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Statelessness and Mass Expulsion in Sudan: A Reassessment of the International Law

Mike Sanderson*

I. INTRODUCTION: “RENATIONALIZATION” AND THE RESULTING THREATS OF MASS EXPULSION AND STATELESSNESS

¶1 Following the secession of South Sudan¹ from Sudan on July 9, 2011, both South Sudan and Sudan have passed new citizenship laws with dramatic effects for the rights of individuals on both sides of the new border. While in Sudan this consists of a series of amendments to the 1994 Sudanese Nationality Act,² the new South Sudan government has promulgated an entirely new Nationality Act.³ I have recently published an extended analysis of the resulting legal regime that describes its key features in some detail.⁴ This paper builds on that initial analysis through an examination of the key resulting protection threats for those South Sudanese remaining in Sudan and, in particular, resulting *de jure* and *de facto* statelessness and the threat of mass expulsion. As such, this article is intended to serve as something of a companion piece to my earlier paper. While that paper examined the operation of the post-secession nationality regime in detail, this article explains the resources available at public international law to address the key failures of that regime.

¶2 I begin in Section 2 of this paper with a discussion of denationalization following state succession with particular reference to the case of Sudan and South Sudan. Put broadly, individuals with ethnic and familial affinities to South Sudan acquire the citizenship of South Sudan⁵ *ex lege* while, in parallel, the Sudanese law operates to denationalize individuals who acquire (“*de jure* or *de facto*”) the citizenship of South Sudan.⁶ The combined effect of both laws is to “renationalize” individuals with ethnic and familial affinities with South Sudan to South Sudanese nationality. It is not uncommon to denationalize someone following his or her voluntary acquisition or

⁵ LLB (SOAS), BCL, MPhil (Oxon.), MSc (LSHTM), Barrister (England and Wales), Lecturer, School of Law, University of Exeter (m.a.sanderson@exeter.ac.uk). I have previously served as legal consultant to UNHCR Sudan. The present paper is written in my personal capacity and does not necessarily reflect the views of UNHCR.

¹ The Republic of Sudan and the Republic of South Sudan will be referred to as Sudan and South Sudan, respectively, throughout this paper. When Sudanese is used alone (to refer to either the expressions of the state or its citizens) this will always refer to the Republic of Sudan. Similarly, South Sudanese will always refer to the Republic of South Sudan.

² Sudanese Nationality Act (1994) (Sudan).

³ The Nationality Act (2011) (S. Sudan).

⁴ Mike Sanderson, *The Post-Secession Nationality Regimes in Sudan and South Sudan*, 27 J. OF IMMIGRATION, NATIONALITY AND ASYLUM L. 204 (2013).

⁵ The Nationality Act, *supra* note 3, art. 8.

⁶ Sudanese Nationality Act, *supra*, note 2, art. 10(2).

retention of a foreign nationality.⁷ However, it is very unusual to denationalize someone following his or her *involuntary* acquisition of a foreign nationality.⁸ There is, nevertheless, significant state practice in support of this policy in the particular context of state succession.⁹

¶3 Where control over territory passes to a new sovereign and individuals would otherwise be left either uncertain as to their nationality or without the nationality of their (new) state, it makes good administrative sense to introduce a process by which nationality is clearly and quickly allocated among the succeeding states. In these circumstances, citizenship is typically allocated in accordance with the state of “habitual residence.” This serves to efficiently reconcile the citizenship of the individual to the state of their actual residence. In doing so, it preserves an “effective link” between the individual and their state and facilitates good national protection.

¶4 However, and at variance with common international practice, the citizenship of South Sudan is determined on the basis of a complex of ethnic and familial affinities¹⁰ unrelated to actual residence in the territory of South Sudan. As a result, and despite the process of renationalization as implemented by this new regime, there is no necessary or resulting correlation between South Sudanese citizenship and actual residence in South Sudan. A significant class of individuals habitually resident in Sudan, but with ethnic or familial connections with the South, will acquire the citizenship of South Sudan rather than their country of actual residence (i.e., Sudan). This class is, in effect, “displaced” by operation of law as they are now outside their country of citizenship. Individuals left outside their country of nationality by operation of the new citizenship regime are left in a position of extreme vulnerability at risk of both *de jure* and *de facto* statelessness and arbitrary and/or mass expulsion. I identify these as the key legal protection threats for South Sudanese nationals in Sudan.

¶5 In section 3 I discuss the causes of *de jure* and *de facto* statelessness in the Sudanese and South Sudanese nationality regimes in greater detail. Individuals denationalized on the basis of a *prima facie* affinity to the class of South Sudanese citizens (as defined in the new South Sudanese law) may struggle to establish any

⁷ Special Rapporteur on the Expulsion of Aliens, *Fourth Rep. on the Expulsion of Aliens*, Int’l Law Comm’n, ¶ 27, U.N. Doc. A/CN.4/594 (Mar. 24, 2008) (by Maurice Kamto).

⁸ *Id.*; see also BRONWEN MANBY, *CITIZENSHIP LAW IN AFRICA: A COMPARATIVE STUDY* 84 (2010), <http://www2.ohchr.org/english/issues/women/docs/OtherEntities/OSJI%20CitizenshipAfricaStudy.pdf>. Kamto suggests a useful distinction between “loss of nationality” (“the consequence of an individual’s voluntary act”) and “denationalization” (“a State decision of a collective or individual nature”). While I have not chosen to adopt Kamto’s usage and use these terms synonymously throughout this paper, Kamto’s usage of these terms points to legally significant distinctions not immediately evident in the more common and homogenous use of these terms.

⁹ Special Rapporteur on Nationality, Including Statelessness, *Rep. on Nationality, Including Statelessness*, Int’l L. Comm’n 3, 10, 11-12, U.N. Doc. A/CN.4/50/1952 (1952) (by Manley O. Hudson) (Germany undertakes to recognize any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalisation laws or under treaty stipulations, and “to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin.”) (quoting Treaty of Versailles, art. 278, June 28, 1919). Paul Weis refers to the process of the “automatic loss of nationality upon acquisition of another nationality . . . by operation of law” as “substitution.” PAUL WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 116 (Sijthoff et al. eds., 2d ed. 1979).

¹⁰ Sanderson *supra* note 4 at 209-216.

subsequent claim to South Sudanese citizenship and so be left as *de jure* stateless. Both laws operate *ex lege* and in advance of any formal determination by the state. The operation of the Sudanese denationalization provisions is, according to the terms of the Sudanese law, contingent on prior acquisition of South Sudanese citizenship.

Denationalization from Sudanese citizenship only occurs upon acquisition of South Sudanese citizenship. At first blush this appears to exclude the possibility of *de jure* statelessness. However, while any determination with respect to such acquisition will be made in accordance with the acquisition criteria as set out in the South Sudanese law, the Sudanese law does not require a prior determination as to acquisition by the South Sudanese state itself. Rather, this is something to be determined by Sudan in parallel with any later determinations made by South Sudan with respect to the same issue. While both countries are tasked with determining acquisition of South Sudanese nationality they will not necessarily consider the same evidence, apply the same legal tests, or complete their determinations with the same degree of administrative efficacy. The result is that some individuals, denationalized by Sudan on the basis of their *prima facie* South Sudanese citizenship (as determined by the Sudanese authorities), will ultimately be rendered *de jure* stateless as they fail to establish their claims to citizenship before the new South Sudanese authorities.

¶6 Moreover, even where citizenship of South Sudan is acquired, individuals outside their country of nationality and in need of national protection will be left as *de facto* stateless in the absence of proactive steps on the part of the South Sudanese state to extend protection to their nationals abroad. This is of particular significance given the obstacles now facing individuals seeking to return from Sudan to South Sudan. Following the secession of South Sudan measures were put into place to facilitate the return of South Sudanese nationals to Sudan.¹¹ However, a policy of public austerity enforced by the shutdown of oil production in South Sudan in early 2012,¹² combined with increasing tensions on the border between Sudan and South Sudan,¹³ have now largely brought the returns process to a halt.¹⁴ As a result, a significant number of South Sudanese nationals remain stranded outside their country of nationality and subject to any discretionary measures that might be taken by the state authorities with respect to foreign nationals. This may include restrictions on the right to work and reside in the state, restricted access to public services, and, ultimately, expulsion as a foreign national. The interaction between the two nationality regimes, in turn, raises an important question of interpretation with respect to the definition of *de jure* statelessness found in Article 1(1) of the 1954 Statelessness Convention.¹⁵ I discuss the correct interpretation of Article 1(1)

¹¹ INTERNATIONAL ORGANIZATION OF MIGRATION, IOM SOUTH SUDAN ANNUAL REPORT 2012 (2012), http://www.iom.int/files/live/sites/iom/files/Country/docs/IOM_South_Sudan_Annual_%20Report_2012.pdf.

¹² Mading Ngor & Maher Chmaytelli, *South Sudan Cuts Back Oil Output, Braces for Shutdown*, BLOOMBERG, (July 25, 2013), <http://www.bloomberg.com/news/2013-07-25/south-sudan-cuts-back-oil-output-braces-for-shutdown.html>.

¹³ HUMAN RIGHTS WATCH, WORLD REPORT 2013: SOUTH SUDAN (2013), <http://www.hrw.org/world-report/2013/country-chapters/south-sudan>.

¹⁴ Harriet Martin, *South Sudanese Still Struggle to Return*, AL-JAZEERA, (August 30, 2013), <http://www.aljazeera.com/indepth/features/2013/08/201382992527601610.html>.

¹⁵ “For the purpose of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.” Convention Relating to the Status of Stateless Persons art. 1(1), Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter 1954 Statelessness Convention].

in sections 3(c) and 3(d) of this paper. Is the question of nationality for the purposes of the Article 1(1) statelessness definition to be determined on the basis of a third-party construction of the law or according to the views, however peculiar or arbitrary, of the state of presumptive nationality itself? On first reading, Article 1(1) itself may appear equivocal on this point. It defines a stateless person as someone “who is not considered as a national by any State” and this apparently preferences the subjective views of the state.¹⁶ However, it qualifies this with a further requirement for such consideration to be “under the operation of its law,” which introduces an objective element.¹⁷ I consider the role of both the subjective and objective elements of this definition with reference to the UNHCR Prato Conclusions¹⁸ on statelessness and recent case law from the U.K. on the application of Article 1(1). I conclude that, while the Article 1(1) definition contains both subjective and objective elements, it is the subjective view of the state with respect to the fact of acquisition that is to be given the greatest weight

¶7 Put bluntly, national protection can only be delivered by states. Although an objective or third-party construction of a state’s nationality law may be significant for determining what protection can be offered by that state, it cannot substitute for that protection. It is easy to imagine a situation in which an individual is plainly entitled to citizenship on any reasonable construction of the domestic nationality law, yet is denied nationality by an autocratic state because of its own capricious reasons. An individual in this position is left without national protection despite what might be the best or most obvious interpretation of the law. To further exclude an individual in this position from protection under the 1954 Statelessness Convention on the basis of an interpretation of the nationality law which has been rejected by the state itself would defeat the most important policy aim of the convention, namely, to extend international protection to those individuals denied citizenship and the protection of a state. More prosaically, to privilege a third-party interpretation of the law over the subjective views of the state is simply to misread the Article 1(1) definition. The definition contains both subjective and objective tests. Consideration should be given to the views of the state together with the operation of its laws. Any construction of the law must be considered in the context of the state’s own subjective viewpoint. To apply only the objective element is to apply only one part of the relevant definition.

¶8 It is important to emphasize that this reading of Article 1(1) does not serve to occlude the important distinction between *de jure* and *de facto* statelessness but, rather, to highlight its most important features. It is, of course, true that states may fail to effectively protect their citizens, in which case they may be left as *de facto* stateless. However, it is also true that states may seek to deny the fact of acquisition altogether. In this case the individual is left as *de jure* stateless, despite what might otherwise seem to be an objectively better reading of the relevant domestic law. To deny the acquisition of their nationality is not simply another type of protection failure but, rather, reflects the

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ U.N. HIGH COMMISSIONER FOR REFUGEES, EXPERT MEETING: THE CONCEPT OF STATELESS PERSONS UNDER INTERNATIONAL LAW (SUMMARY CONCLUSIONS) (May 27-28, 2010) [hereinafter Prato Conclusions].

state's own view as to the application of its laws to the individual concerned and their "right to have rights"¹⁹ at domestic law.

¶9 To disregard the views of the state in this regard is to disregard the law as interpreted and applied in that state, however arbitrary or unfair it may seem to an outside observer. This is to adopt a strangely impoverished view of law itself. Law is as it is interpreted and applied. To preference an abstract construction of the law over the law as actually applied in the state is to fail to consult the full range of relevant interpretive materials. This will include the administrative practice of the state. In some systems this will mean taking into account what might, to many observers, appear to be the disproportionate influence of the executive in determining the correct interpretation and implementation of its domestic laws. This is not, of course, to dismiss the possibility that some actions taken by the executive might in fact be illegal. However, this can only be determined on the basis of the administrative and constitutional law of that state taken as a whole.

¶10 In section 4 I examine the rules at public international law that constrain state action with respect to the expulsion of foreign nationals and stateless persons with particular reference to the African (Banjul) Charter on Human and Peoples' Rights. Traditionally, states have retained considerable discretion in the expulsion of non-nationals. However, this discretion is now significantly constrained by requirements of both formal and substantive due process. Although the expulsion of foreign nationals traditionally lies within the "reserved domain" of state powers, their powers in this regard are now significantly constrained by rules of substantive and formal due process. I consider the sources of these constraints at public international law and in the Banjul Charter, paying particular attention to the jurisprudence of the African Commission on Human and Peoples' Rights. In particular, Articles 12(4) and 12(5) of the Banjul Charter provide important guarantees against mass and/or arbitrary expulsion. Further, any expulsion taken for reasons of race/ethnicity will almost certainly implicate the well-founded rules in public international law with respect to race discrimination. The Banjul Charter²⁰ in particular features extensive and specific provisions with respect to expulsion, with an explicit prohibition on mass expulsion for reasons of race, ethnicity, religion and nationality.

¶11 This is particularly significant in the present context due to the particular structure of the post-secession nationality regime. As has already been noted, the denationalization provisions of the Sudanese law are contingent on acquisition of South Sudanese citizenship. The acquisition of South Sudanese citizenship, in turn, depends upon ethnic and familial connections to South Sudan. The result is that those denationalized by operation of the Sudanese law will disproportionately be persons of South Sudanese ethnicity. The process of substitution itself probably does not offend the norms of public international law with respect to race discrimination due to the long-standing state practice in the context of state succession. However, any subsequent measures to expel individuals so denationalized, insofar as this disproportionately affects individuals of South Sudanese ethnicity, will almost certainly amount to indirect discrimination and so offend the norm of non-discrimination in international law.

¹⁹ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 177-78 (1968).

²⁰ African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59 [hereinafter African Charter].

