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Mario Silva
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AFTER PARTITION: THE PERILS OF SOUTH SUDAN

Dr. Mario Silva*

*PhD, International Law (National University of Ireland Galway); LLM (Oxford); guest lecturer at several international universities.

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AFTER PARTITION: THE PERILS OF SOUTH SUDAN

Dr. Mario Silva

I. INTRODUCTION

The partition of South Sudan from the largest country on the African continent – Sudan, took place on July 9, 2011.[1] The northern portion retained the name Sudan while the newly formed southern state would be known as South Sudan. South Sudan became the newest member of the United Nations (UN) with comparatively little infrastructure and limited arrangements for shared sovereignty by the international community.[2] The partition process was undertaken with oversight from the United Nations and the African Union.[3] It was rather idealistically considered a prelude to an enduring peace within this traditionally troubled African region. The former unitary state of Sudan had been plagued by bitter internecine conflict for more than half a century, and as a result, an estimated 2.5 million people lost their lives and over five million were internally displaced.[4]

Prior to partition, a referendum in the southern region of the then unitary Sudanese state took place in January 2011.[5] Support for secession from the Sudanese state was over 98%.[6] The actual partition process had moved forward with relatively little violence, and every

1. U.S. DEP'T OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE ON SOUTH SUDAN, Sept. 22, 2011, http://www.state.gov/outofdate/bgn/southsudan/178466.htm.
2. U.N. Member States, http://www.un.org/en/members/index.shtml#s (providing that South Sudan was admitted as a New Member State on July 14, 2011).
3. Press Release, Security Council, United Nations-African Union Joint Task Force on Peace and Security, U.N. Press Release AFR/ 2254 (Sept. 26, 2011) http://www.un.org/News/Press/docs/2011/afr2254.doc.htm.
4. Kingsley Ighobor, *Uprooting the Causes of Conflict*, AFRICA RENEWAL MAG. (Aug. 2013) http://www.un.org/africarenewal/magazine/august-2013/uprooting-causes-conflicts.
5. U.S. DEP'T OF STATE, *supra* note 1.
6. Press Release, Security Council, Security Council Extends Mandate of Mission in Sudan Until 9 July 2011, Unanimously Adopting Resolution 1978 (2011), U.N. Press Release SC/ 10233 (April 27, 2011) http://www.un.org/News/Press/docs/2011/sc10233.doc.htm.

reasonable hope existed to expect a peaceful coexistence between Sudan and the new state of South Sudan. However, disputes as well as interethnic differences have once again resulted in fighting, and fears of a protracted internal and external conflict in South Sudan have re-emerged. Accompanying this resurgent conflict is the fear that another humanitarian crisis could occur in the region as food shortages in the South now threaten millions of people once again.

Fault for the fact that partition has failed to bring peace to the region is increasingly being assigned to undue haste and lack of international supervision. South Sudan, it would seem in retrospect, was permitted to secede without the establishment of mechanisms to resolve internal and external disputes. Moreover, during the transition to independence, all power was assigned to an interim government instead of a coalition of interests, which occurred without a United Nations trusteeship arrangement.[7]

The transfer of control by failed states to the United Nations requires considerable debate and a clear consensus among UN member states, so as to prevent equating transferral of control with any form of colonial takeover.[8] The authority of the International Trusteeship System and the terms for administration and designation of authority is outlined under Chapter XII of the UN Charter.[9] The notion of sovereign equality was unquestionably important to the architecture of the Charter following the devastation of the Second World War;[10] however, at the time of signing there were only fifty-one member states, and by 2011 South Sudan became the 193rd member state.[11]

As the crisis in South Sudan worsens, with mounting evidence of gross violations of international human rights law and internal strife, it is important to critically analyze the reasons for the failure of the partition to bring about peace, and to review solutions the international community might implement to realize peaceful co-existence between the two "Sudans."

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7. United Nations-African Union Joint Task Force on Peace and Security, *supra* note 3.
8. U.N. Charter art. 77-85.
9. *Id*.
10. U.N. Charter art. 77.
11. U.N. Member States, *supra* note 2.

The United Nations peacekeeping Mission in the Republic of South Sudan (UNMISS) was authorized by the Security Council in December 2013 to double its armed strength to nearly 14,000 in an effort to protect civilians.[12] However, its mandate is not adequate to deal with the challenges.

The power struggle between President Salva Kiir Mayardit and the former Vice President Riek Machar has made the challenge of state reconstruction an impossible task. The current efforts by the East African regional bloc, the Intergovernmental Authority on Development (IGAD), to find a peaceful solution will not lead to long term stability as there is no political will by IGAD, nor the international community for long-term state-building efforts.

If there is hope that a failed state such as South Sudan can be rescued from this situation, efforts to do so will require more international assistance and the pursuit for comprehensive approaches, which entails putting the country under a UN mandate, pending such time when it would be capable of successfully and efficiently running its affairs.

A. Background

South Sudan's history is characterized by tribal migrations from the Nile region and also from within Central Africa.[13] The people of South Sudan have resisted outsiders, including the French and Belgians, as well as the spread of Islam to the south.[14] By 1821 the name Sudan, borrowed from an Arab term meaning "Land of the Blacks," led to the beginning of an emergent political entity.[15] The British eventually expanded their influence to the south in the late

12. Press Release, Security Council, Unanimously Adopting Resolution 2132 (2013), Security Council Increases United Nations Mission's Military Presence in South Sudan, U.N. Press Release SC/ 11230 (Dec. 24, 2013) http://www.un.org/News/Press/docs/2013/sc11230.doc.htm.
13. *See* P. M. HOLT & M. W. DALY, A HISTORY OF THE SUDAN: FROM THE COMING OF ISLAM TO THE PRESENT DAY 1, 3 (Pearson Educ. Ltd., 5th ed. 2000) (The Arabic term used was "Bilad al Sudan," "Land of the Blacks").
14. *Id*.
15. Holt & Daly, *supra* note 13 at 3.

nineteenth century, and included Sudan.[16] For all practical purposes, Britain ruled Sudan until 1956, even though officially, by virtue of an 1899 agreement, the country was to be jointly administered by Egypt and Britain.[17] In reality, London chose which officials would administer Sudan, and Egypt remained very much a junior partner.[18]

In 1947, British hopes to join South Sudan with Uganda were dashed by the Juba Conference, which aimed to unify North and South Sudan.[19] The realities of Britain's post-war status meant that it was not well positioned to resist political change, and consequently in 1953, elections were conducted and Ismail al-Azhari became the country's first prime minister.[20] The British and the Egyptians departed Sudan on January 1, 1956, which was the day that Sudan became formally independent.[21] However, prior to the official proclamation of independence, rebellion had broken out in the southern part of Sudan.[22] In actuality, the concept of a united Sudan was a colonial creation, and with Britain's departure it was almost inevitable that conflict would follow. This familiar fault line, characterized by the Arab north versus the African south, held deep and enduring animosity.

