

# Key Threats of Statelessness in the Post-Secession Sudanese and South Sudanese Nationality Regimes

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*Following the secession of South Sudan from Sudan on 9 July 2011, both countries have passed new citizenship legislation with dramatic effects for the rights of individuals on both sides of the new border. While the South Sudanese nationality provisions appear generous, its regime is at once both over and under-inclusive. It grants citizenship to a broad range of persons with little connection to South Sudan but fails to guarantee citizenship for individuals habitually resident in South Sudan and children born in South Sudan to stateless, undocumented or foreign parents. The Sudanese Act provides for the automatic denationalisation of South Sudanese nationals only and reserves to its own authorities the discretion to determine whether South Sudanese nationality has been acquired. This will lead to de jure statelessness as individuals denationalised by operation of the Sudanese law struggle to establish their nationality claims in South Sudan. Those individuals who have acquired South Sudanese citizenship but remain in Sudan are left as de facto stateless in the continuing absence of effective state protection from South Sudan.*

## **1. Introduction**

Following the secession of the Republic of South Sudan from the Republic of Sudan<sup>1</sup> on 9 July 2011<sup>2</sup>, both states have passed new citizenship laws with serious implications for the

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protection of individuals on both sides of the border and, in particular, individuals of South Sudanese origin remaining in Sudan. The new state of South Sudan has promulgated an entirely new Nationality Act<sup>3</sup> (hereinafter the NASS), while Sudan has introduced a number of significant amendments to the 1994 Sudanese Nationality Act (hereinafter the SNA).<sup>4</sup> I have recently published an extended analysis of the resulting nationality regime that describes its key features in some detail.<sup>5</sup> The two laws combine to produce a substantially increased risk of both *de jure* and *de facto* statelessness. This paper seeks to explain the principle causes of these key protection threats.

## 2. The General Position Following State Succession

The new Sudanese nationality regime makes aggressive provision for the automatic denationalization of individuals as they obtain the citizenship of South Sudan.<sup>6</sup> Provision for involuntary denationalisation, following acquisition of a foreign nationality, are common among states that seek to avoid dual or multiple nationality.<sup>7</sup> However, this is normally done only in those cases where a person acquires foreign nationality on a voluntary basis or retains it following acquisition by automatic/*ex lege* operation of law.<sup>8</sup> Where an individual is

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<sup>1</sup> The Republic of Sudan and the Republic of South Sudan will be referred to as Sudan and South Sudan throughout this paper.

<sup>2</sup> Mike Pflanz 'South Sudan Independence: Juba Celebrates the Birth of a Nation' *The Telegraph* (London, 9 July 2011) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/south-sudan/8627647/South-Sudan-independence-Juba-celebrates-the-birth-of-a-nation.html>> accessed 1 October 2013; 'South Sudan's Flag Raised at Independence Ceremony' (*BBC News On-Line*, 9 July 2011) < <http://www.bbc.co.uk/news/world-africa-14092375>> accessed 5 August 2013.

<sup>3</sup> The Nationality Act 2011 (South Sudan).

<sup>4</sup> Sudanese Nationality Act 1994 as amended by the Sudanese Nationality Act (Amendment) 2011 (Sudan).

<sup>5</sup> Mike Sanderson, 'The Post-Secession Nationality Regimes in Sudan and South Sudan' (2013) 27(3) *Journal of Immigration, Asylum and Nationality Law* 204.

<sup>6</sup> 'A person will automatically lose his Sudanese nationality if he has acquired, *de jure* or *de facto*, the nationality of South Sudan' Sudanese Nationality Act (n 4) art. 10(2).

<sup>7</sup> International Law Commission 'Draft Articles on Nationality of Natural Persons in Relation to the Succession of States with commentaries' *Yearbook of the International Law Commission* 1999, Vol II Part Two, art.10 commentary 1.

