

THE REQUIREMENTS FOR A PERMANENT, STABLE AND IMPLEMENTABLE CONSTITUTION FOR SOUTH SUDAN

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Abstract

South Sudan accessed statehood when it proclaimed its independence on 9 July 2011. The pre-independence period was tumultuous; mostly characterized by the struggle over resources accession and end to the marginalization of the south. Within South Sudan itself independence came in the background of multiple difficulties and problems; be they political, institutional, structural and legal. During the period South Sudan was still part of Sudan, the country has never had a stable constitution. The Interim constitution of Southern Sudan dictated by the Comprehensive Peace Agreement signed between the South and Sudan in January 2005 was drafted in a political environment made of few individuals appointed by the political wing of the Sudanese People Liberation Movement without any wide public involvement. It was followed by the Transitional Constitution of the Republic of South Sudan, 2011. Its' drafting was similar to the former one, except that it was written by a legislature of an independent South Sudan. Article 202(6) of the Transitional Constitution of 2011 provides for "nation-wide public information programme and civic education on constitutional issues." By Presidential Decree No 03/2012, the President of the Government of South Sudan appointed permanent and part-time members of the National Constitutional Review Commission. The commission has a challenging task of drafting a constitution that reflects the aspirations of all the people of South Sudan. Those aspirations are many, including the issue of nationality, border disputes between Sudan and South Sudan, human rights, liberties and fundamental freedom; but most importantly the mechanism and institutions to enforce those rights. South Sudan is inhabited by a multiplicity of ethnic groups each having its own customs and customary law. There have also been many returnees who fled the pre-independence violence, and who did not fight during the struggle. There is a mixture of laws that applied to Sudan and which have become obsolete for South Sudan. South Sudan is a State that still to become a nation. The state is largely dominated by former combatants from the rank of the Sudanese Liberation Army (SPLM). It is an extremely poor country where services and infrastructures are scarce. The least however, South Sudan suffers enormously from manpower capable of taking the country forward. The constitution, in addition to come from the people it is intended to serve, must set priorities and how they will be met. It must be an inclusive instrument to avoid the repeat of past violence. It must be implementable. While normatively, yet after hard labour such a constitution is possible; it will however meet lot of impediments in its application and sustainability. Whereas international assistance in terms of expertise in matters beyond the constitutional process is needed; yet the ideas must come from the citizen. The people must commit to live in one shared country. The current leadership must facilitate the process rather than taking chance of it to keep hold on power or believing that the country owes them more than anyone else.

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1. INTRODUCTION

South Sudan accessed statehood when it proclaimed its independence on 9 July 2011. The pre-independence period was tumultuous, mostly characterized by the marginalization of Southern Sudan for quite a long time. It was followed by a two periods' civil war.² Independence came in the background of multiple difficulties and problems; be they political, institutional, structural and legal. The Interim constitution (IC) of Southern Sudan dictated by the Comprehensive Peace Agreement (CPA) signed between the Sudanese People Liberation Movement (SPLM) and Sudan on 9 January 2005 was drafted in a political context made of few individuals appointed by political figures without far reaching citizens' involvement and ownership. It was followed by the Transitional Constitution (TC) of the Republic of South Sudan, 2011. Its' drafting was similar to the former one, except that it was written by a legislature of an independent South Sudan; yet still SPLM- dominated. Article 202(6) of the TC provides for 'nation-wide public information programme and civic education on constitutional issues.'

By Presidential Decree No 03/2012, the President of the Government of South Sudan appointed permanent and part-time members of the National Constitutional Review Commission (NCRC). The commission has a challenging task of drafting a constitution that reflects the aspirations of all the people of South Sudan. Those aspirations are many, principally the issue of nationality, border disputes between Sudan and South Sudan, human rights, preservation of cultural rights, liberties and fundamental freedom; mechanisms and institutions to enforce those rights. South Sudan is inhabited by diverse ethnic groups each having its own customs and mores. There is a mixture of laws that applied to Sudan and which have become obsolete for South Sudan.

From a review of the literature in constitution making best practices, factual reports on South Sudan and a short visit in Juba; this paper argues that South Sudan is a State that still to become a nation. The state is largely dominated by former combatants from the rank of the Sudanese Liberation Army (SPLM). It is an extremely poor country where services and infrastructures are scarce. The country suffers enormously from manpower capable of taking the country forward. The constitution, in addition to come from the people it is intended to serve, must set priorities and how they will be met. It must be an inclusive instrument in its making process and content to avoid the repeat of past mistakes that brought a lot of violence. It must be implementable. While normatively, yet after hard labour such a constitution is possible; it will however meet lot of impediments in its application and sustainability. Whereas international assistance in terms of expertise in matters beyond the constitutional process is needed; the ideas must come from the citizenry. The people must commit to live in one shared country. The current leadership must facilitate the process rather than taking chance of it to keep hold on power or believing that the country owes them more than to anyone else.

This article develops in four sections. Section One briefly discusses the history of South Sudan, from a marginalized entity to an independent and sovereign state and its current internal challenges. Section two highlights the loopholes in the current South Sudanese constitutional and legal order that should enlighten

² The first war lasted 17 years from 1955 to 1972. The second war lasted 22 years, from 1983 to 2005.

the process of making a people-oriented constitution for a stable nation. It also examines the contents, general requirements and priorities of the permanent constitution. Section three looks at the role the SPLM) /A leadership and its' close allies may play in the process and implementation of the constitution. It discusses the better way the NCRC may discharge its' functions. The article concludes by suggesting an inclusive and participatory process in which national aspirations³ lead rather than short-term interests of leading factions and other sectarian interested groups.

