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## South Sudan Road to Independence: Broken Promises and Lost Opportunities

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*Articles***South Sudan Road to Independence: Broken Promises and Lost Opportunities***Salman M. A. Salman\**

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### I. INTRODUCTION

Father Saturnino Lohure, a Southern Sudanese politician, stated in a speech delivered before the Sudanese national Parliament in Khartoum on June 23, 1958:

Mr. President, Sir, the South has no ill-intentions whatsoever towards the North, the South simply claims to run its local affairs in a united Sudan. The South has no intention of separating from the North, for had that been the case nothing on earth would have prevented the demand for separation. The South claims to federate with the North, a right that the South undoubtedly possesses as a consequence of the principle of free self-determination which reason and democracy granted to a free people. The South will at any moment separate from the North if and when the North so decides directly or indirectly, through political, social and economic subjection of the South.<sup>1</sup>

Fifty-three years later, the prophecy of Father Lohure turned true, and indeed for the reasons he cited—the failure of the Northern Sudanese political leaders to deal with South Sudan’s social, political, economic, and cultural differences seriously. On January 9, 2011, the Southern Sudanese people exercised their right of self-determination and voted by referendum, almost unanimously, to secede from Sudan.<sup>2</sup> The right of self-determination was granted to them, six years before the referendum, by the Comprehensive Peace Agreement (“CPA”) that was concluded between the government of the Sudan and the Sudan People’s Liberation Movement/Army (“SPLM/A”) on January 9, 2005.<sup>3</sup> After the end of an interim period of six months, the Republic of South Sudan emerged on July 9, 2011, as the 193rd member of the global family of nations, and as the 54th African state.<sup>4</sup>

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1. STEVE A. PATERNO, THE REV. FR. SATURNINO LOHURE: A ROMAN CATHOLIC PRIEST TURNED REBEL, THE SOUTH SUDAN EXPERIENCE 119-20 (2007). Father Lohure was elected to the Sudanese national Parliament from the Torit district of South Sudan in the March 1958 elections, and was subsequently elected as the leader of the Southern block in the Parliament. He was also selected as a member of the Constitution Committee. See *infra* notes 21, 90, 92, 104.

2. Close to ninety-nine percent of the Southern Sudanese registered voters opted for secession. See *Results for the Referendum of Southern Sudan*, SOUTHERN SUDAN REFERENDUM 2011, <http://southernsudan2011.com/> (last visited Mar. 9, 2013).

3. Alan Masakhalia Wanga, *The South Sudan Independence Referendum*, DEMOCRACY INT’L (2011), available at <http://direct-democracy-navigator.org/system/documents/37/Report%20on%20the%20South%20Sudan%20Independence%20Referendum.pdf?1320762493>.

4. *South Sudan Becomes an Independent Nation*, BBC NEWS (July 8, 2011), <http://www.bbc.co.uk/news/world-africa-14089843>.

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This Article provides an overview of the turbulent historical relations between Sudan North-South, the demands of the people of South Sudan for a special political status within a unified Sudan, and how the North adamantly and consistently failed to take these demands seriously through a series of broken promises and lost opportunities for resolving the problem of South Sudan. After a short introduction highlighting these issues, Part II of the Article discusses the political geography and history of South Sudan. Part III details the rise of the various nationalist movements in both parts of the country, and the futile attempts to resolve the Sudan North-South problem and keep the country together. Part IV then discusses how the concept of self-determination emerged and how it was gradually accepted by the different political groups within the North. Next, Part V reviews the Comprehensive Peace Agreement—a set of agreements that dealt with the right of self-determination for the Southern Sudanese, and the division of wealth and power, as well as the security arrangements, during the interim period prior to the referendum. Finally, Part VI examines Sudan's rocky interim period and the emergence of South Sudan as an independent nation. The Conclusion highlights some of the main lessons that may be learnt from the secession of South Sudan by other nations with culturally and racially diversified communities, as well as by the Sudan itself.

## II. POLITICAL GEOGRAPHY AND HISTORY OF SOUTH SUDAN

South Sudan covers an area of about 640,000 square kilometers,<sup>5</sup> or about twenty-six percent of the total area of Sudan, before the South seceded, of approximately 2.5 million square kilometers.<sup>6</sup> According to the 2009 National Census, the population of Southern Sudan is 8.2 million,<sup>7</sup> or twenty-one percent of the total 39.1 million population of Sudan.<sup>8</sup> It should be added that the parties are not in agreement over those figures.<sup>9</sup> Large areas in the borders between the two countries are still disputed, and South Sudan claimed that large segments of its population were not counted.<sup>10</sup>

A large part of the population of North Sudan is Arabic-speaking Muslims who identify with the Middle East and its Arab-Islamic culture. The percentage of Muslims in the North is larger than that of the Arab population because not all

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5. Wanga, *supra* note 3.

6. Mu Xuequan, *Sudan's Area to Reduce by Quarter After South Sudan Cessation*, WINHUANET.COM (July 5, 2011), [http://news.xinhuanet.com/english2010/world/2011-07/05/c\\_13965373.htm](http://news.xinhuanet.com/english2010/world/2011-07/05/c_13965373.htm).

7. *CORRECTION: Census Shows South Sudan Population at 8.2 Million: Report*, SUDAN TRIBUNE (Apr. 14, 2009), <http://www.sudantribune.com/spip.php?article30867>.

8. *Sudan: People and Society*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> (last visited Feb. 22, 2013).

9. *South Sudan Will Conduct Fresh Population Census Next Year*, SUDAN TRIBUNE (Jan. 9, 2013), <http://www.sudantribune.com/spip.php?article45114>.

10. *Compare* Wanga, *supra* note 3, with Mu Xuequan, *supra* note 6.

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the Muslims in the North are Arabs.<sup>11</sup> Yet, the Arab culture dominates there.<sup>12</sup> As Mr. Oluwadare Aguda observed:

The greatest achievement of Arabism in the Sudan has been the unquestioned acceptance of the whole world that this is an Arab state, in spite of the fact that only forty percent of the population is Arab. The predominance of the Arab Sudanese in the country's culture, politics, administration, commerce and industry makes it *de facto* an Arab Country.<sup>13</sup>

The people of South Sudan, on the other hand, are Africans and fall under three distinct groups: the Nilotes, the Nilo-Hamites, and the Western Sudanic tribes, which are comprised of 572 sub-groups.<sup>14</sup> The Nilotes comprise the three main tribes in the South, namely the Dinka, the Nuer, and the Shilluk, with the Dinka being the largest and most dominant tribe politically and economically.<sup>15</sup> Many of the Southern political leaders, technocrats, and academics belong to the Dinka tribe. The domination of the Dinka has, over the years, generated a lot of tension between the Dinka and the rest of the Southern Sudanese tribes, and has been one major factor in some recent historical and political developments, as will be discussed in the course of this Article.<sup>16</sup>

The people of South Sudan adhere to a number of indigenous religions, although some have embraced Islam and Christianity.<sup>17</sup> Indeed, most of the political leaders in the South are Christians.<sup>18</sup> A wide range of local languages are used throughout the South; however, a vernacular form of Arabic is spoken in the large cities in the South, and English has been the *lingua franca* in the government offices.<sup>19</sup> Thus, the basic differences between the North and the South are ethnic, religious, linguistic, and cultural. The unequal economic development between the two parts of the country was another major difference that exacerbated the other differences.<sup>20</sup>

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11. Oluwadare Aguda, *Arabism and Pan-Arabism in Sudanese Politics*, 11 J. MOD. AFR. STUD. 117, 117 (1976).

12. *Id.*

13. *See id.*

14. *South Sudanese Society*, GOV'T OF THE REPUBLIC OF S. SUDAN, <http://www.goss-online.org/magnoliaPublic/en/about/society.html> (last updated Aug. 19, 2011).

15. *Id.*; Dunstan Wai, *The Southern Sudan: The Country and the People*, in THE SOUTHERN SUDAN: THE PROBLEM OF NATIONAL INTEGRATION 7, 9 (Dustan Wai ed., 1973).

16. *See infra* Part III.D.

17. *South Sudanese Society*, *supra* note 14.

18. *South Sudan*, N.Y. TIMES (Sept. 27, 2012), <http://topics.nytimes.com/top/news/international/countriesandterritories/south-sudan/index.html>.

19. For a more detailed description of the people of South Sudan and their culture, see Wai, *supra* note 15, at 9-10.

20. Joseph Garang emphasized the disparity in economic development as one key element in the problem of South Sudan and argued that “[e]conomic and social progress in the South will definitely lead to an increase

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The Sudan, with its borders prior to the secession of South Sudan, emerged as a result of the Turko-Egyptian conquest in 1821. The ruler of Egypt at that time, Mohamed Ali Pasha, conquered the land south of Egypt, and his successors reached the current southern borders of South Sudan.<sup>21</sup> He moved into the Sudan in search of slaves and gold.<sup>22</sup> He also wanted to reach the origins of the Nile Basin to secure the flow of its waters to Egypt.<sup>23</sup> The harsh Turko-Egyptian rule in the Sudan continued until 1885, when it was overthrown by the Mahdist revolution.<sup>24</sup> Slave trade was the dominant feature of the two regimes; the Turko-Egyptian and Mahdist, and the Northern traders, roamed South Sudan capturing hundreds of thousands of Southerners into slavery and brought them to the North, where many were exported to Egypt and the rest of the Middle East.<sup>25</sup>

Sudan was conquered by the Anglo-Egyptian army in 1898, establishing the condominium rule that overthrew and replaced the Mahdist state.<sup>26</sup> After pacification of the country, the Anglo-Egyptian administration decided to close the three provinces constituting Southern Sudan (Bahr el-Ghazal, Equatoria, and Upper Nile), and to restrict the movement of people across the borders between the two parts of the country.<sup>27</sup> Accordingly, the Passports and Permits Ordinance was promulgated in 1922, requiring a permit for any Northern Sudanese who wanted to travel to the South.<sup>28</sup> The justification given for this action was to stop the slave trade, which was still prevalent in some remote areas in the South.<sup>29</sup> However, the reasons also included fear by the British of the spread of the Islamic religion and Arabic language in the South.<sup>30</sup> The closure of the South, and its separate administration from the North, continued to be the official policy of the colonial administration for the next twenty-five years.<sup>31</sup>

One major decision reflecting this policy was taken in the early-to-mid-1940s. At that time, the condominium administration decided to establish an

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in the strength of the democratic movement." See Joseph Garang, *On Economics and Regional Autonomy*, in THE SOUTHERN SUDAN: THE PROBLEM OF NATIONAL INTEGRATION, *supra* note 15, at 83, 91.

21. *History of the Sudan*, HIST. WORLD, <http://www.historyworld.net/wrldhis/plaintexthistories.asp?historyid=aa86> (last visited Mar. 9, 2013).

22. ROBERT COLLINS, THE SOUTHERN SUDAN 1883-1898: A STRUGGLE FOR CONTROL 9 (1962).

23. *History of the Sudan*, *supra* note 21.

24. *Id.*

25. COLLINS, *supra* note 22; see also P.M. HOLT & M.W. DALY, HISTORY OF THE SUDAN: FROM THE COMING OF ISLAM TO THE PRESENT DAY (1988); AMIR H. IDRIS, SUDAN'S CIVIL WAR: SLAVERY, WAR AND FORMATIONAL IDENTITIES (2001).

26. Riek Machar Teny-Dhurgon, *South Sudan: A History of Political Domination—A Case of Self-Determination*, U. PA. AFR. STUD. CTR. (Nov. 19, 1995), [http://www.africa.upenn.edu/Hornet/sd\\_machar.html](http://www.africa.upenn.edu/Hornet/sd_machar.html).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. For a detailed analysis of those developments, see JOSEPH ODUHO & WILLIAM DENG, THE PROBLEM OF SOUTHERN SUDAN (1963).

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advisory council to train the Sudanese in local self-government.<sup>32</sup> Membership of the council was confined to Northern Sudan, and it was called “The Advisory Council of Northern Sudan.”<sup>33</sup> The South was left out of the Council and continued to be administered separately.<sup>34</sup> The Council was inaugurated on May 15, 1944, and consisted of the Governor-General of the Sudan as president, the civil, financial and legal secretaries, and twenty-eight Sudanese members.<sup>35</sup> Exclusion of Southern Sudan was criticized by the nationalist movements in the North who saw it as another indication of the intent of the British for the South.<sup>36</sup> The pure advisory role of the Council and its composition were also areas of criticism.<sup>37</sup> Indeed, the Advisory Council for Northern Sudan provided a potent weapon for the rising nationalist movement in Northern Sudan.

### III. THE PROBLEM OF SOUTHERN SUDAN DURING THE DIFFERENT POLITICAL ERAS

#### *A. The Rise of Nationalist Movements in North and South Sudan*

Following the end of the Second World War, Northern Sudanese elites started forming political organizations and parties, and demanded an end to colonial rule.<sup>38</sup> The issue of the unity of the two parts of the country was flagged as an important and urgent matter for the Northern elites, particularly after the establishment of the Advisory Council of Northern Sudan in 1944.<sup>39</sup> The British who ruled Southern Sudan in close coordination with their East African colonies (Kenya, Uganda, and Tanganyika) until that time also wanted a resolution of that matter.<sup>40</sup> Accordingly, a meeting called the “Juba Conference” between some Northern political elites and some Southern chiefs was held in Juba in June 1947.<sup>41</sup> That meeting was the first direct contact between Northern and Southern political and technocratic elites.<sup>42</sup> The Northerners pressed for unity of the country and presented to the Southerners what they claimed would be the fruits of such unity: a large and strong country, participation in administering the

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32. *Id.*

33. TIM NIBLOCK, CLASS AND POWER IN SUDAN 123 (1987).

34. *Id.* at 159.

35. *Id.*

36. *Id.*

37. For background information of the Advisory Council, see P.M. HOLT, A MODERN HISTORY OF THE SUDAN: FROM THE FUNJ SULTANATE TO PRESENT DAY 146-48 (1961).

38. See generally Appendix III: *Proceedings of the Juba Conference on the Political Development of the Southern Sudan, June 1947*, in THE SOUTHERN SUDAN: THE PROBLEM OF NATIONAL INTEGRATION, *supra* note 15, at 185.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

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country, equal treatment, jobs, education, and equal pay.<sup>43</sup> The Southerners were, however, cautious. They demanded that certain safeguards be agreed upon.<sup>44</sup> Such safeguards included recognition of the blotted history of relations between the two parts of the country, commitment to equality of citizens, preservation and promotion of their cultures (languages, traditions, and customs), and involvement of the Southerners in the administration of the country on equal footing.<sup>45</sup> They demanded an accelerated economic development program for South Sudan.<sup>46</sup> They also asked for more time for interaction and to test the good faith of their Northern brothers.<sup>47</sup> One Southern representative, Chief Lolik Lado, compared the situation to a marriage proposal—the two parties needed more time to know and trust each other.<sup>48</sup>

Yet, many Northerners claim that the Conference endorsed the unity of the country, and Northern politicians kept repeating that claim when challenging the demands of Southerners. The Southerners were irritated and angered by the Northerners' claims. Most of them argued that the Southern participants actually asked for a transitional period to test the goodwill of the North before agreeing to any form of association, while others read the proceedings of the meeting as a demand for a federal system of government. Irrespective of how to interpret the outcome of the Conference, it should be noted that the Civil Secretary of the Sudan, at that time, had already moved in the direction of uniting the Sudan a few weeks before the Conference, and had issued his instructions accordingly.<sup>49</sup> The borders were reopened in 1947, after twenty-five years of closure, and restrictions on the movement of the people were fully lifted following the abolition of the Passports and Permits Ordinance of 1922.<sup>50</sup> Although the closure of Southern Sudan under the Passports and Permits Ordinance of 1922 lasted for only twenty-five years, the Northern Sudanese political leaders would continue attributing the lack of integration and communication between the Northern and Southern Sudanese, and consequently the civil war itself, to this closure. This attempted justification continued and many Northern Sudanese even blame the secession of the South, which took place more than sixty years after the policy was reversed, on the closure of the South.

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See generally id.*

48. For more details on the Juba Conference and the statement of Chief Lolik Lado, see *id.* Twenty-eight people participated in the Juba Conference: six British officials, five Northern Sudanese, and seventeen Southerners, of whom seven were chiefs and the remaining ten were civil servants.

49. *See* JAMES ROBERTSON, *TRANSITION IN AFRICA* 107 (1973).

50. Teny-Dhurgon, *supra* note 26.



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Meanwhile, the political situation was developing rapidly in the North. Elections for a Legislative Assembly were held in November 1948,<sup>51</sup> although they were boycotted by the unionists (those who stood for unity of Egypt and the Sudan). In its first major political act, the Assembly represented both parts of the Sudan, reversing the British's Southern policy in the Sudan. Thirteen members represented the South, while fifty-two members were directly or indirectly elected from the North.<sup>52</sup> However, the powers of the Assembly were quite curtailed, and were clearly defined. An executive council was also established with the Sudanese constituting half of its members, but the Governor General of the Sudan continued to be the supreme ruler of the country, with veto powers over the decisions of the Council, and the British administrators constituting the other half.<sup>53</sup>

Negotiations on the future of the Sudan between the Northern political parties and the Anglo-Egyptian administration of the Sudan started immediately thereafter. These negotiations were concluded on February 12, 1953 in Cairo, and led to the Agreement concerning self-government and self-determination for the Sudan, with the choice between unity with Egypt, or independence of the Sudan.<sup>54</sup> Consequently, the Self-Government Statute was adopted on March 21, 1953 as a transitional constitution for the Sudan until a permanent one was adopted (following the exercise by the Sudanese of the right of self-determination). The Statute mandated the holding of elections for the Parliament that would lead the country during the transitional self-government period prior to the exercise of the right of self-determination. Those elections were held in November 1953 under international supervision.<sup>55</sup>

A few years after the Juba Conference, the Southern Sudanese educated class started organizing themselves into political parties, as was happening in the North. Immediately after the first democratic elections were held in the Sudan in November 1953, some of the Southerners who won the elections in the South met under the banner of what they called the "Southern Party." By that time, they had already started voicing their anger at being left out of the discussion and negotiations of the Sudanese political parties with Egypt and Britain regarding the future of the Sudan. This was the beginning of the rift that would keep widening after the formation of the first national government.

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51. *Id.*

52. HOLT, *supra* note 37, at 153.

53. *See id.* at 152-54.

54. *History of Sudan*, UNIC KHARTOUM, <http://unic.un.org/imucms/khartoum/36/497/history-of-sudan.aspx> (last visited Feb. 22, 2013).

55. For a detailed analysis of the 1953 Cairo Agreement and the Self-Government Statute, see HAROLD CARMICHAEL, *THE SUDAN* 291 (1954).

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The National Unionist Party (“NUP”), which stood for unity with Egypt, emerged as the winning party in the elections of November 1953, held under the Self-Government Statute of 1953.<sup>56</sup> Subsequently, the NUP leader, Ismail Al-Azhari, was elected as the first Prime Minister of the Sudan.<sup>57</sup> He formed his government in January 1954, and his cabinet included three Southerners as state, rather than full, ministers.<sup>58</sup> That was a major disappointment to the Southerners, who expected at least two full cabinet seats, as indicated in the 1953 Agreement. The exclusion of the Southerners from the 1953 negotiations, and the failure to appoint full ministers from the South already started sowing the seeds of distrust and discontent. Those feelings were soon exacerbated by the results of the Sudanization of the civil service posts that were formerly filled by British and Egyptian staff. Only six out of 800 posts went to the Southerners, and they were mostly junior posts. The promises of the Juba Conference for jobs and equal treatment were already forgotten.<sup>59</sup> Thus, even before the independence of the Sudan on January 1, 1956, “[t]he disappointment over broken promises, the resentment at the constant overlooking of the South’s political interests, and the alienation brought on by instances of insensitivity shown by inexperienced northern officials drafted to the South, all created growing spirit of unrest in Southern Sudan in 1954 and 1955.”<sup>60</sup>

Three more major developments took place that widened the rift further between the North and the South. The Southern politicians who formed the Southern Party and some other Southern intellectuals joined together and formed a new party called the “Liberal Party.” The Liberal Party decided to hold a conference in Juba to discuss the future relations between the two parts of the country and planned to invite all the Southern educated class to attend. However, the Prime Minister, Mr. Al-Azhari, objected to the participation of Southerners who were government employees in this conference because of their official status. He further threatened anyone who would participate in this conference with dismissal from government employment. The Liberal Party, however, went ahead with the conference and included government employees from the South, simply ignoring the warnings of the Prime Minister. The conference was held in

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56. *History of Sudan*, *supra* note 54.

57. *Id.*

58. The three Southerners who were selected by Mr. Al-Azhari as state ministers were Messrs. Pauline Alier, Santino Deng, and Dak Dei. Mr. Siricio Iro was selected in 1956 as a member of the Supreme Council of State (the collective head of state), the first Southern Sudanese to be selected as a member of the Council. The presidency of the Council would rotate every month amongst the five members. Thus, the Southern member would have the opportunity to become president of the Council at least two months a year. This arrangement was replaced in 1965 by a permanent presidency. See ABDEL MAGID BOB, *SOUTH SUDAN: THE DEBATE OF UNITY AND SECESSION* (2009) (in Arabic).

59. For a discussion of those issues, see OLIVER ALBINO, *THE SUDAN: A SOUTHERN VIEWPOINT* (1970).

60. NIBLOCK, *supra* note 33, at 216.

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October 1954 in Juba, and discussed a number of issues including the future relations between the North and the South. On the last day of the conference, the party adopted a resolution, passed almost unanimously by the 227 attendees, demanding a federal system of government for Southern Sudan.<sup>61</sup> Henceforth, federation became the official position of the Liberal Party, and the Party carried that demand and presented it to Mr. Al-Azhari's government in Khartoum. Unfortunately, as will be discussed later, Mr. Al-Azhari and his government, as well as the opposition Umma Party, reacted in a dismissive manner, and did not give that demand any serious thought or consideration.

The second development was the most serious of all. On August 18, 1955, the Equatorial Corps of the Sudan Defense Force in the Southern Sudanese city of Torit refused the order of their transfer to the North and mutinied because they were apprehensive and concerned about the transfer.<sup>62</sup> The disturbances soon extended to many other parts of South Sudan. The result was the killing of 366 Northerners and seventy-five Southerners during the disturbances. Some of the mutineer soldiers fled to the bush, sowing the seeds for the civil war that would soon engulf the South.<sup>63</sup> The reaction of the government was, unfortunately, quite harsh and swift. Instead of looking into the causes and grievances that caused the mutiny and trying to address them in a responsible and stately manner, the government took harsh measures. Southerners suspected of involvement in the disturbances were arrested and brought to swift trials, and some were sentenced to death and executed, while others were sent on long-term jail sentences. A third group was simply kept in jail awaiting trial for a long time.

The two addresses Prime Minister Al-Azhari gave to the Parliament on August 26, 1955 and November 2, 1955 reflected an unfortunate view of the situation. He called the disturbances a serious mutiny against law and military orders and elaborated on the harsh measures and heavy-handed approach his government was adopting. He called on the soldiers who participated in the mutiny to surrender and face trials for their actions and warned the chiefs who would shelter any such persons with harsh consequences.<sup>64</sup> Although he announced the formation of a committee to inquire into the disturbances and present a report,<sup>65</sup> he went on condemning the Southern policemen and accused

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61. For a detailed analysis of the proceedings of this Conference and the demand for federation, see BOB, *supra* note 58, at 60-70. Of the 227 participants in the meeting, 220 voted for federation. It is worth noting that this near unanimous vote in favor of federation in 1954 was repeated fifty-seven years later in the near unanimous vote in favor of secession on January 9, 2011. See James Gadet Dak, *South Sudan Celebrates Torit Revolution Day of 1955*, SUDAN TRIBUNE (Aug. 19, 2008), <http://www.sudantribune.com/spip.php?article 28325>.

62. See Dak, *supra* note 61.

63. *Sudan—History*, MONGABAY.COM, [http://www.mongabay.com/reference/country\\_studies/sudan/HISTORY.html](http://www.mongabay.com/reference/country_studies/sudan/HISTORY.html) (last visited Mar. 27, 2013).

64. For the address of the Prime Minister of November 2, 1955, referring to his address of August 26, 1955, see BOB, *supra* note 58, at 453.

