

Working Together to Break Apart: Building a Framework for the Secession of Southern Sudan

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INTRODUCTION: “INDEPENDENCE IS MORE THAN SECESSION”

Southern Sudan: Secession on the Horizon

Sudan is a country whose people are divided along religious, ethnic and tribal lines. Competition over natural resources¹ and a British colonial policy of indigenous administration only strengthened such divides.² Wars have been and continue to be fought along such lines of identification. In addition to the violence in Darfur and the East, there is a long history of violence between the North and South.

Sudan's second North-South civil war, a twenty-two year conflict that killed at least two million people, and displaced roughly four million more, came to an official end on January 9th, 2005.³ The Comprehensive Peace Agreement (CPA)⁴ was the product of thirty months of negotiations between the Southern-based Sudan People's Liberation Movement/Army (SPLM/A) and the National Congress Party (NCP) government of Sudan, a Northern Nile Valley-based “coalition of Islamist, commercial and security interests” that has been in power since a coup in 1989.⁵

The CPA outlined a six-year process intended to reconcile the forces that had fuelled the civil war: the North's coercive centralization of political authority, disputes over ownership of natural resources; policies that consolidated the centre's power by inciting and facilitating sectarian violence in the South; and a general Southern alienation partially rooted in its cultural distinctiveness from the North. The goal of the CPA was to foster unity by promoting respect for human rights, broad-based social justice, fairness in the distribution of wealth and political power, autonomous Southern governance, and reconciliation between North and South.⁶

Key events envisioned for the period between 2005 and 2011 included the adoption of an interim constitution, which occurred on July 9th, 2005; a census, which was completed in July 2009, two years behind schedule; processes of national reconciliation, which have seen little to no progress; and a national election.⁷ This election, which was to have occurred by July 2009 but was delayed until April 2010, was designed to be the central event of the interim period, cementing the legitimacy of the CPA and Sudan's political leaders, fostering national identity and allowing the participation of those excluded from CPA negotiations.⁸ However, the withdrawal of the SPLM/A candidate, election irregularities and the general political climate has left limited possibilities for the promotion of national unity.

Many of these difficulties of implementation have flowed from the tension between building unity and guaranteeing Southern autonomy. In the CPA, this tension was addressed through a “safety valve” for the South: a referendum on secession that must be held before the

¹ “Conflict and the Environment” *Post-Conflict and Disaster Management Branch* (June 2007), online: United Nations Environment Programme (UNEP) <<http://www.unep.org/>>.

² Douglas Johnson, *The Root Causes of Sudan's Civil Wars* (USA: Indiana University Press, 2003) at 11-13.

³ Johan Brosche, “Sharing Power – Enabling Peace?” (Uppsala: Uppsala University and the United Nations, 2009) at 19, online: <http://www.pcr.uu.se/pcr_doc/other_pub/Sharing%20Power.pdf>; “Sudan: Displaced caught in the crossfire” *IRIN* (accessed 3 April 2010), online: <<http://www.irinnews.org/InDepthMain.aspx?InDepthId=41&ReportId=71000&Country=Yes>>.

⁴ Online: United Nations Mission in Sudan, <<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>> [CPA].

⁵ Edward Thomas, “Decisions and Deadlines: A Critical Year for Sudan” (London: Chatham House, January 2010) at v, online: <<http://www.chathamhouse.org.uk/publications/papers/view/-/id/823/>>; Edward Thomas, “Against the Gathering Storm: Securing Sudan's Comprehensive Peace Agreement” (London: Chatham House, January 2009) at 6, online: <<http://www.chathamhouse.org.uk/publications/papers/view/-/id/688/>>.

⁶ Thomas, “Decisions”, *ibid.* at v and 1-2; Thomas, “Gathering Storm”, *ibid.* at 6 and 9

⁷ United Nations Security Council, “Report of the Secretary-General on the Sudan”, S/2005/579 (12 September 2005) at para. 3.

⁸ Thomas, “Decisions”, *supra* note 5 at ix and 1-2; Thomas, “Gathering Storm”, *supra* note 5 at 16 and 18.

end of the interim period.⁹ The right of the people of Southern Sudan to a referendum was first posited by the Intergovernmental Authority on Development (IGAD) in its 1994 *Declaration of Principles*¹⁰, which was “inspired” by what appeared at the time to be Eritrea’s peaceful secession from Ethiopia.¹¹ The right was incorporated into both the CPA and the *Interim National Constitution of the Republic of the Sudan (INC)*.¹² Section 219 of the *INC* provides that “the people of Southern Sudan shall have the right to self-determination through a referendum to determine their future status.” Voters must be given the choice between secession and continued unity within the general framework of the CPA.¹³ This referendum must occur on or before January 9th, 2011¹⁴; it is currently scheduled for January 3rd.

Secession, however, was not the focus of the CPA and the *INC*, which contain few provisions relating to Southern self-determination. The project was one focused on building national unity through elaborate arrangements for reconciliation, the recognition of diversity, and the protection of Southern autonomy through such measures as devolution of powers and legal pluralism. Unity was also the stated goal of the political leaders who drafted and entered into the CPA.¹⁵ John Garang, then leader of the SPLM/A, and one of the CPA’s chief intellectual architects, was a passionate advocate for transforming “Old Sudan” into a “New Sudan” that would be united through values of justice and democracy.¹⁶

Garang died accidentally on 30th July 2005, shortly after being sworn in as Sudan’s First Vice-President.¹⁷ Unity became less attractive for Southern Sudan after his passing: Garang had been viewed as a possible Presidential candidate with the potential for holding national support, and the only Southern leader who could successfully negotiate with the NCP.¹⁸

Although the CPA survived his death, its implementation in subsequent years has stalled. NCP tactics have been perceived, particularly by the public in Southern Sudan, as intentionally obstructionist. Cooperation between the NCP and the SPLM/A has degraded into a bitter stalemate, where the passage of much-needed legislation and implementation of key steps in the CPA timetable have been delayed by the parties’ zero-sum attitudes.¹⁹ President Omar al-Bashir has been forced into a defensive stance by the International Criminal Court’s indictment. As a result of these frustrating difficulties, the goal of national unity has fallen by the wayside. Among the SPLM/A leadership, those who support secession now openly express their preference, while many of those who originally supported unity have given up this hope. NCP leaders, including President al-Bashir, have begun to speak of their acceptance of Southern secession.²⁰

Planning for the Probable

The wisdom of secession as a solution to societal divisions has been considered in depth

⁹ International Crisis Group, “Sudan: Preventing Implosion” (Africa Briefing #68, 17 December 2009, Nairobi/Brussels) at 7, online: <<http://www.crisisgroup.org/home/index.cfm?id=6438&l=1>>.

¹⁰ Principles 2 and 4, quoted in Thomas, “Decisions”, *supra* note 5. at 5.

¹¹ *Ibid.*

¹² 9 July 2005, online: <http://www.sudan-embassy.de/c_Sudan.pdf>; Chapter I, art. 2.5, CPA; International Crisis Group, *supra* note 9 at 7.

¹³ *INC*, *supra* note 12, s.222(2).

¹⁴ *INC*, *ibid.*, s.222(1); International Crisis Group, *supra* note 9 at 7.

¹⁵ Thomas, “Decisions”, *supra* note 5 at 5 and 7; Thomas, “Gathering Storm”, *supra* note 5 at 12.

¹⁶ Thomas, “Gathering Storm”, *ibid.* at 13.

¹⁷ United Nations Security Council, *supra* note 7 at para. 2.

¹⁸ Thomas, “Gathering Storm”, *supra* note 5 at 14; Brosche, *supra* note 3 at 36-37.

¹⁹ Maggie Fick, “Preparing for Two Sudans” (The Enough Project, March 2010) at 4-5 and 7, online: <www.enoughproject.org>; International Crisis Group, *supra* note 9 at 1 and 5-6; Thomas, “Decisions”, *supra* note 5 at vi.

²⁰ Fick, *ibid.* at 7-9; Thomas, “Decisions”, *ibid.* at 18.

both in the academic sphere²¹ and in the specific policy context of Southern Sudan.²² These debates do have relevance for political actors as the referendum campaign approaches. But at this point, another set of questions is equally important. The holding of the referendum can no longer be contested. It has become a non-negotiable aspect of the CPA, both from a constitutional perspective and in view of the political positions taken by SPLM/A leaders – some of whom have indicated that a delayed referendum could lead to a unilateral declaration of independence, or even war.²³ Now it appears all but certain that when the referendum is held, the vote will be overwhelmingly in favour of Southern independence.²⁴

The implications of such a result, and the practical details of holding the referendum, have received little attention thus far. The *INC* suggests only the barest outlines of referendum procedure. It “offers almost no guidance for the post-referendum arrangements,” providing only that it will immediately cease to apply to Southern Sudan should the referendum favour secession.²⁵ Leaders in Sudan are only now beginning to turn their attention to the practical implications of a vote for secession; negotiations between the parties have yet to begin. The *Southern Sudan Referendum Act*, which passed into law several months ago, identifies nine issues that should be negotiated prior to the referendum: “citizenship; currency; public service; status of the Joint Integrated Units...; agreements and international covenants ...; debts and assets; oil concessions and production, transportation and exporting; water; and ownership (largely of land).”²⁶

But this list is not accompanied by a framework for negotiation, something which is essential considering leaders’ current preoccupation with the outcome of the national elections.²⁷ The list also leaves out many pressing questions – such as the transnational status of pastoralist populations, the future of internally displaced persons, the special CPA rights of non-Muslims in Khartoum, and unimplemented processes of national reconciliation.²⁸ It is worth remembering that unresolved issues such as “unsettled currency, trade and financial arrangements were major reasons for the war that erupted between Eritrea and Ethiopia in 1998, after their velvet divorce in 1993.”²⁹

With less than nine months remaining before the referendum, Sudanese political leaders and civil society, as well as the international community, must turn their attention to the question of how to facilitate a peaceful and legitimate process of secession. In an attempt to contribute meaningfully to these efforts, this report identifies a few key concerns that must be addressed pre- and post-referendum, and provides specific recommendations for how these issues may be managed. With a goal of facilitating the establishment of two independent, viable and peacefully co-existing states, this report highlights issue areas for urgent policy attention.

While this report focuses on issues between Northern and Southern Sudan, and does not

²¹ See, e.g., Donald L. Horowitz, “A Right to Secede?” in Stephen Macedo & Allen Buchanan, eds., *Nomos XLV: Secession and Self-Determination* (New York: New York University Press, 2003) 50; Wayne Norman, “Domesticating Secession” in Macedo & Buchanan, eds., *ibid.*, 193; Asbjorn Eide, “In Search of Constructive Alternatives to Secession” in Christian Tomuschat, ed., *Modern Law of Self-Determination* (Boston: Martinus Nijhoff, 1993) 139.

²² See, e.g., Thomas, “Gathering Storm”, *supra* note 5; Angela M. Lloyd, “The Southern Sudan: A Compelling Case for Secession”, Note, (1994) 32 *Colum. J. Transnat’l L.* 419.

²³ Thomas, “Decisions”, *supra* note 5 at vi and 8; Fick, *supra* note 19 at 5 and 9; Jon Temin, “Negotiating Sudan’s Post-Referendum Arrangements” (Washington, DC: United States Institute of Peace, 22 January 2010) at 2, online: <www.usip.org>.

²⁴ Fick, *ibid.* at 1; International Crisis Group, *supra* note 9 at 1; Temin, *ibid.* at 1; Thomas, “Gathering Storm”, *supra* note 5 at 10.

²⁵ Thomas, “Decisions”, *supra* note 5 at 23; INC, *supra* note 12, s.226(10).

²⁶ Temin, *supra* note 23 at 1-2; United Nations Security Council, *supra* note 7 at para. 93.

²⁷ Temin, *ibid.* at 2.

²⁸ Thomas, “Decisions”, *supra* note 5 at vi and 24; Fick, *supra* note 19 at 6; International Crisis Group, *supra* note 9 at 1; United Nations Security Council, *supra* note 7 at para. 16.

²⁹ Thomas, “Decisions”, *supra* note 5 at 23.

make recommendations for ending violence in Darfur or calling for accountability, the desperate needs of Darfur are neither discounted nor underestimated. The lack of discussion on the situation in Darfur should not be interpreted as a minimization of the continuing atrocities. All of the recommendations made herein should be implemented mindful of the continued conflict in Darfur and the need for it to remain a priority for Sudan and for the international community.

Outline of the Report

In Chapter 1, Dan Moore examines how the secession of Southern Sudan could occur within a constitutional framework. His analysis focuses on three of the most important issues that are not explicitly addressed by the *INC*. The first issue is who should be eligible to vote in the referendum. A principle for eligibility is constructed through contextual interpretation of the *INC*, in which all members of the *Sudanese polity* should be eligible to vote.

The second issue is: what are the constitutional requirements for the referendum to trigger secession; the *INC* only vaguely provides that it will do so “if the outcome ... favours secession”.³⁰ Moore argues that there is a substantive requirement of “a clear majority on a clear question”.³¹ Sudan’s political leaders have already agreed that a simple majority will be sufficient, but they have not yet decided on the referendum question. For the question to be “clear”, the voters must be adequately informed of the consequences of a vote for secession. Procedurally, the *INC* requires an internationally monitored referendum, held in conditions where freedoms of expression and association are respected. Steps must also be taken to prevent voter intimidation, and to facilitate voter registration and voting itself.

The third issue is whether the *INC* permits immediate consensual secession or a UDI. The SPLM/A has asserted that s.226 (10) justifies immediate secession.³² Moore argues that it does not, and that contextual interpretation of the *INC* suggests something far more rigorous: “co-operative secession”, through a negotiated process of gradual post-referendum devolution. Prior to the referendum, there is an obligation to negotiate, ratify and publicize an additional CPA protocol or other binding agreement. While this need not be comprehensive, it must establish a framework for eventual Southern independence.

Moore then turns to how this could practically be realized. First, he argues that co-operative secession is the strategically preferable path. It will guarantee the most orderly and democratically legitimate transition for each government, and will almost definitely lead to international recognition of the South’s independent statehood. The concluding section of his chapter then outlines the role of the international community. It is argued that involvement by the international community is required to ensure a fair election, and to get Sudan’s political leaders to the bargaining table in good faith.

In Chapter 2, Hannah Moosa points to the importance of negotiating agreements for joint natural resource management prior to the January 2011 referendum vote, as a prerequisite to ensuring a peaceful transition to a newly independent South Sudan.

First, the author provides an overview of the 2004 Agreement on Wealth Sharing (AWS), which demonstrated the value in decoupling natural resource ownership issues from more ‘divisible’ issues, such as revenue-sharing and management of oil resources. She then examines

³⁰ *INC*, *supra* note 12, s.226(10).

³¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 87, 100, and 153.

³² Thomas, “Decisions”, *supra* note 5 at 23.

Sudan's oil sector, and the region's almost complete reliance on oil revenues for economic growth. The author notes the slow progress in implementing key provisions of the AWS, and raises questions regarding the management and control of oil resources in the post-secession period. Next, Moosa addresses complex issues surrounding Sudan's water resources and highlights the failure of the AWS in providing Sudan with a comprehensive arrangement for joint water management.

Taking into account contentious issues linking oil and water resources to conflict in Sudan, as well as failures in implementing provisions of the AWS; the author then generates four post-referendum secession scenarios for Sudan and possible implications for natural resources. Drawing upon the predicted outcomes from these scenarios, in the final section, the author provides recommendations for measures that should be taken prior to the referendum vote, in order to ensure that the transition to a newly independent Southern Sudan is as peaceful as possible.

Primary amongst these recommendations is a call to international and regional actors to pressure Sudanese political parties to urgently negotiate an additional protocol to the CPA before January 2011. This Additional Protocol should ideally feature agreements on border demarcation; ownership of land and subterranean natural resources; management and control of oil fields; wealth-sharing and contractual arrangements; reallocation of Nile waters; and resolution of the conflicts in Abyei, Southern Kordofan and the Blue Nile States.

However, bearing in mind the harsh and complex realities on the ground, reaching agreement on these fundamental issues in the next eight months is doubtful. Thus, Moosa urges international actors to ensure that, at a minimum, the North and South establish a framework mechanism and process through which parties can continue to negotiate cooperative arrangements for joint and sustainable resource management, irrespective of the type of post-secession reality which emerges in Sudan.

In Chapter 3, Aneesa Walji explores the implications of a new international border (disputed or otherwise) and the accompanying risk of de-stabilizing cross-border migration. To date, there has been woefully limited discussion about migration concerns in the event of secession and with this in mind, Walji highlights two issues in need of attention.

In the first section of this chapter, the author raises the issue of pastoral communities whose traditional migratory routes will involve the crossing of a North-South international border. Walji uses the Misseriya as a case study for analysis because of their critical role in achieving peace in Abyei, a region that serves as a flashpoint issue between North and South Sudan. She argues that, despite the existence of recognized grazing rights for Misseriya in Abyei, there is confusion and uncertainty on the ground. With a new and independent South Sudan, the situation will only be further complicated. The issue will then also become one of intergovernmental policy and constitutional design. With this in mind, Walji makes a host of recommendations ranging from improved security in the region to a shared border institution. Not only is the livelihood and traditional lifestyle of the Misseriya at stake; peace and stability between two states with a shared border is also at stake. The author acknowledges the many challenges involved in implementing such recommendations but urges both Sudanese governments and the international community to begin thinking about these issues and developing short and long-term solutions.

In the second section of this chapter, Walji raises another possibly de-stabilizing migration concern. She points out that a flux of human migration from North to South is a real

possibility in the event of secession. However, the timing and scale of this migration will depend on various factors, including citizenship and minority rights protections for Southerners that choose to remain in the North. Once again, the author urges both Sudanese governments and the international community to begin considering these issues seriously by, for example, creating a framework for the negotiation of key factors that will shape the nature of this anticipated migration.

Given that a significant amount of Southward bound migration is a concern in any scenario where secession occurs, recommendations are made in order to ensure a relatively smooth passage for migrants and avoid destabilizing effects such as humanitarian crises or violent outbreaks. Again, Walji makes a number of recommendations ranging from the need to create safe road conditions to the mobilization of humanitarian aid.

In Chapter 4, Emilie DesRosiers examines the need for decentralization and institutional capacity building at all levels of the Government of Southern Sudan (GoSS), paying particular attention to ethnic diversity and suggesting additional support at the state and local governing levels.

In the first section, DesRosiers examines the progress made by the central government and argues that despite the current institutional growth, the GoSS still lacks vital capacity. There are few effective links between the three levels of government, hampering efficient governing practices and institutions. A department overseeing capacity building projects is desperately needed.

In the second section, DesRosiers argues that state governments are weak and inefficient governing institutions owing to a lack of capacity. Effective decentralization requires that the state governments have the ability and the personnel to undertake administrative duties. Thus, it is imperative for state governments to receive international assistance for financing planning, urban and project works development, and management. Moreover, these projects should work in tandem with decentralization to ensure a relatively smooth transition.

In the final section of this chapter, DesRosiers examines the role and structure of local governments and the level of ethnic inclusivity within them. County lines are ill-defined, and sentiments of ethnic marginalization and favouritism within government are major sources of local conflict. The author argues that local customs and traditions should be incorporated in both local and state policies and practice in order to foster inclusivity.

In this chapter, primary among the recommendations is the creation of a department within the central government devoted to capacity building and responsible for ensuring training, transparency and monitoring by both local and international personnel. Moreover, it is suggested that the international community should refocus their attention towards building state governments and supporting the incorporation of different ethnic groups into all levels of governments.

DesRosiers notes that although progress has been made, Southern Sudan is in dire need of institutional capacity-building, particularly at the state level. While the interim constitution and the CPA support initiatives for an inclusive and multi-level approach to governing, decentralization and sufficient institutional capacity building has yet to occur. The author points out that it is imperative for Southern Sudan to establish stable institutions if it is to succeed as a sovereign nation.

In Chapter 5, Laura Brittain considers the long history of atrocity and violent conflict

in the country, and in the South in particular, making recommendations for what transitional justice might contribute to a peaceful Southern secession.

The author approaches transitional justice as a framework for effecting political transformation, ceasing hostilities, and confronting past abuses. Occurring in concert with other elements of Southern Sudan's independence, transitional justice in Southern Sudan not only ensures accountability and reparations for a generation of civil war, but, most importantly, also provides forward looking access to justice and effective conflict resolution for the many present and potential conflicts in a nation that has been mobilized against itself. This chapter approaches transitional justice at the regional, national, and community level.

The first section of this chapter considers if transitional justice and reconciliation is necessary in the region of Sudan, as between the governments of North and South. International criminal prosecutions have already begun for abuses in Darfur, but do not have the support of the NCP. Given the deterioration of the relationship between North and South, and the real possibility of a return to violence if the states are further pitted against each other, Brittain suggests that further prosecutions may rock the boat. Instead, if the existing prosecutions are able to proceed, any salutary effects could be shared by the South. Claims between North and South, if they must be resolved, could be adjudicated via a Claims Commission at the Permanent Court of Arbitration.

The second section of this chapter addresses the need for reconciliation at the national level. Southern Sudan is deeply divided along ethnic and tribal lines; strategies must be mindful not to exacerbate this, but should instead attempt to forge a Southern identity as an element of peace.

In the final section, the author considers one of the greatest challenges facing the newly constituted Southern Sudan; increasing tribal violence has heralded 2009 as the most violent year that the South has seen since the end of the civil war. Traditional methods of conflict resolution are present and functioning at the community level in many areas, though lack of enforcement reduces their effect. The author suggests methods for reforming and reinforcing existing mechanisms to ensure that they are rights respecting as a first step towards judicial reform.

Finally, in Chapter 6, Semir Yusuf takes up the regional dimension of the conflict with a focus on Eastern and North Eastern Africa. Sudan's long-standing North-South conflict has been closely related, directly or otherwise, with regional political and security dynamics ever since the very first violent standoffs between the ruling Northern elite and Southern factions. This "internal" conflict has been fuelled by the adverse interventions of the region's countries in their support of one group against another. But the same conflict has also contributed its share to the destabilization of these countries themselves, as the Northern elite exploited the Achilles' Heels of these countries: supporting anti-establishment forces in their bid against the current governments.

Yusuf's chapter focuses on the regional level political dynamics vis -à-vis Sudan's North-South divide as played out since independence. It assesses the trend in this mutually destabilizing predicament ever since the independence of Sudan; it challenges the countries of the region as to why they should change their hither-to destructive interventions in Sudanese politics, and puts forward some recommendations as to what they should be contributing to help achieve not only peaceful internal developments in Sudan but also stable and mutually beneficial regional interdependence in the times ahead.

In terms of specific recommendations, the author outlines some roles for regional actors,

which he basically divides into two: "passive" and "active". The former include desisting from spoiling the successful and peaceful conduct of the peace process, the elections, the referendum and post-referendum developments by antagonizing one group against the other as has been witnessed for decades. Their "active" roles mainly involve facilitating peace talks through regional organizations, especially the IGAD; forging economic ties with South Sudan and supporting its dire need for institutional capacity building; monitoring the security of intrastate and interstate conditions of the Sudan(s) both in the pre- and post-referendum periods; and establishing an interdependent regional complex mainly predicated on water resources. This last point might have a lasting positive impact on regional economic growth, apart from its profound role in establishing peace and security in the Horn and beyond. In short, the region's countries and the major regional organization, IGAD, should learn from the past records of their involvement in Sudanese politics, and help bring a better regional political arrangement which will very likely turn out to be rewarding for all.

Conclusion: "Independence is more than secession"³³

The history of Sudan ever since independence has been a narrative of exclusion and violence for the people of the South, with civil war between the North and South in all but eleven of the 50 years prior to the ratification of the CPA. The CPA was a constructive effort to create the conditions for peace and internal self-determination, but a lack of good faith and co-operation between the NCP and SPLM/A has hindered the process. It is now all but certain that in less than nine months, the people of Southern Sudan will exercise their constitutional right and vote in favour of secession. Secession carries a risk of exacerbating instability and maybe even leading to outright violence. But if approached in a planned and methodical manner, it carries great potential to become a vehicle for positive political transformation.

This report seeks to assist in charting the course towards the latter outcome. It is possible for Southern secession to set in motion a process that culminates in a transformed political situation in the Sudanese region: one where the stable, sovereign states of North Sudan and South Sudan work co-operatively within well-established mechanisms of inter-governmental relations to further their mutual goals, and resolve issues of governance arising from their inevitable interdependence. True independence for Southern Sudan will require more than merely the technical legalities of secession.

In addition to the holding of a free and fair referendum, the first steps towards Southern independence should ideally include the negotiation of an additional CPA protocol prior to January 2011, setting out the framework for secession. According to Chapter 1, such an agreement is a constitutional and strategic imperative. It would not have to, and clearly could not, settle all the issues that will arise during secession, but it would have to provide referendum voters with sufficient knowledge to make an informed choice, and it would have to provide Sudan's political leaders with a roadmap for post-referendum negotiations. Although many observers of Sudan doubt whether the country's political leaders could realistically reach an agreement prior to the referendum, some kind of pre-arranged and publicized framework is critical for a peaceful secession. The international community must, at the very least, ensure that some sort of basic agreement is in place before the referendum to manage processes of secession.

Chapter 1 explains why the most constitutional and strategically preferable option for the secession process would be a negotiated course of gradual devolution. The argument is that

³³ Thomas, "Decisions", *supra* note 5 at vi.

immediate secession is both unrealistic and irresponsible. In order to create a viable Southern state and build peace in the region, a gradual, cautious, and methodical approach is required. Chapters 2 to 5 build on this argument by exploring some of the complex problems that should be addressed both prior to and during the interim devolutionary period.

Chapters 2 and 3 include discussion of some of the substantive issues of constitutional design that should be negotiated prior to and during the devolutionary period. While this deeply divided society will soon experience secession, these chapters highlight the manner in which the North and South will continue to remain highly interdependent for years to come. Uniquely, constitutional design in Sudan will be an inter-governmental project.

Chapter 2 focuses on the critical importance of negotiating intricate arrangements for joint natural resource management in an additional CPA protocol, prior to the January 2011 referendum. Ideally, such a pre-secession framework should resolve the contentious issue of border demarcation, and commit the North and South to: (a) a continuation of joint management, control and regulation of oil and water resources; (b) an equitable distribution of oil revenues; and (c) an arrangement for the reallocation of Nile Waters. At the very minimum, key international actors must use their political leverage to ensure that the North and South establish a framework mechanism which keeps the channels of communication open, through which the parties can continue negotiating cooperative arrangements for natural resource management in the post-secession period.

The creation of a new international border in the context of complex interdependence will affect many groups of people, and Chapter 3 turns its attention to two groups in particular. First, pastoralist communities such as the Misseriya, whose traditional migratory routes cross what is expected to be the North-South border, will require special programs to ensure that their way of life is preserved and stability in the region maintained. These include transnational legal mechanisms to protect their migratory rights. Second, it is possible that secession could trigger large-scale migration of ethnic Southerners from the North into the South. Such migration could raise serious humanitarian concerns and for this reason, any agreement reached before the referendum must turn its attention to this issue by for example, guaranteeing the status of ethnic Southerners living in the North post-secession.

Both Chapters 2 and 3 provide illustrations of the kinds of difficult questions of inter-governmental constitutional redesign that will be raised by secession – issues that would be most effectively resolved through negotiations that occur within a co-operative, orderly framework of gradual devolution. Chapters 4 and 5, on the other hand, discuss some of the steps that need to be taken internally to prepare South Sudan for independence. South Sudan is itself a divided society. The demanding nature of the requisite processes of constitutional design provides another reason why gradual devolution is preferable to immediate secession.

Recommendations are made in Chapter 4 for the development of South Sudan's capacity for independent governance that is both stable and democratic. This will require the building of institutional capacity at all levels of government – central, state, and local – accompanied with real decentralization of authority, so that local tensions can be addressed effectively through increased recognition of ethnic heterogeneity. Ideally, the post-referendum structure of governance should include mechanisms to buttress government capacity in the South and this will require additional support from the international community.

But strong institutions will not be sufficient to prepare South Sudan for a peaceful independence. As explained in Chapter 5, processes of retrospective and prospective transitional justice should be an integral part of the devolutionary period. At the level of North-South

intergovernmental affairs, improving relations through co-operative negotiations will have to be the focus, supplemented by mechanisms of international adjudication and arbitration. Within the South, a new national identity will have to be forged, transcending existing divisions along ethnic and tribal lines. At the local level, increasing tribal violence will need to be addressed by ensuring better access to already-existing traditional structures of justice.

What these chapters emphasize is that independence is more than secession. A viable and sustainable independence will require concerted capacity building in the South; it will also require political agreement between the North and South on contentious issues that demand cooperation. In order for independence to be more than simply a technicality – in order for it to also promote peace, stability and human rights – independence must take time. It must be regarded as a process.

The international community will need to take a strong leadership role to ensure that Southern secession culminates in a transformed political situation. Assistance from external actors will be required to hold a free and fair election, negotiate a framework for gradual devolution, and secure the good faith participation of Sudan's political leaders in devolutionary negotiations. In addition, the international community should play a key role in providing humanitarian assistance in the case of large-scale migration into the South, developing South Sudan's capacity for independent governance, and facilitating processes of transitional justice.

Although the United Nations Mission in the Sudan (UNMIS) should play a role in securing the North-South border in the fragile months post-referendum, it is argued in Chapter 6 that other aspects of the international effort should be led by regional actors, in particular the member states of IGAD. Many different international actors – with varying political philosophies – have economic, security, or ideological interests in influencing the institutional governance and design of North Sudan and South Sudan.³⁴ It is important that they work in a co-ordinated fashion, under the leadership of regional actors such as IGAD. These are the states that have the strongest security and economic interest in a stable outcome – in developing an interdependent, co-operative arrangement that will facilitate long-term peace and development not just in North Sudan and South Sudan, but in the region as a whole.

Ultimately, however, political transformation must come from within Sudan and substantive solutions should not be imposed. The role of regional actors and members of the international community generally is to ensure that the processes recommended above are established, that the identified issues are on the agenda, and that the conditions for a domestic agreement to be reached and respected are guaranteed. Southern Sudan may be hurtling toward a non-negotiable referendum with an outcome that is debated by few, but where individual actors can undeniably contribute constructively is in making that outcome work. This will require from the SPLM/A, the NCP, and the international community traits that have been regrettably lacking during the interim period: motivation, initiative, cooperation and good faith.

³⁴ For instance, China is playing an increasing role in Sudanese development in addition to the United States and regional actors.

1. COOPERATIVE SECESSION AND THE SUDANESE CONSTITUTION – DAN MOORE

Introduction

Although the referendum on the secession of Southern Sudan is less than nine months away, the legal framework for the referendum itself and for the South's probable secession is acutely underdeveloped. Section 219 of Sudan's *Interim National Constitution*¹ (*INC*) grants to "the people of Southern Sudan" a "right to self determination through a referendum to determine their future status", but subsequent provisions provide little explicit guidance on how to constitutionally implement this right. The national elections have distracted Sudan's political leaders from the many divisive issues surrounding the referendum, which have now been left to the last minute, and pose yet another threat to the stability of Sudan's fragile peace.²

The *INC* does settle some questions. The referendum, which will be "internationally monitored", must be held on or before 9 January 2011.³ Voters must be given the option either to "vote for secession," or to confirm unity.⁴ The *INC*'s only indication of the consequences of a vote for secession is in s.226(10): "if the outcome of the referendum on self-determination favours secession", then all aspects of the *INC* "that provide for Southern Sudan institutions, representation, rights and obligations shall be deemed to be duly repealed."

At least three issues surrounding the constitutional right to secession are not explicitly addressed in the *INC*. First, who are "the people of Southern Sudan"? Second, what is required for the referendum result to validly "favour" secession? Third, does s.226(10) mean that the *INC* permits immediate unilateral or consensual secession?

This chapter will argue that embedded within the *INC* are the principles for a co-operative approach to Southern secession: a free and fair referendum, held in accordance with international standards, and organized with the assistance of the international community; followed ideally by a negotiated process of gradual devolution, culminating in independence. The second section will address the first two issues identified above, providing the outlines of a constitutional referendum procedure. The next section will turn to the third issue, explaining why "co-operative secession" is the constitutional path to Southern independence. The remainder of the chapter addresses the practical questions of how and why this ideal approach might actually be implemented. The fourth section will argue that this approach is preferable from a strategic perspective for the National Congress Party (NCP), the Sudan Peoples' Liberation Movement/Army (SPLM/A), and the international community. The conclusion outlines the necessary leadership role of the international community, if this process is to be implemented in the little time remaining.

I. A free and fair referendum held with the assistance of the international community

A contextual interpretation of the *INC* can provide some guidance with respect to issues of voter eligibility and referendum procedure, but many aspects of the referendum process will still need to be settled through political negotiations. The first issue is that of voter eligibility.

¹ *Interim National Constitutional of the Republic of the Sudan, 2005* (entry into force 9 July 2005) [*INC*].

² Edward Thomas, "Decisions and Deadlines: A Critical Year for Sudan" (London: Chatham House, January 2010) at 18-19 and 25-26, online: < <http://www.chathamhouse.org.uk/publications/papers/view/-/id/823/> >; Maggie Fick, "Preparing for Two Sudans" (The Enough Project, March 2010), online: < www.enoughproject.org >.

³ *INC*, *supra* note 1, s.222(1); International Crisis Group, "Sudan: Preventing Implosion" (Africa Briefing #68, 17 December 2009, Nairobi/Brussels) at 7, online: < <http://www.crisisgroup.org/home/index.cfm?id=6438&l=1> >.

⁴ *INC*, *supra* note 1, s.222(2).

The *INC* vests a right to self-determination through referendum participation in “the people of Southern Sudan”, without explicitly defining this collectivity. The *Southern Sudan Referendum Act*, recently enacted pursuant to s.220(1), does not address this highly-charged issue either, leaving it to be settled by the still-unformed Referendum Commission.¹ This leaves four categories of persons with an especially uncertain status: refugees and internally displaced persons (IDPs) originally from South Sudan; members of the Southern Sudanese diaspora; Sudanese citizens originally from the South, but presently resident in the North (including the large number of Southerners working in Khartoum); and individuals – either Sudanese citizens or permanent residents – who are presently resident in Southern Sudan, but are not members of one of the territory’s traditional ethnic or indigenous communities.²

The *Interim Constitution of Southern Sudan (ICSS)*³, which is only valid to the extent that it is in compliance with the *INC*⁴, does provide a potential rule for referendum voting eligibility. The *ICSS* provides that any individual eighteen years of age or older who is South Sudanese has a right to participate in the referendum.⁵ At s.9, a “South Sudanese” is defined as:

- (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, 1956.⁶

This definition would theoretically include all of the above categories of individuals in the referendum, except for some of the latter category. Practical difficulties would also prevent the registration of numerous voters eligible under this definition, since many refugees, IDPs, and Southerners resident in the North have been displaced from their traditional kinship structures.⁷

Although the *ICSS* definition is currently considered the most likely to be used⁸, its conformity with what is intended in the *INC* is doubtful, when the meaning of s.219 is considered in light of the international jurisprudence and state practice surrounding the right of peoples to self-determination. At international law, there has always been uncertainty on the question of how to define a “people.”⁹ Two general approaches have been taken.

The first defines a people on the basis of some kind of subjectively perceived and objectively identified national homogeneity.¹⁰ The International Commission of Jurists, for example, has suggested a set of objective criteria for identifying a “people”, the majority of which relate to national homogeneity: “(1) common history, (2) racial or ethnic ties, (3) cultural or linguistic ties, and (4) religious or ideological base.”¹¹ The Supreme Court of Canada

¹ *INC*, *supra* note 1, s.220; International Crisis Group, *supra* note 3.

² Thomas, “Decisions”, *supra* note 2 at 18-19 and 25-26.

³ *The Interim Constitution of Southern Sudan, 2005 [ICSS]*.

⁴ *INC*, *supra* note 1, s.3.

⁵ *ICSS*, *supra* note 7, s.9(2).

⁶ *ICSS*, *ibid.*, s.9(3) (1 January 1956 is the date of Sudan’s independence).

⁷ Thomas, “Decisions”, *supra* note 2 at 19.

⁸ Thomas, *ibid.*

⁹ Hugh M. Kindred & Phillip M. Saunders, gen. eds., *International Law, Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery Publications, 2006) at 78 (“As used in United Nations practice, the term refers to an identifiable group of individuals but is nowhere conclusively defined.”); Patrick Thornberry, “The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism” in Christian Tomuschat, ed., *Modern Law of Self-Determination* (Boston: Martinus Nijhoff, 1993) 101 at 124.