2. From a marginal entity to an independent State with its internal struggles

Sudan has been in turmoil since its independence from Britain in 1956 even before then. According to D'Agoût, the instability was basically due to, among others, the geographic vastness, irreconcilable histories of the people, contentious ethnic and religious relations and antagonistic polity.⁴ These factors were combined with the exploitation of the periphery (like the South) by the centre (Khartoum), internal colonialism, or marginalization, the poverty of the many and the enormous wealth of a few who were invariably linked to the state.⁵ These are reasons that explain the continuous unrest in Sudan even today. It is not the aim of this article to revisit the history of Sudan before or after independence. The focus is to trace the relevant part of Sudan's post-independence history which shaped and facilitated the secession of South Sudan by an overwhelming vote in a referendum held on 11 January 2011.

The pre-independence Sudan has had a big impact on subsequent developments in South Sudan. However, it is from the independence in 1956 that signs of a potential disjunction appeared. The period from 1956 to 1972 was marked by the Anyanya war which ended by the signing of Addis Ababa Peace Agreement between the central government and the rebels in February 1972. That war started as a mutiny of army officers from the south who resisted the central government's attempt to force Islamic and Arabic cultures on the south. They also claimed the broken promise of autonomy through a federal system of government. The Addis Ababa Accords brokered a sort of regional autonomy from 1972 to 1983.⁶ The accord contained provision for lasting peace, political stability, economic development and social progress.⁷

The Agreement could not hold as the government in Khartoum which promoted islamisation and arabisation of the South by introducing Sharia Law in addition to marginalization of the south in terms of power and provision of services, triggered a second war from 1983 to 2005. The war was fought by the SPLA and its political wing the SPLM. Initially however, the SPLM/A did not fought for secession. In the early 1980s, SPLM/A was formed of various underground organizations, that included the National Action Movement (NAM), the Movement for Total Liberation of Southern Sudan (MTLSS), Juwama African People's Organization (JAPO), Council for the Unity of Southern Sudan (CUSS), and South Sudan Liberation Front (SSLF). These organizations combined efforts with armed struggles under separate commands in Bor, Pibor and Ayod, especially towards 1983.⁸ The SPLM envisaged finding solutions to problems of national groups

³ According to the CPA, the basic aspirations are peace, stability and development

⁴ D'Agoût M 'Understanding the lethargy of Sudan's periphery-originated insurgencies' (2013) 24 *Small Wars and Insurgencies* 57 – 83, at 57

⁵ Idem 59

⁶ See Mohamed IAW 'Hyenas and Lambs: the implications of impacts of South Sudan Secession' Social Sciences Research Network, electronic copy available at <http://www.ssrn.com/abstract=1748608>, (accessed 23 July 2013)

⁷ Scott P, 'The Sudan People's Liberation Movement (SPLM) and liberation army'(1985) 12 *Review of African Political Economy*, 69 – 82, at 69

⁸ The Sudan People Liberation Movement, Historical Background, available at <http://www.SPLMToday.com>, Official website of the Sudan Peoples' Liberation Movement, (accessed 5 August 2013)

and religions in Sudan in the context of a united, democratic and secular state.⁹ The SPLM was a movement which belonged to the whole Sudanese and which fought tirelessly for their Unity, Peace and Progress.¹⁰ It had a national agenda though started in the south. The “problem of the south” was just one particular facet of many problems Sudan faced as a country. SPLM fought for a New Sudan, as opposed to the Old Sudan.¹¹ It is obvious that a movement made up of many factions bears within it differences with different visions of what the eventual victory might become; some might have liked an independent South Sudan while others aimed at a New Sudan. However, the concept of the New Sudan had no racial, ethnic or separatist ideas. It was rather a framework and a national project for building a true and sustainable Citizenship-State capable of accommodating the multiple diversities of Sudanese society.¹² Whereas separation has prevailed after the referendum, which in fact reflected the aspiration of the people in the South, there is always that idea of citizenship of the new nation behind the scene. With the signing of the CPA, the Khartoum government agreed to a power-sharing government for six years, to be followed by a referendum on self-determination for the south. However, fighting on both sides continued throughout the peace negotiation.

It is therefore fair to state that South Sudan¹³ is a state born out of an ‘extended process of war and peace that were both exceedingly tortured and persistently complex.’¹⁴ The country is moreover still in a post-conflict situation. The wounds of the war are yet to heal. The dynamics of the first and second war went beyond the civil war because inside South Sudan, there were many fighting factions. The search for autonomy, self-determination of an independent state; remain nevertheless, unifying factors.¹⁵ Can this signal the desire to form a nation by leaving aside the sectarian interests of groups? This is one of the many issues a constitution for South Sudan should look at.