65. See GOV'T OF SUDAN, REPORT OF THE INQUIRY COMMITTEE ON THE SOUTHERN SUDAN

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them of participation in the disturbances and the breach of law and order. It was not clear what the role of the committee of inquiry would be after the Prime Minister made his announcements and took his measures. Henceforth, Southerners who revolted against their treatment by the Khartoum government were termed “mutineers.” The “mutiny,” as the civil war was formally termed by all successive governments in Khartoum, would soon engulf the South and last for over half a century, except for a brief period between 1972 and 1983, as discussed later.<sup>66</sup>

The third development concerned the demands of the South for a federal system of government. The Southerners agreed to support the resolution for the independence of the Sudan that would be tabled before the Parliament at the end of the self-government period provided that it included a reference to the federal system of government, which was demanded by the 1954 Juba Conference of the Liberal Party. The government of Mr. Al-Azhari, and the opposition led by Mr. Mohamed Ahmed Mahjoub representing the Umma Party, both agreed to include this demand in the independence resolution. Indeed, the Parliament unanimously adopted, on December 19, 1955, the independence resolution, which also stated “[t]he request by Southern members of Parliament for a federal status of the South will be given due consideration by the Constituent Assembly.”<sup>67</sup> Consequently, the Northern and Southern members of the Parliament voted for the independence resolution and Sudan gained its independence on January 1, 1956.<sup>68</sup> The referendum provided for under the 1953 Agreement concerning self-government, and under the Self-Government Statute, was simply replaced by the December 19, 1955 parliamentary resolution on independence. The Southerners claim that agreement by the Northern political parties to a federal system of government was the *quid pro quo* for the South’s vote for independence. In other words, it was a package deal.<sup>69</sup>

It turned out that neither the government nor the opposition took their promise or the resolution seriously. The government did not follow up with any action or conduct a study on how to move forward with a federal system of government. The leader of the opposition, Mr. Mohamed Ahmed Mahjoub, remarked a few months later that the inclusion of the reference to the federal

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DISTURBANCES DURING AUGUST 1955 (1956). Judge Tawfik Cotran headed that committee of inquiry, and the report is referred to as the Cotran Report. The report was critical of the heavy-handed manner with which the disturbances were handled. It also criticized the huge promises made by Mr. Al-Azhari government in 1954 for jobs and equal pay, stating that those promises raised the expectations of the Southerners. It indicated that the failure to meet them, and the results of the Sudanization process that gave the Southerners only six out of 800 posts, had contributed immensely to the disturbances. *Id.*

66. *Sudan—History*, *supra* note 63.

67. *History of Sudan*, *supra* note 54.

68. *Id.*

69. See Bona Malwal, *The Roots of Current Contention*, in *THE SEARCH FOR PEACE AND UNITY IN THE SUDAN* 9, 9-12 (Francis Deng & Prosser Gifford eds., 1987).

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system for the South “was meant to make the Southerners happy and get them to go along with the independence resolution.”<sup>70</sup>

In July 1956, Mr. Al-Azhari’s government was voted out of office after some members of the NUP ruling party broke away and established a new party, the People’s Democratic Party (“PDP”). The Umma Party formed a government headed by Mr. Abdallah Khalil as the Prime Minister, in coalition with the newly formed PDP. The same coalition government with the same Prime Minister continued in power after the Umma Party emerged as the winning party in the March 1958 elections of the Constituent Assembly. The primary task of the Constituent Assembly was the drafting of a permanent constitution. The Sudan Self-Government Statute, which was the constitution of the Sudan during the transitional era prior to independence, was retailored in a hurry and issued as the Sudan Transitional Constitution of 1956 a few days prior to the declaration of independence of the Sudan.

A Constitution Committee consisting of members of the Constituent Assembly was established in 1958 to prepare a draft constitution to replace the Transitional Constitution of 1956.<sup>71</sup> Of its forty-six members, only three were from South Sudan—a gross under-representation. After a few days of deliberations, the Committee indicated that it had given “due consideration” to the request of the South for a federal system of government, as mandated by the 1955 resolution, and decided that federation would not be an appropriate form of government for the Sudan. Sadly, the government and the opposition felt that their only obligation under the resolution was to give only “due consideration” to the request, and this took place almost three years after the resolution was adopted in 1955.

As if that was not enough, the Constitution Committee started drafting a constitution for an Arab-Islamic Sudan, with *Sharia* (Islamic law) being the main source for legislation and Arabic being the official language for the whole country. The Prime Minister, Mr. Abdallah Khalil, his Umma Party, their coalition partners in the PDP, as well as the opposition NUP, were all pushing for the Arab-Islamic constitution. Understandably, the three Southern members of the Committee, led by Father Lohure, walked out in protest over both denial of federation to South Sudan and insistence on an Arab-Islamic constitution.<sup>72</sup>

The rift between the North and the South was clearly widening by the day in the mid-to-late-1950s.<sup>73</sup> By that time, the low-intensity civil war had already cropped up in many areas in the South. While the Constitution Committee was drafting the Arab-Islamic constitution, the two political parties of the government

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70. See ABEL ALIER, *SOUTHERN SUDAN: TOO MANY AGREEMENTS DISHONOURED* 23 (1990).

71. *Sudan—History*, *supra* note 63.

72. For a detailed discussion of the boycott of the Southern members for the work of the Committee, see DENG D. AKOL RUAY, *THE POLITICS OF TWO SUDANS: THE SOUTH AND THE NORTH 1821-1969* 90-93 (1994).

73. For a more detailed analysis of the rift between the North and the South, see DOUGLAS HAMILTON JOHNSON, *THE ROOT CAUSES OF SUDAN’S CIVIL WAR* (2003).

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were plotting against each other. Realizing that he would be voted out of office, the Prime Minister, Mr. Abdallah Khalil, instructed the army to take over power. General Ibrahim Abboud did so on November 17, 1958,<sup>74</sup> ending the first civilian era in the Sudan, as well as the post-independence dreams of democracy, freedom, and rule of law.

*C. The First Military Rule 1958–1964: Intensification of the Civil War*

Mr. Abdallah Khalil instructed the military to take over because of the rivalry between the Umma Party, the NUP, and the PDP. The 1956 Transitional Constitution that was tailored in a hurry from the Self-Government Statute of 1953, and that continued as the supreme law of Sudan during the first civilian era, was suspended. The country would be governed for the next six years by military decrees. Notably, the ruling military council did not include a single Southerner and the cabinet had only one Southerner as minister (for the Ministry of Animal Resources) during the entire six years.

Consequently, civil liberties were suspended and the political parties dissolved. However, a few days after the coup, Sayyed Abdel Rahman Al-Mahdi, the leader of the Ansar sect that is the backbone of the Umma Party, issued a statement endorsing the coup.<sup>75</sup> This was followed immediately by a similar statement of endorsement of the coup by Sayyed Ali Al-Mirghani, the leader of the Khatmiyya sect that is the backbone of the PDP. The endorsements reflected the approval of the two parties of the military takeover, as well as the rivalry between them in all political matters of the Sudan, including rapprochement with military rulers. The rivalry extended later to the appeasement of the SPLM, as will be seen in the course of this Article.<sup>76</sup>

The army takeover paved the way for an unchecked military response to the problem of South Sudan. Although the military government of General Abboud did not declare an Arab-Islamic state or promulgate an Islamic constitution for the Sudan, it moved swiftly to Arabize and Islamize the South. That was how the army officers, and the civilians who joined them, naively perceived the solution of the problem of Southern Sudan. For them, the problem was simply one of national integration that could be achieved by spreading and imposing an Arab-Islamic culture throughout Southern Sudan. Thus, forced Arabization and Islamization became the official policy of the regime.

General Abboud's government decreed that Arabic language would replace English and the local languages in the South, and that it would be the media of instruction in schools and the *lingua franca* in the government offices. Those

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74. *History of Sudan*, *supra* note 54.

75. *Sudan—History*, *supra* note 63.

76. For the two statements and discussion of the relationship of the two leaders with the government of General Abboud, see NIBLOCK, *supra* note 33, at 219–21.

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offices would henceforth have to work in Arabic, and those who did not know Arabic were removed. It should be added that Arabic language was introduced in the schools in Southern Sudan in 1949, immediately after the Passports and Permits was abolished in 1947, but it was taught together with English language.<sup>77</sup>

Christian missionaries, totaling more than three hundred, were expelled, and a new law, the Missionary Societies Act, was promulgated in 1962, requiring a license for any missionary that wanted to work in the South.<sup>78</sup> Friday was declared the day of rest instead of Sunday. Christian and local names were discouraged and replaced by Arabic/Islamic names. Mosques and Koranic schools were opened in many areas in the South with a concomitant closure of churches and missionary schools.

In addition to these provocative measures, the government announced that the South was in mutiny and a military response was required.<sup>79</sup> The military governors of the three Southern provinces were given a free hand to deal, as they deemed fit, with the situation in their respective provinces. Atrocities were reported throughout the South, and a large number of Southern Sudanese, particularly politicians and the educated class, fled the country to the neighboring African countries, particularly Kenya and Uganda.<sup>80</sup>

Under the Passports and Permits Ordinance of 1922, Southern Sudan was closed for Northern Sudanese to, *inter alia*, avoid spread of Islam and the Arabic language.<sup>81</sup> Under the Missionary Societies Act of 1962, the South was closed for the rest of the world to give absolute hegemony for Islam and Arabic language.<sup>82</sup> Northern Sudanese were banned from the South in 1922. In the 1960s, only Northern Sudanese were allowed in the South. Rather than integrate the South with the North, as the Abboud government naively thought, these measures helped unify the Southerners, and the low-intensity civil war gradually became a full-fledged, high-intensity war spreading throughout Southern Sudan.

The Northern Sudanese, tired of the war that took its toll on their relatives and friends, as well as on the economy, and longing for a democratic rule and freedom, revolted in October 1964<sup>83</sup> and overthrew General Abboud's government. The call for a peaceful resolution of the Southern Sudan problem

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77. See FAISAL ABDEL RAHMAN ALI TAHA, THE PROBLEM OF SOUTHERN SUDAN IN AN HISTORICAL PERSPECTIVE 1899-1986 22-23 (2012) (in Arabic). The Minister of Education justified this step by the need for the whole country to work through one language that was understood by everyone.

78. *Id.*

79. See YOUSIF MOHAMED ALI, SUDAN AND THE MISSING NATIONAL UNITY 62 (2012) (in Arabic); see also ALIER, *supra* note 70, at 25.

80. See NIBLOCK, *supra* note 33, at 223-25.

81. Teny-Dhurgon, *supra* note 26.

82. Francis M. Deng, *Sudan—Civil War and Genocide: Disappearing Christians of the Middle East*, 8 M. E. Q. 13 (Winter 2001).

83. *Sudan—History*, *supra* note 63.

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was high on the agenda of the October revolution. A new era dawned on Sudan, which, unfortunately, would prove another lost opportunity for resolution of the problem of Southern Sudan and restoration of the rule of law and respect for the basic human rights.

*D. The Second Civilian Era 1964–1969: The Roundtable Conference*

The October revolution succeeded in forcing General Abboud to disband his regime and hand over power to the civilian groups,<sup>84</sup> comprising the political parties and trade unions that led the revolution. The 1956 Transitional Constitution was revived by agreement among the political parties and trade unions, retailored again in a hurry, and termed the Transitional Constitution of 1956, as amended in 1964.<sup>85</sup> Consequently, a civilian transitional government was formed in November 1964, mostly from technocrats, and one of its urgent tasks was addressing and trying to resolve the problem of Southern Sudan.<sup>86</sup> The government included two ministers from South Sudan. One of them, Mr. Clement Mboro, was assigned to the Ministry of Interior. This was the first time a Southerner was assigned an important ministry. Assigning the ministry that oversaw law and order in the whole country to a Southerner was presented as a goodwill gesture and confidence-building measure by the North, and was viewed positively by some segments of Southern Sudanese.

The suggestion of one Southern political leader, Mr. William Deng, for holding a roundtable conference for discussing and agreeing on a solution for the Southern Sudan problem was accepted by the transitional government and all the political parties in Sudan. After all, this was one major reason for the October revolution and a major component of the National Charter. Preparations for that conference were soon underway. Two major issues had to be dealt with and resolved before the conference could be convened. The first was where to hold the conference. The Southerners insisted that the conference be held in a neutral location outside Sudan, while the Northern political parties insisted that it be held in Khartoum. The Northerners cited the political change in Sudan following the overthrow of Abboud's regime and the democratic environment in which the Southern political parties were themselves operating. The Southerners in the Sudan were able to persuade a large number of those in exile to drop this demand, and they agreed to hold the conference in Khartoum.

The second issue was the participation of observers in the conference. The Southerners insisted that observers from the United Nations, the Organization of the African Unity ("OAU"), as well as all of Sudan's neighboring countries be invited. The Northerners argued that the conference was a purely Sudanese

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84. *Id.*

85. *Id.*

86. *Id.*



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matter and attendance should be limited to Sudanese only. They were opposed to the invitation of the United Nations and OAU, and they argued that this would be interpreted as an internationalization of the North-South Conflict. After lengthy negotiations, they agreed to invite Kenya, Uganda, Tanzania, Nigeria, Egypt, Ghana, and Algeria as observers. The Southerners also dropped their demand for lifting the state of emergency in the South after it was agreed that there would be a ceasefire as soon as the conference would start.

Five months after the October revolution, the roundtable conference was underway. The conference started on March 15 and closed on March 26, 1965.<sup>87</sup> Each political party in the North and the South sent its representative to the conference. A number of Southern Sudan representatives returned from neighboring countries, where they were in exile, for the roundtable conference. However, they represented different groups and ideas.

The Prime Minister of the transitional government, Mr. Sirr Al-Khatim Al-Khalifa, delivered the inauguration address to the conference. He admitted to the basic differences between the two parts of the country as well as the low state of economic development in the South. However, he attributed that situation, as well as the lack of integration and communication between the two parts of the country, to the British colonialist policy that closed Southern Sudan, prevented communication between the two parts of the country, and failed to undertake any development projects. He promised a new era, and new policies that would aim at equality and respect. As indicated earlier, the closure of the Southern Sudan under the Passports and Permits Ordinance lasted for only twenty-five years and was reversed in 1947.

Mr. Aggrey Jaden, speaking on behalf of the Southerners who came from exile, set a different tone. He was extremely sharp in his criticism of the Northerners for the civil war and the atrocities in the South. He reiterated the major differences between the two parts of the country and reminded the Northerners of their dishonor regarding the agreement on a federal system of government, which was agreed upon in December 1955. He stated that things had changed since that time and it was time that the South be allowed to secede from the Sudan. Thus, separation was Mr. Jaden's main theme, message, and demand. Mr. Gordon Mortat, another Southern Sudanese leader who also returned for the conference from abroad, was less sharp in his criticism of the North. After reiterating the grievances of the Southerners, he demanded that the Southern Sudanese be allowed to exercise the right of self-determination and decide their own destiny. Mr. William Deng, representing a large segment of the Southern Sudanese political leaders, reiterated the earlier demand of federation. He argued that federation was the only way to end the conflict and accommodate the socio-economic and cultural differences between the two parts of the country. He

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87. For a detailed discussion of the conference proceedings and outcome, see MOHAMED OMER BASHIR, *THE SOUTHERN SUDAN: BACKGROUND TO CONFLICT* (1968).

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reminded both the Southerners, calling for separation, and the Northerners, insisting on unity, that this was the demand of the Liberal Party in 1954, and the one that formed part of the package deal for the 1955 independence resolution.

The Northern political parties' representatives were functioning under a completely different paradigm. They made it clear that they were totally opposed to the break-up of the country, just as they were opposed to the right of self-determination, and insisted on a unified Sudan as the starting point for the conference.<sup>88</sup> They further argued that federation was simply the first step towards secession.

At the conference, the Southern Sudanese spoke with more than one voice. Rather than sticking to their earlier demand of federation, demands for separation, right of self-determination, and federation were all on the table from their side. The Northerners insisted on a unified country, claiming that the whole country exercised the right of self-determination in 1955, and opted for independence and unity of the country. Accordingly, the roundtable conference turned into a dialogue of the deaf. It ended twelve days later without an agreement on how to resolve the Southern problem, although it was agreed that the two extreme positions—separation and the then existing centralized system of government—would not be appropriate to pursue.

Nonetheless, one could argue that the demands of the Southerners for separation or self-determination were negotiating tactics. They raised the bar so they could compromise for something less—federation. Indeed, the three Southern speakers reminded their Northern counterparts of the 1955 Sudanese Parliament resolution on federation. The resolution could have been a middle point where the two parties would meet. This was clear from the address of Mr. William Deng, who stressed the federal system of government as a way for accommodating the cultural, religious, ethnic, linguistic, and economic differences between the two parts of the country. Mr. Deng was considered by most participants and observers of the conference as the voice of moderation and reason in that conference. Indeed, the whole idea of the roundtable conference was his. Yet, his voice seemed as one in the wilderness. The Northerners vigorously attacked and opposed federation and strongly and loudly asserted the supremacy and dominance of their Arab-Islamic culture. That must have widened the rift between the two parties. It was unfortunate that the Northern political leaders would keep claiming that the entire country exercised its right of self-determination in 1955 and opted for a united independent Sudan. The reply the Southerners kept repeating was that their vote for independence was based on an agreement for federation. The claims of the Northern political leaders that due consideration was indeed given to the demand, which was rejected, was also inappropriate and was counterproductive. It kept irritating and angering the

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88. For a summary of the addresses of the representatives of the Southern and Northern political parties, see BOB, *supra* note 58, at 185-90.

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Southerners. Similarly, the Northerners' argument that the Juba Conference opted for unity, such that the issue was no longer open for discussion or negotiations, was unfortunate and historically incorrect. Thus, the Northern political leaders threw out a golden opportunity for righting their own wrongs, ending the civil war, and keeping the country unified. They simply blundered that opportunity.

To save face, the conference agreed on the establishment of a twelve-man committee, representing the Northern and Southern political parties, to look further into the issues raised at the conference and come up with some recommendations. The participants also agreed to convene three months later to discuss the report of this committee. By that time, the Northern political parties were engaged in a feverish race for winning the parliamentary elections and forming the new government, and their leaders were jockeying for ministerial positions. The Southern problem started to gradually take a back seat in their priorities. The civil war dragged on, but the country, it seemed, had gotten used to it by that time.

The twelve-man committee soon ran into problems. The Southerners who came from exile for the conference, and who left by that time, would soon inform the secretariat of the committee that the Southerners in the committee did not represent them.<sup>89</sup> A few weeks later, the People's Democratic Party and the Communist Party withdrew from the committee protesting the committee's failure to condemn the Southern parties for their failure to stop the attacks on the main towns in the South. This was a strange demand because the whole purpose behind the conference was to resolve the Southern problem, of which the military attacks from both sides was one major issue. Besides, the parties had not reached a formal ceasefire agreement.

The March 1965 elections brought the Umma Party back to power,<sup>90</sup> and the party formed a new coalition government with the NUP, headed by Mr. Mohamed Ahmed Mahjoub,<sup>91</sup> with Mr. Al-Azhari heading the Supreme Council of State (or the presidency).<sup>92</sup> The Constitution was amended to end the rotating presidency of the Council,<sup>93</sup> and Mr. Azhari was appointed as the permanent president. This deal between the two Northern political parties deprived the Southern member of ever being the president of the Council, and exacerbated the anger and grievances of the Southerners.<sup>94</sup>

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89. See ALBINO, *supra* note 59, at 58.

90. *Brief History of Elections in Sudan*, SPLMTODAY, [http://splmtoday.com/index.php?option=com\\_content&view=article&id=353&Itemid=59](http://splmtoday.com/index.php?option=com_content&view=article&id=353&Itemid=59) (last visited Feb. 22, 2013).

91. ALBINO, *supra* note 59, at 59.

92. *Id.* at 69.

93. Steering Comm. for Human Rights in the Transition in Sudan, *Issue Paper C-1: Constitutional Challenges of the Transition*, NUBA SURVIVAL FOUND., <http://www.nubasurvival.com/conferences/kampala1/c1.htm> (last visited Mar. 27, 2013).

94. See *History of the Sudan*, *supra* note 21, on the initial establishment of the Council.

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It may be recalled that Mr. Mahjoub remarked about ten years earlier<sup>95</sup> that the reference to the federal system for the South in the independence resolution was meant to make the Southerners happy and to get them to go along with the resolution. Along those lines, he wasted no time in criticizing the twelve-man committee, declaring that it failed in its mandate. In fact, the committee presented its report on June 26, 1965, recommending devolution of some powers to the three provincial governments in the South (Bahr el-Ghazal, Equatoria, and Upper Nile),<sup>96</sup> but this recommendation had already been overtaken by Mr. Mahjoub's approach and proposed solution of the Southern problem.

Mr. Mahjoub's government decided to intensify the military campaign, arguing that the divisions within the Southern political parties (especially between those who returned to exile and those who remained inside the Sudan, as appeared during the roundtable conference) would help the government win the war. He managed to get the Constituent Assembly to pass a unanimous resolution authorizing his government to restore law and order in the South. Sadly, the problem of Southern Sudan was relegated to a law and order one, and Mr. Mahjoub was given a free hand in conducting the war to restore law and order.<sup>97</sup>

Consequently, Mr. Mahjoub turned the whole Southern Sudan into a full war zone. Mr. William Deng, a leading Southern politician and the driving force behind the round table conference, was killed on May 28, 1968 in the South, and all the fingers pointed at the government army.<sup>98</sup> Another Southern political leader, Father Saturnino Lohure, was killed a few months later under very suspect circumstances in Uganda.<sup>99</sup> Moreover, close to 500 Southern civilians were killed by the Sudanese army in two incidents in Juba and Wau, one of them during a wedding ceremony. The government was no longer interested in any further contact or dialogue with the Southern politicians and was under no pressure to do so because the problem was, for the government and the opposition, one of law and order. The former military ruler of the Sudan, General Abboud, must have wondered how a popularly-elected government would be allowed to replicate the same flawed approach and policies that his military government tried, in vain, for close to six years, and that were among the main reasons for the fall of his regime.

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95. *Independent Sudan*, COUNTRY STUDIES, <http://countrystudies.us/sudan/20.htm> (last visited Mar. 27, 2013) ("On December 19, 1955, the Sudanese [P]arliament, under Azhari's leadership, unanimously adopted a declaration of independence.").

96. FRANCIS DENG, *PREVENTIVE DIPLOMACY: THE CASE OF SUDAN 4* (1997).

97. There were no Southerners in the Constituent Assembly at that time because elections had not yet been held in the South due to the security situation there. As such, no Southerner identified with that resolution. The Assembly continued to carry on its business although it had no representatives from South Sudan for a while.

98. *Nhial Deng Nhial Appointed Southern Sudan Defence Minister*, SUDAN TRIBUNE (Dec. 21, 2008), [http://www.sudantribune.com/spip.php?page=imprimable&id\\_article=29650](http://www.sudantribune.com/spip.php?page=imprimable&id_article=29650).

99. See PATERNO, *supra* note 1, at 214.

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As if the situation in Southern Sudan was not enough, the country was soon engulfed in a major constitutional crisis.<sup>100</sup> Following a motion presented by the Umma Party, the NUP, and the Islamic Charter Front (“ICF”), the Constituent Assembly passed a resolution dissolving the Sudanese Communist Party and expelling its eleven members from the Assembly. The justification given was that the party espoused atheism as its ideology, which a Muslim nation should not tolerate.<sup>101</sup> The leaders of the Umma Party (Mr. Mohamed Ahmed Mahjoub and his rival, Mr. Sadig Al-Mahdi), the NUP (Mr. Al-Azhari, who was the President of the Supreme Council of State), and the ICF (Mr. Hassan Al-Turabi) pushed hard for, and managed to get, the resolution adopted by the Assembly.<sup>102</sup> Although the High Court decided a few months later that the dissolution of the Communist Party was not constitutional, Mr. Sadig Al-Mahdi, who replaced Mr. Mahjoub by that time as Prime Minister, refused to abide by that judgment. He stated that the judgment was “declaratory” and not binding on his government. The principles of the October revolution—democracy, freedom of speech and association, independence of the judiciary, and the peaceful resolution of the Southern problem—were being systematically dismantled one after the other by the Umma, NUP, PDP, and ICF. The PDP would soon merge with the NUP to form the Democratic Unionist Party (“DUP”), which continued with the same policies and ideology of the NUP.<sup>103</sup> However, like the Umma Party, which was dominated by the Al-Mahdi family and the Ansar sect, the DUP would be dominated by the Khatmiyya sect led by Mr. Mohamed Osman Al-Mirghani and his family.<sup>104</sup> Politics in the Sudan was clearly a family business and was dominated by the rivalry between the two families, sects, and their leaders.

