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REPORT

SOUTH SUDAN

PROSPECTS FOR DEMOCRACY IN THE WORLD'S NEWEST STATE

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THE RESULT OF THE JANUARY 2011 REFERENDUM ON SELF-DETERMINATION FOR SOUTH SUDAN, ALONG WITH THE NORTH'S ACCEPTANCE OF THE OUTCOME, PAVES THE WAY FOR SOUTHERN INDEPENDENCE ON 9 JULY 2011. THIS IS THE DATE THE COMPREHENSIVE PEACE AGREEMENT (CPA) EXPIRES, ESTABLISHING THE WORLD'S NEWEST STATE: THE REPUBLIC OF SOUTH SUDAN.

EXECUTIVE SUMMARY

Since attaining independence, many other African countries have been unable to develop strong state structures and a sense of shared nationhood. Too often, one political force or tribe has sought dominance over others, political space has been restricted, military interference has impeded progress in civil affairs or competition for resources has led to instability, displacement and conflict.

The overarching question for South Sudan is whether such scenarios can be avoided. Even before independence, much remains to be done. The future president of the new state, Salva Kiir Mayardit, has emphasised the need to accomplish two tasks above all others: building strong relations with the north and forging a shared national identity from its myriad tribal groups and nationalities.

The success of ongoing discussions between Khartoum and Juba on the terms of the separation will set the tone for future north-south relations, the viability of an independent south and the stability of both countries. How South Sudan goes about the challenging task of state building in the present is equally essential for its democratic prospects in the future. Self-government will not be a new experience as semi-autonomous government institutions have been in place since 2005. Nonetheless South Sudan faces a series of daunting tasks as it makes the transition to independent statehood.

The persistence of violent conflicts in South Sudan represents real risks for the emerging state. It also must tackle the south's serious underdevelopment, create a truly multi-ethnic national army loyal to the state and not just to the SPLM or specific commanders, absorb hundreds of thousands of southerners who are migrating from the north to the south, and deal with the large number of automatic weapons in circulation, which are often used in local disputes.

On paper, the Interim Constitution for Southern Sudan (ICSS) is a modern and largely progressive basic law upon which to build the new state. It incorporates a Bill of Rights, requires the government to promote democratic principles and political pluralism, and establishes the principles of decentralisation and devolution of power. It also provides for an independent judiciary and a range of state commissions that could, in future, serve as an institutional check against any abuse of state power if they are properly organised and resourced.

Currently, the south is transforming the ICSS into a transitional constitution ahead of independence, until such time as a permanent constitution can be adopted. Decisions in this regard could well determine the success or failure of the transition period and the long-term future of the country. As the transitional constitution ought to be in place no later than 8 July 2011, there will be little time to undertake wide consultations. Although drafting the transitional constitution is presented as a largely technical exercise, opposition parties and civil society groups are concerned that far-reaching changes could be proposed. These groups also have complained that this process does not respect previous political agreements, that Sudan People's Liberation Movement (SPLM) figures are over represented and that they so far have been excluded from the deliberation and drafting stages.

The duration of the transitional period is equally controversial. Even though the president of the Government of South Sudan (GoSS), the Southern Sudan Legislative Assembly (SSLA) and 10 state legislative assemblies (SLAs) were elected in 2010 for five-year terms, many opposition parties contend that fresh elections are due once independence is officially declared on 9 July 2011, after which general elections should be held to elect a constituent assembly (CA). In their view, the current representatives of these institutions have only been elected for the interim period; i.e., until the expiry of the CPA, when the ICSS loses legal force. They also contend that SSLA members were not elected as deputies for an independent state, but rather as representatives for a semi-autonomous entity. In contrast, the SPLM believes that elections are not due until April 2015.

If a CA is established to draft a permanent constitution, its composition and manner of appointment will be of crucial importance. One option in discussion is to transform the SSLA into a CA. However, due to the SSLA's domination by one political force, this approach may not be sufficient in terms of representing all South Sudanese political interests. Moreover, the SSLA should concentrate on adopting much-needed primary legislation. Given these factors, along with the clear need for inclusivity and the significant organisational challenges of holding an election, the GoSS should give serious consideration to appointing an inclusive CA rather than electing its members. In compensation, a new constitution ought to be made subject to approval by referendum.

Unlike the transitional constitution, there are no serious time constraints for adopting a permanent constitution. In a diverse, polarised and armed society such as South Sudan, the overarching aim should be to design structures and institutions that can reduce ongoing conflicts and lessen the risk of future conflicts. The big ticket items likely to be discussed intensely include: whether South Sudan will be a federal or a unitary state and what powers will be vested in the 10 states; the respective powers of the executive, legislative and judicial branches of government; and whether there will be a unicameral or bicameral parliament.

South Sudan has committed itself to establishing decentralised government. Given the diverse composition of its population, this appears logical. However, developing the capacities of state-level institutions will require significant financial and human resources. Instituting a system with checks and balances between the legislature and the executive, as well as the judiciary, could help avoid creating an overly-dominant presidential office. The choice of electoral system also could have a beneficial impact on an effective balance of power, as well as influence the representativeness of elected bodies. The 2010 elections used a mixed parallel electoral system, but this proved problematic: it was cumbersome to implement and voters were presented with 12 different ballot papers, a level complexity that is inappropriate in a country with high illiteracy rates.

At the same time, both factors (decentralisation and the choice of an electoral system) could risk reinforcing subnational identities, thus weakening any sense of common national purpose. The alternative– attempting to create cohesion by exerting strong central authority– would be vigorously resisted by traditional authorities and local political elites. Ultimately, then, South Sudan may have to decide whether the imperative to avoid political fragmentation is more important than the imperative to ensure adequate representation.

While there is no agreement between the SPLM and the opposition about when the next elections are due, one could be necessary at short notice; e.g., in the event of the resignation, death or impeachment of the president. However, after independence, there will neither be valid electoral legislation in place, nor an established election management body. Unless action is taken in the near future, at the moment of independence, South Sudan will also find itself without legislation regulating political parties. The Political Parties Affairs Council (PPAC), based in the north and which registered Sudanese parties, will no longer have any jurisdiction in the south.

The SPLM is a political 'big tent' where most of the different tribal-political forces coexist, often on the basis of co-option and sharing the spoils of government. Like many liberation movements elsewhere, the SPLM tends to dominate political life and ignore dissident views. Following in the footsteps of other parties of liberation, some in the SPLM appear to believe that their victory in the struggle for independence gives them a mandate to decide the rules of the new state without reference to other opinions. This approach runs the risk of alienating segments of South Sudan's diverse population, possibly sowing the seeds of future violent conflicts.

Other than the SPLM, South Sudan lacks strong political parties. Non-SPLM deputies in the SSLA hold less than 7% of the seats. This is partly a result of the election system and partly due to the organisational and financial weakness of South Sudan's approximately 20 opposition parties. Given their modest levels of electoral support in 2010, opposition parties should avoid making unreasonable demands or jeopardising what is already a difficult path to independence. Alongside this, in the short term, the continued unity of the SPLM will be an important factor in achieving political stability.

The absence of a strong opposition and the relative underdevelopment of civil society and the media sectors mean that it is even more important for South Sudan's political leaders to make a firm commitment to transparent, accountable and responsive government. This also means that the political leadership needs to reach out to the political opposition to ensure that important decisions on transition issues garner broad consent. Formalising inter-party dialogue, such as was initiated at the All-Southern Sudanese Political Parties Conference held in October 2010, and the formation of a broad-based government after 9 July are important steps.