The divergent nature of the southern and northern regions is illuminated in the partitioned state, where South Sudan has a population of over 8 million and a predominantly rural, subsistence economy.[23] Today, South Sudan struggles to cope with the effects of conflict, displacement, and insecurity. The country has many tribal groups and languages, and its people practice traditional, indigenous beliefs, irrespective of the fact that over 90% of the population identify themselves as Christian.[24]

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16. *Id*.
17. *Id*. at 102, 104.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*. at 102, 104.
22. *Id*.
23. U.S. DEP'T OF STATE, *supra* note 1.
24. *Id*.

II. CIVIL WAR

The conflict between the North and South has endured principally as a result of a long-held tendency by successive governments in Khartoum to view the difficulties with the South as issues best resolved militarily. Initial promises by northern political leaders to establish a federal state structure and uphold secularism were not honored. The provisional constitution adopted at the time of independence was silent on fundamental issues for southern leaders, such as "the secular or Islamic character of the state and its federal or unitary structure."[25] The agreement, implied or statutory, with respect to how the newly independent Sudan would function was quickly disregarded by the Arab-led Khartoum government, which resulted in a long civil conflict lasting from 1955 until 1972.

In the early years of Sudanese independence, a military coup lead by General Ibrahim Abboud overthrew the elected government and suspended democracy. General Abboud pursued a policy of "Arabization and Islamisation throughout the Sudan that strengthened southern opposition."[26] In 1964, General Abboud was overthrown and replaced with a civilian caretaker government. At the time southern leaders were divided into two factions: those who wanted a federal solution and those who advocated independence.[27]

An opportunity for reconciliation occurred when the southern rebels signed an agreement in Addis Ababa in 1972, establishing a measure of autonomy for the South.[28] However, this development did not endure for long, and its demise was hastened when international oil companies discovered substantial oil reserves in the South in the late 1970s.[29] In 1983, President Nimeiri abrogated the peace treaty by revising Sudan's civil laws to establish conformity with Sharia, or Islamic Law, and in so doing ignited the second Sudan civil war.[30]

When the second civil war commenced, the government in Khartoum clearly had every intention of exploiting the South's natural

25. U.S. DEP'T OF STATE, *supra* note 1.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

resources.[31] A military coup led by General Omar al Bashir took place, and upon his assumption of power, he banned all political parties. The authoritarian regime supported radical Islamist groups, including providing a training base to terrorist organizations such as Osama Bin Laden's al Qaida.[32]

The Sudan People's Liberation Army (SPLA) managed to survive the chaos of the 1990s and remained the principal party participating in negotiations between the North and the South. In 1997, the Khartoum government had agreed to permit a referendum in the South to determine whether the people there desired independence, or a continued unified state with the North. Irrespective of this, it took another eight years to end the fighting when the SPLA and the al Bashir government signed a Comprehensive Peace Agreement (CPA) on January 9, 2005, in Nairobi, Kenya.[33]

This milestone agreement established a ceasefire, regional and national elections, resettlement of internally displaced persons, withdrawal of troops from South Sudan, and a free referendum to determine the status of South Sudan.[34] Under the power sharing agreement, Colonel John Garang was named Vice President and Omar al Bashir retained the presidency. Seven months later, Colonel Garang died in a helicopter crash. The man who would eventually become South Sudan's first President, Salva Kiir Mayardit, took over after Col. Garang's untimely death.

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31. U.S. DEP'T OF STATE, *supra* note 1.
32. *Id.*; *see also* Office of the Coordinator for Counterterrorism, State Dep't, Country Reports on Terrorism (2010), available at http://www.state.gov/documents/organization/170479.pdf (Released on Aug. 18, 2011, the U.S. Department of State's annual terrorism assessment concluded that terrorist groups, including "Al-Qaeda-inspired terrorists, remain in Sudan as gaps remained in the Sudanese government's knowledge of and ability to identify and capture these individuals as well as prevent them from exploiting the territory for smuggling activities.").
33. The Comprehensive Peace Agreement, The Government of the Republic of Sudan – The Sudan People's Liberation Movement/Sudan People's Liberation Army, July 20, 2002, available at http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_060000_The%20Comprehensive%20Peace%20Agreement.pdf.
34. *Id.*

A. Referendum and State Formation

Consistent with the terms of the 2005 peace accord, a referendum was conducted from January 9-15, 2011, to determine if South Sudan should declare its independence from Sudan.[35] The official results were released on January 30, 2011, indicating that 98.83% of the population supported independence.[36] This led to the formal declaration of independence by the Republic of South Sudan on July 9, 2011.[37] The newly independent state was quickly recognized as the newest member of the United Nations.[38] The Security Council adopted Resolution 1996 and established a Mission in the Republic of South Sudan (UNMISS) to consolidate peace and to assist in nurturing condition for development.[39] Resolution 1996 emphasized the importance of partnerships and consultation, as well as encouraging the new South Sudanese government to ratify international human rights treaties.[40]

The transitional constitution, ratified by the South Sudan assembly just prior to independence, provided a legal framework for the new nation state.[41] The constitution establishes a mixed presidential system of government, headed by a president who is head of state, head of government, and commander-in-chief of the armed forces.[42] It also establishes the National Legislature comprising of two houses: a directly elected assembly, the National Legislative Assembly; and a second chamber of representatives of the states, the

35. Security Council Extends Mandate of Mission in Sudan Until 9 July 2011, Unanimously Adopting Resolution 1978 (2011), *supra* note 6.
36. Security Council Extends Mandate of Mission in Sudan Until 9 July 2011, Unanimously Adopting Resolution 1978 (2011), *supra* note 6.
37. Press Release, Security Council, 'Like Any Newborn, South Sudan Needs Help,' Secretary-General Says, Moments After Security Council Recommends Country's Admission to United Nations, U.N. Press Release SC/10323 (July 13, 2011).
38. U.N. Member States, *supra* note 2.
39. 'Like Any Newborn,' *supra* note 37.
40. S.C. Res. 1996, U.N. Doc. S/RES 1996 (July 8, 2011) http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1996(2011).
41. THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN, July 9, 2011, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=250715.
42. *Id*.