Independent South Sudan inherited many unresolved questions including nationality, competition over resources, extreme poverty, lack of basic services and insufficient development infrastructures, and what Daase terms predatory or fractured leadership, corruption, group grievances.¹⁶ The war was too costly in terms of duration; more than 2.5 million of lives lost and displacement exceeded 5 million, inside South Sudan, in neighbouring countries and abroad. Despite the high price, many of the underlying causes for the

⁹ *idem*

¹⁰ Garang, 1984, cited by Scott P ‘The Sudan People’s Liberation Movement (SPLM) and liberation army’ (1985) 12 *Review of African Political Economy* 69 – 82 at 69

¹¹ *Id.*

¹² *Id.*

¹³ South Sudan is a territorial entity of 619,745 sq km, ranking 42nd in the world; see <http://www.godgossip.org/articulo/pdf/id/209>; (accessed 31 July 2013). According to the CIA World Fact Book, South Sudan borders Central African Republic for 989 km, Democratic Republic of the Congo for 639 km, Ethiopia for 934 km, Kenya for 232 km, Sudan for 2,184 km, and Uganda 435 km. It is made of ten States that include Central Equatoria, Eastern Equatoria, Jonglei, Lakes, Northern Bahr el Ghazal, Unity, Upper Nile, Warrap, Western Bahr el Ghazal, Western Equatoria

¹⁴ *Idem*, 2

¹⁵ The CPA in its’ preamble provides for the right of the people of Southern Sudan to self-determination and seeks to make unity. Moreover the CPC constitutes a foundation for a State built upon the values of justice, democracy, good governance, respect for fundamental human rights and freedoms of the individual, mutual understanding and tolerance of diversity within the realities of Sudan.

¹⁶ Daase C ‘International Arbitration: a new mechanism to settle intra-state territorial disputes between states and secessionist movements? The divorce of Sudan and South Sudan and the Abyei question’ *Comparative Research in Law & Political Economy*, York University, Paper No. 28/2011. For a comprehensive analysis of the progress, challenges and prospects in South Sudan, see Africa Growth Initiatives at Brookings *South Sudan: One year after independence: opportunities and obstacles for Africa’s newest country* (2012)

conflict were not resolved. Religious, ethnic and regional divisions were all highlighted and exploited during the war and have continued to exhibit a large influence over South Sudan's politics.¹⁷

Like any other post-conflict situation, South Sudan faces the challenge of healing residual hatred and deep internal divisions. It needs an effective and fully functioning government that all citizens consider to be credible and legitimate. The state has the greatest responsibility to establish mechanisms for internal and external stability, and be able to provide public safety and security.¹⁸ It must be able and willing to deliver health and education, and build transport and communication infrastructures. According to the World Bank, South Sudan annual infrastructure funding gap amounts to \$879 million per year.¹⁹ Poverty is widespread. The few resources available are unequally distributed. Malnutrition and disease, a crumbling infrastructure unable to provide basic services, endemic corruption, and a considerable amount of crimes prevail.²⁰ Under-five and infant mortality rate is the highest in the world. About 90% of the population live on less than one dollar a day. International organizations and NGOs remain heavily involved in meeting humanitarian needs and leading recovery and development activities.²¹ South Sudanese economy largely depends on oil resource, limited domestic production, and high reliance on imports, subsistence farming and livestock-rearing.²² There are however opportunities for investment in agriculture, physical and social infrastructures; mining and related²³, and many others. Independence brought about the loss of citizenship for some Southerners, who were chased from their employment in Sudan.²⁴ Illiteracy is high; basic, high and tertiary education is still a luxury commodity. This is another sector the constitution needs to tackle with necessary care and consideration.

Tribal conflicts that followed the signing of the CPA have limited the creation of an integrated nation.²⁵ The inter-tribal violence between the Lou Nuer, Murle, and Dinka in Jonglei State are the deadliest and most complex of the many violent conflicts in South Sudan.²⁶ These conflicts are basically clashes over territorial control and access to grazing lands for cattle, which is the major source of wealth. They date back for centuries, have not abated, but have become more lethal nowadays.²⁷ Likewise, regular and sustained fighting subsists between Sudan and South Sudan over the disputed region of Abyei, with both sides claiming provocation by the other.²⁸ Conflicts are exacerbated by economic disparities among ethnic groups. Where dominant tribes fight to maintain their control on scarce resources, especially land and water; others fight to have their fair share thereon. Jauhari observes that 'the inevitable outcome, either way, has been

¹⁷ Messner J. J. (ed.), *The Fund for Peace: Failed States Index* (2012) 31/32, available at <http://www.fundforpeace.org/global/library/cfsir1210-failedstatesindex2012-06p.pdf> (accessed 10 August 2013)

¹⁸ The United Nations, *Rule of Law Indicators: Implementation Guide and Project Tools* (2011) First Edition 13, available at http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf (accessed 10 August 2013)

¹⁹ Ranganathan R & Briceno-Garmendia C M *South Sudan's Infrastructure: a continental perspective* (2011) Policy Research Working paper 5814 available at <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-5814> (accessed 10 August 2013)

²⁰ The United Nations, *Rule of Law Indicators*: (2011) 13

²¹ International Legal Assistance Consortium (ILAC), Report, *Pre-Assessment Mission: South Sudan, 6 – 13 December (2011)* 6

²² Mohamed I A W & Akongdit A A O *Political Stability and Economic Development in the New Nation South Sudan*, Electronic copy available at <http://ssrn.com/abstract=2131701>, (accessed 15 July 2013)

²³ Government of Southern Sudan, *The Investment Promotion Act 2009*, First Schedule, The Investment Priority Areas, 20 January 2010

²⁴ ILAC (2011) 7

²⁵ Jauhari A 'South Sudan: a fledging nation' (2010) 1 *International Journal of Business and Social Sciences* 167 – 171, at 167

²⁶ Human Security Baseline Assessment (HSBA), "My neighbour, my enemy", Sudan Issue Brief (2012) 21 *Small Arms Survey* 1