INTRODUCTION

Paul O'Grady and Geoffrey Weichselbaum of Democracy Reporting International (DRI) wrote this report.[1] It follows on from two previous reports related to Sudan (November 2009), which assessed the framework for general elections, and South Sudan (July 2010), which assessed the Southern Sudan Referendum Act.[2]

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POLITICAL BACKGROUND

The Comprehensive Peace Agreement (CPA) signed between the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) ended two decades of civil war in Sudan. Signed on 9 January 2005, it was designed to make unity attractive but also allowed South Sudan to hold a referendum on self-determination.

Holding the referendum in January 2011 was the defining event of the CPA. Southerners voted decisively in favour of independence. The north's acceptance of this result paves the way for a formal declaration of southern independence on 9 July 2011. This is the date on which the CPA expires, establishing the world's newest state, the Republic of South Sudan. The success of the ongoing discussions between Khartoum and Juba on the terms of separation and decisions taken by southerners on their post-CPA political framework could well determine the success or failure of the transition and the country's long-term future.

Thirty seven African countries gained independence between 1956 and 1968.[3] The challenges faced by some at the time of their independence are similar to those South Sudan faces today: high levels of poverty, limited experience of multi-party democracy, few skilled professionals, very poor physical infrastructure, food insecurity and inadequate social services. The south also will have to contend with the legacy of decades of violent conflict and the ongoing existence of armed groups, as well as the challenges of absorbing large numbers of returnees from the north and a political system dominated by a liberation movement.

Many African countries have been unable to develop sufficiently strong state structures and a sense of shared nationhood. Too often, one political force or tribe has sought dominance over others, political space has been restricted, military interference has impeded progress in civil affairs or competition for resources has led to instability, displacement and conflict. The overarching question for the new Republic of South Sudan is whether it can avoid this scenario.

South Sudan's immediate 'to do' list is daunting. It includes not only important internal (south-south) issues, but also must address pressing north-south matters. With the CPA having just a few months left to run, attention is currently focussed on negotiating and resolving a number of key north-south political issues. These include demarcation of the north-south border, the status of the disputed Abyei region, citizenship issues for southerners living in the north, apportionment of the national debt, security arrangements, and a solution on oil resources and revenues.[4] As President Kiir has repeatedly emphasised, these issues will be crucial in determining future north-south relations.

1 The authors wish to thank Jérôme Leyraud,IFES Country Director Sudan, and Sanne van den Bergh, former Carter Center Sudan Country Director, for their comments on the draft text, and Kate McGuinness, who edited this text.

2 Respectively, see: http://www.democracy-reporting.org/files/sudan_091209_online.pdf and http://www.democracy-reporting.org/files/dri_report_sudan_ referendum_-_english.pdf.

3 Since 1980, only three new African states have emerged: Zimbabwe (1980), Namibia (1990) and Eritrea (1993).

4 Discussions are taking place under the auspices of the African Union High Implementation Panel (AUHIP), headed by former President of South Africa, Thabo Mbeki.

The CPA granted South Sudan semi-autonomous status and created formal government institutions in the south. Independence gives the south an opportunity to reform these institutions without reference to the north. In that context, the most important south-south political issue is how to reach a politically inclusive agreement about ongoing review of the interim constitutional arrangements that will lead to the formation of transitional state bodies and subsequent arrangements for adopting a permanent constitution. These decisions could determine whether the democratic advances made since 2005 are consolidated or instead lay the foundations for a country dominated by one political force. As the dominant ruling party, the SPLM must avoid the temptation to dictate the new rules. To do so would alienate segments of the population and possibly sow the seeds of future conflict.

THE SOUTHERN SUDANESE: DIVERSE, DISPLACED AND IN DEBT

According to the 2008 census of the Republic of the Sudan, the population in the south was 8.26 million, although the Government of Southern Sudan (GoSS) believes this figure is too low.[5] The south is home to about 60 tribes which are further divided into sub-tribes and clans. While most southerners are Christian or Animist, there is also a Muslim minority.

The south has three primary linguistic groups: the western Nilotes; the eastern Nilotes (sometimes referred to as Equatorians); and the central Sudanic group. Tribal identity is still pervasive and South Sudan has a long history of inter-ethnic conflict in which many thousands of people have died. Fierce rivalries exist between the main western Nilotic groups (the Dinka, Nuer and Shilluk) and the Equatorians, with many of the latter resenting the strong political influence exerted by the more numerous western Nilotic peoples.

In the past, tribal divisions have caused splits within the Sudan People's Liberation Movement/Army (SPLM/A).[6] Many southerners still consider the SPLM/A to be dominated by the Dinka and to serve their communal interests. Currently the Juba government faces potentially serious challenges from a number of armed anti-GoSS militias loyal to renegade military commanders. One of the major challenges for the SPLM government will be to forge a truly multi-ethnic national army loyal to the state, and not to the SPLM/A or specific commanders. Another challenge will be to move away from a culture of resorting to violence in order to achieve political gains.

South Sudan is one of the world's most underdeveloped regions. It lacks physical infrastructure and basic social services, particularly outside the main population centres. Popular expectations over the benefits independence will bring are high. The government is likely to come under pressure to improve economic conditions in the short term. President of the GoSS, Salva Kiir Mayardit, is optimistic about South Sudan's long-term economic potential, pointing to its abundant natural resources, such as water, fertile land and oil.

It is estimated that oil will account for some 98% of the future state's revenues.[7] However, the south has no refining capacity. The only existing pipeline exits in the north at the Port Sudan terminal. This necessarily means that in the medium term, southern prosperity depends on maintaining workable relations with the north, until an alternative transit route can be built. In the meantime, the south may have to pay up to 30% of expected oil revenues for transportation.[8]

According to the World Bank, Sudan's external debt amounted to some $36 billion at the end of 2009. The IMF stated that, "External debt…– most of which is in arrears – is not sustainable in the absence of debt relief."[9] Debt has yet to be apportioned between the north and the south, and there is currently no agreement on debt relief.

In addition to these challenges, South Sudan also will have to absorb hundreds of thousands of southerners migrating from the north to the south.[10] These vulnerable groups add to the number of internally displaced persons, who fled their homes after attacks by the Lord's Resistance Army and indigenous armed southern rebel groups.

The availability of automatic weapons has made disputes over access to grazing, arable land and water more deadly. If not managed properly, the recent trend of leasing large swathes of land to foreign agribusiness could intensify competition over land, particularly if it leads to further population displacement.[11]

5 Although the census in the south was largely conducted and overseen by southerners, the issue became politicised because the size of the south's population determined the allocation of parliamentary seats in the National Assembly of Sudan ahead of the April 2010 general elections.

6 The military arm of the SPLM, The Sudan People's Liberation Army (SPLA) fought against the armed forces of successive Khartoum governments during the second Sudan civil war (1983-2005). The most serious schism occurred in the early 1990s, when Riek Machar, a prominent Nuer leader, and Lam Akol, a prominent Shilluk leader, set up rival military forces which then fought the SPLA. The split led to the creation of SPLM/A-United faction (later renamed the Southern Sudan Independence Movement/Army, SSIM/A). The common purpose offered by the prospect of a peace agreement led the Nuer-dominated Sudan People's Defence Force (SPDF) to reintegrate into the SPLM/A in 2002.

7 'Fuelling distrust, the need for transparency in Sudan's oil industry', Global Witness, 7 September 2009. See: http://www.globalwitness.org/library/fuelling-mistrust-need-transparency-sudans-oil-industry.