<sup>8</sup> A comprehensive list of such provisions is provided in Maurice Kamto Fourth Report on the Expulsion of Aliens International Law Commission, Sixtieth Session, 24 March 2008, UN Doc A/CN.4/594, 9-18.

denationalised in advance of their voluntary acquisition (or retention) of a foreign nationality they will frequently be rendered as *de jure* stateless. If these measures are implemented in a manner that fails to appropriately balance the legitimate interests of the state and the individual, this will constitute a violation of the guarantee against arbitrary deprivation of nationality found in Article 15(2) of the *Universal Declaration of Human Rights*,<sup>9</sup> and now part of customary international law.<sup>10</sup> Bearing in mind the impact statelessness will have on the individual, any deprivation which results in statelessness will be arbitrary, save when this is done in response to the most pressing needs of the state.<sup>11</sup> As explained by UNHCR in their reply to the report of the UN Secretary-General on the arbitrary deprivation of nationality:

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<sup>9</sup> Universal Declaration of Human Rights 1948 General Assembly Resolution 217A (III), art. 15(2).

<sup>10</sup> While not reflected in the International Covenant on Civil and Political Rights 999 UNTS 171 itself this right is now reflected in a wide range of other international treaties and instruments; International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195, art. 5(d)(iii); Convention on the Elimination of All Forms of Discrimination Against Women UN Doc A/34/46, art/ 9; Convention on the Nationality of Married Women 309 UNTS 65, art/ 9; Convention on the Reduction of Statelessness 989 UNTS 175, art/ 8(1); General Assembly Resolution 50/152 9 February 1996, para 16; Human Rights Council Resolution 20/5, para 2; Human Rights Council Resolution 7/10, para 2; Human Rights Council Resolution 10/13, para 2; Human Rights Council Resolution 13/2, para 2; *Report of the Secretary-General Human Rights and Arbitrary Deprivation of Nationality* UN Doc No A/HRC/13/34, 14 December 2009, paras 19-46; Permanent Court of Arbitration, *Eritrea-Ethiopia Claims Commission, Partial Award Civilians Claims, Eritrea's Claims* 15, 16, 23 and 27-32, between the State of Eritrea and the Federal Democratic Republic of Ethiopia, The Hague, 17 December 2004, para 60; '(...) while there may not necessarily be a positive duty on States to confer nationality there is, arguably, 'a negative duty not to create statelessness', so that any deprivation must be accompanied by strict rules of procedure and should not result in statelessness.' Carol A. Batchelor, 'Stateless Persons: Some Gaps in International Protection' 7(2) *IJRL* 232, 238; J.M.M. Chan 'Nationality as a Human Right', 12 *HRLJ* 11, 18; James Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP 2012) 516.

<sup>11</sup> 1961 Statelessness Convention (n 10), art. 8(2)a and 8(2)b.

The avoidance of statelessness is a general principle of international law. Deprivation of nationality resulting in statelessness will generally be arbitrary unless it serves a legitimate purpose and complies with the principle of proportionality. Thus, article 8 of the Convention on the Reduction of Statelessness allows for a limited set of circumstances under which deprivation of nationality resulting in statelessness is permissible, but as exceptions to a general principle they must be narrowly construed.<sup>12</sup>

There is, however, considerable state practice supporting the involuntary substitution of nationality in the context of state succession.<sup>13</sup> As explained by Hudson,

If 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 (...)<sup>14</sup>

Habitual residence is the test most frequently used to assess the connection between the individual citizen and a successor state.<sup>15</sup> This test achieves two key policy goals. First, it

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<sup>12</sup> Report of the Secretary-General (n 10), para 51.

<sup>13</sup> Manley O Hudson, 'Report on Nationality, Including Statelessness' UN Doc No. A/CN.4/50 Yearbook of the International Law Commission 1952, Vol II, para 10; 'Germany undertakes to recognise 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.' *Treaty of Versailles* 28 June 1919, art. 278; Paul Weis refers to this process as "substitution": '(...) automatic loss of nationality upon acquisition of another nationality (...) by operation of law (...)'. Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff International Publishers BV 1979) 116.