²⁷ Idem at 5

²⁸ ILAC (2011) 7

violence and struggle. In more than 100 tribal conflicts in the year 2009 alone, close to 400,000 people have been displaced and hundred others have been killed.²⁹

Beyond the inter-and intra-ethnic fighting, there are other various militia and proxy forces that hamper the reform and development of a cohesive national security force.³⁰ The state has not the monopoly of use of force. Restoring such monopoly and capacitating a new and united armed force in an unstable environment presents obvious difficulties.³¹ The security forces were born from various backgrounds. The South Sudan Police, the Prisons and Wildlife Services were created pursuant to the CPA in 2005-2006. The National Security Service is a partition from the Khartoum-controlled National Intelligence and Security Service in 2011. And finally the SPLA has never been a coherent guerrilla force.³² Building a professional national army, police and other security details from the rebels out of the bush under the orders of the national government proves to be a hard work. While the current government battles with the insecure and unstable environment, mindsets of individuals and conflicting priorities, it also has to develop an organized, well-structured army and police; decide on their strengths in terms of numbers and composition, functioning budget, personnel capacity and accountability³³ and provide them with adequate equipment.

Internal and external security remains a central prerequisite for any kind of reforms. Indeed no reforms can take place in war zones or areas marred with tribal violence. Threats to external security are still mainly the unresolved negotiations over oil transit fees through Sudan, the failure to demarcate the North-South border, especially in Abyei, and an insurrection by the SPLM-North in Sudan's South Kordofan and Blue Nile States.³⁴ Sudan is likely to continue causing disturbance and insecurity in border areas by direct air and ground attacks as well as using proxy forces to provoke SPLM's military reaction.³⁵ Legislating on these various matters requires clear and unequivocal provisions in the national constitution.

The predominance of the Dinka tribe in the SPLM\A during the years of war has been extended even after the signing of the CPA and stretches as far as in the institutions and administration of the independent state. The tribe is overwhelmingly represented in all states' institutions and administration. This facilitates easy access to power and resources. The situation creates anger and resentment of other under or non-represented tribes, which is a source of ongoing conflict.³⁶ Within the party-army-state, there are many managerial problems that include accountability, logistics, lack of mobility, and poor tactical communications.³⁷ The struggle for self-determination and a successful accession to statehood have not benefited all. Ethnic engagements aimed at bringing everyone on board through a system of fair representation in all South Sudanese political discourse is key to building a united and strong nation. The SPLM must be able to work constructively, equitably and fairly with opposition parties while managing ethnic, regional and political diversity. As a still-ruling party, it has the greater 'task of creating an inclusive and representative administration among different tribes with a history of bitter enmity.'³⁸ The nation cannot be built on the predominance of one ethnic group or over few of them even though they may be the majority. Not

²⁹ Jauhari A (2010) 168

³⁰ Snowden J S (HSBA), "Work in Progress: Security Force Development in South Sudan through February 2012" (2012) 21 *Small Arms Survey* 6

³¹ The Fund for Peace: Failed States Index (2012) 32

³² *Idem* at 7

³³ *Idem* at 7

³⁴ *Idem* at 9

³⁵ *Idem* at 9

³⁶ Jauhari A (2010) 168

³⁷ The Fund for Peace: Failed States Index (2012) 32

³⁸ *Idem* at 32

addressing this matter in constitutional grassroots consultations may give reason to non-represented tribes or clans to legitimately continue fighting until their voices are heard. The constitution must set the guiding principles to avoid resort to conflict.

It may be arguable whether the Government has determinatively begun the challenge of accommodating other groups in terms of power sharing and fair distribution of resources. If South Sudan fails to make these efforts, it will fester the dynamics of power and governance that lead to the two long armed conflicts. Briefly, the constitution should address in its spirit, letter and practice issues of ‘voice and participation, exclusion, power differentials, low social capital, low legitimacy and impunity of leaders, and unchallenged legitimization of violence.’³⁹ A proper and appropriate constitutional and legal order is, once again, key to success; yet South Sudan faces a legal challenge as well.

3. Understanding the current constitutional and legal order and formulating the requirements, contents and priorities of a permanent constitution

Understanding the constitutional and legal regime in today South Sudan is one of the most challenging matters still to be resolved in the drafting of the new constitution. The rule of law is a mixture of the laws inherited from Sudan, the legal order established during the years of war, the legal dispensation under the CPA and quite few laws that align to the Interim and Transitional constitution in addition to customary law.

The IC, for example, provided that all then-existing laws in Sudan would remain in force in South Sudan, unless abrogated.⁴⁰ Moreover, it created the Southern Sudan Legislative Assembly with powers to adopt laws for South Sudan. Where no new legislation was available, the laws of Sudan remained applicable.⁴¹ As already seen, the TC was adopted without any popular consultation and debate on its contents and structures. The TC was a duplicate of the IC. The ILAC observed that ‘the Transitional Constitution included the principle that, until there was specific legislation passed by the new legislature, laws enacted by the Southern Sudan Legislative Assembly or (if that body had not acted) the laws of Sudan remained in effect.’⁴² All this mixture apply in a country in which very few understand the most simplified legal order.