8 'South Sudan may pay north 30% of oil revenues for shipping crude exports', *Bloomberg News*, 23 March 2011. See: http://www.bloomberg.com/news/2011-03-23/south-sudan-may-agree-to-cede-30-of-oil-revenue-wakoson-says.html.

9 See: http://www.imf.org/external/np/country/notes/sudan.htm. Last updated 17 April 2011.

10 Between October 2010 and January 2011, some 200,000 people migrated from the north to the south. Some humanitarian agencies project that this number could rise to 500,000 in the aftermath of the January referendum ('Sudan managing the great trek southwards', IRIN 10 March 2011). See: http://www.irinnews.org/Report.aspx?ReportID=92150.

11 'South Sudan Threatened by Land Grab', Norwegian People's Aid, 23 March 2011. See: http://www.npaid.org/en/News_Archive/?module=Articles;action=Article.publicShow;ID=17086.

SOUTH SUDAN'S INTERIM INSTITUTIONS: WELL DESIGNED ON PAPER

Adopted in December 2005, the Interim Constitution for Southern Sudan (ICSS) provides South Sudan with a well-structured, modern and largely progressive basic law.[12] The Preamble of the ICSS commits South Sudan to 'establishing a decentralized democratic multi-party system of governance in which power shall be peacefully transferred and to upholding values of human dignity and equal rights and duties of men and women'. Article 39 of the ICSS states that the primary political objective of governance is to 'promote democratic principles and political pluralism... guided by the principles of decentralisation and devolution of power to the people through the appropriate levels of government where they can best manage and direct their affairs'.

The Bill of Rights in the ICSS guarantees a broad range of individual and collective rights and freedoms.[13] However, the death penalty is permitted for unspecified extremely serious offenses. According to Article 13, Paragraph 3 of the ICSS 'all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill'.[14]

The ICSS establishes a presidential system of government based on the principles of southern autonomy, decentralisation and the separation of powers. The central institutions are the executive (a president, vice president and a council of ministers), the legislative branch (the Southern Sudan Legislative Assembly [SSLA]), and an independent judiciary. Decentralised political authorities are state governors, the state legislative assemblies and local judicial branches.

The president of the GoSS is commander-in-chief of the SPLA, appoints the council of ministers and exercises the competencies ascribed by the CPA and the ICSS.[15] Until the expiry of the CPA, the president of the GoSS is also vice president of the Republic of the Sudan.

The SSLA exercises legislative functions,[16] oversees the work of the executive, holds government ministers to account and promotes decentralised governance. According to Article 62(1.e) of the ICSS, an elected member of the SSLA who changes the political or party affiliation upon which ticket s/he was elected, loses her/his membership in the SSLA. This may reduce members' capacity to hold the GoSS to account. In practice, it also makes deputies more accountable to their nominating party than to their electors.

Judicial power is exercised by the courts in accordance with the customs, values, norms and aspirations of the people in conformity with the ICSS and the law, including reference to international obligations related to human and political rights. According to the ICSS, the judiciary should be an independent and decentralised institution. The judiciary consists of a supreme court, courts of appeal, high courts, county courts and other tribunals. There is an inadequate supply of properly trained judges, particularly at regional and local levels, and many disputes are resolved *de facto* using traditional, non-judicial means.

The ICSS stipulates that South Sudan is composed of 10 States.[17] It also provides for a decentralised system of governance aimed at accommodating the south's mixed tribal, national and religious character. States adopt their own constitutions, which must conform to the ICSS.

State authorities have competence over matters within their borders that are not exclusive competencies of the national government. According to the ICSS, each state has an executive (an elected governor and a state council of ministers) and an elected legislative body (state legislative assemblies). State assemblies have 48 members. Article 168(5) of the ICSS stipulates that states should promote and empower local government and local elections fall within the jurisdiction of the states. State laws regulate the establishment of local councils.[18] Judicial power is vested in the state-level high courts and the county courts. Each state determines the jurisdiction of its courts.

The ICSS establishes a large number of independent state commissions, including: the Civil Service Commission, the Anti-Corruption Commission, the Human Rights Commission, the Demobilisation, Disarmament and Re-integration Commission, the Land Commission, the Fiscal and Financial Allocation and Monitoring Commission, and the Relief and Rehabilitation Commission. Other constitutional public institutions include: the Public Grievances Chamber, the Audit Chamber, and the Employees Justice Chamber. These bodies potentially could play an important role in establishing a democratic South Sudan by

12 See: http://www.chr.up.ac.za/undp/domestic/docs/c_SouthernSudan.pdf. All subsequent references in the text to the Interim Constitution of Southern Sudan (ICSS) are drawn from this source.

13 *Inter alia*, the Bill of Rights includes: sanctity of rights and freedoms; life and human dignity; personal liberty; freedom from slavery, servitude and forced labour; equality before the law; right to found a family; rights of women; rights of the child; freedom from torture; fair trial; freedom of assembly and association; right to participation and voting; freedom of expression and media; right of access to information; and rights of ethnic and cultural communities,

14 The Republic of the Sudan acceded to the International Covenant for Civil and Political Rights (ICCPR) and ratified the African Charter on Human and Peoples' Rights (ACHPR) in 1986. The Bill of Rights shall be upheld by the Southern Sudan Constitutional and Supreme Courts and monitored by the Southern Sudan Human Rights Commission.

15 *Inter alia*, s/he: provides leadership; presides over the council of ministers; appoints judicial and constitutional office holders; initiates constitutional changes; summons, adjourns or prorogues the SSLA, and represents the people of South Sudan.

16 Sources of legislation include not only the ICSS but also 'customs and traditions of the people of Southern Sudan' and 'popular consensus of the people of Southern Sudan'. Bills are tabled by the president, the GoSS or a member of the SSLA. When the SSLA is not in session, the president of the GoSS can adopt a 'Provisional Order', which subsequently the SSLA can review or amend and present to the president as a legal act.

17 These 10 states are Eastern Equatoria, Western Equatoria, Central Equitoria, Upper Nile, Unity, Western Bahr al Gazal, Northern Bahr al Gazal, Lakes, Warrap, and Jonglei.

18 According to Article 173 of the ICSS, "Local government tiers shall consist of County, Payam and Boma in the rural areas, and of city, municipal and town councils in the urban areas."

serving as an institutional check against abuse of state power, arbitrary actions and corrupt practices.

Some institutions, such as the Human Rights Commission, potentially have strong powers[19] but for most others the primary legislation regulating their work has yet to be adopted.[20] If these bodies are to fulfil their tasks effectively they will need to be allocated scarce state resources to develop their capacities and reach. It is believed that this issue is holding up passage of the legislation.

AVOIDING A ONE-PARTY STATE

The SPLM remains the political 'big tent' where most of the various tribal-political forces coexist, often on the basis of co-option and sharing the spoils of government. Currently the party is registered in Khartoum and has both northern and southern branches.[21] Like many liberation movements elsewhere, it tends to dominate political life in the south. The main party in the north, the National Congress Party (NCP), also has a presence and a limited degree of electoral support in the south.

Some 20 other parties have a presence in the south, including the Sudan African National Union (SANU),[22] South Sudan Defence Force (SSDF),[23] United Democratic Front (UDF),[24] and United Democratic Sudan Forum (UDSF).[25] In one way or another, most are associated with the struggle for self-government in the south. The leaders of some (e.g., SANU and SSDF) are associated with the first civil war (1955–1972). Others, such as the UDSF, were founded during periods when the SPLM/A was split along political lines. A breakaway faction of the SPLM, the SPLM – Democratic Change (SPLM DC), was formed in June 2009 by Lam Akol.