¹⁰ Kindred & Saunders, *ibid.* at 78.

¹¹ International Commission of Jurists, “East Pakistan Study” (1972) 8 Int. Comm. Of Jurists Rev. 23 at 47, cited in Darlene M. Johnston, “The Quest of the Six Nations Confederacy for Self-Determination” (1986) 44 U.T. Fac. L. Rev. 1 at 26 (The other three relate to the people’s capacity to self-govern).

favoured this approach in the *Reference re Secession of Quebec*, indicating that had it been forced to rule on the existence of a “people”, it would have examined whether the Quebec population shares certain characteristics, “such as a common language and culture.”¹² This approach appears to be in general accord with the *ICSS* rule for voting eligibility.

Rather than relying on an inherent trait of the collective, the second approach identifies units of self-determination according to their political situation. In this approach, any one of “those territories established and recognized as separate political units” will be considered a “unit” to which self-determination applies – a people – if its political situation falls within one of several categories. Peoples at international law, particularly when they assert a right to external self-determination, would then be political-territorial entities, rather than necessarily ethnic or cultural ones.¹³ In the case of Southern Sudan, the relevant category for its right to self-determination appears to be that it is a territory “forming a distinct political-geographical area, whose inhabitants are arbitrarily excluded from any share in the government either of the region or of the State to which they belong.”¹⁴ Applying to this approach, the “people of Southern Sudan” is constituted by a common experience: the general exclusion of the territory’s people from government, and their oppression by the state.¹⁵ Even though this exclusion may have been partially rooted in ethno-national division, the membership of the “people” includes all members of the territorially-defined “separate political unit.”

There are two reasons why the latter approach should be taken in the context of Southern Sudan.¹⁶ First, it is probably closer to what was originally meant by the drafters of the CPA. The meaning of s.219 *INC* can be understood by referring to the history of this provision. The 1994 *Declaration of Principles* by the Intergovernmental Authority on Development was the first document to affirm the “right of self-determination of the people of south Sudan to determine their future status through a referendum”¹⁷ This guarantee was then adopted essentially unchanged into the CPA and the *INC*. The IGAD affirmation was directly inspired by the Eritrean independence referendum that had occurred the previous year¹⁸; the language used by the *Declaration of Principles* to describe the right clearly echoes that of the political agreement that initiated the Eritrean referendum.¹⁹ The way in which Eritrea implemented the right of its people to self-determination can therefore provide insight into the appropriate eligibility rules for the South Sudanese referendum. In the Eritrean referendum, all Eritrean citizens over the age of 18 were eligible to vote.²⁰ This included citizens by naturalization, through marriage, adoption,

¹² *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 125 [*Secession Reference*]. See also: *Report of the International Commission of Jurists on the Aaland Islands Question* (1920), League of Nations O.J., Spec. Supp. 3 at 6 (Characterizing self-determination recognizes “new aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization.”)

¹³ See, e.g., James Crawford, *The Creation of States in International Law*, 2nd ed. (New York: Clarendon Press, 2006) at 387 (“self-determination is predicated on a free and effective choice by the people of the territory concerned.”) (Emphasis added).

¹⁴ *Ibid.* at 126-127.

¹⁵ Angela M. Lloyd, “The Southern Sudan: A Compelling Case for Secession”, Note, (1994) 32 *Colum. J. Transnat’l L.* 419 at 452 (“The Southern Sudanese are a ‘people,’ not only because they believe themselves to be, but because ... their years of unity amidst the endless ravages of Northern tyranny have made them so ... They have suffered a pattern of systemic discrimination and abuse.”)

¹⁶ It should be noted that although the two approaches are different in principle, their application will not necessarily result in different conclusions. The homogeneity rule could possibly be understood to include in the “people” minority groups within the homogeneous group’s territory: *Secession Reference*, *supra* note 16 at para. 125.

¹⁷ Thomas, “Decisions”, *supra* note 2 at 5.

¹⁸ *Ibid.* at 4.

¹⁹ Edward Thomas, “Against the Gathering Storm: Securing Sudan’s Comprehensive Peace Agreement” (London: Chatham House, January 2009) at 4-5, online: <<http://www.chathamhouse.org.uk/publications/papers/view/-/id/688/>>; “Letter dated 13 December 1991 from the President of the Transitional Government of Ethiopia to the Secretary-General of the United Nations concerning the results of the Conference on Peace and Democracy held in Ethiopia in July 1991”, UN Doc. A/C.3/47/5, Annex II, 29 October 1992, Document 13 in *The United Nations and the Independence of Eritrea* (New York: United Nations, 1996) 154 (“the people of Eritrea have the right to determine their own future by themselves and ... the future status of Eritrea should be decided by the Eritrean people in a referendum....”); “Referendum Proclamation, No. 22/1992”, Document 17 in *The United Nations and the Independence of Eritrea*, *ibid.*, 158.

²⁰ “Referendum Proclamation, No. 22/1992”, *ibid.* at 163-164, s.24.

or the fulfilment of several requirements. Most of these requirements were linked in some way to membership of the Eritrean polity.²¹ None of the requirements were linked to ethnicity or parentage.

The second reason to base voting eligibility on a political-territorial definition of “the people of Southern Sudan” is that a definition based on ethnicity or parentage could be discriminatory. Section 31 of the *INC* specifically enumerates among the forbidden bases of discrimination “race, colour ... language, religious creed ... or ethnic origin”. In s. 41(1), which establishes the right of “every citizen ... to take part in the conduct of public affairs, through voting,” electoral or referendum participation is linked to political rather than ethnic membership. This provision can also be interpreted in light of Sudan’s obligations under international human rights law²², especially since the text of s.41(1) echoes art. 25 of the *International Covenant on Civil and Political Rights*.²³ According to the Human Rights Committee (HRC):

no distinctions are permitted between citizens in the enjoyment [of an art. 25 right to vote in a referendum] on the grounds of race, colour, ... religion, ... national or social origin, ... birth or other status. *Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization* may raise questions of compatibility with article 25.²⁴

Only conditions “based on objective and reasonable criteria” can restrict the exercise of art. 25 rights.²⁵

These considerations suggest that the *ICSS* definition of the “people of Southern Sudan” is not the appropriate interpretation of s.219 *INC*, and that a territorial-political definition of the “people” would be more fitting. In other words, it can be argued that when the *INC* affirms the right of the people of Southern Sudan to self-determination, it grants that right to all individuals who are currently members of the *Southern Sudanese polity*, not just those who identify with a traditional “South Sudanese” ethnicity, or those who would have Southern Sudanese nationality by birth. Presumably such a criterion would be “objective and reasonable” in the context of a secession referendum.²⁶

Returning to the categories of persons outlined at the beginning of this section, an approach to referendum voting eligibility that extends it to all members of the Southern Sudanese polity would have to include refugees and IDPs, since their territorial displacement from the Southern Sudanese polity is involuntary.²⁷ In the Eritrean referendum, both ethnic Eritreans in Ethiopia and Eritrean refugees were allowed to vote in their host state.²⁸ Sudanese citizens born in the North who have been long-time residents of the South should also be included, since they have become rightful members of the polity. As discussed above, in Eritrea

²¹ “The Eritrean Nationality Proclamation No. 21/1992”, Document 16 in *ibid.*, 156 at 156-157, s.4 (The requirements included having: “been domiciled in Eritrea for a period of twenty (20) years while making periodic visits abroad; ... renounced the nationality of another country; ... decided to be permanently domiciled in Eritrea upon the granting of his Eritrean nationality; ... not committed anti-people acts during the liberation struggle of the Eritrean people”; and signed an oath of allegiance.)

²² *INC*, *supra* note 1, s.27(3) (“All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part” of the Part Two Bill of Rights.)

²³ 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Sudan 18 March 1986) [*ICCPR*].

²⁴ Human Rights Committee, *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service* (Art. 25), CCPR/C/21/Rev.1/Add.7 (12 July 1996) at paras. 3 and 6 (emphasis added) [*General Comment No. 25*].

²⁵ *Ibid.* at para. 4.

²⁶ Such a restriction in this context is also generally consistent with the ideas of popular sovereignty that form the basis of the *INC*, *supra* note 1, ss.2 and 4.

²⁷ Dennis Gallagher & Anna Schowengerdt, “Participation of Refugees in Postconflict Elections” in Krishna Kumar, ed., *Postconflict Elections, Democratization & International Assistance* (Boulder, CO: Lynne Rienner Publishers, 1998) 195 at 198-199.

²⁸ Boutros Boutros-Ghali, “Introduction”, in *The United Nations and the Independence of Eritrea*, *supra* note 23, 1 at paras. 77-79.

the referendum vote was extended to such “citizens by naturalization.”²⁹ Non-citizen permanent residents of the South could constitutionally be excluded, since they are not technically members of the polity.

The greatest challenges for the application of this approach are presented by the South Sudanese diaspora, and by individuals originally from the South who are now living in the North. The latter group – the “domestic diaspora” – would definitely be eligible. Although some of them may no longer have any genuine connection to the South, and therefore may have lost their connection with South Sudanese polity, it would be near impossible to find any objective and reasonable criteria for making such a determination. The domestic diaspora had unrestricted voting rights in the Eritrean referendum, in which there were both voter registration drives and polling stations in Ethiopia.³⁰

The voting rights of the international diaspora involve a more complex set of considerations, especially in the South Sudanese context, where much of the diaspora left the country due to conflict. The granting of both dual nationality and diaspora voting rights has become much more common in recent years, although it remains controversial.³¹ The debate centres around two issues: first, the significant differences between the voting behaviour of the diaspora and of the domestic citizenry³²; and second, the contested normative claim of the diaspora to vote on the future political direction of a territory in which they do not reside. The merits of the normative claim would probably vary between individuals according to their level of retained connections to his or her homeland.³³ The loss or renunciation of Sudanese citizenship could be an objective criterion for these connections, but much of the diaspora might have been involuntarily stripped of their Sudanese citizenship upon acquisition of foreign nationality.³⁴ In the Eritrean referendum, members of the international diaspora who had been granted foreign citizenship were granted dual nationality – and thereby allowed to vote – if they provided “adequate justification” to the Department of Internal Affairs.³⁵ The UN registered voters and established polling stations in 36 foreign states.³⁶

The status of the diaspora under s.219 is therefore uncertain. The choice appears to be up to Sudan’s political leaders, and pragmatic arguments could be made that they should choose to extend the franchise to the diaspora. The economic benefits of strengthened connections with the diaspora have been the motivation for several governments that have granted increased diaspora rights of citizenship, political participation, and voting.³⁷

Flexible elaboration of the *INC* does clarify some of the broader ambiguities surrounding referendum voting, but clearly the technical details on how to apply the eligibility principle will only be resolved through political negotiation and the formation of a truly empowered Referendum Commission. The same is also true with respect to the second issue identified at the

²⁹ “Nationality Proclamation No.21/1992”, *supra* note 25 at 156-157, s.4.

³⁰ Ghali, *supra* note 32 at paras. 73, 77, and 79.

³¹ Anupam Chander, “Homeward Bound” (2006) 81 N.Y.U.L. Rev. 60 at 69-70; Kim Barry, “Home and Away: The Construction of Citizenship in an Emigration Context” (2006) 81 N.Y.U.L. Rev. 11 at 42-50 and 51-58.

³² Jan Fidrmuc & Orla Doyle, “Voice of the Diaspora: An Analysis of Migrant Voting Behaviour” (ZEI Working Paper, March 2005), online: <http://www.zei.de/download/zei_wp/B05-02.pdf>. This study explains the variation as a result of diaspora members’ socialization to their host states. Another potential reason is that the diaspora does not experience everyday life in their original polity, and so their voting choices are likely to be driven by different concerns than those of the domestic citizenry.

³³ Ruth Rubio-Martin, “Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants” (2006) 81 N.Y.U.L. Rev. 117 at 124 and 127-129.

³⁴ *Nationality Act, 2003* (Sudan), 31 December 2003, s.14, online: <<http://www.unhcr.org/refworld/docid/469e24992.html>>; *Sudanese Nationality Act 1957, 1957* (last amended 1974), s.12, online: <<http://www.unhcr.org/refworld/docid/3ae6b56718.html>>.

³⁵ “Eritrean Nationality Proclamation No. 21/1992”, *supra* note 25, s.2(5).

³⁶ Ghali, *supra* note 32 at paras. 73 and 79.

³⁷ Chander, *supra* note 35 at 72-76; Barry, *supra* note 35 at 28-31 and 35-42.

beginning of this chapter. For the outcome of the referendum to “favour” secession under s.226(10), contextual interpretation of the *INC* indicates that not only must the referendum result substantively indicate a popular preference for secession, but the referendum itself must be procedurally valid.

The most useful concept for elaborating on the substantive requirement is the democratic principle, which is one of the fundamental bases of the *INC*.³⁸ Democracy has been interpreted by the Supreme Court of Canada to “demand” that a secession referendum only be understood to indicate a popular preference for secession if there is “a clear majority on a clear question”. Applying this standard democratically requires a “qualitative evaluation” for which “only the political actors would have the information and expertise to make the appropriate judgment”.³⁹ The definition in Sudan of what constitutes “a clear majority” has indeed been approached so far as a political issue. The *Referendum Act* requires 60% turnout with a simple majority in favour of secession.⁴⁰ The turnout requirement is not likely to be a deciding factor, since secession referenda have historically seen high levels of participation.⁴¹

Turning to the framing of “a clear question”, Sudan’s political leaders seem to have delegated this task to the Referendum Commission. For democratic reasons, though, the people’s representatives should have input. The *INC* sets out the ultimate choice that must be given to the people of Southern Sudan, but it does not necessarily define the precise wording of the referendum question. Section 222(2) establishes two positive options: voters can either “vote for secession”, or “confirm unity of the Sudan” and their desire to sustain the general constitutional arrangement established by the CPA. Although this possible framing might reflect the *INC*’s goal of national reconciliation⁴², it is confusing and could obscure the referendum choice for voters. It would be clearer to frame the question in simple yes or no terms, as was done in Eritrea: “Do you approve Eritrea to become an independent, sovereign state?”⁴³ A final factor affecting the clarity of the question is the extent to which the consequences of each choice have been explained to the voters beforehand: “if the purpose of the referendum is to allow the majority to decide for itself, the majority must know what it is voting for.”⁴⁴ The implementation of this obligation will be discussed below.

Valid referendum procedure is not given much specific, explicit treatment in the *INC*, aside from s.222, which requires that the referendum must be “internationally monitored,” and organized by the Referendum Commission in cooperation with both the national government and the government of Southern Sudan. Since a guiding principle “basic to governance”⁴⁵ in Sudan is “promotion of international cooperation, specifically within the United Nations family and other international and regional organizations”⁴⁶, it could also be argued that cooperation with agencies providing international electoral assistance, in addition to basic monitoring, would be most in accordance with the *INC*.⁴⁷

The various procedural norms which can be read in to the *INC* identify issues that will

³⁸ *INC*, *supra* note 1, ss.1(1) and 4(a).

³⁹ *Secession Reference*, *supra* note 16 at paras. 87, 100, and 153. See also: *Clarity Act*, 2000, c.26 (Canada).

⁴⁰ Thomas, “Decisions”, *supra* note 2 at 18; International Crisis Group, *supra* note 3 at 7.

⁴¹ Thomas, *ibid.* In the 1993 Eritrean referendum, which had no turnout requirement and only required a majority vote for secession, 98.24% of registered voters participated: Ghali, *supra* note 32 at paras. 83 and 86.

⁴² *INC*, *supra* note 1, ss. 21, 24(a), 79, 82(c), 91(1).

⁴³ “Referendum Proclamation, No.22/1992”, *supra* note 23 at 159, s.3(2).

⁴⁴ Allen Buchanan, “The Quebec Secession Issue: Democracy, Minority Rights, and the Rule of Law” in Stephen Macedo & Allen Buchanan, eds., *Nomos XLV: Secession and Self-Determination* (New York: New York University Press, 2003) 238 at 248.

⁴⁵ *INC*, *supra* note 1, s.22.

⁴⁶ *INC*, *ibid.*, s.17(a)

⁴⁷ The distinction between monitoring and assistance is explained in Krishna Kumar, “Postconflict Elections and International Assistance”, in Krishna Kumar, *supra* note 31, 5 at 6.

need to be addressed immediately in Southern Sudan if the referendum is to be constitutional. First, the Bill of Rights guarantees several general provisions that are essential to a free and effective referendum: these include freedom of expression, association and assembly.⁴⁸ But legal reform to statutes pre-dating the CPA will be necessary for these rights to be at all protected in time for the referendum campaign. Such statutes include the National Security Forces Act, which makes the security services “a force for local intimidation” by granting them sweeping powers of arrest and detention with minimal judicial oversight; the Criminal Procedures Act, “which routinely limits freedom of association and assembly”⁴⁹; and the 2004 Press and Publications Act, which has allowed for direct government censorship of newspapers.⁵⁰

The Bill of Rights can also be interpreted in light of the provisions on political rights in the *ICCPR*⁵¹ and the *African Charter on Human and Peoples Rights*.⁵² For example, the s.41(1) “right to take part in the conduct of public affairs, through voting” can be elaborated on through reference to the HRC’s jurisprudence on Art. 25 *ICCPR*. This leads to a number of conclusions. First, it suggests that voters have a right under s.41(1) *INC* to be protected from intimidation or coercion.⁵³ This will require in Sudan not only reforms to the security services, as discussed above, but also measures to prevent even unintentional voter intimidation by the Sudan People’s Liberation Army or members of a Joint Integrated Unit. In Eritrea, this was done by allowing soldiers in the Eritrean People’s Liberation Army to vote in their barracks prior to the general referendum period.⁵⁴

Second, the HRC has written that the protection of voting rights requires states to “take effective measures” to facilitate the registration of eligible voters, and their ultimate exercise of the right.⁵⁵ In Southern Sudan, where many potential voters have been displaced by conflict, registration will involve a massive effort. Although many displaced Southern Sudanese have already spontaneously returned or been repatriated, many will not have by January 2011; special agreements will have to be made with refugee and diaspora voters’ host states to allow Sudanese political activities to occur on their territory. This was done successfully in the Eritrean referendum, but only after extensive negotiations with several governments, particularly in cases where the host state had troubled diplomatic relations with Ethiopia.⁵⁶ In the case of Southerners displaced in the North, there will need to be better cooperation between the NCP and SPLM.

Especially in rural areas, there may be resistance to the registration of women. This was experienced in Eritrea, but respectful discussions with elders usually led to a compromise that respected both cultural sensitivities and the principles of universal adult suffrage and non-discrimination.⁵⁷ More generally, the Referendum Commission will need to implement voting solutions for illiterate voters. Past Sudanese referenda have used tokens that can be placed in one of several ballot boxes to indicate the voter’s choice, but this option is highly vulnerable to fraud. More secure methods were used in Eritrea, where the two choices were represented by colours as well as words, and in East Timor, where voters were presented with a choice of flags.⁵⁸

As part of the obligation to take effective measures to facilitate voting, the HRC’s

⁴⁸ *INC*, *supra* note 1, ss.39-40; *General Comment No. 25*, *supra* note 28 at paras. 12 and 26.

⁴⁹ Thomas, “Decisions”, *supra* note 2 at 16; Thomas, “Gathering Storm”, *supra* note 23 at 17.

⁵⁰ Thomas, “Gathering Storm”, *ibid.*; International Crisis Group, *supra* note 3 at 5.

⁵¹ *Supra* note 24. See especially Arts. 2(1), 18-19, 21-22, and 25-27.

⁵² 17 June 1981, 21 I.L.M. 58 (ratified by Sudan 18 February 1986, entered into force 21 October 1986). See especially Arts. 2-3 and 9-13.

⁵³ *General Comment No. 25*, *supra* note 28 at para. 12.

⁵⁴ Ghali, *supra* note 32 at para. 84.

⁵⁵ *General Comment No. 25*, *supra* note 28 at para. 11.

⁵⁶ Ghali, *supra* note 32 at paras. 77-78.

⁵⁷ *Ibid.* at para. 71.

⁵⁸ Thomas, “Decisions”, *supra* note 2 at 20.

jurisprudence suggests that there must be “voter education and registration campaigns” to ensure that there is an “informed community.”⁵⁹ The most important implication of this obligation is that the people of Southern Sudan will need to be informed of the practical implications of a vote for secession *before* they cast their ballot. Education campaigns undertaken pursuant to this obligation must be targeted to address specific barriers to free and informed voting, “such as illiteracy, language barriers, poverty, or impediments to freedom of movement.”⁶⁰ The UN Mission in the Sudan (UNMIS) has already, in the electoral context, advised the Sudanese government on various vulnerable groups that must be specifically targeted.⁶¹ In Eritrea, the principle barriers to voting were illiteracy and a “relative lack of voting experience and training in electoral practices.” Education efforts there also faced public scepticism regarding the referendum’s significance, since eventual independence was perceived to be inevitable.⁶² These problems were addressed by a “massive voter education programme to explain the concept, principles and purposes underlying a referendum and to instruct prospective voters in the actual voting procedures and techniques”. Posters, voting manuals, school curricula, practice voting sessions, touring theatre troupes, and television and radio programmes were all used. The latter method was considered most effective.⁶³

The many remaining, unanswered questions about valid referendum procedure should be considered in light of general norms for democratic electoral processes. These norms are made constitutionally relevant through two basic concepts in the *INC*. First, democratic governance, which is a fundamental basis of the *INC*, requires such processes. According to the *African Union Declaration on the Principles Governing Democratic Elections in Africa*, “democratic elections are the basis of the authority of any representative government”, and “constitute a key element of the democratization process.”⁶⁴ The second concept is the self-determination of peoples, which in the *INC* is the concept framing the referendum. At international law, the right of self-determination “is predicated on a free and effective choice by the people of the territory concerned.”⁶⁵ Where the right is being exercised through a referendum, it therefore “implies a democratic process.”⁶⁶ International standards would be a useful resource for elaborating on the general norms for democratic electoral processes.⁶⁷

The Eritrean referendum, which was pronounced by the UN to be “free and fair at every stage”, and “a model for such future endeavours elsewhere”, should also inform decisions about referendum procedure.⁶⁸ The Eritrean referendum, however, was held in a situation of peace, and

⁵⁹ *General Comment No. 25*, *supra* note 28 at paras. 11 and 19 (“Persons entitled to vote must be free to vote ... for or against any proposal submitted to referendum or plebiscite, ... without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector’s will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference.”)

⁶⁰ *Ibid.* at para. 12.

⁶¹ United Nations Security Council, “Report of the Secretary-General on the Sudan”, S/2010/31 (19 January 2010) at para. 52 (including “women, youth, internally displaced persons, refugees, migrant populations, rural voters, the illiterate, persons with disabilities, and other special needs groups.”)

⁶² Ghali, *supra* note 32 at para. 69.

⁶³ *Ibid.* at para. 74.

⁶⁴ AHG/Decl.1 (XXXVIII), 2002, ss. II.1-2. See also: *Declaration of Principles for International Election Observation*, 27 October 2005, Commemorated at the United Nations, New York, at 1, online: http://ec.europa.eu/europeaid/observer/declaration_of_principles_code_of_conduct_en.pdf >. (“genuine democratic elections are a requisite condition for democratic governance, because they are the vehicle through which the people of a country freely express their will ... as to who shall have the legitimacy to govern in their name”)

⁶⁵ Crawford, *supra* note 17 at 387, citing *Western Sahara Case*, [1975] I.C.J. Rep. 12 at 32 (“a free and genuine expression of the will of the peoples concerned”).

⁶⁶ Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Boston: Martinus Nijhoff, 1994) at 18.

⁶⁷ For examples of such standards, see: *African Union Declaration*, *supra* note 68; *General Comment No. 25*, *supra* note 28.

⁶⁸ Ghali, *supra* note 32 at para. 87, see generally paras. 66-88; “Referendum Proclamation, No. 22/1992”, *supra* note 23.

organized by a Referendum Commission established one year before the referendum.⁶⁹ Southern Sudan faces a dire lack of time and security that will make it difficult to meet internationally-accepted standards for a democratic referendum.⁷⁰ The lack of doubt surrounding the referendum's outcome should not be used as an excuse to accept an unconstitutional, less democratically legitimate referendum procedure.

II. Co-operative secession through a gradual devolution of powers

Section 226(10) provides that the constitution of Sudan instantly ceases to apply to Southern Sudan upon announcement of results favouring secession. The SPLM/A has interpreted this as a provision for immediate secession, and some of its leaders have already begun to threaten a unilateral declaration of independence (UDI), particularly if the referendum is delayed or compromised.⁷¹ This is exacerbated by the delays in organizing the referendum. As one Sudanese public official has observed, “There’s not much time. There’s negative time. ... UDI will be increasingly likely because the referendum is virtually impossible.”⁷²

But s.226(10) does not address whether a UDI or even immediate consensual secession would be constitutional. The *INC* does not explicitly provide for Southern Sudan’s constitutional order after a referendum favouring secession, and it does not define the post-referendum relationship between the North and South. There is nothing in the *INC* specifically permitting either a UDI or a consensual immediate secession; nor is there anything preventing the NCP and the SPLM from entering into additional CPA protocols that bind them post-referendum.

When interpreted contextually, and with a view to the current political situation in Sudan, it appears that the *INC* demands something far more rigorous than either a UDI or immediate consensual secession: a negotiated process of cooperative secession, ideally in the form of a gradual devolution of powers to the South, culminating in independent statehood. This interpretation is rooted, once again, in the principles of democratic governance and popular sovereignty that are fundamental bases of the *INC*.⁷³

How secession will be achieved is a decision that, according to democratic principles, requires input from the entire population of Sudan. If, as provided in s. 2 of the *INC*, “sovereignty is vested in the people” – the whole people, coextensive with Sudan’s whole territory – then all of the decision-making with respect to secession cannot democratically be left only to the people of Southern Sudan:

In a legitimate democratic state, the entire territory of the state is the territory of the people of the state as a whole. It is the people, not the government, to whom the territory belongs; the government merely acts as trustee for the people. Hence there is a presumption that any alienation of part of the territory of the state must be achieved through a process in which the people as a whole, not simply the people of the seceding area, are represented.⁷⁴

In a democratic society, unilateral secession is “incompatible with popular sovereignty”.⁷⁵

This interpretation of *INC* is strengthened when its democratic principles are read

⁶⁹ Ghali, *ibid.* at paras. 64 and 68.

⁷⁰ As of April 2010, nine months before the Southern Sudanese referendum, the Referendum Commission has not been established; in 2009, “more than 2,500 people were killed and 350,000 displaced” in a “downward spiral of intercommunal violence in southern Sudan”: Fick, *supra* note 2.

⁷¹ Thomas, “Decisions”, *supra* note 2 at 8 and 23; Fick, *supra* note 2 at 9.

⁷² Thomas, *ibid.* at 7-8

⁷³ *INC*, *supra* note 1, ss.1, 2 and 4.

⁷⁴ Buchanan, *supra* note 48 at 242.

⁷⁵ *Ibid.*

together with its provisions for equality rights.⁷⁶ The moral idea of democracy is that the “equality of persons requires that they have an equal say over at least the most important decisions that determine the character of their society or that they be able to participate as equals in making those decisions.” In the context of secession, the implication of this idea is that all the citizens of a democratic polity should have an equal say.⁷⁷

Section 219 already ensures, however, that only the people of Southern Sudan will be able to vote in the referendum. Furthermore, s.2 strikes a delicate balance that must be recognized. It requires that popular sovereignty “shall be exercised by the State in accordance with the provisions of this Constitution ... without prejudice to the autonomy of Southern Sudan”. The autonomy and overall special status of Southern Sudan is indeed one of the principles that animates the *INC*, and the CPA from which it emerged.

The interpretive problem that emerges, then, is how to reconcile the *INC*’s specific provisions for Southern autonomy and self-determination with the implications of its core requirements of democracy and equality. A solution is suggested by another basic principle of the *INC*: national reconciliation.⁷⁸ Although this principle was included as part of the CPA’s mission to promote unity, it would be relevant in the secession context as well. According to the Supreme Court of Canada, where a referendum favours secession, the rights, obligations, and interests of the many individuals and groups affected – both in the seceding territory and in the “rump state” – will need to be reconciled. This “reconciliation can only be achieved through the give and take of political negotiations.”⁷⁹ The democratic principles of the *INC* would suggest that such negotiations must be transparently conducted, and be informed by a continuing process of extensive public consultations.

It therefore appears that a UDI could never be in accordance with the *INC*. Although s.219 grants the ultimate decision with respect to secession solely to the people of Southern Sudan, this is only a right “to determine their future status”. The right to determine how that status will be achieved must democratically remain vested in the entirety of Sudan’s people. In other words, the South’s “future status” must be achieved within a binding framework negotiated with the North. As was discussed in the previous section, the *INC* requires that referendum voters go to the polls with an understanding of the consequences of a vote for secession. This means that some kind of framework for Southern secession must be negotiated, ratified, and publicized before the referendum.

But it appears unlikely that Sudan’s leaders could reach complete agreement prior to January 2011 on the expansive set of issues that such an agreement would have to settle. The North and South are highly interdependent, and even if agreement could be reached on all identified issues, then an immediate secession would surely reveal problems that had not been predicted. Although an immediate consensual secession therefore could hypothetically be in accordance with the *INC*, if it met a number of challenging requirements, the most achievable option for constitutional secession would be a gradual, co-operative devolution of powers to Southern Sudan, culminating in independent statehood.

Ideally, this would be accomplished through the pre-referendum negotiation of an additional CPA protocol that would bind the North and South in a post-referendum transition period. The International Crisis Group has noted that such a protocol would have to deal with

⁷⁶ *INC*, *supra* note 1, ss. 1(2), 4(a), 31-32.

⁷⁷ Buchanan, *supra* note 48 at 246-247.

⁷⁸ *INC*, *supra* note 1, s.21 (“The State shall initiate a comprehensive process of national reconciliation and healing that shall promote national harmony and peaceful co-existence among all Sudanese.”).

⁷⁹ *Secession Reference*, *supra* note 16 at para. 153.

two separate periods: first, the time after the referendum but before the CPA's expiration in July 2011; "and secondly, for a further several years – perhaps the four-year equivalent of a parliamentary term – to complete implementation of the peaceful transfer of sovereignty and decide numerous practical details."⁸⁰

This additional CPA protocol would function as a procedural and substantive framework for eventual Southern independence. It would not have to address all of the issues, since some of these could be settled after the referendum. But it should contain an agreement on guiding principles, on the date of Southern independence, on the procedures for continuous inter-governmental and public consultations during the devolution, and on the timetable for when various unsettled issues would be addressed. It would also have to include specific detail on some of the more pressing issues, such as border demarcation, natural resource sharing, migratory rights for pastoralist populations, nationality, currency, and division of debts and assets.⁸¹

III. Strategic reasons for engaging in co-operative secession

The previous section justified co-operative secession from the normative perspective of democratic governance, constitutionalism, and the rule of law. But agreeing on another CPA protocol would require high levels of co-operation between Sudan's political leaders – and it would have to be completed in less than nine months. In view of the current political environment in Sudan, this might not seem very realistic. The current section and the conclusion respond to this in two ways: first, by explaining why co-operative secession is a strategic priority; and second, by outlining how the international community could make such an agreement possible.

Co-operative secession is the strategically preferable path for the SPLM/A, the NCP, and the international community. First, a gradual process of devolution will guarantee the most orderly and democratically legitimate transition for each government. As was argued in the previous section, it would allow for comprehensive processes of negotiation and public consultation, ensuring that the difficult practical issues could be thoughtfully addressed, and that eligible referendum voters could make an informed choice. The North needs access to the South's natural resources and associated wealth, and the pipeline for the South's oil travels through the North.⁸² It is in both parties' interests to work together to prevent North-South conflict and regional destabilization.

Furthermore, co-operative secession will almost certainly result in international recognition of an independent Southern state. At international law, "the competence to transfer governmental power to a new State on part of the metropolitan territory is an attribute of State sovereignty," with "few legal limitations to its exercise."⁸³ The most common form of state creation since the Second World War has been through such an explicit grant of independence. As long as the rump state's grant of independence to the seceding territory was constitutionally valid, then it will be valid at international law – a fact which will play a crucial if not deciding role in states' assessments on whether to recognize Southern Sudan as independent.⁸⁴

⁸⁰ *Supra* note 3 at 1-2. See also Jon Temin, "Negotiating Sudan's Post-Referendum Arrangements" (Washington, DC: United States Institute of Peace, 22 January 2010) at 2, online: <www.usip.org>.

⁸¹ International Crisis Group, *supra* note 3 at 8; Fick, *supra* note 2 at 5-6; Thomas, "Decisions", *supra* note 2 at 23-26. See also Chs. 2 and 3 in this report.

⁸² See Ch. 2 in this report.

⁸³ Crawford, *supra* note 17 at 330-331.

⁸⁴ *Ibid*, at 330-332; *Secession Reference*, *supra* note 16 at para.143.

Even if Southern political leaders can make a persuasive claim that co-operation with the NCP is likely to produce only further delays, and the NCP would never consent to secession, their eventual claim to “remedial secession” would still be considered more legitimate if they first pursued it within a constitutional framework.⁸⁵ This is because an important factor with respect to states’ recognition decisions in contested cases has become the domestic legality of a secessionist territory’s claim to independence.⁸⁶

The alternatives to co-operative secession do not have any of these strategic advantages for the SPLM/A, the NCP, or the international community. A UDI, either in the absence of a referendum or after a compromised vote, would risk war between North and South, and destabilize the region. As one “veteran Southern politician” has acknowledged, “UDI is a possibility, but it means war, along a long border.”⁸⁷

In addition, a UDI by the South would represent a challenge for the international state system, making it difficult to predict whether the South’s independent statehood would gain international recognition. The general trend since 1945 is that “where the government of the state in question has maintained its opposition to the secession, such attempts have gained virtually no international support or recognition, and this has been true even when other humanitarian aspects of the situations have triggered widespread concern and action.”⁸⁸ The secessions of Latvia, Lithuania, Estonia, Eritrea, and East Timor all involved self-determination referenda; none of these were recognized as independent until there had been consent by the rump state.⁸⁹

There are two reasons why the international community might treat Southern Sudan differently, but both are highly uncertain. First, some authors have begun to argue that an expressly guaranteed right to secession in a state’s domestic constitution may give rise to a corresponding international right.⁹⁰ The secessions of Croatia and Slovenia, in particular, may have “confirmed that internal commitments of this kind are gaining in relevance at the international level.”⁹¹ This argument is disputed, however.⁹²

Second, the current situation in Kosovo could give rise to a change in the general law and practice of state secession. After nearly a decade of supervised independence under UN administration, the Kosovo Assembly made a UDI in February 2008. Kosovar independence has been consistently opposed by the Serbian government, but many states have recognized it as an independent state. Although it could eventually become the first instance of “remedial secession”, Kosovo’s current status is uncertain, and will be the subject of an Advisory Opinion by the International Court of Justice (ICJ), expected later this year. Kosovo itself and the states that have recognized its sovereignty have asserted that Kosovar independence is to have no

⁸⁵ Marc Weller, “Settling Self-Determination Conflicts: Recent Developments” (2009) 20(1) *E.J.I.L.* 111 at 162-163.

⁸⁶ *Secession Reference*, *supra* note 13 at paras. 103 and 143 (“One of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued ... foreign states may also take into account ... a counterpart domestic evaluation, namely, an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded.”)

⁸⁷ Thomas, “Decisions”, *supra* note 2 at 8; Fick, *supra* note 2 at 7-9.

⁸⁸ Crawford, *supra* note 17 at 403, see also 390 (“Since 1945 the international community has been extremely reluctant to accept unilateral secession ... if the secession is opposed by the government of that State. In such cases the principle of territorial integrity has been a significant limitation. Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State. By contrast there are many examples of failed attempts at unilateral secession.”); John Dugard and David Raic, “The Role of Recognition in the Law and Practice of Secession” in Marcelo G. Kohn, ed., *Secession: International Law Perspectives* (New York: Cambridge University Press, 2006) 94.

⁸⁹ Crawford, *ibid.* at 394, 402 and 416; Weller, *supra* note 89 at 146 and 155-156.

⁹⁰ Weller, *ibid.* at 124

⁹¹ *Ibid.* at 162.

⁹² Crawford, *supra* note 17 at 401.

precedential value⁹³, but the ICJ’s comments on the matter are still likely to have a major influence on the South’s strategic calculus.