¶12 I conclude in sections 6 and 7 with a brief review of the practical situation affecting returns to South Sudan followed by a series of key policy recommendations to improve the protection environment for South Sudanese nationals in Sudan. Most urgently, this should include a change to the underlying citizenship regime to remove criteria for the acquisition of South Sudanese citizenship (and, by extension, denationalization from Sudanese citizenship) based on race to be replaced with criteria based on habitual residence in state territory. Should this prove impractical, the transition period for return or entry to the state of one's citizenship should be re-opened and extended in order to permit those displaced by operation of the new law, and particularly new South Sudanese citizens remaining in Sudan, to return to their new state. No steps should be taken to expel or detain South Sudanese nationals in Sudan until they have been given a realistic practical opportunity to enter their new state. As an essential aspect of this the new South Sudanese state must be encouraged and assisted to provide meaningful national protection to their nationals stranded abroad, particularly in Sudan.

¶13 Finally, and perhaps most importantly, a vigorous campaign of advocacy should be undertaken to inform public officials in Sudan of the position at public international law with respect to the expulsion of foreigners. While the norms related to arbitrary and mass expulsion are now reasonably plain they are also, at present, poorly disseminated. Moreover, any campaign should not only make clear the constraints on state action, but also the discretion for state action that does exist, particularly in response to threats to national security and public safety. As ever, the concerns of politicians and administrators are practical rather than legal. In order to be effective any campaign must be prepared to address the legitimate concerns of policy-makers alongside those of human rights advocates.

II. DENATIONALIZATION IN THE CONTEXT OF STATE SECESSION

¶14 The revised Sudanese law is particularly notable for the dramatic effects of its denationalization provisions. Article 10(2) of the revised Sudanese Nationality Act now provides that “[a] person will automatically lose his Sudanese nationality if he has acquired, *de jure* or *de facto*, the nationality of South Sudan.”²¹ This is particularly significant given what I have suggested elsewhere is the extraordinary breadth of the South Sudanese nationality provisions.²² Of particular note in this context is Article 8(1) of the South Sudanese Act, which provides that a person shall be considered a South Sudanese national by birth where, among several other grounds,²³ “such a person belongs

²¹ Sudanese Nationality Act art. 10 § 2 (1957).

²² Sanderson, *supra* note 4, at 212.

²³ The Nationality Act, *supra* note 3, art. 8 reads: “(1) A person born before or after this Act has entered into force shall be considered a South Sudanese National by birth if such person meets any of the following requirements—

(a) any Parents, grandparents or great-grandparents of such a person, on the male or female line, were born in South Sudan; or

(b) such person belongs to one of the indigenous ethnic communities of South Sudan.

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

(a) he or she has been domiciled in South Sudan since 1.1.1956; or

(b) if any of his or her parents or grandparents have been domiciled in South Sudan since 1.1.1956.

to one of the indigenous ethnic communities of South Sudan.”²⁴ The striking result of Article 8(1)(b) is that every Dinka and Nuer²⁵ inside or outside South Sudan will automatically acquire South Sudanese citizenship by operation of law.

A. *Past Practice at International Law*

¶15

The compulsory imposition of citizenship by a foreign power is unusual.²⁶ This question has previously been addressed by the Permanent Court of International Justice (“PCIJ”) in their advisory opinion on the *Nationality Decrees Issued in Tunis and Morocco*.²⁷ It was the view of the British Government that certain nationality decrees of the French Government passed with respect to Tunis, and what was then the French zone of Morocco, imposed French nationality on British subjects resident there and, as such, were in violation of international law.²⁸ Although the PCIJ recognized that the question of nationality was generally reserved to the domain of municipal law,²⁹ the substantive question in regards to the compulsory imposition of nationality was reserved by France and the U.K. for later settlement by negotiation.³⁰ As explained by Weis,

. . . time limits were set for the filing of applications for release from French nationality and for the granting of such applications. The manner in which the dispute was settled shows that the violation of international law claimed by Great Britain to have been committed by France by the unilateral imposition of her nationality on British nationals

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

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

²⁴ *Id.* art. 8 § 1b, 7.

²⁵ While the Dinka and the Nuer are the two largest ethnic groups in South Sudan, there are more than 200 distinct ethnic groups in the country. *See* INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, ANNUAL REPORT: SOUTH SUDAN 3 (2012),

<http://www.ifrc.org/docs/Appeals/annual11/MAASS00111ar.pdf>. OCHA has prepared a useful map of the distribution of ethnic groups in South Sudan. OCHA, *Distribution of Ethnic Groups in Southern Sudan*, REFworld (Dec. 24, 2009), <http://www.refworld.org/pdfid/4bea5d622.pdf>.

²⁶ It is, however, not at all uncommon for states to “impose” their citizenship automatically on individuals born in their territory pursuant to a general rule *ius soli*. *See, e.g.*, Section 1 of the 14th Amendment to the U.S. Constitution: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside . . .” U.S. Const. amend. XIV, § 1.

By operation of this amendment, all children born in the territory of the United States automatically acquire U.S. citizenship.

²⁷ *Nationality Decrees Issued in Tunis and Morocco* on Nov. 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7) [hereinafter *Nationality Decrees Issued in Tunis and Morocco*].

²⁸ *Id.*; *see also* WEIS, *supra* note 9, at 71.

²⁹ *Nationality Decrees Issued in Tunis and Morocco*, *supra* note 27, at 24; *see also* ALFRED M. BOLL, *MULTIPLE NATIONALITY AND INTERNATIONAL LAW* 97 (2007).

³⁰ *Nationality Decrees Issued in Tunis and Morocco*, *supra* note 27, at 8.

*was considered to be remedied by the granting of a right of option (repudiation) to the affected individuals.*³¹

¶16 In one of the very few cases on this point at the international level the party seeking to impose compulsory nationality felt compelled to concede an option right to individuals affected by the new citizenship regime. The position is rather different in the particular context of state succession where there is substantial state practice supporting the involuntary substitution of nationality following a change of sovereignty.³² Indeed, the International Law Commission's ("ILC") *Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States*³³ makes explicit provision for compulsory "renationalization" in the context of state succession, albeit only following voluntary acquisition of the new nationality: "[a] predecessor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality."³⁴

¶17 Typically, however, this would follow a change in sovereignty over territory where the individuals affected by this process are habitually resident. As Hudson explained in his 1951 report on nationality to the ILC,

[i]f the effects of the cession on the nationality of the inhabitants of the ceded territory are regulated by treaty, such treaties usually provide that the nationality of the predecessor State is lost by the conferment of nationality by the successor State. Where the transfer of territory and the conferment of nationality is in accordance with international law, the predecessor State is obliged to recognize it. Its sovereignty has been replaced by that of the successor State . . .³⁵

¶18 The ILC Draft Articles embody exactly this presumption. Articles 5 and 8(2) note that,

. . . persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State . . .³⁶

and,

[a] successor shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.³⁷

³¹ WEIS, *supra* note 9, at 75 (emphasis added).

³² See *supra* text accompanying note 9.

³³ Int'l L. Comm'n, *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States with Commentaries*, Supp. No. 10, U.N. Doc. No. A/54/10 (Apr. 3, 1999) [hereinafter I.L.C. Draft Articles].

³⁴ *Id.* art. 10(1).

³⁵ Special Rapporteur on Nationality, Including Statelessness, *supra* note 9, at 11.

³⁶ I.L.C. Draft Articles, *supra* note 33, art. 5; JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2d ed. 2006).

B. The Significance of Ethnicity in the Context of Denationalization

¶19 The South Sudanese law is rare in relying on explicitly ethnic criteria for the acquisition (or, as in this case, *the imposition*) of citizenship.³⁸ This is particularly significant in terms of protection as individuals who fall within the terms of Article 8 of the South Sudanese law are automatically denationalized by operation of Article 10(2) of the Sudanese law.³⁹ Both articles operate automatically/*ex lege* without further intervention by the state. I have elsewhere characterized these norms as constitutive or performative in their effects.⁴⁰ The result is something like a two-stage chemical reaction. The first stage produces a compound that, in turn, interacts with a pre-existing substance to produce a secondary chemical reaction without further or intervening action.⁴¹ As individuals fall within the nationality criteria in Article 8 of the South Sudanese nationality law they receive South Sudanese nationality by operation of that law. Their new status as South Sudanese nationals, in turn, interacts with Article 10(2) of the Sudanese law to effect their denationalization by operation of law without further or intervening action on the part of either state.

¶20 By incorporating the criteria of the South Sudanese Act into the denationalization provisions of the Sudanese Act the Sudanese regime effectively reproduces the ethnic/racial bias of the South Sudanese provisions to deleterious effect. In this case, it is unnecessary for ethnicity to be listed as a ground of denationalization in the Sudanese Act itself as the discriminatory effect of the law can be surmised from its effect on individuals of South Sudanese ethnicity.⁴² As the Human Rights Committee explained in *Derksen and Bakker v. the Netherlands* with respect to Article 26 of the ICCPR⁴³,

³⁷ I.L.C. Draft Articles, *supra* note 33, art. 8(2).

³⁸ *Cf.* CONSTITUTION OF THE REPUBLIC OF LIBERIA, Jan. 6, 1986, art. 27(b); Sierra Leone Citizenship (Amendment) Act art. 2(b) (2006); Malawi Citizenship Act arts. 4, 5 (1966).

³⁹ Sanderson, *supra* note 4, at 227; *see also Sudan Plans to Cancel Citizenship of Southerners*, Reuters (July 14, 2011), <http://www.reuters.com/article/2011/07/14/ozatp-sudan-citizenship-idAFJOE76D01E20110714>.

⁴⁰ Sanderson, *supra* note 4, at 218-19, 227-28.

⁴¹ Examples of this abound in nature. A commonly-taught example of this is the process of carbon-fixation, essential to the process of photosynthesis. This is the first stage of the “Calvin cycle” of photosynthesis. *See* James A. Bassham, Andrew A. Benson, & Melvin Calvin, *The Path of Carbon in Photosynthesis*, 185 J. OF BIOLOGICAL CHEMISTRY 781, 782-87 (1950).

⁴² Convention on the Elimination of Discrimination Against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1), 660 U.N.T.S. 195 [hereinafter ICERD]; African Charter, *supra* note 20, arts. 2, 28; Office of the High Commissioner of Human Rights, *General Comment No. 18: Non-Discrimination*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 26 (Nov. 10, 1989); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding the Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 57 (June 21); THE MOVEMENT OF PERSONS ACROSS BORDERS, STUDIES IN TRANSNATIONAL LEGAL POLICY, NO. 23 17-18 (Louis B. Sohn & Thomas Buergenthal eds., 1992).

⁴³ International Covenant on Civil and Political Rights, art. 26, December 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

Article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons.⁴⁴

¶21 The operation of the Sudanese denationalization provisions will therefore result in a violation of Articles 2(1)⁴⁵ and 26 of the ICCPR and the customary international law norm against non-discrimination with respect to race.⁴⁶

C. Two Key Policy Goals of Habitual Residence

¶22 Conferring citizenship in the context of state succession on the basis of habitual residence achieves two key policy goals. First, this effectively guarantees that individuals who acquire citizenship under the new regime will have a genuine or effective link with the relevant state. As explained by the ICJ in the *Nottebohm* case,

. . . nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of

⁴⁴ Human Rights Committee, *Derksen v. Netherlands, Communication No. 976/2001*, ¶ 9.3, U.N. Doc. CCPR/C/80/D/976/2001 (June 15, 2004); Human Rights Committee, *Althammer et al. v. Austria, Communication No. 998/2001*, ¶ 10.2, U.N. Doc. CCPR/C/78/D/998/2001 (Sept. 22, 2003); Human Rights Committee, *Simunek et al. v. The Czech Republic*, ¶ 11.7, U.N. Doc. CCPR/C/54/D/516/1992 (July 19, 1995); Ahmad v. United Kingdom, App. No. 8160/78, 4 E.H.R.R. 127 (1981); D.H. v. The Czech Republic, App. No. 57325/00, 43 E.H.R.R. 41 (2007); 13; Stedman v. United Kingdom, App. No. 29107/95, 23 E.H.R.R. 168 (1997); Zarb Adami v. Malta, App. No. 17209/02, 44 E.H.R.R. 49 (2007).

⁴⁵ ICCPR, *supra* note 43, art. 2(1), (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

⁴⁶ ICCPR, *supra* note 43, arts. 2(1), 24, 26, December 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 2(1), December 16, 1966, 993 U.N.T.S. 3; ICERD, *supra* note 42, arts. 1(1), 2(1); Convention on the Rights of the Child, G.A. Res 44/25, art. 2, U.N. Doc A/44/49 (Sept. 2, 1990) [hereinafter CRC]; African Charter, *supra* note 20, arts. 2, 3, 19. *See also* THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN art. 14 (2011) (“All persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status.”). In addition to conventional sources, there is now little doubt that rules against racial discrimination now form part of customary international law. *See* *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, Judgment, 1970 I.C.J. 3, 32 (Feb. 5); 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 (1987); *Report of the Independent Expert on Minority Issues: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 35, UN Doc A/HRC/7/23 28 (Feb. 28, 2008) (by Gay McDougall); GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 85 (1978); JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 642 (8th ed. 2012).

the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.⁴⁷

¶23 Although the ICJ in *Nottebohm* was concerned with allocating responsibility to states for the diplomatic protection of their nationals this is a principle of general application in the context of citizenship. As Rezek explains, “the judicial relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the state.”⁴⁸ Habitual residence is the most frequently used test for assessing this connection.⁴⁹

¶24 Second, the test of habitual residence ensures that in the vast majority of cases individuals acquiring citizenship of a state *will actually reside in that state*. Individuals renationalized on the basis of their ethnicity to citizenship of a state of which they are not a resident (thereby losing the citizenship of their state of habitual residence) face the immediate prospect of expulsion as a foreign national to the state of their (new) citizenship.⁵⁰ Where, as will frequently be the case, they lack a genuine or effective link with that state, they will face the further challenge of establishing a sustainable livelihood in a context where—apart from the bare of fact of their ethnicity—their language, religion, and profession may differ wildly from those that predominate locally. The test of habitual residence is an important tool by which citizenship in the context of state succession can be made consistent with the practical and effective associations of an individual with the state and allows for the orderly reconciliation of citizenship roles following the transfer of sovereignty over territory. In its absence, and particularly where individuals acquire citizenship on the basis of a purely notional connection such as ethnicity, individuals will struggle to reconcile the reality of their daily lives with the rights and duties associated with their new nationality.

¶25 The peculiar effect of the post-secession nationality regime in Sudan and South Sudan has been to create a class of individuals who are, in effect, legally (if not yet physically) displaced. Although previously resident in Sudan as Sudanese citizens, individuals of South Sudanese ethnicity or with family connections to South Sudan have now been denationalized by operation of Article 10(2) of the Sudanese Act and, as such,

⁴⁷ *Nottebohm Case (Liechtenstein v. Guatemala)*, Judgment, 1955 I.C.J. 4, 23 (Apr. 6); *Magalhães v. Fernandes*, 10 I.L.R. 290 (1936); *German Nationality*, 19 I.L.R. 319 (1952); Crawford, *supra* note 36, at 516; *cf.* Prato Conclusions, *supra* note 18, ¶ 10.

⁴⁸ José F. Rezek, *Le Droit International de la Nationalité*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 198, 357 (1987); UNHCR Regional Bureau for Europe, *The Czech and Slovak Citizenship Laws and the Problem of Statelessness in Citizenship*, in CITIZENSHIP IN THE CONTEXT OF THE DISSOLUTION OF CZECHOSLOVAKIA EUROPEAN (1996).