<sup>14</sup> Hudson (n 13), para 11.

<sup>15</sup> Patrick O'Connell, *State Succession in Municipal and International Law* Vol I (CUP 1967) 518; see e.g. Republic of Kosovo Law Nr. 03/L-034 *On the Citizenship of Kosovo*, art. 29 ('Citizenship according to the

ensures that individuals in receipt of citizenship have a genuine or effective link with the state in question.<sup>16</sup> Second, it ensures that in practice the individuals who acquire citizenship of a state will actually be resident in that state.

### 3. South Sudanese Approach

In contrast with widely accepted international practice, the NASS does not rely on habitual residence in South Sudan as a test for acquisition of its citizenship. Instead, this Act relies on connections with the indigenous ethnic communities<sup>17</sup> or individuals born<sup>18</sup> in South Sudan. The NASS does include a reference to ‘domicile’ which, as used in the Act, is roughly synonymous with the concept of habitual residence.<sup>19</sup> However, the application of this concept is limited to those individuals or, for those individuals claiming citizenship through an operative relative, their parent or grand-parent, ‘domiciled’ in South Sudan continuously

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Comprehensive Proposal for the Republic of Kosova Status Settlement’) ‘29.1 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.’

<sup>16</sup> 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.’ J.F. Rezek, ‘Le Droit International de la Nationalite’ in *Collected Courses of the Hague Academy of International Law* (Vol 198, Martinus Nijhoff 1987) 357; see also the views of UNHCR in the context of the dissolution of Czechoslovakia, ‘(...) it is in the interest of the successor State (...) to come as close as possible, when defining its initial body of citizens, to the definition of persons having a genuine link with that State. If a number of persons are considered to be “foreigners” in “their own country” clearly that is not in the interest of the State itself.’ UNHCR Regional Bureau for Europe ‘The Czech and Slovak Citizenship Laws and the Problem of Statelessness’ in *Citizenship in the Context of the Dissolution of Czechoslovakia European Series* Vol 2(4) September 1996 (both cited in ILC Draft Articles (n 7), art. 5 commentary).

<sup>17</sup> ‘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: (b) such person belongs to one of the indigenous ethnic communities of South Sudan.’ South Sudanese Nationality Act 2011 (n 3), art. 8(1)b.

<sup>18</sup> ‘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’ Nationality Act (South Sudan) (n 3), art. 8(1)a.

<sup>19</sup> 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’ Nationality Act (South Sudan) (n 3), art. 8(2); Sanderson (n 5), 209-212.

since 1 January 1956.<sup>20</sup> This has two key implications. First, a wide range of individuals with familial and ethnic affinities to South Sudan will acquire South Sudanese citizenship *ex lege* without any guarantee that they will have a practical or effective link with the new state as might otherwise be established by their habitual residence. Second, there will continue to be a group of individuals that are actually habitually resident in South Sudan but cannot acquire citizenship due to their lack of a relevant familial or ethnic connection. The resulting nationality regime is at once both over and under-inclusive.

This situation is aggravated by the absence of a general *ius soli* right to citizenship for children born in South Sudan. Whereas Article 8(4) of the South Sudanese Act contains a modified *ius soli* right, its application is restricted to children found in South Sudan ‘(...) as a deserted infant of unknown parents (...)’.<sup>21</sup> No provision is made for children who are born in South Sudan to parents who are themselves stateless or citizens of states that adhere strictly to the principle of *ius soli*, and so are unable to pass on their citizenship to children born abroad.<sup>22</sup> For those children born to stateless parents this will mean that statelessness is passed on from generation to generation like a hereditary disease.<sup>23</sup> This issue is specifically addressed in Article 13 of the ILC Draft Articles,

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<sup>20</sup> 1 January 1956 was the date of Sudan’s independence from Britain and Egypt, see PM Holt and MW Daly *A History of the Sudan: From the Coming of Islam to the Present Day* (6th edn, Longman 2011) ch. 11.