Immediate consensual secession, the second alternative to co-operative secession, is also not strategically preferable. It is true that in the case of an immediate consensual secession, the North’s acceptance of the South’s independence would increase the probability of international recognition. The failure to fully accord with the *INC* would at the very least delay this process, however.⁹⁴

Since it is basically impossible for Sudan’s political leaders to negotiate all the details prior to January 2011, immediate consensual secession would also result in governance problems and resulting regional destabilization. An NCP presidential advisor has said, referring to the examples of Eritrea and Pakistan, that a failure to decide critical issues prior to secession would be “a recipe of war.”⁹⁵ An immediate consensual secession would also undermine the popular legitimacy of both the North and South governments, since the secession would have occurred through an unconstitutional process that violated principles of democratic governance and popular sovereignty.

IV. Conclusion: The international community as mediator, enforcer, and guarantor

The *INC* does not provide much explicit detail on many important issues surrounding Southern secession, including referendum voting eligibility, the majority required to “favour” secession, the question that should be posed to referendum voters, the procedural requirements for a valid referendum, and the appropriate process for Southern secession. But this chapter has argued that embedded within Sudan’s constitution are the guiding principles to begin to address these questions. The *INC* envisions a free and fair referendum in Southern Sudan, and a co-operative approach to Southern secession.

The story of the CPA, however, has so far been one of missed deadlines and last-minute deals between political elites. Although this chapter has argued that co-operative secession is in the strategic interests of the NCP and the SPLM/A, the lack of trust and at times outright hostility between the parties puts the constitutionality – and even peacefulness – of Southern secession at risk. The likelihood of good faith negotiations and gradual devolution also decreases when one considers that the ultimate “bargaining chip” that could have kept the South at the table – the right to self-determination through secession – was guaranteed to the South five years ago. As the Supreme Court of Canada has observed, in negotiating secession “the devil would be in the details ... No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement”.⁹⁶

It is the responsibility of the international community to ensure that the constitutional process for negotiated Southern secession is implemented.⁹⁷ First, a lead mediator must be agreed upon: someone who can act with authority on behalf of the various interested states, international organizations, and regional bodies, and who can demand the attention of Sudan’s

⁹³ Weller, *supra* note 89 at 150-151; Nino Kemoklidze, “The Kosovo Precedent and the ‘Moral Hazard’ of Secession” (2009) 5(2) *J. Int’l L. Int’l Relations* 117.

⁹⁴ *Secession Reference*, *supra* note 16 at para. 143 (“an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition”).

⁹⁵ “Sudanese NCP official criticizes referendum law as ‘recipe for war’” *Sudan Tribune* (5 January 2010), online: <<http://www.sudantribune.com/spip.php?article33679>>; Thomas, “Decisions”, *supra* note 2 at 23.

⁹⁶ *Secession Reference*, *supra* note 16 at para. 91.

⁹⁷ This chapter does not discuss which members of the international community should be involved. See Ch. 6 in this report for a discussion of why the international community should be led by regional actors such as IGAD.

political leaders. This person should commit to see Sudan past the referendum and through the period of devolution.⁹⁸

Second, the international community should agree on a united approach that will get the parties to the bargaining table, and keep them there. The incentives and sanctions built into this approach should be fixed to benchmarks that correspond to the requirements for constitutional secession. Clearly, international recognition is a powerful incentive for the South. Third, the international community needs to secure from Sudan a commitment to accept extensive electoral assistance. In addition to monitoring, this assistance would have to focus on voter education and registration, particularly for refugees and IDPs. Finally, the international community should prepare for the possible need to establish a body similar to the United Nations Interim Administration Mission in Kosovo, to aid the South in developing its governance capacity during the devolutionary period.⁹⁹

Southern secession could pose a true danger to the international community. If it is done unconstitutionally, through a UDI or an immediate consensual secession, it could lead to civil war and regional destabilization. The question of whether to recognize Southern Sudan as an independent state would cause instability in international system. Governments in both the North and South would be domestically delegitimized, contributing to conflict within Sudan at the same time as the two governments attempt to resolve the complex issues raised by the secession. The international community has a stake in ensuring a valid referendum and a constitutional process of gradual devolution. For the *INC*'s principles to effectively regulate Southern secession, the international community must unite to play the role of mediator, enforcer, and guarantor.

⁹⁸ Temin, *supra* note 84.

⁹⁹ Michael Bothe and Thilo Marauhn, "UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration" in Christian Tomuschat, ed., *Kosovo and the International Community* (New York: Kluwer Law, 2002) 217 (another model is the United Nations Transitional Administration in East Timor).

2. SUDAN'S BLUE AND BLACK GOLD: FUELLING CONFLICT OR FOSTERING COOPERATION IN A FRAGILE ENVIRONMENT – HANNAH MOOSA

Introduction

For most of the past 50 years, Sudan has been wracked by protracted civil war and regional strife. The North-South conflict has been driven by a multitude of factors, including competition over political power; cultural identity; religious, ethnic and tribal divisions, economic factors and historical feuds.¹ While not the sole triggers of conflict, natural resources, particularly oil and gas reserves, Nile waters, timber and agricultural land, have been inextricably linked to all levels of feuding between the warring factions.² Competition over ownership, use, control and sharing of oil and revenues, mega-dam development projects, broad disparities in water availability, and land tenure rights have all served as drivers of resource-based conflicts in Sudan. In a country whose people derive their daily sustenance directly from the land, and whose economic growth is almost entirely dependent on the productivity of its natural resource base, control over these invaluable sources of income and livelihood fuels tension on a daily basis. Lacking well-established, transparent and effective institutional mechanisms for sustainable natural resource management at all governance levels has had disastrous consequences. This, coupled with an already highly fragmented political, cultural, religious and ethnic society, has heightened mistrust between parties, and led the country on a downward spiral to persistent and widespread conflict.

The signing of the Comprehensive Peace Agreement (CPA) by the northern-based National Congress Party (NCP) and the southern-based Sudan People's Liberation Movement (SPLM) in January 2005, signalled a new era of hope for the Sudanese people.³ The CPA included agreements on security, wealth-sharing, power-sharing, and the status of the three disputed regions of Abyei, Southern Kordofan and the Blue Nile, for an interim period from 2005-2011.⁴ Additionally, the peace accord provided for the critically important general elections in 2010, and the January 2011 referendum vote for southern secession. The agreement was widely hailed as a model to resolve Sudan's other ongoing conflicts.⁴

As Sudan recently marked the fifth anniversary of the signing of the CPA, the country has seen rising tensions across all regions – with renewed conflict in Darfur, increased violence in Southern Sudan, a state of unease and apprehension across the disputed border areas, and continuing marginalisation and neglect of eastern Sudan.⁵ The will to make unity attractive has not driven the process, key provisions of the CPA remain unimplemented, and most contentions political issues including border demarcation, resolution of conflicts in the disputed areas, ownership, control and revenue-sharing from oil resources, and joint management of Nile water resources, have yet to be tackled. With elections having taken place only nine months before the referendum vote, and a host of critical issues yet to be negotiated for the post-referendum period, the threat of a resurgence of violence across Sudan is looming.

Thus, with the end of the interim period in sight, the emergence of a new country on the map of Africa by January 2011 raises significant new challenges for Sudan and the African continent, which, if not well managed, could lead to a spiral of states' disintegration.⁶

In an effort to ensure a smooth transition to a newly independent Southern Sudan in less than a year, this chapter investigates the critical importance of negotiating arrangements for joint

¹ See Appendix I for a map of the disputed areas. See Appendix III for a summary of the Resolutions of Conflict in Abyei, and Southern Kordofan and the Blue Nile States (2004)

natural resource management, particularly oil and water resources, prior to the January 2011 referendum vote, as a prerequisite to securing a fragile peace in the region.

Section I of this chapter provides an overview of the Agreement on Wealth Sharing (AWS), one of six protocols of the 2005 CPA. Section II takes an in-depth look at the Sudanese oil sector and details the progress made thus far in implementing oil revenue-sharing provisions of the CPA. In Section III, complex issues surrounding Sudan's water resources are tackled. Of particular interest is the increasing pressure for a re-negotiation of longstanding Nile water treaties in response to the looming reconfiguration of the North-South Sudanese border, and the emergence of an additional Nile riparian state.

Taking into account the multiple paths through which oil and water resources are interlinked with the history of protracted conflict in the region, as well as parties' failures to negotiate key resource management issues for the post-secession period in advance; in Section IV, existing predictive models are drawn upon to identify a set of five variables which are then used to generate four future scenarios, that elucidate the manner in which joint management or mismanagement of the country's vast natural resources can either promote a peaceful transition to a two-state Sudan, or plunge the region into a resurgence of violent conflict. It is hoped that this scenario analysis will help international and regional actors recognise the severity of the situation, and pressure warring parties to urgently resolve key contentious issues, in order to ensure that the worst-case scenario of unilateral secession and widespread civil war, is not realised.

Drawing upon the potential triggers of violence and predicted outcomes emerging from these four future scenarios, in Sections V and VI, the chapter concludes with recommendations to the international community and regional actors, as well as the Governments of Sudan (GoS) and Southern Sudan (GoSS) on measures which should *ideally* be taken prior to the January 2011 referendum vote, in order to ensure that the transition to a newly independent Southern Sudan is as peaceful as possible.

The Agreement on Wealth Sharing (AWS), January 2004

The Agreement on Wealth Sharing (AWS), one of six protocols which constitute the CPA, sets out principles for sharing natural resources and institutional arrangements for governing Sudan's economy.⁷ Despite the importance of natural resource issues to the conflict, concerted effort by the parties to discuss provisions for wealth-sharing only occurred after fundamental principles on self-determination, state, religion, and security had been agreed upon in the Machakos and Security Protocols.⁸

At the heart of the negotiations over wealth-sharing was the question of land ownership. While the SPLM/A argued that both surface and subterranean natural resources was owned by the community, the Government of Sudan held firmly to its position of national ownership of subterranean natural resources, claiming that when natural resources are unequally distributed the central government is best suited to distribute revenues equitably relative to the needs of the different regions.⁹ Fearing the two parties' positions irreconcilable, mediators proposed that the ownership of subterranean natural resources remain undecided in the peace agreement, and that the parties agree to a process to resolve the issue at a later stage.¹⁰ The approach of leaving the ownership of subterranean natural resources unresolved thus paved the way for a deal, enabling the parties to focus on 'divisible' issues such as revenue sharing and management of the oil sector.¹¹

In the final agreement, the parties agreed on the establishment of a National Petroleum Commission (NPC) which would formulate public policies, approve new oil contracts and monitor implementation of existing contracts.¹² The NPC would comprise five members from the Government of National Unity (GNU) and five members from the Government of Southern Sudan, as well as a maximum of three non-permanent members from Sudan's oil producing states. While this may have represented a concession on the part of the SPLM/A, it did give the GoSS a de facto veto in the NPC.¹³

With respect to oil contracts, the SPLM/A accepted that existing contracts would not be subject to renegotiation, while the GoS accepted wording to the effect that necessary remedial measures would be taken if contracts were found to have fundamental environmental and social consequences.¹⁴

Under the AWS, parties agreed to share the revenues from oil produced in southern Sudan by allocating 2% of the net revenue from oil to oil-producing states, and then dividing the rest of the oil revenues equally between the GNU and the GoSS. Rather than establishing transfers from the Centre to the GoSS, the parties agreed to a 50-50 split of national revenues (including different taxes, and non-oil revenues), collected in the South. Thus revenues of the GoSS are to come primarily from oil, and resources originating in the North will not be transferred to the South.¹⁵ The agreement further called for revenues at all levels of Government to be held in public accounts, and subject to public scrutiny and accountability.¹⁶

The AWS called for the establishment of a National Land Commission, a Southern Sudan Land Commission and state land commissions. The agreement further included provisions for the establishment of a commission to ensure transparency in the collection and use of tax revenues, as well as the creation of two banking systems, with the Bank of Southern Sudan operating as a branch of the Central Bank of Sudan.¹⁷

According to the AWS, two separate currencies in the North and South are to be recognised until the Central Bank has designed a new currency which reflects the cultural diversity of Sudan.¹⁸ Finally, the AWS called for the establishment of national and southern funds for reconstruction and development, as well as two multi-donor trust funds.¹⁹

OIL

Sudan's vast oil resources have been widely recognised as one of the major catalysts for the outbreak and prolongation of the North-South civil war.²⁰ Oil has fostered grievances in the South and has been used as a rallying cry by the SPLM, which charged the Sudanese government with exploiting the resources without providing tangible benefits to local populations.²¹ The majority of current oil production occurs in the disputed border areas between the North and the South, thus enhancing the strategic significance of these areas and severely complicating efforts at border demarcation. Additionally, roughly 75% of Sudan's proven reserves of 6.3bn barrels of oil lie in the South, while the sole export pipeline which carries the oil to export terminals and refineries runs through the North.^{2 22}

Oil and the economy

Oil has played a pivotal role in Sudan's economy since crude was first exported from Port Sudan on the Red Sea in August 1999, accounting for an average economic growth rate of nearly 7% over the past decade.²³ Following the signing of the CPA, the rise in oil production

² See Appendix II for a map of Sudan's oil concessions

coincided almost exactly with skyrocketing international oil prices.²⁴ While agriculture still employs two-thirds of the workforce, oil has represented over 90% of Sudan's total exports since the 2005 CPA was signed.²⁵ The Government of Southern Sudan is almost entirely dependent on oil transfers from Khartoum, which amounted to US \$6.4 billion from 2005 to June 2009.²⁶ This accounts for roughly 98% of Southern Sudan's non-aid income, while the corresponding figure in the North is 60-70%.²⁷

Foreign oil investors

Since the 1990s, pressure from human rights groups and governments led to the withdrawal of many western oil companies from Sudan. This gave state-owned Asian companies a competitive advantage in investing in Sudan. Today, of the fifteen foreign oil companies in Sudan, the three largest ones are the China National Petroleum Corporation (CNPC), which first arrived in 1995, followed by Petronas of Malaysia in 1996, and India's ONGC Videsh in 2003.²⁸ Together, these companies own 95% of the Greater Nile Petroleum Company (GNPOC), which accounts for 88% of the total oil production in the country. The remaining 5% is owned by Sudapet, the Sudanese national oil company. These three companies have underpinned oil development in Sudan with billions of dollars in investment since CNPC first arrived.²⁹

Sudan's economic ties with Asia and the Middle East have thwarted longstanding US sanctions and widespread divestment campaigns which have limited Western investment.³⁰ With CNPC being the strongest shareholder of the northern Greater Nile Pipeline, China has significant political leverage over Khartoum and Juba. Malaysia and India have continued to develop close ties with the North, through investments in multiple sectors of the economy, with Malaysia involved in facilitating arms deals.³¹

The future of oil

As 2011 approaches, Sudan is set to continue to produce increasing levels of oil, and is likely to remain sub-Saharan Africa's third largest producer behind Nigeria and Angola in the medium term.³² According to the new Sudan Oil and Gas Report, the country is forecast to account for 3.12% of African regional demand by 2014, while providing 6.27% of supply.³³

Despite these positive future trends, there are nevertheless serious concerns regarding the longevity of Sudan's oil production – regardless of the outcome of the referendum vote, even under optimistic forecasts, the region is expected to enjoy only another 20 years of strong revenues from oil exports.³⁴ Today, a combination of exaggerated forecasting, a lack of investment from cautious oil companies, and poor infrastructure, has already limited the country's oil production. Without major discoveries in the future, flattening oil production, poor crude qualities, unproven reserves and questionable oversight threaten to undermine peace and stability in the last months of the CPA.³⁵

With little consensus on measures to be taken to avoid a resource curse,³ oil revenues may create incentives for investments which yield only minimal improvements in economic productivity in other sectors, and may provide further motivation for rent-seeking and insurgencies.³⁶ The weakness of the oil sector has gone largely unacknowledged, and inflated expectations regarding oil production figures threaten to fuel a relapse into civil war.³⁷

³ A natural resource curse refers to a situation in which nations with rich endowments of natural resources (e.g. oil, metals and timber) often dramatically underperform economically relative to one's expectations. In these instances, resource wealth creates stagnation and conflict, rather than economic growth and development, often because income from these resources is misappropriated by corrupt leaders and officials. Furthermore, such wealth often fuels internal grievances which in turn may spark conflict and civil war.

Management of oil resources and revenue-sharing: progress since the 2005 CPA

“The oil situation in Sudan is akin to loaning your cow to someone, full of milk only to find that she’s been given back to you with all her milk gone.”⁴

With less than a year to go before the crucial referendum vote takes place, there is much at stake in the oil sector for both the GoS and the GoSS. To date, implementation of the CPA’s wealth sharing components has been frustratingly slow, and in some instances, nonexistent. Disputes remain over which fields are subject to wealth sharing, how the new institutions are to function, and who determines the status of existing and new contracts.³⁸

While the NPC has been established, it lacks operating rules, subcommittees to perform real work, and a secretariat. Disputes remain over whether the NPC should serve as an advisory or policymaking body, and whether it is an independent body or part of the Energy Ministry, where the GoSS remains marginalised. Wealth sharing from oil revenues remains stalled by boundary disputes.³⁹

In June 2005, a new national accounting system was announced by the Joint National Transition Team, but to date there has been no visible progress. Vice President Salva Kiir nominated four appointees to the Southern Sudan Audit Chamber however the body is still without a legislative basis and is not functioning.⁴⁰

A recent report from Global Witness has called into question transparency across the Sudanese oil sector. The World Bank has gone on to state that transparency is ‘unusually weak’ in comparison to other oil-exporting developing countries which are often not very transparent themselves.⁴¹ Key findings from the Global Witness Report, “Fuelling Mistrust” and others, include:

1. *Oil figures published by the Khartoum government do not match those from other sources⁴²*

One such discrepancy is reflected in the 2009 oil production figures from the Chinese National Oil Company for the blocks it operates in Sudan’s Upper Nile State, which are reportedly 12% larger than those published by the Sudanese government. This difference, which accounts to 12 million barrels of oil, and is worth \$370 million, is sufficient to power a city in the US the size of San Francisco, for an entire year.⁴³

Due in part to non-functional audit-committees in the GoSS as well as the Khartoum government’s taking control of the compilation of figures on how much oil is produced, and the price at which it is sold; neither the Sudanese government, nor Sudanese citizens, have been able to verify whether the oil revenues received from the North or the information on the nation’s overall oil production is accurate and in accordance with the AWS.⁴⁴

2. *The Government of South Sudan has not been receiving half of the oil revenues from Southern oil wells, and millions of dollars in oil revenue are still owing to the GoSS⁴⁵*

Despite the fact that the GoS is receiving half of the revenues from oil wells in the South, the Khartoum government has been deducting a 3% ‘management fee’ from revenues shared with the South. Pipeline fees are also being deducted.⁴⁶ As of March 2009, the arrears amounted

⁴ Stated by a Senior Southern army official, alleging that the North has been pumping southern oil as quickly as it can in case the South becomes independent.

Source: "Fuelling Mistrust: The need for transparency in Sudan's oil industry." Global Witness, September 2009. Web. 20 March 2010. <http://www.globalwitness.org/media_library_detail.php/804/en/fuelling_mistrust_the_need_for_transparency_in_sud>.

to roughly \$180 million – the approximate combined budget for education and health-care in Southern Sudan in 2009. Claims have also been made by the GoSS that the national government deducted \$6.6 million from the South's oil revenues to finance the elections.⁴⁷

3. *A lack of technical capacity has hindered the ability of the GoSS to effectively implement various oil provisions of the AWS.*

The ability of the GoSS to participate in the making of national energy policy and effectively manage oil revenues has been hindered by the lack of personnel, a broad lack of transparency at all governance levels in the South, as well as the inactions of the GoSS itself. In Southern Sudan, there is no Auditor General, despite this being a constitutionally required post. While the South was granted permission to read all oil contracts and seek advice on them, a Technical Team empowered to review contracts within 30 days of the signing of the CPA was never established.⁴⁸ There is insufficient oversight of the millions of dollars of oil money transferred to the oil-producing states, and little visible evidence of what this money has been spent on.⁴⁹ Despite international offers to help, the GoSS has not hired technical advisors to assist with the development and management of its oil sector.

The lack of capacity to manage oil revenue not only impedes the ability of the GoSS to deliver services and the “peace dividend” hoped for by the population, but, in the context of a newly-established country post-secession, it also creates opportunities for corruption, mismanagement, and the evolution of a resource-cursed state in the long run.⁵⁰

The lack of transparency in the oil sector at all governance levels in the North and South is deepening mistrust between two already-mistrustful sides. In a region which derives roughly 98% of its income from oil, accurately calculating the South's share of revenues is imperative to ensuring that the peace agreement holds beyond the post-2011 referendum.⁵¹

Oil: Post-2011 Arrangements

Assuming the South votes for secession, the newly formed country will be landlocked. An independent Southern Sudan will have no choice but to work together with Khartoum in order to export its oil, through the North's pipelines.⁵² This would require the necessary peace and security to be able to extract the oil, and involve negotiations on the transit of oil, which could be refused or made prohibitively expensive.⁵³

In a newly independent South Sudan, a region almost entirely dependent on oil revenues for economic growth and income generation, continuing long-term dependence on the pipeline in the north to export oil is not ideal.⁵⁴ Discussions of building a new pipeline for oil from Southern Sudan to Kenya have been ongoing for some time now. In recent weeks, a Japanese company, Toyota Tsusho, the trading arm of the Japanese carmaker, announced it was developing plans to build a \$1.5bn pipeline, which would run for 1,400 km from Juba to the Kenyan island of Lamu, where an oil export terminal would be constructed. China has also expressed interest in the proposed pipeline, and cooperation with Japan on such a project is a possibility.⁵⁵

While talks of a new pipeline from South Sudan to Kenya provide a glimmer of hope to those southerners who aspire to cut all ties with Khartoum post-referendum; in reality, such an endeavour is unlikely to be realised for at least another few years. Thus, under the current circumstances, the South has no other option but to engage with the North in negotiating arrangements for continued joint management of the oil sector in the post-referendum period.

Oil contractual arrangements post-2011

In considering the post-2011 environment, the question regarding contractual relationships between oil companies and the government must also be raised.⁵⁶ While most oil companies, and all of the currently operational companies, have signed contracts with the national government, many of these companies' blocks may lie in the territory of the newly independent Southern Sudan. Assuming that the South will secede raises the question of which laws will be applicable, and which contracts will be respected. Lacking clear answers to these questions is not only hampering investments in southern Sudan, but is a further source of instability and conflict.⁵⁷

WATER

With almost two-thirds of the Basin found within its borders, and stretching across nearly 80% of the country, the Nile River provides Sudan with a substantial freshwater resource base. Sudan also possesses considerable groundwater resources. The vast Nubian Sandstone Aquifer System (NSAS), which represents one of the largest volumes of freshwater in the world, underlies the north-western part of the country and remains largely untapped in both Chad and Sudan.⁵⁸

Sudan's total natural renewable water resources are estimated at 148hm³/year, of which roughly 80% flows over the borders from upstream countries, while only 20% is produced internally from rainfall.⁵⁹ This notable reliance on externally generated surface waters is a key feature of Sudan's water resources, and is critically important to development projects and ecosystems, as flows are highly variable on an annual basis, and subject to long-term regional trends due to environmental and climate change.

Water availability

In this semi-desert country, the issue of freshwater availability is critical. There are broad disparities in water availability at the regional level, and wide fluctuations between and within years.⁶⁰ While the North and Darfur are predominantly dry, most of the rainfall occurs in the South, where there are numerous wetlands. These inequities are a source of hardship in the drier regions, and serve as a driving force for resource-based conflict across the country.

At present, much of Sudan's population suffers from a shortage of both clean water for drinking, and reliable water for agriculture, upon which an estimated 80% of the people depend. According to recent World Bank estimates, rural access to safe water in some Southern Sudan states, is as low as 14%, while access to and appropriate use of sanitation facilities in these areas may be virtually non-existent.⁶¹ These water shortages are a result of natural conditions as well as underdevelopment. While incremental improvements in the water sector have been noted, there is an increasingly urgent need to ensure that continued development is environmentally sustainable.⁶²

Water sector concerns

While Sudan is on average, a water rich country, lack of governance capacity and poor management and maintenance are resulting in severe degradation and destruction of water resources.

The most significant governance issue for the water sector in Sudan is its culture of development and resource exploitation through mega-projects, rather than sustainable development principles. Historically, dams and water schemes have been promoted by decree at

the federal level, with limited or no local consultation, and no environmental impact assessments.⁶³ This approach proved disastrous for the Jonglei Canal in 1983, and has elicited many problems in the Merowe Dam project in recent years. At the working level, the water sector suffers from a lack of enforceable regulations, standards or enforcement capacity.⁶⁴

Presently, the water resource sector is also facing a range of serious long-standing and emerging environmental issues, including the challenges of dramatically developing water treatment facilities, and providing potable water and sanitation services to a growing population; tackling waterborne diseases, and addressing water pollution, inefficient irrigation methods, destructive rain-fed farming methods, livestock overgrazing, salinisation, degradation of watersheds, catchments, and freshwater ecosystems; and the construction of dams, which is expected to be the dominant factor that will fundamentally alter the environmental integrity of the country's rivers and wetlands over the next two decades.⁶⁵

Sudan's major wetlands are also under significant conservation threats. Uncontrolled hunting and poaching during the protracted North-South conflict devastated the vast majority of Southern wetlands.⁶⁶ Since the signing of the CPA, the country's wetlands have been under increasing pressure from developmental plans. The most significant issues include major infrastructure projects such as dams and water engineering projects, oil fields, housing schemes, roads, conversion for settlement and agricultural purposes, as well as resource over-exploitation due to a burgeoning population.⁶⁷

Water and the CPA

The AWS and CPA's partial treatment of water has limited its contribution to broader economy recovery and long-term development, peace and stability in Sudan.⁶⁸ Water issues were not a primary interest of the GoS or GoSS, and their inclusion would have extended the peace processes to Sudan's neighbours, which would have further complicated and potentially stalled negotiations on reaching an agreement to ending the civil war.⁶⁹

In the CPA and subsequent Interim Constitution, the Federal Government (GNU) was granted specific sole authority over the following: International and Inter-State Transport, including roads, airports, waterways, harbours and railways; Nile Water Commission, the management of the Nile Waters, trans-boundary waters and disputes arising from the management of interstate waters between Northern states and any dispute between Northern and Southern states.⁷⁰

The Government of Southern Sudan and state governments were given separate powers related to water supply projects, and disputes arising from the management of interstate waters within Southern Sudan. Collectively, the National Government, the GoSS and state governments had legislative and executive competencies over: electricity generation and water and waste water management, and water resources other than interstate waters.⁷¹

Accordingly, the GONU was given the mandate for the development of any new major water project. Given that the White Nile borders or flows through five of the ten states of Southern Sudan, northern state water projects would inevitably have impacts on southern states and vice versa.⁷² Thus, the need for continued, open and regular dialogue between the GoS and the GoSS, on the use and development of the Nile waters as a prerequisite to preventing a refuelling of conflict over water management and distribution, cannot be overemphasised.

Water and conflict

a. *The Jonglei Canal*

One of the driving forces behind the resumption of the North-South conflict in 1983 was the Jonglei Canal Project.⁷³ Launched in 1980, the idea behind the project was to build a canal which would bypass the Sudd wetlands, and capture the water for downstream users in North Sudan and Egypt more quickly. The project had strong international ties, included multinational contractors and financiers, and had the strong support of the Khartoum government, as well as Egypt and France. At the same time, however, there was little knowledge and even less acceptance of the project by local stakeholders, who were primarily transhumant pastoralists and a minority population of fishermen and subsistence farmers. Of the Canal's planned 360km, roughly 260km were excavated before southern Sudanese rebel military forces sabotaged the main excavator in 1983, rendering further construction too dangerous.⁷⁴

The Jonglei Canal project demonstrated that major ventures lacking local support are at risk of sparking tension and violent conflict between parties, and that achieving widespread support is a necessary prerequisite for development, and requires both broad consultation and benefits-sharing.⁷⁵

b. *The Merowe Dam Project*

Currently the largest new dam project in Africa, the Merowe Dam project has followed a similar pattern as older dams in Sudan. While the dam is expected to bring significant benefits to the country through electricity generation, the displacement of upstream communities in the dam reservoir has led to local unrest and conflict. To date, the project developers have failed to conduct a full and transparent environmental, economic and social impact assessment, which would assist in maximising the positive while mitigating the negative implications of such a mega-scale endeavour.⁷⁶

c. *The Nile Basin*

The possibility of water issues sparking conflict in Sudan emerges not only from the country's poor management of water resources, lack of governance capacity and history of unsustainable mega-development projects at the local and national levels. Sudan also faces considerable external tensions which could fuel violence over the sharing, use and abuse of the Nile across countries in the region.

For centuries, the Nile waters have been a key source of conflict in the region. The 1929 and 1959 Nile Water Agreements gave downstream Egypt a much bigger allocation than upstream countries. According to the two agreements, Egypt gets 55.5 billion cubic metres of water per year out of a total of 84 billion cubic metres. Sudan also loans Egypt part of its smaller allocation of Nile waters, and leases land taken from small farmers for Egyptian companies to grow thirsty crops such as wheat – another way of exporting Sudan's water.⁷⁷ Egypt's long commitment to Sudan's unity is thus closely linked to calculations about the security of Nile waters, and the Arab-Muslim vision of Sudan's first nationalists.

Nile waters and Sudanese secession

With Southern Sudanese secession now a reality, demands on the waters of the Nile for development, electricity production, irrigation and industry will likely grow significantly. Recognising the importance of maintaining close ties with the South to secure its Nile water flows, Egypt has in recent months, begun investing in water development projects in the South.⁷⁸

Talks of a new Nile Basin Commission

After more than a decade of negotiations, Nile riparian states are ready to adopt a new agreement for the more equitable sharing of the world's longest river.⁷⁹ Dubbed the Nile 'Cooperative Framework Agreement', this agreement seeks to establish a permanent Nile River Basin Commission through which member countries would act together to manage and develop resources of the Nile. Nile riparians have faced resistance from Egypt and Sudan, who are opposed to a change in their water shares, granted to them by the 1929 and 1959 Agreements.⁸⁰ Opposing the unfair distribution of water shares in these agreements, a leftover of the colonial era, Nile states have expressed their willingness to go ahead and sign this new agreement, even without the approval of Egypt and Sudan.⁸¹

However, should the Nile States go ahead with the Cooperative Framework Agreement, without Sudan and Egypt's support, the results could be further conflict and tensions over the new division of Nile waters, and development plans along the River. Furthermore, upstream riparian states could significantly alter the flows to downstream Nile states, which may further fuel intra- and interstate violence in the Basin.

At this critical moment in time, the establishment of a new Nile Basin Commission poses challenges to Sudan and Egypt's existing water-sharing arrangements, and offers opportunities for new partnerships and collaborative water development projects for an independent Southern Sudan.

FUTURE SCENARIOS FOR THE POST-REFERENDUM 2011 PERIOD

Taking into consideration the multiple paths through which oil and water resources are interlinked with the history of protracted conflict in the region, as well as the parties' numerous failures to comply with CPA arrangements governing wealth-sharing and joint resource management, it is evident that the ownership, joint management and division of natural resources between the North and a newly independent Southern Sudan will continue to pose significant challenges to securing a fragile peace in the region in the post-referendum context.

Predicting the precise realities on the ground following the January 2011 referendum is a nearly impossible task given the multitude of uncertainties and factors which may influence the region's already volatile security, economic and political climate. However, conducting some level of future scenario analysis is an invaluable exercise, as this provides a useful tool through which politicians, both local and international, policy makers, and humanitarian and other aid organisations, can identify potential triggers for conflict, and windows of opportunity for dialogue and cooperation between various factions. Furthermore, identifying likely future realities in Sudan post-referendum will enable all actors involved to recognise actions which need to be taken immediately in order to ensure as peaceful a secession as possible.

In recent months, various international organisations and donor governments have designed different models for predicting the future conflict climate in Sudan post-referendum. This chapter draws upon the variables and predicted outcomes of these reports, but focuses solely on those models which assumed southern secession to be the result of the January referendum.

Thus, the analysis which follows is limited to future scenarios in Sudan which begin with the premise that the South will secede in January 2011.

The author recognises that there are a multitude of different predicted outcomes for what may happen in Sudan following the referendum vote, depending on the frame of reference used, the methodology adopted and the variables selected. The analysis which follows is merely aimed

at providing the reader with a sampling of such outcomes, in order to (a) elucidate the important role natural resources play at all levels of the conflict continuum in Sudan, and (b) highlight the need for international and regional players to act immediately in the months leading up to the referendum, to help ensure that the worst-case scenario is not realised.

In hypothesising future scenarios, a set of variables have been selected to help determine the type of post-referendum future likely to exist in a divided Sudan.

Variables:⁸²

- Outcome of elections:
 - Factors relevant here include: the extent to which parties agree upon census results, the level of access to state media and rights to hold rallies pre-elections, a fair voter registration process, the extent to which all parties are fairly and equally represented at the elections, the level of transparency in the election process, the degree to which election results are widely accepted, across Sudan and internationally as legitimate, fair and transparent
- The degree to which the Government in the North engages in meaningful and tangible governance reforms, between now and January 2011, in compliance with the CPA provisions
- The degree to which the GoSS strengthens its governance and institutional capacity, undergoes security sector reform, reduces corruption, and increases the provision of basic services to provide a more credible and real peace dividend to Southerners
- The extent to which the NCP/SPLM can develop a shared view of possible post-2011 futures, and the degree of progress made by these parties in negotiating post-referendum arrangements for the following priority areas:
 - border demarcation
 - oil – ownership; control, management and regulation; and revenue-sharing
 - joint water management and water sharing along the Nile
 - the three disputed areas of Southern Kordofan, Blue Nile and Abyei
 - The degree of credible progress made on the Abyei referendum process and the implementation of the border ruling from the PCA
 - the degree of credible progress made on the popular consultations for the Blue Nile and Southern Kordofan regions;
- the degree to which the North cooperates in facilitating a fair and transparent referendum process, and supports its outcome

Based on these five variables, four post-2011 secession scenarios have been generated for Sudan. Each one assumes that the South will secede in January 2011.

Scenario #1: Secession, with widespread inter-tribal conflict in the South

Most likely cause: failure of the GoSS to dramatically improve governance capacity at all levels between now and the January 2010 referendum⁸³

This may include: a failure to provide basic services and infrastructure to the people in the South, including the equitable allocation of basic resources (e.g. roads, water and food), one of the 'peace dividends' from the CPA; a failure to effectively govern, manage and equitably share allotted Nile water resources; a lack of effort on the part of GoSS to engage with key actors and ensure meaningful resolution of the conflicts in the three disputed areas; corruption, lack of

security sector reform and failure to unite different tribal groups of the South under the umbrella of the GoSS.⁸⁴

This scenario assumes an absence of aggression from the North. Taking aggression from the North into consideration, the outcomes in this scenario would undoubtedly be much more disastrous.

Triggers for large-scale violence within the South:

- Intertribal conflict sparked by: weak or non-existent Nile water governance capacity and institutions which leads to mismanagement and an uneven distribution of the shared resource; lack of clear land tenure rights, particularly in the disputed areas; uncertainty over who owns the oil fields, which in turn leads to rebel groups fighting for ownership of oil wells in the South; inequitable distribution of oil revenues due to mismanagement, and a lack of capacity and transparency in the South Sudan oil sector; continued insufficient distribution of power to capable regional and local governance institutions, and competition between Southern Sudanese politicians leads to ethnic violence⁸⁵
- in the absence of previously negotiated agreements to resolve water, oil and land disputes in Southern Kordofan, Blue Nile and Abyei, violence sparked in these regions could easily spread to the South
- GoSS inability to disarm militias - The absence of clear agreements on wealth sharing, widespread corruption in the South and a continued lack of transparency across the oil sector, could lead to militarisation and conflict around oil fields, and in areas bordering the three disputed regions, as militias and rebel groups fight to secure control over this invaluable source of income. Sabotage of oil pipelines by rebel groups could further result in a stop to oil flows.
 - Inability to disarm militias, coupled with widespread insecurity in the South, could lead to militias being supported by the North. In turn, this could result in the North controlling oil fields in the South, and a potential collapse of the Southern economy⁸⁶

Thus, absent major changes, this scenario predicts that the South will likely not be a viable state. The factors identified above as potential triggers for large-scale political violence in the South, may in the worst case scenario, have a ripple effect in vulnerable regions such as Darfur, and possibly spread across the North to spark another civil war.⁸⁷

Scenario #2: Secession, with a refuelling of North-South conflict

Most likely cause: failure of GoS and GoSS to build trust and come to post-referendum, post-CPA agreements on key issues including: border demarcation; peaceful settlement of tensions in the three disputed areas of Southern Kordofan, Blue Nile and Abyei; oil (ownership, control and revenue sharing), land tenure rights, and Nile water sharing arrangements⁸⁸

Widespread contestation or outright rejection of the legitimacy of the election process, or the re-election of Al-Bashir as President, would further deepen mistrust between the parties. Under such conditions, negotiating agreements on these key contentious issues prior to the January 2011 referendum vote becomes a much harder objective to realise.