⁴⁹ PATRICK O’CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 518 (1967). *See, e.g.*, LAW ON CITIZENSHIP OF KOSOVO art. 29 (Kos.) (“All persons who on 1 January 1998 were citizens of the Federal Republic of Yugoslavia and on that day were habitually residing in Republic of Kosova shall be citizens of Republic of Kosova and shall be registered as such in the register of citizens irrespective of their current residence or citizenship.”)

⁵⁰ “[H]ostile rhetoric from Sudanese government officials toward southerners, which began in the period leading up to the referendum, has stoked fears that large numbers of southerners will be expelled after April 8. President Omar Al-Bashir, who began calling southerners ‘foreign’ during the referendum, has repeatedly vowed that Sudan’s new constitution will not provide any protections for non-Muslims or diversity, a threat that is widely understood in Sudan as directed against southerners.” *Sudan: Don’t Strip Citizenship Arbitrarily*, HUM. RTS. WATCH (Mar. 2, 2012), <http://www.hrw.org/news/2012/03/02/sudan-don-t-strip-citizenship-arbitrarily>.

excluded from the entitlements which they previously enjoyed as citizens in their place of habitual residence.⁵¹

¶26 Immediately following secession the two governments agreed to a nine-month “transition period” to run until April 8, 2012.⁵² During this period, individuals with ethnic and familial affinities with the South were expected either to regularize their immigration status in Sudan as foreign nationals or to relocate to South Sudan.⁵³ It should be emphasized that, although both domestic and international actors typically refer to “return” in this context,⁵⁴ for many South Sudanese in Sudan this would be their first journey to the territory of South Sudan. Following the expiry of this period up to half a million⁵⁵ South Sudanese remain effectively stranded in Sudan, despite having now lost their Sudanese citizenship and having few prospects for regularizing their immigration status in the country.⁵⁶ As result, they have now lost their rights to employment and residence in Sudan and, in many cases, are unable to access basic services such as education and healthcare.⁵⁷ Instead of reconciling the citizenship of habitual residents to the change in territorial sovereignty the new regime has served to disorder their citizenship. The rights of many long-term residents of Sudan are no longer effectively linked to their territory of residence. Individuals resident in Sudan but with connections to South Sudan are consequently vulnerable to two key protection threats: statelessness and mass expulsion. I will now consider each in turn.

⁵¹ Sarnata Reynolds, *Gaining a Nation, Losing a Nationality*, REFUGEES INT’L (Jan. 17, 2012), <http://www.refugeesinternational.org/blog/gaining-nation-losing-nationality>.

⁵² *Id.*; see also James Copnall, *Dispossessed: The South Sudanese Without a Nationality*, BBC NEWS (Apr. 6, 2012), <http://www.bbc.co.uk/news/world-africa-17624075>; S.C. Res. 2046, U.N. Doc. S/RES/2046 (May 2, 2012).

⁵³ U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, SUDAN: WEEKLY HUMANITARIAN BULLETIN: 2–8 APRIL 2012 3 (2012), <http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA%20Sudan%20Weekly%20Humanitarian%20Bulletin%20%20-%208%20April%202012.pdf>.

⁵⁴ See, e.g., *Patterns of Return and Logistical Challenges*, INTERNAL DISPLACEMENT MONITORING CENTRE (Jun. 26, 2012), <http://www.internal-displacement.org/idmc/website/countries.nsf/%28httpEnvelopes%29/905D797AC90C78CAC125796F00021206?OpenDocument>.

⁵⁵ Copnall, *supra* note 52; Reynolds, *supra* note 51; *Sudan and South Sudan Must Step Back from War*, CARITAS INTERNATIONALIS (Apr. 24, 2012), http://www.caritas.org/newsroom/press_releases/PressRelease24_04_12.html. Estimates of South Sudanese nationals remaining in Sudan vary widely. Although the figure of 500,000 was widely reported throughout 2011 and 2012, the figure more commonly reported in 2013 is 250,000. See, e.g., INT’L ORG. MIGRATION, IOM SOUTH SUDAN: 2013 COUNTRY PROGRAMME 2 (2013), http://www.iom.int/files/live/sites/iom/files/Country/docs/IOM_South_Sudan_2013_Country_Programme.pdf. However, given the very slow progress of returns to South Sudan, this latter number seems unduly optimistic.

⁵⁶ Reynolds, *supra* note 51.

⁵⁷ *Id.*; see also BRONWEN MANBY, THE RIGHT TO A NATIONALITY AND THE SECESSION OF SOUTH SUDAN: A COMMENTARY ON THE IMPACT OF THE NEW LAWS 5 (2012), <http://www.opensocietyfoundations.org/sites/default/files/right-nationality-and-secession-south-sudan-commentary-20120618.pdf>.

III. RESULTING *DE JURE* STATELESSNESS⁵⁸

¶27 The denationalization provisions of the Sudanese law operate *ex lege*, without a prior determination with respect to nationality by the South Sudanese state or the opportunity for either individual consideration or administrative appeal.⁵⁹ In these circumstances there is an evident risk of statelessness resulting from the arbitrary deprivation of nationality, contrary to international law.⁶⁰ The basic guarantee against arbitrary deprivation of nationality is found in Article 15(2) of the Universal Declaration of Human Rights.⁶¹ While this provision is not replicated in the International Covenant on Civil and Political Rights,⁶² there is now extensive state practice in support of this as a rule of customary international law.⁶³ The avoidance of statelessness is itself a well-founded principle of public international law. Any deprivation leading to statelessness will most likely be arbitrary unless it is done pursuant to a legitimate state interest and is proportionate to the demands of that interest.⁶⁴ Given the potential impact of rendering an individual stateless, such a measure will be proportionate only when necessary to protect the most urgent state interests.

¶28 The nationality provisions of the South Sudanese law also operate *ex lege*. Individuals with family or ethnic connections to South Sudan will acquire the nationality of South Sudan even in the absence of a positive administrative determination by the South Sudanese state. Any later administrative determinations by the South Sudanese state can only be declarative (descriptive or constative) in their effect. The combined effect of these provisions makes analyzing the position with respect to resulting statelessness complex. On first examination it might seem that due to the automatic/*ex lege* operation of the South Sudanese nationality provisions, and the manner in which they have been incorporated into the Sudanese law, anyone denationalized by operation of the Sudanese law must necessarily have first acquired citizenship of South Sudan.

⁵⁸ Sections 5, 6, 7, and 8 of this paper build on my more preliminary discussion of this same issue in Mike Sanderson, *Key Threats of Statelessness in the Post-Secession Sudanese and South Sudanese Nationality Regimes*, 19 TILBURG L. REV. 234 (2014).

⁵⁹ Sanderson, *supra* note 4, at 227-28.

⁶⁰ See Universal Declaration of Human Rights, art. XV, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810 [hereinafter UDHR]; Convention on the Reduction of Statelessness, art. VIII, ¶ 1, Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter 1961 Statelessness Convention]; U.N. Secretary-General, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Arbitrary Deprivation of Nationality: Rep. of the Secretary-General*, ¶ 51, U.N. Doc. A/HRC/10/34 (Jan. 26, 2009); Carol A. Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. REFUGEE L. 232, 238; (1995); Johannes M.M. Chan, *The Right to a Nationality as a Human Right: The Current Trend Towards Recognition*, 12 HUM. RTS. L. J. 1, 8-9 (1991).

⁶¹ UDHR, *supra* note 60, art. 15(2).

⁶² ICCPR, *supra* note 43.

⁶³ See ICERD, *supra* note 42, art. 5(d)(iii); CEDAW, *supra* note 42, art. 9; Convention on the Nationality of Married Women, ¶ 16, Feb. 20, 1957, 309 U.N.T.S. 65; Human Rights Council, *Thematic Study on the Issue of Violence Against Women and Girls and Disability*, ¶ 2, U.N. Doc. A/HRC/RES/20/5 (July 16, 2012); H.R.C. Res. 7/10, ¶ 2, U.N. Doc. A/HRC/RES/7/10 (Mar. 27, 2008); H.R.C. Res. 10/13, ¶ 2, U.N. Doc. A/HRC/RES/10/13 (Mar. 26, 2009); H.R.C. Res. 13/2, ¶ 2, U.N. Doc. A/HRC/RES/13/2 (Apr. 14, 2010); U.N. Secretary-General, *Human Rights and Rights and Arbitrary Deprivation of Nationality: Rep. of the Secretary-General*, ¶¶ 19-46, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009); CRAWFORD, *supra* note 46, at 522.

⁶⁴ Human Rights Council, *Arbitrary Deprivation of Nationality: Rep. of the Secretary-General*, ¶ 51, U.N. Doc. A/HRC/10/34 (Jan. 26, 2009), <http://www.refworld.org/docid/49958be2.html>.

Insofar as the operation of the Sudanese denationalization provision is conditional upon the prior acquisition of South Sudanese citizenship the operation of this section appears to be consistent with the protections against statelessness found in Articles 5(1)⁶⁵ and 8(1)⁶⁶ of the 1961 Statelessness Convention.⁶⁷ In this case, the operation of the latter provision has been incorporated as the essential condition for the operation of the former. The Sudanese law does not operate to denationalize individuals who have not yet acquired South Sudanese nationality, and where the individual does not acquire South Sudanese citizenship the Sudanese denationalization provisions do not operate: *expressio unius est exclusio alterius*. This appears to eliminate any potential for resulting *de jure* statelessness. Further, and as discussed above, there is good authority in public international law for the involuntary substitution of nationalities following state succession to reflect a change in territorial sovereignty.⁶⁸

A. *Legal Tests and “Interpretive Concepts”*

¶29 However, while the two operations share a test (i.e., the acquisition of South Sudanese nationality), this is not to say that as a result they necessarily share the same criteria for the application of that test. This is particularly important in the absence of a requirement for a formal determination or statement confirming acquisition (regardless of whether this is constitutive or declarative in its effect) by the South Sudanese state. Although each state is free to determine the fact of acquisition it will remain unclear, in the absence of positive steps to extend protection to an individual so affected, whether their nationality will ultimately be recognized by the succeeding state. The criteria for the acquisition of South Sudanese nationality is complex and depends on the evaluation of civil evidence relating to, *inter alia*, family relationships,⁶⁹ ethnicity,⁷⁰ and continuous residency by a range of family members over an extended period in the territory of South Sudan.⁷¹ These are interpretive concepts of the type first made the subject of serious jurisprudential debate by the late Ronald Dworkin.⁷² It is mere prejudice to assume that in order to be meaningful or coherent any exchange concerning these tests must share

⁶⁵ “If the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality.” 1961 Statelessness Convention, *supra* note 60, art. 5(1).

⁶⁶ “A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.” *Id.* art. 8(1).

⁶⁷ *Id.*

⁶⁸ *See supra* text accompanying note 9.

⁶⁹ The Nationality Act, *supra* note 3, art. 8(1)(a).

⁷⁰ *Id.* art. 8(1)(b)

⁷¹ *Id.* art. 8(2).

⁷² Dworkin provides a very tidy explanation of this idea in a recently published excerpt in the New York Review of Books: “[w]hat is the difference between a religious attitude toward the world and a nonreligious attitude? That is hard to answer because ‘religion’ is an interpretive concept. That is, people who use the concept do not agree about precisely what it means: when they use it they are taking a stand about what it should mean.” Ronald Dworkin, *Religion Without God*, N.Y. REV. OF BOOKS (April 4, 2013), <http://www.nybooks.com/articles/archives/2013/apr/04/religion-without-god/>. For a clear and very accessible critique of some of the main features of (what Patterson terms) Dworkin’s rejection of “intersubjective agreement,” see DENNIS PATTERSON, *LAW & TRUTH* 86 (1996).

common linguistic criteria.⁷³ This is what Dworkin referred to as the “semantic sting.”⁷⁴ It is futile to expect such criteria to be susceptible to anything like objective conceptual analysis in the absence of a shared interpretive attitude. This attitude will vary widely and unpredictably in accordance with the very different historical, religious and cultural trajectories of each state.

B. Two Parallel Administrative Processes

¶30 While implementing regulations for the South Sudanese law have been promulgated, these remain at a comparatively high level of generality.⁷⁵ No guidance is provided with respect to either which ethnic groups are to be classed as “indigenous” for the purposes of Article 8(1)(b) of the South Sudanese law or how membership in a particular ethnic group is to be assessed.⁷⁶ The regulations do provide for the use of oral evidence where documentary evidence is either unavailable or inadequate.⁷⁷ However, it remains unclear what standards of admissibility will apply with respect to such evidence or the standards of proof that will apply in the context of determination proceedings more generally. This is particularly significant in the context of South Sudan where the history of civil disorder, mass displacement and on-going conflict in the border regions between Sudan and South Sudan mean that many individuals of South Sudanese extraction will have either lost or been unable to obtain appropriate civil documentation.⁷⁸

¶31 Although each state will purport to determine the fact of acquisition according to the criteria found in the South Sudanese law, the administrative processes of each state with respect to acquisition and denationalization remain separate and without legal effect for the other. The process of denationalization in Sudan will require a prior determination (by the same authority) as to the acquisition of South Sudanese citizenship. However, any determination made by the Sudanese authorities as to the acquisition of South Sudanese citizenship will not effect any later determinations by the South Sudanese authorities themselves. It remains to be seen whether the Sudanese authorities will accept any decisions made by the South Sudanese authorities as to the acquisition of South Sudanese citizenship to be determinative for the purposes of denationalization proceedings in Sudan.

¶32 It can be expected that some individuals who habitually reside in Sudan will be determined by the Sudanese authorities to fall within the terms of the South Sudanese nationality provisions, and so denationalized by operation of Article 10(2) of the Sudanese law, only to have their subsequent application for nationality rejected by the South Sudanese authorities. As a result, and regardless of the view taken by the Sudanese authorities with respect to acquisition, they will no longer be “considered as a national by any State under the operation of its law”⁷⁹ and so left as *de jure* stateless. This occurs regardless of any prospects they may have for re-consideration or appellate review of the

⁷³ RONALD DWORKIN, *LAW’S EMPIRE* 33 (1986).

⁷⁴ *Id.* at 45.

⁷⁵ Nationality Regulations (2011) (S. Sudan).

⁷⁶ Sanderson, *supra* note 4, at 212-215.

⁷⁷ Nationality Regulations, *supra* note 75, § 1(26).

⁷⁸ MANBY, *supra* note 57, at 5.

⁷⁹ 1954 *Statelessness Convention*, *supra* note 15, art. 1(1).

initial administrative refusal.⁸⁰ It remains correct to say that the South Sudanese acquisition provisions operate *ex lege*. In practice, however, any acquisition must be confirmed by the state authorities (even if this is only declarative in effect) if they are to be effective as a guarantee of national protection.