Between its founding in 2005 and the April 2010 elections, the 170 seats of the SSLA were apportioned among the parties according to a power-sharing agreement enshrined in the CPA[26] as follows: 70% to the SPLM; 15% to the NCP; and 15% to other southern political parties.[27] In the 2010 elections, the SPLM won 94% of all mandates (159 seats). In part, this result stems from the election system, whereby most seats were contested according to the majoritarian first-past-the-post (FPTP) method, which tends to give stronger parties a greater percentage of seats than the percentage of votes they receive. The SPLM DC has four seats, making it the largest opposition bloc in the SSLA. According to the ICSS, this makes it the official leader of the opposition. The NCP won one seat and several non-party MPs were elected.

The election results reflect the SPLM's significant support due to the SPLM/A's role as the primary liberation movement. As most opposition parties supported the CPA and southern self-determination– the two overarching political issues of the peace process– it was hard for them to campaign effectively against the SPLM, particularly as some were also part of the pre-April 2010 government. However, other factors contributing to the opposition's relatively poor electoral performance include organisational weaknesses, lack of funds necessary to establish an effective party infrastructure across the south and, to some extent, a misunderstanding of the electoral system.[28]

Some political parties claim that the elections were marred by intimidation and a lack of a level playing field.[29] Up to a point, this view is supported by the Carter Center and the EU Election Observation Mission, with the latter commenting that, "In the south, competition was greater but a less controlled environment led to more confusion, clashes and intimidation."

President Kiir has emphasised two issues above all others that must be addressed if South Sudan is to avoid the risk of becoming 'a non-viable entity'.[30] Firstly, the south must build strong relations with the north. Secondly, it is essential to forge a shared national identity in the south.[31] Indeed, the persistence of and increasing number of violent conflicts in South Sudan, as well as a tendency to ignore dissenting views, represent real risks for the emerging state.

The ICSS enshrines the principle of decentralised government among its 10 component states. Ostensibly, decentralised

19 The Human Rights Commission has the power to launch investigations. It also can summon SSLA members and even the president of the GoSS.

20 The laws about the Human Rights and Anti-Corruption Commissions were promulgated in 2009. Ten draft bills to form state commissions and other bodies were presented to the president in January 2011 for adoption as Presidential Orders, although most were not signed.

21 Parties in Sudan are registered with the Political Parties Affairs Council (PPAC), which is headquartered in Khartoum.

22 SANU was founded in 1962 by southerners living in exile. The party has supported the SPLM on various issues, notably the implementation of the CPA, and is a strong advocate of 'unity in diversity' and federalism.

23 SSDF was founded by prominent south Sudanese exiles in 2001. While the party cooperates with the SPLM, it is also critical of the movement over its handling of the Abyei issue, for example.

24 UDF was founded in 2003. Its party leader, Peter Abdelrahman Sule, led the Imatong Liberation Front in Equatoria, which later joined with SPLM/A-United. While the UDF supported the CPA it was critical of the SPLM, alleging government corruption.

25 UDSF was founded in 1997 after the conclusion of the Khartoum Peace Agreement between the Government of the Sudan and the South Sudan Independence Movement/Army (SSIM/A). Initially, the UDSF was led by current Vice President Riek Machar, but he left the party in 2002 and SSIM forces joined with the SPLM/A.

26 For more detail about power-sharing arrangements in the CPA and the 2010 electoral framework, see: 'Assessment of the Electoral Framework, Final Report, Sudan', Democracy Reporting International (DRI), November 2009; http://www.democracy-reporting.org/files/sudan_091209_online.pdf.

27 These included the Union of Sudan African Parties (1 & 2), UDSF, SSDF, UDF and SANU.

28 In general, parties were more familiar with the first-past-the-post (FPTP) system. Many leading party figures decided to contest FPTP constituency seats when arguably they stood more chance of election on a party list.

29 Some candidates have since violently contested the election results; e.g., General Athor in Jonglei State, who together with his supporters took up arms after he lost the gubernatorial election.

30 Opening speech by President Kiir to the second session of the SSLA, Juba, 24 January 2011.

31 President Kiir also stated, "Creating and forging a common identity for all Southern Sudanese irrespective of ethnicity, region or creed is... imperative... [W]hat is critical is the maturity to recognize the fact that none of our communities can go it alone. ...It is now time to consolidate the unity of the people of Southern Sudan and cease from pointless manoeuvres and conspiracies that will take us nowhere" (*ibid*).

government appears a logical approach to the diverse population in South Sudan. However, decentralisation could reinforce sub-national identities, thus doing little to instil a sense of common purpose. The alternative– attempting to create a more cohesive national identity by exerting strong central authority over the regions – would be vigorously resisted by traditional authorities and local political elites. If applied too aggressively, such an approach easily could lead to institutionalised authoritarianism and further violent conflict.

In the short to medium term, the unity of the SPLM will be an important factor in achieving stability because for the time being, SPLM unity is seen as almost synonymous to that of South Sudan. The absence of a strong political opposition, as well as the relative underdevelopment of civil society and the media sectors, means that the political leadership in South Sudan must rise to the occasion of creating transparent, accountable and responsive government even though temptation may be great to wield its far-reaching powers in strong ways. The formation of a broad-based government in the period after 9 July will be an important step.

The SPLM also should consider ways to strengthen its internal democracy and intensify consultation with other political groups on important political issues. A good start was made in October 2010 when the president convened the All-Southern Sudanese Political Parties Conference (hereafter referred to as the 'All- Party Conference' or the APC), which was attended by over 20 parties, along with civil society and faith-based groups. Amongst other things, participants agreed that in the event of a vote for southern secession:

- The conference should be reconvened as the National Constitutional Conference (NCC) within one month from the announcement of the result of the referendum
- The NCC would deliberate and adopt a constitutional system for the new independent and sovereign state, and discuss and agree on the formation of a broad-based interim transitional government under President Kiir
- The NCC should decide on the length of the interim period necessary to carry out general elections for a constituent assembly

It also was agreed to offer an amnesty to all armed rebel groups and establish the Southern Sudan Leadership Consultative Forum composed of all party leaders. The final conference *communiqué* acknowledged that efforts were necessary to overcome divisions caused by the April 2010 electoral disputes.[32]

While an inclusive political approach is clearly needed, and is often articulated by President Kiir, many within the SPLM think that the movement ought to have the primary role in deciding future constitutional arrangements because of the SPLM's decisive electoral victory. Some appear fearful that attempts to reach political consensus would, in effect, give opposition parties veto power over the ongoing political reform process. In turn, this would risk jeopardizing the whole reform exercise and, more broadly, the prospect of independence itself.[33] This is especially the case among those SPLM supporters who regard some opposition parties as 'fifth columnists' working under instruction from Khartoum.

CONSTITUTIONAL REVIEW: AN OPPORTUNITY FOR POLITICAL ACCOMMODATION?

01. FROM AN INTERIM TO A TRANSITIONAL CONSTITUTION

Article 208(7) of the ICSS provides for continuity in the event of a vote in favour of secession:

> If the outcome of the referendum on self-determination favours secession, the Constitution shall remain in force as the Constitution of a sovereign and independent Southern Sudan and the parts, chapters, articles, sub-articles and schedules of the Constitution that provide for national institutions, representation, rights and obligations shall be deemed to have been duly repealed.