There is no consistent, uniform and harmonious legal system in the country. The legal regime depends on the topic to be addressed. The governing law may be the law of Sudan, a law passed by the now-defunct Southern Sudan Legislative Assembly, or a new law passed by the National Assembly.⁴³ Some areas are not regulated, like family law, gender and domestic violence, inheritance, divorce, adultery, ownership of property and even marriage⁴⁴; in which case customary law governs. Customary Law, though preferred by the majority of South Sudanese, contains “discriminatory facets”. The government and the aid community efforts to eliminate them are opposed by the people who stick to their traditions.⁴⁵ Amending the

³⁹ Reeve R *Peace and Conflict Assessment of South Sudan 2012, Understanding Conflict, Building Peace* (2012) International Alert 7

⁴⁰ ILAC (2011) 8

⁴¹ *Idem* at 8

⁴² *Idem* at 8

⁴³ *Idem* at 9

⁴⁴ Human Security Baseline Assessment, Women’s Security and the Law in South Sudan, available at <http://www.smallarmssurveysudan.org> (accessed 13 August 2013)

⁴⁵ *Idem*

unconstitutional party of Customary Law requires people who are familiar with both statutory and customary law. That capacity is still lacking.⁴⁶

Liberal professions still follow the law of Sudan, even though detached from the realities of the new state. There exist many gaps, inconsistencies, poor draftsmanship and incompatibility with other laws in most of the law drafted by the Legislative Assembly⁴⁷, including the TC. Written laws apply in the urban areas mainly in Juba; while in the remote villages, customary law and traditional justice prevail. Article 5 of the TC provides five sources of legislation, being the constitution itself, written law, customs and traditions of the people; will of the people; and any other relevant source. This is quite puzzling even in the legal fraternity. One may just imagine what the situation looks like where we have more than sixty different ethnic groups; each with its own mores and customs in addition to contradictions, inconsistencies, and deplete laws from Sudan or within South Sudan itself.

South Sudan people know better than anyone else what they need and how they want it. They know whom, among the many South Sudanese leaders can better serve them. They only need to design how their endeavour and aspirations can be translated in a permanent constitution. According to Biong⁴⁸, the constitutional review process would lay a foundation that will enable South Sudanese people to avoid the state and nation to fail. The law of the land must be a product in which everyone has contributed in various capacities not one that is imposed by those who are powerful. It must be the result of a fair consultation and widely open discussion from knowledgeable minds.

A state fails if its'

public institutions are unable to deliver positive political goods such as security, rule of law and order, basic services and political space, to citizens on a scale likely to undermine the legitimacy and the existence of the state itself. Some indicators for state weaknesses include disharmony between communities, inability to control territory and its borders, a growth of criminal violence and corrupt institutions.⁴⁹

The nation fails when it is no longer convincing to many communities as it does not provide the foundation for its acceptance. Such a nation does not provide consensus, affiliation and sense of belonging. Leading figures and factions take chances to wage war as the only solution in the name of national self-defense with increased desire to secede.⁵⁰

From the analysis of the prevailing situation in South Sudan, both the ingredient for state and nation's failure are present. Some South Sudanese argue that their struggle was aimed at defending their customs, languages, religions, and communal properties against Khartoum's attempt of Arabicisation, Islamisation, resource extraction, and land alienation.⁵¹ Constitution-makers should not only concentrate on state building, but they should also consider nation-building. In this respect, Biong is of the view that state-building consists in establishing and strengthening public institutions that deliver political goods with powers and rules that are regarded by the citizenry as legitimate. Nation-building requires a 'process of collective identity formation as the basis for legitimizing the power of public institutions. [...] Nation-building is a process that is context

⁴⁶ Id.

⁴⁷ ILAC (2011) 9

⁴⁸ Deng L B 'What is expected from South Sudan Constitutional Review Commission?' Part I *Sudan Tribune* (2013) available at (accessed 8 August 2013)

⁴⁹ Idem

⁵⁰ Idem

⁵¹ Leonardi C and cie *Local justice in Southern Sudan* (2010) United States Institute for Peace, Peace Work No. 66 at 11

specific and is different from state building and it cannot be simply achieved through democracy alone.⁵² From these two considerations, the diagnosis of what is available may give an indication of the kind of a prognosis constitution South Sudan needs.

Reading from the preamble of the TC, the Referendum for separation from Sudan was the overall unifying factor in South Sudan. The legislative Assembly also acknowledges the ‘long and heroic struggle for justice, freedom, equality, and dignity.’⁵³ Another sign of unity is the commitment to proceed to a national healing and the building of trust and confidence in the society through dialogue.⁵⁴ Moreover, the TC contains a determination for a ‘united, peaceful and prosperous society based on justice, equality, respect for human rights and the rule of law.’⁵⁵ The TC commits to decentralized multi-party system of governance and a peaceful change of power as well as gender equality of rights and duties. The Juba Declaration of January 2006 and the All - Southern Sudanese Political parties Conference of 2010 are other optimistic factors for unity, and possibly nationhood.⁵⁶ Are these aspirations all that is needed to build up a nation through a constitutional process and how far are they put into action?

The everyday life in South Sudan tells a different story. Frahm finds that in the absence of a clear-cut common enemy and fighting that enemy, though Sudan still poses a threat, South Sudan is still to design a ‘common identity that goes beyond competing loyalties to ethnicities, tribes and family.’⁵⁷ Young expresses the same view that fighting the common enemy ‘is not the expression of a deeply felt and fully developed nationalism. The war of resistance has not significantly weakened parochial ethnic and regional loyalties among the people.’⁵⁸ Building a nation requires more than just shared resistance to oppression. The SPLM/A and other stakeholders in the South have not done enough ‘to develop a robust Southern Sudanese national consciousness and identity.’⁵⁹ Within the SPLM/A itself, there subsist many internal tensions some of which are historical, regional, ethnic or personal.⁶⁰ Without firstly resolving these tensions, there is no prospect of being able to democratically engage with other parties. Peace will require greater attention to reconciliation initiatives, nation-building, and the greater inclusion of women and young people in the process and institutions born out of it. For stability and peace to hold, it is urgently needed to downsize the excessively dominance of the ruling party; deal decisively with the culture of violence, reinforce the sense of a shared nationhood, uplift the institutional cohesion and accountability, get the soldiers under control and demobilize some, disarm civilians, ease access to justice to all, create alternative livelihood beyond pastoralism, pay more attention to basic education and literacy, fill the gap between those in and around the power and others.⁶¹ These should be long-term projects.