Seeds of potential violence between the North and South:

- The absence of negotiated agreements to settle ownership, control and/or oil-revenue sharing issues prior to the referendum vote, will likely fuel an arms race between the North and

South, as each side prepares to fight for control over invaluable land and revenues, and protect their vital interests and territory

- Invasion into border areas and militarisation around the oil fields is a likely move by the North, which is heavily dependent on oil flows from the South to sustain its economy. This could lead to violent conflict between the North and South, primarily in the South Kordofan, Blue Nile and Abyei areas, as both regions fight to secure ownership and control of vital oil resources. The newly independent South, claiming ownership of these fields, which now lie within its state territory, will likely respond with violence, to prevent the North from gaining control over the oil. The GoS will likely use the North's oil pipeline as leverage to secure some level of control over the management and revenue-sharing from southern oil fields. With no agreed-upon wealth-sharing arrangement for the post-referendum period, the oil fields could suffer significant environmental destruction due to conflict between the North and newly independent and landlocked South Sudan. This could further lead to a short-term standstill in oil production, crippling both economies, and having severe impacts on the productivity and long-term sustainability of Sudan's vast oil reserves. The potential for a repeat of the Russia-Georgia conflict is a chilling reality.
 - o In the absence of clearly defined borders for North and South Sudan, the level of conflict is likely to escalate, as parties fight over oil fields which lie in disputed territories, and straddle potential 'international' border lines
 - Incomplete border demarcation, including continued disagreement over Abyei, and lack of settlement of land tenure issues particularly in the disputed areas, will likely fuel tensions between tribal groups, such as the Ngok Dinka and Misseriya tribes, over land rights, revenue sharing and water resources.⁵ This could easily spill over into the surrounding states in North and South Sudan, sparking widespread tribal conflicts across the disputed areas, and plunging the region into civil war⁸⁹
- Nile water resources: In the absence of a negotiated settlement regarding water resources prior to the referendum vote, conflict may arise between the GoS and GoSS regarding the shares of Nile waters rightfully owing to each side. Questions of use and development of Nile resources (including for mega-projects such as dams and canals), if not settled amicably before secession, could spark tensions between the North and the South, given the natural disparities in water availability across the region, as well as the CPA's limited provisions for joint water resource management

Collectively, these disputes and uncertainties create a volatile environment in which a lack of shared vision of the CPA or its future, will likely trigger large-scale North-South violence.⁹⁰

Scenario #3: Secession – unilateral

Possible Cause #1:

General elections are held in April 2010, only nine months prior to the scheduled referendum vote. Amidst widespread contestation of the legitimacy of the election process and claims of vote rigging, Al-Bashir is re-elected President of Sudan. Election outcomes heighten mistrust between the GoS and opposition parties, further hindering the negotiation process, and preventing the sides from securing meaningful post-secession agreements in the months leading up to the referendum vote.

⁵ See Chapter 3 of this Report for a more thorough analysis of the tensions between the Ngok Dinka and Misseriya tribes

- With little progress made in negotiating post-referendum arrangements for natural resources prior to January 2011, concerns in the GoS intensify, as the North has no guarantees that, following secession, the GoSS will continue the joint control and wealth-sharing arrangements for oil fields in South Sudan. Fearing a collapse of its economy, and the loss of significant international investment should the South renege on its CPA commitments and stop all oil flows to the North once it achieves independence; the Government of Al-Bashir forges unity, even after a majority ‘yes’ for secession is obtained in the referendum vote. If these forged results are not accepted, and the referendum is widely perceived as flawed, the South unilaterally secedes
- Heightened mistrust between the parties, coupled with insufficient time to adequately prepare for a fair and transparent referendum process in Southern Sudan and the Abyei Regions, leads to a flawed referendum process and questionable referendum results, if any. The South, deeply dissatisfied with the outcome, unilaterally secedes.

Possible Cause #2:

The withdrawal of a number of SPLM candidates from the general elections leads to Al-Bashir's re-election as President. Following through on his pre-election threat to SPLM leaders about the consequences of boycotting the elections, Al-Bashir cancels the referendum vote in January. Defending their right to self-determination, agreed-upon by both sides in the CPA, the South unilaterally secedes.

Unilateral Secession of the South is the most devastating post-2011 scenario outcome predicted. Under this scenario, violence is likely to be triggered at all levels (intertribal conflict in the North and South; conflict between the North and South; spill-over conflicts from the three disputed areas, which is likely to be at the heart of much of the violence in this scenario; spill-over from and/or into Darfur) simultaneously, or in succession within a fairly short period of time.

In the absence of arrangements for wealth-sharing and joint natural resource management, agreed upon prior to the referendum, bringing the two sides to a negotiating table to discuss key contentious issues following unilateral secession by the South will prove immensely challenging, as the levels of mistrust between the parties would be significantly heightened.

Conflict will likely be rife along undefined border areas, particularly across the three disputed areas of Southern Kordofan, Blue Nile and Abyei; heightened mistrust between parties will likely lead to a fragmented GoSS, with rebel groups vying for control of oil resources; fighting along religious and ethnic lines will likely be rampant, particularly in border areas.⁹¹

The region is likely to descend into chaos and violent conflict, along similar lines as the recent violence in Nigeria:

The militantly Islamic Khartoum government will tighten its grip over the North, and violence between the nomadic and sedentary populations along border areas will likely escalate. In the absence of legitimate governance institutions for the oil sector, militant and rebel groups lobbying for a greater share of oil revenue will likely engage in violent conflict and sections of the oil pipeline may be blown up. The GoSS would work hard to cut off the North's supply of oil, shutting down the pipeline through the North and focussing on building a pipeline through Kenya from which to export oil. Ties with international investors will have broken. The North and South will independently reach out to companies to secure foreign investments in order to

guarantee a continuation of oil revenues, which will likely serve to fund the acquisition of arms. With a rush to extract as much of the natural resource as possible before it is claimed by the other side, over-exploitation, misuse of the oil fields and environmental destruction, are inevitable outcomes. The entire oil-rich region may be plunged into militarisation and violent conflict.

Scenario #4: Secession – fragile peace is maintained

Most likely cause: With concerned effort, robust international and regional engagement and some progress on key issues, the parties avoid large-scale violence as the South claims independence

This best case scenario will only be achieved if parties can make tangible progress in negotiating arrangements for the settlement of contentious issues prior to the January 2011 referendum. While such an approach does not constitute a long-term solution, it could avoid large-scale political violence in the post-referendum period. The international community, led by the US, will play a pivotal role in pressuring the North and South to make a concerted effort to achieve incremental progress on key contentious issues.⁹²

Confidence and trust building will be central to ensuring a fragile peace is maintained in the short-to-medium-term as the South transitions to an independent state. Prerequisites for securing such a peace include: a compromise on the census, acceptance of election and referendum results, border demarcation, a shared vision for the future, and negotiated settlement or other resolution of the three disputed areas.⁹³

RECOMMENDATIONS

Drawing upon the potential triggers of violence and predicted outcomes from the four future scenarios detailed above, the need for urgent and immediate action to prevent the worst case scenario from being realised cannot be over-emphasised. International and regional actors must strengthen diplomatic efforts on all fronts to bring the warring factions to the negotiating table and encourage meaningful dialogue to develop a shared vision for joint natural resource management in the post-secession transitional period and beyond.

The following is a set of recommendations for the international community, and the Governments of Sudan and Southern Sudan, on steps which should *ideally* be taken prior to the referendum vote, to facilitate a smooth transition to an independent Southern Sudan.

The US, EU, China, IGAD (the Intergovernmental Authority on Development)⁶ and other key international actors must adopt a two-pronged approach to help Sudan address natural resource management concerns:

1. In the months leading up to the referendum vote of January 2011, international actors must pressure the GoS and GoSS to enhance efforts at implementing outstanding natural resource provisions of the CPA's agreements
2. International actors must urgently assist Sudan's political parties to negotiate an additional protocol to the CPA (CPA+) before January 2011

⁶ IGAD, the Intergovernmental Authority on Development, was initially formed in 1986, to battle widespread famine, ecological degradation and economic hardship in the Horn of Africa. Today, it serves as a key regional organization, with an expanded mandate including the promotion of regional security and political dialogue. See Chapter 6 for a more detailed explanation of IGAD's role in the Horn of Africa.

1. Implementation of outstanding CPA provisions:

Over the next nine months, the US, EU and key international and regional actors must intensify their efforts to help Sudan seize on the remaining opportunities presented by the CPA for advancing government reform, and smoothing centre-periphery relations, in order to aid in preserving long-term stability in the North and South, irrespective of whether the South secedes or not.⁹⁴

Particularly important in this regard are transformations of the centres (Khartoum and Juba) through democratic means and through the respect of the rule of law.⁹⁵ Furthermore, in the short-term (from now until the Jan 2011 referendum), the GoSS needs to work hard to prove itself as a credible provider of state security in the South, in response to increased internal and intertribal conflicts in Southern States in recent months; and dramatically improve its capacity to deliver services at the local level.^{7 96}

The GoS and GoSS must be encouraged to make a more concerted effort to implement outstanding CPA provisions for natural resource management. To that end, parties need to clarify which oil fields are subject to wealth sharing, how new institutions created under the CPA are to function, and who determines the status of existing and new contracts. Parties need to decide upon the precise role played by the NPC (advisory or policy-making), and need to staff the NPC so that it can be operational. Transparency across the region's oil sector requires dramatic improvements.⁹⁷ Additionally, parties need to continue engaging in regular and open dialogue concerning the use and development of the region's vast water resources.

2. Negotiating a CPA+ Agreement prior to January 2011

The international community must assist Sudan's political parties to negotiate arrangements for the joint management of the region's natural resources in the post-secession transition period. This Additional Protocol (CPA+) *should ideally* feature agreements on:

- border demarcation
- ownership of land and oil fields,
- wealth-sharing and contractual arrangements,
- sharing of Nile water resources

Furthermore, this CPA+ should:

- *Establish a post-referendum transitional period* to provide for a gradual transfer of sovereignty between Khartoum and Juba, and to implement the secession outcome of the referendum. The length of the new post-referendum transition could be equivalent to a new full parliamentary term of four years. The additional protocol should also set up a negotiation framework to discuss and plan pending post-referendum co-existence scenarios and arrangements, and include monitoring mechanisms for implementation⁹⁸
- *Broaden the scope of stakeholders*: the additional protocol should be supported by stakeholders other than just the NCP and the SPLM. A "CPA+" agreement requires all stakeholders, including local, tribal and rebel group leaders, political parties, regional actors and key international players, to collectively devise an 'all-Sudan' strategy for achieving and sustaining peace in the North and South⁹⁹
- *Promote a more multilateral approach to resolving Sudan's complex challenges*: The international community, particularly the troika members, China, the African Union and

⁷ See Chapter 4 of this report for a more detailed analysis of the need for decentralisation and institutional capacity building in the GoSS

the Intergovernmental Authority on Development (IGAD) must agree on a common 'Sudan' policy to help the South peacefully transition to an independent state¹⁰⁰

SPECIFIC RECOMMENDATIONS FOR THE OIL SECTOR

Any CPA+ agreement should *ideally* address the following issues related to oil resources: (a) ownership; (b) allocation of control, use and management; and (c) treatment of natural resource revenues.

a. Ownership:

The questions of 'who owns what', and 'which oil field belongs to which state/territory', will become much more salient in the context of a divided Sudan, as the boundaries between the North and South will determine the territory belonging to either of the two independent states of Sudan. Thus the issue of border demarcation goes hand in hand with land and subterranean resource ownership issues, and is particularly urgent to address prior to the break-up of Sudan into two independent states. Unlike the 2005 CPA, which only provided a cursory treatment of land rights, and left subterranean natural resource ownership considerations out of the agreement, in order to allow for meaningful and long-term sustainable arrangements to be reached regarding oil control and revenue sharing; **any CPA+ agreement, should first and foremost, include resolution of land ownership issues and a division of subterranean resources, and clearly delineate the borders which will separate North Sudan from South Sudan.**

- Delineating the North-South Border should include an agreement regarding the futures of Abyei, Southern Kordofan and the Blue Nile states
- Negotiations on border demarcation should engage not only the NCP and SPLM, but also local, tribal and rebel group leaders, representatives from the tribal groups and local clans of the three disputed regions
- Oil companies and foreign investors in Sudan's oil sector, with extensive knowledge of the oil fields, their productivity and value in the long-term, have a particularly important role to play in mediating between the two sides, and helping parties finally agree upon a North-South border, which divides the land ownership and subterranean natural resources as equitably as possible, under the current conditions.¹⁰¹ In order to entice key investors, such as China and Japan, to engage in negotiations with Sudan and support an expected Southern secession, the US and EU should offer guarantees to these external actors, that their oil equities will be protected following secession.¹⁰²

Alternative approach to resolving contentious issues of ownership

Resolving the highly contentious issue of land ownership prior to the referendum vote would no doubt, facilitate settlement of border demarcation, and assist in securing arrangements for oil and water resource management for the post-referendum transition period. However, under the existing highly charged political and security environment, where both sides continue to fall short of CPA commitments, and where allegations regarding rigged elections may deepen mistrust between two already-mistrustful sides, reaching consensus in the next eight months on questions of land ownership, an issue which lies at the heart of much of the conflict in Sudan, appears unlikely.

Thus, drawing upon the lessons learned from crafting the 2005 CPA, international and regional actors, as well as North and South Sudan, should recognise the value of decoupling

subterranean resource ownership issues, from more 'divisible' issues such as revenue sharing and management of oil and water, in order to keep warring parties at the negotiating table in the hopes of securing some consensus on post-referendum collaborative arrangements for natural resources.

In the months leading up to the referendum, international actors should thus pressure parties to adopt, at the very minimum, a short-term creative arrangement, which allows for sovereignty and land ownership concerns to be abstracted from resource management issues. Such an agreement could draw upon similar models for abstracting sovereignty, found in the international law of the sea literature, and recent proposals for a Special Regime in Jerusalem's Old City.⁸ (See Boxes # 1&2)

⁸ In crafting creative arrangements for decoupling land ownership and sovereignty issues from more divisible issues such as resource management and revenue-sharing, particularly in the disputed border areas in Sudan; Aboriginal title and Land Claims issues in British Columbia (BC) Canada, and BC's Treaty Commission could provide an additional source of inspiration. See: <http://www.bctreaty.net/>

As provided for in Article 57 of the 1982 UNCLOS Convention, international law permits a State to extend its exclusive economic zone (EEZ) seaward to a distance of 200 nautical miles from its baseline.¹⁰³ In many instances, maritime zones of two states meet and overlap, requiring a line of separation to be drawn to distinguish the rights and obligations between the states. This process of *delimitation*, involves the division of maritime areas in a situation where two or more states have competing claims. Delimitation, much like border demarcation on land, may result in restrictions of states' perceived sovereign rights.¹⁰⁴

In response to states' overlapping claims of ownership over seabed resources, in situations where delimitation remains unsettled, Joint Development Zones (JDZ) and Joint Development Agreements have emerged. Joint Petroleum Development Agreements are arrangements between two states to develop and share in agreed proportions the petroleum found within a geographic area whose boundaries have not yet been defined and whose sovereignty is thus disputed.¹⁰⁵ A JDZ is usually established as a temporary solution for a specified period of time, without prejudice to subsequent delimitation; however it can also serve as a permanent solution in place of a delimited boundary.¹⁰⁶

Despite a recent increase in concluding bilateral JDAs, there is no legal obligation for states to cooperate and agree to jointly develop a disputed area.¹⁰⁷ Thus, the concept of joint petroleum development cannot be considered international customary law. However, several international cases decided before the ICJ and international tribunals have strongly recommended JDZs. Additionally, increasing international practice demonstrates that it is viewed as a viable legal alternative to the maritime boundary delimitation process, at least as 'a provisional arrangement of a practical nature'.¹⁰⁸

Today, JDZ agreements have been concluded in many parts of the world, including the North and South Atlantic, the Middle East, East and Southeast Asian regions, West Africa and the Caribbean.¹⁰⁹ The 1958 Bahrain-Saudi Arabia agreement established a joint development area which lies entirely in the Saudi Arabian continental shelf; the 1971 Iran-Sharjah Agreement established a joint regime for the disputed island of Abu Musa; the 1974 Saudi Arabia-Sudan agreement established a 'Common Zone' in areas of the seabed and subsoil beyond 1000-metre depth lines in the Red Sea; the 1989 Australia-Indonesia Agreement established a highly complex 'zone of cooperation' in the East Timor continental shelf area; the 1992 Memorandum of Understanding between Malaysia and Vietnam established an 'interim arrangement for the purpose of exploring and exploiting petroleum in the seabed in the overlapping area' in the Gulf of Thailand, where the two countries failed to delimit their boundary lines; the 1993 Colombia-Jamaica treaty established a JDZ where the parties were unable to agree on delimitation; in April 2003, Nigeria and São Tomé & Príncipe concluded discussions concerning details of their JDZ in the north western Gulf of Guinea; and in August 2003, Angola and the Democratic Republic of the Congo, while having an ongoing dispute concerning the as-yet-undefined maritime boundary, agreed to joint oil exploration in an area referred to as the 'common maritime corridor'.¹¹⁰

Cooperative arrangements for the development of seabed resources can also cover broad geographical areas, such as the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) Convention, which encompasses the whole of the Antarctic continent and surrounding continental shelves. This implies that the geographical scope of any such arrangement need not be restricted to a given deposit or specific area, but can extend to broad regions of land and marine spaces.¹¹¹

Arrangements relating to the exploration and exploitation of natural resources in joint development areas range from simple schemes of cooperation to highly complex and structured systems of jurisdiction and revenue sharing. Furthermore, many JDZs include some form of institutional machinery and provision for the settlement of disputes.¹¹² For example, the Saudi Arabian-Sudan Red Sea Agreement provides for a powerful Joint Commission, which can determine the boundaries of the zone, grant licences and concessions, supervise the exploitation, and determine the applicable law. The CRAMRA Convention has also provided for a very elaborate and complex institutional arrangement which proved necessary to accommodate different national interests, with particular reference to the role of claimants and non-claimants of sovereignty.¹¹³

Joint development and management zones have enabled states to continue benefiting from collaborative exploration and exploitation of natural resources, while at the same time delaying the actual contentious issue of delimiting boundaries.¹¹⁴ Serving as a powerful management tool in situations which would otherwise lead to disputes and confrontation, the creation of JDZs is likely to expand in the future, as the race to exploit valuable resources in regions of disputed maritime boundaries increases. The most promising development in this legal regime lies in the expanding geographical scope of JDZs, which have demonstrated that such a concept can apply to a large geographical region, be it an archipelago or a whole continent. The geographical expansion is also importantly related to the establishment of comprehensive regimes under international law for the management of such large areas.¹¹⁵

Box #2: A Proposal for a Special Regime for Jerusalem's Old City

The Old City in Jerusalem is arguably the most contentious issue in the Arab-Israeli conflict, reflecting the sides' overlapping political, demographic, security, socio-economic and religious claims. Sovereignty, administration and control over the Old City are hotly disputed, and its holy sites are a central focus for Christians, Jews and Muslims.¹¹⁶

The Jerusalem Old City Initiative (JOCI) was launched in 2003, with the aim of developing creative options for the governance and management of the Old City of Jerusalem in preparation for a negotiated settlement between Israelis and Palestinians. Following extensive consultations and study, the JOCI concluded that the optimal solution for Jerusalem's Old City is the creation of a "Special Regime" founded upon agreed norms of international law, and established at the direction of both the Israelis and Palestinians.¹¹⁷

This proposed Special Regime would neither resolve, nor seek to resolve competing claims to sovereignty over the Old City and its Holy Sites. Rather, it would be designed to permit the achievement of a peace agreement even in the absence of a resolution on questions of sovereignty, and without prejudicing the sovereignty claims of either side.¹¹⁸

Characteristics of the Special Regime

The Special Regime would be tasked by the Israeli and Palestinian Governments to perform specific functions in the Old City on their joint behalf e.g. security and policing, movement and access within the Old City and to its Holy Sites, property and ownership, and environmental regulation. Additionally, some functions (including legal and environmental) would involve a degree of shared authority, requiring continued coordination between the Special Regime and the respective national and local authorities.¹¹⁹

Establishment of this special regime would require the full approval and participation of both Israel and Palestine — something that would not be achievable unless both sides were convinced that the envisioned arrangements would be open to the resolution of sovereignty claims in the future.¹²⁰

This proposed 'special regime', which would be treated as a single unit, would be headed by a Chief Administrator, an internationally respected individual, agreed to by the parties. The Chief Administrator would be accountable to a Governance Board composed of the parties themselves and international stakeholders acceptable to both sides. Taking into account the needs, interests and aspirations of all stakeholders, the Administrator would be responsible for the efficient and equitable management and governance of the Old City.¹²¹

The Special Regime would further require a robust security force. Substantial third-country participation in such a force would be important to help in overcoming the deep mistrust between Israel and Palestine.¹²²

The mandate of such a Special Regime would remain in force until parties achieved a negotiated agreement which establishes a new system of governance for the Old City.¹²³

Together with the assistance of key international and regional actors, North and South Sudan could craft a temporary arrangement for a specified period of time, which combines features of the proposed Old City Special Regime and the Joint Development Zones. Such an agreement should clearly specify that it seeks neither to resolve, nor to prejudice sovereignty claims of the two sides, but rather leaves sovereignty claims open to negotiated settlement at some point in the future.

The warring parties could create Joint Development Agreements for oil fields which straddle the disputed North-South border regions. Such an agreement could include a simple scheme, or a highly structured system of jurisdiction and revenue sharing, as well as institutional arrangements and provisions for dispute settlement. Additionally, the agreement could call for the establishment of a 'Regional Oil Ministry', which would be tasked with overseeing and monitoring the exploitation, control and management of oil resources, particularly those found in the disputed border regions. This body could also be tasked with ensuring transparency and accountability across the oil sector, and monitoring revenue-sharing between North and South Sudan. Within the framework of this Joint Development Agreement, a Chief Administrator could be appointed, or a Joint Commission could be established to assist in these functions, address boundary concerns and supervise exploitation of subterranean resources. Any bodies created through this mechanism should be approved by local and regional Sudanese stakeholders, and include representatives from Sudan, as well as key international and regional actors.

In constructing a Joint Development Agreement which allows for collaborative exploitation and management of oil resources, while at the same time prolonging resolution of contentious border demarcation and ownership issues to a point in the future; parties are, in essence, agreeing to create a temporary zone along the North-South border belonging to neither side. In setting aside sovereignty and land ownership concerns to allow for cooperation on more divisible issues, parties are thus faced with a sovereignty trap. In order to prevent a legal vacuum and ensure the presence of a law enforcer in this disputed border zone, parties to the Joint Development Agreement would have to come to a consensus on an external authority to serve as an interim sovereign power. Given their continued presence in the region and their commitment to helping Sudan achieve long-term stability, the UNMIS (UN Mission in Sudan) and IGAD (Intergovernmental Authority on Development) could be called upon to expand their mandates in Sudan, taking on the responsibility for law enforcement, and maintenance of peace and security in a 'buffer zone' created along the disputed North-South Sudanese border. A collaborative UNMIS-IGAD monitoring force would need to have a particularly strong presence around oil fields straddling the border, as well as in the disputed areas of Southern Kordofan, the Blue Nile and Abyei.

Any such joint development framework and its provisions, agreed to by key stakeholders from North and South Sudan *must* be recognised as a provisional arrangement and a temporary solution for a specified period of time, until contentious issues of land ownership and border demarcation can be fully resolved.

While achieving a negotiated settlement on ownership and border demarcation concerns prior to January 2011 is the ideal outcome for any CPA+; if progress on other key contentious issues is halted and general agreement on any CPA+ is threatened by parties' failure to reach a meaningful compromise on land ownership, international actors should encourage North and South Sudan to craft a short-term arrangement whereby sovereignty concerns are abstracted from the more divisible issues such as management and revenue-sharing from oil resources. Such a

Joint Development Agreement could form a critical part of a CPA+ agreement, building trust between the sides and laying the foundation for further negotiations on key resource issues.

b. Control, use and management of oil resources

Given that the North is dependent on the South for oil resources, and that the South in turn is dependent on the North's pipeline for oil exports, the US and other key actors need to use their political leverage to help both North and South Sudan recognise that it is in their individual and collective interests to continue joint management, control and regulation of oil resources in the post-referendum transitional period, in order to prevent economic collapse in both regions following the South's transition to an independent state.¹²⁴

The GoS and GoSS need to come to an agreement on the future of institutions such as the NPC which have been set up through the 2005 CPA. Once parties agree to continue jointly managing oil resources in the post-referendum period, agreement on the types of governance mechanisms required will then follow. At the very least, GoS and GoSS are encouraged to extend the life of the NPC throughout the transitional period, or design a new 'Regional Petroleum Commission', which more accurately reflects the emerging political and economic dynamics between the North and newly independent South Sudan.

The US, China and key regional and international actors have a critical role to play in providing tradeoffs and creating resource bargains to ensure that, prior to the referendum vote, parties come to a mutual agreement on the transit of oil, and the joint control and use of the pipeline in the North for oil exports.

Any CPA+ protocol should include provisions on which contractual laws will apply and which contracts will be respected in the post-referendum transitional period. Furthermore, foreign oil investors must make a more concerted effort to build strong relationships with the Government of South Sudan in the upcoming months. While oil consortia, such as GNPOC, WNPOC, Petrodar and Sudapak as well as their constituent companies, CNPC, ONGC, Petronas and Zafir Petroleum, have invested millions in Southern Sudan, their relationship with the GoSS is weak. Only Total has opened offices in Juba.¹²⁵

c. Revenue sharing

While Norway has been engaging with the NCP and SPLM in establishing post-2011 oil revenue-sharing agreements, it is unclear how far these efforts have progressed.¹²⁶ The international community must work harder to ensure that, prior to January 2011, the North and South have a negotiated settlement outlining the details of revenue-sharing which would be implemented following southern secession.¹²⁷

In recent weeks, representatives from the GOSS have suggested that, following secession, the South would be open to, at least a short-term continuation of the existing 50-50 split of oil revenues with the North, agreed upon under the 2005 CPA.¹²⁸ Given the current levels of mistrust between the parties, and the numerous uncertainties and factors which could trigger a relapse into civil war, this arrangement for revenue sharing seems a viable solution in helping sustain the two economies post-secession. The international community should develop a series of carrots and sticks to make this revenue-sharing arrangement, or a similar one, appear attractive to all political stakeholders in the North and South, and strive to secure an agreement to this end before January 2011. Negotiating such an agreement with the broad involvement of all relevant political and tribal groups, would be crucial to suppressing any rebel groups in the South from stirring violence over revenue-sharing.

Any agreement for revenue-sharing should also include a strategy, or outline a negotiation process, to address the longer-term division of revenues, following the post-secession transitional period. Based on the degree of peace and stability maintained between the North and South in the months and years following secession, a gradual change in the allocation of revenues could be designed, to make the South less reliant on the economy of the North.¹²⁹

Such a wealth-sharing agreement should importantly include the establishment of an independent body for overseeing and monitoring revenue-sharing and oil production figures by both investing companies and the governments. Increasing transparency across the oil sector in the Sudan is essential to continue attracting foreign investors.¹³⁰

Any revenue sharing agreement designed for the post-secession period should also include provisions for the banking system, provisions for the future of joint revenue funds (Oil Revenue Stabilisation Account and the Support Unity Fund), and a mechanism for both sides to verify the figures relevant to revenue sharing.¹³¹

SPECIFIC RECOMMENDATIONS FOR THE WATER SECTOR

Any viable CPA+ agreement should first highlight that the North and South recognise, and take responsibility for the following areas of concern in the water sector, and resolve to find cooperative ways to address them, both independently and collaboratively: weak governance capacity, water resource management and maintenance which has led to degradation of water resources; unsustainable mega-development projects and dams, and an absence of environmental impact assessments; extremely poor access to clean water and basic sanitation services, particularly in the South; chronic water pollution and increasing water-borne diseases; inefficient irrigation methods.

With Southern Sudan's secession imminent, questions as to how the North and South will coordinate their water management and use must be resolved. Recognising the vast freshwater resources in the region, the multiple water management and usage issues in the country; and regional disparities in water availability; parties should agree on provisions for the equitable use of water resources and benefit-sharing from development projects, as a prerequisite for maintaining peace between North Sudan and a newly independent Southern Sudan.¹³²

Learning from past experiences with the Jonglei Canal and Merowe Dam Projects, a viable CPA+ agreement should critically include provisions for the establishment of a new Sudanese regional decision-making framework and body for more sustainable joint water resource management following the South's secession.¹³³ Such a body should: (i) draw on two underlying strategic tenets from the World Commission on Dams, namely, 'gaining public acceptance' and 'recognising entitlements and sharing benefits'; (ii) be based on equity, public participation and consultation, transparency and accountability;¹³⁴ (iii) be multi-stakeholder in composition: this decision-making body should include representatives from both the North and South, as well as tribal/clan leaders from areas most affected by water shortages and/or historically most vulnerable to conflicts over water resources;¹³⁵ (iv) involve international experts on water resource management to provide guidance and technical expertise, and to assist in capacity building and operationalising the framework; (v) provide the forum for information-sharing and negotiations for joint management and development of shared water resources in Sudan, including the Nile River Basin, aquifers and wetlands; (vi) oversee the development of strategic action plans aimed at the more sustainable use of wetlands; (vii) be institutionalised in the Sudanese Dam Sector, and assist in revising top-down approaches by which decisions to construct dams have previously been made by federal decree;¹³⁶ (viii) be responsible for

mediating discussions between parties regarding future mega-development projects, such as the Jonglei Canal and the Merowe Dam projects; (ix) be responsible for conducting, in collaboration with the relevant stakeholders and local governance institutions, environmental impact assessments for proposed development projects; and (x) provide the platform for dialogue between governmental instruments and those most harshly affected by proposed water development projects, through its open, consultative mechanisms.

Establishing such a framework and consultative decision-making body would strengthen regional capacity for water resource management, and introduce the philosophy and practical aspects of Integrated Water Resource Management to North and South Sudan.¹³⁷

A viable CPA+ agreement should include provisions which adapt the 2005 CPA arrangements for distribution of power over water resources between the GNU and GoSS, to ensure a more equitable distribution of power in the context of a newly independent South Sudan. Given that a significant amount of the freshwater resources, including a large portion of the Nile waters, aquifers and wetlands are found in the South, any viable water-sharing agreement governing management and sustainable usage post-secession should provide the South with equal rights over water resources. Current provisions under the 2005 CPA thus need to be adapted to ensure that, in the long-term, the South has independent rights and powers over: the management of Nile waters, resolution of disputes arising from the management of inter-state waters between the North and South, the Nile Water Commission, as well as competencies over water and waste water management, and electricity generation in the South, many of which were under the sole authority of the GNU under the CPA¹³⁸

While involvement of regional powers, particularly Nile riparians will likely complicate negotiations further, the international community must ensure that these key regional actors are included in the dialogue between the North and South regarding a more equitable division of water resources, and the creation of a joint water resource management plan for the post-secession period.

Nile Water Resources

With Southern secession and the reconfiguration of the North-South border imminent, pressure for the re-negotiation of the Nile Basin Treaty, on the basis of an additional riparian state, is increasing.¹³⁹ Thus, any viable CPA+ protocol should ideally provide for the negotiation of a long-term arrangement regarding the division and reallocation of Nile Water resources between North and South Sudan, as well as with the other eight Nile riparian states. Key international and regional actors should develop a series of carrots and sticks to make re-negotiation of the Nile Basin Treaty attractive to Egypt, and North and South Sudan, to ensure a more equitable division of the Nile waters between the ten Nile Riparian States.

The International community should put urgent pressure on Sudan and Egypt to recognise that it is in their interests to join the ongoing conversation on a new Nile River Cooperative Framework Agreement (CFA). A newly independent Southern Sudan will desperately need assistance in the sustainable development of its water sector, while downstream North Sudan, has an interest to cooperate in order to secure its invaluable flows from the Nile.

Water, land and migration issues

While the 2004 AWS only included land issues in vague terms as part of the Land Commissions, a viable and meaningful CPA+ agreement should more comprehensively address land rights and recognise the undeniable links between water and land issues.¹⁴⁰ Parties must

recognise the critical importance of addressing land rights, as a prerequisite to resolving persistent local conflicts which have been exacerbated by population movements and environmental change. Furthermore, parties must recognise the close linkages between land resources, pastoralist issues and water management. International actors must put pressure on both the North and South to negotiate agreements on land ownership and land tenure rights, taking into account border demarcation, the location of oil fields, water resource considerations as well as the vast number of returning IDPs and the possible movement of southerners from the North to the South¹⁴¹ Additionally, international actors must encourage foreign powers, including Saudi Arabia, the UAE, Egypt and South Korea, who have purchased Sudanese terrain, to use their political and economic leverage in Sudan to get both the North and South to agree upon a settlement for the division of territory post-secession.¹⁴²

CONCLUSIONS

With only eight months remaining before the historic referendum vote for Southern independence, Sudan is at a critical crossroads. The degree of progress made by the North and South in building trust and resolving key contentious issues prior to January 2011, will in large part, determine the type of future likely to emerge in Sudan following the referendum vote.

This chapter has outlined the crucial need for a continued and concerted effort by North and South Sudan to negotiate resource agreements for the post-secession period, prior to the referendum vote. Ideally, any viable and sustainable CPA+ Protocol, negotiated before January 2011, should importantly feature agreements on border demarcation, ownership of land and oil resources, wealth-sharing and contractual arrangements, and the joint management of Nile water resources. However, given the high-stakes nature of these issues, coupled with deepening mistrust between the warring factions, and an immensely complex political and security situation on the ground, resolution of these key contentious issues, which lie at the heart of much of the conflict in Sudan, is unlikely to occur before the referendum vote.

Thus, the international community, and specifically, the US, EU, China and IGAD members must adopt a united strategy for Sudan's future, and develop a series of carrots and sticks to ensure parties come to the negotiating table and engage in realistic dialogue to envision post-referendum futures.¹⁴³ While resolution of all contentious resource issues is unlikely to be achieved over the next eight months, international and regional actors must use their political leverage to encourage incremental and sustained progress on these issues. Furthermore, key actors must ensure that, at the very minimum, North and South Sudan establish a framework mechanism and process to allow for the continued development and negotiation of a comprehensive CPA+ protocol following Southern secession. Agreeing upon such a framework prior to the referendum vote is essential, as it will provide a channel through which the two sides can continue deliberations for cooperative natural resource management arrangements post-secession.

Global actors should urgently identify an international lead mediator, who would act on behalf of key international and regional players, to guide the complex negotiations between North and South Sudan in the months leading up to the referendum vote, as well as in the post-secession transitional period. Furthermore, an international mediator would importantly facilitate the participation of all stakeholders, including local, tribal, regional and national representatives from Sudan, and key regional, multilateral and foreign actors, at the negotiating table.

In the remaining months before the January 2011 vote, international and regional actors must pressure the Governments of North and South Sudan to continue implementing outstanding natural resource provisions of the CPA, engage in widespread governance reforms, strengthen institutional capacity, and enhance transparency and accountability at all governance levels. Despite claims of vote-rigging which have dented the credibility of elections, by immediately recognising the results of the historic polls and the re-election of Al-Bashir as President, the international community will take an important step in building trust between the various factions, thereby encouraging the parties to continue honouring their CPA commitments, and helping lay the groundwork for collaboration on preparing a fair referendum process.⁹

International and regional actors have an important role to play in helping parties recognise that, even after the establishment of a newly independent Southern Sudan, the North and South will continue to remain highly interdependent for the foreseeable future, due to their reliance on the region's vast and unevenly distributed natural resources. To this end, key actors must develop a series of incentives to guarantee that both sides remain at the negotiating table, regardless of the type of post-referendum future that emerges.

Negotiating natural resource management arrangements and settling border demarcation disputes in the upcoming months will play an invaluable role in securing a smooth transition to peace and stability across Sudan following the South's expected secession in January 2011. Failure to begin resolving at least some of these key contentious issues before the referendum vote may once again, plunge the region back into violent conflict. With less than a year to go before Southerners exercise their right to self-determination, there has never been a more critical time for political parties to honour their commitments and recognise the invaluable benefits of coming to a consensus on arrangements for the long-term sustainable use and joint management of Sudan's life-sustaining natural resources.