On 21 January 2011, by presidential decree President Kiir appointed the Southern Sudan Transitional Constitution Technical Committee[34] (hereafter the 'technical committee' or the 'committee') to bring into effect and operationalise Article 208(7).[35] The review is required to 'highlight the transitional nature of the Constitution until a permanent constitution is promulgated'.

Thus the constitutional review will be a two-stage process. Phase 1 will transform the ICSS, which is the fundamental law of a sub-national entity, into a transitional constitution of the newly independent state. Phase 2, which will occur after independence is officially declared, will transform the transitional constitution into a permanent new constitution of the independent state.

The technical committee must present its proposals to President Kiir by 25 April 2011, who in turn will present a draft transitional constitution to the SSLA. Under Article 206 of the ICSS, amending the constitution requires approval by two-thirds of all members of the SSLA, with deliberations beginning two months after draft amendments have been submitted. As the transitional constitution ought to be in place no later than 8 July

32 The final conference *communiqué* states that 'all efforts must be exerted to redress the political and military consequences of the contested elections results as these consequences can certainly affect the referendum process'. See: http://maggiefick.files.wordpress.com/2010/10/southern-sudan-political-parties-final-communique.pdf. Subsequent references to this text are drawn from this source.

33 Some in the SPLM point out that the resolutions of the APC constitute political agreements and, as such, are not legally binding.

34 Presidential Decree 002/2011.

35 Article 208(6) of the ICSS deals with the status of the constitution had the outcome of the referendum been a vote for unity rather than secession.

2011,[36] there will be little time for the committee to undertake widespread consultations with non-parliamentary political parties, civic groups or citizens before it is submitted to the SSLA.[37] Given that there is limited scope for wider consultations, the technical committee should focus only on the essential changes required for the transition period. Fundamental issues require broad canvassing of opinion before decisions are taken and hence should be left to the drafters of the permanent constitution.

The technical job of the committee is to delete where deemed appropriate all parts, chapters, articles, sub-articles and schedules of the ICSS that provide for or refer to national institutions, representation, rights and obligations and replace these with comparable South Sudanese national institutions, representation, rights and obligations. While the committee's work has been presented as a largely technical exercise, its terms of reference also include the following: "Evaluating and indentifying ICSS provisions that may need immediate modification or amendment to *ensure effective governance*"[38] (emphasis added). This is subjective and potentially allows the committee wide latitude in deciding which constitutional provisions fall within its scope of work.

The presidential decree that established the technical committee also tasks it to, "Develop and present to the President options for the process through which a *Permanent* Constitution shall be discussed and adopted taking into account the resolutions and recommendations of the All-Southern Sudanese Political Parties Conference of October 2010" (emphasis added). The APC resolved that it would reconvene as the National Constitution Review Committee (NCRC) to review the Interim Constitution of Southern Sudan 2005 and draft a permanent constitution for the new independent and sovereign state of South Sudan.[39] The understanding of the opposition parties after the October conference was that their representatives would be appointed to the NCRC, or at least consulted on its formation.

The presidential decree and the APC resolution are in contradiction on two counts. Firstly, according to the APC, the NCRC should be the body to transform the ICSS into a transitional constitution rather than the technical committee. Secondly, the general outline for the process of adopting the permanent constitution is already set out in the APC resolutions.

The decree provides that the committee is formed of 'highly skilled Southern Sudanese lawyers, scholars, and experts with knowledge of and experience relevant to constitutional process and legislative drafting'. While it must take 'due regard to the need for inclusiveness' (according to the presidential decree), critics have complained that SPLM government ministers were over-represented in the committee's initial membership[40] thereby rendering it a political rather than a technical body. Opposition parties resented the fact that the presidential decree did not respect the resolutions of the APC. They also resented their exclusion from the deliberation and drafting stages, especially given that the remit of the committee was broader than its presentation as a simple technical review.

In mid-February 2011, a meeting of the Political Parties Leadership Consultative Forum (PPLCF) was convened,[41] during which opposition parties agreed to set aside the APC resolution on the formation of the NCRC and accept the work of the technical committee.[42] For his part, President Kiir agreed to present the committee's proposals to the PPLCF before submission to the SSLA. He also agreed to broaden committee membership by adding 12 members, mainly from opposition parties.[43] However, to the dismay of the opposition, on 21 February President Kiir appointed a further 17 persons to the committee, thereby diluting the opposition's numerical strength. The opposition claimed that these persons are members of the SPLM. Subsequently, the committee became embroiled in a dispute over the voting arrangements as set out in the committee's rules of procedure and in early March, five committee members nominated by the opposition resigned in protest.[44]

02. THE POST-9 JULY TRANSITIONAL ARRANGEMENTS

The October 2010 APC resolved that a constitutional system for independent South Sudan would be deliberated and adopted. However, it is not entirely clear whether the APC will still have a role in deciding the modalities for adopting a permanent constitution. The APC also resolved that it would decide on the length of the transitional period. But it now appears that this decision will be taken by the technical committee. These issues will be clearer once the technical committee submits its proposals on 25 April 2011.

While the APC resolutions called for the formation of a broad-based transitional government, these did not set out the apportionment of portfolios among the parties nor was it agreed the levels of government to which the principle would apply. Opposition parties are calling for a smaller cabinet of ministers than at present and a 50-50 division of portfolios between

36 Article 206(2) of the ICSS provides that, "Any amendment affecting the provisions of the Comprehensive Peace Agreement shall be introduced only with the approval of both Parties signatory to the Comprehensive Peace Agreement." However, as the CPA will expire at midnight on 8 July 2011, and the transitional constitution is likely to have legal effect only from that time, it is not necessary to secure the approval of the Government of the Sudan for changes.

37 Interlocutors informed DRI that the committee was formed from a small circle of people with legal expertise rather than from a broad political spectrum. Many of these committee members were involved with drafting the ICSS.

38 Presidential Decree 002/2011.

39 Final *communiqué* of the APC, 19 October 2010.

40 Initially, the Committee was composed of 20 people: seven ministers, two presidential advisors, three representatives of state commissions, two members of parliament, five lawyers and a judge. In addition, it had four appointed advisors, most of whom were senior judges. Gabriel Changson, the only non-SPLM minister appointed to the committee, declined to take part in the work of the committee allegedly because of its lack of pluralism.

41 In order to follow up on and implement its resolutions, the October 2010 APC agreed to form the Southern Sudan Leadership Consultative Forum, which is composed of all the chairpersons or representatives of all southern Sudan political parties.

42 For more detail on the sequence of events and disagreement between the SPLM and the opposition parties, see: 'Carter Center Urges Inclusive Transition Process in Southern Sudan', Carter Center Statement, 17 March 2011; http://www.cartercenter.org/news/pr/sudan-031711.html.

43 See Presidential Decree 08/2011.

44 Carter Center (*ibid*).

them and the SPLM at national, state and county levels. They have requested that this arrangement be set out in the transitional constitution.

The duration of the transitional period is controversial. According to opposition parties, it should not last more than 21 months (after 9 July), 'after which general elections shall be held to elect the Constituent Assembly that will promulgate the Permanent Constitution'.[45] Some in the SPLM believe that the transitional period should be five years starting from the April 2010 elections. It appears that all sides are using the length of the transitional period as synonymous with the length of the mandate of the institutions elected in 2010. While linked, it is justifiable to argue that the length of mandate of the institutions elected in 2010 (5 years) and the length of the transitional period (from 9 July until a permanent constitution is adopted) are in fact two separate issues.