⁵² Deng L B (2013), op. cit.

⁵³ The Transitional Constitution of the Republic of South Sudan, 2011

⁵⁴ Idem

⁵⁵ Id.

⁵⁶ Juba Declaration on Unity and Integration between the Sudan People’s Liberation Army (SPLA) And the South Sudan Defence Forces (SSDF), 8 January 2006; see also Mohamed I A W & Akongdit A A O *Political Stability and Economic Development in the New Nation South Sudan*, Electronic copy available at <http://ssrn.com/abstract=2131701> (accessed 15 July 2013)

⁵⁷ Frahm O ‘Defining the Nation: National Identity in South Sudanese Media Discourse’ (2012) 1 *Africa Spectrum* 21 – 49 at 21

⁵⁸ Young J ‘Sudan: liberation movements, regional armies, ethnic militias & peace’ (2003) 30 *Review of African Political Economy* 423 – 434 at 423 - 424

⁵⁹ Idem

⁶⁰ Reeve *Peace and Conflict Assessment of South Sudan 2012, Understanding Conflict, Building Peace* (2012) International Alert 7

⁶¹ Reeve R *Peace and Conflict Assessment of South Sudan 2012, Understanding Conflict, Building Peace* (2012) 8

South Sudan state can claim its recognition by the international community. Statehood is not enough factors to constitute a nation. Section one highlighted how ethnicity, factionalism and associated conflicts are nowadays still divisive factors; and how little, if anything, has been done to downplay their negative consequences.

The South Sudan Development plan 2011 – 2013 of August 2011⁶² is titled ‘Realising freedom, equality, justice, peace and prosperity for all.’ It contains a section on governance with an emphasis on institutional strengthening, and improving transparency and accountability. It focuses on rural development and infrastructure improvement; investing in the people; deepening peace and improving security. These are, one may so believe, the priorities that the new constitution should address in the first instance. All will depend on available revenue and its proper allocation coupled with the willingness of the current leadership to open up political space for everyone. The question is to know the ultimate beneficiary of these improvements. They are not aimed at the top leadership; but at the people, the citizenry. So, the citizenry has a say in the process as well as in the product of constitution making. Selassie argues that ‘the process and product are dialectically linked: the ends prescribe the means and the means impinge on the ends.’⁶³ Public involvement gives a sense of ownership of the constitution and allows them to air their views on a range of critical issues that affect their lives. So, South Sudan should not be exception in the current trend.

Ebrahim suggests factors that are more relevant to South Sudan. Its’ constitution should represent a discovery of nationhood by reflecting the soul of the nation.⁶⁴ The core contents and functions of such a constitution should portray the people’s history, fears, concerns, aspirations, vision, and indeed, the soul of that nation.⁶⁵ Though the constitution reflects the will of the majority, it must equally take into account the fears and concerns of minorities. It must provide a common framework within which people of diverse or even opposed views, beliefs, and cultures can interact without having to resort to force of arms.⁶⁶ The challenge that faces the NCRC is to go down to the people, with various and diverging views and come out with a reflective constitutional text easily implementable. The words of wisdom in this respect are again borrowed from Ebrahim who proposes that only the express will of all through representativity and not just majority rule enable the constitution and the government to justly claim authority.⁶⁷

There are common guidelines for the making of any constitution everywhere in the world which need specification and particularisation for South Sudan. A good constitution must ‘frame the institutions of government and determine who exercises the power and authority of the state, how they do so and for what purpose. But constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle.’⁶⁸ There is no doubt that power is vested in the people of South Sudan. The constitution will be that kind of social contract in which the people will distribute that power and determine who and to what extent it will be exercised. The

⁶² Government of the Republic of South Sudan, *South Sudan Development Plan 2011 – 2013: Realising freedom, equality, peace and prosperity for all* (2012)

⁶³ Selassie B H ‘Constitution Making in Eritrea: a process-driven approach’ (2013)58 available at http://www.usip.org/sites/default/files/Framing%20the%20State/Chapter3_Framing.pdf (accessed 10 August 2013)

⁶⁴ Ebrahim H The South African Constitution: Birth certificate of a nation, a paper presented at Constitution making forum, a Government of Sudan consultation, 24 – 25 May 2011, Khartoum, Sudan 2

⁶⁵ Idem

⁶⁶ Ebrahim H The South African Constitution (2011) 2

⁶⁷ Idem 3

⁶⁸ Böckenförde M Hedling N and Wahiu W *A practical Guide to Constitution building: International Institute for Democracy and Electoral Assistance* (International IDEA) (2011) Foreword by Cassam Uteem iv

people will also undertake to abide by the constitution it would have moulded by giving it primacy over any other laws or practices. Looking at the problems that South Sudan faces, it is crucial that the people itself, and not the only leadership of the people, find means and ways of resolving those problems without resorting to violence.