<sup>21</sup> The Nationality Act (South Sudan) (n 3), art. 8(4).

<sup>22</sup> 1961 Statelessness Convention (n 10), art. 1(a), 4; Convention on the Rights of the Child 1577 UNTS 3, art. 7; Report of the Secretary-General (n 10), para 37; ‘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.’ David Weissbrodt, *The Human Rights of Non-Citizens* (OUP 2008) 75.

<sup>23</sup> Hudson (n 13), para 17.

A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.<sup>24</sup>

The ILC Draft Articles are otherwise limited to considering ‘(...) nationality solely in relation to the occurrence of a succession of States.’<sup>25</sup> In this case the ILC recognized ‘(...) the need for an exception from the rigid definition *ratione temporis* (...) for addressing also the problem of children born after the succession of States from parents whose nationality (...) has not been determined.’<sup>26</sup>

#### 4. Sudanese Approach

The impact of the South Sudanese citizenship provisions can only be properly understood when they are examined together with the denationalisation provisions of the SNA. Article 10(2) of the amended SNA provides that ‘A person will automatically lose his Sudanese nationality if he has acquired, *de jure* or *de facto*, the nationality of South Sudan’.<sup>27</sup> The SNA incorporates the nationality provisions of the NASS as the basis for denationalisation. The huge breadth of the South Sudanese nationality provisions makes the Sudanese denationalisation provisions truly sweeping.

Importantly, the effects of the provisions of both laws are constitutive (performative) rather than constative (descriptive).<sup>28</sup> They operate *ex lege* without further, intervening, state action. As an individual falls within the scope of the criteria for South Sudanese nationality

<sup>24</sup> ILC Draft Articles (n 7), art. 13.

<sup>25</sup> ILC Draft Articles (n 7), art. 13 commentary para 1.

<sup>26</sup> ILC Draft Articles (n 7), art. 13 commentary para 1.

<sup>27</sup> Sudanese Nationality Act (n 4), art. 10(2).

<sup>28</sup> Sanderson (n 5), 218-219, 227-228.

they are denationalised by operation of the Sudanese law. Any later determinations with respect to either the acquisition or loss of nationality are merely declarative. Official recognition does not make someone a national of South Sudan but declares them to be one. They do not become a national because of their recognition by the authorities, but are recognised by the authorities because they are a national.

For individuals who are already resident in South Sudan and who fall within the acquisition criteria of the NASS the combined effect of these two laws provides an efficient mechanism for 're-nationalisation' from Sudanese to South Sudanese citizenship. However, the South Sudanese acquisition criteria are sufficiently sweeping so as to include many individuals resident outside of South Sudan. It is commonly estimated that up to half a million individuals from South Sudan remain resident in Sudan.<sup>29</sup> The combined effect of these laws is to renationalise these individuals to citizenship of a state where they are no longer (or, indeed, never were) resident and so leaving them without effective national protection in their actual place of residence.<sup>30</sup>

### **5. *De Jure* and *De Facto* Acquisition**

The appearance of the words *de facto* and *de jure* in Article 10(2) as conditions for the acquisition of nationality is striking. It is tempting to attribute to them some role in determining the extent of the Sudanese denationalisation provisions. This point has already

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<sup>29</sup> Refugees International *South Sudan Nationality: Commitment Now Avoids Conflict Later*, 29 May 2012 <[http://www.refugeesinternational.org/sites/default/files/052912\\_South\\_Sudan\\_Nationality%20letterhead.pdf](http://www.refugeesinternational.org/sites/default/files/052912_South_Sudan_Nationality%20letterhead.pdf)> accessed 1 August 2013, 2.