While Article 208(7) provides for the legal continuity of the ICSS in the case of secession, some opposition forces contend that fresh elections are necessary after independence is officially declared. This view is based on the following rationale: 1) the current institutions were only elected for the interim period; 2) the ICSS would no longer have legal force; and 3) SSLA members were not elected as deputies for an independent state, but as representatives for a semi-autonomous entity.

According to Article 102 of the ICSS, the 'tenure of the office of the *elected President* of the Government of Southern Sudan shall be five years, commencing from the date of assumption of office, and the same President may be re-elected for one more term only' (emphasis added). Thus it seems clear that President Kiir's mandate legally runs until April 2015. Although the opposition parties agreed at the APC that Salva Kiir would become the president of an independent South Sudan for the transitional period, as already noted, they do not agree with the SPLM on the length of this period. The ICSS is somewhat ambiguous about the SSLA tenure after secession.[46] However, taking multiple factors into account, and in reference to Article 208(7), with the possible exception of state governors, it appears that no elections are legally required until 2015.

However, the ICSS does not address the issue of the status of the 96 southerners elected to the Sudan National Assembly, whose mandates will expire upon southern independence. Some in the SPLM have suggested that they be incorporated into an expanded SSLA, with others proposing that the technical committee should make recommendations on this point.[47]

45 'Position of South Sudan Political Parties on the Transition', *Sudan Tribune*, 13 March 2011. See: http://www.sudantribune.com/Position-of-South-Sudan-Political,38265.

46 Article 65 provides that, "The term of the Southern Sudan Legislative Assembly shall be five years commencing from the date of its first sitting." However, it omits the term 'elected' which is only used when referring to the president. There was a specific need for the ICSS drafters to stipulate the term 'elected president': unlike deputies in the SSLA, the president is restricted to two elected terms in office. The opposition's argument that the current SSLA is an interim body overlooks Article 208(5), which states that, "All the interim provisions contained in the various parts and chapters of this Constitution shall cease to have effect after the holding of the general elections..." Under the ICSS, the state legislative assemblies also have a five year mandate. However, neither the Interim National Constitution of Sudan nor the ICSS specify the length of mandate for state governors.

47 As already indicated, such proposals have no basis in law.

Unsurprisingly, opposition parties do not agree. Essentially, just as for the composition of the government and the length of the transition period, this is a political problem requiring a political solution rather than a technical fix. As such, the issue should be decided by the president and the SSLA, after consultation with all political groups, but based on the existing provisions of the applicable legislation.

03. A CONSTITUENT ASSEMBLY: HOW TO ENSURE INCLUSIVITY?

The APC resolved that 'the transitional government shall be charged, *inter alia*, with the duty to conduct... *general elections for a constituent assembly that shall promulgate the permanent constitution*' (emphasis added).

If a constituent assembly (CA) is established to draft the permanent constitution, its composition and manner of appointment will be of crucial importance. Such a body requires an inclusive approach. One option under discussion is to transform the SSLA into a CA. While the SSLA has democratic legitimacy by virtue of being elected, and will already have had a role in turning the ICSS into the transitional constitution, it was not elected as a constituent assembly *per se* and, perhaps more problematically, is dominated by one political force. This raises a question about whether it could adequately represent all southern Sudanese interests.

While the APC foresees the election of a CA, given the clear need for inclusivity when drafting the constitution of a state and the significant organisational challenges of holding an election, the GoSS should give serious consideration to appointing a CA rather than selecting its members through an election. If an appointed CA is formed, it should incorporate representatives of non-parliamentary parties, experts, civic groups and traditional tribal leaders. It could also include SSLA members, but their participation in the CA should not interfere with the adoption of much-needed legislation.

The CA and the SSLA could function as separate, but parallel entities as it would be inappropriate to give a legislative mandate to a body with unelected members. Similarly, if the CA is in part or in full an unelected body, adopting the permanent constitution should be done only after a popular referendum is held.

04. THE PERMANENT CONSTITUTION: TIME TO REFLECT. TIME TO CONSULT

Unlike the adoption of the transitional constitution, there are no serious time constraints for the promulgation of the permanent constitution. In a diverse, polarised and armed society such as South Sudan, the overarching aim of the permanent constitution should be to design structures and institutions that can both reduce the risk of future violent conflicts and constructively address ongoing conflicts.

While some provisions could be improved, the ICSS offers a solid starting point for the drafters of the permanent constitution. As a first step, it would be worthwhile to assess the implementation and working of the ICSS. However, South Sudan

may well decide to restructure its state institutions. In terms of institutional architecture, the major issues likely to be deliberated include:

- Whether South Sudan will be a federal or a unitary state, and what powers will be vested in the states
- The respective powers of the executive and the legislative branches of government; i.e., whether South Sudan will have a presidential or parliamentary form of government
- The structure of parliament; i.e., whether it will be unicameral or bicameral

As previously noted, South Sudan is already committed to decentralisation. The permanent constitution, primary legislation and administrative arrangements should enable this concept to be more fully implemented. Effective decentralisation will be important to ensure citizens' representation and access to services. However, it also will require significant financial resources to develop the capacities of state level institutions. The permanent constitution should clearly set out the division of powers between state-level institutions and the GoSS, as this currently lacks clarity. The 10 state constitutions also will need to be reviewed to ensure compatibility with the permanent constitution.

Instituting a system with checks and balances between the executive, legislature and judiciary could help avoid creating an overly-dominant presidential office, if indeed a presidential system is retained. In classical presidential systems, as in the United States, the power of the president is checked by a strong legislature and judiciary. In the context of South Sudan, the president can rely on a political party that dominates the legislature, making it less likely that presidential prerogatives will be checked. Semi-presidential or parliamentary systems may be more promising in creating different poles of power.

Establishing a bicameral parliament with an upper chamber composed of representatives of South Sudan's diverse tribal and national groups could be useful for creating a sense of inclusion. On the negative side, such an arrangement would reinforce the concept of tribal affiliation. Nonetheless, the current realities of South Sudan indicate that tribes are powerful social organisations and consequently need to be brought into the state-building effort. The question of selection of tribal representatives would need to be discussed. In order to maintain a privilege for electoral legitimacy, a tribal upper house of parliament should not have decisive legislative powers, but it could be entitled to slow down the legislative process; e.g., by reviewing laws, or requesting review and re-voting by the lower house of parliament.[48]

48 A House of Nationalities was first proposed in 2002.

LEGISLATION: MUCH TO DO

From 2006 to early 2010, the SSLA adopted some 35 laws. *Inter alia*, these have dealt with: legal procedures; appropriations; financial, fiscal and commerce issues; development and local government; formation of state councils and commissions; security bodies; and specific issues, such as children and land issues. Some acts are still awaiting promulgation. Numerous other bills also have been drafted but have not yet been passed.

The SSLA's legislative workload in the period after independence will be heavy and it may be necessary to set priorities. In terms of legislation related to multiparty democracy, in addition to the acts already under preparation and consideration, the authorities should draft and adopt a political parties' act and an elections act as soon as possible.