¶33 It is reasonable to expect considerable delays in processing applications for citizenship as the nascent South Sudanese state works to increase internal administrative capacity. Although some delay is inevitable in any administrative process, where this becomes undue or disproportionate it is right to consider the process of acquisition as incomplete. This is regardless of what, in principle, is the *ex lege* operation of the South Sudanese acquisition provisions. The result with respect to an individual's national protection is the same regardless of whether their application for citizenship (or, more accurately, the confirmation or recognition of their citizenship by the relevant authorities) has been refused outright or unduly delayed. Further, it is unaffected by the reason for that refusal or delay. Regardless of whether the delay is malicious or the result of administrative error, if the state is unwilling or unable to confirm acquisition of their nationality the individual remains (assuming the prior denationalization) as *de jure* stateless.

C. The Article 1(1) Definition

¶34 It should be emphasized that an individual is left as *de jure* stateless whenever a state is unwilling to confirm acquisition of its nationality. This occurs regardless of whether this takes the form of an outright refusal or undue or disproportionate delay and occurs despite the *ex lege* operation of the relevant acquisition provisions. It might be that the only reasonable interpretation of the relevant provisions would grant citizenship in a particular case. This conclusion might, in fact, be entirely self-evident or may already have been adopted by a decision-maker in another state. However, regardless of any other determinations that may have already been made with respect to acquisition, unless the relevant administrative body in the responsible/granting state is willing to confirm acquisition of its nationality the individual is not considered as a national under operation of its law and therefore lacks good national protection. It is only the juridical acts of the state which permit us to assess its views with any degree of certainty. This is true even when such confirmation can only be declarative in its effect.

¶35 This follows from the natural reading of the definition of a stateless person found in Article 1(1) of the 1954 Statelessness Convention. Article 1(1) reads, “[f]or the purpose of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.”⁸¹ The “operation of its law” is an important element of this definition. Nevertheless, any reference to what might be the

⁸⁰ “The Article 1(1) definition employs the present tense (‘who is . . .’) and so the test is whether a person is considered as a national at the time the case is examined and not whether he or she might be able to acquire the nationality in the future.” Prato Conclusions, *supra* note 18, ¶ 16; U.N.H.C.R., *Guidelines on Statelessness No. 1*, ¶ 43, U.N. Doc. HCR/GS/12/01 (Feb. 20, 2012) [hereinafter UNHCR Statelessness Guideline No. 1] (“An individual’s nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question.”).

⁸¹ 1954 Statelessness Convention, *supra* note 15, art. 1(1).

objective facts of domestic law are qualified by the state's own subjective views as to "who is not considered as a national" by that state. The Article 1(1) definition makes plain that the "operation of its law" is only one element of the state's own view as to the nationality of the individual in question. It is, in effect, made subordinate to the subjective judgment of the state. Accordingly, the question of whether an individual is stateless (or, conversely, enjoys the nationality of a given state) cannot be determined according to an abstract construction of the law. It is, rather, an essentially subjective determination that must be judged principally from the perspective of the responsible state.

¶36 It remains true, however, that Article 1(1) contains both objective and subjective elements. Its reference to "the operation of its law" naturally entails an evaluation of existing state norms (including ordinary administrative practices) in relation to nationality.⁸² It is doubtful, for example, whether a wholly discretionary grant of nationality, without some basis in domestic law or administrative practice, would be sufficient to prevent statelessness within the meaning of Article 1(1). Any such grant would be unlikely to provide the qualities of durability and administrative certainty necessary to establish good national protection. However, the subjective view of the state authorities with respect to the individual concerned must be accorded greater significance. While this is consistent with the natural meaning of Article 1(1), it also meets a key protection need. A purely objective construction of national law and/or practice with respect to nationality, regardless of how comprehensive or progressive it is, will be irrelevant to the protection of the individual unless it is plain that the state is willing to apply the same standards. The relevant inquiry in the context of *de jure* statelessness is whether the state considers the individual to have acquired their nationality because it is the state itself which is ultimately responsible for their protection. No mere operation of law, however construed, is capable of extending good national protection in the absence of a state that is willing to acknowledge the acquisition of its nationality and act accordingly. To exclude individuals from the protections of the 1954 Statelessness Convention on the basis of an abstract construction of a domestic nationality law that is left unimplemented by the relevant state is to leave individuals both as stateless and without the status at international law designed to protect stateless persons.

¶37 Intriguingly, the UNHCR Prato Conclusions present the subjective and objective strands of the Article 1(1) definition as alternatives rather than elements of even equal importance. As it explains,

[i]f, after having examined the nationality legislation and practice of States with which an individual enjoys a relevant link...and/or after having checked as appropriate with those States – the individual concerned is not found to have the nationality of any of those States, then he or she should be considered to satisfy the definition of a stateless person in Article 1(1) .

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⁸² Prato Conclusions, *supra* note 18, ¶ 13.

⁸³ *Id.* ¶ 14. The UNHCR's most recent 2012 guidance on this point, while not addressing this issue specifically, appears to accept that any interpretation of domestic law should be made principally with

¶38 Allowing any statelessness determination procedure to rely solely on an assessment of “the nationality legislation and practice of States” leaves individuals vulnerable to the capricious whims of intolerant states who may seek to exclude unpopular minorities or political dissidents from citizenship regardless of what might seem the ordinary meaning of their nationality legislation. It is easy to imagine a situation in which a third-party decision-maker understands the domestic law of a state to grant citizenship in a particular case while the state itself either stubbornly refuses to acknowledge or actively denies the fact of acquisition. Individuals caught in this position will be left without national protection regardless of what might seem the best or most obvious reading of the law. Moreover, the approach of the Prato Conclusions seems to reflect an obvious misreading of the Article 1(1) definition itself, which includes reference to both the subjective view of the state and the objective operation of its laws. To rely on one element to the exclusion or in the alternative of the other is to apply only one part of the Article 1(1) definition.

¶39 It should be emphasized that this does not altogether rule out the possibility of executive or administrative conduct that is itself patently illegal and so illegitimate as a juridical act of state. There must be a point in any system where the conduct of the executive moves beyond what can be accepted as a legitimate expression of the state and descends into outright illegality. However, this can only ever be judged on the basis of the constitutional practice of the state taken in the round. It would certainly be wrong to conclude that executive and/or administrative action taken contrary to an abstract or third-party construction of the nationality law is necessarily illegal, if only because this fails to take into account the particular model or division of state powers relevant to that state. In part, any such conclusion will depend on domestic provision to address the abuse of executive or administrative power. In the absence of such provision the question of when state action passes from the legitimate exercise of administrative discretion, however capricious or eccentric, to outright illegality within the terms of the domestic constitutional settlement will frequently remain obscure to foreign observers. An outside observer should be slow to reach a conclusion of illegality where the result would be to leave an individual without protection as either a national or a stateless person within the terms of Article 1(1). To disregard all subjective or discretionary conduct that appears to contradict an abstract or third-party construction of the law as mere illegality would be to reduce the subjective element in Article 1(1) to irrelevance.

¶40 This is also not to confuse the question of effective nationality with the effective acquisition of nationality.⁸⁴ It is these, quite separate, questions that underpin the key distinction between *de facto* and *de jure* statelessness. States may, of course, seek to exclude individuals who have properly acquired nationality from the benefits or protection to which they are properly entitled. States may also, however, seek to behave more radically and deny the fact of acquisition at all. The two positions, while often blurred in state practice, can and should be distinguished in law.

reference to (and so subordinate to) that state’s own practice. *See* UNHCR Statelessness Guideline No. 1, *supra* note 80, ¶ 16 (“Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws . . . This is a mixed question of fact and law.”).

⁸⁴ *Id.* ¶ 3.

D. *The Case of B2*

¶41 Although not particular to Sudan, a very clear illustration of the failure of protection that can result where a decision-maker fails to give priority to the subjective view of the granting state when determining the fact of nationality can be found in the recent English case of *B2 v. The Secretary of State for the Home Department*.⁸⁵ In this case, the Home Secretary sought to denationalize a UK citizen of Vietnamese extraction (B2) pursuant to her powers under § 40(2) of the British Nationality Act 1981.⁸⁶ As the Home Secretary is forbidden from making an order pursuant to § 40(2) where this would render an individual stateless,⁸⁷ the question at hand was whether B2 retained Vietnamese citizenship. While the position at Vietnamese law was reasonably clear, it was submitted on behalf of B2 that, because of the influence of the executive in the Vietnamese government, the ordinary or apparent laws or state practice with respect to nationality could not be taken as confirmation of B2's citizenship. Indeed, Jackson LJ (writing on behalf of the court) conceded that "[t]he Vietnamese Government has now, apparently, decided to treat B2 as having lost his Vietnamese nationality."⁸⁸ Nevertheless, the court found that,

[i]f the relevant facts are known and on the basis of those facts and the expert evidence it is clear that under the law of a foreign state an individual is a national of that state, then he is not *de jure* stateless. If the Government of the foreign state chooses to act contrary to its own law, it may render the individual *de facto* stateless. Our own courts, however, must respect the rule of law and cannot characterize the individual as *de jure* stateless.⁸⁹

¶42 B2 could, therefore, be deprived of his UK citizenship by the Home Secretary in compliance with the restrictions in s40(2). Although in the view of the court B2 enjoyed the citizenship of Vietnam, this was denied by Vietnam itself. He was thereby left without effective national protection from either the U.K. or Vietnam or international protection pursuant to the 1954 Statelessness Convention as a *de jure* stateless person. Here the court relied on its own construction of the Vietnamese statute to the exclusion of the view of the Vietnamese state. Regardless of whether this approach complied with the more general value of the "rule of law," it failed to properly apply Article 1(1) of the 1954 Convention. Insofar as the court preferred the objective element to the exclusion of the subjective element (in this case the clearly expressed view of the Vietnamese state) it applied only part of the Article 1(1) definition to B2's case.

⁸⁵ *B2 v. The Secretary of State for the Home Department* [2013] EWCA (Civ) 616. This case is currently on appeal in the U.K. Supreme Court and a final judgment is expected sometime in 2014.

⁸⁶ "The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good." British Nationality Act, (1981) § 40(2).

⁸⁷ "The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless." *Id.* § 40(4).

⁸⁸ *B2 v. The Secretary of State for the Home Department*, [2013] EWCA (Civ) 616, [91].

⁸⁹ *B2 v. The Secretary of State for the Home Department*, [2013] EWCA (Civ) 616, [92].

E. Resulting De Facto Statelessness

¶43 It remains true that individuals with ethnic or familial affinities with South Sudan (regardless of their place of habitual residence, but including those resident in Sudan) will have acquired South Sudanese citizenship *ex lege* by operation of Article 8 of the South Sudanese nationality law. There is an important distinction to be made here between those cases where a state refuses or unduly delays recognition of its nationality and where it has not yet been asked the relevant question. In the absence of clear measures by the state to indicate that the individual has not, in fact, acquired South Sudanese citizenship (including outright rejection or an undue or disproportionate delay in confirming acquisition) it is correct to assume that acquisition has occurred in the expected manner. To assume otherwise would frustrate the process of substitution envisaged by the ILC Draft Articles and leave individuals falling within the nationality provisions of the South Sudanese law as inchoate and, following their denationalization by operation of Article 10(2) of the Sudanese law, as *de jure* stateless. In addition to leaving these individuals without national protection this would place an almost insurmountable burden on the South Sudanese administration. It would be called upon to individually consider and process applications for citizenship made by all individuals denationalized by operation of the Sudanese law and who would otherwise acquire the citizenship of South Sudan *ex lege*.

¶44 It goes without saying, however, that acquisition of a new nationality *ex lege* does not necessarily translate into good national protection. Those individuals who have been denationalized by operation of Article 10(2) of the Sudanese law and who remain in Sudan will frequently be left as *de facto* stateless. Regardless of their acquisition of South Sudanese nationality they remain outside their country of nationality and, in many cases, without meaningful national protection. This follows the definition of *de facto* stateless as given in the recent UNHCR Prato Conclusions,

¶45

. . . *de facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality.⁹⁰

¶46 Until South Sudan is in a position to take positive steps to extend national protection to their nationals in Sudan (including practical assistance to facilitate their return), such individuals should be considered as *de facto* stateless within this definition. This serves to expose an important, if long-standing, protection gap. There is an extensive and well-articulated treaty regime for the protection of individuals who are *de jure* stateless as defined in Article 1(1) of the 1954 Statelessness Convention. This includes,

⁹⁰ Prato Conclusions, *supra* note 18, ¶ II(A)(2).

most notably, the 1954 and 1961 Statelessness Conventions.⁹¹ However, there is no particular regime for the protection of *de facto* stateless persons.⁹² Individuals left outside their country of nationality and in need of national protection are reliant on any discretionary measures that might be taken for their protection by the host state.

F. *De Facto and De Jure Acquisition of Nationality*

¶47 It is notable that Article 10(2) of the Sudanese law refers to both *de jure* and *de facto* acquisition of South Sudanese nationality as conditions for denationalization. This is an apparently novel formula and it is important not to allow it a significance that it should not properly have. The reference in Article 10(2) is to the *de facto* acquisition of nationality rather than the acquisition of *de jure* nationality. What must be established for the operation of Article 10(2) is the *de jure* or *de facto* acquisition of nationality rather than actual or *de facto* state protection. Individuals acquire the nationality of South Sudan when they meet the criteria set out in Article 8 of the South Sudanese Act due to the *ex lege* operation of this section. The acquisition of South Sudanese nationality is, therefore, both *de jure* and *de facto* without further administrative measures. As a result, this formula adds nothing to ordinary legal/*de jure* acquisition. This is particularly true as this is phrased in the alternative (*de jure* or *de facto*) with either option apparently sufficient to bring the individual so affected within the operation of Article 10(2).⁹³

¶48 In addition to the risk of resulting *de facto* statelessness individuals denationalized by the operation of Article 10(2) of the Sudanese Act are at risk of expulsion from Sudanese territory as foreign nationals. The standards relating to expulsion at public international law are somewhat more ambiguous than those related to the prevention and reduction of statelessness and so a somewhat more thoroughgoing assessment of the law in this area is necessary in order to determine the constraints on state action.

IV. EXPULSION: GENERAL PRINCIPLES

¶49 Once individuals are denationalized by operation of the Sudanese law they are eligible for expulsion as foreign nationals. It is a well-established principle of public international law that states have the power to expel foreign nationals as an incidence of their sovereignty.⁹⁴ The classic position at public international law was well summarized by the Privy Council in *A.G. (Canada) v. Cain*,

⁹¹ 1954 Statelessness Convention, *supra* note 15; 1961 Statelessness Convention, *supra* note 60. Unfortunately, Sudan is not a signatory to either the 1954 or 1961 Conventions.

⁹² Prato Conclusions, *supra* note 18, ¶ II(E)(11).

⁹³ Sanderson, *supra* note 4, at 229.