<sup>30</sup> Bronwen Manby, *The Right to a Nationality and the Secession of South Sudan: A Commentary on the Impact of the New Laws* Open Society Initiative for Eastern Africa 18 June 2012: <<http://www.opensocietyfoundations.org/sites/default/files/right-nationality-and-secession-south-sudan-commentary-20120618.pdf>> accessed 15 July 2013, 5.

been picked up by some in the NGO community.<sup>31</sup> However, the reference in the Sudanese Act is to the *de facto* acquisition of nationality, rather than the acquisition of *de facto* nationality. What must be established *de facto* for the operation of Article 10(2) is not actual state protection but the legal fact of acquisition. Due to the constitutive structure of Article 8 of the NASS individuals acquire nationality as soon as they meet the criteria in that Article. The legal fact of acquisition is both *de jure* and *de facto* without further or intervening administrative measures. The addition of *de facto* acquisition as a condition for denationalisation adds nothing to ordinary legal (*de jure*) acquisition. Although *Human Rights Watch* has stated that ‘[t]he fact that a person is eligible to be a citizen of South Sudan is not to say he or she has acquired South Sudanese citizenship’<sup>32</sup> this is incorrect. In fact, that is exactly what this means.

### 5.1 Resulting *De Jure* Statelessness

The interaction between these two laws can make the analysis of any resulting statelessness a complicated exercise. At first blush it might seem that, due to the constitutive nature of the South Sudanese nationality provisions and the manner in which they have been incorporated into the Sudanese law, anyone denationalised by operation of the Sudanese law will necessarily have acquired citizenship of South Sudan. The denationalisation procedures of the Sudanese law do not operate unless and until the individual acquires the nationality of South Sudan. Where the individual does not acquire South Sudanese citizenship the Sudanese denationalisation provisions do not apply: *expressio unius est exclusio alterius*. This appears to eliminate any potential for resulting *de jure* statelessness.

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<sup>31</sup> see, eg, *Manby* (n 30); Human Rights Watch, ‘Sudan: Don’t Strip Citizenship Arbitrarily’ 2 March 2012 <<http://www.hrw.org/news/2012/03/02/sudan-don-t-strip-citizenship-arbitrarily>> accessed 18 July 2013.

<sup>32</sup> Human Rights Watch (n 31)

Although superficially, both stages (the acquisition of citizenship and subsequent denationalisation) appear to depend on shared criteria (acquisition of South Sudanese citizenship) this is misleading for two reasons. Firstly, this criteria are complex and depend upon the evaluation of civil evidence relating to family relationships<sup>33</sup>, ethnicity<sup>34</sup> and, in some cases, continuous residency in South Sudan.<sup>35</sup> Although the South Sudanese law appears comprehensive with respect to the grounds for the acquisition of citizenship it provides no guidance as to, for example, the meaning of ‘belonging’ to an indigenous ethnic group.<sup>36</sup> Whereas some provision is made in the implementing regulations for the use of oral evidence where documentary evidence is unavailable it is unclear what standards of admissibility or proof will apply in the course of such proceedings.<sup>37</sup> This is particularly important in the context of South Sudan where, in part due to the recent history of civil disorder and resulting displacement, it can be expected that many will lack the civil documents needed to establish their nationality claim under the NASS.<sup>38</sup>

While the acquisition provisions are constitutive in practice, they require confirmation by the state authorities (even if this is only declarative in effect) if they are to be effective as a guarantee of national protection and other, corollary, public entitlements. Where, as in the present case, each state reserves to itself the right to determine the fact of acquisition it is virtually inevitable that substantively different criteria will be applied by each state. Any determination made by the Sudanese authorities in respect of denationalisation 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 fact of

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<sup>33</sup> Nationality Act (South Sudan) (n 3), art. 8(1)a.

<sup>34</sup> Nationality Act (South Sudan) (n 3), art. 8(1)b.

<sup>35</sup> Nationality Act (South Sudan) (n 3), art. 8(2).