Soon, those three Islamist parties (the Umma, DUP, and ICF) formed the Constitution Committee and embarked on the task of drafting an Arab-Islamic constitution, thus continuing where the 1958 committee stopped, following the 1958 *coup d’etat*.<sup>105</sup> The new committee was already guided by the oft-quoted crux of the address of Prime Minister Sadig Al-Mahdi to the Constituent Assembly: “[t]he dominant feature of our nation is an Islamic one, and its overpowering expression is Arab, and this nation will not have its entity identified and its prestige and pride preserved except under an Islamic revival.”<sup>106</sup> The nation he was talking about was obviously the whole Sudanese nation,

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100. ALBINO, *supra* note 59, at 64.

101. Magdi El Gizoli, *Mohamed Ibrahim Nugud: A Sudanese Communist*, SUDAN TRIBUNE (Mar. 22, 2012), <http://www.sudantribune.com/Mohamed-Ibrahim-Nugud-A-Sudanese,41998>.

102. *Id.*

103. ALBINO, *supra* note 59, at 68-69.

104. *Id.* at 69.

105. *Id.* at 64.

106. For the full address of Mr. Al-Mahdi, see Abel Alier, *The Southern Sudan Question*, in THE SOUTHERN SUDAN: THE PROBLEM OF NATIONAL INTEGRATION, *supra* note 15, at 11, 24 (quoting Proceedings of the Sudan Constituent Assembly, October 1966).

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Southerners included. Along the same lines, if not worse, Mr. Hassan Al-Turabi, leader of the ICF, was quoted as stating that the South had no culture, so this vacuum would necessarily be filled by Arab culture under an Islamic revival.<sup>107</sup> Mr. Ali Abdel Rahman, a leading member of the NUP (then the PDP and later the DUP) and a cabinet member in two governments, also added his party's voice to this exclusivist chorus. He stated that Sudan is an integral part of the Arab-Islamic nation, and those who do not like it should pack up and leave.<sup>108</sup> The Southerners in the Constitution Committee did just that. As happened in 1958, they walked out of the Committee in October 1968 in protest over the proposed Arab-Islamic constitution being prepared by the Committee.<sup>109</sup>

The intensification of the war in the South, the political in-fighting within the government and the two coalition parties, and the controversies with the judiciary over the government's refusal to implement the decision on the unconstitutionality of the dissolution of the Communist Party, paved the way for the return of the country to military rule in May 1969 and the end of the second civilian era. Another golden opportunity for resolution of the Southern Sudan problem, the roundtable conference, was wasted.

*E. The Second Military Rule 1969–1985: The Addis Ababa Agreement*

Colonel Gaafar Mohamed Nimeiri and his fellow officers overthrew the ineffective civilian government of Mr. Mahjoub in a bloodless coup on May 25, 1969, bringing back military rule to the Sudan in less than fifteen years after independence. The coup was supported by the leftwing parties, particularly the Sudanese Communist Party which was trying to avenge its dissolution. The war in the South was again quoted by the leaders of the coup as one of the main reasons for their "May Revolution."<sup>110</sup>

On June 9, 1969, two weeks after the coup, the government announced a Policy Statement on Southern Sudan, termed the 9th of June Declaration.<sup>111</sup> The Declaration recognized for the first time the historical and cultural differences between the North and the South, and affirmed the right of the Southerners to develop their cultures and traditions within a unified Sudan.<sup>112</sup> The Declaration outlined a program for Southern Sudan, which included an amnesty for all Southerners involved in the conflict; "economic, social and cultural development of the South;" and "appointment of a minister for Southern Affairs."<sup>113</sup> Mr.

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107. *See id.*

108. Quoted in ALBINO, *supra* note 59, at 6.

109. Alier, *supra* note 106, at 24.

110. *Id.* at 25-26.

111. *Id.* at 25.

112. *Id.*

113. For a copy of the June 9, 1969 Declaration, see *Appendix VI: President General Nimeiry's Policy Statement on the Southern Question, 9th June, 1969*, in *THE SOUTHERN SUDAN: THE PROBLEM OF NATIONAL*

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Joseph Garang, a Southern Sudanese lawyer and a leading member of the Sudanese Communist Party, was appointed to the Ministry of Southern Affairs. Another Southern Sudanese lawyer and politician, Mr. Abel Alier, was appointed as a Minister of Housing.

The Declaration set in motion a lengthy and complex process of contacts between the new government and the Southern Sudan Liberation Movement (“SSLM”), headed by Mr. Joseph Lagu, which was fighting the war in the South. The contacts led to some secret meetings, and those meetings were subsequently followed by negotiations between the two parties. The negotiations, which started in February 1972 at Addis Ababa, were mediated by the World Council of Churches and the Ethiopian government. One interesting observation about the negotiations was that the government of Sudan’s team included a Southern Sudanese, Mr. Abel Alier, who was the Minister of Housing in Mr. Nimeiri’s government.

After lengthy negotiations, the two parties signed, on March 12, 1972, the Addis Ababa Agreement on the Problem of Southern Sudan. The Agreement comprised of the basic law for the organization of regional autonomy in the three Southern Sudan Provinces, which were called the “Southern Region,” and five protocols (or chapters, namely, (i) the Amnesty and Judicial arrangements, (ii) the administrative arrangements for the interim period until the establishment of the institutions for regional autonomy mentioned in the basic law, (iii) the cease fire arrangements, (iv) the temporary arrangements concerning the armed forces, and (v) the resettlement and rehabilitation of the Southern Sudan refugees).<sup>114</sup> The basic law was adopted by the government in Khartoum on March 3, 1972, and was called the “Southern Provinces Regional Self-Government Act, 1972” (“Self-Government Act”). Under this law, Southern Sudan (which was termed the “Southern Region”) was granted regional autonomy. A People’s Regional Council would be elected by the citizens of the Southern Region, with full authority to legislate on all local matters. The matters considered as national, and excluded from the regional authority, included: (i) national defense, (ii) external affairs, (iii) currency and coinage, (iv) air and inter-regional transport, (v) communications and telecommunications, (vi) customs and foreign trade except for border trade and certain commodities, which the Regional Government may specify with the approval of the Central Government, (vii) nationality and immigration, and (viii) planning for economic and social development.<sup>115</sup>

A High Executive Council would be established, headed by a president nominated by the People’s Regional Council and appointed by the President of

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INTEGRATION, *supra* note 15, at 219.

114. The Addis Ababa Agreement on the Problem of South Sudan, Gov’t of the Democratic Republic of the Sudan-The S. Sudan Liberation Movement, Feb. 27, 1972, *available at* <http://madingaweil.com/addis-ababa-peace-agreement-1972.htm>.

115. *Id.* at ch. III, art. 7.

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the Republic.<sup>116</sup> Its authority was to execute regional policies and plans. Mr. Abel Alier was appointed as President of the High Executive Council. Mr. Joseph Lagu, the leader of the SSLM, was appointed Commander of the Sudanese Army in the Southern Region, with the rank of Major General.

Thus, the civil war that started in 1955 came to an end in 1972, although temporarily, after seventeen years of killings and destruction. The South was given full authority over all local matters. That was satisfactory to most of the Southerners, although there were dissenting views. Whether to call this arrangement regional autonomy or federation did not seem to make much of a difference to the Southerners, who endorsed it because the powers of each government were clearly defined. Mr. Nimeiri was hailed by the Southerners as a national hero and peacemaker. Mr. Dunstan Wai wrote, "President [Nimeiri] has certainly won the confidence and trust of the peoples of the South as he has proved himself a man of his own word. For the first time in the history of independent Sudan, the country has found a man of strong personality, blessed with vision and certain ideals which have the merit of being intensely practicable."<sup>117</sup> Mr. Francis Deng was more restrained as he stated, "[r]egional self-rule is the best solution the President could have adopted, and it should be viewed as a giant step toward an ultimate solution."<sup>118</sup> Both men, as well as the entire population of South Sudan, would soon be disappointed over the gradual tearing apart by Mr. Nimeiri of the Addis Ababa Agreement.

However, this high praise for Mr. Nimeiri and the enthusiastic support to the Addis Ababa Agreement among the Southerners was not shared by the Northerners. Between May 1969 and March 1972, when the Addis Ababa Agreement was signed, Mr. Nimeiri alienated almost all the Northern political groups. Political parties were banned, their leaders jailed, and properties confiscated. When the Ansar sect revolted against Mr. Nimeiri in March 1970, he dealt with them in an extremely harsh manner. He attacked the Ansar in Omdurman and Aba Island, their citadel, and massacred thousands of them.<sup>119</sup> That attack was followed a few days later with the killing of their spiritual leader, Imam Al-Hadi Al-Mahdi.<sup>120</sup> Those killings created bitter feelings among the followers and supporters of the Umma Party and lead to calls for revenge.

A failed coup, supported by the Communist Party in July 1971, was followed by the brutal executions of those accused of involvement. Among those executed were Mr. Abdel Khalig Mahjoub, the Secretary-General of the Party, Mr. Joseph

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116. As discussed later, Mr. Nimeiri became President of the Sudan after a plebiscite in August 1971.

117. See *Epilogue*, in THE SOUTHERN SUDAN: THE PROBLEM OF NATIONAL INTEGRATION, *supra* note 15, at 173, 174.

118. FRANCIS DENG, DYNAMICS OF IDENTIFICATION: A BASIS FOR NATIONAL INTEGRATION IN THE SUDAN 7 (1973).

119. *The Nimeiri Era, 1969-95*, COUNTRY STUDIES, <http://countrystudies.us/sudan/23.htm> (last visited Mar. 27, 2013.)

120. *Id.*



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Garang, the Minister of Southern Affairs in Nimeiri's government, and Mr. El-Shafie Ahmed El-Sheikh, the Secretary-General of the Sudan Workers Union.<sup>121</sup> This was accompanied by a wide purge of those accused of having leftist leanings in the civil service and educational institutions and the detention of tens of thousands.

A few weeks after the attempted coup, Mr. Nimeiri held a typical third-world plebiscite and announced that he won the Presidency of Sudan by the usual close-to-ninety-nine percent vote.<sup>122</sup> He appointed Mr. Abel Alier as Vice President, the first Southerner to hold this position. This was followed by the establishment of the Sudanese Socialist Union ("SSU"), the government party and only political organization allowed in the Sudan. Thus, when the Addis Ababa Agreement was concluded in March 1972, the Sudan was under an oppressive military dictatorship and a one-party, perhaps more precisely, one-man, rule.

Under these circumstances, it is hardly surprising that no popular support or enthusiasm for the Addis Ababa Agreement emerged in the North. The man who was perceived by the Southerners as blessed with vision and ideals, and called President by them, was considered by most of the Northerners as a bloody, ruthless dictator. Indeed, some Northern politicians and intellectuals doubted the genuineness of Mr. Nimeiri, and claimed that he was simply looking for new political allies after he had alienated and lost a large segment of the Northerners.<sup>123</sup> The Umma Party, DUP, and ICF perceived the Addis Ababa Agreement as a new major obstacle in the face of their Arab-Islamic vision of the Sudan. On the other hand, the leftists considered it as an unholy reactionary alliance against the liberal and socialist forces in the whole of the Sudan.

Another major disconnect was that the South was, at least theoretically under the Addis Ababa Agreement, a democracy with free elections, freedom of expression and association, and rule of law, while the North was under an autocratic rule, with its constitution being Republican Order No. 5, issued by the Military Command Council (the army officers who led the May 25 coup). The

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121. Gamal Nkrumah, *Al-Tijani Al-Tayeb: A Revolutionary Path*, 707 AL-AHRAM WEEKLY ON-LINE (Sept. 9-15, 2004), <http://weekly.ahram.org.eg/2004/707/profile.htm>.

122. *Elections in Sudan*, AFRICAN ELECTIONS DATABASE, [http://africanelections.tripod.com/sd.html#1971\\_Presidential\\_Election](http://africanelections.tripod.com/sd.html#1971_Presidential_Election) (last updated Jan. 31, 2011).

123. Along those lines, it was stated:

Initially the Addis Ababa Agreement was viewed by most northern political leaders as sellout to the southerners by Nimeiri. Little did they realize that he was compelled by circumstances to do so and would be equally prepared to abandon it if circumstances so required. Indeed it was when Nimeiri no longer needed southern support that he realigned himself with the politico-religious forces in the north and unilaterally abrogated the Addis Ababa Agreement in June 1983.

See Elias Nyamllel Wakoson, *The Dilemmas of South North Conflict*, in *THE SEARCH FOR PEACE AND UNITY IN THE SUDAN*, *supra* note 69, at 90, 92.

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Permanent Constitution of the Sudan, which was promulgated in 1973,<sup>124</sup> cemented the extensive powers of the President and the one-party rule. Thus, the opposition groups were either opposed to, or at best apathetic about, the Addis Ababa Agreement.

However, Mr. Nimeiri did not need anyone else to undermine the Addis Ababa Agreement. He would soon start to do that by himself. He interfered with the appointment for the senior political positions and imposed his candidates from the early days of the Addis Ababa Agreement. He instructed Mr. Abel Alier to withdraw from nomination for President of the High Executive Council in 1978, in favor of Mr. Joseph Lagu. The Speaker of the Regional Assembly, Mr. Clement Mboro, was removed in 1979, and he alleged that this was done at the instigation of Mr. Nimeiri. In October 1980, Mr. Nimeiri suddenly issued presidential orders dissolving the Regional Assembly and the High Executive Council. He replaced Mr. Lagu with Mr. Gismallah Rassas, a Southerner who lived in the North, and was mistaken as a Northerner, perhaps because of his name, by most Southerners. He also appointed the cabinet, as well as the commissioners of the Southern provinces. This was a gross violation of the Self-Government Act of 1972, as the Act required that the appointment and dismissal of the President of the High Executive Council would be done by the President of the Republic on the recommendation of the Regional Assembly.<sup>125</sup> Mr. Nimeiri justified his decisions on the need to create an environment conducive for a plebiscite he was contemplating on the division of the Southern Region into three regions.

The idea of dividing the Southern Region into three separate regions (corresponding to the three Southern Provinces of Bahr el-Ghazal, Equatoria, and Upper Nile) started to emerge in the late 1970s. Some non-Dinka politicians, including Mr. Lagu himself, who was from the Madi tribe, thought it would do away with the domination of the Dinka politicians and intellectuals and allow wider participation of the smaller tribes in the South. Nimeiri thought it would give him more control of the South if the Southern region was divided into three separate regions. Although the Southern leaders opposed to the division of the South won the 1982 elections, their views were ignored, and they were harassed. In February 1983, the Speaker of the Regional Assembly, Mr. Mathew Obur, and the Vice President of the High Executive Council, Mr. Dhol Acuil, were arrested for speaking publicly against the proposed division.

Division of the Southern Region into three regions required an amendment to the Self-Government Act of 1972, and any amendment to the Act required a two-thirds majority of the Southern Sudanese voters.<sup>126</sup> Yet, Mr. Nimeiri went ahead

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124. See THE PERMANENT CONSTITUTION OF THE SUDAN 1973, available at [http://www. Righttononviolence.org/mecf/wp-content/uploads/2012/01/Constitution-Sudan-1973--amendment-1975.pdf](http://www.Righttononviolence.org/mecf/wp-content/uploads/2012/01/Constitution-Sudan-1973--amendment-1975.pdf).

125. See Self-Government Act of 1972, art. 19 (Sudan).

126. Article 34 of the Self-Government Act stated: "This law cannot be amended except by a three

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and on June 5, 1983 issued Republican Order No. 1, establishing three regions in the place of the one region under the Self-Government Act. In addition to the principal change of establishing three regions, the Order transferred a good part of the authority of the regional government to the central government.<sup>127</sup>

A number of other decisions taken by Mr. Nimeiri kept the anger of the Southerners rising. Oil was discovered in the South by Chevron Company, but a decision to build a refinery in Bentiu, where the oil was discovered, was reversed. The refinery would be built in Kosti, in the North, and the oil would be exported through Port Sudan. Those decisions simply meant to the Southerners that their oil would be refined, used in, and exported through the North.

Plans for the construction of the Jonglei canal project in South Sudan were completed after the Addis Ababa Agreement was concluded, and the work started in the late-1970s. The canal would add about five billion cubic meters of the waters of the Sudd swamps of Southern Sudan to the Nile waters. The canal was planned under, and reference to it was included in, the 1959 Nile Agreement between Egypt and Sudan.<sup>128</sup> Under the Agreement, Egypt and Sudan would share the cost of the project and the water conserved. The project was opposed by the Southerners, and seven people were killed in the demonstrations against the canal in 1976. The demonstrators saw the canal as another project harming the Southern environment and the local communities in the canal area, for the benefit of Northern Sudan and Egypt. For them it was the oil, and now the water, of the South, being transported for the benefit of the North. The situation quieted after promises of a number of development projects in the canal area, including an irrigation scheme, a sugar factory, roads, hospitals, schools, and bridges to allow movement of people and livestock across the two sides of the canal. However, by 1983, the canal was two-thirds completed (260 kilometers out of the total canal length of 360 kilometers), and none of the promised development projects were started.<sup>129</sup>

No movement took place with regards to the border issues between the North and the South that were raised during the Addis Ababa negotiations. The issue of the Abyei enclave was particularly important for the Southerners because it was the area where the Ngok Dinka tribe lived. The area had been transferred to the North in 1905 and became geographically part of the North. The Misseriya, a northern Arab tribe, shared part of the area with the Ngok Dinka and moved

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quarters majority of the People's National Assembly and confirmed by a two-thirds majority in a referendum held in the three Southern Provinces of the Sudan."

127. For a detailed account of the developments leading to the abrogation of the Addis Ababa Agreement, see generally ALIER, *supra* note 70.

128. Agreement for the Full Utilization of the Nile Waters, United Arab Republic-Sudan, Nov. 8, 1959, 453 U.N.T.S. 64.

129. For a detailed account on the Jonglei canal, see Salman M. A. Salman, *Water in the Sudan North-South Relations: Past Experience and Future Trends*, 16 AFR. Y.B. INT'L L. 299, 319 (2008). See also Salman M. A. Salman, *The New State of South Sudan and the Hydro-politics of the Nile Basin*, 36 WATER INT'L 154, 163 (2011).

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during the dry season deep into the south of the Abyei area. Thus, the dispute involved not only the North and the South, but also the Ngok Dinka and the Misseriya tribes.

The Addis Ababa Agreement defined the Southern Provinces of the Sudan to include “the Provinces of Bahr El Ghazal, Equatoria and Upper Nile in accordance with their boundaries as they stood January 1, 1956, and other areas that were culturally and geographically a part of the Southern Complex as may be decided by a referendum.”<sup>130</sup> Although Abyei was not mentioned explicitly in this paragraph of the Addis Ababa Agreement, it was understood and agreed that “the other areas that were culturally and geographically part of the Southern Complex”<sup>131</sup> referred to the Abyei area. Indeed, a presidential decree was issued in 1974 placing the Abyei area administratively under the presidency, but nothing was done to implement that decree. The referendum for the residents of the Abyei area to determine its future, referred to in the Addis Ababa Agreement, was all but forgotten by Khartoum.<sup>132</sup>

Consequent to Republican Order No. 1, Mr. Nimeiri issued a decree dissolving the two institutions of regional autonomy in Southern Sudan—the Regional Assembly and the High Executive Council. This action washed away any doubts about the determination of Mr. Nimeiri to do away with the Addis Ababa Agreement. Even those who pushed for the division of the South, like Mr. Lagu, were alarmed, and realized that their demand was manipulated by Mr. Nimeiri.

Following two attempted takeovers of power by the opposition in 1975 and 1976, Mr. Nimeiri reconciled in 1978 with the three opposition Islamist parties (the Umma Party, DUP, and ICF, who worked together under an umbrella they called the “National Front”). As a result of the reconciliation, the three parties were represented in the government and the SSU organs. Mr. Al-Mahdi and the brother of Mr. Al-Mirghani were appointed as members of the Political Bureau of the Sudanese Socialist Union (the government and only party allowed in the Sudan). Mr. Al-Turabi became the Attorney General in Nimeiri’s government. All the talk by the National Front parties about democracy, freedom, human rights, and the rule of law was forgotten. As mentioned earlier, the leaders of the two sects had initially endorsed the takeover by General Abboud in November 1958 that was orchestrated by the Prime Minister of the Umma Party. By 1978, the three parties of the National Front were an integral part and parcel of Mr. Nimeiri’s government and his political organs and structures.

The National Front parties saw the Addis Ababa Agreement as an obstacle to their goal of an Arab-Islamic constitution and state. They argued that the

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130. See The Addis Ababa Agreement, *supra* note 114, art. 3(c).

131. *Id.* art. 3(c).

132. For a detailed account of the Abyei dispute, see John Young, *John Garang’s Legacy to the Peace Process, the SPLM/A & the South*, 106 REV. AFR. POL. ECON. 535 (2005).

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Agreement delegated to the South too much power. They endorsed the division of the South into three regions, believing that the step would weaken the South, as well as the regime, and make its manipulation, and even its overthrow, easier. On the other hand, Mr. Nimeiri naively believed that he had new allies in the North, and thus should no longer be concerned about the loss of his old allies in the South.

There were problems regarding the absorption of the Southern Sudan Liberation Movement soldiers (called the *Anya-nya*) in the Sudanese army. Many soldiers felt they were not given the rank they deserved, and their Northern superiors did not treat them well. On March 2, 1975, the Okobo garrison mutinied, and seven Northern soldiers and ten Southerners were killed, and a number were wounded. Another garrison in Wau deserted in February 16, 1976 and headed to the bush. Those mutinies and desertions kept repeating themselves in other garrisons in the South.

Mr. John Garang was an army officer in the *Anya-nya*. He was absorbed in the Sudanese army after the Addis Ababa Agreement, and five years later was sent to the United States to do his doctorate degree.<sup>133</sup> He completed his degree in 1981, and returned to the Sudan that year. In May 1983, he deserted the Sudanese army where he held the rank of colonel, and joined the garrison that mutinied in Bor that month. The National Security Council ordered an attack on the Bor garrison on May 16, 1983. The attack succeeded in dispersing the garrison, but its soldiers regrouped near the Ethiopian borders.

In July 1983, Mr. John Garang announced the birth of the Sudan People's Liberation Army ("SPLA"),<sup>134</sup> with the Sudan People's Liberation Movement ("SPLM") as its political wing (collectively, the "SPLM/A"), and he emerged as the leader of both. The SPLM vision, as articulated in the Manifesto, was no longer confined to Southern Sudan. Rather, it was a national one based on the liberation of the whole of the Sudan and the establishment of a secular democratic state—the New Sudan. Paragraph III.I.3 of the Manifesto stated:

*Voluntary unity* in the New Sudan is, therefore, conditioned on creating a political and socio-economic commonality that brings all the Sudanese together as equal citizens in rights and obligations. We must clearly move away from the parameters of the Old Sudan of racism, religious intolerance, historical myopia, and the associated economic collapse,

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133. Joseph Lagu claimed that Mr. Garang was opposed to the integration of the *Anya-nya* units within the Sudanese army after the Addis Ababa Agreement, and that he decided to send Mr. Garang to the United States to do his doctorate degree so he would be away while the integration was being undertaken. See BOB, *supra* note 58, at 499.

134. *Young, supra* note 132, at 535-48.

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instability and wars. The Old Sudan has clearly taken us to a dead end, to the edge of the abyss.<sup>135</sup>

Thus, the problem for the SPLM was no longer of Southern Sudan, but of the whole state. This was certainly a complete change from the program and vision of all the previous Southern movements and political parties.

The SPLA started its military activities in South Sudan soon after its establishment. Two of its early targets were oil and water. By early 1984, both the Chevron oil operations and the Jonglei canal project were attacked by the SPLA and shut down.<sup>136</sup> By that time, the second civil war had already engulfed Southern Sudan, and gradually, large areas of the South came under the control of the SPLA. It would soon extend to Northern areas close to the South, as well.

As if the abrogation of the Addis Ababa Agreement was not enough, Mr. Nimeiri went further and made the job of Mr. Garang easier. In September 1983, four months after Mr. Garang started his movement, Mr. Nimeiri, who came to power with the help of the Communist and other leftist parties, discovered political Islam. In that month he decreed the application of *Sharia* law in the whole country (called “September Laws,” as the decree was issued in September 1983).<sup>137</sup> No doubt, the leaders of the National Front in Nimeiri’s government played a major role in the introduction of *Sharia* law. What they failed to achieve during the two civilian eras—the declaration of Sudan as an Islamic state—was now fully accomplished under Nimeiri’s military rule through one presidential decree. They pledged their allegiance to the newly born “leader of the faithful,” Imam Gaafar Mohamed Nimeiri. The 1973 Constitution was amended to reflect the new Islamic character of the Sudan, and more of the September Laws were introduced. Harsh penalties, such as the amputation of hands of those convicted of petty theft, were carried out publicly. The declaration of the Islamic state and the introduction and application of the September Laws were the last nails in the coffin of the Addis Ababa Agreement.