Council of States.[43] The constitution also provides for an independent judiciary, the highest level being the Supreme Court.[44]

The referendum unfortunately left several contentious issues unresolved. One issue was the future of the Abyei region where a simultaneous referendum was supposed to be held; however, it was postponed due to disputes over demarcation lines and residency rights. The ensuing clashes in Abyei eventually led the Sudanese President, Omar al-Bashir, and the President of the autonomous Government of Southern Sudan, to agree in 2008 to have the boundary issue arbitrated by the Permanent Court of Arbitration.[45] In 2009 the Abyei's boundaries were redefined when the Tribunal of the Permanent Court of Arbitration ruled that:

> The eastern boundary of the Abyei Area runs along longitude 29°00'00"E, from latitude 10°10'00"N south to the Kordofan – Upper Nile boundary as it was defined on 1 January 1956. Moreover, the Tribunal rules that the western boundary of the Abyei Area runs along longitude 27°50'00"E, from latitude 10°10'00"N south to the Kordofan – Darfur boundary as it was defined on 1 January 1956. The western boundary of Abyei Area then follows the Darfur-Kordofan boundary until it meets the southern boundary of the Abyei Area.[46]

The Tribunal decision was based on scholarly, documentary, cartographic, and oral evidence submitted by the parties.[47] The parties have yet to respect the decision and tensions remain high. The final status of the Abyei region remains unresolved even after the October 2013 non-binding referendum, which overwhelmingly supported

43. U.S. DEP'T OF STATE, *supra* note 1.
44. *Id*.
45. Gov't of Sudan v. Sudan Peoples' Liberation Movement/Army ("Abyei Arbitration") (Arb. Trib. July 22, 2009), http://www.pca-cpa.org/showfile.asp?fil_id=1240.
46. *Id*.
47. *Id*.

joining South Sudan.[48] The referendum was proposed by the African Union.[49] The other conflict area is South Kordofan, where fighting had broken out in June 2011 between Sudan and the SPLA over the ownership of the Nuba Mountains. Once again, in July 2012, fighting continued in the region including involvement from Darfur region insurgents.

Although Sudan was the first country to recognize South Sudan's independence, relations have certainly not developed along friendly lines. The biggest remaining problem is the sharing of oil revenues. An estimated 80% of oil production of undivided Sudan came from the south and Sudan now wants an increased share of that revenue. Once again, this was supposed to have been settled by the August 2, 2012 deadline; however, the nature of the negotiations and the tenor of exchanges between the two governments makes achieving an agreement by the set date unlikely.

III. PARTITIONING CONFLICT OIL

The dispute over oil revenues stems from the fact that the Sudanese government derived as much as 98% of its budgetary revenues from the sale of almost half a million barrels of oil per day.[50] The creation of South Sudan deprived Khartoum of most of its oil. The crux of the current problem is that South Sudan's oil is exported through two pipelines controlled by Sudan.[51] These oil pipelines run to refineries and export terminals at Port Sudan on the Red Sea.[52] A

48. Musaazi Namiti, *Analysis: Struggle for power in South Sudan*, AL JAZEERA, Dec. 21, 2013, http://www.aljazeera.com/indepth/features/2013/12/analysis-struggle-power-south-sudan-20131217845861691.html (explaining that he Dinka people with close ties to South Sudan participated in the vote but not the Arab Misseriya).
49. *Id.*
50. *South Sudan: An Infrastructure Action Plan*, AFRICAN DEVELOPMENT BANK GROUP (2013), http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/South%20Sudan%20Infrastructure%20Action%20Plan%20-%20%20A%20Program%20for%20Sustained%20Strong%20Economic%20Growth%20-%20Full%20Report.pdf.
51. *South Sudan: Economy*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_od.html.
52. *Id.*

2005 oil-sharing agreement with Khartoum called for an even share of oil revenues between the two entities, but that arrangement concluded when South Sudan became an independent state.[53] As South Sudan resisted paying huge fees to Khartoum for oil transportation, it suffered blockades imposed on its goods and capital.[54]

According to Luka Biong Deng, a former minister of the national government of Sudan and a senior member of the Sudanese People's Liberation Movement, the two states depend so heavily upon oil revenues that differences over revenue sharing after secession have triggered intensely antagonistic feelings.[55] Deng noted:

> It would have been simple arrangements after secession that the South to manage its own oil and pay internationally accepted fees for the use of oil infrastructure in the Sudan. However, after the secession of the South, Sudan puts very a high bill to be covered by the South not only for the use of its pipelines (USD36 per barrel) but also to meet the budget deficit (USD10 billion) caused by the secession of the South.[56]

In January 2012, South Sudan shut down all oil production due to the dispute over the high fees demanded by Khartoum for transporting its oil.[57] The decision surprised the world community and exposed Khartoum and Juba's political and economic fragility. The decision has led to fighting along the border, as access to the oil is viewed as a matter of survival for Sudan.[58] According to a former U.S. envoy to

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53. *South Sudan: Economy,* CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_od.html.
54. *Id.*
55. Luka Boing Deng, *Sudan and South Sudan: Where are they heading?*, SUDAN TRIB., May 11, 2012, http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=42561.
56. *Id*.
57. *South Sudan: Economy, supra* note 51.
58. *United Nations Mission In Sudan: Fleeing Conflict in Abyei*, UNMIS PUBLIC INFORMATION OFFICE (June 2011), http://unmis.unmissions.org/Portals/UNMIS/2011Docs/inSUDAN-June-2011-eng-web.pdf.