As Böckenförde and his peers put it, the ‘people demand involvement in deciding on the terms of the constitution and insist upon processes of legitimizing constitutions that are inclusive and democratic.’⁶⁹ Legitimizing a constitution and anything contained in it is a three layers exercise: it is a legal, political and moral issue. As a legal matter, legitimacy is gained ‘through conformity to relevant legal rules, principles and norms.’⁷⁰ Politically, legitimacy is ‘reflected in the national ownership or sovereign independence of the people who adopt constitutions, a collective that may be composed of distinct plural groups.’⁷¹ The State must be governed in the manner that citizens accept and support. Let’s insist and emphasize that States and government ‘that lack legitimacy devote more resources to maintaining their rule and less to effective governance, which reduces support and makes them vulnerable to overthrow or collapse. Within the ruling elite, doubts about legitimacy undermine self-esteem, which creates splits that accelerate this process.’⁷²

Finally, moral legitimacy requires ‘a close relationship between the constitution and the shared values that underlie the moral basis of the state; in addition, the constitution may aim at goals such as societal reconciliation, forgiveness after prolonged victimization, social inclusion and moral rejuvenation of the state.’⁷³ South Sudanese people aspire to all of these.

The South Sudan constitution must not be another way of giving power to authorities who will use it for their own interest or the interest of a particular group or individuals over the interests of others.⁷⁴ The assumption should rather be that authorities in a state like South Sudan will be inclined to abuse power. Through the constitutional process, the citizen must be able to regulate the distribution of that power to enable authorities to work effectively, yet in the limit of what has been given to them.

As the constitution remains higher law and that it specifies the institutions of governance, defines the rights, duties and relationships of state and citizens and sets the tone or establish the identity of the nation-state; its process must be accompanied by massive efforts to involve the public before, during and after the text is finalized.⁷⁵ Though few participated in the draft of the IC and TC of South Sudan, it is still opportune for the NCRC to re-discuss the principles upon which those instruments were drafted, listen, add or subtract those principles that the citizenry are comfortable with or not. As Hart argues, the NCRC may give high consideration to ‘democratic deliberation; civic education and media campaigns; the creation and guarantee of channels of communication, right down to local discussion forums; elections for constitution-making assemblies; open drafting committees aspiring to transparency of decision making; and approval by various

⁶⁹ Böckenförde M Hedling N and Wahiu W *A practical Guide to Constitution building: International Institute for Democracy and Electoral Assistance* (International IDEA) (2011) Foreword by Cassam Uteem iv

⁷⁰ Böckenförde M Hedling N and Wahiu W *A practical Guide to Constitution building* (2011) 2

⁷¹ Idem

⁷² Gilley B ‘The meaning and measure of state legitimacy: Results for 72 countries’ (2006) 45 *European Journal of political Research* 499 – 525 at 499

⁷³ Böckenförde M Hedling N and Wahiu W *A practical Guide to Constitution building* (2011) 2

⁷⁴ Tyler T R *Why People Obey the Law* (1990) New Haven and London

⁷⁵ Hart V *Democratic Constitution making* (2003) United States Institute for Peace Special Report 2

combinations of representative legislatures, courts, and referendums.⁷⁶ Considering the circumstances upon which the IC and TC were drafted, the NCRC should not be bound by the provisions of Section 202 and 203 of the TC, but rather take the permanent constitution as a matter of public interest. This means that rather than giving deference to a National Constitutional Conference, the permanent constitution should be adopted by referendum. This is the only viable way to curb South Sudanese conflicts over resources, rights, power, identities, endemic past injustices and deep mistrust.⁷⁷ For a durable consensus and a democratic process, principles and values should take roots from the grassroots. Such a process would also ensure local ownership and responsible citizenship.

4. The SPLM/A leadership and the NCRC roles in shaping and facilitating the constitutional review process

The current South Sudanese political and administrative leadership has a great responsibility to facilitate the constitutional review process. Playing a facilitation role does not mean imposing or owning the process. Some roles are of a generic nature and stem from the importance and contents of a constitution. Others are specific to South Sudan in its current situation as described above. For over two decades of war, no one man or group could have won the war in South Sudan. No one man or group, or even an entire ethnic group could have voted for secession and independent South Sudan. Self-determination has been a collective action. This means that the constitutional review process must also not be marred by the dominance of the SPLM/A or other powerful groups looking at only their short-term interests. The entire population must be educated on its' role in the formulation of the new constitution, informed on how democracy and constitutional supremacy works in general to give constitution legitimacy. The people may be educated and sensitized through seminars, workshops and public discussions. The people should know what a national constitution is and why it is needed, what it contains and why it is important.⁷⁸

The national government, the states' administrative structures, counties, payams; customary entities have a role to play in the process. The consultation must include everyone and not only be limited to the elite or principal power brokers, but all classes of society. The civil society is key to this end. To be successful, the process should be open, transparent and accessible at all stages. Issues of language, cultural sensitivities even illiteracy of the majority of South Sudanese should be considered in spreading the message.

The constitutional process is not a panacea of high politics and closed doors negotiations among elites and experts.⁷⁹ It is true that experts will be needed to give technical advice but not to decide. The government may hire external experts to ensure that the permanent constitution conforms to the format of any other constitution; but even then, it will have to consider the specific circumstances of South Sudan. People with dominating indigenous cultures need an understanding of how the culture mixes with ideas of individual human rights.