⁹ See Chapter 1 of this report for a more detailed analysis of how to ensure a free and fair referendum process

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APPENDIX I



APPENDIX II: Sudan Oil Concessions Map



APPENDIX III

The Resolution of the Abyei Conflict (2004)

In 2004, the parties negotiated a separate protocol on resolution of the Abyei conflict, in which the disputed area was granted special administrative status during the interim period, following the definition of the Abyei areas by the Abyei Border Commission.¹⁴⁴

The agreement provided for Abyei to have representation in the legislature of Southern Kordofan and Warap states.¹⁴⁵

The Agreement also included provisions for wealth sharing from Abyei: oil revenues are to be split between the North and South (50:42), with small percentages of revenues allocated to other states and ethnic groups.¹⁴⁶

At the end of the interim period, and simultaneously with the referendum for Southern Sudan, residents of Abyei will cast a separate ballot. Irrespective of the results in the Southern referendum, the proposition voted on in the separate ballot will present residents of Abyei with the following choices:

- a. that Abyei retain its special administrative status in the north;
- b. that Abyei be part of Bahr el Ghazal¹⁴⁷

The Resolution of Conflict in Southern Kordofan and the Blue Nile States¹⁴⁸

In this Protocol, the Government of Sudan and the Sudan People's Liberation Movement committed to reaching a just, fair and comprehensive peace agreement to end the war in the Southern Kordofan and Blue Nile States.

As part of the deal, the Nuba Mountains became part of a new state of Southern Kordofan based on the previous boundaries of Kordofan's two states prior to 1974, while the Southern Blue Nile became the state of Blue Nile.¹⁴⁹

The agreement provides some degree of power sharing, security reform and wealth sharing. It called for the two states to be represented at the national level in proportion to their population size. At the state level, the NCP will comprise 55% of the State Executive and State Legislature. Governorship of each state shall rotate between the NCP and the SPLM during the interim period.¹⁵⁰

Wealth-sharing provisions for oil revenues were also included in the agreement: the 2% of Southern Kordofan State oil due to the state is to be shared between the two state components. The 2% share of Abyei's oil due to the state shall be equally divided between the two states. The 2% forming the Misseriyya share in Abyei oil shall benefit the previous Western Kordofan component.¹⁵¹

The agreement further called for the establishment of a State Land Commission in the State of Southern Kordofan/Nuba Mountains and the Blue Nile, respectively. The regulation of the land tenure, usage and exercise of rights in land were recognised as a concurrent competency exercised by the National and State Governments.¹⁵²

The parties agreed that the legislatures of the two States would each establish a Parliamentary Assessment and Evaluation Commission to assess and evaluate the implementation of the Agreement in each state.

While the Protocol recognises that resolution of conflict in these disputed areas would serve as a 'model for solving the problems throughout the country', it does little to directly

address the core grievances which gave rise to the conflict. Instead, it defers resolution to a complex political process and a series of commissions.¹⁵³ The agreement is not final until it is tested against popular will through popular consultation after both the national and local elections. The aim of popular consultation would thus be to ascertain the views of the people of Southern Kordofan/Nuba Mountains and Blue Nile States on the CPA, and would serve as an indirect consultation through the elected representatives to the state assembly, with advice from national-level and state-level CPA monitoring commissions.¹⁵⁴

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3. ANTICIPATING THE BIRTH OF A NEW BORDER: CROSS-BORDER MIGRATION AND THE CHALLENGE OF AVOIDING DE-STABILISATION – ANEESA WALJI

Introduction

Given the political climate and approaching referendum, a secession of Southern Sudan is now expected.¹ However, there is little in the way of post-secession arrangements.² Given that “a return to conflict remains a very real possibility,”³ anticipating and responding to issues that will arise in the event of secession is of urgent importance.

Part of ensuring a smooth secession and long-term peace and stability involves anticipating and addressing controversial issues of mutual concern between North and South in a timely and cooperative manner. With governmental capacity concerns and politically tense relations between North and South, the international community must play a key role in identifying issues and promoting negotiation. In this chapter, I will explore the implications of a new international border between North and South Sudan. Focusing on two particular cross-border migration concerns, I call for these issues to be placed on the negotiation agenda, and propose some practical strategies to consider in order to promote a smooth secession and long-term peace between North and South Sudan.

Within Sudan as it exists today, there are already existing tensions surrounding the movement of people. There are pastoral communities that are competing with sedentary communities for resources, a large population of internally displaced persons and people searching for improved livelihoods who are migrating to urban centres. Stakeholders have recognized this and much is already being done on the ground. For example, the United Nations Mission in Sudan (UNMIS) has been using an “integrated approach in support of peaceful migration, including early warning programmes, support for peace conferences and targeted assistance at the local level.”⁴ However, migration in the region will likely only become a more a complex and politicized issue in the event of Southern secession.

In this chapter, I focus on two particular migration concerns: cross-border pastoralism and North-South migration. In the first section of this chapter, I raise the issue of pastoral communities whose migratory routes will involve traversing the North-South border. For reasons relating to their critical role in the North-South conflict, I focus on the Misseriya pastoralist community. Cognizant of the formal recognition of Misseriya grazing rights and contrasting ambiguities on the ground, I make recommendations targeted to the Misseriya. However, the approach and framework for analysis can be applied to other pastoral communities that will soon traverse an international border.

In the second section of this chapter, I raise the concern about a flux of North-South migration that can be expected following secession. I highlight three important factors that will shape the nature of this migration: (1) the possibility of expulsion of Southerners from the North; (2) the possibility of Southerners being stripped of their citizenship; and, (3) the extent and enforceability of human rights protections available for Southerners who wish to remain in the North. Subsequently, in acknowledgment that whatever the case, some amount of North-

¹ Maggie Fick, “Preparing for Two Sudans” (The Enough Project, March 2010) at 1, online: <www.enoughproject.org>;

² As mentioned in the introductory chapter, the *Southern Sudan Referendum Act* identifies nine issues that should be negotiated prior to the referendum: “citizenship; currency; public service; status of the Joint Integrated Units...; agreements and international covenants ...; debts and assets; oil concessions and production, transportation and exporting; water; and ownership (largely of land).” However, negotiations have yet to begin and this list of issues is by no means exhaustive.

³ Report of the Secretary-General on the Sudan, *United Nations Security Council* (19 January 2010), UN Doc. S/2010/31 at para. 89.

⁴ *Supra* note 3 at para. 38.

South migration is likely to occur, I make some practical suggestions with an eye to managing this migration and avoiding destabilizing outcomes.

Of course, there are many challenges that arise in implementing the recommendations proposed. Nevertheless, this chapter can serve as an impetus, encouraging stakeholders to consider these issues and begin thinking about solutions as the idea of Southern independence begins to take hold. Prior to the referendum, at least some basic interim measures should be adopted to respond to these migration concerns. As Dan Moore suggests in Chapter One, an additional Comprehensive Peace Agreement (CPA) protocol could serve as an appropriate interim mechanism for issues like this.

The Misseriya

The Misseriya are commonly a pastoral community in Sudan, commonly described as “Arab” cattle herders.¹ Their traditional migration route involves travelling south for cattle grazing. For many Misseriya, this brings them into contact with Ngok Dinka – a sedentary population in Abyei. The two groups have had amicable relations in the past.² However, relations between the two groups have been tense in more recent times. A critical turning point occurred in 1965 when a number of unarmed Ngok Dinka were burned alive in a police station.³ The two groups have also had a tense modern relationship because each group was pulled towards different allegiances during Sudan’s civil war, adding a political dimension to Misseriya migration. Generally, the Dinka identify with the South while the Misseriya identify with the North.⁴

In the present context where demarcation of the 1/1/56 border, preparations for the 2011 referenda and secession are on the agenda, the situation is particularly tense. Already, violence has inflicted the lives of those in Abyei. Today, a majority of the Dinka population is displaced.⁵ As recently as March 2010, violence erupted in the Abyei. Clashes occurred between South Sudan’s military and Misseriya. At least 13 people were killed.⁶

Assuming secession occurs, there are a number of pastoral groups whose migratory movements may be affected by a new international border. However, Misseriya pastoralists that pass through Abyei deserve particular attention. It is a very politically charged climate along this route partly because Abyei, with its oil wealth, has become a flashpoint issue between the North and South. Analysts suggest that, “What happens in Abyei is likely to determine whether Sudan consolidates the peace or returns to war.”⁷ At this point, the possibility of returning to a North-South violent conflict is a real one and every piece of the Abyei puzzle must be addressed holistically in order to create genuine and lasting stability.⁸

The grazing rights of the Misseriya in Abyei is a charged issue. A decision from the Permanent Court of Arbitration (PCA) in The Hague recognized that the Misseriya hold

¹ International Crisis Group, “Sudan: Breaking the Abyei Deadlock” (12 October 2007), online: Refworld <<http://www.unhcr.org/refworld/docid/471311572.html>> at 2.

² *Supra* note 5 at 2.

³ Francis Deng, *War of Visions: Conflict of Identities in the Sudan* (USA: The Brookings Institution, 1995) at 292.

⁴ *Ibid.*

⁵ *Supra* note 5 at 2.

⁶ “Deadly clashes erupt in Sudan” (19 March 2010), online: Al Jazeera <<http://english.aljazeera.net/news/africa/2010/03/2010319105842184465.html>>.

⁷ *Supra* note 5 at 11.

⁸ “The parties must...work towards long-term agreements on *grazing rights*, residency and other pressing issues necessary for sustainable peace in Abyei.” Emphasis added. *Supra* note 3 at para. 96.

customary grazing rights in Abyei.⁹ On the ground however, these rights are not widely known to exist and nor are they adequately protected. The Misseriya thus remain fearful about their ability to maintain their customary migration in a secure climate. Given the fragility and complexity of the situation in Abyei, resolving the issue of overlapping land rights in Abyei is equally as important as resolving the issue of oil ownership and wealth sharing.

In addition to the fact that Misseriya interests play a critical role in achieving peace and stability in Abyei, this group of pastoralists also deserve particular attention because they are expected to regularly traverse the anticipated North-South *international* border. A Misseriya tribal leader put it this way: “It will be a border of a whole different country to cross into with our cattle.”¹⁰ The PCA decision effectively put many of the Misseriya in Northern territory and since Abyei is expected to join the new Southern state after the 2011 Abyei referendum,¹¹ it is predicted that the Misseriya will then cross an *international* border on their migration route – a border between two states with a history of hostilities and a border that itself may be disputed.

If the situation of the Misseriya, soon to be transnational pastoralists, can be dealt with in a manner that will promote peace and stability between the two states, it will provide stakeholders with a great deal of hope in tackling the host of other issues that require urgent attention. More than that, it will help prevent an outbreak of war. Although violence that occurs involving Misseriya is often at a very local level, Misseriya migration and grazing rights are a politically charged issue, with the potential to not only stall the resolution of other border issues but also trigger a war in the delicate climate that exists in Sudan today.

The Status of Misseriya Grazing Rights

Section 1.1.3 of the *Abyei Protocol* states explicitly that “The Misseriya...retain their traditional rights to graze cattle and move across the territory of Abyei.”¹² In July 2009, the PCA confirmed the continued existence of Misseriya grazing rights in the region in a ruling on border demarcation for Abyei. It referred specifically to the *Abyei Protocol* and international law to support its position.¹³

The PCA decision is final and binding as a matter of law and, it was formally accepted by the parties to the decision.¹⁴ However, the decision does not (and should not be expected to) provide practical advice about how to implement and manage overlapping land rights between the Ngok Dinka and Misseriya. In other words, the PCA decision cannot serve as a substitute for the political work that must be done on the ground.¹⁵

Unfortunately, high level politics and legality has not translated into meaningful change at the grass roots level. For this reason, the situation of Misseriya pastoralists remains quite

⁹ Permanent Court of Arbitration, “The Government of Sudan / The Sudan People’s Liberation Movement/Army (Abyei Arbitration)” (22 July 2009), online: <http://www.pca-cpa.org/showpage.asp?pag_id=1306> at para. 752.

¹⁰ Sudan Watch, “Abyei: Misseriya tribe fears losing traditional grazing rights” (9 October 2009), online: Sudan Watch <<http://sudanwatch.blogspot.com/2009/10/abyei-misseriya-tribe-fears-losing.html>>.

¹¹ Sharon Otterman, “Court Redraws Disputed Area in Sudan” (22 July 2009), online: The New York Times <http://www.nytimes.com/2009/07/23/world/africa/23sudan.html?_r=3&hp>.

¹² *Protocol on the Resolution of Abyei Conflict* (26 May 2004), online: The Sudan Tribune <<http://www.sudantribune.com/spip.php?article3134>> at s. 1.1.3.

¹³ *Supra* note 13 at paras. 750-766.

¹⁴ “South Sudan fragile peace” (3 March 2010), online: Reuters AlertNet <http://www.alertnet.org/db/crisisprofiles/SD_PEA.htm?v=in_detail>. However, the PCA decision was not accepted without at least some dispute. Some members of the Misseriya tribe protested against the ruling. See Ngor Arol Garang, “Abyei holds reconciliation conference between Dinka Ngok and Misseriya” (2 August 2009), online: Sudan Tribune <<http://www.sudantribune.com/spip.php?article32002>>.

¹⁵ “Experts warned that serious issues remained in enforcing Wednesday’s decision. For now, the border remains a straight line on a map, and the hard work of cutting across grazing lands and other holdings must begin. ‘In principle, the ruling makes both sides relatively happy, but we don’t know what will happen with the implementation,’ said Fabienne Hara, a vice president at the International Crisis Group.” *Supra* note 15.

uncertain. The most recent United Nations (UN) Secretary General report on Sudan explains that “misunderstandings, misinterpretations and false rumours regarding the PCA decision have increased tensions throughout the area.”¹⁶

The Sudan Peoples' Liberation Movement/Army (SPLM/A) has in fact stated that it will continue to allow Northern pastoralists to use Southern pastures.¹⁷ But it seems that this is not a guarantee that people are aware of and/or trust. To some extent, scepticism towards this guarantee is warranted since this assurance is practically and politically dependent on the political relationship between North and South. For example, Chatham House postulates that if secession occurs and Southerners are subsequently expelled from Northern Sudan, SPLM/A may decide to bar pastoralists from the South in retaliation, pushing relations between the states “towards renewed conflict and instability.”¹⁸

Recommendations

In what follows, I propose some focus areas for consideration and methods of responding to the challenge of cross-border Misseriya migration. Some of the recommendations may overlap and complement one another – they are not mutually exclusive. For all of these recommendations, inter-government cooperation will be required between North and South Sudan. A first step in this regard will be, as Dan Moore proposes, the negotiation of an additional CPA protocol that creates interim measures for the short-term and structures future negotiations on the issue.

(1) Improved security in Abyei: There has and continues to be much discussion among analysts about the importance of security in Sudan generally.¹⁹ A demilitarized or secure environment in Abyei would be a first step in creating “space for dialogue” between Misseriya and Ngok Dinka tribal leaders.²⁰ In the short-term, it would also help guarantee safe passage for Misseriya and prevent outbreaks of violence.

(2) Increased transitional justice efforts: Efforts in this realm are already being made. For instance, UNMIS is working with tribal leaders in Abyei to promote negotiations and supporting a “multi-state inter-tribal conference to address migration and cross-border issues.”²¹ However, there is room for much more when it comes to reconciliation efforts between Misseriya and Ngok Dinka. In the fifth chapter of this report, Laura Brittain proposes some valuable measures that could be applied to this particular context, such as traditional methods of conflict resolution.

(3) Promotion of information and awareness: The International Crisis Group (ICG) has suggested that “The biggest local risk [in Abyei] comes from Misseriya fear, nurtured by the National Congress Party, that implementation of the Abyei Protocol and a referendum on joining the South would mean loss of grazing rights.”²² In recognizing that the Misseriya do in fact have legally guaranteed grazing rights in Abyei but insecurity and confusion about the status of these rights remains, an essential factor to ensuring peaceful secession in the short and long-term is information and awareness on the ground.

¹⁶ *Supra* note 3 at para. 17.

¹⁷ Chatham House, “Decisions and Deadlines: A Critical Year for Sudan” (January 2010), online: <<http://www.chathamhouse.org.uk>> at 24.

¹⁸ *Supra* note 21 at 26.

¹⁹ For a detailed discussion on what exactly is being done and opportunities for improvement, see *supra* note 3.

²⁰ *Supra* note 5 at 10.

²¹ Report of the Secretary-General on the Sudan, *United Nations Security Council* (17 April 2009), UN Doc. S/2009/211 at para. 15.

²² *Supra* note 5 at 10.

Information and awareness can be promoted in a variety of ways. For example, the Enough Project suggests that there be a plan for “full public dissemination and public education about the [international] Tribunal’s decision.”²³ Local communities can also be engaged through radio, as suggested by Laura Brittain in the fifth chapter of this report.²⁴

(4) Use of targeted development projects: Targeted development projects could help address conflict between the Misseriya and Ngok Dinka from an environmental resource perspective.²⁵ For instance, The Netherlands, the Canadian International Development Agency (CIDA) and the United Nations Development Programme (UNDP) launched the Reduction of Resource Based Conflicts Project in 2004. The objective of the Project is “to contribute to the reduction of natural resource based conflict among pastoralists and between pastoralists and farmers in the Sudan.”²⁶ This project was implemented elsewhere in Sudan but not in Abyei. However, it serves as a useful model. It involved a variety of approaches such as the rehabilitation of degraded land and training of local mediators.²⁷

(5) Resource Management: Academics have pointed to the role of resource competition in creating and shaping conflict in Sudan.²⁸ Pastoralists migrate southwards for cattle grazing and part of the tension that then arises with sedentary communities is based on a competition for land. With this in mind, resource management becomes a key part of the solution for long-term peace in the area.

There are many ways in which this problem can be addressed. For example, one method of managing natural resources lies in the Conflict Early Warning System created by the Intergovernmental Authority on Development (IGAD),²⁹ of which Sudan is a member. It is a program that supports cross-border pastoralism and works to prevent outbreaks of violence by providing early warning of factors that would exacerbate conflict and violence.³⁰ One can imagine that factors receiving attention would include environmental ones such as rain shortfalls that may temporarily alter migration routes, put livestock at risk and aggravate poverty. However, there is limited information that is publicly available on how this System functions in practice. The actual functioning of this program may need to be assessed and possibly strengthened.

There are also schemes that could be developed in order to respond to changing weather conditions and promote effective management of natural resources among communities. With improved natural resource management, poverty can be reduced and friction between communities over resources will likely decrease as a result. In this vein, livestock insurance could be made available to Misseriya. This is a relatively new concept that was implemented for the first time in January 2010 by the International Livestock Research Institute (ILRI) in Kenya.³¹

²³ Enough Project, “Abyei: Sudan’s Next Test” (July 2009), online: Enough Project <http://www.enoughproject.org/files/publications/Abyei_Activist_Brief-1.pdf>.

²⁴ “Both [UN] missions...have agreements with the government allowing them to operate radio stations across Sudan. But the NCP has resisted allowing UN radio to broadcast in central Sudan in spite of an agreement entirely lacking ambiguity. A number of international radio stations have operating licenses in Sudan – the BBC, Deutsche Welle and Radio France Internationale – all of which could consider making and broadcasting special programmes to help Sudanese people participate in discussions about their future.” *Supra* note 21 at 34.

²⁵ *Supra* note 5 at 1.

²⁶ “Reduction of Resource Based Conflicts among Pastoralists and Farmers”, online: UNDP Sudan <<http://www.sd.undp.org/projects/cp3.htm>>.

²⁷ For more details, see *Ibid*.

²⁸ “Conflict and the Environment” *Post-Conflict and Disaster Management Branch* (June 2007), online: United Nations Environment Programme (UNEP) <http://postconflict.unep.ch/publications/sudan/04_conflict.pdf>.

²⁹ *Supra* note 21 at 32.

³⁰ For more information, see “Conflict Early Warning & Response Mechanism (CEWARN), online: <<http://www.cewarn.org/>>.

³¹ “Livestock Insurance – The Answer to a Threatened Livelihood?” *Pastoral Voices* (February 2010), online: <[http://www.reliefweb.int/rw/rwb.nsf/db900sid/SKEA-82SKEE/\\$File/full_report.pdf](http://www.reliefweb.int/rw/rwb.nsf/db900sid/SKEA-82SKEE/$File/full_report.pdf)>.

(6) Institutional development: Section 3.3 of the CPA provides that “There shall be established...an Abyei Resettlement, Construction and Development Fund to handle relief, repatriation, resettlement, reintegration, rehabilitation and reconstruction programmes in the Area.”³² This institution could theoretically deal with issues of land but to date, there is little to no public documentation of any activity from this Fund. Unfortunately, the *Abyei Protocol* does not address the issue of land disputes at all, except to guarantee grazing rights for the Misseriya in principle.³³

In the short-term, a land commission should be created for Abyei.³⁴ Land commissions currently exist for two protocol areas in South Sudan - South Kordofan and Blue Nile. Of course, a land commission should be democratic in its structure and allow for representation of both Misseriya and Ngok Dinka group members.

In the long-term, a shared border institution could be created between North and South Sudan. This institution could be used to gather information, draw lessons learnt from surrounding regions with cross-border pastoralism, monitor development, promote dialogue between the two states and make recommendations for improvements generally.

(7) Dual citizenship: In post-secession negotiations, the question of whether Misseriya should receive dual citizenship could also be discussed. Dual citizenship is one way to help provide the Misseriya with a political voice in the full range of their ‘homeland’, essential for long-term peace and governance across the border.

(8) Formalize customary land rights: Currently, customary law exists in favour of Misseriya grazing rights in Abyei but there is no domestic legislation in Sudan to reflect this right.³⁵ Some would argue that pastoral land rights should be formalized and registered. Registering customary land rights will provide “the legal basis by which legally recognized rights are held [and], at the same time it ensures the certainty and validity of rights, unless they are revoked in a legal and comprehensive way.”³⁶

However, there are many challenges that arise in considering the registration of pastoral land rights.³⁷ Challenges to the registration of pastoral land rights relate primarily to the fact that their characteristics are different than traditional land rights. Pastoral rights are more complex both spatially and temporally. These challenges would only become more complex if Sudan split into two and there was then an attempt to register *pastoral* land rights that traverse an international boundary. Dealing with these challenges in the event of secession will also mean having to coordinate policies between two states. Formalizing and registering land rights is no doubt a mammoth task but perhaps something to consider in the long-term, with an eye to evolving state practice and literature on land management and pastoralism.

North-South Migration

In the event of secession, transborder pastoralism is just one of many issues that the two governments will have to address in a cooperative and inter-dependent manner in order to ensure

³² *The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Army*, online: United Nations Mission in Sudan, <<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>>.

³³ *Supra* note 16 at s. 1.1.3.

³⁴ In Chapter Two, Hannah Moosa briefly discusses Land Commissions in Sudan.

³⁵ “The 7th Regional Resource-Based Conflict Conference: Land Use, Land Rights & Conflict in East Africa and the Horn”, online: Pastoral and Environmental Network in the Horn of Africa (PENHA) <<http://www.penhanetwork.org/home/details.php?id=22>> at 85.

³⁶ Monica Lengoiboni, Arnold Bregt and Paul van der Molen, “Pastoralism within Land Administration in Kenya – The Missing Link” (2010) 27 *Land Use Policy* at 586.

³⁷ For a discussion of this, see *Ibid*.

a smooth secession and maintain peace. Another migration-related concern that would arise in the event of secession is the possibility of a mass flux of migration from North to South. This has the potential to be seriously destabilizing and demands attention in advance of the approaching referendum.³⁸ In Chapter One of this report, Dan Moore calls for the negotiation of an additional CPA protocol in advance of the referendum. One of the issues that that additional CPA protocol must address, in at least an interim manner, is the possibility of destabilizing North-South migration.

Currently, there are a large number of people living in the North who ethnically identify with the South. Many are found in Khartoum. A recent estimate suggests that there are approximately 500,000 Southerners in the North but this figure is thought to be an underestimate. Some claim that the real figure is in the millions.³⁹ Southerners migrated to the North for a variety of reasons. Many left due to war and job insecurity in the South. In fact, the high labour costs in Khartoum mean that Southerners play an important economic role in Khartoum.⁴⁰

Some of the factors that made these people leave their home in the first place will encourage them to remain in the North post-secession. However, there may be outweighing ‘push and pull’ factors encouraging them to leave the North. One ‘pull’ factor is that the South may still serve as a home and identity to which they relate. This may encourage people to relocate. However, it is difficult at this point to predict exact outcomes. There are many ‘push and pull’ factors that remain unknown and a variety of possible scenarios that may result.

Scenarios

Of course, the ideal scenario is one where rights are respected and any migration that occurs is peaceful in nature. In this scenario, when secession occurs, there will be no reprisal against Southerners in the North.⁴¹ A significant amount of migration Southwards may still occur but the risk of North-South relations deteriorating as a result of migration is relatively low. Migration southwards would occur without extreme stigma and without being highly politically charged. It would occur on a smaller scale and perhaps over a longer duration of time, making it easier to manage.

Another possible scenario is one where the policies of the National Congress Party (NCP) result in the (formal or effective) expulsion of the Southern population. This could occur in at least three possible situations after secession: (1) if Southerners are formally expelled from the North; (2) if the NCP strips Southerners of their citizenship; and, (3) if the human rights situation for Southerners in the North deteriorates significantly. In any of these cases, relations between North and South may sour significantly and migration southwards may occur on a larger scale. With a larger group of migrants, the risk of destabilization increases. Humanitarian crises and/or conflict between groups along migratory routes may occur, leading to outbreaks of violence, further increasing tensions between North and South.

In either of these two broad scenarios, some Southward migration will likely take place. In anticipation of the South seceding, it therefore seems to be a question largely of numbers. At

³⁸ Jon Temin, “Six Important Issues for Sudan and its Future” (September 2009), online: United States Institute of Peace <http://www.usip.org/files/resources/six_points_sudan_0.pdf>.

³⁹ *Ibid.*

⁴⁰ *Supra* note 21 at 26.

⁴¹ *Supra* note 42.

this point, analysts are unable to predict the scale of migration that might occur.⁴² One senior Government of Southern Sudan minister suggested that, “The worse-case scenario in Sudan is the partition of India.”⁴³ Migration on this sort of scale is extremely worrying.

In anticipation of secession and at least some Southward migration occurring afterwards, the challenge then becomes one of *management*. The first task for both Sudanese governments and the international community is to maintain stability by *reducing the number of people* that feel the need to move Southward at any given time. In Chapter One, Dan Moore calls for a gradual devolution and urges Southern independence to be regarded as a process. If the process is a gradual one, this may help prevent a sudden and *en masse* migration.

In addition to gradual devolution, there are at least three critical driving factors that will affect the timing and scale of migration: (1) the possibility of formal expulsion; (2) the possibility of denationalization; and, (3) the human rights situation for Southerners. In what follows, I will briefly expand on the possible role of these three factors in shaping North-South migration.

Some Critical Factors Affecting the Scale of Migration

(1) Formal expulsion: Expulsion is legally defined as “a measure by which the authorities of a state forbid an individual present on its territory to continue his or her stay there and proceed to escort the individual... to the border, or send him or her back to the state of origin.”⁴⁴ In such circumstances, Southern residents of the North would be forced to leave and their departure would likely be accompanied by feelings of fear and insecurity. This would likely translate into immediate and large-scale migration with a high risk of destabilization occurring as a result – the most difficult type of migration to manage.

(2) Denationalization: Questions of citizenship have already been identified as a key issue to address in post-referendum arrangements.⁴⁵ The NCP has threatened to strip Southerners of their citizenship if secession occurs. This has implications for rights and security in the North. A Chatham House report suggests that, “Rights of work, ownership, residence and entry may be jeopardized.”⁴⁶ Denationalization would affect the rights of Southerners to some extent at least, and to that extent, migration southwards will be encouraged.

(3) Deteriorating human rights protection: The United States Institute for Peace explains that, “regardless [of numbers]...the rights and safety of Southerners living in the North...will need to be a matter of increasing attention as the 2011 referendum approaches.”⁴⁷ Indeed, the worrying progress of civil and political rights in Sudan accompanied with the “low level” of economic and social rights constitutes a “major threat” to stability generally.⁴⁸ There is an already existing institution in place to address the issue of human rights protection for Southerners in the North - the Commission for Rights of Non-Muslims in the National Capital, created through the CPA. However, the Commission has a “low profile.”⁴⁹

⁴² *Supra* note 42.

⁴³ *Supra* note 21 at 25.

⁴⁴ Françoise Bouchet-Saulnier, Laura Brav and Clémentine Olivier, *The Practical Guide to Humanitarian Law* (USA: Rowman & Littlefield Publishes, Inc., 2007) at 364.

⁴⁵ *Supra* note 42.

⁴⁶ *Supra* note 21 at 24.

⁴⁷ *Supra* note 42.

⁴⁸ *Supra* note 3 at para. 66.

⁴⁹ *Supra* note 42.

If there is a significant deterioration in the human rights situation of Southerners living in the North post-secession, the effect will be similar to that of denationalization. One journalist put it aptly: “You don’t need to send them back. You just need to say – priority in employment for nationals.”⁵⁰ Since many of the Southerners living in the North are there in large part for economic opportunity, rights to work will be an important human rights factor. Generally, an insecure human rights climate for Southerners will encourage emigration but, depending on the extent of rights grievances, this will not necessarily lead to a massive and urgent migration of people.

Ensuring Smooth Passage for Migrants

No matter what the situation and ‘push and pull’ factors in place, secession on its own will likely lead to at least some migration southwards. In order to effectively manage an anticipated Southward migration, cooperation between both Sudanese governments will be key. A smooth passage for migrants will help avoid increased tensions and violence in what is already a politically volatile climate.

The goal of preventing destabilization is a sufficiently valuable goal in and of itself but there are also other, overlapping policy imperatives at stake – human rights protection and adherence to the rule of law. Indeed, part of avoiding stabilization will involve ensuring that basic human rights are protected for migrants. A denial of human rights can itself serve as a cause for conflict.⁵¹

In addition to protecting basic rights of migrants, both the NCP and SPLM/A have an interest in avoiding a breach of international humanitarian law, which would result in international de-legitimization. In situations of forced expulsion from a state, international law requires that the physical conditions of expulsion meet a minimum standard. In a case heard by the Eritrea Ethiopia Claims Commission after Eritrean secession, the Commission decided that “despite some efforts to provide for expellees during some transports, the physical conditions frequently failed to comply with international law requirements of humane and safe treatment.”⁵² Ethiopia was thus found liable on this point.

Some recommendations to promote safety and security are listed below. North and South Sudanese governments, local civil society and the international community must begin considering the possibility of North-South migration and making appropriate preparations.

(1) Increased security: It would be wise to consider making arrangements in advance of the referendum for the deployment of security forces along predicted migration routes. An increased concentration of security forces in these areas will help prevent and/or respond quickly to outbreaks of violence.

(2) Promotion of safe road conditions: The United States Institute of Peace has pointed out that “There are concerns about the safety and security of the few roads linking North and

⁵⁰ *Supra* note 21 at 25.

⁵¹ “Where groups are socially excluded through persistent denial of their rights, evidence suggests this can act as a cause of violent conflict. In turn, conflicts cause denials of all kinds of human rights.” Governance and Social Development Resource Centre (GSDRC), “Rights, conflict and fragile states”, online: <<http://www.gsdrc.org/go/topic-guides/human-rights/rights-conflict-and-fragile-states>>.

⁵² Eritrea Ethiopia Claims Commission, “Eritrea’s Claims 15, 16, 23 & 27–32” (17 December 2004), online: <<http://www.pca-cpa.org/upload/files/ER%20Partial%20Award%20Dec%202004.pdf>> at para. 106.

South.”⁵³ Responding to this issue will involve, among other things, focusing on the removal of land mines along what may be popular North-South migration routes.⁵⁴

(3) Mobilization of humanitarian aid: Any existing political tension that accompanies Southward migration will only be aggravated if migrants do not have access to sufficient food, water and other basic resources. The international community is best poised to play a key role in this regard. However, in recognition of resource limits, the deployment of humanitarian aid should be coordinated amongst actors in order to ensure the most effective use of limited resources.

⁵³ *Supra* note 42.

⁵⁴ Landmines in Sudan continue to pose a threat to the safety and security of civilians: “Landmines and other contamination from explosive remnants of war will continue to present challenges in the coming elections, as displaced populations begin to return to their places of origin to vote.” *Supra* note 3 at para. 77.

4. INSTITUTIONAL CAPACITY BUILDING: DECENTRALISATION AND CREATING CAPACITY FOR THE GOVERNING STRUCTURES OF SOUTHERN SUDAN – EMILIE DESROSIERS

Introduction

The civil war that plagued Sudan for more than two decades destroyed the government, industry, buildings, infrastructure and deterred reconstruction and development in Southern Sudan. This has meant that in Southern Sudan the public institutions of governance at all levels are at best, rudimentary. Indeed, the situation in Southern Sudan is one starting essentially from scratch in terms of key capacities and delivery services (UNDP LGRP Report, 2005), and although progress has been made in the way of capacity building, much more development is needed for Southern Sudan.

Institutional building in Southern Sudan is of vital importance if it is to survive as an autonomous state with minimal internal conflict. In order for the capacity building in Southern Sudan to be effective, these processes will have to take ethnic heterogeneity into consideration. Without the involvement of local tribes in governing institutions, Southern Sudan could face an escalation in violence amongst major tribes, which could lead to a full-scale conflict soon after secession. Decentralization of the GoSS is an effective means to strengthen the government's institutional capacity in order to dispel outbreaks of violence in Southern Sudan (Wyeth, 2006). There exists little discussion that pertains to achieving realistic and effective means for building institutional capacity in Southern Sudan. While there are numerous reports that stress the importance of capacity building, few go into detail, and none offer alternative suggestions.

If Southern Sudan votes in favour of secession in January 2011, the main challenge for the GoSS will be to shift away from the highly centralized, military-oriented administration into one that represents and responds to civilians (Wyeth, 2006). It is in the GoSS' interest to actively pursue capacity building mechanisms if it is to become a capable sovereign state. Institutional capacity will need to focus on creating institutions that focus on transparency, accountability, and public support; as this will help to foster institutional stability. (UNDP LGRP Report, 2005)

In the case of the GoSS, the strategies and mechanisms for capacity building are focused on all levels of government—national, state, and local. These mechanisms include training personnel bureaucratic positions, placing democratic mechanisms within the structure of state institutions, ensuring additional security presence at the local level, timely delivery of salaries, the incorporation of local level traditions, strengthening the partnership, dialogue and communications between the local and national levels of government, establishing adequate enforcement of policy compliance, and technical support.

It is the contention of this chapter that there is a great need for decentralization and institutional capacity building at all levels of government. This chapter will pay particular attention to ethnic and tribal diversity, suggesting that an increase in ethnic diversity in governing structures could help to facilitate institutional legitimacy and decentralization. Increased institutional capacity, particularly at the state and local levels could also aid in diminishing the escalating tribal violence in Southern Sudan. It should be noted that flexibility and long-term commitment from the international community are necessary elements to promote these recommendations and to ensure the success of Southern Sudan post-referendum.

These recommendations are to be read in conjunction with Chapters 1 and 5, which discuss power devolution and transitional justice, respectively. The main challenges facing these

recommendations include the lack of political incentives for decentralization, time constraints, noncommittal recommendations from the international community, and the lack of educated and qualified individuals to fill available government positions, resulting in a large Diaspora.

Section 1: Structure of the GoSS and creating a ministry of capacity

This section examines the structure and the progress that has been made by the central government. Although much progress has been made in the years following the signing of the Comprehensive Peace Agreement (CPA), the GoSS still lacks vital capacity in areas of civil administration, economic institutions and law enforcement. In addition, there are few effective links between the three levels of government, which impedes efficient governing practices and institutions. Facilitating institutional linkages and improving upon governing practices can be achieved through the creation of a Ministry of Capacity and the eventual creation of a university training programme that specializes in capacity building.

GoSS Structure The government of Southern Sudan (GoSS) was created as a result of the Comprehensive Peace Agreement (CPA), the Interim Constitution of Southern Sudan (ICSS), and the Interim National Constitution (INC), which currently gives Southern Sudan a high level of autonomy (Wils 2007). According to Article 39 of the ICSS, governance “shall promote democratic principles and political pluralism, and shall be guided by the principles of decentralization and devolution of power to the people through the appropriate levels of government where they can best manage and direct their affairs” (2005).