Sudan, the country demanded $36 a barrel to transport the oil to Port Sudan, while the going international rate is less than $1.[59]

In May, Sudan seized control of the Abyei region, a disputed oil-rich territory.[60] Heavy shelling, aerial bombardment, and numerous tank assaults accompanied the northern advance.[61] South Sudan declared this to be an act of war, and the United Nations was compelled to send an envoy to Khartoum to intervene.[62] Abyei at one time produced more than one-fourth of Sudan's oil, and Sudan's Greater Nile Oil Pipeline runs through this region, which is claimed by both the states.[63] Even though Abyei's oil supplies are currently running low, some experts believe that untapped oil reserves still remain buried in the region.

Since its discovery, revenues from oil have represented more than 90% of foreign exchange earnings for the government,[64] and after succession the issue has emerged as a matter of political and economic survival for the government of Khartoum.

IV. HUMAN RIGHTS VIOLATIONS

Relations between the two states sharply deteriorated in 2012. Fighting began in March 2012 when South Sudanese forces seized the Heglig oil fields in lands claimed by both Sudan and South Sudan in the province of South Kordofan.[65] The Sudanese Air Force bombed the South Sudan Unity oilfields, and the Sudanese Army later attacked the disputed areas of Jau, Pan Akuach, and Teshwin. The South Sudanese People's Liberation Army reportedly repulsed most of these attacks.

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59. Andrew S. Natsios, *To Stop the War on South Sudan, the U.S. Should Send Weapons*, WASH. POST, May 12, 2012, http://www.washingtonpost.com/opinions/to-stop-the-war-on-south-sudan-the-us-should-send-weapons/2012/05/11/gIQAywIkIU_story.html.
60. *United Nations Mission In Sudan: Fleeing Conflict in Abyei*, *supra* note 58.
61. *United Nations Mission In Sudan: Fleeing Conflict in Abyei*, *supra* note 58.
62. *United Nations Mission In Sudan: Fleeing Conflict in Abyei*, *supra* note 58.
63. *United Nations Mission In Sudan: Fleeing Conflict in Abyei*, *supra* note 58.
64. Deng, *supra* note 55.
65. *UN Says South Sudan Seized Oil Field Illegally*, BBC NEWS AFRICA (Apr. 19, 2012), http://www.bbc.com/news/world-africa-17780226.

This military conflict has led to the intensification of nationalistic feelings in both Sudanese states. In April, the Sudanese parliament passed a unanimous resolution declaring the government of Southern Sudan to be an "enemy."[66] This move came days after Southern Sudanese troops took control of Sudan's oil-rich area of Heglig on the border.[67] The South Sudanese forces had temporarily seized the North's main Heglig oilfield for ten days in April, but were reported to have pushed back by military means. The current round of fighting is the most serious to have taken place since the South's independence last July, and it has raised fears of a more widespread war. The international community is working diligently to push Sudan and South Sudan back to the negotiating table after talks were suspended in spring 2012.[68]

The UN Security Council was forced to intervene in early May 2012, and demanded that Sudan withdraw its forces from Abyei.[69] Khartoum responded by indicating that it would only do so after a joint military observer group was created for the area.[70] The latest round of clashes broke out on May 9, 2012, with South Sudan accusing Sudan of bombing southern border states in the Upper Nile, Unity, and Western Bahr el-Ghazal regions. The United Nations Security Council passed a resolution on May 2, 2012, threatening sanctions if the two sides did not follow an African Union roadmap stipulating a cease-fire and a return to talks within two weeks.[71]

Several news reports in the early summer of 2012 suggested a hardening of attitudes in Khartoum.[72] The Albawaba News Service reported that the Sudanese president Omar al Bashir declared there

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66. *South Sudan Declared "Enemy" by Sudan Parliament*, ALBAWABA NEWS (Apr. 16, 2012), http://www.albawaba.com/main-headlines/south-sudan-declared-enemy-sudan-parliament-421176.
67. *UN Says South Sudan Seized Oil Field Illegally, supra* note 65.
68. S.C. Res. 2046, U.N. Doc. S/RES/1325 (May 2, 2012).
69. *Id.*
70. *Sudan Rejects Calls for Negotiations with South*, ALBAWABA NEWS, Apr. 24, 2012, http://www.albawaba.com/news/sudan-rejects-calls-negotiations-south-422153.
71. Kremena Krumova, S*udan Intensifies Crackdown on Media: South Sudan Follows Suit*, THE EPOCH TIMES, May 18, 2012, http://www.theepochtimes.com/n2/world/sudan-intensifies-crackdown-on-media-239115.html.
72. *See generally Sudan Rejects Calls for Negotiations with South*, *supra* note 70.

would be no negotiations with South Sudan, "With them, we are negotiating with guns and bullets."[73]

Both governments spent the spring of 2012 accusing each other of supporting rebels in their respective territories.[74] Khartoum has asserted that the Government of South Sudan supports rebels of the Sudan People's Liberation Army-North (SPLA-N), operating in Khordofan and South Blue Nile.[75] Sudanese forces are alleged to have reacted with a brutal crackdown on rebels and their sympathizers.[76]

The governor of South Khordofan in Sudan, Ahmed Harun, recently gave instructions to the Sudanese armed forces "clearly suggesting that they should not take prisoners."[77] Harun is one of three Sudanese men, including President Omar al-Bashir, who are the subject of arrest warrants by the International Criminal Court (ICC) for war crimes and crimes against humanity in Darfur.[78] Despite international pressure on the government of Sudan to surrender him to the ICC, Harun served as Sudan's Minister of State for Humanitarian Affairs until May 2009, when he was appointed to the governorship of South Kordofan.[79] The Sudanese government has refused to surrender Harun to the ICC, arguing that the court has no jurisdiction over the case and that the possible crimes were a matter for the Sudanese judicial system.