⁹⁴ *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Boffolo Case (Italy v. Venezuela)*, 10 R.I.A.A. 528, 534 (Perm. Ct. Arb. 1903); *Maal Case (Netherlands v. Venezuela)*, 10 R.I.A.A. 730, 731 (Perm. Ct. Arb. 1903); *Paquet Case (Belgium v. Venezuela)* 9 Reports of International Arbitral Awards 323, 325 (Perm. Ct. Arb. 1903); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (1987); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 32 (2006); Ruth L. Cove, *State Responsibility for Constructive Wrongful Expulsion of Foreign Nationals*, 11 FORDHAM INT'L L.J. 802, 815 (1987); GOODWIN-GILL, *supra* note 46, at 203; Shigeru Oda, *The Individual in International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 469, 482 (1968); LASSA OPPENHEIM, INTERNATIONAL LAW

[o]ne of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order and good government, or to its social or material interests.⁹⁵

¶50

While states continue to enjoy a wide margin of discretion in such matters,⁹⁶ any exercise of such powers is subject to general public international restrictions with respect to the abuse of rights,⁹⁷ good faith,⁹⁸ arbitrariness,⁹⁹ and the treatment of aliens.¹⁰⁰

691 (8th ed., 1955); RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* 459 (2nd ed., 1988); Lawrence Preuss, *International Law and Deprivation of Nationality*, 23 *GEO. L. J.* 250, 272 (1934).

⁹⁵ *Attorney General for the Domain of Canada v. Cain*, [1906] A.C. 542, 546 (Can.).

⁹⁶ “It is the prevailing view that a State has wide discretion in expelling foreigners. Certain procedural and substantive minimum standards, however, are guaranteed under international law.” *Yeager v. The Islamic Republic of Iran*, 17 *Iran-U.S. Cl. Trib. Rep.* 92, 106 (1987). *See also* Special Rapporteur on State Responsibility, *Fifth Rep. of the Special Rapporteur: Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights and Constituent Elements of International Responsibility*, Int’l L. Comm’n, ¶¶ 76, 77, U.N. Doc. A/CN.4/125 (1960) (by F. V. García Amador) (“while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute.”); ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 940 (9th ed., 1996); Rainer Arnold, *Aliens*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW VOL. IV* 102, 104 (Rudolf Bernhardt, ed., 2001).

⁹⁷ *Montevideo Convention on the Rights and Duties of States* art. 3, Dec. 26, 1933, 165 *L.N.T.S.* 19; *Convention on the Law of the Sea* art. 87(2), Dec. 10, 1982, 1833 *U.N.T.S.* 3; *The Trail Smelter Case* (U.S. v. Canada), 3 *R.I.A.A.* 1905, 1965 (1949); *Corfu Channel* (U.K. v. Albania), Judgment, 1949 *I.C.J.* 4, 47-48, 75, 129 (Apr. 9); *Anglo-Iranian Oil Co* (U.K. v. Iran), Judgment 1952 *I.C.J.* 93, 133 (July 22). *See also* B. O. Iluyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 *HARV. INT’L L.J.* 47, 72 (1975) (“The decisions of some international tribunals and the practice of a number of states reveal that the principle of abuse of right has become accepted as part of international law and that states may, and often do, invoke the principle as the basis of an international claim.”); JENNINGS & WATTS, *supra* note 96, at 407 (“Such an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage.”); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 *MCGILL L.J.* 389, 417-425 (2002); GOODWIN-GILL, *supra* note 46, at 209, 211.

⁹⁸ “The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this century in the *Arbitral Award of 7 September 1910 in the North Atlantic Fisheries case* (United Nations, *Reports of International Arbitral Awards*, vol. XI, p 188). It was moreover upheld in several judgments of the Permanent Court of International Justice (*Factory at Chorzow, Merits*, Judgment No 13, 1928, *PCIJ*, Series A, No 17, p 30; *Free Zones of Upper Savoy and the District of Gex*, Order of 6 December 1930, *PCIJ*, Series A, No 24, p 12 and 1932, *PCIJ*, Series A/B, No 46, p 167). Finally, it was applied by this Court as early as 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco* (Judgment, *ICJ Reports*, 1952, p 212), then in the case concerning *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), (Jurisdiction of the Court, Judgment, *ICJ Reports*, 1973, p 18), the *Nuclear Tests cases* (*ICJ Reports*, 1974, pp. 268 and 473), and the case concerning *Border and Transborder Armed Actions* (Nicaragua v. Honduras) (Jurisdiction and Admissibility, Judgment, *ICJ Reports*, 1988, p 105).” *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Judgment on Preliminary Objections, 1998 *I.C.J.* 275 (June 11); GUY S. GOODWIN-GILL, *STATE RESPONSIBILITY AND THE “GOOD FAITH” OBLIGATION IN INTERNATIONAL LAW ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS* 75, 85 (2004); Sohn & Buergenthal eds., *supra* note 42, at 23.

However, this basic position is now considerably constrained by the right of *non-refoulement*¹⁰¹ as interpreted broadly in light of the complementary non-return obligations found in a range of key international human rights treaties.¹⁰² In the present context, particular note should be taken of Articles 31(1) and 31(2) (“Expulsion”) of the 1954 Convention on the Prevention of Statelessness:

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.¹⁰³

¶51 While this article permits the expulsion of *de jure* stateless persons, this is confined to those circumstances where there is a legitimate ground of “national security” or public order” to justify the expulsion.¹⁰⁴

¶52 While Article 31(2) provides a due process guarantee, this appears to operate only with respect to the grounds of the expulsion and does not provide an opportunity for the individual to determine their status as a stateless person within the meaning of the convention. Indeed, it is the view of both the ILC Special Rapporteur on the Expulsion of Aliens and Alison Kesby (writing separately) that this section only applies to documented stateless persons lawfully in the territory of the state party.¹⁰⁵ It thus leaves unprotected

⁹⁹ “‘Arbitrariness’ is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of ‘arbitrary action’ being ‘substituted for the rule of law.’” Asylum Case (Colombia v. Peru), Judgment, 1950 I.C.J. 266, 284 (Nov. 20). “It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.” Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment, 1989 I.C.J. 15, 76 (July 20). See also JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 28-40 (1995); JENNINGS & WATTS, *supra* note 96, at 940; CHENG *supra* note 94, at 36; GOODWIN-GILL, *supra* note 46, at 208.

¹⁰⁰ Myres S. McDougal, Lung-chu Chen & Harold D. Lasswell, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT’L L. 432 (1976); GOODWIN-GILL *supra* note 46, at 62.

¹⁰¹ *Convention Relating to the Status of Refugees* arts. 32, 33, Apr. 22, 1954, 189 U.N.T.S. 150.

¹⁰² On the principle of *non-refoulement* and associated sources of complementary protection, see generally JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007); Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)*, in UNHCR LEGAL AND PROTECTION POLICY RESEARCH SERIES, PPLA/2005/02 (2005).

¹⁰³ 1954 Statelessness Convention, *supra* note 15, art. 31.

¹⁰⁴ There is no general right of *non-refoulement* for stateless individuals comparable to that found in Article 33 of the 1951 Refugee Convention. Cf. Mandal, *supra* note 102; 1954 Statelessness Convention, *supra* note 15, art. 32.

¹⁰⁵ ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW 19 (2012) (“[T]he 1954 Statelessness Convention only provides protection from expulsion for a stateless person lawfully on the territory of a state party (subject to the exceptions of expulsion on the grounds of national security or public order) leaving unaddressed the plight of the unlawfully resident stateless

individuals either undocumented as stateless persons or unlawfully in the territory of the state.¹⁰⁶

¶53 The expulsion of aliens generally is controlled by Article 13 of the ICCPR, which reads:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.¹⁰⁷

¶54 While Article 13 appears to refer only to the procedural requirements for an expulsion, the Human Rights Committee has now interpreted it to prohibit expulsions that are substantively arbitrary. As it explained in its General Comment 15,

Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out ‘in pursuance of a decision reached in accordance with law’, its purpose is clearly to prevent arbitrary expulsions.¹⁰⁸

¶55 The concept of arbitrariness remains somewhat under-defined in international law. However, it is clear that any determination with respect to expulsion requires the state to balance their own interests against that of the individual alien to see that the measures taken in defense of their interests are both proportionate and bear a meaningful relationship to the facts of the case.¹⁰⁹ This, in turn, requires the state to determine a

person.”); Special Rapporteur on the Expulsion of Aliens, *Third Rep. on the Expulsion of Aliens International Law Commission Fifty-ninth Session*, ¶ 86, U.N. Doc. A/CN.4/581 (Apr. 19, 2007) (by Maurice Kamto) (“[O]nly documented stateless persons are covered. Of course, the issue of stateless persons residing unlawfully in the territory of the host country is sensitive, as some undocumented migrants may fraudulently claim that they are stateless. What is to become, however, of the genuinely stateless persons who nevertheless reside unlawfully in the territory of a State?”); *MT (Palestinian Territories) v. Secretary of State for the Home Department* [2008] EWCA (Civ.) 1149, [50]; HENCKAERTS, *supra* note 99, at 97-99.

¹⁰⁶ On the right of admission and residence for stateless persons, see generally Carol Batchelor, *The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization*, 22 REFUGEE 31, 27-43 (2004).

¹⁰⁷ ICCPR, *supra* note 43, art. 13.

¹⁰⁸ Office of the High Commissioner of Human Rights, *General Comment 15: The Position of Aliens Under the Covenant*, ¶ 10, U.N. Doc. HRI/GEN/1/Rev.6 (Apr. 11, 1986).

¹⁰⁹ GOODWIN-GILL, *supra* note 46, at 230 (“A considerable margin of appreciation is left to States, but it is a margin that has its own limits. The expelling State is required to balance its own interests against those of the individual. It is, therefore, obliged to take account of the alien’s acquired rights or legitimate expectations, and to arrive at a decision which bears a reasonable relationship to the facts.”); HENCKAERTS, *supra* note 99, at 30.

legitimate ground for the expulsion of the alien and to present this as part of any proceedings to review the legality of the expulsion.¹¹⁰

A. *The Duty to Give Reasons*

¶56 The evidence in support of a rule to give reasons for the expulsion relies largely on the rulings of arbitral tribunals.¹¹¹ Both Goodwin-Gill and Plunder have suggested that the duty to give reasons is restricted to international proceedings and is thus owed principally to the state of nationality (or the state extending diplomatic protection to the alien concerned) rather than the alien themselves.¹¹² In the case of *Boffolo*, for example, Umpire Ralston found that “. . . the country exercising the power must, when occasion demands, state reasons of such expulsion before an international tribunal, and an insufficient reason or none being advanced, accept the consequences.”¹¹³

¶57 Nevertheless, the failure by the state to present reasons for the expulsion (while not necessarily an independent violation of international law) may serve as evidence of arbitrariness in respect of the expulsion.¹¹⁴ Further, there is now some international practice in support of an independent rule requiring governments to give reasons for their expulsion to the affected alien.¹¹⁵ “Reasons of safety” was found to be an insufficiently precise reason for expulsion by the arbitrator in *Zerman’s Case* who consequently awarded substantial damages despite Zerman’s own notoriety and lack of any demonstrable pecuniary loss.¹¹⁶ This reasoning is echoed in the more recent judgment of the ICJ in the case of *Ahmadou Sadio Diallo* where (when discussing the requirement in Congolese law to produce a reasoned decision for the expulsion of a foreign national¹¹⁷) it found that,

¹¹⁰ PLENDER, *supra* note 94, at 461 (“The rule appears to be that the expelling State must, if required to do so by the State of nationality, advance a reason for the expulsion, which could reasonably and properly lead it to the conclusion that such an action is warranted in the public interest.”); Oda, *supra* note 94, at 482 (“The state of nationality of an alien expelled may assert the right to inquire into the reasons for his expulsion, and the sufficiency of proof of the charges on which the expulsion is grounded.”).

¹¹¹ *Boffolo Case (Italy v. Venezuela)*, 10 R.I.A.A. 528, 534 (Perm. Ct. Arb. 1903); *Paquet Case (Belgium v. Venezuela)* 9 R.I.A.A. 323, 325 (Perm. Ct. Arb. 1903).

¹¹² PLENDER, *supra* note 94, at 461; GOODWIN-GILL, *supra* note 46, at 232.

¹¹³ *Boffolo Case (Italy v. Venezuela)*, 10 R.I.A.A. 528, 534 (Perm. Ct. Arb. 1903).

¹¹⁴ JENNINGS & WATTS, *supra* note 96, at 943-44, 904-05 (“While the failure of a state to advance any reason for the expulsion may not itself be a breach of any international legal obligation, the refusal to give reasons may lend support to a finding of arbitrariness in the expulsion.”); PLENDER, *supra* note 94, at 461-62 (“It was even suggested in the *Paquet Case* that a refusal to state reasons for expulsion would warrant the inference that the expelling State had exercised its power arbitrarily.”).

¹¹⁵ *General Comment 15*, *supra* note 109, ¶ 10; Council Directive 2004/38/EC, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation, 2004 O.J. (L 158/77), art. 30; *Amnesty International v. Zambia*, African Commission on Human and Peoples’ Rights Comm. No 212/98 (1999); *Rezguia Adoui v. Belgian State and City of Liège*, *Dominique Cornuaille v. Belgian State*, Court of Justice of the European Communities, ¶ 4 (May 18, 1982).

¹¹⁶ IV JOHN B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN PARTY 3348 (1898); I MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 507 (1937); GOODWIN-GILL, *supra* note 46, at 231; PLENDER, *supra* note 94, at 462.

¹¹⁷ As noted by Ahmadou Sadio Diallo, “[c]ompliance with international law is to some extent dependent here on compliance with internal law.” *Republic of Guinea v. Democratic Republic of the Congo*, Judgment on the Merits, 2010 I.C.J. 639, 663 (Nov. 30).

[t]he decree confines itself to stating that “presence and conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so.” . . . [T]his is so vague that it is impossible to know on the basis of which activities the presence of Mr. Diallo was deemed to be a threat to public order. The formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure.¹¹⁸

¶58 However, the obligation to give clear and specific reasons for the expulsion does not necessarily translate to a requirement to show “reasonable cause” for the expulsion. While states must not proceed in an arbitrary manner they also have the right to judge the demands of “*ordre public*” on the basis of their own national circumstances.¹¹⁹

¶59 Finally, and as a matter of common sense, it is difficult to see how any expulsion could be done “in accordance with law” and provide for meaningful review within the terms of Article 13 without first making available to the subject alien reasons in support of the action to serve as a basis for any subsequent process of administrative appeal.¹²⁰ As the Human Rights Committee concluded,

[a]n alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when “compelling reasons of national security” so require.¹²¹

¶60 The duty to show reasonable cause for such expulsions is a natural corollary of the obligation not to expel aliens for “ulterior and illegal” purposes.¹²² As such, it now seems well established that any expulsion of an alien must be for good reason and said reason must be provided to the alien prior to the act of expulsion.¹²³

B. Grounds for Expulsion

¶61 It is probably impossible at this stage to frame a comprehensive list of permissible grounds for expulsion.¹²⁴ However, such grounds certainly include prior illegal entry,¹²⁵

¹¹⁸ *Id.* at 665.

¹¹⁹ GOODWIN-GILL, *supra* note 46, at 232.

¹²⁰ *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“[T]he decision maker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing . . . To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.”); *see also* HENCKAERTS, *supra* note 99, at 32 .

¹²¹ *General Comment 15*, *supra* note 108, ¶ 10.

¹²² HENCKAERTS, *supra* note 99, at 17.

¹²³ PLENDER, *supra* note 94, at 468; HENCKAERTS, *supra* note 99, at 29.