It was only after the signing of the CPA that the Sudan People’s Liberation Military (SPLM) and international actors begin to construct a framework for governing that was beyond the structure of the military. Located in the Southern capital city of Juba, the executive structure of the GoSS consists of the President, Vice-President, and the Council of Ministers (Gurtong Trust, 2010). The president, Lt. General Salva Kiir Mayardit, also heads the Council of Ministers and is the Commander-in-Chief of the SPLM (Wils, 2007). Not only does the central government maintain a large percentage of the power, it appears that Lt. General Mayardit still maintains a large portion of the power in the South. Given this, institutional links are not only lacking across the levels of government, but institutional links are also scarce within the governing levels (Temin, 2009). The current vice president, Lt. Gen. Dr. Riek Machar Teny-Dourghon, is appointed by the President. The main responsibility of the Vice President is to serve as an assistant to the President (Gurton Trust, 2010). The legislative assembly consists of 170 members, appointed by the President of the GoSS. Assembly seats are allocated according to political party, with 70% of seats goes to the SPLM, 15% to the National Congress Party (NCP), and 15% goes to other Southern Sudanese parties. Theoretically, this distribution was created to ensure that different constituencies and communities are directly involved in the legislative process, and overseeing the work of the government (Wils, 2007). In addition, issues at the varying levels can be addressed and resolved in parliament, or by parliamentary committees (Gurton Trust, 2010). However, in order to ensure the inclusion and input from regional, ethnic and community actors, it would be more prudent to allocate assembly seats based on proportional representation of the votes as opposed to fixed party representation. The majority of power in the central government is heavily concentrated in the hands of the president and his political party. While this top-down approach to governing may have been affective in conditions of war, it is not the type of governing structure that will facilitate transparency, public support

and legitimacy. In order to establish an effective and efficient central government, decentralization and further ethnic representation needs to occur.

Civil administration and SPLM bias Heavy concentration of SPLM members can be found throughout the offices of the civil administration, especially in the areas of finances and law enforcement. Appointments made by the central administration bias former army officers and members of the SPLM. Also, this bias has been understood as an ethnic bias because the SPLM is mostly comprised of members from the Dinka and Lou tribes, which are the two largest tribes in Southern Sudan (Branch, 2005). Moreover, the perception of ethnic bias at the level of the central government will lead to a lack of public support for the governing institutions, and if this issue is not addressed, it has the potential to escalate ethnic tensions into ethnic conflict after secession (Sudan: Preventing implosion, 2009).

Although the central government is infested with former officers and SPLM members, finding and training an adequate number of individuals to competently perform the tasks required for the civil administration jobs remains a challenge. According to Edward Thomas, those who have been trained or sent to work in Khartoum and with the GONU find it difficult to learn the diplomatic and bureaucratic skills that are necessary to maintain and support a government (2009). There are very few skilled and experienced administrators that exist within the system, mostly because individuals work either in the private sector, or have fled that country because of the civil war, or the threat of reoccurring violence. Although the GoSS was once considered to be ethnically stable, especially in comparison to the North, as the referendum moves closer, accusations of tribal favouritism have increased exponentially.

Despite attempts by international actors to establish a transparent and efficient financial system in the central government, there are few mechanisms for financial management and control. There is no consistent delivery of salary payments, especially for the staff at the state and local levels. According to Thomas, the GoSS has created a large payroll, with approximately 45% of the current revenues going towards salaries (2009). This has sparked accusations of corruption; mismanagement of funds and the prevalence of “ghost” employees particularly in the police forces (International Crisis Group: Jonglei 2009). Moreover, the majority of the money given to government employees is at the level of the central government, creating accusations of tribal favouritism. This causes a problem for establishing effective decentralization mechanisms because, rather than forming the bottom-up approach to government stated in the CPA, the GoSS appears to be following the centralism that can be found in Khartoum (Wils, 2007).

General Recommendations and areas of concern: Assistance and decentralization initiatives for the central government and civil administration are largely associated with training and international monitoring. While there are prescriptions calling for additional international support, some are concerned that international actors will take over most of the control of the central government and governing institutions, much like the UN mission in Cambodia (UNAMIC) during 1991-1992 (Elnur, 2009). Moreover, critics of intense international assistance question the effectiveness of international monitors, stating that the GoSS may have difficulty in maintaining transparency and enacting further decentralization programmes once the international actors have left. Also, these authors contend that capacity building issues in Southern Sudan are more closely related to the capacity building concerns that occur in other neighbouring countries. It is for this reason that Elnur suggests that regional actors would be better suited to monitor the GoSS capacity building projects (2009). While this prescription offers insight into the governing hurdles the GoSS and its regional counterparts face regarding

institutional legitimacy and transparency, it would be a mistake to remove international actors from the monitoring because it seems highly unlikely that regional monitors will help to implement capacity mechanisms in the GoSS independent of regional interests.

Monitors are needed to ensure the effective implementation of capacity building mechanisms, and policies that will reduce ethnic tensions and the centralized approach of the GoSS. It would seem prudent that for every civil administration structure, one international, one regional and one Sudanese monitor should be present to ensure the developing of infrastructure capacity, the distribution of salary, and other matters concerning the civil administration.

Assessment programmes and sessions should occur on a regular basis by international experts in areas of report writing/analysis, and presentation skills (Wils 2007). Also to evaluate management and leadership skills and to assess ways in which these can be improved. For instance, the Division for Economic Planning of MoFEP underwent a training assessment course in order to address policy formulation and analysis and other areas of concern (Wils 2007). Moreover, an assessment of the budget should involve international monitoring to ensure that the central government should relinquish partial control of revenues to the states in order to promote a sense of transparency and decentralization.

With any sort of recommendations, especially those made to the international community, there will be coordination, funding, and physical challenges. Moreover, one of the main challenges for approaching these issues is the lack of coordination amongst the various international actors and the methods used for training, the way in which the Sudanese are being trained, and the way in which assessment and monitoring occur. In order to combat these issues and to further provide inroads to the other governing levels, establishing a Ministry of Capacity and a college programme that focuses on civil service training is desperately needs.

Establishing a Ministry of Capacity: The way in which Ethiopia has developed a department that oversees capacity building projects in key sectors of development, provides a precedent: the Ethiopian government, with the help of international support, created a Ministry focused on capacity development, stating that the government's main priority is to begin to expand and strengthen institutional capacity in the country (UCBP, 2010). Initiated in 2001, the Ministry of Capacity Building (MoCB) is the only ministry of its kind in the world. The work that is being done at the MoCB is largely cross-cutting in nature, coordinating strongly with other government ministries, most notably the Ministries of Finance, Trade, Industry and Education. It is through the coordinated efforts that these Ministries have focused on creating capacity in the construction sector, with the purpose of developing the infrastructure of Ethiopia in order to further develop trade and expand on economic opportunities (UCBP, 2010).

One of the major projects undertaken by the MoCB in conjunction with the Ministry of Education is the creation of a university, with its programmes of study concentrated on teaching capacity development skills in areas of engineering, architecture, software design, and financial training. The main objective of the university is to decentralize Ethiopia's higher education system in order to encourage individuals from all parts of the country to seek skills and a higher education. Moreover, after the construction of the university campuses is complete, it is estimated that 121,000 students will enrol (UCBP, 2010). It is expected that these students will become the backbone of Ethiopia's human resource development, and carry these skills into varying levels of government and private sector development (UCBP, 2010). Moreover, the prospects of creating a university in Southern Sudan, with satellite campuses across the south would not only encourage tribal diversity, and encourage the creation of a Southern national

identity, this could entice the Diaspora to return to Southern Sudan to teach these skills at a university level, and to develop each campus in such a way that it addresses the specific capacity building dilemmas found in that area.

Although it seems unlikely that the creation of a university, particularly one specifically for capacity building will be established in the near future, there are a plethora of initiatives that Ethiopia's Ministry of Capacity is developing that could translate well for the capacity building in Southern Sudan. Of particular interest for this chapter is Ethiopia's Distinct Level Decentralization Programme (DLDP). Although this programme was created to further decentralize power and authority from the regional level to the local level, it offers insight for the GoSS in terms of the way in which local level governing structures can participate in the legislative process, incorporate local tribes in the national infrastructure development programmes through job creation and skills training, and to improve service delivery through all levels of government (DLDP report, 2010). This unique and coordinated approach to strengthening institutional capacity can be utilized by the international community to facilitate the creation of a Ministry of Capacity Building for Southern Sudan. Similar to Ethiopia, the creation of a MoCB and a college designed to educate civil servants will greatly help to facilitate decentralization, ethnic diversity amongst the governing levels and departments, and will ultimately help to strengthen Southern Sudan.

Section 2: State government and the need for inroads and capacity development

Both the interim constitution and the CPA support an inclusive, bottom-up approach to governance for Southern Sudan; however, linkages between the central, state and local forms of governance are almost non-existent. Moreover, with the concerns of SPLM favouritism occurring at the national level, and trepidation over increased incidents of tribal violence at the local county level (more detail in section 3); capacity building initiatives for the state are largely overlooked. This section will focus on the challenges that the State governments face in Southern Sudan. These challenges include the slow pace of decentralization, the lack of transparency in policy procedures from the central government, particularly in the way of police force development, huge lack of international monitors and support at the state level, and a lack of security coordination when addressing tribal conflicts. The recommendations in this section will concentrate on creating bridges of communication between the central and state governments in order to facilitate decentralization.

State Governing Structure: There are ten states in the Southern Sudan; Central Equatoria, Eastern Equatoria, Jonglei, Lakes States, Upper Nile, Warrap, Western Bahr al-Ghazal, Western Equatoria, Western Upper Nile, and Northern Bahr al-Ghazal. The executive branch of government is headed by the Governor and is composed of the Governor, the Governor's advisors and the state ministries. The Governor is also accountable to the President of Southern Sudan, and the state ministers are answerable to the Governor (Wils 2007). Although the Governor is accountable to the President, there is little communication between the state and central ministries. Communication is essential in order to adequately address issues that are associated with creating institutional capacity.

Effective decentralization requires that the state government has the ability to undertake administrative duties in the way of financial management, urban development and the reconstruction of the state infrastructure. The international community has established

workshops, conferences and courses in order to educate individuals in effectively creating and implementing budget and financial management policies (GTZ, 2007). While these programmes were initially producing positive results in terms of decentralization, there is concern that most of the money from the state revenues is going to the centre and not the states. According to Thomas, almost 90% of the salaries and 67% of the development expenditure were assigned to the central government (2009). This disproportionate level of salary allocation not only inhibits the stability of the state government, but it also creates a sense of distrust and tension between the levels of government (Wils, 2007).

Recommendations and areas of concern: Current initiatives are in place with the purpose of building capacity at the state level, the most notable example of this is the GTZ programme for facilitating capacity development at the state level. In 2007, the GTZ launched a ten year long programme aimed at decentralization, improved communication between civil society and the government, and developing a public administration that was easily accessible for the citizens (2007). Although it is commendable that GTZ established a project with long-term goals, urgent state capacity development is needed for the present. For instance, the UNDP presently employs only one international monitor for each of the ten states (UNDP report, 2006). The vast geographical expanse and poor transportation links makes monitoring the progress of capacity, especially amongst the states virtually impossible. Given this, this chapter proposes that the international community drastically increase financial and personnel support to include a minimum of one international and one Sudanese monitor for every office in each state. This increase in international support will help to facilitate capacity development, thus further preparing the states for additional governing responsibilities.

International actors should work in concert with the central and the state government to create coordination positions within various departments. The objective of these coordination positions is to bring together policies, reports and issues that are affecting multiple levels of governance (GTZ, 2007). Moreover, international actors should establish a programme that allows for decentralization projects to work in concert with state capacity building, especially when these actors are attempting to create effective and transparent ways of financial management. This will help to ensure that state salaries obtained for revenues will be fairly distributed.

Section 3: Tribal Diversity and Local Forms of Governance

This section examines the role of local and tribal forms of governance within Southern Sudan, the interaction with the central government, and the level of institutional capacity needs for local governance to become stable (Wils, 2007). As mentioned in the previous section, local and state governance have a key role to play in maintaining the stability and encouraging the decentralization of the GoSS. The recommendations in this section will focus on the ways in which tribes can be further included in the formal organization of the government, and the types of institutions that can be created and enforced that would encourage tribal and ethnic participation in all levels of government.

Governing Structure: Local government that exists in various Southern states are divided into counties, and there are 92 counties in Southern Sudan called *Payams* and *Bomas*. In the Dinka language, *Payam* means district and *Boma* means village (Wils, 2007). These small units

of local government were established in the former SPLA liberated areas and, under Article 92 of the interim constitution, have been officially recognized as such. However, in most areas, the shape and boundaries of the Bomas are not clear as the borders have never been officially established (Thomas, 2009). As a result, the borders have been susceptible to violent conflict and dispute between different tribes (Wils 2007).

The politicization of violence among southern tribes: Violent conflict between tribal groups in the South is increasing. The UN Office for the Coordination of Humanitarian Affairs (OCHA) reports that violent conflict has killed approximately 2,500 people in Southern Sudan and displaced more than 350,000 in 2009, which is nearly twice as many as in the previous year. While tribal conflict has caused unrest in many southern states, the majority of the brutal conflict has been centred in and around the state of Jonglei (International Crisis Group: Jonglei, 2009). Violence often afflicts pastoral communities, and in this instance, the violence among southern tribes has become increasingly politicized in nature.

The Dinka and the Lou tribes are the two largest ethnic groups in Southern Sudan, and they also hold the most senior GoSS positions. The Lou are involved in conflict cycles that are associated with seasonal pastoral migration. The Lou tribe are at a geographical disadvantage because they lack adequate water sources to sustain their cattle. For further information on Southern Sudanese tribes, see Chapter 3 on pastoral tribes, and Chapter 2 for issues associated with natural resources. The Lou must either migrate to Dinka, Gawaar, Jikany or Murle territories to gain access to proper grazing areas, a reality which is itself a primary trigger for conflict (International Crisis Group: Jonglei, 2009). However, conflict is not automatic because “some of the tribes see each other as brothers; they have a deeply held mutual respect, communication channels are usually open, even amid cattle rustling and traditional disputes. That is not at all the case at present between the Dinka and Lou” (International Crisis Group, worker interview, 2009). In January 2009, seven state wildlife and police personnel were killed while delivering salaries to state employees in the Lou-dominated Nyrol County. This attack, so close to Lou communities, ignited suspicion that Dinka officials were involved. The Lou tribe saw this as yet another manifestation of their marginalization and restricted access to state institutions and markets (International Crisis Watch: Jongeli, 2009).

While Southern Sudan aims to become an independent, multi-ethnic nation, ethnicity remains central to politics, and the state of Jonglei is no exception: “east of the Nile, things are highly politicized now, and capacity training for the local government has not been successful. There is absolutely no trust” (International Crisis Group, UNMIS Interview, 2009). In conjunction with these issues, violence has escalated in Jonglei. This has deepened divisions among the counties, and in many cases, its political leaders. Southern Sudan politicians have been accused of inciting tribal violence to pursue personal agendas. Whether or not these claims are warranted, local and state officials have been criticized for failing to stem the violence. There are those that have criticized that the Jonglei state governor’s military background and his inability run a civil administration or to negotiate and discuss possible solutions for the tribal violence (International Crisis Watch: Jonglei, 2009). In addition, there are those who think that Lou politicians are not doing enough to end the conflict, or to dissuade the various tribes from seeking retribution through violence. A Jonglei youth leader explained the fragile institutional capacity: “Communities are used to receiving strong direction from their leaders, and when they don’t, things can easily spin out of control” (International Crisis Group Interview Malakal Youth, 2009).

Politicians in Jonglei and elsewhere have exploited divisions among communities, and if the international community does not enforce stronger governing mechanisms, these divisions could increase in the future (Wils, 2007). Civil service posts in the counties are often held by local community members often because there is an absence of qualified individuals, and there are limited training opportunities. Even if ethnic preference is unintentional, these forms of appointment often entangle these individuals in ethnic disputes and this reinforces tribal favouritism. Ethnic politics drives political appointments, and a departing minister is often replaced by a ‘son’ of the same geographic area and ethnic background. While there are some benefits to employing staff with local ties and knowledge, a policy in which civil servants are based away from their home area would make gains in establishing ethnic diversity among governing institutions (International Crisis Watch: Jonglei, 2009).

Given that the level of violence has escalated, the GoSS should extend its authority and to provide additional means of security in the state in order to avoid additional conflict that could arise during the 2011 referendum. International actors in conjunction with the GoSS should increase their support in the region because they run the risk of making the state unstable.

Current Programme Initiatives: Building institutional capacity for local governments has been marginally successful. These programmes include the Local Government and Recovery Programme (LGRP), the House of Nationalities. The LGRP was created and implemented by the UNDP with additional support from the Catholic Relief Services (CRS), PACT and various tribal groups in 30 counties. The aims of the LGRP are to ensure that a local government was established and that the “capacity of local governments [will] meet their prescribed roles in governance and recovery” (UNDP Local Report, 2006). The first form of capacity building is through technical assistance at all levels of government. From the county level this report suggests that there should be an “organizational development facilitator” assigned to each county, contracted by the international partners. These facilitators will work in tandem with a state-level advisor for assistance in creating training programmes, and giving advice regarding the organizational development of the governing structure (UNDP Local Report, 2006). The second form of capacity building is through core training for local government staff regarding topics such as finance, general management, legal and policy matters, and areas of governance. The third form of capacity building entails immediate access to additional training sessions. And the fourth form of capacity building is through establishing technical support linkages between the varying levels of government (UNDP Local Report, 2006).

The House of Nationalities (HoN) is an institution that is composed of Southern leaders and members of different ethnic and tribal backgrounds. Its aim is to protect the identity of all ethnic groups that are living in Southern Sudan. Its main objectives are to provide a space in which all ethnic groups in Southern Sudan can meet and discuss issues pertaining to their respective groups, to serve as a place to settle tribal disputes, and to provide recognition for the different ethnic groups in Southern Sudan (HoN website, 2004). The concept of the HoN was the outcome of discussions between members of the Swiss Department of Foreign Affairs and Southern Sudanese about various ways in which traditional structures could be linked to formal governance structures (Wils 2007). The HoN and its aims have yet to be fully established and much of this programme is still in the development and discussion phase (2004). If this collective idea were to be given funding and resources for institutional building, it could be used as a mechanism for solving the violent disputes that are occurring in the Jonglei state.

While these programmes have been instrumental in maintaining relative stability amongst tribal groups, the link between these programmes and the central government does not exist. Incorporating local customs and traditions into state structures is extremely important for inclusivity and capacity development. Not only does it enhance the stability of the GoSS, it creates ethnic accommodation at the national level, which could help to address and alleviate tribal tensions at the county level.

Recommendations: Prescriptions for increasing institutional capacity in the local government and in county areas are predominately associated with workshops, hosting seminars on ethnic integration, training, technical assistance, and international monitoring. Although unlikely, these prescriptions should occur prior to the 2011 referendum in order to limit the level of ethnic violence that could occur as a result of the referendum. At a minimum, the international community should continue to contribute to programme initiatives that are designed to encourage local participation in the management of the area, and that facilitate peaceful negotiations regarding land and resource use.

The international community should assist the central government, both physically and financially, in order for the government to demonstrate greater presence at the local level, particularly in county areas of contention. GoSS presence should include police and military personnel. Once the violence has dissipated, the central government in concert with international assistance, the state should attempt to create a partnership with the local tribes to leave some of the military and police officers in the disputed areas in order to ensure the protection of civilians. Moreover, international actors should take immediate steps in providing a forum, monetary funds, training and communications support for the House of Nationalities (Wils 2007). The formal creation of the HoN could provide a much needed forum for negotiating and resolving tribal conflicts.

The central government needs to show ethnic neutrality. The central government could employ individuals with ties and knowledge of the various tribes. This would not only help to dispel accusations of ethnic favouritism, it will also help to create decentralization (International Crisis Group: Jonglei 2009). The international community can help to facilitate this through assisting the central government in the hiring process in order to ensure ethnic heterogeneity. This can be done by establishing criteria for hiring employees; these criteria should be uniform across all departments and all levels of government.

The time frame for the LGRP should be extended. “Refresher” workshops and training programmes should focus on reinforcing the issues and recommendations that were originally discussed in the LGRP.

With any sort of recommendations addressed to the international community, there will be coordination, funding, and physical support challenges. Adding to this is the fact that these prescriptions should take into account the possibility of session and how that will change the outcome of the prescriptions that have been implemented. This is why flexibility and a deep understanding of the region is imperative.

There is a concern that these recommendations will not be implemented, at least partially, before the referendum. If additional institutional capacity measures are not employed prior to the referendum, ethnic violence could escalate exponentially, leaving the military and the international actors ill-prepared for dealing with a high level of violence.

The length and the amount of money allocated to each project will not be sufficient, thus leaving the success and effectiveness of the project to wane. This is of particular concern if tribal

violence increases in Jonglei. The central and state governments are already struggling to manage tribal conflicts, and with suppression in international financial assistance, the ability to manage will become next to impossible.

Conclusion

Institution building in Southern Sudan is of vital importance if it is to survive as an autonomous state with minimal internal conflict. This chapter's recommendations have stressed decentralization, and building the institutional capacity of the Government of Southern Sudan (GoSS). In addition, building institutional capacity at any level of government should consider how the referendum will affect the governing structure and ethnic tensions at the county level. Although the international community has made great strides in building institutions and institutional mechanisms to run a government, work still needs to be done to force the central government to relinquish control over certain structures, and further establish capacity building mechanisms at all governing levels. Ethiopia's Ministry of Capacity Building provides a useful framework for establishing much needed capacity development and decentralization initiatives. Although the prospect of establishing a university for civil servants does not seem attainable at present, coordinating training and education efforts is imperative if success of the governing institutions is to be achieved. Both the interim constitution and the CPA support initiatives for an inclusive and bottom-up approach to governing. However, decentralization and sufficient institutional capacity building has yet to occur in the varying levels of government. It is imperative for Southern Sudan to establish stable institutions and address ethnic clashes if it is to succeed as a sovereign nation. The time frame for effectively achieving these aims is rapidly diminishing because of the up-coming referendum. Capacity-building efforts can still be achieved after the referendum; however, achieving this aim will become more difficult because the potential for conflict with Southern tribes and between the North and the South drastically increases.

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5. TRANSITIONAL JUSTICE FOR SOUTHERN SUDAN – LAURA BRITTAIN

“MINDFUL that the conflict in the Sudan is the longest running conflict in Africa, that it has caused horrendous loss of life and destroyed the infrastructure of the country, wasted economic resources, and has caused untold suffering, particularly with regard to the people of South Sudan”¹

Introduction

The longest running conflict in Africa has left a long legacy, particularly in Southern Sudan. Northern and Southern Sudan fought a long and bloody civil war; widespread targeting of civilians or complete disregard for the Southern population claimed more than two million civilian lives and displaced four million more.² The civil war ended with the signing of the Comprehensive Peace Agreement (CPA) by the Northern NCP and the Southern SPLM,³ but tribal conflict within the South rages still across eight of ten states. In 2009, more than 2,500 people were killed and estimates are that 350,000 people were displaced.⁴ Clashes over cattle, land, and resources escalate into violence, and ethnic cleavages are only aggravated by historical militarization of these communities in the civil war and their mobilization against each other.⁵

If Southern Sudan secedes in January 2011, there is a constructive role for transitional justice to play in the South’s process of nation-building. As the South establishes itself as a sovereign state, its government can use transitional justice to earn stability, accountability, legitimacy and public confidence.⁶ Given its tumultuous past and ongoing violence, one of Government of Southern Sudan’s (GoSS) primary challenges will be first to secure and then to continue peace within its boundaries. Transitional justice may be used to facilitate that process and, insofar as possible while preserving peace, to prevent wallpapering over a generation of human rights abuses.

Transitional justice is a “framework for confronting past abuse as a component of a major political transformation,” in the aim of building a more democratic, just, or peaceful future.⁷ There is sometimes a dynamic tension, however, between justice and peace, and the devices used in Southern Sudan must have a mind to both. Amnesties, for example, may allow for more truth-telling as those who offer information are free from the threat of prosecution; granting amnesties is controversial, however, for it also serves to undermine accountability and rule of law if perpetrators are not seen to be brought to justice.⁸ More subtly, retrospective strategies may pose a threat in Southern Sudan if they focus attention on grievances and fuel ongoing conflict, thus hindering a peaceful process towards independence.

¹ *The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Army*, Preamble to the *Matchakos Protocol*.

² Human Rights Watch, “Selling Justice Short: Why Accountability Matters for Peace,” (July 2009), online: <<http://www.hrw.org>> at 68.

³ For further discussion, see the introduction to this report.

⁴ Edward Thomas, “Decisions and Deadlines: A Critical Year for Sudan” (London: Chatham House, January 2010) at v, online: <<http://www.chathamhouse.org.uk>> at 12 and *Report of the Secretary General on the United Nations Mission in the Sudan*, UNSC, 21 October 2009, S/2009/545 at para 52.

⁵ Thomas, *ibid.* at 10.

⁶ Jose Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington, D.C.: United States Institute of Peace Press, 1995) at 6.

⁷ *The Encyclopedia of Genocide and Crimes Against Humanity*, vol. 3 (Macmillan Reference USA, 2004), pp. 1045-1047.

⁸ The author acknowledges the academic debate regarding how best to balance justice and accountability with peace and political realities. The strategies proposed in this paper attempt, where possible, to address the concerns raised by both arguments. For more discussion of the tension between accountability and necessary amnesties, for example, see Human Rights Watch, *supra* note 2 and Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice” (2003/4) 28 *International Security* 5.

It is in the GoSS's interest to leverage transitional justice to forge legitimate national institutions and, where possible, confront past and present human rights violations. The recommendations in this chapter focus on transitional justice at the regional level between Northern and Southern Sudan, as well as at both the national and local levels within Southern Sudan. At the regional level, the short term recommendation is to leverage ongoing prosecutions at the International Criminal Court (ICC) for abuses in Darfur and, if necessary in the longer term, to establish a Sudanese Claims Commission at the Permanent Court of Arbitration. At the national level, the short term recommendation is to foster Southern nationalism and thereby begin surpassing deep ethnic cleavages, while a Truth Justice and Reconciliation Commission (TJRC) is considered in the longer term. Finally, at the local level the short term recommendation is to reinforce the traditional methods of conflict resolution already in use, increasing access to justice and creating intercommunity mechanisms to reduce violent conflict. A process of public engagement with these institutions can pave the way for longer term judicial reform.

These recommendations are to be read in concert with Chapters 2 and 4 on resource management and institution building; justice is but one of the necessary political transformations necessary for peace in Sudan and lends legitimacy to other transformations.¹ The greatest challenges facing each recommendation, however, are a lack of institutions and political incentives, the need for public buy in, and difficult strategic choices about how either to confront a violent past to move forward or to let some sleeping dogs lie in the name of peace.² At each stage, the GoSS should, wherever possible, avoid making peace at the expense of human rights.

The recommendations in this chapter do not propose solutions to the conflict in Darfur, but this is in no way to underestimate nor to disrespect its desperate situation.

Part I: Reparations between Northern and Southern Sudan

If possible, accountability for civil war abuses perpetrated by the North may lend legitimacy to the GoSS's ability to represent its people, and this may be accomplished in the short term by utilizing the ongoing ICC prosecutions for Darfur, and, if necessary in the longer term, by a formal Claims Commission established between the North and South.

As stated, the Sudanese fought a 21-year civil war whose crimes have gone largely unpunished. Documented human rights abuses included scorched earth tactics against villages, torture, disappearance, summary execution, starvation, arming tribal militia against civilians, abduction of women and children, and the use of child soldiers.³ The impunity with which these violations have been met is a factor which likely influenced the NCP's repetition of these abuses in Darfur.⁴ Though not currently at war, tensions between the NCP and the SPLM continue to escalate steadily and a return to violent conflict remains "a very real possibility, with potentially catastrophic humanitarian, political, military and economic consequences."⁵

A peaceful secession will require cooperation between the two governments throughout negotiations. Moreover, both governments are currently committed by both the CPA and the *Interim National Constitution* (INC) to processes of reconciliation and healing to promote

¹ For a discussion on tensions between transitional justice and broader social reforms, see Godfrey M. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions" (2009) 3 *International Journal of Transitional Justice* 445.

² For more on tensions between external prescriptions of the international community and local legitimacy, see Margherita Zuin, "A Model of Transitional Justice for Somalia" (2008) 23 *Fletcher Journal of Human Security* 89

³ Human Rights Watch, "Civilian Devastation: Abuses by All Parties in the War in Southern Sudan" (1993), online:<<http://www.hrw.org>>

⁴ "Selling Justice Short," *supra* note 2 at 68.

⁵ "Report of the Secretary-General on the Sudan," UNSC, 19 January 2010, UN Doc. S/2010/31 at 2, 17.

“harmony and peaceful co-existence among all Sudanese.”⁶ No steps toward this goal have been implemented in the five years since the CPA came into force.⁷ Post-secession, reconciliation may become less important;⁸ as the parties redefine themselves in terms of their independence of each other, cooperation and comity become paramount instead. Depending on the circumstances of the secession, it may be that formal processes of transitional justice and reconciliation serve only to focus attention on past abuses and incite further hostility.

Serious human rights violations, however, have institutionalized an “atmosphere of pervasive mistrust, in which any gain by one party is viewed as a loss for the other.”⁹ Peace agreements between factions of the SPLA and other armed southern groups in 1994 included amnesties for all military personnel,¹⁰ and the current CPA contains neither provision for accountability nor for reparation for victims.¹¹

Domestic criminal prosecutions are not likely to secure justice and continued peace. Neither country’s judicial system is up to the task, though Khartoum has at least paid lip service to domestic prosecution.¹² Furthermore, in addition to legal hurdles of jurisdiction and extradition between two independent states and judiciaries, the political challenges of the South wanting to prosecute Northern nationals or vice versa would be a challenge for diplomacy.

International prosecutions for abuses committed during the civil war risk being divisive; not all abuses can be prosecuted owing to the fact that the ICC is limited by the Rome Statute, which does not extend jurisdiction to retroactive punishment before its enactment in 2002.¹³ If the focus is limited to more recent violations, however, then not all victims may feel that justice has been done. Depending on who is prosecuted, the prosecutions may also reinforce cleavages if they further pit the North against the South, as was arguably the case with the ICTY.¹⁴

International criminal prosecutions are, however, already underway for abuses in Darfur. On February 4, 2009, Omar Al-Bashir became the first sitting head of state to be indicted by the ICC,¹⁵ in addition to three other individuals also indicted for crimes in Darfur.¹⁶ There has been significant resistance on the part of Al-Bashir’s government to turn over any of the individuals indicted, including himself, and indeed some international organizations have since been barred from operating in Sudan.¹⁷ This is the most significant impediment to successful prosecutions.

It may be that the Darfur prosecutions, depending how they unfold, could be leveraged in Southern Sudan as well. Many of the abuses perpetrated in Darfur were first rained upon the South. Public education could utilize these existing processes to accomplish some of the goals of accountability, including individualizing guilt, protection against revisionism, and deterrence.¹⁸

⁶ CPA, *supra*, note 1, *Power Sharing Protocol* (2004), s. 1.7 and *Interim National Constitutional of the Republic of the Sudan, 2005* (entry into force 9 July 2005) [INC], s.21.

⁷ Crisis Group Africa, “Sudan’s Southern Kordofan Problem: The Next Darfur?” (21 October 2008, Briefing 145), online: <<http://www.crisisgroup.org>> at 18. In fact, Ahmed Haroun, currently the subject of an ICC arrest warrant, served until May 2009 as the minister for humanitarian affairs, which coordinates the assistance to those he is accused of victimizing. See *supra*, note 6 at 73.

⁸ Thomas, *supra* note 4 at 24.

⁹ Report of the Secretary-General, *supra*, note 13 at 17.

¹⁰ Human Rights Watch, “Behind the Red Line: Political Repression in Sudan” (1 May 1996), online: <<http://www.hrw.org>> at 340-342.

¹¹ “Selling Justice Short,” *supra* note 2 at 73.

¹² A specialized Prosecution for Crimes Against Humanity Office was established in 2005, but was never used. “Selling Justice Short,” *ibid.* at 103.

¹³ *Rome Statute of the International Criminal Court*, 17 July 1998, UNDCPEICC A/CONF.183/9 at Article 11.

¹⁴ Snyder and Vinjamuri, *supra* note 8 at 21.

¹⁵ International Criminal Court, Press Release, **ICC-CPI-20090304-PR394**, “ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan” (4 March 2009).

¹⁶ Three other individuals have also been indicted. For more information, see International Criminal Court, “Situation in Darfur, Sudan” ICC-02/05, online: <<http://www.icc-cpi.int>>.

¹⁷ For more information, see Crisis Group Africa, “Sudan: Justice, Peace and the ICC” (17 July 2009, Briefing 152), online: <<http://www.crisisgroup.org>>.

¹⁸ For a theoretical discussion, see “Selling Justice Short,” *supra* note 2.

This would also help to ensure that international focus does remain on Darfur and its plight does not get lost in the shuffle of the referendum.¹⁹

Of course, relying on the Darfur prosecutions to heal or to account for abuses in the civil war hangs many hopes on convictions; there are dangers inherent to the process, such as the inability to control either the narratives of the prosecutions or of the defences or the danger of retributive violence in the event of an acquittal. These can, hopefully, be mitigated by the fact the Darfur prosecutions are one step removed from Southern Sudan.

More formal reconciliation between North and South may not be necessary as southern demands for reparation may be satisfied by secession, nor are there strong political incentives for Al-Bashir's NCP to engage in reconciliation after a secession movement. If accountability for human rights abuses and catharsis can be satisfied via the existing prosecutions, this may be the best option. Al-Bashir is unlikely to submit to arrest, however, and thus the prosecutions may not offer these opportunities.

The burgeoning field of international law, however, offers innovative conflict resolutions mechanisms should they be required. The arrangements made to handle the conflict between Ethiopia and Eritrea provide a recent precedent; after Eritrea seceded from Ethiopia, a war broke out, ending with a *Comprehensive Peace Agreement*, or the *Algiers Agreement*.²⁰ Article 5 of the *Algiers Agreement* called for the establishment of a Claims Commission, under the aegis of the Permanent Court of Arbitration (PCA), which would address “the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported.”²¹ The Commission was to decide claims for loss, damage, or injury from either government or individual nationals that were related to the war and resulted from violations of international humanitarian law or other international law and to award damages between the governments.²²

The Claims Commission consisted of binding, final arbitration by a panel of five arbitrators: each nation appointed two non-national, non-permanent resident arbitrators, who together decided upon the president of the Commission. This ensured that both states had buy in but also ensured, to the extent possible, that those nominated were impartial.²³ Claims were submitted by the state parties on behalf of themselves or individuals, and mass claims were permitted.²⁴ The Commission was not empowered to make decisions *ex aequo et bono* (to dispense with the law and decide what is most just) but was held to relevant rules of international law; it applied both international humanitarian law and principles of human rights law in a comprehensive manner.²⁵ At any time during the proceedings, the parties were empowered to settle claims by a mutually agreeable mechanism.²⁶

Once the claims were heard, the Commission rendered its decisions in two phases: liability and damages. Its final decisions on damages were rendered on August 17, 2009.²⁷ There are lessons to be learned from a normative perspective. It has been said that the December 15, 2005 decision on Ethiopia's claims of *ius ad bellum* overstepped jurisdiction, undermined

¹⁹ Thomas, *supra* note 2 at 6.

²⁰ *Algiers Agreement*, UN Doc. S/2000/1183, 13 Dec. 2000.

²¹ *Ibid.* at article 5(1).

²² *Ibid.*

²³ *Ibid.* at article 5(2) and (3).

²⁴ *Ibid.* at article 8 and 10.

²⁵ *Ibid.* at article 13 and Won Kidane, “Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague” 25 *Wis. Int'l L.J.* 86 at 69.

²⁶ *Algiers Agreement, ibid.* at article 16.

²⁷ Eritrea Ethiopia Claims Commission, Press Release, “Eritrea-Ethiopia Claims Commission Renders Final Awards on Damages” (17 August 2009), online: <<http://www.pca-cpa.org>>.

decisions of the Eritrea-Ethiopia Boundary Commission,²⁸ at a time when boundary tensions were already mounting, and contained legal reasoning that was not entirely consistent. Furthermore, both Eritrea and Ethiopia have reneged on compliance with decisions of the Boundary Commission, leaving the UN Security Council to issue declarations threatening sanctions pending compliance.²⁹ These criticisms do not attack the overall jurisdiction of the Commission nor its utility, but rather provide feedback for areas of improvement.