Another major issue of concern is the expulsion of South Sudanese from Sudan, following partition.[80] Khartoum has threatened and issued an ultimatum to an estimated 500,000 ethnic South Sudanese to leave or join Sudan by filing the required residency

73. *Sudan Rejects Calls for Negotiations with South*, *supra* note 70.
74. *Sudan Rejects Calls for Negotiations with South*, *supra* note 70.
75. *South Sudan Declared "Enemy" by Sudan Parliament*, *supra* note 66.
76. Krumova, *supra* note 71.
77. *South Sudan Declared "Enemy" by Sudan Parliament, supra* note 66.
78. *South Sudan Declared "Enemy" by Sudan Parliament, supra* note 66.
79. *South Sudan Declared "Enemy" by Sudan Parliament, supra* note 66.
80. *South Sudan 'Bombing' Despite UN Sanctions Deadline*, BBC NEWS, May 4, 2012, http://www.bbc.com/news/world-africa-17954805.

paperwork.[81] Official estimates note that 350,000 South Sudanese remain in several refugee camps in Sudan.[82]

The fighting and economic challenges have led to acute food scarcity in South Sudan.[83] The United Nations has called for emergency assistance for the millions of Southern Sudanese who are facing unparalleled levels of food insecurity.[84] The World Food Program estimates that about "4.7 million people in South Sudan are in need of food assistance, with an estimated 1 million people set to suffer from food insecurity in 2012, and another 3.7 million people likely to face significant vulnerabilities to food insecurity."[85] Of the estimated 9 million people, half are currently under the age of eighteen and yet, the country suffers from high unemployment, infant mortality, and substantial rates of literacy.[86] According to UNICEF, "70 percent of children between six and seventeen years of age have never been to school."[87]

V. INSTABILITY AND INTERNAL CONFLICT

No less critical than its external conflict with Sudan is South Sudan's myriad of domestic challenges. The basic problem stems from the disparate tribal societies that constitute South Sudan's population. It is estimated that the country is comprised of more than sixty distinct cultural and linguistic groups, each of which have strong tribal loyalties.[88] Rebels opposed to the SPLA-dominated South Sudan

81. *South Sudan 'Bombing' Despite UN Sanctions Deadline,* BBC NEWS, May 4, 2012, http://www.bbc.com/news/world-africa-17954805.
82. Konye Obaji Ori, *S. Sudanese Evacuated from Sudan*, THE AFRICA REPORT (May 15, 2012), http://www.theafricareport.com/East-Horn-Africa/southern-sudanese-evacuated-from-sudan.html.
83. Ivana Kyesic, *Food Shortage Reaching Crisis Point in Southern Sudan.* THE CHRISTIAN POST, May 17, 2012, http://www.christiantoday.com/article/food.shortages.reaching.crisis.point.in.sourthern.sudan/29885.htm.
84. *Id*.
85. *Id*.
86. *Id*.
87. *Investment in Children Must be a Priority in South Sudan – UNICEF,* UN NEWS SERVICE (July 6, 2012), http://www.un.org/apps/news/story.asp?NewsID=42411#.VAtYVlYk9g0.
88. U.S. DEP'T OF STATE, *supra* note 1.

government accuse the administration of plotting to retain power indefinitely and maintain that the regime is not fairly representing all tribal groups.[89]

These tribal groups were united in their opposition to the North and their struggle for self-determination.[90] However, in the post-secessionist state, this key element has been removed with no other unifying issue to fill the gap. The latest member of the UN has found itself with an unclear sense of nationhood, "making its viability as a nation a matter of speculation."[91]

Inter-ethnic clashes have been endemic to South Sudan for many years now. Jonglei is the largest of the ten states in South Sudan.[92] In 2009, conflict erupted, killing more than 2,000 people and displacing approximately 250,000 others.[93] In December 2011, tribal clashes in Jonglei intensified between the Nuer White Army of the Lou Nuer and the Murle. The White Army warned that it would wipe out the Murle and fight the South Sudanese and UN forces sent to the area around Pibor.

Six months after succession, there were deadly clashes between the Lou Nuer and Murle communities, which led to the displacement of thousands of civilians.[94] Hilde Johnson, the Secretary-General's Special Representative and head of the UN Mission in South Sudan (UNMISS), expressed deep concern about the killings at press conference on January 19, 2012.[95] Hate messages were delivered by some individuals and groups, which she said could incite systematic ethnic violence.[96]

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89. JOK MADUT JOK, U.S. INST. ON PEACE, SPECIAL REPORT NO. 287, DIVERSITY, UNITY, AND NATION BUILDING IN SOUTH SUDAN (2011), http://www.usip.org/sites/default/files/Diversity,%20Unity,%20and%20Nation%20Building%20in%20South%20Sudan%20(Jok).pdf.
90. *Id*.
91. *Id*.
92. U.S. DEP'T OF STATE, *supra* note 1.
93. U.S. DEP'T OF STATE, *supra* note 1.
94. *South Sudan: UN Urges Redoubling of Efforts to End Cycle of Deadly Ethnic Violence*, UN NEWS CENTER, (Jan. 19, 2012), http://www.un.org/apps/news/story.asp?NewsID=40976#.VDMETkvuUds.
95. *Id*.
96. *Id*.

Presently, as many as nine of South Sudan's ten provinces are reported to be embroiled in violence caused by local militias and armed ethnic groups. In many places, euphoria about independence has been replaced by despondence. While the war with Khartoum is worrying the people of the new nation, it is the internal conflicts that are a seemingly more pressing threat. Thus, greater increased attention to the issue is needed. Contrary to those in the West, who would argue in support of further arms for South Sudan to curtail acts of aggression by Khartoum, a recent statement published by Amnesty International accuses the U.S., Russia and China of fuelling violations in the Sudan conflict through the arms trade.[97]

In late December 2013, the Security Council held a series of crisis meetings on South Sudan, and demanded immediate cessation of hostilities following a report by UNMISS. The report provided "mounting evidence of gross human rights abSes in the strife-torn country, including, extra-judicial killings of civilians and captured soldiers, massive displacements and arbitrary detentions, often on ethnic grounds."[98]

The situation was a result of a coup d'état on December 14, 2013 by the former Vice President Riek Machar, who was dismissed in July 2013. President Kiir belongs to the Dinka ethnic group and Machar to the Lou Nuer. There is mounting evidence of ethnic targeting of South Sudanese citizens.