01. POLITICAL PARTIES ACT

Strong and effective political parties are essential in any democratic state. It has been suggested that the 2007 Sudan Political Parties Act (PPA) could be applied as an interim measure to register parties in South Sudan after independence.[49] However, this approach may not provide a workable system for the following reasons:

- After the declaration of South Sudan independence, the Political Parties Affairs Council (PPAC)[50] will only have jurisdiction in the Republic of the Sudan. South Sudan cannot influence any decision of the PPAC regarding registration of existing parties. As such, it is conceivable that at some point the PPAC or the Sudanese courts could decide to suspend or dissolve any party that is not operating in the Republic of the Sudan.
- It is probable that new parties will emerge in South Sudan and it is essential that an effective mechanism is in place in the short term to register them as legal entities.
- As the PPAC would appear to have no jurisdiction over the functioning of parties in South Sudan after 9 July 2011, there is no means to enforce party compliance with their legal obligations and duties.
- South Sudan should have a regulatory framework in place that meets the specific needs of the new state and its parties; e.g., requirements for a minimum number of members, how and whether parties can register at national and/or state level, reasonable proscriptions on party activity and possible state funding.

The political party legislation will need to provide for a political parties commissioner (or similar) to oversee the registration and functioning of parties, although this role could possibly be given to an independent election commission.

49 DRI was informed by a key GoSS minister involved in technical committee work that South Sudan will apply this law during the transitional period.

50 Since 2007, the PPAC decides on party registration issues. All Sudanese parties, including those in the south, are registered in the Republic of the Sudan.

In order to avoid the emergence of political organisations based on tribal affiliation, some in South Sudan have suggested that parties should be founded as national organisations with registered members in a majority of states. Potentially, this is at odds with the need to ensure effective representation for all of South Sudan's groups because it could prevent the emergence of parties seeking to represent the population of a single state. For example, a political group may have strong support in one locality, and thus be able to achieve representation in a given SLA, but have an insufficient number of supporters to achieve representation in the SSLA, particularly in a winner-takes-all majoritarian electoral system. Ultimately, South Sudan may have to decide whether the imperative to avoid political fragmentation is more important than the imperative to ensure adequate representation.

02. ELECTIONS

The last elections in South Sudan (i.e., GoSS president, SSLA, state governors and state legislative assemblies) were held in April 2010, alongside elections to national Sudanese institutions and states in the north. All of these elections were conducted under the National Election Act (NEA), adopted in July 2008. While there is no agreement between the SPLM and the opposition about when the next elections are due, a number of by-elections are already required. It is also conceivable that an election could be necessary at short notice; e.g., in the event of the resignation, death or impeachment of the president.

As arrangements for adopting the new constitution are not yet finalised, it is possible that elections for a constituent assembly or a referendum on adoption of the permanent constitution could be required. The government should draft and adopt electoral legislation in the near future, prioritising an act dealing with the formation of election management body. Provisions regarding the electoral system, polling procedures, candidate registration, election campaigning and so on, could be set out in other acts adopted thereafter.

03. ELECTION MANAGEMENT

The April 2010 elections were administered by the National Elections Commission (NEC), with limited responsibilities delegated to the Southern Sudan High Elections Committee (SSHEC) and the State High Committees in South Sudan (SHC). All high committees were responsible to the NEC for administering and supervising the elections. The South Sudan Referendum Act of December 2009 provided for the establishment of the Southern Sudan Referendum Commission (SSRC), which was mandated to organise the poll in cooperation with the Government of Sudan and the Government of South Sudan. Membership of the SSRC expires at the end of the interim period.

As the mandate of the SHC derives from the NEA, which will cease to be applicable in South Sudan from 9 July, and because the mandate of the SSRC expires at the end of the interim period, in the near future South Sudan will not have an established body to manage elections.

As such, the required election legislation could be split into different laws, with the immediate priority being an act to establish an independent electoral authority. However, the SSLA should adopt legislation sufficiently well in advance of an electoral event in order to enable the electoral management body to conduct constituency delimitation and voter registration in an efficient manner. This approach would enable the body to organise itself properly and undertake appropriate training before it is called upon to administer an election.

In adopting new legislation, the legislature should carefully consider options to ensure that the election management body is:

- Granted full independence from the executive; e.g., financial independence, the ability to adopt legally-binding regulations subject to judicial review, and the authority to appoint its own staff
- Composed of members who enjoy the confidence of all election stakeholders and is politically impartial
- Able to function in a fully transparent manner and required to provide information to contestants and stakeholders

The election management body should not be given an unrealistic mandate, nor should it be overburdened with tasks (e.g., enforcement of media, campaign and campaign finance provisions, or be given quasi-judicial functions) unless it receives the resources and training required to fulfil these tasks effectively.

The decision on which body has competency to administer elections at state and local levels may be dependent on wider decisions about subsidiarity. If states are given competence over state and local elections, SLAs may be required to adopt state-specific legislation. They also may possibly be required to make decisions about their electoral system. In this scenario, enabling the capacity of these bodies to organise elections would constitute a major challenge.

04. THE ELECTORAL SYSTEM

The National Assembly of the Republic of Sudan, the SSLA and the SLAs are composed of deputies, based on a mixed parallel electoral system as follows:

- 60% elected from single-member election districts using the first-past-the-post system (FPTP)
- 25% elected from closed party lists reserved for women candidates, with seats allocated by proportional representation (PR) and lists needing at least 4% of the valid votes to participate in the allocation of mandates (hereafter referred to as the 'women's quota list')
- 15% from closed party lists, with seats allocated by PR, subject to the same 4% threshold (hereafter referred to as the 'general list')

Due to the electoral system, voters in southern Sudan were presented with 12 different ballot papers.[51] This level of

51 One each for the president of Sudan, the president of the GoSS and state governors and three each for the national assembly, the SSLA and the SLAs.

complexity is inappropriate in a country with a very high illiteracy level.[52]

The election system also affected the representativeness of the elected bodies. According to the EU Election Observation Mission, the election system 'favours the biggest parties and provides little space for representation of the diversity of Sudanese society and culture'.[53] While on paper, 40% of the mandates are distributed under PR systems, the number of mandates available for allocation to the SSLA is far too small to achieve meaningful proportionality for two reasons. Firstly, the PR system is divided into two components (women's quota and general lists). Secondly, each state is allocated a specific and separate number of seats for the women's quota and general lists, and parties register their lists at state rather than national level.

In practice, in almost all states, to receive a mandate a party required much more than 4% of the vote ('natural threshold'). Indeed, one state was allocated only one general list mandate. In the four states allocated two seats, to be guaranteed a mandate, a candidate list required as much as 33.34% of the vote. In states with three seats, it required in excess of 25%.

The table below shows the number of seats per state in South Sudan.[54]

State	Constituency Seats	Women's Seats (PR)	Candidate List (PR)
Eastern Equatoria	11	5	3
Upper Nile	12	5	3
Unity	7	3	2
Western Bahr al Gazal	4	1	1
Lakes	8	4	2
Warrap	12	4	3
Central Equatoria	14	6	3
Northern Bahr al Gazal	9	4	2
Jonglei	17	8	4
Western Equatoria	8	3	2
Total	**102**	**43**	**25**

Serious consideration should be given to the choice of an electoral system because it can significantly influence the representativeness of the elected bodies. Given the recent experience with an overly complicated system, there is also a need to simplify arrangements.

Employing one type of election system would meet the second objective (simplifying the system), but adopting a winner-takes-all majoritarian system could serve to reinforce the SPLM's hold on political power – possibly to the exclusion of all others. It also could entrench the role of local 'big men' and probably reduce women's representation.