As a result of these developments, many Southerners in the army, civil service, and academic institutions flocked to join the new movement. The vision of the New Sudan attracted some Northern Sudanese as well, and soon the SPLA had Northerners fighting side-by-side with the Southerners against the Khartoum government. Furthermore, some Northerners gradually made it to senior positions in the SPLM, the political wing of the SPLA.

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135. See THE MANIFESTO OF THE SUDAN PEOPLE’S LIBERATION MOVEMENT (2008), available at <http://www.splmtoday.com/docs/SPLM%20docs/2008%20The%20Manifesto%20of%20the%20SPLM.pdf>.

136. It is worth adding in this connection that Mr. John Garang wrote his Ph.D. thesis on the Jonglei canal. See John Garang, Identifying, Selecting, and Implementing Rural Development Strategies for Socio-economic Development in the Jonglei Project Area, Southern Region, Sudan (1981) (unpublished Ph.D. dissertation, Iowa St. U.) (on file with author).

137. *History of the Sudan*, supra note 21.

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By the mid-1980s, the economic situation and political oppression in the North worsened, and the civil war in the South that had just erupted intensified. Those factors, together with the introduction of the harsh September Laws and their discriminatory application, helped galvanize the opposition against Nimeiri's regime. The regime was finally toppled through a popular uprising in April 1985.<sup>138</sup> Mr. Nimeiri lost his old allies in the South, and his new ones in the North were happy to see him go, determined to replace him, and continue with his precious gift of the September Laws and the new Islamic state he declared and started to establish. That was Mr. Nimeiri's fatal miscalculation. Worse, he went down in history as the leader who irresponsibly squandered a golden opportunity for the resolution, once and for all, of the problem of Southern Sudan—or perhaps we should say the problem of the Sudan. The enormous goodwill among the Southern Sudanese that ensued as the result of the Addis Ababa Agreement evaporated, and it was quite apparent that it would be very difficult, if not impossible, for the North to regain it any time again.

#### *F. The Third Civilian Era 1985–1989: The Sudanese Peace Initiative*

The popular revolt that overthrew Mr. Nimeiri in April 1985 had a number of similarities with the one that overthrew General Abboud's regime in October 1964. The slogans of the October revolution—democracy, freedom, and resolution of the Southern problem—were resurrected, in addition to the abolition of the September Laws. History repeated itself, not only in the April revolt being similar to the October one, but also in the developments that followed and the terrible failure and disappointments of the third civilian era, which were similar to the second one.

A civilian transitional government was formed after the overthrow of Mr. Nimeiri, headed by Mr. Al-Gizouli Dafallah, a medical doctor with clear Islamist leanings.<sup>139</sup> The government consisted of technocrats, but the political parties were also represented. A Transitional Military Council (“TMC”) consisting of the leading army officers was appointed as a collective head of state. It was headed by an Islamist, Field Marshal Abdel Rahman Swar Al-Dahab, who was the Minister of Defense and General Commander of the armed forces in Mr. Nimeiri's last government.<sup>140</sup> In other words, he moved from the position of Minister of Defense in Mr. Nimeiri's government, to chairman of the TMC that replaced Mr. Nimeiri.

Like the transitional government that was established after the October revolution in 1964, it was an inept and ineffective government, and its transitional character made it even weaker. The 1973 Constitution, which Mr.

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138. *Id.*

139. *Sudan—History*, *supra* note 63.

140. *Id.*

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Nimeiri promulgated, was abolished, and the 1964 Transitional Constitution, which was based on the 1956 Transitional Constitution, was revived with some amendments and called the 1985 Transitional Constitution.<sup>141</sup> It seems that the political leaders of the Sudan in that era felt embarrassed to call it the 1956 Constitution, as amended in 1964, and amended again in 1985. Those three constitutions were based on the Self-Government Statute of 1953, tailored and retailored in the three instances, in quite a hurry, to meet the new political circumstances. Because of the political instability and movement between parliamentary and military governments, no permanent constitution was adopted during any of the three civilian eras, and the Sudan kept being governed by transitional constitutions.

Despite the abrogation of the 1973 Constitution, Sudan remained as a rigid Islamic state because the September Laws had already converted Sudan into a theocratic state. As mentioned earlier, the September Laws were Nimeiri's precious gift to the three Islamist parties. They failed twice during the two previous civilian eras to adopt an Islamic constitution or Islamic laws. Nimeiri did that, to their astonishment, overnight. They would hold on to it dearly, whether the Southerners and the secular elements in the North liked it or not. It would certainly guarantee their hold on power.

Contacts between the transitional government and the SPLM took place, but did not lead anywhere. This was due largely to the lack of trust between the SPLM and the TMC. The SPLM saw the TMC as consisting of the very same army officers who planned and conducted the ruthless war in the South against the SPLM/A. The failure of the transitional government to abolish the September Laws was held by the SPLM against the transitional government and taken, together with the structure of the TMC, as signs of the continuation of Mr. Nimeiri's policies.

The contacts resulted in a meeting between the SPLM and representatives of the professional and trade unions that led the April revolt, as well as the Umma Party and the Communist Party. Those groups and parties came together after the April revolt under the banner of the National Alliance for National Salvation. The meeting took place in Koka Dam in Ethiopia in March 1986.<sup>142</sup> The two parties deliberated on the problems of the Sudan for three days. On March 24, 1986, the participants agreed on and issued the Koka Dam Declaration. The Declaration underscored the fact that the problem being faced was that of the Sudan and not Southern Sudan. It called for "[t]he lifting of the State of Emergency, [r]epeal of the 'September 1983 Laws' and all other laws that [were]

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141. Ali Suleiman Fadlalla, *Constitution—Making in the Sudan: Past Experiences* 7 (May 24-25, 2011) (a paper presented at the Constitution-making Forum: A Government of Sudan Consultation) (on file with author).

142. *Chronological Digest of Peace Meetings and Proposals, 1983-98*, SUDANUPDATE, <http://www.sudanupdate.org/REPORTS/PEACE/peace%20inits%201983-2000.htm> (last visited Mar. 27, 2013).



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restrictive of freedoms, [a]doption of the 1956 Constitution as amended in 1964, with incorporation of ‘Regional Government,’ [and] [a]brogation of the military pacts . . . [that] impinge[d] on Sudan’s national sovereignty.” The Declaration also called for convening a national conference with the participation of all the political parties in the third week of June 1986.<sup>143</sup>

The Koka Dam meeting and Declaration were hailed as a major step for peace in the Sudan. The participants were given a hero’s welcome upon arrival in Khartoum. Meetings started taking place for dissemination of the outcome of the Koka Dam meeting and for preparations for the national conference envisaged under the Declaration. However, a few days after the Declaration was issued, the Umma Party announced its reservations about some of the recommendations of the Koka Dam Declaration, particularly the abolition of the September Laws. Moreover, the Transitional Military Council, the collective head of state during the transitional period, was not enthusiastic about the Koka Dam Declaration either.<sup>144</sup> In fact the TMC was accused of undermining the Koka Dam process.<sup>145</sup> Since the DUP was not a party to the Koka Dam Declaration, and the TMC was not enthusiastic about it, the withdrawal of the Umma Party effectively meant the end of the Koka Dam process.

Elections took place in April 1986, and another Umma-DUP coalition government under Mr. Sadig Al-Mahdi was formed soon after.<sup>146</sup> Mr. Al-Mahdi would remain Prime Minister until June 1989, the longest civilian politician to serve in that position during a civilian era.<sup>147</sup> Yet, there was not much positive to show for his tenure. As in the second civilian era, the DUP got the permanent presidency of the Supreme Council of State. Mr. Ahmed Al-Mirghani, the brother of the DUP leader, was chosen for that position as the *quid pro quo* for Mr. Al-Mahdi getting the premiership. Clearly, the more things changed in the political scene in the Sudan, the more they remained the same.<sup>148</sup>

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143. For the Koka Dam Declaration, see *Koka Dam Declaration (A Proposed Programme for National Action)*, in *THE SEARCH FOR PEACE AND UNITY IN THE SUDAN*, *supra* note 69, at 24, 24-26. The Declaration is also available at: <http://www.fou.uib.no/fd/1996/fi/712001/annex1.htm>.

144. See Lam Akol Ajawin, *The Present War and its Solution*, in *THE SEARCH FOR PEACE AND UNITY IN THE SUDAN*, *supra* note 69, at 15, 21-22.

145. In the letters Mr. John Garang exchanged with the Prime Minister of the Transitional Government, Mr. El-Gizouli Dafalla, Mr. Garang pointed out repeatedly that the army officers of the TMC were the ones who ran the military campaign in Southern Sudan during Nimeiri’s era. He quoted a number of examples of the military campaign they were conducting in the South when they were in the TMC. For those letters, see JOHN GARANG, *THE CALL FOR DEMOCRACY IN SUDAN* 85-100 (Mansour Khalid eds., 2d ed. 1992).

146. HOLT & DALY, *supra* note 25, at 182.

147. *Id.* at 185.

148. It is worth adding in this connection that in December 2011, one of the sons of Mr. Sadig Al-Mahdi, and one of the sons of Mr. Mohamed Osman Al-Mirghani, were both appointed as assistants to President Omer Al-Bashir, a move that was met with a lot of sarcasm among the Sudanese people. See *Sons of Sudan’s Opposition Leaders Appointed as Bashir’s Aides*, SUDAN TRIBUNE (Nov. 29, 2011), <http://www.sudantribune.com/Sons-of-Sudan-s-opposition-leaders,40858>.

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Following the elections and formation of the government, a meeting was held between Mr. Garang and Mr. Al-Mahdi in Addis Ababa. Mr. Garang insisted on the abolition of the September Laws, which Mr. Al-Mahdi was not willing to do. Mr. Garang argued for a secular democratic state, while Mr. Al-Mahdi stood for an Arab-Islamic one. Mr. Garang wanted a balanced foreign policy that would look at both Africa and the Arab world, and insisted on Sudan abrogating its military pacts with Egypt, while Mr. Al-Mahdi emphasized the Arabic allegiance of the Sudan. The meeting ended without an agreement on any of the issues facing the country. Indeed, each of the two leaders had his own philosophy and agenda, and the rivalry between them for leadership of the Sudan was evident, and it dominated their entire relationship. The letters they would exchange in the 1990s revealed the deep distrust and misgivings they harbored about each other, as well as the sharp ideological differences between them. The civil war intensified and was carried briefly to the North, where the SPLA occupied the Kurmuk town for a while, close to the borders with Ethiopia.

On November 16, 1988, Mr. Mohamed Osman Al-Mirghani, leader of the DUP, and Mr. John Garang met in Addis Ababa and, after one long day of discussion, concluded an agreement that was known as the Sudanese Peace Initiative.<sup>149</sup> The agreement called for holding a constitutional conference to discuss the problem of the Sudan (not Southern Sudan).<sup>150</sup> The conference would be held no later than December 31, 1988, and would be preceded by certain measures, including the freezing of the application of the September Laws (and not their abolition), a ceasefire, and lifting the state of emergency.<sup>151</sup> This framework agreement was certainly a major positive development and reflected some flexibility on the part of Mr. Garang. It was welcomed by most political groups and trade unions in Khartoum, and Mr. Al-Mirghani received a hero's welcome upon return to Khartoum.

However, the Prime Minister, Mr. Al-Mahdi, dragged his feet. He was not willing or able to freeze application of Islamic law. His allies in the CIF, by then renamed themselves as the National Islamic Front ("NIF"), mobilized their members and organized rallies and a vicious campaign against the agreement. Moreover, neither Mr. Al-Mahdi, nor Mr. Al-Turabi wanted the credit for ending the civil war to go to their rival, Mr. Al-Mirghani. They questioned the motives of the DUP and reminded the Sudanese people that the DUP was not a party to the Koka Dam meeting or Declaration. That was part of the truth because the NIF was not a party to Koka Dam either, and the Umma Party announced its

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149. For the Sudanese Peace Initiative, see STEVEN WONDU & ANN LESCH, *BATTLE FOR PEACE IN SUDAN—AN ANALYSIS OF THE ABUJA CONFERENCES* 219 (2000). The Sudanese Peace Initiative is also available at [http://www.sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=Dzcrgd9\\_3.1.1&dl=1](http://www.sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=Dzcrgd9_3.1.1&dl=1). The Agreement was also referred to as "The Mirghani-Garang Agreement."

150. The Sudanese Peace Initiative, Sudan Peoples' Movement/Army-Democratic Unionist Party, Nov. 16, 1988, available at [http://www.sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=Dzcrgd9\\_3.1.1&dl=1](http://www.sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=Dzcrgd9_3.1.1&dl=1).

151. *Id.*

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reservations about the Declaration after it initially agreed to it, and later opposed it. Meanwhile, the economic situation worsened with the scarcity of basic commodities and mounting inflation. The civil war escalated and dragged on.

The inept government of Mr. Al-Mahdi was overthrown by a military coup on June 30, 1989.<sup>152</sup> Like the two previous military takeovers, the Prime Minister whose government was overthrown belonged to the Umma Party. Clearly the Umma Party did not learn from the past two *coup d'etats*. Sudan kept running in the vicious cycle of coups and popular revolts. The Sudanese Peace Initiative was a promising opportunity for ending the civil war, but was plundered by political rivalries, the indecisiveness of the Prime Minister, and his manipulation by the NIF. Thus, two more opportunities for ending the civil war—the Koka Dam Declaration and the Sudan Peace Initiative—were both lost, dragging the country deeper into an unwinnable war, and exacerbating the human, social, and economic misery of the nation.

#### *G. The Third Military Rule: 1989–Present: The Comprehensive Peace Agreement*

The June 30, 1989 military coup was masterminded by the National Islamic Front, the allies of the Prime Minister, Mr. Sadiq Al-Mahdi. Like the previous two military coups, it started with banning political parties and organizations, jailing their leaders, and confiscating their properties. The NIF soon embarked on harsh measures of mass arrests, torture, and extensive purge of the civil service of people whose loyalty was not assured.<sup>153</sup> Execution of twenty-eight army officers accused of plotting to overthrow the government took place in the last week of Ramadan in 1990 and was a clear indication of the extent the NIF government would go to assert its authority to scare and subdue its opponents. Although Brigadier Omar Hassan Ahmed al-Bashir announced that he was the head of the military command council that took over, the real powers were in the hands of Mr. Hassan al-Turabi, the leader of the NIF. After all, the coup was planned and executed by the NIF.

The civil war was escalated by the new regime, and the goal was no longer to re-establish law and order and end the mutiny of the Southerners.<sup>154</sup> Rather, it was called *Jihad*, a holy war against the infidels in the South.<sup>155</sup> It aimed at spreading Islam and extending the Islamic state in the South, and through the South into equatorial Africa. Northern soldiers and members of the newly-formed popular defense forces were given a free hand in conducting the war. Their members who

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152. HOLT & DALY, *supra* note 25, at 185.

153. Mahgoub El-Tigani, *The Ramadan Martyrs' National Committee*, SUDAN HUM. RTS. ORG.-CAIRO, <http://www.shro-cairo.org/articles/02/century.html>.

154. *Id.*

155. *Id.*

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were killed in combat in Southern Sudan were declared martyrs, who would go straight to heaven, announced the government. Martyrs' weddings and celebrations, led in most occasions by Mr. al-Turabi himself and absurd as they may have been, were held for those killed in the South. Main streets and halls were named after the leaders of the NIF who were killed in the South. All sorts of opposition to the war and the government were harshly silenced, and it was declared that no voice would be louder than that of *Jihad*.

Despite escalation of the war, secret and open contacts and meetings between the NIF government and the SPLM/A took place and continued. A number of initiatives were offered by Sudan's neighboring countries and some regional and international organizations to mediate an end to the war. Some of those initiatives, and the declarations and agreements resulting therefrom, will be reviewed and analyzed in the course of this Article. As will be discussed in more detail below, those initiatives and declarations led, thirteen years after the NIF took over power, to the conclusion of the Machakos Protocol granting South Sudan the right of self-determination with the option of unity or secession on July 20, 2002. Two and half years later, on January 9, 2005, the two parties concluded the Comprehensive Peace Agreement.<sup>156</sup> In addition to the Machakos Protocol, the CPA included five other agreements and protocols, as will be discussed later.<sup>157</sup>

However, before delving into the details of those protocols and agreements and how they were negotiated and concluded, it is important to discuss one significant development within the ruling NIF in the Sudan. The development was the major split within the ruling NIF in 1999 and the end of the rule of Mr. al-Turabi.<sup>158</sup> As a result of the split, the NIF broke into two parties: the National Congress Party ("NCP") of President Omar al-Bashir, and the Popular Congress Party ("PCP") of Mr. Hassan al-Turabi. The differences that led to the split were not ideological; rather, they centered on who would be the absolute ruler of the country. The demise of Mr. al-Turabi's rule seemed to have played a role in ending the civil war in the Sudan, as he was the political ideologue of the NIF regime and the real power behind the throne. Moreover, Mr. al-Bashir and his group might have decided they could not afford to fight in two fronts, one against Mr. Garang, and the other against Mr. al-Turabi.

It should, however, also be added that the conclusion of the CPA was a result of the realization by both parties, particularly the NIF, and later the NCP government, that, after thirteen years of heavy military combat, the civil war was

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156. Mollie Zapata, *Sudan: Comprehensive Peace Agreement and South Sudan Independence*, SATELLITE SENTINEL PROJECT (Dec. 20, 2011), <http://www.satsentinel.org/blog/sudan-comprehensive-peace-agreement-and-south-sudan-independence>.

157. *Id.*

158. For the details of the split within the ruling NIF in the Sudan, its causes and consequences, see AL-MAHBOUB ABDEL-SALAM, *THE SUDANESE ISLAMIC MOVEMENT—THE CIRCLE OF LIGHT AND THE THREADS OF DARKNESS* (2009) (in Arabic).

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simply not winnable. The cost in human life and fiscal resources was no longer affordable by the government, which was facing increasing isolation and was under heavy pressure from the United States and West European countries. The economic situation worsened during the first ten years of NIF rule, with the Sudanese pound losing more than ninety percent of its value. The discovery of oil in Southern Sudan and the start of its development and export through the pipeline that flows through large areas of the South was a huge incentive for the NCP to end the war. The NCP knew very well that oil could only be extracted and exported, and oil companies would only operate, in a peaceful environment. Everyone remembered the attacks on Chevron by the SPLA in 1984. Moreover, the strategy of the NIF, and later the NCP, of weakening the SPLM by concluding agreements with the SPLM splinter groups, supporting them, and giving them a share in power, did not work, as will be discussed later.

By 2002, the NCP government was forced by the above factors, as well as international pressure, to enter into serious negotiations with the SPLM. Shortly after the conclusion of the Machakos Protocol on July 2002, the first agreement under the CPA, the government started to gradually abandon the calls for *Jihad* and the absurd martyrs' weddings. By that time, the NCP had forgotten about the contention that even regional autonomy for the South would stand in the way of the Arab-Islamic state in Sudan. It also closed its eyes to the forty years of its persistent refusal to acknowledge the different cultural, ethnic, religious, and linguistic characteristics of the South. By 2005, the South was no longer a vacuum to be necessarily filled by Arab culture under an Islamic revival, as Mr. al-Turabi announced in 1967.<sup>159</sup> Rather, the Southerners were regarded as a distinct people with a distinct culture, and equal constituents and partners that were entitled to the full rights of self-determination.<sup>160</sup>

After lengthy and complex negotiations that spanned almost three years in Kenya, under the auspices of the Intergovernmental Authority on Development ("IGAD") and the government of Kenya, the government of the Republic of the Sudan and the SPLM/A signed, on January 9, 2005, the CPA.<sup>161</sup> The CPA was painstakingly and incrementally negotiated during those three years and incorporated a number of separate protocols and agreements. This was a defining moment in the history of Sudan. The CPA ended a devastating civil war that had lasted since 1983 following the collapse of the Addis Ababa Agreement, as discussed earlier. It put in place radical new political structures for the division of power and wealth between the two parts of the country during an interim period of six years. More importantly, the CPA recognized for the first time the right of the people of Southern Sudan to self-determination with the option of secession.

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159. Ryan Mauro, *Jihad Defeated in Sudan*, FRONTPAGE MAG (Jan. 26, 2011), <http://frontpagemag.com/2011/ryan-mauro/jihad-defeated/>.

160. *Id.*

161. Zapata, *supra* note 156.

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Before reviewing the agreements and protocols under the CPA, it is essential to trace the route that the SPLM followed to attain the right of self-determination and to succeed in implanting it as the main component of the first protocol under the CPA, essentially hoisting it as the flagship of the CPA and the Interim Constitution. The road to self-determination was a long and difficult one, but was shrewdly and intelligently negotiated by the SPLM for over more than a decade, with both the NIF/NCP government in Khartoum and the opposition National Democratic Alliance (“NDA”) political parties and trade unions in Sudan’s neighboring countries. The road was over-laid with guns and diplomacy, and was coated all the way through by the broken promises the North made to the South since 1947, when Northern political leaders met their Southern counterparts for the first time ever during the Juba Conference.<sup>162</sup>

IV. HISTORY AND EVOLUTION OF THE RIGHT OF SELF-DETERMINATION FOR SOUTH SUDAN

A. *The SPLM Shift to the Right of Self-Determination*

Two immediate questions may jump to the mind of the reader when reaching this point of the history of modern Sudan. The first question relates to the right of self-determination and how it emerged and became the flagship of the CPA. The second question is how the government and the political parties that fought for fifty years to deny a large segment of its population even limited regional autonomy could suddenly agree to grant that same segment the right of self-determination with the option of secession.

As discussed earlier, the first time the issue of self-determination for Southern Sudan was formally raised was during the preparations for the roundtable conference in 1965. During the conference, some of the Southern Sudanese leaders wanted to bring to the table for discussion the issue of the right of Southern Sudan to self-determination. However, this demand was vehemently rejected by the Northern parties, and was not pursued by the Southerners. Instead, some of the Southern leaders, led by Mr. William Deng,<sup>163</sup> reverted to their original demand of federation, which was also and again rejected by the Northern parties. The issue of the right of self-determination was not raised again for the next twenty-five years. Even during the Addis Ababa negotiations, the

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162. Paanluel Wël, *South Sudan: Timeline South Sudan—The Evolutionary Phases of South Sudan’s Liberation Struggle (Part 1)*, ALLAFRICA (Sept. 21, 2012), <http://allafrica.com/stories/201209281062.html>.

163. Deng A. Dekuek, *Dr. John Garang, the SPLM and the Question of Unity: A Rebuttal to Mr. Elhag Paul*, NEW SUDAN VISION (Oct. 8, 2011, 2:01 AM), [http://www.newsudanvision.com/index.php?option=com\\_content&view=article&id=2459:dr-john-garang-the-splm-an](http://www.newsudanvision.com/index.php?option=com_content&view=article&id=2459:dr-john-garang-the-splm-an).

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issue on the table was federation, which was later diluted to regional autonomy and self-government, as reflected in the Addis Ababa Agreement.<sup>164</sup>

Although the SPLM/A declared and pronounced in its Manifesto in 1983 that it was fighting for a secular democratic united state, the New Sudan, the quest for self-determination suddenly found its way into its menu of demands in 1991.<sup>165</sup> In September of that year, the SPLM/A held a meeting of its Political Military High Command in the town of Torit in Southern Sudan, which was under their control at the time. The meeting took place one month after a splinter group, led by Mr. Riek Machar and Mr. Lam Akol Ajawin, broke away from the SPLM in August of 1991, and established a separate liberation movement. The Machar/Akol movement was referred to as the “Nasir Group,” in reference to the city of Nasir in the Upper Nile province in Southern Sudan, where the Shilluk tribe (Mr. Akol’s tribe) lived.

The Torit meeting was held despite, or perhaps because of, those divisions within the SPLM. The meeting issued a number of resolutions, totaling eighteen and dealing with a wide range of issues (referred to as the “Torit Resolutions”). Resolution 1 dealt with what it called “The Riak/Lam theoretical coup of 28/8/1991.” It denounced and condemned the coup as divisive and destructive, but it stated that the situation would be approached peacefully, and an amicable solution sought. Resolution 3 on the “Current Peace Initiatives” enumerated such peace initiatives since the birth of the SPLM. It listed the Koka Dam Declaration of 1986, the agreement with the Sudan African Parties in 1987, and the Sudanese Peace Initiative with the DUP in 1988. It indicated that the SPLM entered into peace talks with the Khartoum *junta* in 1989 and confirmed the intentions of the SPLM to continue to actively seek peaceful resolution with the government in Khartoum and the other political forces.