VI. CONFLICT PREVENTION AND STATE BUILDING

The euphoria generated by the independence of South Sudan has quickly dissipated, raising serious doubts as to the future viability of the new nation, and many speculate on the wisdom of the potentially unrealistic and rushed acceptance by the United Nation of its latest member. As far back as 2005, when the Comprehensive Peace

97. *South Sudan: Arms Supplies Fuelling Violations in Forgotten Conflict*, AMNESTY INT'L (June 28, 2012), http://www.amnesty.org/en/news/south-sudan-arms-supplies-fuelling-violations-forgotten-conflict-2012-06-27.

98. *Evidence Mounts of Extra-judicial Killings, Rights Abuses in South Sudan, UN Reports*, UN NEWS CENTRE (Dec. 31, 2013), http://www.un.org/apps/news/story.asp?NewsID=46857&Cr=south+sudan&Cr1=#.U_gkla0Zg1.

Agreement (CPA) was signed, the international community optimistically, or naively, assumed that this would lead to peace and stability in the region.[99] Some supporters of South Sudan assume that the situation can be repaired if only Sudan could be restrained militarily. Andrew S. Natsios, George W. Bush's former envoy to Sudan and a professor at Georgetown University, suggests that the solution lies in arming South Sudan:

> Its war with the North is the result of an imbalance of military power that has encouraged military adventurism. Omar al-Bashir, President of the North and a possible coup target, believes he can secure his future by bombing the South into submission instead of negotiating. . . The only way to end the North's bullying and foster peace talks is to give the South the right tools: American anti-aircraft weapons. If the United States provides the materiel [sic], the South can end the North's bombing campaign.[100]

However, as noted above, both Khartoum and Juba are already receiving arms from various states. Unfortunately, acts of aggression by Sudan are not the only problem with which South Sudan must contend. The inability of South Sudan's President, Salva Kiir, to address the grievances of the smaller tribes and ethnic groups is a significant problem that war with the North cannot gloss over. In his Independence Day speech, President Kiir had promised "transparency and open government" as the main priorities for the new nation. However, the opposition in South Sudan claims that the President has not kept his word and is not open to transparency in government.

State building essentially assumes that a modern state has a certain set of obligations that must be met, such as respect for the rule of law, accountability, security, and welfare. State building can also involve the construction of basic infrastructure, such as roads for ease of transportation. This is an important endeavour, given that, as has been demonstrated by several scholars with respect to Africa, the

99. Deng, *supra* note 55.
100. Natsios, *supra* Note 59.

"government's inability to broadcast power into peripheral regions of state territory lies at the heart of state failure and collapse."[101]

Reconstruction and state building are daunting tasks even in the most opportune circumstances. Furthermore, it may not always be possible to have an overarching authority that can guarantee security, and therefore it has been suggested that a new mechanism, created and supported by the international community, needs to take root. State formation in South Sudan has not effectively occurred.

VII. ROLE OF UN SECURITY COUNCIL

The UN Security Council has adopted a series of resolutions dealing with the conflict in Sudan, including the unanimously adopted Resolution 1556 on July 30, 2004, regarding the humanitarian crisis in Darfur.[102] However, more pertinent to the issue of South Sudan, was the adoption on November 19, 2004, of Security Council Resolution 1574, which provided support for the implementation of a Comprehensive Peace Agreement (CPA) in 2005.[103] The resolution was adopted at a meeting in Nairobi, Kenya, and was only the fourth meeting held outside its New York City headquarters since 1952. Since the milestone Resolution 1574, and the involvement in several peace initiatives in Sudan, UN participation in the creation of the Republic of South Sudan has been critical.[104]

The legal framework was established with the Referendum Act, and the Southern Sudan Referendum Commission (SSRC) was formed at the national level. The Security Council has also unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict, which contains the first official reference to the Responsibility to Protect. This resolution was cited when Resolution 1996 was adopted on the eve of the birth of the Republic of South Sudan, when the Security Council welcomed the new state and

101. Jens Meierhenrich, *Forming States after Failure*, *in* WHEN STATES FAIL: CAUSES AND CONSEQUENCES 162, (Robert I. Rotbery ed., 2004).
102. S.C. Res. 1556, U.N. Doc. S/RES 1556 (July 30, 2004).
103. S.C. Res. 1574, U.N. Doc. S/RES 1574 (Nov. 19, 2004).
104. *See id*.

reaffirmed its strong commitment to the "sovereignty, independence, territorial integrity, and national unity of the Republic of South Sudan."[105] It also noted that, "national ownership and national responsibility are key to establishing sustainable peace and the primary responsibility of national authorities in identifying their priorities and strategies for post-conflict peace building."[106]

Yet the same motion also deplored the security situation in the region and emphasized the need for clarity regarding the "roles, responsibilities, and collaboration between UNMISS and the UN Country Team." The Security Council further determined under Chapter VII that the situation in South Sudan "continues to constitute a threat to international peace and security in the region." A UN mission in the Republic of South Sudan (UNMISS) was supposed to operate for one year; however, on July 5, 2012, Resolution 2057 was passed which extended the mission for another twelve months.[107]

UNMISS' mission from the beginning has always been to establish the conditions to strengthen the capacity of the Government of South Sudan, as well as assist and advise on the fulfilment of its responsibility to comply with international humanitarian and human rights law.

In April 2013, five Indian UNMISS troops and several civilians were killed in a rebel ambush in Jonglei. UN Secretary-General Ban Ki-moon called the killings a war crime.[108] The crisis intensified with further mass violation of human rights, ethnic targeting, and an attempted military coup, which, on December 24, 2013, resulted in Security Council authorization to double the number of existing troops. Since its inception, South Sudan has demonstrated that inadequate resolutions by the Security Council will not lead to reconstruction and stability of the latest member of the UN, and confirm the need for a more robust trusteeship arrangement.