Conversely, a system based only on proportional representation, which addresses the first objective (representativeness), could cause parties to have too much influence over candidate selection thereby creating tensions and possible conflict.[55] For these reasons a simplified version of the mixed parallel system may be appropriate.[56]

Prior to the adoption of the NEA in 2008, there was discussion of employing a 50-50 split between constituency and list seats with 50% of the latter allocated to women candidates. If applied to future elections in South Sudan, this system would increase the electoral chances of smaller parties, particularly if instead of having a single candidate list at the national level separate lists were registered in each of the 10 states, as was the case in the April 2010 election. In such a system, in most states a party would likely require some 7–12% of the vote in any given state to receive one SSLA mandate.[57] Using a single national list also would increase the chances of parties with a general level of support across the country to secure representation. However, this system could be less effective in ensuring representation for groups that have a concentrated support base in only one or two states.

Two additional concerns also should be addressed in discussions about the type of electoral system that will be adopted. First, ensuring the proper registration and representation of electors from migrating pastoralist communities is likely to present a particular challenge, although this issue has been adequately addressed in other countries with similar communities.[58] Second, a further challenge relates to ensuring representation for internally displaced persons.

52 If the same system is used in the future, even without voting for Sudanese institutions, electors would be presented with eight ballots if elections were held simultaneously.

53 EU EOM Final Report, http://www.eueom.eu/files/pressreleases/english/final-report-eu-eom-sudan-2010_en.pdf.

54 According to http://www.goss.org.za/docs/SSLA.pdf.

55 Further elaboration of this point is beyond the scope of the current discussion.

56 The mixed parallel system is one where the two component parts (PR and FPTP) are not 'linked' to determine a party's entitlement to mandates; i.e., they are separate elections (sometimes referred to as 'parallel system'). In contrast, the mixed 'compensatory' system (sometimes called the 'mixed member proportional system') that is used in Germany, for example, links the two parts of the election in an attempt to achieve 'overall proportionality' in the composition of parliament. The compensatory system is complicated and has a flaw that can be exploited to nullify the mandate allocation formula, as occurred in Albania in 2001 and 2005 and in Lesotho in 2007, provoking serious political disputes in both countries.

57 The exception is Western Bahr al Gazal, where a party would still require a maximum of 25% to be guaranteed a seat.

58 For example, Ethiopia has set aside 22 constituencies for non-territorial representation; i.e., to groups with a distinct identity spread over different constituencies or who migrate on a season basis.

05. THE CENSUS

Depending on the choice of electoral system, there may be a need to establish election constituencies. DRI interlocutors indicated that the delimitation of constituencies would only occur after a census was conducted. It is anticipated that the census also may be used to enumerate the size of South Sudan's different tribal and national groups. This data would enable the legislature to design a system that gives reasonable representation to all groups. It also could inform decisions about the composition of a possible upper house of parliament.

06. THE MEDIA

A 2009 study that mapped the media in South Sudan found 'a great news and information void in South Sudan'.[59] The role of radio is crucial for access to information due to high rates of illiteracy and the absence of even a small range of printed media outside urban centres. Government ministries are making an effort to ensure information is available to the public on their activities and on issues requiring public awareness. While this approach is laudable, it cannot serve as a substitute for an independent media capable of reporting on and scrutinising the work of state bodies at all levels of government.

First drafted over five years ago, media bills have yet to be adopted as laws.[60] New drafts of three bills (i.e., the Right to Information Bill, the Media Authority Bill and the Public Service Broadcast Bill), have been finalised with input from specialist civil society organisations. It is hoped that these acts will establish the Office of the Information Commissioner, the Media and Communications Commission, a public licensing regulator, as well as set out the rights and duties of a public service broadcaster.

59 'Mapping the Void', the Consortium Promoting Freedom of Expression and Civil Society Involvement on Developing of Democratic Media Legislation in Sudan, August 2009. See: http://www.article19.org/pdfs/publications/sudan-mapping-the-void.pdf.

60 DRI was informed that previous drafts were eventually rejected because of concerns raised by local activists and media professionals that they placed restrictions on free speech.

RECOMMENDATIONS

The Transitional Constitution

1. The time limitation for adoption of the transitional constitution appears to preclude the possibility of wide popular consultations. Therefore, the technical committee ought to focus only on the essential changes required for the transition period.
2. The Committee ought to avoid proposing changes of a political nature; e.g., the composition of the transitional government and the power sharing arrangements as this decision appears to be a presidential prerogative.
3. Serious consideration ought to be given to incorporating into the constitution a general provision that establishes
4. an independent election management body. It is impossible to know with certainty when the next elections or a referendum will be required. Additional details should be set out in primary legislation and, at a later date, in the permanent constitution.

A Constituent Assembly

1. The transitional constitution ought to set out the modalities for adopting the permanent constitution, in particular for the formation and composition of a constituent assembly (or other body charged with this mandate), as well as the length of the transition period.
2. While the APC foresees the election of a constituent assembly, given the clear need for inclusivity, consultation and expertise when drafting the constitution of a state, along with the significant organisational challenges of holding an election, the GoSS should give serious consideration to appointing a representative CA rather than selecting its members through an election. A lack of electoral legitimacy in the beginning could be balanced by adoption of the proposed constitution by referendum.
3. If a constituent assembly is formed that incorporates the SSLA in part or in full, the SSLA should retain its legislative functions because many laws will require adoption during the transition period.

SSLA Mandates

1. The provision in the ICSS that an elected member of the SSLA who changes the political or party affiliation upon which ticket s/he was elected loses her/his membership in the SSLA ought to be abrogated in the permanent constitution because the current arrangement makes deputies more accountable to their party than their electors.

Human Rights

1. After independence, South Sudan ought to ratify international human rights treaties and instruments and ideally incorporate them into its permanent constitution.

Political Parties

1. The government ought to give serious consideration to adopting a political party act in the near future because the current legislation will cease to apply after 9 July 2011. This puts in question the legal arrangements for existing parties and unless this issue is addressed it could prevent new political organisations from forming.
2. Parties ought to be permitted to register at the level of an individual state or states, as well as at national level.
3. To improve competition among parties, it may be necessary to grant political parties a reasonable level of state funding.

Election Management

1. The government ought to draft and adopt electoral legislation in the near future, prioritising an act dealing with the formation of election management body. Provisions regarding the electoral system, polling procedures, candidate registration, election campaigning and so on, could be set out in other acts adopted thereafter.
2. The legislature ought to ensure that this body is independent, impartial and transparent, and that it is composed of persons who garner the respect and confidence of all stakeholders.
3. The election management body ought not to be given an overly broad mandate, and it should receive the resources and training required to effectively fulfil all of its assigned tasks.

The Election System

1. Serious consideration ought to be given to the choice of an electoral system because it can significantly influence the representativeness of the legislative assemblies. A simplified version of the 'mixed' parallel system, used in 2010, may be appropriate.
2. The electoral system for legislative bodies ought not to be set out in either the transitional or the permanent constitution. Doing so could cause unnecessary complications at some future point; e.g., if there is a consensus to alter the system.[61]

Constituency Delimitation

1. When delineating constituencies, the legislature ought to respect international obligations relating to the equality of the vote, in particular trying to ensure that the number of citizens in each constituency is broadly equal.

The Media

1. Although public funds are scarce, the existence of a free and vibrant media is essential to democracy. As such, the adoption of legislation and the establishment of independent state bodies to regulate and protect the independence of the media ought to be one of the government's top priorities.

61 For example, the new constitution may require a referendum to be held on adopting subsequent amendments that would entail a considerable organisational effort and financial cost.

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Democracy Reporting International

Friedrichstraße 180
10117 Berlin / Germany
T / +49 30 25 92 19 39-5
F / +49 30 25 92 19 39-7
info@democracy-reporting.org
www.democracy-reporting.org