Resolution 3.2 was the most important of all the Torit resolutions. It began by noting that “a centralized system of government in the Sudan based on Arabism and Islam with local autonomies or federal states granted to the South (or other Regions) has been tried, failed, or discredited, and thus the country has oscillated between war and peace since independence.”<sup>166</sup> Resolution 3.2 went on to chart the future negotiation strategy of the SPLM. It stated that “in any future peace initiatives and talks, the position of the SPLM/SPLA on the system of [g]overnment shall be based on resolving the war through a united secular democratic Sudan, confederation, association of sovereign states or self determination.”<sup>167</sup>

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164. Daniel Thabo Nyibong, *History of Southern Sudan (Hoss)*, PACHODO.ORG (Oct. 6, 2010), [http://pachodo.org/index.php?option=com\\_content&Itemid=100041&catid=55&id=1749&lang=en&view=article](http://pachodo.org/index.php?option=com_content&Itemid=100041&catid=55&id=1749&lang=en&view=article).

165. *The Rise and Evolution of the SPLM*, SPLMTODAY.COM, <http://www.splmtoday.com/index.php/about/what-is-the-splm> (last visited Feb. 20, 2013).

166. See GARANG, *supra* note 145, at 284.

167. For the resolutions of the Torit meeting, see *id.* For discussion of the background to the Torit

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This was certainly a milestone and a bombshell. The slogan of the unified “New Sudan” pronounced eight years earlier was no longer the only SPLM agenda item, or its pivotal principle.<sup>168</sup> It was rivaled by the squarely contradictory demand of self-determination with the option of secession.<sup>169</sup> Moreover, even a federal system under a central authority based on an Arab-Islamic system was no longer an option for the SPLM. Thus, the long-standing quest of the Southerners for federation, which dated back to the early 1950s, had suddenly ended by 1991.<sup>170</sup> Henceforth, the right of self-determination for Southern Sudan would dominate the political campaign, agenda, and activities of the SPLM, raising serious doubts about its commitment to the united New Sudan, pronounced eight years earlier under its 1983 Manifesto.

What prompted this change in the strategy and program of the SPLM/A? Could the fall of the autocratic regime of Mr. Mengistu Haile-Mariam in Ethiopia, in May of 1991, be a reason for this change? After the attack on the Bor Garrison by the government army in May of 1983, Colonel Garang retreated to the border areas with Ethiopia and soon established his military base there.<sup>171</sup>

Mr. Haile-Mariam welcomed the SPLM/A in Ethiopia and provided massive military and logistic support to the SPLM/A and became their closest ally. This was a golden opportunity for him to avenge the huge support Sudan provided to the Eritrean movements since the 1960s. Clearly, he was determined to use the opportunity effectively. In this connection, many have argued that it was unthinkable for the SPLM/A to demand separation from Sudan, or even self-determination, and expect help from Mr. Haile-Mariam, because Mr. Haile-Mariam was fighting a similar war and facing similar demands for separation by the Eritreans.<sup>172</sup> According to this line of thinking, Mr. Garang had to appear and act as a unionist to guarantee the continuation of Ethiopia’s military and logistic support.<sup>173</sup> However, the fall of the regime of Mr. Mengistu Haile-Mariam, in May of 1991, cleared the way for the SPLM to raise, four months later in the Torit meeting, the issue of self-determination, including secession. After all, Eritrea itself was on its way to independence after its liberation movement extracted the right to self-determination in 1991 from the government that toppled Mr. Haile-Mariam and, after the movement swept Asmara, the capitol of Eritrea.

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meeting and an analysis of the resolutions of the meeting, see OYSTEIN ROLANDSEN, *GUERRILLA GOVERNMENT: POLITICAL CHANGES IN THE SOUTHERN SUDAN DURING THE 1990S* 55-57 (2005).

168. *The Rise and Evolution of the SPLM*, *supra* note 165.

169. *Id.*

170. *Id.*

171. Paanluel Wël, *South Sudan: Timeline South Sudan—The Evolutionary Phases of South Sudan’s Liberation Struggle (Part 3)*, S. SUDAN NEWS AGENCY (Sept. 21, 2012), <http://www.southsudannewsagency.com/opinion/articles/timeline-south-sudan-the-evolutionary-phases-of-south-sudans-liberation-struggle-part-3>.

172. See JOHN YOUNG, *THE FATE OF SUDAN: THE ORIGINS AND CONSEQUENCES OF A FLAWED PEACE PROCESS* (Zed Books, London, 2012) at 45-46.

173. See Young, *supra* note 132.



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The SPLM's path to self-determination was not an easy one, however, and it was paved with legal and political hurdles. One such major hurdle was the early resolution of the Organization of African Unity ("OAU") which mandated that the borders between African states inherited from the colonial era were sacrosanct.<sup>174</sup> The OAU declared in their resolution, in July of 1964, that "all Member States pledge themselves to respect the frontiers existing on their achievement of national independence."<sup>175</sup> In essence, the resolution reconfirmed the principle of stability of borders, the key element of *uti possidetis*, which ensured that the colonial borders stayed without change.

Thus, the OAU resolution made it clear that secessionist movements would not be recognized or tolerated. For example, the quest of Biafra to break away from Nigeria and become an independent nation through the gun in the 1960s was crushed by Nigeria, as well as by the refusal of almost all the African states to recognize Biafra, in deference to the OAU resolution, and because of fear of their own "Biafras." Southern Sudan was no exception, and its leaders knew that. Indeed, this might have been the reason why its leaders were content until the early 1990s with their demand for federation, rather than secession or even confederation.

Eritrea was the only country before South Sudan to break away from another country in post-colonial Africa. However, Eritrea had a different history. The British administered the territory under a UN mandate until 1951, when Eritrea was federated with Ethiopia per a UN General Assembly resolution.<sup>176</sup> Ethiopia, however, breached that status, and annexed Eritrea as its 14th province in 1952, in blatant defiance of the UN resolution, and immediately thereafter embarked on aggressive and harsh integrationist measures. That gave Eritrea's case a special legal and political distinction.

However, the OAU resolution does not prevent any government from granting the right of self-determination to any of its distinct groups or regions by agreement. The right of self-determination under this scenario would be a treaty-based one and would not contradict the OAU resolution. Indeed, the quest of the Eritreans for self-determination was made easier through recognition of that right by the new government in Addis Ababa in May 1991.<sup>177</sup> This was the strategic route the SPLM/A shrewdly decided to take. With promises being broken and

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174. Lydia Polgreen, *For Rebels in Mali, Odds of Establishing a Nation Are Slim*, N.Y. TIMES (Apr. 6, 2012), [http://www.nytimes.com/2012/04/07/world/africa/mali-rebels-declare-independence-but-face-an-uphill-task.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2012/04/07/world/africa/mali-rebels-declare-independence-but-face-an-uphill-task.html?_r=0&pagewanted=print).

175. See Resolution on the Intangibility of Frontiers, 1st Sess., July 17-21, 1964, O.A.U. Res. at 16(1), available at [http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_17\\_21\\_JULY\\_1964\\_ASSEMBLY\\_HEADS\\_STATE\\_GOVERNMENT\\_FIRST\\_ORDINARY\\_SESSION.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_17_21_JULY_1964_ASSEMBLY_HEADS_STATE_GOVERNMENT_FIRST_ORDINARY_SESSION.pdf). This Resolution is also reprinted in DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 49 (Gino J. Naldi ed., 1992).

176. G.A. Res 390A(V), 5th Sess., U.N. Soc. A/RES 390A(V) (Dec. 15, 1990).

177. Gilbert A. Lewthwaight, *Eritreans Declare Autonomy from Addis Ababa*, BALTIMORE SUN (May 30, 1991), [http://articles.baltimoresun.com/1991-05-30/news/1991150049\\_1\\_addis-ababa-ethiopian-people-revolutionary-eprdf](http://articles.baltimoresun.com/1991-05-30/news/1991150049_1_addis-ababa-ethiopian-people-revolutionary-eprdf).

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agreements being dishonored one after the other, the Southerners had to reconsider their strategy. Would a demand for self-determination find any support anywhere? Could it be negotiated with the Khartoum government and the Northern opposition political parties? Apparently the SPLM decided to give it a try, and strangely enough, and perhaps to the surprise of its leaders and members, they succeeded incrementally over a period of time.

*B. The Government of Sudan Acceptance of the Right of Self-Determination*

The NIF government decided to jump the self-determination wagon a few months after the SPLM Torit meeting. In January of 1992, four months after the Torit meeting, the government of the Sudan, represented by Mr. Ali Al-Haj, a leading member of the NIF, met in Frankfurt, Germany, with Dr. Lam Akol Ajawin, who had just broken ranks with the SPLM/A in August 1991, a month before the Torit meeting. The Frankfurt meeting took place from January 23 to 25, 1992, and the two parties concluded the Frankfurt Agreement (also referred to as the Frankfurt Declaration, or Joint Statement). The Agreement is short, consisting of only four paragraphs. The first paragraph stated that there would be a transitional period, to be agreed upon, “during which Southern Sudan shall enjoy a special Constitutional and Political Status within the unified Sudan.”<sup>178</sup> After that period, “the people of the South shall exercise their right to freely choose the political and constitutional status that accords with their national aspirations, *without ruling out any option*.”<sup>179</sup> The second paragraph indicated the agreement of the two parties to establish constitutional and legal rules for resolving differences through the political and constitutional institutions. The remaining paragraphs dealt with agreement of the parties for continuation of the negotiations in Abuja, Nigeria, at the earliest possible time. The negotiations would be preceded with a ceasefire and would address the system of government during the transitional period, sharing of power and wealth, as well as security arrangements, and the return and resettlement of the refugees.<sup>180</sup>

The Frankfurt Agreement was no doubt an electrifying agreement; it was the first time ever that any Northern political party or government in Khartoum recognized the right of self-determination for the people of South Sudan. The fact that no option was excluded simply meant that the Frankfurt Agreement recognized the right of the Southern Sudanese to self-determination with all options available, including the option of secession.

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178. GARANG, *supra* note 145, at 292.

179. For the Frankfurt Agreement, see AL-TAHIR HASSAN AL-TOM & DR. LAM AKOL AJAWIN—MY JOURNEY WITH THE SPLM 219 (2011) (in Arabic) (emphasis added). See also GARANG, *supra* note 145, at 292.

180. The Abuja meetings took place during 1992 and 1993 between the Government of Sudan and the two groups of the SPLM, but there was no breakthrough on any of the issues tabled for discussion. For a detailed discussion of the Abuja meetings, see WONDU & LESCH, *supra* note 149.

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It is quite ironic that recognition of this right came from the very same political group that three years earlier objected vehemently, through huge rallies and demonstrations, to the Sudanese Peace Initiative of November 1988, which did not include either a reference to self-determination for Southern Sudan, nor to secession. Indeed, the 1989 NIF *coup d'état* was justified by the inability of the third civilian government to fight the war in the South and to maintain the unity and integrity of the Sudan. This complete change by the NIF of its position has since been quite puzzling, not only to observers, but to many members of the NIF and now the NCP itself.

In my view, the NIF leaders thought that granting the right of self-determination to the SPLM splinter group, led by Mr. Lam Akol, would strengthen that group and would make it look more capable of extracting concessions from the government than the mother movement led by Mr. John Garang. It should be pointed out that Mr. Garang belonged to the Dinka tribe, while Mr. Akol belonged to the Shiluk tribe. Strengthening the hands of Mr. Akol would mean widening the rifts between the two rival tribes, as well as the two leading politicians. Indeed, as will be discussed later, the government would soon conclude a similar agreement with Mr. Riek Machar of the Nuer tribe. Clearly, the strategy of the government was to present the SPLM as a Dinka-based movement and to support and strengthen the other two largest and competing tribes with the Dinka in the South—the Nuer and the Shiluk—and thus widen the rift between them, and, in the process, weaken the main SPLM/A. In other words, it was a divide-and-rule strategy. As may be recalled, President Nimeiri tried that when he re-divided the South into three regions in 1983.<sup>181</sup>

As a result of the Frankfurt Agreement, the psychological and political barriers against self-determination for the South had finally been broken. Henceforth, the rivalry between the government and the opposition would revolve, *inter alia*, around recognition of this right for the people of Southern Sudan. As it turned out, the decade of the 1990s can be viewed as the decade when the right of self-determination for Southern Sudan received wide acceptance and recognition by the Sudanese government and the opposition parties and trade unions, as well as the neighbors of the Sudan and the United States.

In fact, the right of self-determination would prove to be a unifying element for the splinter groups within the SPLM. In an attempt to reunite those groups, the U.S. administration called for a meeting in Washington, D.C. in October 1993. The meeting was attended by the SPLM, led by Mr. John Garang; the splinter groups of the SPLM, led by Mr. Riek Machar and Mr. Lam Akol; and representatives of the Northern opposition groups under the umbrella of the National Democratic Alliance. Although the two SPLM groups failed to agree on

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181. *The Root Causes of Conflict in South Sudan*, SOUTHSUDAN.NET, <http://southsudan.net/theroot.html> (last visited Feb. 21, 2013).

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a joint declaration to be issued on their reunification, each of them signed a separate statement that included a reference to the right of self-determination for Southern Sudan as the means for ending the conflict in the Sudan.<sup>182</sup> The overlap of views on the right of self-determination for Southern Sudan made it easier for Mr. Riek Machar, and later Mr. Lam Akol, to return to the SPLM/A a few years later. By 1993, they all had one and the same goal: resolution of the North-South conflict through self-determination for the Southern Sudanese with the option of secession.

The SPLM decided to give the demand for self-determination its full legal, constitutional, and political cover. It called for a national conference of the SPLM, which took place during the first week in April of 1994 in Shagdom in East Equatoria state, in South Sudan. The conference endorsed the right of self-determination for the three provinces of Southern Sudan, in addition to the Abyei area, South Kodofan, and Blue Nile states in the North.<sup>183</sup> Thus, the conference went beyond the decisions of the Torit meeting in September 1991 that limited the demand for the right of self-determination to Southern Sudan with its borders as they stood on independence on January 1956.

Building on the Frankfurt agreement and the Washington statements, the IGAD countries,<sup>184</sup> which were then involved in the South Sudan problem following the failure of the Abuja meetings, prepared, after two meetings with the two parties in March and May of 1994, the draft Declaration of Principles on the Conflict in the Sudan. The draft was completed in Nairobi on July 20, 1994 and presented to the government of Sudan and the SPLM.<sup>185</sup> The IGAD Declaration stated that “the right of self-determination of the people of South Sudan to determine their future status through a referendum must be affirmed.”<sup>186</sup>

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182. The meeting took place at the initiative of U.S. Congressman Harry Johnson, who later became the U.S. Special Envoy to the Sudan. For details on the Washington meeting, see JOHN G. NYUOT YOH, PEACE INITIATIVES IN SUDAN AND LESSONS LEARNED (1984-2002) (2004), available at <http://www.johngaiyoh.com/pdf/Peace%20Initiatives%20in%20Sudan%20and%20Lessons%20Learned.pdf?PHPSESSID=putki848kn70foiqpbs8po9gp1>. See also BOB, *supra* note 58, at 379.

183. For more details on the Shagdom (also spelt as Chukudum) Conference, see FATHI ALDAW, SUDAN: THE FALL OF THE MASKS 242 (2006) (in Arabic). See also Young, *supra* note 132, at 541. Shagdom was under the control of the SPLM/A at that time.

184. IGAD is an inter-governmental organization consisting of Kenya, Uganda, Djibouti, Somalia, Ethiopia and the Sudan. Eritrea joined IGAD after it emerged as an independent nation in 1993. See IGAD, <http://www.igad.org> (last visited Mar. 27, 2013).

185. ALEX DE WAAL ET AL., PEACE BY PIECE, ADDRESSING SUDAN’S CONFLICTS 78-81 (2006), available at [http://www.c-r.org/sites/c-r.org/files/Accord18\\_26Keytextsandagreements\\_2006\\_ENG.pdf](http://www.c-r.org/sites/c-r.org/files/Accord18_26Keytextsandagreements_2006_ENG.pdf).

186. For the IGAD Declaration of Principles on the Conflict in the Sudan, see The 1993 Abuja 2 Sudanese Peace Conference: The IGAD Declaration of Principles (May 20, 1994), UNITED NATIONS PEACEMAKER, [http://peacemaker.un.org/sites/peacemaker.un.org/files/SD\\_940520\\_The%20IGAD%20Declaration%20of%20principles.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_940520_The%20IGAD%20Declaration%20of%20principles.pdf). It should be added that the Declaration also stated that “[e]xtensive rights of self-determination on the basis of federation, autonomy, etc., to the various peoples of the Sudan must be affirmed.” Members of the IGAD decided to intervene and offer their good offices in 1994, after the failure of the Abuja negotiations that took place in 1992-1993; see *supra* text accompanying note 82. Thus, the problems of the Sudan moved from West Africa to East Africa in 1994.

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The government of Sudan formally rejected the IGAD Declaration in September of 1994; however, it agreed later in 1997 that the Declaration would form the basis for negotiations with the SPLM.<sup>187</sup>

These developments seemed to resonate well within the U.S. administration itself, and the right of self-determination for Southern Sudan got a major boost on August 4, 1994, eight months after the Washington meeting. On that day, a U.S. House of Representatives resolution condemned Sudan for its support of international terrorism and also recognized the right of self-determination for the Southern Sudanese people.<sup>188</sup> Meanwhile, articles started appearing in academic journals arguing that the Southern Sudanese were distinct people who were entitled to the right of self-determination under international law.<sup>189</sup>

#### *C. The Northern Opposition Parties and the Right of Self-Determination*

With the government of Sudan agreeing to the right of self-determination for Southern Sudan in Frankfurt in 1992, and the IGAD issuing its Declaration in 1994, the SPLM soon started to discuss and tried to persuade the Sudanese political parties to endorse this demand. It should be noted that representatives of those parties attended the Washington meeting in October of 1993, where both groups of the SPLM agreed, in separate statements, on the right of self-determination. The opposition parties clearly took note of this development and prepared for what was to come and what to expect. The DUP was the first Northern Sudanese party to recognize the right of self-determination for Southern Sudan. This may be due to the close ties between Mr. Garang and Mr. Al-Mirghani. As may be recalled, the two leaders met in Addis Ababa in November of 1988 and concluded the Sudan Peace Initiative. Recognition of the right of self-determination for the South was the highlight of the Cairo Agreement concluded by the DUP, represented by Mr. Ahmed Al-Sayyed Hamad, and the SPLM, represented by Mr. Yousif Kuwa Mekki, in Cairo on July 13, 1994.<sup>190</sup>

As expected, the Cairo Agreement underscored the close and special relationship between the DUP and the SPLM and highlighted the conclusion by the two parties of the Sudanese Peace Initiative. The Agreement, consisting of seven points, underscored the need to maintain the unity of the Sudan, and emphasized that the problems of the Sudan could only be resolved by dialogue. The Agreement then laid down a number of principles that would be included in the next constitution of the Sudan: the international covenants and conventions on human rights would be considered part of the national laws, and any law that

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187. DE WAAL ET AL., *supra* note 185, at 78-81.

188. See *House Approves Measure Against Sudan*, REUTERS (Aug. 4, 1994); see also Angela M. Lloyd, *The Southern Sudan, A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT'L L. 419 (1994).

189. In this connection, see Lloyd, *supra* note 188.

190. Copy of the Cairo Agreement is on file with the author.

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is inconsistent with any of them would be null and void; equality of all Sudanese before the law regardless of religion, race, or culture; implementation of decentralization or a regional autonomy system of government in the different regions of the Sudan; and ensuring a fair and equitable division of wealth between the different regions of the Sudan. The Agreement went on to state, in Article 6, that if a violation of any of the principles agreed upon during the constitutional conference occurred, then the aggrieved party would have the right of self-determination through a referendum, and the results of such a referendum would be binding on the parties. Article 8 confirmed that the IGAD Declaration represented a positive step, which reflected the attention of the neighboring countries to the problems of the Sudan and underscored the need to give priority to the unity of the Sudan. The Agreement ended with a call to the Sudanese people to support the principles set forth in the Agreement.

It is noteworthy that the Cairo Agreement followed a convoluted path in arriving at the right of self-determination. It conditioned the right of self-determination for Southern Sudan on the failure of the Northern political parties to meet the obligations agreed upon in the constitutional conference that would be held to discuss the Sudan problem. This is a very interesting stipulation and was quite reflective of the promises, agreements, and declarations that were dishonored by the North. The Cairo Agreement also endorsed the IGAD Declaration of Principles, an implied but obvious reference to the right of self-determination for South Sudan, which was the main element of the Declaration. With this agreement, the DUP became the first Sudanese political party to recognize the right of self-determination for South Sudan. Although the right of self-determination was qualified, the Cairo Agreement was no doubt a major breakthrough for the SPLM and was the equivalent of the Frankfurt Agreement. Each represented a major threshold in the history of the North-South relations.

The rivalry between the two political parties in the Sudan, the Umma and the DUP, would now be played out in regards to their relationship with the SPLM. The Umma Party, it seemed, decided that it would not allow the DUP to outmaneuver it politically, even on issues concerning the possibility of the breakup of the Sudan. Five months after the Cairo Agreement, the Umma Party, represented by Mr. Omer Nour Al-Daiem, the Secretary-General of the Party, signed an agreement with the SPLM, represented by Mr. Salva Kiir, in Shagdom, South Sudan on December 12, 1994.<sup>191</sup> The Agreement laid down detailed procedures for the exercise of this right, following the establishment of a confederal system of government in the Sudan for an interim period of two to four years, which would be under international supervision. This was another

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191. Copy of the Shagdom Agreement is on file with the author. See also SUDAN UMMA PARTY, <http://www.umma.org/08/8,1b1.htm> (last visited Mar. 27, 2013). For discussion of the Shagdom Agreement, see *Studies: New Existing Facts: Salva Kiir—From the Jungle to the Palace*, SUDAN VISION (Jan. 15, 2012), <http://www.sudanvisiondaily.com/modules.php?name=News&file=article&sid=10137>. As indicated earlier, Shagdom was under the control of the SPLM/A at that time.

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major breakthrough for the SPLM. With this agreement, the SPLM had the approval of the two largest political parties in the Sudan for the right of self-determination for Southern Sudan. The Umma-SPLM agreement even granted the South a confederal system of government during the transitional period, which was another major achievement for the SPLM.

Having attained the separate agreement of both the DUP and the Umma Party to its demand for self-determination, the SPLM's next move was to get that agreement into one document that was signed by both parties and the SPLM. After all, the DUP and the Umma Party were, since independence of the Sudan, the largest two parties and the main obstacle to the demands of federation or regional autonomy for the South. This was achieved in Asmara on December 27, 1994, when the Umma, the DUP, and SPLM met together, with the newly-formed Sudanese Alliance Forces ("SAF") (referred to together in that agreement as the "Main Political Forces in the Sudan"), and signed the Declaration of Political Agreement.<sup>192</sup> After confirming the unity of the Sudan as the strategic choice of all the political groups, the Agreement recognized the right of self-determination for Southern Sudan that was to be exercised after an interim period, which would be agreed upon in a more inclusive conference.<sup>193</sup>

Although this was a major achievement for the SPLM, it was still only one building block towards a more inclusive document where the right of self-determination would be recognized by the Northern political groups. Immediately after that Agreement, the SPLM moved swiftly to get the grouping of the Sudanese opposition political parties and trade unions, which were organized under the umbrella of the National Democratic Alliance and also included the SPLM, to endorse, as a group, the right of self-determination. This finally took place during the NDA's meeting held in Asmara, Eritrea, from June 15-23, 1995, which resulted in the issuing of the Asmara Declaration.<sup>194</sup>

The Asmara Declaration addressed and endorsed the right of self-determination for the people of South Sudan as a basic, democratic, and human right, to be exercised after a transitional period. It is interesting to note that the justification given for granting the right is similar to what Father Lohure stated about forty years ago—reason and democracy.<sup>195</sup> The Asmara Declaration started with a long preamble that underscored the urgent need to achieve peace and justice for all the marginalized people of the Sudan and the establishment of the New Sudan. It indicated the plan to hold a national conference for discussing and resolving all the pending problems of the Sudan. The Declaration went on to elaborate those problems and the plans for their resolution in fourteen points.