<sup>36</sup> Sanderson (n 5), 212-215.

<sup>37</sup> Nationality Regulations 2011 (South Sudan), s 1(26).

<sup>38</sup> Manby (n 30), 5.

acquisition will not influence any later determinations by the South Sudanese authorities themselves. It remains to be seen whether the Sudanese authorities will accept decisions made by the South Sudanese authorities as to the acquisition of South Sudanese citizenship as determinative for the purposes of denationalisation proceedings in Sudan. As a result, the individual will be rendered *de jure* stateless regardless of what might be the potential for a later or further application for citizenship.<sup>39</sup>

Even where an application for South Sudanese citizenship is not refused outright it is predictable that there will be significant delays in regularizing the South Sudanese citizenship procedures as the country works to improve their own internal administrative capacity. Where this produces an undue delay in confirming the acquisition of South Sudanese citizenship the process of substitution should be regarded as incomplete. The individual may have been prevented from confirming their acquisition of South Sudanese citizenship due to simple error or lack of administrative capacity. Nevertheless, during the period of this delay they are not ‘(...) considered as a national by any State under the operation of its law.’<sup>40</sup> And, as such, are left as *de jure* stateless.

This is true regardless of the constitutive nature of the South Sudanese acquisition provisions. It may be that a reasonable outside observer (or foreign state, such as Sudan) would interpret those provisions as applied to have granted South Sudanese citizenship in a particular case. This may, in fact, be an unavoidable conclusion. Nevertheless, should the relevant administrative body in South Sudan deny or unduly delay recognition (even if this is only a declarative measure and even if this is done wholly capriciously) the practical effect of this is

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<sup>39</sup> ‘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.’ UN High Commissioner for Refugees, Expert Meeting ‘The Concept of Stateless Persons under International Law’ (“Prato Conclusions”) May 2010

<sup>40</sup> Convention Relating to the Status of Stateless Persons 360 UNTS 117, art. 1(1).

to fail to consider that individual as a South Sudanese national under operation of its law. The judgment as to whether an individual is stateless within the meaning of Article 1(1) of the 1954 Stateless Convention is an essentially subjective one and must be viewed from the perspective of the responsible granting state.<sup>41</sup> It does not matter if the individual is manifestly entitled or, indeed, has actually received citizenship by operation of that state's nationality law if the state itself does not accept that this is the case. The relevant inquiry in the context of *de jure* statelessness is whether the state apparatus itself considers the individual to have acquired their nationality.

## 5.2 Resulting *De Facto* Statelessness

While many of the individuals 're-nationalised' to the citizenship of South Sudan will either be resident in South Sudan or actively seeking to return, up to half a million individuals of South Sudanese origin remain in Sudan.<sup>42</sup> Those who remain in Sudan have been subjected to a range of discriminatory measures. Some have now lost their jobs and homes and are unable to access basic public services such as schools and health clinics.<sup>43</sup> In practice, opportunities for return to South Sudan remain extremely limited even for those actively seeking to do so. International funding for returns was exhausted by February 2012<sup>44</sup> and the consequent reduction in return programmes has left many stranded either inside Sudan or at key transit points just across the South Sudanese border.<sup>45</sup> While some small-scale convoys

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<sup>41</sup> For a detailed discussion of the correct interpretation of Article 1(1) of the 1954 Stateless Convention see Mike Sanderson 'South Sudanese in Sudan: Two Key Protection Threats' *Northwestern University Journal of International Human Rights* (Forthcoming)

<sup>42</sup> Refugees International (n 29), 2.

<sup>43</sup> Manby (n 30), 5.

<sup>44</sup> Ian Timberlake, 'Convoy takes South Sudanese Home from Khartoum' *Agence France-Presse* 19 March 2013 <<http://reliefweb.int/report/sudan/convoy-takes-south-sudanese-home-khartoum>> accessed 15 April 2013.