¹²⁴ PLENDER, *supra* note 94, at 468 (“There are different views as to the feasibility of elaborating an exhaustive list of permissible grounds for the expulsion of aliens as a matter of international law. While this survey tends to confirm the impossibility of devising an exclusive list of the grounds on which States

breach of conditions for entry,¹²⁶ protecting public order,¹²⁷ national security,¹²⁸ public morality,¹²⁹ or following a serious violation of domestic law.¹³⁰ It should be noted that the concept of public order (*ordre public*), as used here, is substantially broader than simply the prevention of civil disorder¹³¹ and may, in some circumstances, encompass expulsions conducted on economic,¹³² political,¹³³ or health grounds.¹³⁴

¶62 Expulsions may also offend against more general restrictions in public international law. While public authorities have a comparatively wide margin of appreciation in their control of aliens for reasons of “*ordre public*,” this is only true where such measures are exercised in good faith and not for an illegitimate ulterior motive.¹³⁵ As Goodwin-Gill explains,

. . . the “right” of expulsion may be exercised with the intention of effecting a *de facto* extradition, or in order to expropriate the alien’s property, or even for the purposes of genocide, as by mass expulsions over

may expel aliens, it reveals sufficient congruence of State practice to support the view that the expulsion of an alien without cause amounts to a breach of international practice[.]”).

¹²⁵ Sohn & Buergenthal eds., *supra* note 44, at 90-91 (“An unlawful entry can result in the expulsion of the foreigner on the ground that the entry was not justified.”); *Id.* (“The alien can be expelled or deported at any time if it is discovered later that he or she entered the country illegally, unless the alien can benefit from a local statute of limitations, an amnesty or a pardon.”); GOODWIN-GILL, *supra* note 46, at 262; PLENDER, *supra* note 94, at 467.

¹²⁶ Sohn & Buergenthal eds., *supra* note 44, at 90-91; GOODWIN-GILL, *supra* note 46, at 262.

¹²⁷ *Vilvarajah v. U.K.*, 14 Eur. H.R. Rep. 248, 286 (1992); *Moustaquim v. Belgium*, 13 Eur. H.R. Rep. 802, 814-15 (1991); *Paquet Case (Belgium v. Venezuela)* 9 R.I.A.A. 323, 325 (Perm. Ct. Arb. 1903); Rainer, *supra* note 96, at 104; GOODWIN-GILL, *supra* note 46, at 307; Sohn & Buergenthal eds., *supra* note 44, at 90-91; PLENDER, *supra* note 94, at 467.

¹²⁸ T. Alexander Aleinikoff, *International Legal Norms and Migration: A Report*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 1, 5 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003) (“The power of a state to protect its security is a core attribute of sovereignty. Although there is no comprehensive instrument relating to migration and security, it is clear that states possess authority, under international law, to limit and control migration on national security grounds; and the exclusion and expulsion of persons thought to pose a threat to the national security of a state is firmly embedded in state practice.”); GOODWIN-GILL, *supra* note 46, at 262; PLENDER, *supra* note 94, at 467; HENCKAERTS, *supra* note 99, at 30.

¹²⁹ PLENDER, *supra* note 94, at 467-68; Sohn & Buergenthal eds., *supra* note 44, at 90-91.

¹³⁰ GOODWIN-GILL, *supra* note 46, at 255, 262; JENNINGS & WATTS, *supra* note 96, at 904-05; Sohn & Buergenthal eds., *supra* note 44, at 89.

¹³¹ Eur. Consult. Ass., *Protocol to the European Convention on Establishment*, § 3(a) (Dec. 13, 1955) (“The concept of *ordre public* is to be understood in the wide sense generally accepted in continental countries. A Contracting Party may, for instance, exclude a national of another Party for political reasons, or if there are grounds for believing that he is unable to pay the expenses of his stay or that he intends to engage in a gainful occupation without the necessary permits.”).

¹³² See GOODWIN-GILL, *supra* note 46, at 255.

¹³³ *Perregaux Conseil d’État France*, 74 I.L.R. 427-30 (1977) (Fr.); *Galvan v. Press*, 347 U.S. 522 (1954); *Bujacz v. Belgium Minister of Justice*, 1953 I.L.R. 336-37 (1953) (Belg.); see *Ex Parte Pettine*, 259 Fed. 733 (D. Mass. 1919); see *Lopez v. Howe*, 259 F. 401 (2d Cir. 1919); cf. EUR. PARL. ASS. DEB., *Recommendation 769*, 13th Sess. 769 (Oct. 3, 1975) (“An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious.”).

¹³⁴ PLENDER, *supra* note 94, at 467; Sohn & Buergenthal eds., *supra* note 44, at 90.

¹³⁵ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 521 (6th ed. 2003); PLENDER, *supra* note 94, at 467.

desert frontiers. In such cases the exercise of the power cannot remain untainted by the ulterior and illegal purpose.¹³⁶

C. *Non-Discrimination*

¶63

In particular, state discretion in relation to expulsion is constrained by general public international norms in relation to non-discrimination.¹³⁷ As explained by the Human Rights Committee in relation to Article 13 of the ICCPR, “[d]iscrimination may not be made between different categories of aliens in the application of article 13.”¹³⁸ This position was somewhat expanded by the Committee on the Elimination of All Forms of Racial Discrimination, which in their General Recommendation 30 calls upon states to,

[e]nsure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among noncitizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.¹³⁹

¶64

As long as it is done according to one of the permitted grounds and provides for relevant due process protections, including the provision of both a reasoned decision and

¹³⁶ GOODWIN-GILL, *supra* note 46, at 209 (quoting Special Rapporteur on the Expulsion of Aliens, *Sixth Rep. on the Expulsion of Aliens*, Int’l Law Comm’n, ¶ 29-42, U.N. Doc. A/CN.4/625 (Mar. 19, 2010) (by Maurice Kamto)).

¹³⁷ See CONSTITUTION OF THE REPUBLIC OF LIBERIA, Jan. 6, 1986, art. 27(b); Sierra Leone Citizenship (Amendment) Act art. 2(b) (2006); Malawi Citizenship Act arts. 4, 5 (1966).

¹³⁸ *General Comment 15*, *supra* note 108, ¶ 10; *see also* Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, art. 7, U.N. Doc. A/RES/40/144 (Dec. 13, 1985); Rankin v. Islamic Republic of Iran, 142 Iran-U.S. Cl. Trib. Award No. 326-10913-2, ¶ 22 (1987); Comm. on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: France*, ¶ 9, U.N. Doc. CERD/C/304/Add.91 (Apr. 19, 2000); Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *International Provisions Protecting the Human Rights of Non-Citizens*, ¶ 286, U.N. Doc. E/CN.4/Sub.2/392/Rev.1 (1980) (by Baroness Elles) (“It has been held that discriminatory expulsions on racial grounds are contrary to international law, relying on the human rights provisions of the United Nations *Charter*, the force of the Universal Declaration and, with more recent effect, the International Convention on the Elimination of All Forms of Racial Discrimination and the legally binding International Covenant on Civil and Political Rights.”); Union Inter Africaine des Droits de l’Homme, Federation Internationale des Liges des Droits de l’Homme and Others v. Angola, Decision, Comm’n No. 159/96, ¶ 17 (1997); KOLAWOLE OLANIYAN, *THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS: THE SYSTEM IN PRACTICE* 212, 230-34 (Malcolm Evans & Rachel Murray eds., 2d ed. 2011).

¹³⁹ Comm. on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination Against Non-Citizens*, ¶ 25, U.N. Doc. CERD/C/64/Misc.11/rev.3 (1948); PLENDER, *supra* note 94, at 476 (“It is true that the International Convention on the Elimination of All Forms of Racial Discrimination, so far as it is material, prohibits racial discrimination only in respect of limitations on freedom of movement and residence within the borders of the State and in respect of limitations on the right to leave any country including one’s own and to return to it. Thus it is silent on the question of discrimination in respect of expulsion. No significance is to be attached to this circumstance, however, since the civil rights listed in that Convention are taken from the Universal Declaration of Human Rights which was silent on expulsion generally; and this was so less for reason of principle than because of European preoccupations in 1948.”)

the opportunity for meaningful administrative review, states retain a comparatively wide discretion in relation to the expulsion of foreign nationals. Nevertheless, states may not act in a way that discriminates between groups of aliens on grounds of either ethnicity or national origin (including former nationality).

¶65 This is of particular importance with respect to Sudan, where Article 10(2) of the amended Sudanese Nationality Act operates to remove the nationality of South Sudanese nationals only. Any acts of expulsion taken subsequent to the implementation of this Act and directed against former Sudanese citizens denationalized by operation of Article 10(2) would inevitably offend the clear prohibition at public international law on discriminatory conduct of this type. This is true regardless of whether any subsequent acts of expulsion explicitly target South Sudanese nationals or where the measures, albeit neutral on their face, disproportionately affect particular classes distinguished according to their ethnicity or national origin.¹⁴⁰ Regardless of whether the policy in question is discriminatory by “purpose” or by “effect,”¹⁴¹ it is equally abhorrent to the public international norms in question.¹⁴²

D. *Expulsion under the Banjul Charter*

¶66 Of particular significance in this context are Articles 12(4) and 12(5) of the Banjul Charter¹⁴³ (to which Sudan is a state party¹⁴⁴),

12(4) [a] non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law;

12(5) [t]he mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

¶67 Unfortunately, and despite the numerous examples of mass and discriminatory expulsions since the Charter entered into force in 1986,¹⁴⁵ this Article remains

¹⁴⁰ “The Committee notes with concern that current immigration policies, in particular the present level of the ‘right of landing fee,’ may have discriminatory effects on persons coming from poorer countries. The Committee is also concerned about information that most foreigners who are removed from Canada are Africans or of African Descent.” Comm. on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Canada*, ¶ 336, U.N. Doc. A/57/18 (2002); see also Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: France*, ¶ 144, U.N. Doc. A/49/18 (1994).

¹⁴¹ ICERD, *supra* note 42, art. 1(1).

¹⁴² WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 152-166 (1983); GOODWIN-GILL, *supra* note 46, at 275.

¹⁴³ African Charter, *supra* note 20, art. 12(5).

¹⁴⁴ *List of Countries that have Signed, Ratified/Acceded to the African Charter on Human and People’s Rights*, AFRICAN UNION (Apr. 2, 2010), <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>.

¹⁴⁵ NICHOLAS VAN HEAR, CONSEQUENCES OF THE FORCED MASS REPATRIATION OF MIGRANT COMMUNITIES:

surprisingly under-examined. Where cases falling under Article 12 have been considered by the African Commission their judgments “have been based on poor reasoning, and without sufficient articulation of the legal issues involved.”¹⁴⁶ This makes it difficult to determine the boundaries of these norms with any degree of precision. Nevertheless, the general outlines of Article 12 are now reasonably plain.

1. Article 12(4) of the Banjul Charter

¶68 In-line with the natural meaning of Article 12(4) the African Commission has made clear that “while the Charter does not bar a state’s right to deport non-nationals per se, it does require deportations to take place in a manner consistent with the due process of law.”¹⁴⁷ This requires access to judicial review to challenge any irregularities affecting the administrative act of expulsion.¹⁴⁸ This might be regarded as merely a formal measure of protection by which the regularity of the administrative action can be assessed. However, in the view of the Commission, this also includes a right to be brought “before a court of law to answer any charge concerning their activities and stay”¹⁴⁹ that serves to support the decision of the state to expel the individual concerned. So, in addition to the merely formal requirement of administrative review obvious from the natural wording of Article 12(4), the Commission appears to infer a further requirement of substantive review in-line with the general public international standards restricting arbitrary expulsion. Indeed, in the case of *Organisation Mondiale Contre la Torture and Others v. Rwanda* the Commission interpreted (without further argument) Article 12(4) as an explicit prohibition of arbitrary expulsion.¹⁵⁰ As a result, Article 12(4) of the Charter appears to guarantee access to proceedings for the judicial review of any administrative action taken pursuant to expulsion and to restrict any expulsions to situations where these meaningfully reflect the demands of legitimate state interests, such as security or public order. However, the Commission has not explained which state interests would support such expulsions or if there are any further constraints on these orders, such as a specific requirement of proportionality. In this respect, we are thrown back to the general principles of public international law already discussed.

¶69 Almost certainly, expulsion in the absence of provision for ordinary judicial review of the administrative action would be arbitrary *ab initio*. Access to judicial review is a requirement to establish a reasonable (or, indeed, any) relationship between the decision to expel an individual and their activities in the expelling state. The Commission has repeatedly questioned the failure by respondent states to substantiate, or to provide an opportunity to the individual concerned to refute, allegations of subversion and/or

RECENT CASES FROM WEST AFRICA AND THE MIDDLE EAST GENEVA (1992); HENCKAERTS, *supra* note 99, at 16.

¹⁴⁶ OLANIYAN, *supra* note 138, at 234.

¹⁴⁷ Institute for Human Rights and Development in Africa v. Angola (2008) ¶ 63 A.H.R.L.R. 43 (ACHPR 2008); *see also* Union Interafricaine des Droits de l’Homme and Others v. Angola (2000) ¶ 14 A.H.R.L.R. 18 (ACHPR 1997).

¹⁴⁸ Institute for Human Rights and Development in Africa v. Angola, *supra* note 147, ¶ 64.

¹⁴⁹ *Id.* ¶ 62.

¹⁵⁰ “Article 12(4) prohibits the arbitrary expulsion of such persons from the country of asylum.” *Organisation Mondiale Contre la Torture and Others v. Rwanda* (2000) ¶ 30 A.H.R.L.R. 282 (ACHPR 1996).

criminal conduct related to expulsion.¹⁵¹ It seems particularly telling that the Commission has been willing to find a violation of Article 12(4) without further argument where there is a violation of Article 7¹⁵² of the Charter in the context of expulsion.¹⁵³ It appears to be the view of the Commission that, where an individual is denied access to a competent court in violation of Article 7, this necessarily implies a further violation of Article 12(4) when this occurs in the context of expulsion.

2. Article 12(5) of the Banjul Charter

¶70 Article 12(5) is of more specific relevance to the position of South Sudanese nationals in Sudan insofar as it embodies a general prohibition on mass expulsion. Here, mass expulsion is defined as expulsion that is “aimed at” particular “national, racial, ethnic or religious groups.”¹⁵⁴ Although Article 12(5) does not define this class further in respect to numbers it might naturally be presumed from the use of the terms “mass” and “groups” that this refers to only large-scale, rather than individual, expulsions. The Commission has until now avoided offering their own definition for the minimum size of a “mass” or “group” within the meaning of Article 12(5). However, they have so far found violations of Article 12(5) where thousands,¹⁵⁵ hundreds¹⁵⁶ and, in one rather surprising case, only four¹⁵⁷ individuals, were expelled. While at this stage it remains difficult to draw any firm conclusions with respect to the numerical requirements of a “mass” or a “group” within the meaning of Article 12(5), it appears that the protections in this article may extend to any number of individuals more than one.

¶71 Bearing in mind the singular nature of the definition of “mass expulsion” in Article 12(5), it might be argued that it is unnecessary to actually expel a large group of individuals to violate this Article. Rather, and taken most strictly, this Article might restrict any act of expulsion which is literally “aimed at” a particular national, racial, ethnic or religious group. On this meaning, any expulsion, even of only one person, might amount to a violation of Article 12(5) if the act of expulsion was “aimed at” (i.e., because of) their particular national, racial, ethnic or religious association. In this case, such an expulsion would be “mass” only because of its concern with the larger group, regardless of the practicalities of expulsion on any given occasion.