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192. *Declaration of Political Agreement*, SUDAN UMMA PARTY, <http://www.umma.org/07/7,04a.htm> (last visited Feb. 20, 2013).

193. For the text of the Declaration of Political Agreement, see ALDAW, *supra* note 183, at 280-82.

194. DE WAAL ET AL., *supra* note 185, at 78-81.

195. For the reasoning given by Father Lohure, see PATERNO, *supra* note 1.

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The first point emphasized the option of unity built on diversity of traditions, customs, religions, languages, races, cultures, and respect of those differences based on the international conventions and treaties thereon. It then endorsed the IGAD Principles as the basis for a just and sustainable resolution for the problems of the Sudan and recognized that the right of self-determination provided the basis for ending the civil war. The Declaration stated that the areas affected by the war were Southern Sudan, the Abyei area, and the Ingasana mountains in the Blue Nile Province. It then laid down its roadmap for a resolution for each of those areas. The people in Southern Sudan, within the 1956 boundaries, would exercise the right of self-determination before the end of the transitional period. The options for the people of Southern Sudan were unity (federal or confederal) or secession.

The people of the Abyei area would decide, through a referendum to be held during the transitional period, whether they wanted to remain within the geographical boundaries of the Kordofan province in the North, or to become part of the Bahr Al-Ghazal Province in the South. If they decided to be part of Bahr Al-Ghazal Province, then they would participate in the self-determination referendum of the South. As for the Ingasana area and the Nuba mountains area of South Kordofan, the transitional government would aim at achieving a political solution for addressing the injustices that prevailed in those areas, and would organize a referendum during the transitional period for ascertaining the views of the people of those areas about their future political and administrative status. The last point of the Declaration underlined the determination of the NDA for taking all the required action during the transitional period for rebuilding the institutions of the state to achieve the aims of the Declaration, including the holding of the self-determination referendum and supporting the unity option under the Declaration.

The Declaration was clearly a defining moment in the history of the Sudan. The right and the left, religious, and secular political groups of the Sudan were able to forge some basic consensus on Sudan's most pressing and difficult problem. However, the Declaration was a very optimistic and simplistic document. It was based on the overthrow of the NIF government and replacing it with the NDA government, as happened in 1964 and 1985, with the new government undertaking the self-determination referendum for the South. Ironically, the referendum would take place ten years later without any role or part for the NDA. Indeed, the Asmara Declaration would be the basis for the resolution, not only of the problems in Southern Sudan, but also those of the Abyei area and Blue Nile and South Kordofan states.

The Asmara Declaration was signed by all the NDA political opposition parties and representatives of the trade unions in exile, as well as the SPLM/A.<sup>196</sup>

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196. Copy of the Asmara Declaration is on file with the author. *See also* SUDAN UMMA PARTY, <http://www.umma.org/09/9,2a.htm> (last visited Mar. 27, 2013). The Declaration was signed by the DUP, the



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The outcome of the Asmara meeting was a major achievement for the SPLM. It sealed the right of self-determination among the opposition parties by giving it a solid legal and political foundation. The inclusion of the Abyei area and the referendum for the Blue Nile and South Kordofan states were definitely more than what the SPLM had hoped for. Although the Umma Party excluded the Blue Nile and South Kordofan in the Shagdom Agreement, it apparently voiced no objection to their inclusion in the Asmara Declaration. The Asmara meeting elected Mr. Mohamed Osman Al-Mirghani as the chairman of the NDA, Dr. John Garang as deputy chairman, and Mr. Mubarak Al-Fadil Al-Mahdi of the Umma party as the Secretary-General. This was clearly an attempt to underscore the unity of the opposition groups, and by implication of the Sudan.

#### *D. Reconfirmation by the Government of Sudan of the Right of Self-Determination*

Clearly the SPLM had, by 1995, crossed a major threshold in its diplomatic campaign to win the right of self-determination for the people of Southern Sudan. But that was not the end of the SPLM campaign. On April 21, 1997, the NIF government of the Sudan concluded an agreement with a number of Southern groups, including a splinter group of the SPLM led by Mr. Riek Machar. The agreement, known as the Khartoum Peace Agreement, reconfirmed the right of self-determination for Southern Sudan pronounced in the Frankfurt Agreement and to be exercised through a referendum. The Khartoum Peace Agreement paved the way for the SPLM splinter groups to participate in the government in Khartoum.<sup>197</sup>

The Khartoum Peace Agreement was preceded by the conclusion of a short agreement, which laid down the main principles of the Khartoum Peace Agreement, called the Political Charter for Peace. The Charter was signed in Khartoum on April 10, 1996, by a number of Southern parties and organizations. The Charter included a reference to the right of self-determination for the people of South Sudan to be exercised after a transitional period to be agreed upon by the parties.<sup>198</sup>

As indicated earlier, the strategy of the government until that time centered on the tribal divisions of the South. It aimed at widening the rift between the

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Umma Party, the SPLM/A, the Coalition of the African Parties, the Sudanese Communist Party, the Legitimate Leadership of the Sudanese Armed Forces, the Beja Congress, the Sudanese Alliance Forces ("SAF"), a number of Trade Unions in exile, and a number of Sudanese national personalities. This grouping of parties and trade unions, including the SPLM/A, constituted the National Democratic Alliance. It should be added that a few weeks after the Asmara Declaration, the NDA agreed that the transitional period would be four years.

197. For The Khartoum Peace Agreement, see 1997 Peace Agreement, Apr. 21, 1997, *available at* <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/sudan2.pdf>.

198. For the Political Charter for Peace, see MOHAMED AL-AMIN KHALIFA, PEACE STEPS DURING THE INGAZ ERA, ADDIS ABABA 1989-NAIVASHA 2005 218 (2005) (in Arabic).

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Dinka, dominated by SPLM on the one hand, and the Nuer and the Shiluk tribes, led by Mr. Riek Machar and Mr. Lam Akol, respectively, on the other hand. Indeed, Mr. Akol joined the Khartoum Peace Agreement five months later through the Fashoda Agreement that was concluded on September 20, 1997, in Fashoda, South Sudan, between his group, another splinter of the SPLM, and the Sudan government.<sup>199</sup> Subsequent to those agreements, both politicians joined the government in Khartoum.

Furthermore, the Constitution of the Republic of the Sudan, issued by the NIF government on July 1, 1998, included a reference in Article 139(g) to the right of self-determination for South Sudan.<sup>200</sup> Mr. Al-Turabi, the Speaker of the National Assembly and author of the 1998 Constitution, might have thought that such an oblique reference to self-determination would satisfy the Southerners, and would not be noticed by the Northerners.<sup>201</sup> However, Mr. Machar would abandon his peace process with Khartoum and return a year later to the SPLM ranks, carrying with him the Khartoum Peace Agreement and the 1998 Constitution of the Sudan as two more exhibits in the long list of evidence of acquiescence of the NIF, and later the NCP, government in Khartoum, as well as the Northern opposition groups, to the right of self-determination for Southern Sudan.

Thus, by 1999 the SPLM had amassed a large number of agreements with both the government and the opposition parties recognizing the right of self-determination for Southern Sudan. Those agreements included the Frankfurt Agreement of 1992, the IGAD Declaration of Principles of 1994, the U.S. House of Representatives resolution of 1994, the Cairo Agreement of 1994, the Shagdom Agreement of 1994, the Asmara Declaration of 1995, the Political Charter of 1996, the Khartoum Peace Agreement of 1997, and the Sudan Constitution of 1998. It is interesting to note that the SPLM agreements until that time were with the opposition parties of the NDA, while the agreements of the SPLM splinter groups were with the government. By any standard, those instruments were an impressive achievement for the SPLM and its splinter groups, and a clear indication of their diplomatic skills and abilities.

Those agreements, no doubt, facilitated the task of the SPLM negotiating team in Naivasha and paved the way for conclusion in July 20, 2002 of the Machakos Protocol, the flagship of the CPA, on self-determination for the people

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199. For the Fashoda Agreement, see AL-TOM & AJAWIN, *supra* note 179, at 225-26.

200. For the Constitution of the Sudan of 1998, see THE CONSTITUTION OF THE REPUBLIC OF THE SUDAN 1998, available at <http://www.sudanembassy.ca/Docs/THE%20CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20THE%20SUDAN%201998.pdf>. Article 139(g) indicated that Southern Sudan has a transitional system of federal government which would expire by the exercise of the right of self-determination. This Constitution was replaced by the 2005 Interim Constitution.

201. Jacob K. Lupai, *South Sudan Constitution Under Microscope*, SUDAN TRIBUNE (May 9, 2011), [http://www.sudantribune.com/spip.php?iframe&page=imprimable&id\\_article=38845](http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=38845).

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of Southern Sudan with the option of secession.<sup>202</sup> It proved quite difficult during the CPA negotiations for the government team to pull out of those agreements. For example, Ms. Hilde Johnson wrote that when the government delegation balked during the CPA negotiations at the issue of the right of self-determination for Southern Sudan, members of her mediation team “reminded the government delegation that resisting an exercise of self-determination was problematic, since Khartoum had signed on to this in previous agreements and even embedded the principle in the constitution.”<sup>203</sup>

Clearly, the point of no return and the moment of truth on self-determination for South Sudan were reached by this time for both the government and the opposition parties of the Sudan. The CPA sealed this fact and institutionalized and elaborated the right of self-determination in regards to how and when it would be exercised by the people of South Sudan, as discussed further below. Indeed, the right of self-determination was clearly highlighted in the Chapeau to the CPA, in addition to the detailed provisions elaborated in the Machakos Protocol. It was the only element of the CPA to be flagged in the Chapeau.

The Sudanese opposition parties of the NDA endorsed the Machakos Protocol granting the South the right of self-determination. This decision was made during the NDA Council meeting held in Asmara on August 7, 2002, two weeks after the Protocol was concluded.<sup>204</sup> Although the NDA political parties were not party to the negotiation process, they still had no choice, as they had individually and collectively endorsed that right earlier. Three years later, they would also endorse the CPA as a whole, although they did not participate in any session of the negotiations. They simply followed the whole negotiations process from a distance like any other interested group or persons. The government did not want them to participate even as observers, and the SPLM was not keen on fighting their case. In fact, in some instances, members of the SPLM indicated they were negotiating in the name of the NDA, of which the SPLM was a member, and indeed some members of the NDA repeated and perhaps believed that incredible statement.

Although the government and the opposition parties competed with each other in appeasing the SPLM on the issue of the right of self-determination during the 1990s, they would in a few years regret it. A few days after the Southerners opted for secession in January of 2011, the government and the

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202. GOV'T OF THE REPUBLIC OF SUDAN & THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY, LANDMARK SUDANESE PEACE AGREEMENT: SUDAN GOVERNMENT CONCLUDES WITH THE SPLMA “MACHAKOS PROTOCOL” AND ISSUES A JOINT COMMUNIQUE (JULY 20, 2012), *available at* <http://southsudanfriends.org/News/Machakos.html>.

203. *See* HILDE JOHNSON, WAGING PEACE IN SUDAN, THE INSIDE STORY OF THE NEGOTIATIONS THAT ENDED AFRICA'S LONGEST CIVIL WAR 48-49 (2011). Ms. Johnson was then the Minister of International Development of Norway and was the representative of the Norway in the troika (United States, United Kingdom, and Norway) that mediated the CPA, together with IGAD.

204. For discussion of the endorsement of the opposition parties of the National Democratic Alliance of the Machakos Protocol granting South Sudan the right of self-determination, see *id.* at 56.

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opposition parties started pointing fingers at each other as to who was the first to recognize this right and who was really responsible and to blame for the secession of the South.<sup>205</sup> The right of self-determination for the South was no longer an honor that the Northern Sudanese parties were competing to be associated with. It had by that time become a historical responsibility, indeed a burden, which each party wanted the other to shoulder the blame for.

V. AGREEMENTS AND PROTOCOLS UNDER THE COMPREHENSIVE PEACE AGREEMENT

The Comprehensive Peace Agreement was signed on January 9, 2005, by the then first vice president of the Republic of the Sudan and the chairman of the SPLM/A, and was witnessed by envoys of thirteen countries and organizations—the presidents of Kenya and Uganda and representatives of Egypt, Italy, Netherlands, Norway, the United Kingdom, the United States, the African Union, the European Union, the IGAD, the Arab League, and the United Nations.<sup>206</sup> This was another clear distinction from the Addis Ababa Agreement, which did not have such regional and global attention.

In addition, the UN Security Council met in Nairobi on November 19, 2004, six weeks before the CPA was signed, and issued a resolution in which it reaffirmed its support for the Machakos Protocol of July 20, 2002, on the right of self-determination for South Sudan, and the subsequent agreements based on this Protocol. It further declared its strong support for the efforts of the government of Sudan and the SPLM/A to reach a Comprehensive Peace Agreement and strongly endorsed the parties' commitment to reach a final comprehensive agreement by December 31, 2004, and expected that it would be fully and transparently implemented, with the appropriate international monitoring.<sup>207</sup>

This wide range of participants to, and endorsements of, the CPA is a testament to the importance the world community had ascribed to the CPA and to the peaceful resolution of the conflict in Sudan. Sadly, the only relevant group that was not a witness to the CPA, or even present at the signing ceremony, was the NDA, the umbrella group of the opposition parties. Not a single NDA representative was even present at the signing ceremony. One would have thought that the SPLM, being a member of the NDA of which Mr. Garang was

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205. *SPLM: Kuacjok ROR Preliminary Referendum Results*, GURTONG (Jan. 22, 2011) <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/4736/SPLM-Kuacjok-ROR-Preliminary-Referendum-Results.aspx>.

206. Press Release, Sudan Peace Agreement Signed 9 January Historic Opportunity, Security Council Told, U.N. Press Release SC/8306 (Aug. 2, 2005).

207. See Press Release, Security Council, Security Council Nairobi Meeting Welcomes End of Year, U.N. Press Release SC/8249 (Nov. 19, 2004). This was one of the rare occasions in which the Security Council met outside the UN headquarters in New York. The purpose of the meeting in Nairobi was to give support to the Sudan Peace Process and encourage the parties to reach a final agreement.

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its deputy chairman, would have insisted that the NDA attend the signing ceremony after having been kept out of the entire negotiating process.

The CPA's main provisions were reflected in the Interim National Constitution of the Republic of the Sudan which was adopted on July 6, 2005, six months after the conclusion of the CPA.<sup>208</sup> This was another major distinction from the Addis Ababa Agreement that was adopted as an organic law, together with the other agreements. The SPLM had clearly learned a great deal from the past experience of South Sudan's dealings with the North. It was determined to get it right this time, and indeed they did.

Two other interesting features of the CPA need to be highlighted. The CPA indicated that the agreed Arabic and English texts of the CPA would both be official and authentic; however, in the event of a dispute regarding the meaning of any provision of the text, the English version would be authoritative. The justification stipulated in the Chapeau was that English was the language of the peace negotiations. However, this was a clear indication of the changing times and milieu brought about by the SPLM and the CPA. The other feature was that the official and authentic Arabic and English text of the CPA were lodged with the United Nations, the African Union, the IGAD Secretariat in Djibouti, the Arab League of States, and the Republic of Kenya. This step, particularly lodging the CPA with the United Nations, would clearly strengthen the legal and political foundations of the CPA.<sup>209</sup>

The CPA consisted of the Chapeau,<sup>210</sup> six protocols and agreements, and two annexures on the implementation of these instruments. The Chapeau recorded the long and continuous negotiations process that took place from May 22, 2002 to December 31, 2004 in Kenya.<sup>211</sup> It referred to the tragic loss of life and

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208. The CPA is available at <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>.

209. The fact that the CPA was lodged with the United Nations raises some interesting and intricate questions as to whether this action amounted to registration of the CPA under Article 102 of the UN Charter. That Article reads "[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." U.N. Charter art. 102, para. 1.

210. The Chapeau was the umbrella agreement that was signed by the two parties and the thirteen witnesses on January 9, 2005, and to which the other agreements and protocols constituting the CPA are attached.

211. Negotiations took place under the auspices of IGAD. They were held in Karen, Machakos, Nairobi, Nakuru, Nanyuki, and Naivasha, all in Kenya. Because five of the six main agreements of the CPA were concluded at Naivasha, the CPA is often referred to as the Naivasha Agreement. Kenya played a major role in the negotiations and appointed General Lazaro Sumbeiywo as a mediator. The Chapeau clarified that the overall negotiations were carried out under the auspices of the IGAD Peace Process, and in respect of the issues related to the conflict areas of Southern Kordofan and Blue Nile States and Abyei area under the auspices of the Government of Kenya. Indeed, the preamble to the Machakos Protocol stated that the rejuvenated IGAD peace process under the chairmanship of the Kenyan President, H.E. Daniel T. arap Moi, provided the means to resolve the conflict and reach a just and sustainable peace. For a description of the negotiations process and the role of General Sumbeiywo, see WAITHAKA WAIHENYA, *THE MEDIATOR: GEN. LAZARO SUMBEIYWO AND THE SOUTHERN SUDAN PEACE PROCESS* (2006); see also JOHNSON, *supra* note 203.

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destruction of infrastructure and erosion of the economic resources of the country that resulted from what had become the longest-running conflict in Africa. It emphasized the need for full adherence to the letter and spirit of the CPA to ensure lasting peace, security, justice, and equality in Sudan. The Chapeau underscored the commitment of the parties to a negotiated settlement on the basis of a democratic system of governance, which, on the one hand, recognized the right of the people of Southern Sudan to self-determination and, on the other, sought to make unity attractive during the interim period. The Chapeau also confirmed that the system of governance would be founded on the values of “justice, democracy, respect for fundamental rights and freedoms of individuals, and mutual understanding and tolerance of diversity within the realities of the Sudan.” The Chapeau enumerated carefully the six agreements and protocols included in the CPA. It concluded with recognition of the enormity of the tasks that lay ahead in successfully implementing the CPA and a reconfirmation of the parties’ commitment to implement the CPA fully and jointly.

The first and most important of those agreements was the Machakos Protocol, concluded on July 20, 2002. The preamble underscored the need to redress the historical injustices and inequalities in development between the different regions of the Sudan. It further confirmed the desire of the two parties to resolve the Sudan conflict in a just and sustainable manner by addressing the root causes of the conflict and by establishing a framework for governance through which power and wealth could be equitably shared and human rights guaranteed. The preamble noted that the rejuvenated IGAD peace process and the IGAD Declaration of Principles provided the means to resolve the conflict and reach a just and sustainable peace for the benefit of all the people of the Sudan. Thus, this last recital of the preamble to the Machakos Protocol had clearly set the scene for the right of self-determination because that right was the highlight of the IGAD Declaration. The Protocol stated in paragraph 1.1:

That the unity of the Sudan, based on the free will of its people democratic governance, accountability, equality, respect, and justice for all citizens of the Sudan is and shall be the priority of the Parties and that it is possible to redress the grievances of the people of South Sudan and to meet their aspirations within such a framework.

Yet, paragraph 1.3 hastened to add “that the people of South Sudan have the right to self-determination, *inter alia*, through a referendum to determine their future status.” More specifically, paragraph 2.5 stated that, “[a]t the end of the Interim Period, there shall be an internationally-monitored referendum, organized jointly by the [g]overnment of the Sudan and the SPLM/A, for the people of the South Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement, or to vote for secession.”

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Incorporating these provisions, the Interim Constitution reconfirmed the six-year interim period, starting on July 9, 2005, with the referendum on the status of Southern Sudan to take place on January 9, 2011, six months before the end of the interim period on July 8, 2011.<sup>212</sup> Although the Machakos Protocol was firm on dates, it missed dealing with and specifying the percentages of voters needed for the referendum and its results to be legally binding. Those two issues would become major areas of contention when the two parties started discussing the Southern Sudan Referendum Act in 2009.

The Machakos Protocol, in a separate part, also dealt in detail with state and religion. The Protocol recognized “that Sudan is a multi-cultural, multi-racial, multi-religious, and multi-lingual country, and confirmed that religion would not be used as a divisive factor.” It stated that the “[r]eligions, customs and beliefs are a source of moral strength and inspiration for the Sudanese people,” and confirmed the “freedom of belief, worship, and conscience for followers of all religions or beliefs or customs.” However, the Protocol allowed Northern Sudan to continue with its *Sharia* laws. It stated that nationally-enacted legislation having effect only in respect of the states outside Southern Sudan would have as its source of legislation *Sharia* and the consensus of the people. Although the SPLM had insisted in the past on the total abrogation of the September Laws, it finally agreed in 2002 to exclude the South from the *Sharia* laws, and let them continue in the North. This clearly marked the end of the new secular unified Sudan called for under the SPLM Manifesto of July 1983. Henceforth, the Northerners opposed to the *Sharia* laws would have to fight their case themselves. The principle of a united new secular Sudan was no longer on the agenda of the SPLM.

The Protocol proscribed discrimination against anyone on the basis of religion. More importantly, the Protocol stated that, “[e]ligibility for public office, including the presidency, public service and the enjoyment of all rights and duties shall be based on citizenship and not on religion, beliefs or customs.” Furthermore, “[a]ll personal and family matters including marriage, divorce, inheritance, succession and affiliations would be governed by the personal laws, (including *Sharia* or other religious laws, customs, or traditions) of those concerned.” Finally, in paragraph 6.5, the Protocol granted each of the two parties the right “[t]o observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one’s religious beliefs.”<sup>213</sup> Thus, the Machakos Protocol concentrated on the two issues of self-determination—state and religion. On the first issue, the Protocol included two diametrically

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212. The first six months after the CPA was signed (January 9, 2005 to July 8, 2005) were referred to as the pre-interim period. This period was devoted primarily to agreeing on and adopting the Interim Constitution on July 6, 2005 and putting in place the arrangements and institutions for the start of the interim period.

213. This paragraph of the Protocol gave the SPLM the right to reverse the decision taken in 1960 during Abboud’s regime which imposed Friday as the day of rest in the South instead of Sunday.

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contradictory features—the aspiration for unity of the Sudan and the right of the Southern Sudanese to self-determination with the option of secession. The debate on those two contradictory features and the issue of making unity attractive for the Southern Sudanese would dominate and cloud the entire interim six-year period before it finally led to the secession of South Sudan.

The Agreement on Security Arrangements was concluded on September 25, 2003.<sup>214</sup> It provided for an internationally-monitored ceasefire to enter into effect upon the signing of the CPA. It also provided for the continued existence of two separate and equal armed forces during the interim period, the Sudanese Armed Forces and the Sudan People's Liberation Army, along with a number of joint integrated units incorporating members from both forces.

The Agreement on Wealth Sharing, concluded on January 7, 2004, addressed land and natural resources, including oil.<sup>215</sup> It provided for the establishment of a National Land Commission, a Southern Sudan Land Commission, a National Petroleum Commission, a Fiscal and Financial Allocation and Monitoring Commission, and an Oil Revenue Stabilization Account. It set forth guiding principles for sharing oil and non-oil revenues, and dealt with monetary policy, banking, currency, borrowing, and the establishment and operation of multi-donor trust funds. The Wealth Sharing Agreement stipulated that the net revenue from the oil in Southern Sudan would be divided equally between the national government and the government of Southern Sudan, after deduction of a certain amount for the Oil Revenue Stabilization Account and two percent for each of the oil-producing states or regions.<sup>216</sup> This provision was resented by most Southerners as unfairly giving half of their oil revenue to the North at a time when huge funds were needed to start the process of rebuilding the South. If the North was serious about the unity of the Sudan, then it no doubt had committed a grave mistake by taking half of the oil revenue of the South. If the South was looking for additional reasons to opt for secession, it found one in the oil sharing arrangement; indeed, a solid and major one.

The Agreement on Power Sharing was concluded on May 26, 2004.<sup>217</sup> It set forth principles of governance and human rights and fundamental freedoms. Enumerated freedoms included freedom of thought, conscience and religion, expression, assembly, and association.<sup>218</sup> It called for a decentralized system of

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214. GOV'T OF THE REPUBLIC OF SUDAN & THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY, AGREEMENT ON PERMANENT CEASEFIRE AND SECURITY ARRANGEMENTS IMPLEMENTATION MODALITIES DURING THE PRE-INTERIM AND INTERIM PERIODS BETWEEN THE GOVERNMENT OF THE SUDAN AND THE SPLM/SPLA (Dec. 31, 2004), available at <http://reliefweb.int/report/sudan/agreement-permanent-ceasefire-and-security-arrangements-implementation-modalities>.

215. Agreement on Wealth Sharing During the Pre-interim and Interim Period art. 5.3, Sudan-Sudan Peoples' Liberation Movement/Army, Jan. 7, 2004.