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105. S.C. Res. 1996, U.N. Doc. S/RES 1996 (July 8, 2011), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1996(2011).
106. S.C. Res. 1996, U.N. Doc. S/RES 1996 (July 8, 2011).
107. *Security Council Extends UN Mission in South Sudan for Another Year*, UN NEWS CENTRE (July 5, 2012), http://www.un.org/apps/news/story.asp?NewsID=42406#.U_eM40srdg0.
108. *Attack on Peacekeepers a War Crime: Ban Ki-moon,* THE HINDU, Apr. 11, 2013, http://www.thehindu.com/news/international/attack-on-peacekeepers-a-war-crime-ban-kimoon/article4599333.ece.

VIII. LIMITED TRUSTEESHIP

The question of South Sudan transferring control to a United Nations Trusteeship Council requires considerable debate. The issue of state sovereignty and self-determination remain, as in the times of the mandate system, legal challenges to prospective trusteeships. Trusteeship today, is both complicated and highly political. Under the United Nations Trusteeship System, no member can be put under trusteeship due to the international legal principle of state sovereignty. However, both the Security Council and the International Court of Justice have shown flexibility in their interpretation of the Charter. The Security Council could authorize some form of shared sovereignty to assist a failing state.

The United Nations Charter must set out specific conventions if it is ever to move forward toward some form of shared sovereignty in the wake of state failure. A partnership needs to be encouraged between the United Nations and the Member State, and trust needs to be developed at the local level to avoid any resentment among the local population. Articles 75-91 of Chapter XII of the United Nations Charter outline the authority of International Trusteeship System.[109] Under Article 75, for example, "The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed there under by subsequent individual agreements. These territories are hereinafter referred to as trust territories."[110]

On the question of failed states becoming part of a trusteeship, the Secretary-General replied that this is something the United Nations Member States will have to discuss.[111] The United Nations Charter precludes the kind of trusteeship indicated above, as the International Trusteeship System applies only to former League mandates, territories captured during the Second World War, and other areas placed under trusteeship by their administering states. However, as stated in Article 78, "[t]he trusteeship system shall not apply to

109. U.N. Charter art. 75-91.
110. U.N. Charter art. 75, para. 1.
111. Press Release, Secretary-General, Transcript of Press Conference by Security-General Kofi Annan at U.N. Headquarters. U.N. Press Release SG/SM/8855 (Sept. 8, 2003).

territories which have become Members of the United Nations".[112] This limitation reflects the colonial situation and the priorities of Member States of the United Nations at the close of the Second World War.

The creation of a trusteeship in 1945 over a Member State would have been viewed as inconsistent with the premise that the United Nations was to be based upon "the principle of the sovereign equality of all Members,"[113] and that it would not interfere with their internal affairs. However, states could voluntarily relinquish control over their internal and external affairs for a defined period of time. The trusteeship plan could, however, go further with the United Nations, or a group of states serving as the administering authority for South Sudan.

Obtaining political consensus is a difficult undertaking at the United Nations, and changing the Charter would be even more challenging, as many states would assert that such an action would undermine Article II, Section 1, or the "sovereign equality" provision. However, as noted by scholars, most failed states hardly govern themselves; thus the notion of sovereignty is changing. This would necessitate developing clear criteria of responsibility, as well as the power to commence and conclude.

The traditional fundamental principles of legitimacy of the Westphalia system rest on the notion of state sovereignty, even a recommendation that "states that cease to exercise formal control over parts of their nominal territories should lose their sovereignty, that is, be decertified".[114] This article shares the view that has been expressed by some legal scholars that the Westphalian sovereignty model "should never have been accorded to fragile post-colonial entities with no history and experience of performing as or organizing a state".[115]

The debate as to the best possible means of reconstructing a failed state is an ongoing matter, and the proposal that sovereignty may be

112. U.N. Charter art. 78.
113. U.N. Charter, art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").
114. Robert I. Rotberg, *The Failure and Collapse of Nation-States. Breakdown, Prevention, and Repair*, *in* WHEN STATES FAIL CAUSE AND CONSEQUENCES 1, 41 (Robert I. Rotberg ed., 2004).
115. *Id*. at 27.

breached by outsiders in order to build the states can, for some, evoke disturbing images of colonialism. However, as noted above, there is a growing body of literature arguing, "international engagement must be more robust".[116] Scholars have also suggested that "[w]ithout outside intervention, the formation of a state after failure is likely to be in vain."[117]

An imposed solution for the reconstruction and rebuilding of South Sudan is not the preferred option. There is need for an engaged indigenous process in order for reconstruction to be successful, and to be maintained once foreign assistance is withdrawn. Some scholars have indicated that this is not always attainable, but have maintained that "[a] certain degree of international control and imposition is necessary in order to bring about a well-functioning state, in which the ruling elite are accountable to the people."[118] In the context of failed states, the need to reintroduce a formal trusteeship that can ensure both accountability to agreements and delivery of vital service begs serious debate.[119]

Given that there is no consensus to apply an overall supervisory role similar to the mechanism in place during the Trusteeship Council, a number of observers have noted that in lieu of a formal Trusteeship, the international community has instead used ad hoc devices for the international stewardship of peoples and territory, in what Ralph Wilde has termed "international territorial administration."[120] These ad hoc arrangements have the same basic objectives as were in place during the Trusteeship Council, which were meant to impose order and help territories in reconstruction. For example, in 1999 the United Nations Security Council, in adopting resolutions 1272 (East Timor) and 1244 (Kosovo), and placing these territories under a temporary UN administration, in essence reaffirmed the need to revive the Trusteeship Council. In the case of East Timor, "the Competencies of

116. Louisa Andersen, *Fragile States on the International Agenda*, *in* FRAGILE SITUATIONS. BACKGROUND PAPERS, DANISH INST. OF INT'L STUDIES REP. 15 (Mar. 2008).
117. Meierhenrich, *supra* note 101, at 162.
118. Andersen, *supra* note 116, at 15-16.
119. *Id*. at 16.
120. Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. OF INT'L L. 583, 585 (2001).

the United Nations Transitional Administration included all the classic powers of a state."[121]

These unique circumstances present an opportunity, but also raise questions in international law as to the optimal arrangements to deal with the sovereignty deficit of these naissance states. In a recent op-ed on *African Arguments*, former Assistant Secretary of the United States for Africa, Herman Cohen, noted the Security Council needs to establish a trustee mandate, given that "the ruling Sudan People Liberation Movement (SPLM) has no ability to govern the country particularly given the lack of infrastructure, education, private investment and institutions."[122]

In many parts of the world state failure is rooted in weak state capacity. The settlement negotiation of Namibia provides a good example of a United Nations trusteeship that occurred in a period of transition and led to its independence after several legal classifications and compromises that were *sui generis* of the United Nations operation.