¹⁵¹ *Id.* ¶ 1; Amnesty International v. Zambia (2000) ¶ 2 A.H.R.L.R. 325 (ACHPR 1999).

¹⁵² “1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.” African Charter, *supra* note 20, art. 7.

¹⁵³ Amnesty International v. Zambia, *supra* note 151, ¶ 36.

¹⁵⁴ African Charter, *supra* note 20, art. 12(5).

¹⁵⁵ Institute for Human Rights and Development in Africa v. Angola, *supra* note 147, ¶ 67.

¹⁵⁶ Rencontre Africaine pour la Défense des Droits de l’Homme v. Zambia (2000) ¶ 1, A.H.R.L.R. 321 (ACHPR 1996).

¹⁵⁷ Organisation Mondiale Contre la Torture and Others v. Rwanda, *supra* note 150, ¶ 1.

¶72 The Commission has addressed a related issue in the leading case of *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia*, in which the Zambian government sought to resist the characterization of their expulsions as being “en masse” on the grounds that “. . . the deportees were arrested over a two-month period of time, at different places, and served with deportation orders on different dates.”¹⁵⁸ This argument was rejected by the Commission, which noted that,

[i]n holding this case admissible the Commission has already established that none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation.¹⁵⁹

¶73 On the basis of the holding in *Rencontre Africaine*, it seems that it is unnecessary for the individuals concerned to be detained and/or actually expelled at the same place or time as long as there is a rough proximity (in this case over two months) among the state actions taken pursuant to expulsion. This appears to inject a further degree of flexibility into the Article 12(5) standard. The class in question may be anywhere in size between four and thousands and it is unnecessary for them to be detained, ordered, or actually expelled simultaneously. It seems that even a relatively small group that is detained and/or expelled by the state over an extended period may still attract the protections of Article 12(5).

¶74 Further, it is unnecessary for the class in question to be ethnically, religiously, or nationally homogeneous. In *Rencontre Africaine*, Zambia sought to resist the application of Articles 2 and 12(5) on the grounds “. . . that the expulsion was not discriminatory because nationals of several West African countries and other foreign countries were all subject to the same treatment.”¹⁶⁰ However, the Commission found that:

[i]t is clear from the government’s own list of repatriated aliens, however, that after excluding nationals of Zambia’s immediate neighbours, Tanzania and Zaire, West Africans constitute the majority of those expelled.¹⁶¹

¶75 It is clear that the Commission is willing to adopt an extremely flexible approach to the definition of a class for the purposes of Article 12(5). In this case, the class as defined appears to be “West Africans,” although it is unclear if this was defined in relation to the national, racial, or ethnic (religious seems unlikely, although not impossible) origins of the individuals concerned. Further, the Commission is willing to determine such a classification on the basis of an overall majority as, in the instant case, it eliminated “nationals of Zambia’s immediate neighbours” for the purposes of its own analysis.

¶76 Finally, it is important to emphasize the absolute nature of the prohibition found in Article 12(5). The concept of arbitrary expulsion implies that some acts of expulsion, if properly related to legitimate state interests and subject to independent judicial review, may be acceptable. However, Article 12(5) is clear that all mass expulsions are

¹⁵⁸ *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia*, *supra* note 156, ¶ 27.

¹⁵⁹ *Id.* ¶ 30.

¹⁶⁰ *Id.* ¶ 24.

¹⁶¹ *Id.* ¶ 26.

prohibited. This is true even where such expulsions purport to be for reasons of particular state interest, such as the preservation of good economic order. As the Commission explained in the case of *Union Interafricaine des Droits de l'Homme and Others v. Angola*,

. . . States often resort to radical measures aimed at protecting their nationals and their economy from non-nationals . . . such measures should not be taken to the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations “constitute a special violation of human rights.”¹⁶²

3. The Significance of Articles 12(4) and 12(5) of the Banjul Charter

¶77 The prohibition on mass expulsion in Article 12(5) of the Charter is of particular significance for South Sudanese nationals remaining in Sudan. Article 12(4) provides an important guarantee of due process that, in particular, requires access to the independent judicial review of administrative actions taken pursuant to expulsion. It may also provide for further, substantive, review of the reasons for that expulsion. The Commission has already found that this may not include economic reasons. It is likely that, in-line with the general public international principles in respect of non-discrimination and Article 2¹⁶³ of the Banjul Charter itself, this also serves to bar expulsion where such actions directly or indirectly discriminate against individuals on grounds of ethnicity or religion. However, these standards remain markedly under-examined by the Commission and remain open to a wide range of interpretations by member states.

¶78 In contrast, Article 12(5) embodies a clear prohibition on expulsion where this affects groups defined on national, racial, ethnic or religious grounds. The class of South Sudanese nationals at risk of expulsion from Sudan can be defined according to both nationality and race/ethnicity (and possibly religion as well, as predominantly non-Muslims in contrast with the majority Arab and Muslim Republic of Sudan).¹⁶⁴ By definition, individuals denationalized by operation of Article 10(2) of the Sudanese nationality law should fall within the criteria for nationality found in Article 8 of the South Sudanese law.¹⁶⁵ They can, therefore, be distinguished on grounds of nationality. Further, insofar as the process of denationalization will serve to reproduce the Article 8(1)(b) grounds for South Sudanese nationality with respect to ethnicity, any subsequent process of expulsion with respect to this group will indirectly discriminate against a class made up of individuals of predominately South Sudanese ethnicity.¹⁶⁶ Although this in itself comprises a somewhat disparate group of tribes/ethnicities, it is at least as coherent

¹⁶² *Union Interafricaine des Droits de l'Homme and Others v. Angola*, *supra* note 147, ¶ 16.

¹⁶³ “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.” African Charter, *supra* note 20, art. 2.

¹⁶⁴ R.S. O’Fahey, *Islam and Ethnicity in Sudan*, 26 RELIGION IN AFRICA 258 (1996).

¹⁶⁵ Sudanese Nationality Act, *supra* note 2, art. 10(2); The Nationality Act, *supra* note 3, art. 8(1)(b).

¹⁶⁶ *Id.*

as the class of “West Africans” defined by the African Commission in the case of *Rencontre Africaine*.

¶79 Further, and again in reliance on *Rencontre Africaine*, it seems unnecessary for a group to be arrested/detained, processed, or actually expelled simultaneously to attract the protections of Article 12(5).¹⁶⁷ It is sufficient if this is done only roughly contemporaneously (in *Rencontre Africaine* this process lasted over a period of at least two months) and “aimed at” a named category such as nationality or race. Whether framed with respect to nationality or race, the result is an absolute prohibition on any large-scale expulsion of South Sudanese nationals from Sudan. Regardless of whether the ethnic or national basis for this expulsion is made explicit or this is done at once or as part of a process which extends over time, if the end result is the expulsion of individuals that can be defined as a class (directly or indirectly) according to criteria enumerated in Article 12(5), actions leading to their expulsion are prohibited by the Charter.

¶80 While the individual expulsions of non-nationals continue to lie within the discretion of states, such actions are subject to the due process requirements of Article 12(4). This requires, at a minimum, the opportunity for meaningful judicial review of the state action taken with respect to expulsion, almost certainly including a substantive review of the reasons given for the expulsion. The Commission has not yet discussed the range of reasons that might legitimately support expulsion of non-nationals and, as such, these remain somewhat open-ended. However, following the case of *Union Interafricaine*, it is now plain that economic order cannot justify expulsions.¹⁶⁸ Nor can the expulsion of non-nationals be justified when such expulsions infringe upon the non-discrimination provisions of Article 2 in the Charter.

V. CONCLUSION: RESULTING STATELESSNESS

¶81 Denationalization by operation of Article 10(2) of the Sudanese Nationality Law creates a clear risk of both *de jure* and *de facto* statelessness. Denationalization pursuant to the operation of Article 10(2) of the Sudanese Act is conditional upon acquisition of South Sudanese nationality. In theory, this should prevent resulting statelessness. The acquisition provisions of the South Sudanese Act operate *ex lege* without further intervening administrative actions by the South Sudanese state. Any further determinations are merely declarative (rather than constitutive) of any given individual’s South Sudanese citizenship. In practice this means that determinations with respect to South Sudanese citizenship for the purposes of Article 10(2) denationalization procedures will inevitably be made by the Sudanese, rather than the South Sudanese, authorities. There is no reason to think that the judgments of the two states in this regard will necessarily be consistent. An individual found to be a South Sudanese national by the Sudanese authorities and, by consequence, denationalized by operation of Article 10(2), may ultimately fail in any subsequent application to the South Sudanese state to have their nationality recognized. They will thus be rendered *de jure* stateless as a result.

¶82 Further, individuals denationalized by operation of Article 10(2) and who remain in Sudan may be unable (or, for valid reasons, unwilling) to obtain effective protection from

¹⁶⁷ *Rencontre Africaine pour la Défense des Droits de l’Homme v. Zambia*, *supra* note 156, ¶ 1.

¹⁶⁸ *Union Interafricaine des Droits de l’Homme and Others v. Angola*, *supra* note 147, ¶ 14.

the South Sudanese state regardless of what might otherwise be their effective acquisition of South Sudanese nationality. Insofar as they are now outside their (new) country of nationality and lack state protection, they are rendered as *de facto* stateless.¹⁶⁹ Although the protection of *de jure* stateless individuals is governed by a well-articulated international treaty regime, the treaty does not extend protection to the *de facto* stateless. As such, they will be reliant on more general international human rights standards (including norms with respect to expulsion) and the discretion of other states for their protection.

¶83 In theory, the renationalization of Sudanese nationals with ethnic and family affinities to South Sudan should occur instantaneously. Individuals who fall within the nationality criteria in Article 8 of the new South Sudanese Act acquire South Sudanese nationality automatically and are only then denationalized by operation of Article 10(2) of the Sudanese Act. In practice, however, this system produces only an illusory certainty with respect to citizenship. It will still fall to the two states to confirm citizenship by making formal determinations as to the application of relevant nationality criteria and to issue documentation in support of this fact. While this system may work well for those individuals who automatically acquire South Sudanese nationality and who are actually resident in South Sudan it leaves individuals with familial or ethnic affinities to South Sudan but who remain in Sudan in a deeply vulnerable position. Their denationalization will precede any grant of effective state protection by South Sudan. Many will remain in Sudan without either the resources to travel to South Sudan or a realistic prospect of supporting themselves in South Sudan should they return. These individuals will remain for the foreseeable future without effective state protection and, as such, *de facto* stateless.

A. *Expulsion*

¶84 While states enjoy a degree of discretion with respect to the expulsion of aliens there is now a considerable due process burden on states prior to initiating any process of expulsion. States are certainly under an obligation to give reasons for any expulsion to states that legitimately exercise diplomatic protection on behalf of the individual concerned and are most likely under an obligation to give reasons to the individuals themselves prior to any expulsion. Although it is not possible at this stage to compile a comprehensive list of reasons that support legitimate acts of expulsion, it is clear that states may not expel an individual arbitrarily. As in the case of denationalization, this requires states to meaningfully balance their own interests against those of the alien, checking to ensure that any process of expulsion is both proportionate and responds sensibly to the actual facts of the case. Certainly this rules out expulsion taken for reasons that are either directly or indirectly discriminatory. As a matter of good administrative practice and common sense this cannot be assessed without any reasons for the expulsion being made available to the individual in advance together with a meaningful opportunity to access an independent process for judicial review of the administrative conduct in question.

¹⁶⁹ Prato Conclusions, *supra* note 18, at 6.

B. Expulsion Under the Banjul Charter

¶85 Of particular importance in this context are the protections against mass displacement found in Article 12(5) of the Banjul Charter. This article makes explicit what is only implicit in the general public international law standards with respect to the expulsion of non-nationals. Article 12(5) awaits more detailed examination by the African Commission. However, it is plain on the basis of their jurisprudence to date that the prohibition in this article with respect to expulsions “aimed at” particular ethnic and national groups will certainly extend to individuals of South Sudanese ethnicity and nationality. As such, the Sudanese government should be extremely wary of undertaking any process of removal/expulsion aimed at individuals denationalized by operation of Article 10(2) of the amended Sudanese law. It is difficult to see how any such process, even one that incorporated good due process standards in-line with Article 12(4) of the Charter and general public international law standards, could be compliant with either the absolute prohibition against mass expulsion found in Article 12(5) of the Charter or the rules against arbitrary expulsion in general public international law. Any process of removal will need to be conducted on an individual basis and in response to a legitimate state interest, such as crime control, public health or the preservation of good public order. As the Commission has now made plain in the case of *Union Interafricaine*, the need to preserve good economic order will not be sufficient to justify a process of expulsion.¹⁷⁰

VI. THE PRACTICAL SITUATION FOR RETURNEES

¶86 For those residents in South Sudan of identifiably South Sudanese ethnicity the process of renationalization has worked roughly as it should. Their citizenship now correlates with their place of habitual residence and state of effective nationality. However, for individuals with familial and/or ethnic affinities with South Sudan and who remain outside of the country, the expiry of this period has left them in a position of extreme vulnerability. Up to 500,000 individuals of South Sudanese ethnicity remain in Sudan now as foreign nationals and, in many cases, as *de facto* stateless.¹⁷¹ Those who remain in Sudan have been subject to a range of discriminatory measures. Some have now lost their jobs and homes and, as a result, are now unable to access basic public services such as schools and health clinics.¹⁷²

¶87 Even for those individuals with good prospects for protection and support in South Sudan the collapse of the return process has left many stranded either inside Sudan or at key transit points just across the South Sudanese border.¹⁷³ International funding for returns was exhausted by February 2012 and, as of March 2013, there is still no further

¹⁷⁰ See text accompanying *supra* note 155.

¹⁷¹ See S.C. Res. 2046, *supra* note 52.

¹⁷² MANBY, *supra* note 57, at 5.

¹⁷³ IOM, *Partners Highlight Continued Plight of Stranded South Sudanese*, INT’L ORG. MIGRATION (Mar. 5, 2013), <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2013/pbn-listing/iom-partners-highlight-continued.html>; IOM SOUTH SUDAN: 2013 COUNTRY PROGRAMME, *supra* note 55, at 3.

funding available for large-scale returns.¹⁷⁴ While some small-scale convoys continue to return to the South from Sudan, approximately 40,000 people remain stranded at return points around Khartoum.¹⁷⁵ According to the OCHA office in Sudan, “[t]hese points have basically become squatter camps and the people are living in squalor.”¹⁷⁶ During a recent assessment mission OCHA officials found,

. . . thousands of residents living in precarious conditions with limited food, water, healthcare and sanitation. Shanties made of plastic sheeting, wood and scavenged materials provide them with little protection from the elements, particularly during the rainy season. With no sanitation facilities, defecation in the open is common, which poses huge health risks especially when flooding occurs.¹⁷⁷

¶88 In practice, opportunities for return remain extremely limited, even for those with the financial means to access public transport. Return movements by rail and barge were organized between 2011 and 2012 by both governments, as well as some non-governmental and inter-governmental organizations. However, trains between the two states are restricted to one track and have been repeatedly attacked as they pass through the Misserya areas in the border state of South Kordofan.¹⁷⁸ In April 2012 a group of returnees was caught in the cross-fire of a conflict between the SPLA and Sudanese army in the Heglig area of South Kordofan as the two sides battled for control of the extensive oil fields in the area.¹⁷⁹ Although key humanitarian actors have urged the two governments to establish corridors for safe return, on-going border conflicts continue to threaten key transit points between the two states.¹⁸⁰ The situation has now been further complicated by the escalation of the conflict between the Sudanese Armed Forces and the Sudan People’s Liberation Movement in South Kordofan in autumn 2012.¹⁸¹ Travel through this region for returnees to South Sudan is now effectively prevented by the escalation in the conflict. One of the very few remaining routes for travel from Sudan to South Sudan is via barge to Juba from the border town of Renk. However, Port Renk was

¹⁷⁴ Ian Timberlake, *Convoy takes South Sudanese Home from Khartoum*, Agence France-Presse (Mar. 19, 2013), <http://reliefweb.int/report/sudan/convoy-takes-south-sudanese-home-khartoum>.