216. *Id.*

217. Protocol on Power Sharing, Sudan-Sudan Peoples' Liberation Movement/Army, May 26, 2004.

218. *See generally id.*



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government with significant devolution of powers to Southern Sudan, the states, and local governments, and described the structure and institutions of the national, Southern Sudan, and state governments.<sup>219</sup>

The Protocol on the Resolution of the Conflict in the Two States of Southern Kordofan and Blue Nile was also concluded on May 26, 2004.<sup>220</sup> It dealt with those two states that are geographically part of Northern Sudan, but inhabited by people who identify culturally and ethnically with Southern Sudan. It called for the diverse cultures and languages of the people in these states to be developed and protected. It underscored the need for the development of the two states, and it set up special local structures, with significant powers devolved to them. It also stipulated carrying out of popular consultations for ascertaining the degree of achievement of these objectives.<sup>221</sup> These two areas were engulfed in war with Khartoum just prior to the secession of Southern Sudan on July 9, 2011. As discussed earlier, the Asmara Declaration addressed those two areas and proposed a similar approach. The only difference was that the Asmara Declaration termed the process for achieving the objectives as “referendum,” while this Protocol called it “popular consultations.”

The Protocol on the Resolution of the Abyei Conflict, also known as the Abyei Protocol, was the third agreement concluded on May 26, 2004, and the sixth and last agreement under the CPA.<sup>222</sup> Major difficulties were faced while the two parties were negotiating the Abyei issue. The parties were deadlocked on the definition and the size of the Abyei area, each sticking to its position. Moreover, the dispute was exacerbated by the competing claims of the Ngok Dinka, a Southern Sudanese tribe, and the Misseriya, a Northern Sudanese tribe, over the Abyei area. The Americans who were actively involved in the peace negotiations at that time stepped in attempting to break the deadlock over Abyei. The then U.S. Special Envoy to the Sudan, Senator John Danforth and his staff, presented in March 2004 certain proposals to the two parties, including a definition of the area, a process for delimiting it, and resolution to the dispute. Those proposals were accepted by the two parties and became the basis for the Abyei Protocol.<sup>223</sup>

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219. *See generally id.*

220. The Comprehensive Peace Agreement ch. V, Sudan-Sudan Peoples' Liberation Movement/Army, May 26, 2004.

221. *See generally id.*

222. Protocol on The Resolution of the Abyei Conflict, Sudan-Sudan Peoples' Liberation Movement/Army, May 26, 2004 [hereinafter Abyei Protocol].

223. *See Resolution of Abyei Conflict*, Protocol Between The Government of The Sudan & The Sudan People's Liberation Movement/Army n. 1 (May 26, 2004), available at: [http://www.chr.up.ac.za/chr\\_old/indigenous/documents/Sudan/Legislation/Abyei%20Peace%20Agreement%202004.pdf](http://www.chr.up.ac.za/chr_old/indigenous/documents/Sudan/Legislation/Abyei%20Peace%20Agreement%202004.pdf). The footnote on page 1 stated that:

This is the full text of the proposal entitled “Principles of Agreement on Abyei,” presented by US Special Envoy Senator John Danforth to H.E. First Vice President Ali Osman Mohamed Taha and SPLM/A Chairman Dr. John Garang on the 19th March 2004. The Parties hereby declare to adopt these Principles as the basis for the resolution of the Abyei Conflict.

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The Protocol defined Abyei as the area that was transferred from Southern Sudan to the North during the colonial era in 1905.<sup>224</sup> The Protocol established the Abyei Boundaries Commission (“ABC”) for defining the boundaries of the area. Once the Abyei area was defined, a referendum would be carried out simultaneously with the Southern Sudan referendum to determine the Abyei area’s future.<sup>225</sup> The choices under the referendum were whether the Abyei area would continue as part of the North in a special administrative status, or whether it would revert back to the South.<sup>226</sup> As discussed earlier, Abyei, though not mentioned by name, was dealt with in the Addis Ababa Agreement in 1972. However, nothing was done during the Nimeiri era to resolve the dispute. As will be discussed later, the Abyei referendum did not take place as planned on January 9, 2011. The resolution of the Abyei dispute remains as remote as ever, with the issue continuing as one of the thorniest in the relationship between Sudan and the Republic of South Sudan.

On December 31, 2004, two annexures were concluded on the implementation of the six agreements, covering issues such as timing, executing authority, funding sources, and procedures for the different components of the CPA. This brought to a successful conclusion the arduous negotiations that had spanned almost three years. The CPA was signed less than ten days later on January 9, 2005. The pre-interim period commenced and lasted until July 9, 2005, when the interim period commenced. On July 6 of that year, the Interim National Constitution of the Republic of the Sudan was adopted, incorporating the basic provisions of the CPA.<sup>227</sup>

As mentioned earlier, the SPLM had clearly managed to avoid the mistakes the SSLM committed in the Addis Ababa Agreement. The CPA, unlike the Addis Ababa Agreement, was one integrated agreement witnessed by a large number of countries and regional and international organizations. It would be fully reflected in the Interim Constitution of the Sudan (that was adopted on July 6, 2005) to the point of its supremacy over the Interim Constitution. The officers and soldiers of SPLA would not be integrated into the Sudanese armed forces. Rather, the SPLA would stay as a separate and equal army, which would form with the Sudanese Armed Forces (“SAF”), the national army of the Sudan, with some jointly integrated units. It is noteworthy that the system of government established under

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*Id.*

224. Abyei Protocol, *supra* note 222, art. 1.1.2.

225. *Id.*

226. *Id.*

227. Article 225 of the Interim Constitution stated: “The Comprehensive Peace Agreement is deemed to have been duly incorporated in this Constitution; any provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution.” This Article attested clearly to the comprehensiveness and authority of the CPA and came very close to recognizing the supremacy of the CPA over the Interim Constitution. The government of Southern Sudan adopted its own Interim Constitution in December 2005.

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the CPA was not given a classification. However, with the extensive powers given to the government in Juba—including the right to open liaison offices in foreign capitals with similar reciprocal rights to those countries and with two separate and equal armies—the system was clearly something akin to confederation.

Mr. Garang returned to Khartoum on July 9, 2005 to an unprecedented hero's welcome by a huge crowd totaling in the millions. He was sworn in as the First Vice President of the Republic of the Sudan, the highest political office ever to be held by a Southern Sudanese. He was also sworn in as the President of the government of Southern Sudan, while maintaining his position as the chairman of the SPLM/A. This was no doubt a defining moment in the history of the Sudan. A new chapter of the Sudan started that day with the commencement of the interim period. Ironically and sadly, it turned out to be the final chapter of the unified Sudan.

#### VI. THE ROCKY INTERIM PERIOD AND THE FINAL SPLIT OF THE SUDAN

As per the CPA and the Interim Constitution, the interim period started on July 9, 2005, following the adoption of the Constitution on July 6, 2005, and the return and swearing in of Mr. Garang as First Vice President on July 9, 2005.<sup>228</sup> However, less than a week later, sharp differences between the government and its new partner, the SPLM, started to surface. Those differences would grow in number and magnitude and would cloud the entire interim period, eventually leading to the secession of South Sudan.

The first and most difficult difference that faced the two parties concerned the Abyei dispute and the report of the Abyei Boundaries Commission. The ABC was established pursuant to the “Understandings on the Abyei Boundaries Commission” concluded on December 17, 2004, seven months after the Abyei Protocol.<sup>229</sup> The Understandings stated that the ABC would be established and would consist of fifteen members, as follows: (i) five members to be appointed by the government of Sudan representing the government, the Misseriya, and the administrators of the Abyei area; (ii) five members to be appointed by the SPLM representing the SPLM, the Dinka, and the administrators of the Abyei area; and (iii) five impartial experts (“Experts”) to be appointed by the United States,

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228. *Sudan Peace Project*, MAX PLANCK INST. FOR COMP. PUB. L. & INT'L L. (Mar. 15, 2012), [http://www.mpil.de/ww/en/pub/research/details/know\\_transfer/africa\\_projects/sudan\\_peace\\_project.cfm](http://www.mpil.de/ww/en/pub/research/details/know_transfer/africa_projects/sudan_peace_project.cfm).

229. For the Understandings on the Abyei Boundaries Commission, see *Abyei Boundary Commission Report*, SUDAN TRIBUNE, 12 (Sept. 15, 2005), <http://www.sudantribune.com/TEXT-Abyei-Boundary-Commission,11633>. In addition to the Understanding, the two parties concluded (i) the “Text of the Terms of Reference (‘TOR’) for the Abyei Boundaries Commission” on March 12, 2005; and (ii) the “Rules of Procedure for the Abyei Boundaries Commission” on April 11, 2005. Both instruments are also included in the ABC Report, at 14 and 18, respectively.

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United Kingdom, and Inter-Governmental Authority on Development.<sup>230</sup> The Abyei Protocol entrusted the ABC with the task of defining and demarcating the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. It was agreed by the parties and the fifteen members of the ABC that the Experts would examine and evaluate the material they gathered and prepare the report, which would be final and binding on the parties.

The ABC presented its report to the Presidency of the Sudan (the President, First Vice President, and Vice President) on July 14, 2005, less than a week after Mr. Garang was sworn as First Vice President.<sup>231</sup> The report demarcated the Abyei area in a manner close to the demands of the SPLM and far exceeding the area acknowledged by the government to be Abyei.<sup>232</sup> The report was immediately rejected by the government of the Sudan who claimed that the ABC had exceeded its authority. The SPLM welcomed the report and insisted that the report, as per the Abyei Protocol, was final and binding on the parties. This was the first setback to the CPA, and it was indeed a major one. It led to a complete stalemate on the Abyei dispute and created an environment that was not conducive to resolving other differences. Henceforth, the Abyei dispute would remain the thorniest issue in the Sudan North-South peace process and relations.<sup>233</sup>

This setback was followed by a sharp disagreement on the allocation of ministries in the new partnership government to be composed of the two parties under the CPA and the Interim Constitution. The SPLM demanded that either the Ministry of Energy or the Ministry of Finance be allocated to the SPLM. The demand was rejected by the ruling NCP which insisted on holding both ministries by virtue of being the senior partner in the government. The leaders of the NCP should have known that their insistence and intransigency in keeping under their domain the oil that came largely from the South, and the revenue it generated, would simply strengthen the secessionist trends within the South. The Southerners would succumb and give up both ministries, knowing very well that

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230. Those five experts were Ambassador Donald Petterson (former U.S. ambassador to the Sudan), U.S. appointee; Dr. Douglas Johnson (scholar and expert on Southern Sudan), U.K. appointee; and the three IGAD appointees: Professor Godfrey Muriuki (University of Nairobi); Professor Kassahun Berhanu (University of Addis Ababa); and Mr. Shadrack Gutto (a South African lawyer). Ambassador Petterson was selected as the Chair of the ABC in accordance with the wishes of the Government of Sudan and the SPLM.

231. Roger Winter, *Abyei: Sudan's "Kashmir"*, ENOUGH (Jan. 28, 2008), <http://www.enoughproject.org/publications/abyei-sudan%E2%80%99s-%E2%80%9Ckashmir%E2%80%9D>.

232. See ABYEI BOUNDARIES COMMISSION REPORT (THE EXPERTS' REPORT) (2005), available at <http://sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=D11d18&dl=1&sim=Screen2Image>.

233. For an analysis of the decision of ABC, see Donald Petterson, *Abyei Unresolved: A Threat to the North-South Agreement*, in IMPLEMENTING SUDAN'S COMPREHENSIVE PEACE AGREEMENT: PROSPECTS AND CHALLENGES 22, 22-31 (Woodrow Wilson International Center for Scholars Africa Program ed., 2008), available at [http://www.wilsoncenter.org/sites/default/files/Africa\\_SudanCPA\\_rpt\\_booklet.pdf](http://www.wilsoncenter.org/sites/default/files/Africa_SudanCPA_rpt_booklet.pdf). As indicated earlier, Mr. Petterson was the selected by the two parties as the chair of the ABC. See also *Breaking the Abyei Deadlock*, INT'L CRISIS GROUP (Oct. 12, 2007), <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/B047-sudan-breaking-the-abyei-deadlock.aspx>.

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it was a matter of time before they would control all of their oil and all the revenue it generated. The SPLM received the Ministry of Foreign Affairs. That was the first time ever that a Southerner would hold that ministry.<sup>234</sup> Mr. Lam Akol Ajawin, the on-and-off member of the SPLM, would hold that portfolio for the first two years of the interim period from September 2005 to October 2007.

The country, and indeed the whole region, was shocked when three weeks into the interim period, Mr. Garang was killed in a plane crash on July 30, 2005, while returning to the South from Kampala on a Ugandan presidential jet. Riots broke out, and Khartoum was engulfed in major disturbances.<sup>235</sup> The rioters simply could not believe or accept the fact that the government was not involved in the accident. The security forces dealt harshly with the rioters, and some were killed and many were arrested. Both the death of Mr. Garang and the riots were bad omens for the future of the Sudan.

Mr. Salva Kiir took over as the new chairman of the SPLM, First Vice President of the Sudan, and President of the government of Southern Sudan. Many people, particularly the sympathizers of the SPLM in the North, started doubting the commitment of the new leadership of the SPLM to the vision of the New Sudan and to the unity of the country. For most of those people, the vision of the New Sudan was buried in Juba with the coffin of Mr. John Garang in the early days of August 2005. In my view too, the South by that moment had clearly made up its mind on its future relationship with the North. Any remaining thoughts of unity after the Torit meeting of 1991 were gone once and for all. The first anniversary of the CPA, January 9, 2006, passed quietly, and none of the government officials travelled to Juba to participate in the celebrations. In fact, during the entire interim period, the President of the Sudan travelled to Juba only three times; the last two visits were in the last year of the interim period.

Differences between the NCP and the SPLM continued to grow. In October 2007, the SPLM withdrew from the national government over a number of issues, including the continued refusal of the NCP to accept the ABC report on the boundaries of Abyei.<sup>236</sup> The SPLM ministers eventually returned to their ministries, but the Abyei dispute remained unresolved. Diplomatic efforts by the IGAD and the U.S. Special Envoy to Sudan continued, but did not lead to a breakthrough.

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234. Mr. Francis Deng was appointed as State Minister for Foreign Affairs by Mr. Nimeiri from 1976 to 1980, four years after the Addis Ababa Agreement was concluded in 1972. He was the first Southerner to hold that position. A State Minister is basically a Deputy Minister. The Minister himself to whom Mr. Francis Deng reported was a Northerner. *Nhial Deng Nhial*, SUDAN TRIBUNE, [http://www.sudantribune.com/+Nhial-Deng-Nhial.833-+?debut\\_articles=10#pagination\\_articles](http://www.sudantribune.com/+Nhial-Deng-Nhial.833-+?debut_articles=10#pagination_articles) (last visited Feb. 21, 2013).

235. Mabior Atem de Kuir, *Death of Dr. John Garang: Huge Controversial and Worse Scenario of the Year*, GURTONG (Aug. 21, 2007), <http://www.gurtong.net/Forum/tabid/81/forumid/91/threadid/45173/scope/posts/Default.aspx>.

236. *SPLM Withdraw from Sudan National Unity Government*, SUDAN TRIBUNE (Oct. 11, 2007), <http://sudantribune.com/spip.php?article24184>.

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Furthermore, there were also sharp differences on the actual amounts of revenue the oil of Southern Sudan generated and, as a result, the actual share of South Sudan. As stipulated under the Wealth Sharing Protocol, the North was entitled to half the revenue of the oil from South Sudan. It was estimated at that time that about seventy-five percent of the Sudan proven oil resources were in South Sudan. The Southerners were angered by the arrangement under the CPA that gave the North half of their oil revenue and the refusal of the NCP to allocate the Ministry of Energy to the SPLM. About three years into the interim period, they were further angered by reports that they might not even receive that unfair share of the revenue of their own oil.<sup>237</sup> It is surprising that the NCP leaders failed to see how the division and management of South Sudan oil and its revenue during the interim period could provide a very strong incentive for the South to secede, as secession simply meant getting all their oil and its revenue.<sup>238</sup>

Meanwhile, application of the September Laws continued, and many Southern youths in Khartoum were lashed publicly for allegedly either drinking alcohol or not abiding by the dress code imposed by those harsh laws. The streets that were named after leading NCP members killed in the war in the South, with the title “martyr” before the name, continued to have those names. This certainly overlooked or ignored the fact that Sudan was passing through a new and different era and that the negative effects of the civil war should be rectified and not glorified. On the other hand, not a single street, building, or institution was named after Mr. Garang following his death in July 2005. Moreover, for some time, the stamp duties in the name of, and supposedly to help, the “martyrs” families killed in the war and those wounded in the war in the South, which were imposed for almost every transaction with the government, continued to be levied and collected, even from Southern Sudanese. Furthermore, the voices of some Northern Sudanese calling for separation of the South and criticizing and even

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237. See GLOBAL WITNESS, FUELLING MISTRUST—THE NEED FOR TRANSPARENCY IN SUDAN’S OIL INDUSTRY (2009), available at [http://www.globalwitness.org/sites/default/files/pdfs/fuelling\\_mistrust\\_english\\_without\\_pictures.pdf](http://www.globalwitness.org/sites/default/files/pdfs/fuelling_mistrust_english_without_pictures.pdf). The report stated on page 4 that:

The oil figures published by the Khartoum government do not match those from other sources. These figures determine the revenues disbursed to the government of Southern Sudan. The Khartoum government has reported that a smaller volume of oil was produced in southern oil blocks than is reported by the company that operates the blocks. It is not clear which set of figures, company or government, are the correct ones, but the discrepancy highlights the need for the oil figures to be independently verified.

*Id.*

238. During his first visit to the United States as First Vice President and President of the government of Southern Sudan in October 2005, Mr. Salva Kiir held a public meeting with the Sudanese community in Washington D.C. at the American University auditorium. Mr. Kiir was asked by one young angry Southern man as to why the SPLM agreed under the CPA to give up half of Southern Sudan oil to the North when the South needed every dollar for economic development. Mr. Kiir replied calmly that it was a deal—oil for self-determination. He went further and advised the young man to go and prepare his people to vote for independence if he wanted the South to get all its oil. The author was one of the people who attended the public meeting with Mr. Kiir.

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referring with disrespect to the SPLM and its leaders started getting louder, and the authorities did nothing to curtail their activities or counter their calls or arguments. They even managed to publish a daily newspaper to disseminate their views.<sup>239</sup> All those actions and omissions, no doubt, added to the sense of resentment and kept feeding and strengthening the secessionist tendencies and inclinations within the Southern Sudanese.

Along those lines of the widening rift between the two parts of the country, the government of Southern Sudan declared, in 2007, the 18th of August every year as a national holiday in South Sudan, calling it the “Day of War Veterans.” This was in commemoration of the mutiny of the Equatorial Corps of the Sudan Defense Force in Torit on August 18, 1955, which refused the order of the transfer to the North.<sup>240</sup> As discussed earlier, that mutiny marked the start of the civil war in the Sudan. Addressing the celebrations on August 18, 2008, Vice President Salva Kiir described the Torit events “as the starting point of the real political movement in Southern Sudan.”<sup>241</sup>

In May 2008, fighting broke out between the Sudanese army and the SPLA in Abyei Town, and the city was completely devastated.<sup>242</sup> UN officials estimated that more than one hundred people might have been killed and that 30,000 residents of Abyei Town and 20,000 from neighboring villages fled at the height of the fighting.<sup>243</sup> This incident underscored the fragility of the situation in Abyei and indicated the threat to the larger North-South peace process posed by the failure to resolve the Abyei dispute. The fighting and devastation of the Abyei Town forced the two parties to rethink their strategies and return to the negotiating table over the Abyei dispute.

After a series of meetings and mediation by the African Union, the two parties signed on July 11, 2008, the Arbitration Agreement referring the Abyei dispute for final and binding arbitration to the Permanent Court of Arbitration (“PCA”) in The Hague. The Arbitration was governed by the PCA’s Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State.<sup>244</sup> The PCA arbitral tribunal was to determine whether the ABC had exceeded its mandate—to delimit the area of the nine Ngok Dinka chiefdoms that had been transferred to Kordofan in 1905.<sup>245</sup> The tribunal consisted of five

239. See INTIBAHA NEWSPAPER, <http://alintibaha.net/portal/> (in Arabic) (last visited Apr. 29, 2013).

240. See Dak, *supra* note 61.

241. See *id.* For more on the Torit disturbances of 1955, see *supra* note 25 and accompanying text.

242. Press Release, Security Council, Briefing Security Council, Special Representative for Sudan Rejects Claims United Nations Mission Did Nothing During Abyei Crisis in May, U.N. Press Release SC/9424 (Aug. 18, 2008).

243. *Id.*

244. The Permanent Court of Arbitration defines its optional rules for arbitrating disputes between two parties of which only one is a state. See Rules of Procedure, PERMANENT CT. ARB., [http://www.pca-cpa.org/showpage.asp?pag\\_id=1188](http://www.pca-cpa.org/showpage.asp?pag_id=1188) (last visited Mar. 12, 2013).

245. James Gatdet Dak, *Sudan Peace Partners Agree on The Hague to Arbitrate Abyei*, SUDAN TRIBUNE (June 21, 2008), [http://www.sudantribune.com/spip.php?page=imprimable&id\\_article=27606](http://www.sudantribune.com/spip.php?page=imprimable&id_article=27606).

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arbitrators. Each party appointed two arbitrators, and the four party-appointed arbitrators were tasked with appointing the presiding arbitrator.<sup>246</sup> However, none of the five candidates identified by them was accepted by the two parties. Accordingly, the PCA Secretary-General appointed the presiding arbitrator.<sup>247</sup> The tribunal adhered to a very tight schedule. Memorials were filed on December 18, 2008, and the counter-memorials on February 13, 2009, with the rejoinder filed on February 28, 2009. Oral hearings took place at The Hague, April 18 to 23, 2009, and the arbitral tribunal of the PCA issued its award on July 22, 2009.<sup>248</sup>

The decision of the PCA indicated that the ABC exceeded its mandate in some areas, but not in other areas. The size of the Abyei area, as delimited by the tribunal award, is about 10,460 square kilometers.<sup>249</sup> This is a considerable reduction from the area set by the ABC report, which was 18,559 square kilometers.<sup>250</sup> This substantial reduction made it easier for the government to accept the decision of the tribunal, and indeed to present it as a victory, even though the area was still larger than what the government initially presented.

The award also confirmed the established traditional rights within or in the vicinity of the Abyei area—particularly, the right of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei area.<sup>251</sup> Both the government and the SPLM accepted the PCA tribunal award. The United Nations, European Union, United States, and IGAD also welcomed the decision and saw it as a major step toward resolving the Abyei dispute. On the other hand, the leaders of the Misseriya tribe rejected the decision. They claimed that the territory delimited by the PCA tribunal award, as the Abyei area gave too much of their own land and villages to the Ngok Dinka and restricted their rights over the area to grazing rights.

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246. Unlike the International Court of Justice (which is also at The Hague, and is usually referred to as the ICJ), the PCA does not have its own regularly presiding judges. Instead, each party to a case appoints an equal number of arbitrators. Once appointed, those arbitrators together recommend a presiding arbitrator to the two parties. *Id.*

247. The government of Sudan appointed Judge Awn Al-Khasawneh of the ICJ and Professor Gerhard Hafner. The SPLM appointed Professor Michael Reisman and Judge Stephen Schwebel. The Secretary-General of the PCA appointed Professor Pierre-Marie Dupuy, as the Presiding Arbitrator. *Abyei Arbitration—December 2008*, PERMANENT CT. ARB., [http://www.pca-cpa.org/shownews.asp?ac=view&nws\\_id=255&pag\\_id=1264](http://www.pca-cpa.org/shownews.asp?ac=view&nws_id=255&pag_id=1264) (last visited Mar. 12, 2013).

248. For a copy of the Arbitral Tribunal Award, see *The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, PERMANENT CT. ARB., [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306) (last visited Mar. 27, 2012).

249. *Abyei: Understanding the Decision of the Abyei Arbitration Tribunal*, EMBASSY OF THE REPUBLIC OF S. SUDAN TO BELG. & THE EUR. UNION (Aug. 6, 2009), [http://www.goss-brussels.com/index.php/index.php?option=com\\_content&view=article&id=2915:abyei:\\_understanding\\_the\\_decision\\_of\\_the\\_abyei\\_arbitration\\_tribunal&catid=34:news&Itemid=70](http://www.goss-brussels.com/index.php/index.php?option=com_content&view=article&id=2915:abyei:_understanding_the_decision_of_the_abyei_arbitration_tribunal&catid=34:news&Itemid=70).