The United Nations had a supervisory central objective, which was to hold free and fair elections for a Constituent Assembly that would draft a constitution leading to the independence of Namibia.[123] Some scholars have commented that the United Nations Trusteeship System "is to some extent a victim of its own success."[124]

Other notable scholars, such as Helman and Ratner, have argued for a return of the trusteeship model as a solution to failing states and recommend:

> [D]irect U.N. trusteeship when there is a total breakdown of governmental authority. . .the theoretical basis for conservatorship in the domestic analogue of the polity

121. Carsten Stahn, *The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis,* 5 MAX PLANCK Y.B.U.N.L. 1, 115 (2001).
122. *South Sudan Blasts Calls to Place Country Under UN Trusteeship*, SUDAN TRIBUNE, Jan. 22, 2014, http://www.sudantribune.com/spip.php?article49681.
123. Hank Cohen, *South Sudan Should be Placed Under UN Trusteeship to Aid Development of Viable Self-Government*, AFR. ARGUMENTS ONLINE, Jan. 6, 2014, http://africanarguments.org/2014/01/06/south-sudan-should-be-placed-under-un-trusteeship-to-aid-development-of-viable-self-government-by-hank-cohen/.
124. Nele Matz, *Civilization and the Mandate System under the League of Nations as Origin of Trusteeship*, 9 U.N.Y.B. 47, 48 (2005).

> helping those who are utterly incapable of functioning on their own, thereby necessitating a legal regime where the community itself manages the affairs of the victim.[125]

Helman and Ratner recommend conservatorship as the theoretical paradigm for assistance of the United Nations in dealing with failed states.[126] Helman and Ratner, as well as Richard Caplan, argued that it might be necessary to establish a trusteeship under the United Nations in extreme cases of state failure.[127] These scholars would propose that the states in question "voluntarily relinquish control."[128] This is a difficult but not impossible task if there is political will on all sides. Stephen Krasner notes that to improve the well-being of the domestic population, and decrease the threat to the international community, alternative options such as *de facto* trusteeships should be considered.[129] Krasner advances the notion of shared sovereignty involving the participation of external actors to assist with failed state reconstruction and a view shared by this article.[130] In South Sudan, the government has limited structural competency to govern themselves.

IX. CONCLUSION

Since succession, the people of South Sudan have been waiting for an elusive peace that simply has not emerged. Various border wars with Sudan, internal conflicts, and human rights abuses against the civilian population (in particular gender-based violence) has dampened the enthusiasm that was present during the referendum. The secession from Sudan was a long a painful struggle, and somewhat unfairly, South Sudan given recognition as a member of the international community under the most difficult of circumstances,

125. Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 12 (1992).
126. *Id*. at 3-21.
127. *Id*.
128. Ruth Gordon, *Saving Failed States: Sometimes A Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 923 (1997).
129. Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 12 INT'L SEC. 85, 86, 106 (2004).
130. *Id*. at 85-120.

with few resources and a seemingly impossible mission of rebuilding from almost nothing.

It is for these reasons that some form of d*e facto* trusteeship or shared sovereignty is needed. Although not a panacea to resolve every issue evident in the reconstruction of South Sudan, this should have been implemented by the international community as a means to assist them in building a truly functional state. Unfortunately, the debate surrounding the legal, moral, and practical implications of such large state-building mechanisms did not take place.

Trusteeship reflects both the severity of the predicament and the challenge confronting policymakers and scholars regarding the newest troubled state. It may be for these reasons that scholars today are looking at trusteeship as a possibly more comprehensive and durable solution for South Sudan.

Non-governmental organizations and informal groups cannot replace South Sudan's lack of a strong federal government and viable federal structure. Given that the present government of South Sudan cannot hold the new country together, international intervention of some sort is imperative. The future could be catastrophic for the millions of South Sudanese on the brink of famine. This, coupled with inter-ethnic violence and a low intensity conflict with Sudan, could quickly threaten South Sudan's experiment in nationhood.

State failure presents a multitude of challenges for the international community, and is linked not only to civil wars and other serious conflicts, but also to poverty, famine, and other social disasters. Given the complex nature of South Sudan and the resultant instabilities, it may arguably be in its people's best interest for the international community to retain a high degree of shared sovereignty, in order to address the many issues affecting the state's structural competency deficit.

Much has changed since the days of the Westphalian concept of statehood. With the emergence of regional and international law—especially human rights law—the notion of state sovereignty has been challenged. States have a responsibility to protect their citizens and ensure that human rights law is followed. Various international law treaties undoubtedly chart the important responsibilities that states have in respecting international law conventions and in providing security for their constituents.

States are not by nature failures, or even doomed to fail. It is important to recognize that state formation requires a belief in the state. The situation in South Sudan did not happen by chance, as historical and geographical circumstances are contributing factors; but it is largely the result of autocratic leaders, who contribute to and aggravate state failure. Even as talks between the rebels and the South Sudan government take place in Addis Ababa, Ethiopia in early 2014, rival parties struggle for power with little interest in finding a solution to the violence and human misery that has afflicted their people.

Prevention and reconstruction of South Sudan are two of the most important challenges facing the international system, which undoubtedly require substantial political will and resources in order to establish the structural competencies of the newest UN Member State. A United Nations authorized shared sovereignty agreement (possibly entailing a trusteeship), under a new international law architecture is needed in order to build the rule of law; economic and social reconstruction; involvement of civil society, especially by bringing women and minority groups into the process; establish security; and disarm this post-conflict state. A trusteeship for South Sudan will require political will and resources from the international community. However, this may be the only viable solution to the challenges facing this troubled nation and region.