<sup>45</sup> IOM 'IOM, Partners Highlight Continued Plight of Stranded South Sudanese' (5 March 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>> accessed 15 April 2013; IOM South Sudan Project Compendium 2013, 3

continue to return to South Sudan, approximately 40,000 people remain stranded at return points around Khartoum.<sup>46</sup>

The acquisition of nationality does not amount to good national protection for those who remain outside their country of citizenship. Without meaningful protection they are *de facto* stateless as defined in the recent UNHCR expert conclusions on *The Concept of Stateless Persons under International Law*,

(...) [D]e 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.<sup>47</sup>

Where South Sudan is unwilling or unable to extend its protection to its nationals abroad, including practical assistance for return, these people are left as *de facto* stateless. This serves to highlight an important protection gap. Although there is an extremely well-articulated treaty regime for the protection of *de jure* stateless persons as defined by Article 1(1) of the 1954 Statelessness Convention including, most notably, the 1954 and 1961 Statelessness Conventions, there is no similar regime for the protection of *de facto* stateless persons.<sup>48</sup> Instead, they must rely on any discretionary measures that might be adopted by interested states.

## 6. Conclusion

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<[https://www.iom.int/files/live/sites/iom/files/Country/docs/IOM\\_South\\_Sudan\\_2013\\_Country\\_Programme.pdf](https://www.iom.int/files/live/sites/iom/files/Country/docs/IOM_South_Sudan_2013_Country_Programme.pdf)> accessed 15 April 2013.

<sup>46</sup> Timberlake (n 44); OCHA, 'Sudan: Families from South Sudan Stranded in Khartoum' (6 March 2013) <<http://www.unocha.org/south-sudan/node/2176>> accessed 15 July 2013.

<sup>47</sup> Prato Conclusions (n 39), 6 para A(2).

<sup>48</sup> Prato Conclusions (n 39), 5.

The amended nationality regimes of Sudan and South Sudan together produce a significantly increased risk of both *de jure* and *de facto* statelessness. The involuntary substitution of nationality following state succession is well-established in state practice. However, by abandoning the test of habitual residence the South Sudanese provisions now fail to effectively reconcile the citizenship of individuals resident in its territory to the sovereignty of the new state. This is aggravated by the provisions of the Sudanese law which purport to automatically denationalise individuals following their acquisition of South Sudanese nationality. Their combined effect is to strip those individuals with ethnic or familial connections to South Sudan of their Sudanese nationality. Those individuals who are subsequently unable to confirm their citizenship of South Sudan will be rendered *de jure* stateless while the many who lack effective state protection and remain stranded outside South Sudan are left as *de facto* stateless.

Perhaps most significantly, neither law provides a mechanism by which the wishes of individuals might be taken into account in respect of their own nationality.<sup>49</sup> This is comparatively unimportant when nationality is attributed on the basis of habitual residence. It can be sensibly assumed that individuals prefer to acquire or retain the nationality of the state where they are resident. However, the new South Sudanese law operates to automatically attribute citizenship to innumerable individuals of South Sudanese ethnic and/or familial origins living outside of South Sudan with effects for them in relation to their other nationality and/or immigration status abroad that as of yet can be only surmised.<sup>50</sup> At

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<sup>49</sup> Cf 'States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.' ILC Draft Article (n 7), art. 11(1)

<sup>50</sup> For discussion of some of the unintended effects of the automatic acquisition of a second nationality see Sanderson (n 5), 215-217

the same time, the Sudanese law operates to denationalise *ex lege* up to half million residents of Sudan.

The process of substitution is an important exception to the general rule in public international law against involuntary denationalisation and is specific to state succession. It is intended to improve protection for individuals who would otherwise be left outside their country of nationality due to territorial change or the dissolution of their former state. In the present context, this process fails to adequately address this key policy aim and leaves a significant minority of the Sudanese and South Sudanese populations without meaningful national protection.