In the Sudanese context, a Sudanese Claims Commission, similar to this one, could be negotiated along with the new CPA recommended by this report when the current agreement's interim period expires. Unlike the conflict in Eritrea and Ethiopia where war erupted post-secession, the abuses committed in the Sudanese context occurred in a civil war; this does not preclude a Commission from arbitrating them, as Common Article 3(1) of the Geneva Conventions extends protection to civilians in times of non-international conflict.³⁰

The benefits of such a commission would be that it provides a public, legal, and binding forum for the adjudication of claims between the two governments. Were it to be accepted as legitimate by both states, the Commission would respect the independence of the newly constituted and independent Southern Sudan, a precondition to successful reconciliation between the parties. More specifically, the Commission's power to adjudicate claims of violations of humanitarian law could significantly advance transitional justice goals of individualization and acceptance of guilt, truth-telling, and reparation, presenting an internationally visible mechanism that avoids some of the difficulties previously identified with ICC prosecutions. It may also provide for more flexible standards of evidence and a lower burden of proof than that mandated by a criminal prosecution. Given the complexity of the conflict between the North and the South, as well as its extremely long duration, the success of claims might be more likely on civil standards than on criminal ones.³¹ The process can be tailored by the two parties, avoiding challenges of external imposition of mechanisms and allowing for buy in, in accordance with international legal principles.

While this suggestion may avoid the difficulties of coordinating both nations to conduct a regional TJRC and provides for binding arbitration in the international eye such that corruption and partiality can be avoided, it has its disadvantages. There is first the question of whose claims get brought to the Commission, if individuals must rely on the state to bring them. NGOs and advocacy groups may shoulder some of the burden in helping to ensure that claims are selected in a fair and representative manner, which would also instill the confidence of the long repressed Southerners in their new state. Another disadvantage is that, similar to prosecutions at the ICC, neither the narratives told in the claims nor the defences can be dictated. In order to prevent the proceedings themselves from breeding hostility between North and South, some thought could be given to some elements of the proceedings being confidential, but this may decrease the public confidence in the Commission and its symbolic reconciliatory effect.

Northern and Southern Sudan are no strangers to the PCA; the parties referred the conflict over the borders of Abyei to arbitration on July 7, 2008.³² A year later, the PCA issued

²⁸ *Algiers Agreement*, *supra* note 28 at article 4.

²⁹ For more detailed analysis of the Eritrea-Ethiopia Claims Commission's 19 December 2005 Partial Award on the *ius ad bellum* claims of Ethiopia, see Christine Gray, "The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?" 17 EJIL 4.

³⁰ *Geneva Conventions of 1949*, Common Article 3(1).

³¹ For a more detailed discussion of the potential of civil litigation in dealing with violations of humanitarian law, see Kidane, *supra*, note 33.

³² *Government of Sudan v. The Sudan People's Liberation Movement/Army* [22 July 2009] Permanent Court of Arbitration.

its decision, which has yet to be implemented by either party.³³ The outcome and impact of the decision may dictate whether further use of the PCA is advisable.³⁴

If a formal mechanism such as a Claims Commission is to be employed between Northern and Southern Sudan, it will require commitment and good faith from both parties; done without transparency, a corrupt Commission risks worsening the situation. The success of such a Commission would depend on effective institutions to distribute any money paid in reparation and to ensure fair considerations of all claims, as well as effective public outreach. Such institutional capacity is not currently present in Southern Sudan and would need significant bolstering in order to be effective.³⁵

In this sense, leveraging any benefits possible from the Darfur prosecutions is likely the simplest and most effective means of ensuring accountability for human rights violations and, in concert with secession, provide some closure to the civil war. A Claims Commission, if required, is a longer-term goal.

Part II: National Reconciliation

At the national level, the immediate transitional justice goal is extensive public outreach regarding the referendum and the forging of a new nation in order to heal deeply sowed mistrust, while more formal mechanisms of national reconciliation such as a TJRC could be employed in the longer term.³⁶

Tribal violence is on the rise in Southern Sudan.³⁷ Limited access to information and lack of outreach by either the GoSS or the central government also aggravates conflict and further “ethnicizes” the population in rural Southern Sudan, and indeed throughout all of Sudan.³⁸ The GoSS accuses the central government of fuelling ethnic cleavages, though there is little evidence available to confirm this.³⁹ Divisions may also be encouraged by local government leaders; President Kiir has accused some Southern leaders of inciting tribal violence to further their own ends.⁴⁰ With much finger pointing, little responsibility for ending violence is being shouldered by any party. Within the South, opposition parties accuse the SPLM of suppressing them,⁴¹ while at the local level, the shared goal of independence does not alter the fact that ethnic and tribal identities are stronger than any sense of national identity in Southern Sudan.⁴²

Sites of political transformation such as a secession are moments where “identities are particularly susceptible to reshaping,” because the state undergoes a deliberate transformation, but also because of new possibilities for identification at the local level.⁴³ Secession offers the possibility of forming a new sense of nationhood encompassing and respecting ethnic divides.⁴⁴ This is supported by the *Interim Constitution of Southern Sudan, 2005* (ICSS) which requires the

³³ Crisis Group Africa, “Sudan: Preventing Implosion” (17 December 2009, Briefing 68), online: <<http://www.crisisgroup.org>> at 3.

³⁴ For a full analysis of the Abyei decision, see John Crook, “Abyei Arbitration – Final Award” 13 *Am. Soc. Of Int’l L. Insight* 15.

³⁵ For a discussion of institutional capacity in Southern Sudan, see Chapter 4 of this report.

³⁶ Such a coherent policy is arguably lacking in the Kenyan context. Distinct initiatives were undertaken, but progress is stunted by lack of central vision. See Musila, *supra*, note 9.

³⁷ Thomas, *supra* note 2 and “Report of the Secretary General on the United Nations Mission in the Sudan,” UNSC, 21 October 2009, S/2009/545 at para 52.

³⁸ Thomas, *ibid.* at 13.

³⁹ Crisis Group Africa, “Jonglei’s Tribal Conflicts: Countering Insecurity in South Sudan” (23 December 2009, Briefing 154), online:

<<http://www.crisisgroup.org>> at 9.

⁴⁰ *Ibid.* at 12.

⁴¹ Report of the Secretary-General, *supra* note 13 at para 18.

⁴² Crisis Group Africa, *supra* note 47 at 15.

⁴³ International Center for Transitional Justice, “Fear of the Future, Lived Through the Past: Transitional Justice in the Wake of Ethnic Conflict” (October 2009) online: <<http://www.ictj.org>>.

⁴⁴ Crisis Group Africa, *supra* note 47 at 15.

GoSS to initiate a process of national reconciliation and healing and to “inculcate in the people of Southern Sudan a culture of peace, unity, cooperation, understanding, tolerance and respect for customs, traditions and beliefs of each other.”⁴⁵

Insofar as possible, Southern Sudan’s nation-building process should foster reconciliation as well as respect for heterogeneity, as suggested in Chapter 4 of this report, rather than mapping on to what are already a deeply politicized ethnic divides.⁴⁶ Those transitional justice mechanisms employed should, at the very least, neither further contribute to the antagonistic and violent ethnic identities formed through years of war, nor define the South in terms of opposition to the North such that it promotes hostility.⁴⁷

Strategies of public engagement are necessary for political transformation during elections, institution building, and, most importantly for the recommendations in this chapter, for the publication of strategies of transitional justice to foster transparency and public confidence.⁴⁸ Such outreach, which Chapter 1 argues is a constitutional obligation stemming from the principles of the INC, should also be mindful of the national identity being built and form part of a coherent and conscious effort. In particular, the use of initiatives like Radio Miraya, a UNMIS run station which already broadcasts from Juba, to publicize fairly both instances of tribal violence and instances of reconciliation could be effective, provided content is not entirely dictated by UNMIS but instead formed in conjunction with local journalists and broadcasters.⁴⁹ One criticism of ICC involvement in the Democratic Republic of Congo was a lack of public outreach, which allowed misconceptions about the court to spread and dampened the impact of the proceedings in public confidence building.⁵⁰ Effective outreach could help to avoid such misconceptions and enhance the impact of measures of reconciliation by ensuring they are widely known. Development and humanitarian efforts that crosscut ethnic divides may also contribute, such as youth conferences or women’s initiatives, to the creation of a new Southern identity.⁵¹

The GoSS, constitutionally required to initiate processes of reconciliation and healing, might also consider the more formal mechanism of a TJRC for addressing past wrongs.⁵² TJRCs, which provide a platform for encounters with the past, can also affect performance and production of national identities. This was particularly true in South Africa, post-apartheid.⁵³

The Kenyan Parliament, to the acclaim of some human rights advocates, passed the Truth, Justice and Reconciliation Act in October 2008, calling for the establishment of its TJRC.⁵⁴ The Commission’s role in a broader scheme of transitional justice has not been clearly articulated; established alongside an event-specific Special Tribunal, the Commission has been criticized as a response to a national crisis, implemented with insufficient public consultation.⁵⁵

⁴⁵ *The Interim Constitution of Southern Sudan, 2005 [ICSS], s. 39(2).*

⁴⁶ For a theoretical discussion of the ways that transitional justice can work around or reduce ethnic conflict, see International Center for Transitional Justice, “Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies” (November 2009) online: <<http://www.ictj.org>>.

⁴⁷ Thomas, *supra* note 16 at v.

⁴⁸ Zalaquett, *supra* note 6 at 6, 9.

⁴⁹ Radio Miraya, online <<http://www.mirayafm.org/>>.

⁵⁰ International Center for Transitional Justice, “Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC” (March 2009) online: <<http://www.ictj.org>> at 30.

⁵¹ For examples of cross cutting development initiatives, see USAid Sudan, “Monthly Update: February 2010” online <<http://www.usaid.gov>>. The success of these initiatives is not evaluated here; they are simply raised as examples of methods to approach the populations in ways other than tribal groupings.

⁵² ICSS, *supra* note 53, s.39(2).

⁵³ International Center for Transitional Justice, “Truth-Telling, Identities, and Power in South Africa and Guatemala” (June 2009) online: <<http://www.ictj.org>>.

⁵⁴ International Center for Transitional Justice, “Background - Kenya” (April 2009) online: <<http://www.ictj.org>>.

⁵⁵ Musila, *supra* note 9 at 452.

In particular, the Commission has been given an extremely broad mandate to promote justice, national unity, reconciliation, and peace and to seek redress for violations of human rights.⁵⁶ To that end, the TJRC has the power to recommend prosecutions, determine redress for victims, facilitating amnesty, and foster truth-telling and confession.⁵⁷ It remains to be seen whether one institution can effectively accomplish all of these goals. Finally, while many Kenyans have called for justice, action against individuals has on occasion been perceived as bias or witch-hunting; groups tend to retreat along ethnic lines and pressure for justice abates.⁵⁸

A Sudanese TJRC would have the benefit of observing the Kenyan example unfold and learning from its successes as well as its failures. The TJRC could feed into a coherent transitional justice strategy if regional centres were established in a fair and inclusive manner, supporting efforts at representative nationalism. New technologies could help provide records of proceedings in geographically scattered locations, to help coordinate the effort and to create memories for later use in museums and culture-building exercises.

Forms of memorialisation and traditional methods of reparations and justice could also be incorporated into the regional centres of the TJRC; unlike the suggestions below regarding local courts, however, the TJRC should be focused upon historical wrongs and symbolic reconciliation among groups.⁵⁹ Specific, recent abuses should be adjudicated in local courts. As with all of the other suggestions in this report, significant emphasis will have to be placed upon representing the many peoples of Southern Sudan, and not simply those favoured by the SPLM, both in the claims being heard and also in the composition of the Commission. Recording events will help ensure representation.

Truth commissions require institutions and democracy as precursors to success;⁶⁰ these will take time and resources to build in Southern Sudan. A poorly executed truth commission may do more harm than good, for it reinforces perceptions of corruption and delegitimizes the government in the process.⁶¹ A TJRC is thus a mid to long term goal. In a situation as complex and with as many cleavages as Sudan, the process will not be simple. Furthermore, a Southern Sudanese TJRC would direct focus on inter-tribal violence and atrocity, which, given the current predominance of these conflicts, may make a commission a risk not worth taking. As between a TJRC and a Claims Commission such as that canvassed above, a Claims Commission has the advantage of focusing public attention on the North/South conflict, rather than on conflicts within the South. Operating both at the same time would likely divide resources and public attention too thinly.

The GoSS is not only constitutionally mandated to pursue processes of reconciliation, but has much to gain in the way of public and international trust and confidence in doing so. At every stage, however, it must gauge the tension that may exist between addressing human rights violations perpetrated among its nationals and the more immediate need for peace. It may be that leveraging prosecutions for Darfur, nation-building and the prevention of further human rights abuses by the local justice mechanisms addressed below must serve in the shorter term until

⁵⁶ *Ibid.* at 453.

⁵⁷ *Ibid.* at 454.

⁵⁸ *Ibid.* at 452.

⁵⁹ For best practices, see International Center for Transitional Justice, “Silences, Visibility and Agency: Ethnicity, Class, and Gender in Public Memorialization” (June 2009) online: <<http://www.ictj.org>>.

⁶⁰ For a critique of the utility of TJRCs and their potential to reinforce cleavages and be smoke screens, see Snyder and Vinjamuri, *supra* note 8 at 20.

⁶¹ Mani, Rama. “Does power trump morality? Reconciliation or transitional justice?” In *Atrocities and International Accountability*, eds. Edel Hughes, William A. Schabas and Ramesh Thakur. New York: United Nations University Press, 2009): 23-41.

Southern Sudan has the institutional capacity and human security necessary to formally confront its past.

Part III: Local Justice For Southern Sudan

Communities throughout Southern Sudan are already using traditional methods of conflict resolution, but inter-ethnic violence demands redress and will not wait for formal legal reform. Local justice can be achieved by leveraging existing traditional justice systems and infusing them with rights respecting judicial principles, while regional mechanisms combining those of several communities could be used to mediate between communities. These suggestions could be implemented in the short term to stop violence and enhance confidence in the GoSS, while formal judicial reform can use the public engagement inherent in these systems to find more lasting solutions. Local justice in this sense will be mainly prospective, a foil for other retrospective forms of retributive and restorative justice such as those above.⁶²

As has been mentioned, tribal conflict has claimed many civilian lives and is on the rise: 2009 was the most violent year the South has seen since the CPA was signed.⁶³ Attacks in Jonglei state in March and April alone saw over 1,000 men, women, and children killed.⁶⁴ Conflicts arise over local politics, cattle-rustling, land and resources disputes and other vital issues, and are only exacerbated by weak access to justice, poor roads, an abundance of small weapons, and failure to implement what settlements are actually achieved.⁶⁵ Abuses by the police and military are also problematic. SPLA soldiers opportunistically target civilians in robberies, beatings, land seizures, and sexual violence;⁶⁶ over 30 civilians were killed during or after military clashes in February 2009 alone.⁶⁷

Years of civil war and the imposition of Sharia law by the dominant North decimated the Southern judicial system. Judges were dismissed and replaced, and the military and police given powers of arbitrary arrest and detention.⁶⁸ As a result, the development of customary and common law was stunted. Post-CPA, reforms are underway, but they are not moving quickly enough to catch the desperate need for adjudication, nor is there a budget for what is truly required.⁶⁹ As of early 2008, much important legislation was still in draft form, and there were no functioning law schools, libraries, Bar Association, legal aid, and too few defence counsels.⁷⁰

An interesting feature of the Southern judicial system, however, is the extent to which it already interacts with local forms of conflict resolution. State courts supervise customary law and accept appeals from the chiefs' courts which apply it. Chiefs' courts also issue valid warrants and have institutional relationships with the police force.⁷¹ These relations are constitutionalized: s. 174 of the ICSS recognizes the institution of traditional authority, mandates that it operate within the bounds of the law, and states that customary law shall apply in Southern Sudan.⁷²

⁶² For a discussion of retributive vs. restorative justice, see Zuin, *supra* note 10 at 91.

⁶³ Amnesty International, Press Release, "Protect Civilians in Sudan" (8 January 2010), online: <<http://www.amnesty.org>>.

⁶⁴ Human Rights Watch, "No One To Intervene: Gaps in Civilian Protection in Southern Sudan" (June 2009), online: <<http://www.hrw.org>> at 4.

⁶⁵ For more detail, see Crisis Group Africa, *supra* note 47.

⁶⁶ Human Rights Watch, "There is No Protection: Insecurity and Human Rights in Southern Sudan" (February 2009), online: <<http://www.hrw.org>> at 3.

⁶⁷ Human Rights Watch, News release, "Sudan: Prevent Recurrence of Fighting in Southern Town" (21 May 2009), online: <<http://www.hrw.org>>.

⁶⁸ Bruce Baker and Eric Scheye, "Access to Justice in a Post-Conflict State: Donor-supported Multidimensional Peacekeeping in Southern Sudan" (2009) 16 *International Peacekeeping* 2 at 175.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at 176.

⁷¹ *Ibid.* at 180.

⁷² ICSS, *supra* note 53, s.174.

Traditional forms of justice are used as existing, trusted methods of conflict resolution and should be used in forging a local judicial system throughout the South.⁷³ Customary methods of conflict resolution include mediation, compensation, and restitution. Though each community has different particularities, opinion leaders and traditional figures mediate conflict throughout the South. Some communities, such as the Azande in Western Equatoria, mix spiritual belief in the mystic powers of evil people as causes of conflict with mediation in a compensatory scheme.⁷⁴ These ancient institutions have been changed and shaped by the war, such that traditional leaders have sometimes lost their influence as a result of militarization or traditions have evolved with the movement of IDPs and cultures colliding.⁷⁵

The disadvantages of traditional justice mechanisms are that they lack of codification and consistency. Traditional structures are male dominated, and can use transfer of women as forms of restitution. While not rights-respecting according to international standards, blatant miscarriages of justice are argued to be “obviated by the wide participation...by ordinary villagers and the real possibility of removal of a chief seen to act contrary to acceptable and accepted standards.”⁷⁶

Rwanda implemented *gacaca* courts as a state institution, a hybrid of international standards and customary traditional structures as the predominant means of traditional justice for the 1994 genocide; hundreds of thousands were put on trial in over 9000 communities.⁷⁷ This approach, while a novel to ensure accountability using legal pluralism, has been heavily criticized for its inability to provide adequate reparations to victims, enforcement of traditional societal inequalities, creation of a new means of social control and marginalization, and its failing to meet international standards on gender equality or inclusivity.⁷⁸ While Rwanda used local justice to confront past atrocity, Uganda implemented local councils using alternative dispute resolution as a means of increasing access to justice for current conflicts. This method has also been criticized as a tool for elites to further exert control and marginalize vulnerable groups; local councils’ demands for “unofficial” payments often made them more expensive and, as they were linked to the formal court system, effectively prevented recourse elsewhere.⁷⁹

Mindful of these lessons, the GoSS should further leverage these traditional structures in the short term as a means of extending rule of law and access to justice throughout the South, which also creates a role for public participation in the construction of a long term judicial system.⁸⁰ International help can support the development of best practices and codification that leaves room for each community to use their particular rituals but codifies judicial principles and instills impartiality or rights-respecting approaches. A balance here must be struck between ensuring consistency and international standards and maintaining the integrity of the traditional systems themselves.⁸¹

Conflict between tribes with differing structures of traditional justice may pose a challenge. A coherent system could, however, establish regional courts using best practices.

⁷³ For a theoretical discussion of the advantages of local justice, including legitimacy and slow imposition of foreign mechanisms, see Baker and Scheye, *supra* note 76.

⁷⁴ Samson Wassara, “Traditional Mechanisms of Conflict Resolution in Southern Sudan,” (March 2007) Berghof Foundation for Peace Support, online: <<http://www.berghof-peacesupport.org>> at 10.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at 11 and Baker and Scheye, *supra* note 76 at 180-181.

⁷⁷ Lars Waldorf, “Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice” (2006) 79 Temple Law Review 1 at 3.

⁷⁸ For a detailed critique, see *ibid* and Zuin, *supra* note 10.

⁷⁹ Lynn S. Khadiagala, “The Failure of Popular Justice in Uganda: Local Councils and Women’s Property Rights” (2001) 32 Development and Change, 55-76.

⁸⁰ Baker and Scheye, *supra* note 76 at 182.

⁸¹ This suggestion was made for Somalia, to maintain integrity of the traditional system. See Zuin, *supra* note 10.

Formal negotiations do happen between different ethnic groups. In February 2009 the GoSS facilitated a peace conference between Dinka and Lou communities in Jonglei; while a peace agreement was reached, it was not enforced and nor were satisfactory reasons for this given by the parties or by the GoSS. Violence erupted and 42 civilians were killed. Another 167 were killed in September when the dispute continued.⁸² Formalization of these types of negotiations could happen through the implementation of regional courts, building on the existing traditional mechanisms of each group.

The International Crisis Group recommended that the GoSS assign civil administrators “away from their home areas as a regular policy, so as to erode pervasive tribalism and build a stronger national identity.”⁸³ Such a practice would also contribute to perceived impartiality of regional courts; regional courts could utilize panels of local opinion leaders and civil administrators assigned from other areas. Human Rights Watch has also recommended the use of mobile courts to meet demands for access to justice.⁸⁴ Poor road conditions make travel difficult, but a formally trained judiciary from the state court, representative of the many ethnic groups in each state could operate as an appellate body for these regional courts, beginning a process of more formalized judicial reform.⁸⁵ The appellate body could travel as necessary when situations, such as the conflict between Dinka and Lou, escalate and require appellate functions. This body could also be used to ensure that local mechanisms do not exclude marginalized groups.

These recommendations focus on increasing access to justice throughout the South, helping to manage local ethnic conflict while also building confidence in the new state. This is not to ignore the importance of targeting root causes of conflict with strategies of institutional reform, vetting, resource division, or disarmament, demobilization, and reintegration (DDR).⁸⁶ Vetting for human rights abuses and corruption, in particular, is important to create a legitimate conflict resolution system trusted by the public.⁸⁷ DDR is also crucial in ensuring that conflicts do not escalate; efforts are underway with the help of the UN, but the program in violent Jonglei, for example, lacks coordination.⁸⁸ Disarming such a sharply divided society poses particular challenges, given that any one group will only be willing to disarm if its neighbours do so in turn, and there is not strong public confidence in the SPLA and police forces to fill the security void.⁸⁹

Long term judicial reform, based upon a permanent constitution and bill of rights, will take time. A process that leverages trusted and recognized structures in working towards a strong judiciary is necessary for public buy in and engagement. The suggestions above provide for an immediate means of accessing justice as well as a learning process for long term development. Traditional structures may not be ideal and comply absolutely with international standards, but they provide an immediate mechanism for use as a stepping stone to better judicial institutions.

Conclusion

⁸² Crisis Group Africa, *supra* note 47 at 4.

⁸³ *Ibid*, at ii.

⁸⁴ Human Rights Watch, *supra* note 72 at 2.

⁸⁵ ICSS, *supra* note 53, s.171.

⁸⁶ Disarmament, Demobilization, and Reintegration is a crucial element of the peace process. UNDDR has begun this process, for more information see UNDDR, “Country Programme: Sudan,” online: <<http://www.unddr.org>>. Further recommendations for DDR can be found in Crisis Group Africa, *supra* note 47.

⁸⁷ For a discussion of the importance of vetting, see ICTJ, *supra* note 58. This is badly needed in Sudan: see Human Rights Watch, *supra* note 74.

⁸⁸ Crisis Group Africa, *supra* note 47 at 18.

⁸⁹ *Ibid*.

Transitional justice, defined as a framework for confronting past abuse, an element of political transformation, and access to justice in the early stages of a newly independent Southern Sudan can help the GoSS to establish its legitimacy both domestically and internationally. Recommendations for achieving this goal have been made at three specific levels: regional, national, and local. At each stage, the GoSS must have a mind both to democratic transformation, accountability, and transparency, ensured by confronting human rights abuses, and the immediate need for peace, which may resist formal retrospection. Insofar as possible, the GoSS should strive to achieve transitional justice goals, and under no circumstances should it perpetrate, condone, or allow human rights abuses to continue.

Negotiations between the North and South should include consideration of reconciliation and reparation, and these must be accomplished in a transparent manner, lest they worsen a precarious situation. The same is true for a conscious process of nation building, respectful of ethnic divides. Public consultation will be necessary at all steps of the secession process; using a coherent strategy that invites trust and delivers on promises will begin to build a united South. Access to justice is one area that can leverage existing structures to broker peace. Security is an area of primary concern for the entire South; tangible gains made in this area in resolving conflict and enforcing decisions may go a long way to establishing the GoSS as a capable government.

Civil society can play an important advisory role in the processes suggested throughout this chapter. International standards should be used to the greatest extent possible. Targeted support in terms of journalistic and media practices to be used in public consultation and legal expertise in administering both a TJRC and local justice would be particularly effective in beginning democratic transformation in the South.

The international community, finally, must facilitate and monitor these efforts. Negotiations between North and South will need full international support, and enforcement mechanisms must be prepared in case either party is lagging in implementation. Funding for various initiatives should be provided but contingent upon signs of progress. UNMIS, in particular, should continue its mandate in Southern Sudan, for it provides an existing framework of outreach and security which should support efforts of the GoSS in reaching the community level.

6. REGIONAL ACTORS AND THE NORTH-SOUTH CONFLICT IN SUDAN: ASSESSING THE PAST AND LOOKING FORWARD TO THE REFERENDUM AND BEYOND – SEMIR YUSUF

Introduction

Sharing boundaries with no less than nine countries in that highly volatile and conflict-ridden region in Africa, it might not be difficult to assume that Sudan's acute and long-standing conflict is in one way or another related to the overall regional dynamics of the Horn of Africa, and the specific relationship the former has had with each country in the region. Sudan's "internal" conflict has contributed to the instability of the region as a whole, just as the regional instability has affected Sudan's conflict in no uncertain terms. This makes Sudanese politics an essential element of the broader regional complex.

This regional complex has multiple patterns, each pattern, just as the overall dynamics, is tied up with specific issues of contention and conflict. The prominent issues that define the relationship of Sudanese conflict with the regional dynamics include oil, water, religion, tribal affiliations, and support for cross-border insurgents or opposition movements (ICG, 2002). In the end, it might make significant sense to consider this complex as a "security complex" characterized and sustained by the already-mentioned factors.

Sudan's relationship with regional powers has been crucial--in both affecting and being affected by them--not only ever since independence, but also even before. Since then, the relations have gone through very complex processes and cannot be boiled down to simple linear trends. For one thing, the relationship has differed a lot from country to country. Secondly, the relationship has differed in accordance with the regime in power, both in Sudan and in each of the neighbouring countries. Thirdly, the relationship between Sudan and the regional powers has been affected by outside powers of different kind and number. Finally, this international aspect of regional politics has also waxed and waned across time. Underlying all these patterns have been a number of variables, which have again differed both in temporal and spatial dimensions.

In the following lines, an emphasis will be given to the first two aspects of regional politics vis-à-vis Sudan's North-South conflict, since the international aspect is relegated to the first chapter of this report. An attempt will be made to tackle three questions: 1) What are the past and present trends in Sudan's relations with the region's countries and how have they affected its North-South conflict, and how, in turn, has this conflict affected the security and political dynamics of the region? 2) What have been the problems and opportunities of the peace process as brokered by the most relevant regional organization, the IGAD? 3) What roles should the region's countries play--and why should they do so-- to ensure a peaceful referendum and to help create a stable and interdependent regional complex that includes two new viable states in the post-referendum period? What opportunities do they have to do so?

In order to make the presentation simple, I will try to follow a country- and time-specific discussion of the relationship. The former incorporates both a country by country and regional analysis, while the latter shows how it all played out in three important time-periods: pre-1989, post-1989 till 2000, and from 2000 till the present situation. This is followed by some reflections on how regional countries and a major regional organization can contribute, both in the long- and short- terms, to help bring about not only peaceful and stable transitions in Sudan, but also a sustainable regional interdependence. One final note is in order: although many actors can be subsumed under "regional actors", for the sake of brevity and focus, in this chapter, an exclusive

emphasis will be given to the region's countries and one regional organization, the IGAD.

Pre-1989 Relations: An Overview

Egypt

Egypt's relations with the Sudan goes back to the colonial times, while the latter was subsumed under the Dynasty of Mohammed Ali since the 1820's as well as when Egypt was co-ruling over the latter in the form of the Anglo-Egyptian Condominium between 1899/98 and 1956. The last date could by no means come down as a happy date for Egypt, which had hoped to turn the Condominium into an Egyptian domination. But wide-spread sovereign recognition by big powers went to trump Egyptian aspiration and Sudan got its independence without much difficulty, and was shortly admitted to the UN and the Arab League (O'Ballance, 2000).

Two variables have defined their relationship since independence: The Nile River and Arabism/Islam (Morrison, J. Stephen & Alex de Waal. 2005). Right from the time of the ancient Nile River Civilization to the current era, Egypt has been overwhelmingly dependent on the river for its source of life and development. And Sudan being the most important of the two countries coming in between its major source (Ethiopia) and Egypt, the latter has always seen to it not only that the flow all the way to Egypt is as beneficial to Egypt as possible, but also that the Sudan plays some reasonably pro-Egyptian roles in Egypt's conflict with Ethiopia over the same river. The second major factor (Arab/Islam) manifests itself in rather contradictory forms: on the one hand, it is manifested in Egypt's bid to keep an Arab-dominated Sudan from disintegration, and therefore in its wish to sustain its Arab/Islamic identity. On the other hand, it is also cautious of the radicalization of this same identity, some of whose versions it has fought in its own land for decades.

These Egyptian concerns vis-à-vis the Sudan have been reflected in some treaties the two countries signed. Our issue of concern--the North-South conflict--also manifests itself sharply in the outcomes of the upgrading of Egypt's vision for Sudan into treaties and pacts. The 1982 integration charter is an illustrative case in point. This charter reflected Egypt's bid in protecting its water interests and keeping the unity and territorial integrity of the Sudan. In turn, Sudan's progressive tilt towards its Arabist/Islamist face as manifested both internally by the policies and actions of Nimeiri and externally by the signing of the above-mentioned charter sparked the revival in 1983 of the Southern counter-offensive (Davis, 2008).

Ethiopia

The relation with Ethiopia has waxed and waned not only across regime but also across different periods of the same regime. Ethiopia hosted the famous Addis Ababa agreement of 1972 between the warring parties of the government of Sudan and the Anyanya movement, which improved the relation between the two countries. The relationship was about to deteriorate a little later reaching its climax during the Dergue's period in Ethiopia. The major pattern of conflict was characterized by supporting each other's opposition movements. While Nimeiri armed and hosted radical opposition groups fighting against the Dergue's regime, Mengistu was keen to support the SPLA (and other Northern opposition groups) in many different ways, including providing it with Soviet-made weaponry and fire and allowing it use its land and air as a launching pad for attacks against the Sudanese government (Woodward, 2003).

Uganda

For some significant period of time, Uganda's relation with the Sudan reflected the strains and stresses of the Arab-Israeli conflict. This was very clear when Idi Amin came to power, and started to play the role of a go-between in Israel's attack on the Sudanese government for its alleged espousal of Arab causes (Collins, 2008). The beneficiary was the SPLA which got access to military training as well as supply of arms. The response of the government in Sudan was obvious: supporting the Lord's Resistance Army (LRA) in its high-intensity infighting against the Ugandan regime.

Libya

Libya's role in the Sudanese conflict was the most dynamic and unpredictable of all. Perhaps the most interesting paradox of Libyan ever-changing "patterns" of involvement in the region as a whole is the fact that all of them took place under the same regime in power--that of Qaddhafi. With the dynamic shifts in the international power distribution, the alteration in the regimes in Sudan and Chad, and finally, the change in Libyan interest in the region (an independent variable on its own or otherwise), apart from the special idiosyncrasies of the leader himself, Libyan foreign policy has been played out in astonishingly different modes. The Cold War saw a clash of interests between Libya and the US, which was reflected in the support they gave to the contending parties in the conflict. Libya finally succeeded in getting Nimeiri unseated in 1984 through its proxy, the SPLA, however much the former was helped by the US. Then Libya suddenly shifted its alliance system, and having signed a pact with the government of Sudan, started to step up its opposition to Egypt and Chad. The latter was accomplished through the Darfur region (Davis, 2008; Collins, 2009).

Chad

Chad formed a security complex which tied it, for better or worse, with Sudan, the US, and Libya (as mentioned above), just to name the most relevant state actors. Its regime changes and opposition movements were strongly related to regional politics. In the 1980's, the alliance system looked like this: The government-rebel clash got active input with the support from the US-Sudan coalition for the latter, on the one hand, and by Libya for the Arab groups in the Chad-Libyan border, on the other. It was only after the fall of Nimeiri that Libya changed its relation with Sudan, as already mentioned above. The impact of Chadian influence in the North-South conflict in Sudan began to be politically and militarily significant afterwards and mainly so indirectly through the Darfur, as we will see later in this chapter (Davis, 2008).

This is a brief survey of Sudan's relations with different regional powers till 1989. We can see that among the many factors that had influenced its relations, some had been more conspicuous than others. The most important factor affecting the regional political and security dynamics had been proxy wars, which in turn reflected the violently contested, and therefore unstable, regimes in this part of Africa. No sooner would a country dare to export its internal divisions till it met with the logical fact of getting destabilized more by its outside enemy via its internal Achilles' Heels. This mutual neutralization had also been fuelled by international involvement, which mostly took the form of proxy wars by itself, but at a higher (state-to-state)

level. Thus, with different layers of actor involvement, the regional security dynamics can best be characterized as “multi-layered proxy infighting”.

In its active engagements in all these conflicts, Sudan had both impacted, and been affected by, the regional political and security dynamics. And in both ways, its internal North-South conflict had been at the heart of the problem. This is also true when we consider the other important factor that had been prominent during this time--the Nile-- although its importance was limited to Sudan's relations with relatively fewer countries in the region.

In the next section, we will try to take up the more charged period in Sudan's relations with these countries, i.e., the post-1989 period. This year and the next three or four marked major shifts at all the internal, regional and international levels. Internal to the states, one can mention major regime changes. While Sudan witnessed the coming to power of a newly re-invigorated Islamist-military coalition, Ethiopia got a new brand of recycled "revolutionary democrats" as leaders who had been supported heavily by the Sudanese governments of the time in their struggle against and final overthrow of Mengistu's regime. Regionally, Eritrea was born in 1993 as the new independent state in Africa with its own influential foreign policies and relations in the region. Internationally, the Cold-War came to an end and the US dominance/influence in the former USSR client states was becoming apparent. The discourse and practical manifestations of Islamist tendencies (with its variant names) along with its animosities with the US government was also becoming apparent around the globe, but specifically in the Horn of Africa. These changes no doubt came with profound implications for the region in general and Sudan's role, either as a subject or an object of the relations, in particular.

In the following lines we will try to look at the rise and fall of Sudan's aggressive Islamist agenda vis-à-vis regional politics in the Horn, and the implications these diverging policies have had for the North-South conflict via regional responses. We will begin with a note on the re-Islamization of politics in the Sudan in the post-1989 period, and then move on to its regional implications and responses, to be followed by the aftermath of the fall of the Islamist perceived threat to the regional powers by 2000.

Islamization of Politics in Post-1989 Sudan

In 1989, a coalition of Islamist and military forces came to power in Sudan with profound consequences for both the region and Sudan's internal fault lines. While the Islamization of politics is one major aspect of the regime's internal and external policies, it is hardly tenable to attribute the post-1989 Islamist nature of northern politics solely to the National Islamic Front (NIF). Indeed, the Islamization of politics has much deeper roots. As elsewhere in Muslim frontier lands, according to O'Fahey (1995), Islamization of Sudan is a Sufi phenomenon. The Turko-Egyptian rulers of Sudan (1820-1885) endorsed these Sufi tariqahs. However, the fact remained that apart from the prevalence of Islamic norms in certain individual and social lives, no institutional take-over had taken place in the whole country (except perhaps in the Fung State) (Ibid).

Politicization of tariqahs and institutionalization of law were rather the most important legacies of the British interlude. The latter reflected itself in the creation of institutions for the training of qadis, the formalization and codification of distinctions between state and private-status law and a recognition of the potentiality for a conflict of law. The former, and the more important issue, was reflected in the rehabilitation of Mahdism as an anti-Turkish movement during the First World War (Ibid). To counteract this move, the khatmiyya tariqah led by

Mirghani was promoted by the Sudanese government. This was also magnified during the Second World War when party mobilization in Sudan centred on these two Islamic parties, Britain and Egypt, each allying with the one as against the other. It can therefore be concluded, after Woodward (2003: 19), that, “the centrality of rival Islamic groups to the evolution of Islamic politics was a product of state policies judged necessary not only for reasons of domestic politics but also for Sudan's position in the wider Islamic world”.