¹⁷⁵ *Id.*; *Sudan: Families from South Sudan Stranded in Khartoum*, U.N. OFFICE FOR THE COORDINATION OF HUMAN AFFAIRS (Mar. 6, 2013), <http://www.unocha.org/south-sudan/node/2176>.

¹⁷⁶ *Sudan: Families from South Sudan Stranded in Khartoum*, *supra* note 175.

¹⁷⁷ IOM, *Partners Highlight Continued Plight of Stranded South Sudanese*, *supra* note 173.

¹⁷⁸ *See, e.g., South Sudan Returnee Train Attacked in South Kordofan*, BBC News (June 27, 2011), <http://www.bbc.co.uk/news/world-africa-13925407>.

¹⁷⁹ *Sudan: Families from South Sudan stranded in Khartoum*, *supra* note 172; *Sudan Troops 'Advance on Heglig Oil Field'*, BBC NEWS (Apr. 13, 2012), <http://www.bbc.co.uk/news/world-africa-17707977>.

¹⁸⁰ Frederick Nzwilli, *Along Sudan's Border, Old Disputes Trigger New Violence, Hunger*, CHRISTIAN SCI. MONITOR (Jan. 22, 2013), <http://www.csmonitor.com/World/Africa/2013/0122/Along-Sudan-s-border-old-disputes-trigger-new-violence-hunger>.

¹⁸¹ U.N. OFFICE FOR THE COORDINATION OF HUMAN AFFAIRS, *SUDAN HUMANITARIAN UPDATE 4TH QUARTER 2012 2* (2012), http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA_Sudan_Humanitarian_Update_4th_Quarter_2012_0.pdf.

closed throughout the first quarter of 2013 due to a tax dispute with local authorities.¹⁸² This, together with the pressures affecting other key departure points, has contributed to a considerable bottleneck at the port. Return with luggage via barge to Juba from Port Renk now costs upwards of \$1000 (USD) for those seeking to fund their return from their own means.¹⁸³

¶89 Return via barge is complicated by the journey time between Renk and Juba (approximately two weeks¹⁸⁴) and what is often the considerable quantity of luggage brought to Renk by returnees. Individuals seeking return to South Sudan now reach Renk with, on average, one ton of luggage.¹⁸⁵ Despite the difficulties this presents for onward travel to South Sudan, returnees are hesitant to sell their goods for the sharply reduced prices they would receive in Sudan. Without guarantees of financial support or employment upon their return to South Sudan there is no guarantee that they will be able to replace their goods upon establishing themselves in South Sudan. Given the considerable sunk costs represented by these goods, many returnees feel that this is the most practical strategy for their long-term economic sustainability despite the short-term challenge this presents for their prospects of return.¹⁸⁶ On June 30, 2013, a convoy of river barges organized by IOM left Renk for Juba carrying 950 returnees. However, this was the first river movement to leave for South Sudan in 2013.¹⁸⁷ Approximately 20,000 returnees remain stranded in one of the four transit/returnee camps around Renk.¹⁸⁸

¶90 In these circumstances it is patently unrealistic to expect individuals to have either established themselves in their new countries of citizenship or to have regularized their immigration status in displacement prior to the expiry of the transition period on April 8, 2012.¹⁸⁹ This is particularly true given the automatic operation of both the South Sudanese nationality law and the Sudanese denationalization provisions. Insofar as these both operate *ex lege*, they do so without further administrative procedures and, virtually by definition, in the absence of documentation for these changes available to either decision-makers on either side of the border or the individuals themselves. The result is two-fold: first, the continuing practical uncertainty in relation to the application of these laws (and the manner and degree of their enforcement), and; second, the extreme vulnerability of those denationalized by operation of this regime and, in consequence, now made either *de jure* or *de facto* stateless and at risk of expulsion as foreign nationals from their country of prior habitual residence.

¹⁸² *IOM Barges Carrying Stranded Returnees Depart South Sudan's Renk Port*, INT'L ORG. MIGRATION (July 2, 2013), <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2013/pbn-listing/barges-carrying-stranded-returnee.html>.

¹⁸³ *South Sudan: 'Your chair or Your Wife' – Tough Choices at Renk Port*, THE GUARDIAN (May 8, 2013), <http://www.theguardian.com/global-development/2013/may/08/south-sudan-renk-port>.

¹⁸⁴ *IOM Barges Carrying Stranded Returnees Depart South Sudan's Renk Port*, *supra* note 182.

¹⁸⁵ *South Sudan: 'Your chair or Your Wife' – Tough Choices at Renk Port*, *supra* note 183.

¹⁸⁶ “[W]here refugees are returning to difficult situations and after having lived in the country of asylum for an extended period, the repatriation of personal property and funds is of crucial importance for a dignified return and a smooth reintegration. Every possible effort should therefore be made to allow refugees to return without leaving their belongings behind.” U.N.H.C.R., VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION 8.1 (1996), <http://www.refworld.org/docid/3ae6b3510.html>.

¹⁸⁷ *IOM Barges Carrying Stranded Returnees Depart South Sudan's Renk Port*, *supra* note 182.

¹⁸⁸ *IOM, Partners Highlight Continued Plight of Stranded South Sudanese*, *supra* note 173.

¹⁸⁹ U.N. OFFICE FOR COORDINATION OF HUMAN AFFAIRS, SUDAN WEEKLY HUMANITARIAN BULLETIN (2011), http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1836.pdf.

VII. NEXT STEPS: ELIMINATION OF RACIAL CRITERIA

¶91 As a first step, close consideration must be given to the wholesale removal of the Article 8(1)(b) ethnicity criteria for South Sudanese nationality.¹⁹⁰ Any use of racial/ethnic grounds in the determination of nationality privileges some racial groups above others with consequent damage to the dignity of those affected (both those who are privileged purely on the basis of their biological heritage and those who are excluded from preferment on the same grounds). Moreover, Article 10(2) of the Sudanese law operates to reproduce the same racial bias in the process of denationalization to the clear practical detriment of those ethnicities referred to in Article 8(1)(b) and in violation of the well-founded rules against racial/ethnic discrimination at public international law. Article 8(1)(b) should be replaced by a criterion that reflects the practical links attendant to effective nationality. The best and most commonly used test for this is habitual residence in the territory of the new state.¹⁹¹

A. *Support for Returns*

¶92 In the absence of a thoroughgoing re-assessment of the post-secession nationality regime in Sudan and South Sudan there are three practical steps that should be taken immediately to improve protection for individuals denationalized and displaced by this regime. These follow three distinct themes: support for returns, outreach to nationals abroad and advocacy in protection of individual rights.

¶93 First, the “transition period” should be re-opened and maintained for as long as is required to effect the repatriation of the overwhelming majority of those currently outside the country of their nationality. This must include, at a minimum, substantive financial support on the part of both governments and the international community to subsidize return movements between the two states. This should also include support for individuals to return with a reasonable (although not, of course, unlimited) amount of luggage.¹⁹² Returnees must not be compelled to sacrifice their long-term economic well-being by selling off their possessions at fire-sale prices for the opportunity to return home. Given the continuing conflicts on the borders between the two states, establishing safe corridors for return will be an essential step in any returns process.

B. *Outreach to Nationals Abroad*

¶94 Second, aggressive steps must be taken by both Sudan and South Sudan to reach their nationals abroad and deliver administrative confirmation of their nationality. This will be particularly important for individuals formerly habitually resident in Sudan who have now been renationalized to South Sudanese citizenship by operation of the post-secession nationality regime. Where relevant, and particularly where individuals lack formal national or identity documentation, this may involve enhanced fact-finding procedures, including taking oral evidence from affected individuals and their family-

¹⁹⁰ For the complete text of Article 8(1)(b), see *supra* note 20.

¹⁹¹ O’CONNELL, *supra* note 49, at 518.

¹⁹² U.N. OFFICE FOR COORDINATION OF HUMAN AFFAIRS, *supra* note 189.

members with respect to their connections with the state.¹⁹³ This will serve to minimize uncertainty and facilitate social reintegration for individuals repatriating to their new country of nationality.

¶95 There will inevitably be cases where the two states continue to disagree as to the citizenship of select individuals, either where each state attributes responsibility for citizenship to the other state or is unwilling to make a formal determination with respect to citizenship due to lack of evidence. These cases should be processed through an independent tribunal empowered to take oral evidence and make determinations with respect to the credibility of such evidence in accordance with clearly stated standards of proof.¹⁹⁴ This is particularly important where processing has been suspended due to continuing uncertainty with respect to the history and/or ethnic background of the individual.

¶96 The introduction of a quasi-judicial/tribunal process will necessarily result in some applications for citizenship being rejected outright. However, this is much preferable than simply letting cases drift indefinitely for lack of evidence. Individuals so rejected may then rely on the formal legal rejection of their application for citizenship to seek protection from the other state. Where an individual's application for the confirmation of their South Sudanese citizenship is finally rejected by the South Sudanese authorities, this should serve as good evidence that they have failed to acquire South Sudanese citizenship "*de jure* or *de facto*" for the purposes of Article 10(2) of the Sudanese law. Properly understood, this is simply a question of fact to be proved like any other element of foreign law.¹⁹⁵ As such, the Article 10(2) denationalization procedures will no longer be relevant to them and they should continue to retain their citizenship of Sudan.

¶97 *In extremis*, individuals denied citizenship by both states, but who obtain legal confirmation of this fact, may then seek to rely on the protections relevant for the *de jure* stateless. With such cases in mind, careful consideration should be given by both the South Sudanese and Sudanese governments to the introduction of a general *ius soli* right to citizenship for those children born within the territory of either state to parents who themselves are either stateless or are unable, for whatever reason, to pass on their citizenship.¹⁹⁶ This will prevent parents from passing on their statelessness to their children and thereby creating a cycle of hereditary statelessness.¹⁹⁷

¹⁹³ Provision for the use of sworn statements by the South Sudanese authorities when determining nationality is provided in the Nationality Regulations. Nationality Regulations, *supra* note 75, at § 1(26).

¹⁹⁴ For a very clear description of some of the diverse methods by which citizenship can be established in African jurisdictions, see Special Rapporteur on Nationality, Including Statelessness, *supra* note 9, at 55.

¹⁹⁵ For a good account of the reception and proof of foreign law in the various jurisdictions throughout Commonwealth Africa, see generally RICHARD FRIMPONG OPPONG, PRIVATE INTERNATIONAL LAW IN COMMONWEALTH AFRICA (2013).

¹⁹⁶ 1961 Statelessness Convention, *supra* note 60, at 4; U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, ¶ 37, U.N. Doc. A/HRC/13/34 14 (2009); DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS 75 (2008) ("In view of the nearly universal ratification of the Convention on the Rights of the Child, the principle of *jus soli* (citizenship based on the place of birth) has emerged as the overriding international norm governing the nationality of children born to non-citizen parents.").

¹⁹⁷ Special Rapporteur on Nationality, Including Statelessness, *supra* note 9, at 177-178; Int'l L. Comm., *Summary Record of the 276th Meeting Extract From the Yearbook of the International Law Commission*, 174, U.N. Doc. A/CN.4/SR.276 (1954).

¶198 It is likely that some individuals who are habitually resident in Sudan but have been renationalized to South Sudanese citizenship will be unwilling to relocate to South Sudan. Particularly for those individuals very long resident in Sudan, relocation to South Sudan may mean giving up long-standing economic and social links that they regard as key to their prosperity and overall well-being. Some individuals, particularly those born in Sudan, may continue to feel a sincere loyalty to the Sudanese state regardless of other ethnic or familial affinities they may have with the new state of South Sudan. For these individuals, some of whom will also be *de facto* stateless, the most anxious consideration should be given to regularizing their immigration status in Sudan before the expiry of any renewed transition period.¹⁹⁸

C. *Advocacy in Protection of Individual Rights*

¶199 Finally, foreign states and relevant international and inter-governmental organizations should be encouraged to undertake a vigorous campaign of advocacy with respect to the prevention of both statelessness and mass expulsion in accordance with the principles discussed above. Already, the Governor of the White Nile State¹⁹⁹ has unilaterally ordered the expulsion of some 12,000 ethnic South Sudanese awaiting repatriation to South Sudan.²⁰⁰ Although IOM intervened to airlift this group to Juba, it is unclear what measures would otherwise have been taken by the state government to effect their expulsion.²⁰¹ The temptation to initiate such acts will only grow as conflicts along the border between the two states continue and the results of the post-secession nationality settlement reify in the minds of decision-makers. There is a clear risk that communities on the border and/or displaced awaiting repatriation to their state of nationality will come to be seen as a security risk and/or a hindrance to on-going military operations.²⁰² Steps must be taken now to introduce decision-makers to the powers they do have to remove foreign nationals that pose a threat to public order or security, the key due process protections that accompany any use of these powers, and the absolute prohibition against mass expulsion found in Article 12(5) of the Banjul Charter. Once a process of mass expulsion begins it is likely to be too late.

¹⁹⁸ “The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” 1954 Statelessness Convention, *supra* note 15, art. 32.

¹⁹⁹ White Nile State is a Southern province (*wilayat*) of Sudan, bordering on South Sudan. The White Nile River runs through White Nile State into Upper Nile State in South Sudan, making this a key transit point for Southerners returning to South Sudan by barge. *Sudan: White Nile State - Administrative Map*, U.N. OFFICE FOR COORDINATION OF HUMAN AFFAIRS (September 2012), <http://reliefweb.int/map/sudan/sudan-white-nile-state-administrative-map-september-2012>.

²⁰⁰ U.S. STATE DEP’T, HUMAN RIGHTS AND LABOR COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>.

²⁰¹ Lisa Schlein, *Thousands of South Sudanese Threatened With Expulsion Get Reprieve*, VOICE OF AM. (May 3, 2012), <http://www.voanews.com/content/thousands-of-south-sudanese-threatened-with-expulsion-get-reprieve-150173475/370022.html>.

²⁰² JOSHUA CRAZE, *DIVIDING LINES: GRAZING AND CONFLICT ALONG THE SUDAN–SOUTH SUDAN BORDER* (2013), <http://www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP30-North-South-Border.pdf>