250. Paul Von Muhlendahl, *International Tribunal Redraws Boundaries of Sudanese Abyei Region: A Chance for Peace?* THE HAGUE JUST. PORTAL (Dec. 10, 2009), <http://www.haguejusticeportal.net/index.php?id=11256>.

251. *Id.*



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In December of 2009, the National Assembly adopted the Southern Sudan Referendum Act and the Abyei Area Referendum Act.<sup>252</sup> The Abyei Area Referendum Act confirmed the boundaries of the Abyei area, as determined and delimited by the PCA tribunal award, notwithstanding the Misseriya rejection of the award.<sup>253</sup> The Act also confirmed the date for the Abyei referendum, January 9, 2011, as determined by the Abyei Protocol of the CPA and the Interim Constitution.<sup>254</sup> It called for an Abyei Area Referendum Commission to be established as a legally and financially independent entity with its head office in Abyei Town, and branch offices where the Commission deemed necessary.<sup>255</sup> The Act gave the Commission wide powers with regard to the conduct of the referendum. The Act invited the thirteen countries and organizations that had witnessed the signing of the CPA, as well as international, regional, and local nongovernmental organizations, to supervise the Abyei referendum.<sup>256</sup>

The Abyei Area Referendum Act was silent on who were considered residents of the Abyei area and thus would be eligible to participate in the referendum.<sup>257</sup> The Abyei Protocol defined the residents of Abyei as “[t]he Members of the Ngok Dinka community and other Sudanese residing in the area”<sup>258</sup> and stated that “[t]he criteria for residence shall be worked out by the Abyei Referendum Commission.”<sup>259</sup> The Act did not reiterate the definition of residency as it did with other provisions of the Abyei Protocol and other parts of the CPA.<sup>260</sup> Perhaps the reason for this was the demand of the Misseriya tribe that they also be mentioned by name in the Act as residents of the Abyei area, which was vehemently rejected by the SPLM and the Ngok Dinka. It seems that the compromise reached by the framers of the Act was neither to reiterate the Abyei Protocol’s definition, which specified the Ngok Dinka, nor to mention the Misseriya by name, but to leave the issue to the Abyei Referendum Commission. This approach must also be seen as a way of allaying the disappointment of the Misseriya over the incorporation by the Act of the boundaries of the Abyei area as established and delimited by the tribunal award.

However, the adoption of the Abyei Area Referendum Act did not pave the way for holding the referendum in Abyei on January 9, 2011, as envisaged under the Abyei Protocol.<sup>261</sup> The Misseriya, with support from the government of

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252. Abyei Protocol, *supra* note 222.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *See id.* at para. 6.1.

259. *Id.* at para. 6.2.

260. *See generally id.* at para. 6.1.

261. Salman M. A. Salman, *The Abyei Territorial Dispute Between Northern and Southern Sudan and the Decision of the Permanent Court of Arbitration*, THE WORLD BANK (July 2010), <http://web.worldbank.org/>

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Sudan, insisted that they were residents of the Abyei area, and that they lived there long before the Ngok Dinka moved to the area.<sup>262</sup> They contended that they were covered by the Abyei Protocol under “other Sudanese residing in the area.”<sup>263</sup> Thus, they believed, they had the right to participate in the referendum. They also raised the point that they were entitled under the Abyei Protocol to two percent of the net oil revenue from the Abyei area, on par with the Ngok Dinka.<sup>264</sup> This, in their view, was a clear recognition of their equal rights with the Ngok Dinka over the Abyei area, and that such equality should extend to participating in the referendum on equal footing with the Ngok Dinka.<sup>265</sup>

The SPLM and the Ngok Dinka rejected this demand.<sup>266</sup> They contended that the Misseriya were not specifically mentioned, like the Ngok Dinka, as residents of the area under the Abyei Protocol and accordingly were not eligible to participate in the referendum.<sup>267</sup> Moreover, they claimed that the definition of the Abyei area under the Abyei Protocol made it clear that the area was exclusively a Ngok Dinka area.<sup>268</sup> They also interpreted the PCA tribunal award, which confirmed the Misseriya’s grazing rights as an indication that the Misseriya were not residents of the Abyei area, but only rights holders.<sup>269</sup>

This issue has turned out to be the crux of the Abyei dispute, overshadowing the original issue of the size and borders of the Abyei area. The extension of the Abyei area by both the ABC report, and later by the tribunal award, beyond the triangle south of the Bahr el Arab River (as claimed by the government of Sudan and agreed to by the Misseriya) must have prompted the claim of the Misseriya that they are residents of the expanded Abyei area. As indicated earlier, the Misseriya claimed and complained that the tribunal award gave too much of their own land and villages to the Ngok Dinka. Furthermore, because of this basic difference, the Abyei Referendum Commission has not been established. Differences persisted on who should head the commission, as each party insisted on its chairmanship. The SPLM insisted that since the Southern Sudan Referendum Commission was headed by a Northerner, then the Abyei Area

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WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:22607203~pagePK:148956~piPK:149081~theSitePK:445634,00.html.

262. *Sudan: Another Year Passes with No Referendum of Abyei*, CISA NEWS AFR. (Jan. 13, 2013), <http://www.cisanewsafrika.com/?p=8582>.

263. *Id.*

264. Paragraph 3.1 of the Abyei Protocol stated that the net revenue from the oil produced in the Abyei area would be shared as follows: fifty percent to the national government, forty-two percent to the government of Southern Sudan, and two percent to each of Bahr Al-Ghazal state, South Kordofan State, Ngok Dinka and Misseriya. Abyei Protocol, *supra* note 222, at para. 3.1.

265. *Sudan Turns Down Mediation’s Proposal to Settle the Abyei Issue*, SUDAN TRIBUNE (Sept. 25, 2012), <http://www.sudantribune.com/spip.php?article44014>.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

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Referendum Commission should be headed by a Southerner. Moreover, the boundaries of the Abyei area have not yet been demarcated because of the rejection by the Misseriya of the PCA tribunal award.

Although the dispute over the size and boundaries of the Abyei area was resolved by the PCA and the resolution reflected in the Abyei Area Referendum Act, the issues got more complicated in regard to the referendum.<sup>270</sup> Indeed, this issue became the new and main element of the Abyei dispute and could not be resolved by the time the referendum was supposed to take place. Consequently, the Abyei referendum did not take place simultaneously with the Southern Sudan referendum on January 9, 2011, as stipulated under the CPA and the Interim Constitution. Each party kept blaming the other for the failure to undertake the referendum.<sup>271</sup> The failure to resolve the Abyei dispute no doubt had its effects on the other pending issues and problems between Sudan and South Sudan.

One of those issues related to the boundaries between the two parts of the country, and later, the boundaries between the two states. The Abyei Protocol repeatedly stated that the January 1, 1956 line between the North and the South would be inviolate.<sup>272</sup> However, despite the extensive work of the boundaries commission, a large number of border areas continued to be in dispute. Disagreements about the revenue generated from the oil sales also continued, with accusations and counter accusations of corruption and mismanagement. Moreover, the SPLM kept complaining that their ministers in the central government were marginalized and kept powerless by the bureaucratic and powerful network of the NCP staff in those ministries.

The First Vice President, Mr. Salva Kiir, spent most of his time during the interim period in Juba or travelling outside the country. He was rarely in Khartoum, and the Presidency hardly met. Mr. Salva Kiir did not visit a single Northern state during the interim period; not even Darfur, which was engulfed in a civil war much like the South before 2005. He did not attend any national event or inaugurate any national project. Clearly, the office of the First Vice President did not interest or concern him much. He indicated on many occasions that he preferred to be referred to as President of the government of South Sudan.<sup>273</sup>

As the two parties were wrangling over those issues, the security situation in a number of areas in Southern Sudan had been steadily deteriorating in the latter

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270. Muhlendahl, *supra* note 250.

271. For a detailed account of the Abyei dispute, see Salman M. A. Salman, *The Abyei Territorial Dispute Between North and South Sudan: Why Has Its Resolution Proven Difficult?* in LAND AND POST-CONFLICT PEACEBUILDING (Jon Unruh & Rhodri Williams, eds., 2013). In May 2011, the Sudanese army took over Abyei area, following the ambush and killing of some its soldiers by the SPLA. Eventually, the UN Security Council intervened in the Abyei dispute and sent Ethiopian soldiers as peace-keepers. However, the dispute remains as one of the thorniest issues in the Sudan South Sudan relations.

272. See Abyei Protocol, *supra* note 222, at para. 1.4.

273. Gabriel Pager Ajang, *The President of South Sudan, Salva Kiir, Must Resign*, SOUTH SUDAN NEWS AGENCY (Dec. 8, 2012), <http://www.southsudannewsagency.com/opinion/articles/the-president-of-south-sudan-salva-kiir-must-resign>.

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years of the interim period. Military clashes with armed militias, intertribal fights, and food shortages have been regularly reported since early 2009.<sup>274</sup> The government of Southern Sudan continued to accuse and blame the Khartoum government of arming and supplying the militias in the South. On March 11, 2011, the government of Southern Sudan issued a strongly worded statement accusing the government of Sudan of trying to overthrow the government of Southern Sudan by arming and supplying militias opposed to it—accusations that were denied by the government of Sudan.<sup>275</sup> The government of Southern Sudan indicated that it would complain to the UN Security Council and suspended talks and contacts with the government on all the pending issues.<sup>276</sup> A few days later, the government of Southern Sudan complained officially to the UN Security Council.<sup>277</sup> The Council invited both the Secretary-General of the SPLM as well as the representative of the government of Sudan to its 6,499th meeting held on March 21, 2011, to discuss the “Reports of the Secretary-General on the Sudan.”<sup>278</sup> However, no decisions were made on the complaint of the government of Southern Sudan.<sup>279</sup>

The Southern Sudan Referendum Act 2009 was adopted in December of that year, more than two years after the date in 2007 stipulated for its adoption in the CPA and the Interim Constitution.<sup>280</sup> The delay underscored the difficulties and controversies surrounding the referendum details. One major area of difference concerned the percentages of voters needed for validity of the referendum and for South Sudan to secede. Strangely enough, those figures were not specified in the CPA, and it took considerable time and effort to agree on them.<sup>281</sup> The Act listed

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274. MAREIKE SCHOMERUS & TIM ALLEN, *SOUTHERN SUDAN AT ODDS WITH ITSELF—DYNAMICS OF CONFLICT AND PREDICAMENTS OF PEACE* (2010), available at <http://eprints.lse.ac.uk/28869/1/SouthernSudanAtOddsWithItself.pdf>; see also *Deteriorating Security in Parts of South Sudan Hampers Refugee Returns*, UNHCR (Mar. 24, 2009), <http://www.unhcr.org/49c908c92.html>.

275. Ministry of Foreign Affairs, *North and South Sudan Continue Talks on Post Referendum Issues*, FED. DEMOCRATIC REPUBLIC OF ETH. (Mar. 11, 2011), <http://www.ethiopia.gov.et/English/MOFA/PressSection/Pages/WeekintheHorn-March11,2011.aspx>.

276. *Id.*

277. Julius N. Uma, *SPLM: Khartoum’s NCP Planning Genocide in South Sudan*, SUDAN TRIBUNE (Mar. 13, 2011), <http://www.sudantribune.com/SPLM-KHARTOUM-S-NCP-PLANNING,38272>.

278. See S.C. Meeting Record, U.N. Doc. S/PV.6499 (Mar. 21, 2011), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sudan%20SPV%206499.pdf>.

279. *See id.*

280. See Southern Sudan Referendum Act 2009, art. 67 (Sudan).

281. This issue concerned the percentages needed for the referendum and its results. Initially the NCP demanded that the voter turnout should be seventy-five percent, and sixty percent majority of that percentage should opt for secession. The SPLM insisted on a simple majority for each. After lengthy discussion and negotiations, a compromise was reached, and the Southern Sudan Referendum Act 2009 required a voter turnout of sixty percent, and a simple majority (fifty of the sixty percent, plus one vote) for Southern Sudan to secede. The fact that close to ninety-nine percent of the Southern Sudanese voters opted later for secession showed clearly how the NCP government was out of touch with reality on the issue of the size of the Southern population who would opt for secession.

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ten issues that were supposed to be resolved by the two parties immediately after the referendum. Those issues comprised nationality; currency; public service; position of joint integrated units; international agreements and treaties; debts and assets; oil fields, production and transport; oil contracts; water resources; and property.<sup>282</sup> Attempts to resolve those issues during the period between adoption of the Referendum Act in December 2009 and the emergence of South Sudan as an independent state on July 9, 2011 were not successful. Most of the issues, in addition to the borders and the Abyei dispute, had to be carried over to the post-secession era and negotiated between two separate states, reflecting the magnitude of the differences between the NCP government and the SPLM. Needless to say, negotiations between states are bound to be more difficult and strenuous than negotiations between two parts of the same state.

As the interim period was coming to a close, and with problems and differences mounting, it was clear that the dreams of unity and a New Sudan had completely evaporated once and for all.<sup>283</sup> Indeed, the question in the minds of many Sudanese was not whether the South would secede.<sup>284</sup> Rather, the question was whether Sudan and the new state of South Sudan would live in peace, or whether the war would erupt again, this time between two states, *à la* Ethiopia and Eritrea after the secession of Eritrea.<sup>285</sup>

## VII. CONCLUSION

On July 9, 2011, more than one-fifth of the population of the Sudan, and more than one-fourth of its area size seceded, declared independence, and formed a separate country, called the Republic of South Sudan.<sup>286</sup> As a result, Sudan lost, among many other things, its basic defining characteristic of being the largest country in Africa, and Africa's microcosm. The ethnic, religious, linguistic, and cultural differences and diversity that are usually a source of strength for nations were Sudan's weakness. This is because the sense of the superiority of the Arab-Islamic culture dominated the thinking and actions of all the Northern political leaders and their parties in Sudan, even before Sudan became independent. For those leaders, Sudan's identity is an Arab-Islamic one, to the total exclusion of other cultures, religions, races, and languages; Southern Sudan was simply a cultural vacuum to be filled by Northern Sudan values and norms.

Thus, the war dragged on and was fed by religious and ideological slogans. The civilian as well as the military governments of the Sudan since 1955

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282. See Southern Sudan Referendum Act 2009, art. 67(3) (Sudan).

283. Azzurra Meringolo, *Non Only Libya. The Cases of Sudan and South Sudan*, EUROPEAN RESEARCH.EU (Sept. 2011), <http://www.euopressresearch.eu/html/focus.php?id=83>.

284. *Id.*

285. *Id.*

286. Larisa Epatka, *South Sudan's Independence Gets a "Rocky" Start*, PBS NEWS HOUR (July 9, 2012, 2:01 PM), <http://www.pbs.org/newshour/rundown/2012/07/south-sudans-independence.html>.

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competed in intensifying the civil war and in implementing and enforcing the exclusivist polices and ideologies of the Arab-Islamic culture. Reports indicated that more than two million Southern Sudanese were killed in the civil war between 1955 and 2005, and about four million Southern Sudanese fled the South to the neighboring countries, or to the North.<sup>287</sup> Hundreds of thousands of Northern Sudanese were also killed during the civil war, the largest part during the *Jihad* era of the NIF/NCP government. The dead during this era included the young “martyrs” of the popular defense forces, in addition to the Sudanese soldiers and army officers.

As discussed throughout, many opportunities to resolve the Sudan North-South conflict and to stop the devastating civil war, bloodshed, and the collapsing economy presented themselves. They were all persistently blundered, one after the other, by the different Northern political parties and their leaders. The Juba Conference of 1947, the independence of the Sudan resolution of 1955, the roundtable conference of 1965, the Addis Ababa Agreement of 1972, the Koka Dam Declaration of 1985, the Sudanese Peace Initiative of 1988, and the unity option under the CPA of 2005, each provided a golden opportunity that was recklessly squandered by the Northern Sudanese leaders. The Northern political leaders, particularly the ruling NCP, should have known that the CPA provided the last opportunity ever for keeping the Sudan united. Yet, they did everything possible to make unity unattractive and to push the Southerners in the direction of secession. One promise after the other to the Southern Sudanese was broken, one agreement after the other was dishonored, and each opportunity for keeping the Sudan together blundered.<sup>288</sup>

The imposition of the Arab-Islamic culture fed the resentment and anger of the Southerners, provided new “mutineers” to their fighting forces, and gave them reasons to secede. The Southerners also saw their oil and water being transported to the North, with the Wealth Sharing Agreement giving the North half the South’s oil, at the time when the South was the least developed region on earth and needed every dollar to pull its people from their poverty and misery.

The failure of Sudan’s political leaders to acknowledge the North-South differences, and to recognize, respect, and accommodate them was abundantly evident and clear during the fifty years of independent Sudan. Mr. Al-Azhari’s harsh, hasty, and unfortunate reaction to the 1955 disturbances, and his failure to comprehend the reasons behind them, were some early examples. His exclusivist statements during the roundtable conference in 1965 on the Arab-Islamic identity of Sudan were other examples. He, his party, and the Umma Party, failed to see that the amendment of the constitution to create a permanent president of the Supreme Council of State, and the appointment of Mr. Al-Azhari to that post,

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287. Daniel Large, *China’s Sudan Engagement: Changing Northern and Southern Trajectories in Peace and War*, 199 CHINA Q. 610, 614 (2009).

288. See ALIER, *supra* note 70.

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meant the deprivation, once and for all, of the Southern member of being head of the state for two months a year. Mr. Al-Azhari's statements on the Arab-Islamic identity of the Sudan were repeated one year later, albeit more strongly, by Mr. Sadig Al-Mahdi, after the latter became Prime Minister, in his address in 1966 to the Constituent Assembly. Further, Mr. Mahjoub's remarks that the inclusion of the reference to the federal system for the South "was meant to make the Southerners happy and get them to go along with the independence resolution" were unfortunate and showed a dismissive attitude towards the Southern Sudanese. His perception of the problem of Southern Sudan as one of law and order, and the adoption of a resolution to that effect unanimously by the Constituent Assembly in 1965, was an evident leadership failure and a continuation of the mistaken and simplistic policies of General Abboud. However, Mr. Al-Turabi's statement that the South had no culture, so this vacuum would necessarily be filled by Arab culture under an Islamic revival, was no doubt the most arrogant and unfortunate of all. That way of thinking paved the way and sowed the seeds for the *Jihad* mentality and the ruthless military campaign against the Southerners following the NIF military coup in June 1989.

Sudan also received all the help that its neighbors could afford to provide. Ethiopia hosted the Addis Ababa negotiations in 1972 and helped forge the Addis Ababa Agreement that year. Nigeria provided substantial assistance to the Abuja negotiations in 1992 and 1993. The IGAD countries, poor and saddled with their own political, social, and economic problems, patiently led the negotiations in 1994 to 1997, and later in early 2000, which led to the CPA. Kenya was the host of the entire CPA peace process. Its former president, Mr. Daniel arap Moi, was himself directly and substantially involved, and intervened many times to resolve difficult issues. Moreover, Mr. Moi appointed General Lazaro Sumbeiywo as a full-time mediator between the Sudanese government and the SPLM.<sup>289</sup> Mediation assistance was also provided by the United States, United Kingdom, and Norway, who established what was known as the troika for the peace process. Ms. Hilde Johnson attended most of the sessions of the negotiations, and she and General Sumbeiywo played a major role in the successful conclusion of the CPA. Egypt and Libya also offered their assistance and came out with their initiative. Yet, Sudan was not able to utilize that extensive goodwill and effort and failed to steer it in the direction of keeping the country united.

As discussed earlier, the SPLM effectively and craftily utilized the rivalry between the government and the opposition to extract from them recognition of the right of self-determination. Thus, the SPLM was able to avoid the complications of the OAU's resolution on the intangibility of the African borders. Their task was made easier by the competition between the government and the opposition to win and woo the SPLM to its side. The SPLM won the right of self-determination from the government through an incremental approach

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289. See *supra* note 211 and accompanying text.

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involving its splinter groups that eventually returned to the SPLM and used those concessions to build the SPLM's case for self-determination. It followed the same approach with the opposition, getting the agreement of each political party separately, which made it quite easy for the SPLM to get their joint agreement later for self-determination, while at the same time stressing unity for the Northern political parties. Mr. John Young observed that "[b]y calling for a united Sudan and at the same time giving support to southern self-determination, Garang has been able to be all things to all people."<sup>290</sup>

The opposition perceived the agreement to the right of self-determination to South Sudan in the larger context of democracy, human rights, and freedoms. The opposition leaders led themselves to believe that the idea of the New Sudan would prevail, and the Southerners would opt for unity because the North had finally recognized their culture and identity. Strangely enough, a number of Northern politicians thought recognition of the right of self-determination would strengthen the unionist elements within the SPLM. The government thought it was splintering the SPLM through strengthening each of its breakaway groups by agreeing with them on self-determination. Even when the NCP government concluded the CPA, like the Northern opposition groups, they also naively thought that the Southerners would opt for unity. This simplistic thinking continued during a good part of the interim period, despite the clear signals and indications that the South would opt for secession.

There was also the argument amongst some Northern circles that because of the difficulties the Southerners were encountering in governing the South, and because of their inter-tribal differences, disputes, and conflicts, they would opt for unity.<sup>291</sup> Those raising such arguments allowed themselves to forget that those same factors are also characteristics of, and prevalent in, the North. But again this is the North, always thinking and making decisions on behalf of the "uninformed" Southerners. Although it became abundantly clear towards the middle of the interim period that the Southerners would opt for secession, there was complete denial among the NCP circles and its official media.

When the dust settled and the results of the referendum became known, with close to unanimity in favor of secession, both the government and the opposition were stunned. They both suddenly realized their gross failure in detecting the secessionist sentiments within the Southern Sudan population. They also realized

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290. See Young, *supra* note 132, at 539.

291. See, as one example, Alsir Sidahmed, *Unity by Default?*, SUDAN TRIBUNE (Feb. 6, 2008), <http://www.sudantribune.com/Unity-By-Default,25865>, where the author, a Northern Sudanese journalist, stated, "Ironically, it is yet again another external factor that is posing tough questions: the [six]-week long turmoil in neighboring Kenya has forced rethinking what three months ago was unthinkable: unity between the North and South could be the first choice, by default." The author did not make it clear amongst whom did that "tough questioning" and "forced rethinking" take place. It could not possibly be amongst the Southerners who voted, almost unanimously, for secession. The article was clearly reflective of the wishful thinking of some of the Northerners about unity, or their state of denial that the South would secede, or perhaps both.



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that they did not do anything to make unity attractive for the Southerners. The nagging questions started surfacing: why did they agree to the right of self-determination instead of federation or even confederation? Immediately thereafter, the government and the opposition started blaming each other for being the first to endorse the right of self-determination for South Sudan—the opposition parties cited the Frankfurt Agreement, while the NCP pointed to the Asmara Declaration. It is indeed ironic that the political parties and leaders who refused for more than fifty years to consider even granting federation or limited regional autonomy to Southern Sudan would agree to a full-fledged self-determination with the option of secession. It is even more surprising, and indeed quite naïve, that with the widespread death and destruction of the civil war in the South, the exclusivist policies that the Northern political leaders pursued, and the promises they made but never fulfilled (and sometimes did not even intend to fulfill), they still expected the Southerners to vote for unity. It should be pointed out, however, that just as the South had the option between unity and secession, the NCP government had the choice between a unified inclusive Sudan and an Arab-Islamic one without the South. Each of them made their choice, and those choices, ironically, resulted in the Sudan being the first and only country in the world to break up in this century, thus far.

The story of the splintering of the Sudan is sad, and indeed, a classic case of how nations should not deal with their differences, and how they should address their religious, linguistic, cultural, and ethnic diversity. It is no doubt a lesson for other nations, particularly in Africa, and the Arab world after the Arab Spring of 2011, and the rise of political Islam there.<sup>292</sup> Will Sudan itself learn its own lessons with regard to Darfur, the Blue Nile, and South Kordofan, or will the war that erupted in the those states escalate, and turn those states into a new and another “South Sudan”?<sup>293</sup>

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292. See LAUREL L. MILLER ET AL., *THE ARAB WORLD ON THE EVE OF CHANGE* 35 (2012) (suggesting the Arab Spring offers “many transformative opportunities for the region,” however democratic progress remains a challenge).

293. For more information on the situation in Blue Nile and South Kordofan, see *Sudan Denies Attacking South Kordofan Civilians*, BBC NEWS (Mar. 7, 2012), <http://www.bbc.co.uk/news/world-africa-17294210>.