Although Islam has for long - as has been alluded to above - remained to be a significant element in Sudanese politics, this was largely confined to mobilization. A significant break appeared with the appearance of the Muslim Brothers in the 1960's. Islam as a political agenda was being promoted with the aim of filling the gap created between grassroots mobilization and secular nationalist policies (O'Fahey, 1995). This unique form of Islamization of northern politics has been explained in two ways: it was, for one thing, the result of the disenchantment with the failure of Western-oriented politicians and intellectuals to provide effective leadership. For another, the Islamist movement in the Sudan can be seen as a derivative of its counterpart in Egypt (Ibid).

Regardless of interpretations (which we are not concerned with here), however, the Sudanese Islamists were only one force within the complex of northern politics until July 1989. Since then, nevertheless, Sudanese Islamists, in conjunction with the military, have grabbed state power and transformed the state and regional politics of Sudan with enormous implications for Sudan's long-standing North-South conflict. This has been dealt with in a number of literatures and need not concern us here.

But by far the most significant heritage--and of sole interest to us here--of the post-1989 government in Sudan was its implications for the regional (and also international, though not important here) political and security configuration. The Islamist government swiftly incurred the wrath of regional and international actors. (True, it gained the support of a few as well.) This was due to either its provocative foreign policy or the perception of threat it posed for some countries. The tradition of tit-for-tat, especially at the regional level, was never, as we have already seen, an unprecedented departure of the NIF-led government. But the level of its intensity and coverage was rightly so immediately after the military/Islamist take-over. The punitive feedbacks for the new government's agenda were so decisive that they nearly brought it down at some point in time. While both the international and regional aspects were responsible for this "outcome", our focus here will be the latter, although we cannot totally neglect the former, especially when it went in conjunction with the latter.

Khartoum against its Neighbours: 1989-2000

Uganda turned out to be the first adversary of Islamist Sudan. After 1990, Museveni took the initiative to destabilise the government in Sudan. Ugandan soldiers advised the SPLA and the Uganda People's Defence Force (UPDF) which, though not committed inside Sudanese territory, was engaged in some hot pursuit operations. But the UPDF's entanglement with sundry constraints and SPLA's split dwindled Uganda's interventionist role. This gave the Sudanese government the opportunity to play its card of reprisal. Among the Muslim organizations in Uganda, Sudan trained and armed the Tablik movement and its offshoot, the Allied Democratic Forces (ADF). Its link to the LRA was much more intimate, though. Commencing its close links with the new Sudanese government in 1994, the LRA heavily relied on the former's support for the following seven years. It was only in 2002 that an agreement between Uganda and Sudan

was reached on the issue of attacking the rebel group via Southern Sudan (Woodward, 2003; de Waal, 2004).

It is a fact as well that Sudan had supported the EPLF at the expense of the Muslim factions in Eritrea from 1990-92. From 1993 onwards, however, it resurrected, as in the pre-1990 period, its assistance to Islamic guerrillas in the Eritrean lowlands, perhaps in reaction to Eritrea's pre-emptive actions along Sudanese borders (Medhane, 1992). Eritrea's response was both military and political. After condemning Khartoum in 1994, it began to engage heavily in training the SPLA, which helped create the New Sudan Brigade, and the guerrillas of the Beja Congress in eastern Sudan. Politically, Eritrea brought together the SPLA and the northern opposition parties (de Waal, 2004), and hosted their meeting (Woodward, 2004) that saw the formation of the National Democratic Alliance (NDA). Cutting off diplomatic alliance with Sudan, Eritrea handed over the Sudanese embassy therein to the new Alliance.

Ethiopia's confrontation with Sudan was even more decisive. It was simply logical to assume that the Ethio-Sudanese relation was but warm during the early 1990's (although Ethiopia was also cautious of the Islamist government and at times even sought to counter-balance it via the SPLA). The driving factors for the severance of relations began with Sudan's increasing forging of ties with numerous guerrilla fighters. These included many Oromo and Ogadeni nationalist movements. But the major turning point in the breakdown of relations came with the assassination attempt of President Hosni Mubarak in 1995. Accusing Khartoum of complicity in the incident, Ethiopia stepped up its military engagement against it. It prevented the defeat of the SPLA in Equatoria in 1995 (jointly with Ugandan and Eritrean forces); it massively trained and fought together with the SPLA in 1996; and it invited the contingents of the Umma Party, Democratic Unionist Party (DUP), and Sudan Alliance Forces (SAF) to open bases in western Ethiopia (de Waal, 2004). It continued with its aggressive policies till it formed a coalition--"frontline states"--in 1996 along with other states to attack the government in Sudan.

Having forged the perception of a common security and political threat, the regional actors strove to coordinate and strengthen their actions ever since 1996. They enlisted Rwanda, which felt threatened (alongside Uganda) by the Sudan-sponsored ADF in Zairian territory, in the coalition of the "frontline states". Backed furthermore by the US, the axis launched its attacks on Sudan so hard that, by 1997, according to de Waal (Ibid), it nearly succeeded in bringing down the Sudanese government.

Sudan was beset with multilateral debacles. After the ADF attack on Uganda (1996), the latter invaded Zaire (where the former was based). Uganda also supported SPLA to launch offensives against the Sudanese government and to cut off the latter from having any access to the Zairian territory. In the meantime, Ethiopia was launching a joint military operation alongside SPLA while Eritrea was actively supporting the NDA in the north in its attack against the government. The military attacks were progressing at a very high rate on multiple fronts. This was having another internal effect: unifying the opposition against the strangled government (O'Ballance, 2000; Collins, 2009; de Waal, 2004). Al-Bashir was forced to make some concessions such as the signing of the Khartoum Agreement which called for self-determination of the south, and returned to the IGAD forum (which he had rejected before in 1994). The frontline states, however, were not satisfied with anything short of bringing down the government and fought persistently until 1998. The latter date came both as a shock for most of the regional and international stakeholders, and a moment of rejoice for Khartoum.

The Ethio-Eritrean war of 1998-2000 was highly significant in transforming the whole political landscape of the Horn. The coalition was disbanded, and the two major countries in it,

Ethiopia and Eritrea, immediately normalized their relations with Khartoum. Meanwhile, a dispute between Al-Bashir and Turabi ended in 1999 the expulsion of the latter from office. By then, moreover, Egypt, in cooperation with Saudi Arabia and the US had ensured the deportation of Osama bin Laden from Sudan. All these meant that Khartoum now gave up its radical missions in the region, and instead started to get its relations normalized. At the same time, the regional powers got a greatly transformed government even if they failed to remove it from power. That came out to be the practically and mutually most sensible compromise between the former contenders.

One final note is in order before closing the discussion on the 1989-2000 regional political scenes in the Horn. This is a highly region-biased discussion of the story, for the international actors that were involved in this war (either in supporting others or in fighting directly) against Khartoum have as well played (minor or major) roles in the final outcome. This forms part of the first chapter of the report. But the role of the US needs to be emphasized here once again. While the US had a direct interventionist role in the fight against Khartoum, the indirect one is more worth underlining here. The latter involved supporting the frontline states in their effort to counteract the Sudanese threat, and their attempts to find a solution to the Sudanese conflict through IGAD. This US interest in the region has been explained in different ways ranging from the sense of guilt from the Rwandan genocide and Ethiopian famine (1984), to the concern with the escalation of regional instability in the Horn and the grudge against Islamist Sudan (de Waal, 2004). Whatever the reason (s), though, the US continued its military supplies to the frontline states till the outbreak of the Ethio-Eritrean war.

2000-Present Relations

As always, Egypt's has been a cautious involvement in Sudan on the side of Khartoum (as we have already seen above). But since the estrangement of their relationship in the 1995 attempt at Hosni Mubarak's life, Egypt's direct role in the North-South conflict has relatively declined, or at best it has been used more by Khartoum itself to support its war efforts against the SPLA (ICG, 2002). This can be illustrated, for instance, in the signing of the Machakos Protocol in 2003 between Khartoum and SPLA in Kenya without the involvement of Egypt. But the cultural affinity and the Nile have still not allowed the emergence of disinterestedness in Sudanese politics on the part of Egypt. This can be seen in its growing efforts to insert itself as a mediator in the Darfur and Northern politics of the Sudan. The most important factor that shapes Egypt's relation with Sudan now, as ever before, is the Nile water. This spurs it to see the South's independence as a threat to its water interests, especially if the former takes place before the issue of water sharing is resolved in a negotiation that includes Egypt.

Again more on the side of Khartoum than against it comes Libya's role. Ever since the fall of Nimeiri (as already mentioned elsewhere), it has worked to improve its relations with Khartoum, especially after the coming to power of Al-Bashir, and it has continued to do so till the present time. Qaddafi's quest for improving his image as a regional peace-maker (part of his agenda as a continental one) has been crucial in this respect. Apart from Libya's efforts apparently to bring peace to the Darfur region, it has worked jointly with Egypt to promote a peace initiative "whose main characteristic was the lack of any promise of self-determination for South Sudan" (Rogier, 2005: 22). Libya still remains opposed to South Sudan's quest for independence.

Perhaps the only non-Arab country in the region tilting slightly towards Khartoum (but

with a lot of caution and also working closely with the SPLA/M at the same time) has been Ethiopia since 2000. The relationship can be characterized as mutually beneficial as well. The two countries have been involved in a multi sectoral cooperation which includes:

"joint infrastructure development, trade, water resource development, transport and communication, industry, investment etc. There are several mechanisms of cooperation that exist between the two countries which include Joint Ministerial Commission, Joint Political Committee and Joint Border Development Commission" (MFAE, 2009).

Possibly the most paradoxical aspect of Ethiopia's relation with its larger neighbour is that it has managed to deal with both the South Sudan and Khartoum without significantly incurring the anger of anyone of them. Ethiopia's relations with South Sudan have been good to say the least. Since June 2008,

"Ethiopia and south Sudan signed a series of agreements to develop joint projects in their neighbouring states where tribes like Nuer and Anyuak are present on both sides of the border, in order to promote peaceful neighbourhood. The two governments also signed a number of economic agreements related to housing projects, fluvial transportation, aerial flights between Juba and Addis Ababa and this year the State-owned Commercial Bank of Ethiopia opened a branch in Juba" (Sudan Tribune, May, 2009).

Interestingly, this relationship has angered Eritrea before Khartoum. President Afeworki has disclosed his frustration with Ethiopia's growing role in South Sudan and his belief that "the Southern Sudanese elite - the academics, politicians and businessmen-have chosen Ethiopia over Eritrea as a better guarantor of their national and economic security and that this view is, at least for now, influencing Sudan at large." (Ibid).

It seems that the current position of Ethiopia on the South's independence is positive. It might see it as a countervailing force against any unfriendly regime that might take power in Khartoum (Davis, 2008). Two of the most important concerns Ethiopia has about Khartoum are: the coming to power of militant Islamism and the falling of Sudan's autonomy in Egypt's sphere of influence. The latter might further endanger Ethiopia's access to the Nile.

Although enjoying a relatively normalized relationship with Khartoum, we have some countries in the region which tend to tilt more or less towards the other side of the spectrum. Uganda and Eritrea come down to this side. Eritrea has been constantly accused of supporting not only the SPLM/A, but also the opposition groups in Darfur (Hennig, n.d.). In turn, many Eritrean dissidents are housed in Sudan and Eritrea accused Sudan of training Eritreans wishing to fight the regime of non-elected President Issayas Afewerki. With the mounting accusations and counter-accusations, the two neighbours have closed their borders.

The Ugandan-Sudanese relations seems to be faring better since 2002 with the reestablishment of diplomatic ties and the signing of a protocol permitting the UPDF to enter southern Sudan and engage the LRA (see above). A formal cessation of hostilities between the LRA and the SPLM/A was also negotiated in 2006 (ICG, 2006). Moreover, the SPLA "seems to be resolute in not allowing the LRA to operate from South Sudan, and its administration of the region may hamper the Sudanese government's ability to supply the group" (Rogier, 2005: 22). Therefore, even if there might exist the will, there seems to be an increasing lack of capacity on the part of Khartoum to destabilize Uganda through the LRA. Uganda seems to be in possession

of a greater card to play against Khartoum at this point in time, if ever the need arises.

Chad undoubtedly falls into this category as well. It has been engaged in a proxy war with Sudan, given that armed militias in both countries have undertaken reciprocal invasions. Chad is effectively supporting the Darfur-based militia, the Justice and Equality Movement (JEM), which has been reluctant to re-engage in dialogue with Khartoum until very recent times. "In riposte", writes Helly, 2010: 54

JEM and GoSS officials have echoed N'djamena's position 'that arms and ammunition continue to be actively supplied by the Sudan Air Force (SAF) to government-supported militia in Darfur; to Chadian opposition rebels in eastern Darfur and western Chad; and to armed groups operating in Southern Sudan, including the Lord's Resistance Army and groups in Jonglei and Upper Nile states. In effect, Idriss Deby's political influence on Khartoum is non-existent, but his convergent views with the GoSS suggest that there is an open line of communication with Juba.

Kenya is seen by many as coming in between the above two groups of states. True, Kenya has seen itself as a beneficiary of the flow of funding from Western sources for the relief assistance it provides in its territory for the victims of the Sudanese conflict (Ibid). And its sympathy for the SPLA has never been a secret, either. However, Kenya's support for the organization has never been military in nature. It has also managed to keep cordial relations with Khartoum for long (Ibid). Because of the trust it has enjoyed among the contenders in Sudan, it has managed to lead and host several peace initiatives since 2001, when Lt. General Sumbeiywo was assigned as chief negotiator. From then on, "the Kenyan government has", according to Rogier (2005: 23), "gradually taken the lead of the IGAD peace initiatives and overshadowed the other state members".

All of the major agreements between Khartoum and the SPLM were signed in Kenya. These have been The Machakos Protocol (or Chapter I), (Agreement on broad principles of government and governance, signed in July 20, 2002); The Protocol on Power Sharing (or Chapter II, signed in on May 26, 2004); The Agreement on Wealth Sharing (or Chapter III, signed on January 7, 2004); The Protocol on the Resolution of the Conflict in Abyei Area (or Chapter IV, signed on May 26, 2004); The Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States (or Chapter V, signed on May 26, 2004); The Agreement on Security Arrangements (or Chapter VI, signed on September 25, 2003); The Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices (or Annexure I, signed on October 30, 2004); The Implementation Modalities and Global Implementation Matrix and Appendices (or Annexure II, signed on December 31, 2004); and the final comprehensive agreement (CPA) which was signed on January 9, 2005.

As we have seen so far, the normalization of Sudan's relation with its neighbours has not meant the cessation of all hostilities and conflicts. The majority of the countries surrounding Sudan have more or less aligned themselves in support of either party in the Sudanese conflict. And the logical outcome of this has been not only the failure of serious regional pressure for peaceful and cooperative engagement between the South and the North, but also the continuation of regional instability. The latter, in other words, means that the age-old tit-for-tat in the region has not been totally outlived yet. With the proliferation of opposition movements fighting against

the state/regime in power in each of these counties as a result of the (perceived) absence of good governance and democracy; the prevalence of poverty and uneven distribution of national wealth; and with the increasing international and transnational material or otherwise support for promoting minority and human rights, each country has continued to host its own Achilles' heels. But its adverse impact on the Sudanese peace process, along with other factors, has been quite immense as well. It is to this particular topic that we now shift our focus. Specifically, we will try to briefly get a general picture of the peace process and its challenges as reflected through the efforts of the IGAD since 1992.

IGAD: Peace Process and Challenges

Initially formed (in 1986) with the intention of battling widespread famine, ecological degradation and economic hardship in the Horn of Africa region, the Intergovernmental Authority on Drought and Development (IGADD) soon widened its mandate becoming a vehicle for regional security and political dialogue. Its major focus in its latter aim was Somalia. However, when the regional effort was overshadowed by the intervention of the US/UN into Somali affairs, the IGADD moved its focus on the peace effort in Sudan (El-Effendi, 2001). In 1994 the efforts of the IGADD were boosted by the "friends of IGADD" which was a coalition of some Western countries intent to help its peace initiatives. 1996 saw its further reinvigoration with the revision of its charter, and its name changed to IGAD, the Intergovernmental Authority on Development.

The peace initiative of mediating the North and South Sudan was formally adopted in 1993, overseen by a "Peace Committee" consisting of state leaders of some neighbouring countries. After four rounds of talks in 1994 which nearly succeeded in a signing of treaties, Khartoum's accusation of SPLA's looting relief barges brought the parties to a deadlock and ultimate failure. The deadlock lasted for three years when the regional states were caught up in a battle against Khartoum as we have already seen. At the point of the gun, Al-Bashir resumed the talks in 1997 which again ended up in wranglings over interpretations of the Declaration of Principles (DoP).

The fate of the several meetings in 1998, 1999 and 2000 wasn't different either. The wranglings in each of these times were either over who should take responsibility for the breaking out of hostilities or over DoP interpretations or over perceived rigidity of negotiators, or any combination of these (El-Effendi, 2001; ISS, 2004). Since 2001, though, a chain of numerous treaties (see above) have relatively succeeded, and the possibility of the most recent one, the CPA, also points to a remarkable achievement at least in officially bringing the violent conflicts of the past to an end.

We need to take stock of the successive past failures and current weaknesses as well, however. El-Effendi has outlined the major factors that led to repeated failure of peace negotiations under IGAD. First, the major "mediators" in the North-South conflict since the 1990s have been those countries at least slightly in favour of SPLA at the expense of Khartoum, which made them untrustworthy in the eyes of the latter. More recently, the problem has been one of one group of countries supporting one side and another supporting the other, as we saw above. Secondly, there was a lack of coordination of action between, on the one hand, international powers which were looking for more direct involvement in the peace initiatives (which they couldn't get), and, on the other, regional ones which were expecting too much from the former.

Thirdly, we can notice the lack of party discipline among some negotiators whose unpredictability was being manifested in the changing of their minds and party affiliations every now and then. Fourthly, there was an absence of a "mutually hurting stalemate" whereby both the parties to the conflict would feel obliged to solve their problems immediately or face the grave consequences of their failure. Fifthly, the regional mediators have not been seen as sincere brokers of peace as they have had their own unresolved identity-based conflicts in their own states. Without being keen to solve their own problems, so was it thought, why should they come in to broker peace between us unless it is for their own selfish political motives? Finally, some countries have been so occupied in their own internal problems of security or otherwise that they could not give the necessary attention the Sudanese conflict deserves if at all it can be resolved. All these factors have played important roles in the repeated failures of the peace process mainly under the auspices of the IGAD.

In the post-2000 period, according to the ISS report (2004), the initiatives of the IGAD have born significant fruits because of two major factors. First, the initiatives showed significant progress in identifying the key issues at the core of the conflict with clarity. But even more important was the increasing role of some international actors in pressurizing the parties to engage in serious negotiations followed by credible implementations of their agreements. The US's role has been very significant in this regards. The changing post-9/11 international alignment of political forces and security issues spurred the US government to focus more on the Horn of Africa and in Sudan in particular than immediately before by way of ensuring stability in the region as part of its mission of combating "terrorism". The post-2000 story of relative success in the IGAD peace initiatives points to the need for a strong and sustained pressure upon the conflicting parties to help bring relatively successful mediations and negotiations.

But it also, again, points to the disadvantages of antagonizing one party at the expense of the other. US's lop-sided pressure on the Sudanese contenders has at best led more to hypocrisy than tangible transformations in the process of the implementation of the peace treaties. The government in Sudan, itself at odds with the strategic interests of the US in the Horn, has always tried to capitalize on and fuel up the wide-spread popular suspicion of the US's agenda in the region to help it shirk away from its responsibilities. This has in turn led to the increasing frustration among the Southern elites and people with regards to the significance of the peace processes on the ground. Although this seems to be the case with all of them, it can be seen most lucidly in the very precarious status of the otherwise much-awaited and most acclaimed peace agreement, the CPA (see, for instance, Thomas, 2009).

Looking Forward to the Referendum and Beyond: The Role of Regional Actors

Some countries in the region may see some advantage in weak and perhaps conflict-ridden Sudan. It might be plausible to argue that a weaker Sudan can be easier to negotiate and trade effectively with (with the idea of maximizing one's interests), as well as one that is incapable of supporting oppositions and exporting Islamist tendencies to neighbouring countries. Incidentally, this is not just a hypothetical line of thinking, but one that some countries in the region have based their relations with Sudan on. It is, however, high time to recognize that this line of reasoning is at least not as satisfactory as its opposite might be--both in the short- and long-term.

In the short-term, an unstable Sudan poses threats due to porous borders and refugees (Davis, 2005). These threats have their own massive military and human security implications

for the region. Furthermore, it seems more plausible to help establish sustainable “just peace” in Sudan (or in the two Sudans and in their relationship) in order to render it innocuous to the countries of the region than to either wish for it all the worst or, still worse, to fight the old game of proxy wars for an indefinite period of time. If democracy and a fair level of representation at the centre and a fair resource distribution is achieved in Sudan (s), the neighbouring countries will not have to live in a constant fear that might come from it, as Sudan will neither have any reason to support opposition movements in, nor can it have the capacity to export radical ideologies to, other countries.

Finally, an economically viable Sudan (or the two new states) can be a dependable economic partner either for regional integration or for bilateral interdependence. The benefits of water, electricity and oil resources can best be shared by regional countries when a modicum of stability and state viability is established in the region as a whole but particularly in Sudan. As a result, it is high time for Sudan's neighbours to work actively, in conjunction with the AU and the international community, towards peace and stability in Sudan both in the period until 2011 and beyond, regardless of the referendum's outcome.

To this end, the region's countries should have short-, medium- and long-term goals behind all their constructive engagements regarding the Sudan. The most important short-term goal should be ensuring that a smooth referendum takes place in 2011. Then we have the most important medium-term goal of ensuring that a smooth secession takes place, in the case that that is the result of the referendum (as it most likely seems to be). The most important long-term goals include giving a helping hand to ensure that two viable states come out in the future and the forging of a cooperative and interdependent regional integration that includes both. But all these goals have lots of paraphernalia that go along with them and also require massive preparations that need to be worked on well ahead of their fixed/expected time. Therefore, all the tasks should not be performed in a sequential, but sometimes in conjunction and in an overlapping, manner. In fact, some of the recommendations for one of the goals can apply for the other (s) as well, and, therefore, should be coordinated accordingly.

The following recommendations for regional actors will focus on both the form and content of their possible roles. From now until 2011, the most crucial role they can play is in the area of facilitating peace talks between the SPLM and the National Congress Party (NCP). There are still a number of unresolved, but very critical, issues in the hither-to signed treaties. The two sides have yet to settle the issues of citizenship, public service, status of the Joint Integrated Units, agreements and international covenants, oil concessions and production, land ownership, water, transport, telecommunication, remittances, currency and debt. These issues are all related to the post-referendum scenario, but given that secession is a very likely scenario and that it would be too late to postpone their negotiation to a later date, they should be resolved now (until the referendum). In order for an effective mediation to take place, there are a number of lessons that can be drawn from the past. These include:

- 1) Peace talks can barely succeed with active spoilers in the region. Whatever group they are aligned with against another, spoilers have had negative effects in emboldening the supported group against its contender and frustrating the creation of a "mutually hurting" stalemate. Both the SPLM and the NCP should be pressurized enough to make them strongly feel, on the one hand, that there is an emerging consensus among all influential powers that their peaceful and successful peace talks and compromises are essential. On the other hand, neither of the parties should also get the feeling that in heading towards compromises, it is not falling prey to the destructive motives of a neighbouring country that operates behind its Sudanese contender. All

this requires the ending of the old game of pitting one party off against the other. If normalization and intimacy of relationship is not possible at this stage, regional countries should not antagonize any of the parties and support the other, at the very minimum.

2) Regional organizations should be revamped and redress their problems and should be actively utilized as platforms for mediation. Multilateral engagement is a necessary condition for launching a successful and peaceful referendum and for entering a new peaceful phase in the post referendum period. It is an age-old wisdom that multilateral institutions help a lot in lowering transaction costs, making pledges more credible, facilitating cooperation and making it easier, and so on. To this effect, the IGAD should play a prominent role with the equal participation of all its members. It should be overhauled and strengthened. It should also be supported actively by the AU, western powers, inter-governmental organizations and international NGO's. All these multi-level involvements should be coordinated through a prior assignment of agreed-upon specific roles for each one of these actors. No side talks, or competing forums or negotiations should take place. All negotiations and mediations should take place at specified dates and places with the full knowledge and agreement of all the stakeholders. "Strong" mediators should be selected on the basis of mutual agreement by the parties. Mediators should get the full support of all the regional and international powers for helping them put strong pressures on the parties as well as keeping any potential spoilers away. The selection of Mbeki in 2009 is one step forward but needs an all-rounded support as just indicated.

There are some points to work on with respect to the coming elections³⁰² as well:

1) There are some dilemmas regarding the role of Darfuris in the coming elections that would affect the timing of elections. There has been a suggestion to delay the elections till negotiations take due course and till Darfuris get ready enough to participate in the elections (Helly, 2010). However, the decision to delay the elections may have negative consequences if done unilaterally by the NCP. That would increase frustration among the Southerners, and if at all the SPLM does not seem to take it seriously, it might turn out to be a sign of putting more weight on its bid for secession by any means.

Therefore, the regional powers/IGAD should work on clearing any pretext that might endanger the timing of the election. Most importantly, they should not neglect the need for stability and infrastructural progress in the Darfur region that might enable Darfuris to take part in the coming election. The most recent apparently successful progress in peace talks between JEM and NCP in Ndjamena are constructive in this regards, and should be followed up and supplemented by more treaties and implementations of the same. The AU's role in this regard, though commendable, should be reinvigorated.

2) A free and fair election is crucial not only for Sudan, but also for the region as a whole. For instance, it is a very effective check on proxy wars. Neither any of the Sudanese parties nor the neighbouring countries will have any good reason to get involved in these activities as long as a free and fair election brings about an all-inclusive and representative government in Sudan. Although there might not be much that the neighbouring countries can do in terms of ensuring free and fair elections (much is expected from Western countries in this respect), they can play crucial roles in desisting from any kind of negative involvement by way of supporting or antagonizing any party in the election. The AU can take part in monitoring elections (along with international monitors) and in providing any necessary security help to

³⁰² Most of this chapter had been written before the elections took place, and hence these recommendations about them are apparently already dated in terms of their direct contextual significance. But I haven't seen it wise to expunge them in the final version of the paper. After all, I believe they have some instructive implication for our general concern here (the role of regional actors), apart from my preference to keep them for the record.

ensure a peaceful election and post-election periods.

Unfortunately, the most recent news coming out from Sudan about the challenges to holding a free and fair election and on its fixed time is a bit disturbing. The most recent decision of the SPLM and the Northern opposition parties to boycott the coming election, if pursued persistently, would mean that the old exclusive political establishment would remain in power, but in a more divided and acute political environment. The antipathy between the SPLM and the NCP seems to be growing now more than ever before since the signing of the CPA, and might continue to worsen if a minority government gets stuck to power in the post-election period. Although the relationship between the SPLM and the northern opposition parties is getting warmer, the very intransigence of the NCP might very well endanger the staging of a peaceful referendum when the time comes. The countries of the region, the IGAD and the AU should work closely to mediate between the contending parties and help the realization of all-inclusive elections, preferably on time.

In the short, medium and long term, monitoring the security of the pre- and post-referendum Sudan(s) is another essential aspect of the role of the countries of the region. At the level of peace-keeping, what some countries of the region (Kenya, Egypt, Uganda, and Ethiopia, apart from some other African countries) are doing through the UNMIS (United Nations Mission in the Sudan) is estimable. This Mission, working in conjunction with the AU, has been active since 2005, and seems to have been well-intentioned to perform certain functions relating to humanitarian assistance, and the protection and promotion of human rights. Although its tasks are supposedly as varied as "providing good offices and political support to the parties, monitor and verify their security arrangements and offer assistance in a number of areas, including governance, recovery and development" (UNMIS, 2010), its most significant contribution in the future should be to help ensure the peaceful conduct of the referendum and post-referendum developments.

In this regard, some criticisms have been raised about its limited scope in monitoring the implementation of the CPA, and hence its ill-equipped and ill-disposed efforts at ensuring the security of citizens (Weir and Vanessa, 2009). "Given the heightened risk of violence", Weir and Vanessa (Ibid) recommend,

the UN Secretariat must insist that UNMIS concentrate on proactive measures to prevent conflict and protect civilians. The mission must develop a more comprehensive and inclusive protection planning mechanism. Finally, the Department of Peacekeeping Operations must establish clear rules of engagement to empower UNMIS troops".

While its roles with respect to the peaceful conduct of the referendum have already been endorsed, its significance in the post-referendum period should not be taken less seriously as well. In the wake of the creation of two new independent entities, the international borders in between, as well as the internal political dynamics of each state (especially South Sudan) should be closely monitored for security reasons. This should continue till it appears apparently clear to the relevant international and regional actors that the inter-state as well as the intra-state peace has been "consolidated" and any flaring up of uncontrollable violence is unlikely in the foreseeable future. Needless to say, the impartiality of its tasks is absolutely indispensable here as well, as already mentioned above.

In the long-term, the countries of the region need to work together to create a more

integrated, interdependent and cooperative complex. This should hold true regardless of the outcome of the referendum. But since the most likely outcome of it, as suggested by sundry forecasts, is the emergence of an independent South Sudan, they need to think of the region's future more along the following lines. In the wake of the division of Sudan into two, the most important task of the region's countries will be striving to contribute something a) to the creation of two viable states, and b) to the development of more interdependent stable regional dynamics. To this end,

1) Although viability and stability is something both the North and the South should be concerned with, the latter should be given much more attention as it starts almost from scratch. As Helly (2010: 62) argues:

the South...does not seem to be ready for independence. There are serious concerns about the viability of the state. The SPLM/A has not yet transformed into a political party and politics is still highly militarised in South Sudan. Furthermore, many intra-South disputes remain unresolved and ethnic violence could take a major toll. Finally, the South will remain severely dependent on international aid.

The region's countries can get involved in a number of mutually beneficial economic and trade relationships with South Sudan. They can also contribute to the development of South Sudan's infrastructural and human capacity-building. Ethiopia's lead in this regards is commendable. In 2008, Ethiopia and South Sudan agreed to promote road, river and air transport between them. The Ethiopian government also agreed to allocate 50% of its cement production for export to Southern Sudan, which, according to Minister Marial, will significantly drop cement prices in the region. They also agreed to establish technical committees to evaluate and monitor the agreements (Dak, 2008). Such bilateral economic ties should be considered by other countries as well.

Moreover, the region's countries should facilitate and mediate South-South dialogue. This should be given ample emphasis as it will have significant security and economic implications for the whole region.

2) There are many untapped potential resources for establishing a more interdependent and cooperative regional system. One area that should be seriously considered and worked on is water resources. Tensions over the Nile were muted in the past because of Egypt's military dominance, civil wars in Sudan and Ethiopia and the negligible use of the river by other riparian states. That is no more the case now. With the increasing failure of rainfall that contributes not only to famines and chronic hunger, but also to the onset of violence when people clash over scarce food and water in the arid and semi-arid regions, most of the upstream riparian states have now challenged the old way of sharing the Nile water that disproportionately favoured Egypt (Tesfaye, 2006). This is likely to continue.

But specifically looking at the case of Sudan as well, the emergence of South Sudan as a new state necessitates serious negotiations on how to share this resource. Moreover, in order to make the negotiation (and its outcome) over economic resources between the North and the South fruitful and mutually beneficial, Sudan should follow the path of economic diversification, rather than remaining overwhelmingly dependant on oil production. Obviously, water resources play an ominous role in this regard. But finally, and most comprehensively and proactively, water resources can be utilized wisely in ways that bring interdependence and cooperation in the

wider region that includes all the riparian states.

Many proposals and projects have been suggested at different times on how to tap the Nile water regionally on a win-win basis. I do not wish to traverse into all those suggestions. I would rather focus on the most comprehensive and most recent initiative, the Nile Basin Initiative. Established in 2001 by the Council of Ministers of Water Affairs of the Nile Basin Trust Fund, it has ever since aspired to implement the grand Shared Vision Plan as well as other projects. The Shared Vision Program is a phase of the NBI Strategic Action Program designed to help realize the shared vision of the Nile Basin countries: harnessing the resources of the river to create a better life for the 300 million people who depend on it (Tesfaye, 2006). Some of the projects have already started to be implemented, while most remain either un-implemented or at a very rudimentary stage. Tesfaye has summarized the major projects it includes:

THE NILE BASIN INITIATIVE: BASIN-WIDE SHARED VISION PROGRAM

Project	Objectives
1. Nile Trans-boundary Environmental Action	Works to promote cooperation among countries in protecting and management of the Nile River eco-system. The project provides training to develop skills in government ministries, NGOs, and local communities in areas such as: water quality, conservation of wetlands. The regional project management unit is located in Khartoum, Sudan.
2. Nile Basin Regional Power Trade	is working to establish the regional power markets among the Nile Basin countries. It began in Sept. 2005. It is located in Dar es Salaam, Tanzania.
3. The Water for Agriculture production	is working to provide sound good conceptual and analytical basis to increase the availability and efficient use of water for agricultural production. This project began in July 2005, and is located is located in Nairobi, Kenya.
4. Water Resources and Planning and Management	is designed to build the skills in each country to analyze the hydrology and nature of the Nile Basin River System essential in the management, development and protection of such resource. The project is located in Addis Ababa, Ethiopia.
5 .The Socio-Economic Development and Benefit Sharing Project	is building a network of experts from economic planning, research institutions, and representatives from civic groups and NGOs from the basin to explore alternative Nile development scenarios and benefit sharing schemes. This project is co-located with the NBI in Entebbe, Uganda.
6. The Confidence-Building and Stakeholder Involvement Project	is working to increase the involvement of stakeholders from government, business, civil society to build public awareness of the NBI programs and future investments. This project began in August 2005 and is co-located with the Nile Basin Secretariat in Entebbe, Uganda.
7. The Applied Training Project	is working to improve water planning and management in the basin by assisting development of human resources/institutional capacity: water resource planning/management; strengthening Nile Basin higher educational/research and to integrate water resources management.

	This project began in January 2005 and is located in Cairo, Egypt.
8. The SVP Execution and Coordination Project.	is strengthening the capacity of NBI institutions to carry out basin wide programs and effective oversight of SVP The three-year project began in March 2004. The regional management project is co-located with the Nile Basin Initiative Secretariat in Entebbe, Uganda.

Most of the projects are at an elementary stage and still ongoing, which makes it difficult to evaluate their success or failure. But one encouraging dimension is the wider welcoming feedback the initiative has received thus far from different international organizations and Western countries, which also have pledged to fund it or have already done so. The major obstacle that needs to be tackled at this point in time and in the coming years is the competitive perception of national interest and the obstinacy that it gives rise to in terms of striking mutually beneficial deals. Although this might betray some circularity, some form of reconstruction of the national interest based on a cooperative framework is necessary to make the further interdependence work. One might not find this very difficult to achieve as the very promising grand plans of the NBI seem to benefit all at least in the long-run.

Conclusion

It is not very clear where South Sudan is heading, but there are four scenarios that are usually forwarded by close observers: unilateral and, therefore violent, secession by the South; secession by agreement, and therefore peaceful separation; voluntary unity; and forced, and therefore violent, unity. Although arguments can be made in favour of the likelihood of each one of these scenarios (see Lijn, 2009; Schwartz, 2009), it is very unlikely that the last two might occur because of several reasons we are not concerned with here. The most likely outcomes will be secession, violent or peaceful. Regardless of the outcomes, though, regional countries can benefit a lot in helping Sudan achieve a peaceful referendum and in effectively implementing its result. Seen especially in the long-term, neither the contending parties, nor the regional powers, can benefit from the long-tested support of one actor against the other. On the one hand, that such a measure can lead to the further intensification, multiplication, and complication of the North-South conflict and regional instability has been proven repeatedly--almost every time it has been tried.

On the other hand, it can also be surmised, based on the available empirical and logical evidences, that both the Sudan and its neighbouring countries can get a lot of advantage from regional integration and interdependence through resource sharing and exchange as well as from the creation of a collective security framework for monitoring the peace and stability of the region as a whole. Therefore, it can be deduced that the roles that the regional actors should play are as "passive" (desisting from spoiling the peace or exacerbating the conflict) as they are "active" (turning the past and present problems into opportunities for Sudanese and regional peace and stability). Regional actors should not just be passive well-wishers but also proactive peace-builders.

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