for one or other nationality. The simplest option here in legal terms would be for such an individual to be presumed to retain the nationality of the Republic of Sudan (they would of course be free to change their nationality at a later date, but the nationality of the Republic of Sudan should not be withdrawn from them on the date of secession). Alternatively, but perhaps more problematically, the dominant habitual residence of those who move with their livestock during part of the year could be defined in relation

to their "dar", their "home". Legal criteria to establish where this is could include the place where these populations spend the rainy season and where they cultivate crops, if they do so, and where their permanent residences are and members of their family may remain during the dry season -- even if in practice the individual has spent the majority of each year away from that place. As a matter of fact, in most cases of cross-border migratory pastoralist groups this would imply continuing citizenship of the Republic of Sudan.

In the course of developing these definitions, it should be possible in principle – albeit politically difficult in practice – to resolve the status of members of the Mbororo and other originally "West African" migrant communities, whose status as "Sudanese" has historically often not been recognized, even though they have been resident in Sudan for generations. In addition, the drafting of specific criteria on the citizenship of partially or fully nomadic populations should provide a legal foundation for the grant of nationality in future to members of cross-border pastoralist groups (thus in principle helping also to reduce allegations of the abuse of nationality law for political purposes such as have arisen in Darfur in recent years).

Whatever the nationality regime, rights of access to grazing and water that were previously negotiated between pastoralists and settled communities should continue to be regulated according to existing agreements between the communities and possible new agreements between the governments of the two states in relation to management of the border zone. Rights to enter a country are not guaranteed to non-nationals, but in practice pastoralist groups regularly cross borders throughout the region, while there are useful precedents on agreements to facilitate cross-border movement by pastoralists especially at West African level, agreed by ECOWAS, in

bilateral agreements between West African states, and at national level.[20]

Evidentiary problems

Any nationality agreement will depend critically on the rules of proof and documentation that are applied to show entitlement to one or other (or both) nationality. This is likely to be a difficult problem in Sudan, where it is estimated that only one third of children under the age of five were registered at birth (the percentage of adults is not known), and other forms of documentary proof may be hard to come by. There will be a need to agree the composition of tribunals (ideally including persons likely to take both sides of the argument in any particular case) that can determine cases of nationality in the first instance (with appeal to the courts), and the sorts of proof that will be accepted – oral statements or affidavits from the person concerned, statements by community elders or other credible witnesses etc.

20 See for example, Loi n°01-004/du 27 fevrier 2001 portant Charte pastorale en République du Mali; Agreement Concerning Transhumance between the Republic of Mali and the Islamic Republic of Mauritania, 19 September 1989; Loi n° 2000-044 portant Code pastoral en Mauritanie; Decret No.97/007 PRN/MAG/EL du 10 janvier 1997 fixant statut des terroirs d'attache des pasteurs (Niger); Réglementation de la transhumance entre les états membres de la CEDEAO Décision A/DEC.5/10/98 of 1998 and C/REG.3/01/03 of 2003. See also "Legislation to Support Crossborder Livestock Mobility", *COMESA Policy Brief Number 14*, February 2010.

Rights of non-nationals

While not directly relevant to citizenship determinations, negotiations around citizenship issues should clearly include as much agreement as possible between the parties on the rights of non-nationals. The "Four Freedoms" agreement between Sudan and Egypt is frequently mentioned; perhaps more useful, because within the framework of more general multilateral treaties, are the similar provisions on freedom of movement, labour, residence & establishment within the framework of COMESA (of which Sudan is a member but has not ratified the relevant protocol), or ECOWAS or the EAC (not directly relevant to Sudan, but providing useful precedents on which the negotiating parties could draw). International human rights law of course provides that the great majority of rights are to be enjoyed by nationals and non-nationals alike.

The main rights not guaranteed to non-nationals in international law are political rights (the right to vote in national elections, stand for and hold public office, etc), though a state may choose to allow them. In practice many do, for example: citizens of EU member states have the right to vote in local and EU elections in other EU countries; within the Commonwealth many countries (including the UK) allow other Commonwealth citizens to vote (in both national and local polls) if legally resident; in the USA some states allow non-nationals to vote at different levels. In Sudan, it may well be helpful to provide pastoralist communities, for example, some degree of political voice at local level in the territories through which they pass: in some cases such arrangements are already in place, providing a formalised basis for disputes to be resolved.

Under international human rights law, non-nationals lawfully in the territory of a state have the right to liberty of movement and to choose their place of residence within that state and the right to leave the

state. Permissible restrictions on these rights are very limited and can only be imposed if they are consistent with other rights. Moreover, under Article 12 of the ICCPR, 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 would include southern Sudanese resident in the north who – if an agreement cannot be reached to the contrary -- are no longer citizens of the Republic of Sudan following the secession of the South.[21] The ILC draft articles on state succession 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."

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21 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...."

Recommendations

In summary, this article argues that the nationality laws of both successor states in Sudan should :

- Not discriminate on the basis of ethnicity, race, religion, gender or any other ground prohibited in the international human rights treaties;
- Provide those who have a connection to both states with a right to opt for their preferred nationality during a transitional period;
- Allocate a default nationality on the basis of habitual residence, if a person fails to opt; or, if that is rejected outright by the negotiating parties, allocate nationality on the basis of other non-discriminatory criteria, especially place of birth;
- At minimum, permit dual nationality by naturalisation following the option for or allocation of an initial nationality;
- Provide guarantees against statelessness.