The constitution making process in South Sudan is more an exercise of trust-building than anything else. As Brant and cie. rightly suggest, such trust cannot be imposed, imported or bought. It must emerge slowly and

⁷⁶ Idem

⁷⁷ Brant M Cottrell J Ghai Y and Regan A *Constitution-making and Reform: Options for the process* (2011) Interpeace, Preface by Scott M W iv

⁷⁸ Justice Odoki B J 'The nature and purpose of a national constitution' a paper presented at the KUMI/SOROTI RC Development Seminar held at Soroti on 20th February 1991 Uganda Constitutional Commission at 3

⁷⁹ Hart V *Democratic Constitution making* (2003) 5

sometimes reluctantly. It must then be encouraged by those who can better grasp its importance and who have means to do so. Yet, they must go about it disinterestedly. In a nutshell,

constitution-making, if it is to be a participatory and deliberative process, must be designed to allow for time to build trust. Recognizing that the process of overcoming mistrust and deep divisions can be a difficult one, we must empower local actors to establish independent institutions, which can continue to address root causes of conflict and promote peace over the long term.⁸⁰

The NCRC, the national government administrative and political structures are not making a constitution for their own and present interests, they are participating in a process for a durable and credible instrument. They have to listen to the people who are the ultimate beneficiaries of the constitution. Those involved in the process either by designing, implementing, and supporting it should not become so focused on arriving quickly at the destination that they overlook the importance of the journey. Bringing people together, building trust, and developing ownership takes time, but it is always time well spent. Constitution-making should be viewed in terms of the process rather than simply the result.⁸¹The good text must come from the people in a process that was known and understood. This will facilitate the application, protection and defence of the constitution.⁸²

Involving the people in the process is so important as it enables them to reflect their ideals, values, interests and aspirations. For the people to respect and safeguard the constitution, they must feel that it is their own brain child. Justice Odoki emphasizes that if, through a sense of involvement and attachment, the people identifies with the constitution; it will command their loyalty, respect, obedience and confidence.⁸³ Involvement confers legitimacy and acceptability. There should be no quick fix in constitution-making process⁸⁴, be it by manipulative tactics or distortion. Constitution is about the people's lives, freedoms and liberties.

The peasantry will be better served if it comprehends the major organs of government, their functions and powers and relationship, the rights and duties of the citizens. The constitution is a "power map" and "character of government". It is a powerful legal instrument that abides everyone.⁸⁵ The constitution is the foundation of any state governed by law. A constitutional order is gainful to all, from health provisions to fight against crimes and corruption; ensuring security of people and their properties, fighting poverty, facilitating and enhancing businesses and international cooperation and assistance.⁸⁶Raising popular constitutional awareness and civic education are not futile exercises. They serve an informed participation and easy implementation of the constitution.⁸⁷

People need to know who, in the national or states' governance is entrusted with which tasks and to what extent he exercises his powers. The system of checks and balances among the three branches of government, namely the Legislative, the Executive and the Judiciary, facilitates the oversight of each organ by the others

⁸⁰ Brant M Cottrell J Ghai Y and Regan A *Constitution-making and Reform: Options for the process* (2011) v

⁸¹ Brant M Cottrell J Ghai Y and Regan A *Constitution-making and Reform: Options for the process* (2011) v

⁸² Democracy Reporting International *Lessons Learned From Constitution-making: processes with broad based public participation* (2011) Briefing Paper No. 20 available at <http://www.democracy-reporting.org> (accessed 12 August 2013 4

⁸³ The nature and purpose of a national constitution, a paper presented at the KUMI/SOROTI RC Development Seminar held at Soroti on 20th February 1991 by The Hon. Mr. Justice B.J. Odoki, Chairman, Uganda Constitutional Commission at 2

⁸⁴ *Idem* 2

⁸⁵ *Idem* 3 - 4

⁸⁶ Agrast M D and cie *The World Justice project Rule of Law Index 2012 – 2013* (2013) 1

⁸⁷ Democracy Reporting International *Lessons Learned From Constitution-making: processes with broad based public participation* (2011) Briefing Paper No. 20 available at <http://www.democracy-reporting.org> (accessed 12 August 2013 4

in an orderly, not anarchic or dictatorial manner.⁸⁸ A branch of government has powers that are specific but that are not overwhelmingly distributed so that they are dominant or uncontrolled.

South Sudan comes from a long-term conflicting situation needs a constitution that embodies arrangements aimed at peaceful transition between socio-political groups with diverging interests. The constitution will bind all the parts of the country and the people together giving them a sense of belonging and national consciousness, and thus consolidating national unity.⁸⁹ It is therefore the ultimate responsibility of the current polity and leadership to instil in the masses the idea that change is possible and social conflicts can be resolved without resorting to violence or armed conflicts. This can only be achieved 'by following accepted democratic principles for acquisition and relinquishment of state power as laid down in the constitution.'⁹⁰ If the people understand that the constitution is the better guarantor of their basic rights and freedoms and that it provides the mechanisms for their enforcement by an independent judiciary and other institutions⁹¹, they will be encouraged and confident and come forward with ideas they need to be included. Examples of people driven – constitutions include South Africa⁹², Uganda⁹³, Eritrea⁹⁴, Zimbabwe⁹⁵, and particularly Kenya.⁹⁶ The NCRC may not only consider the successes, but also the errors committed in the drafting process of these constitutions.

The SPLM/A wields enormous influence in all sector of state's life, including the constitutional process. Young has observed a dichotomy between the SPLM/A's official commitment to a Sudan-wide project. However, the same party-army experiences major difficulties in promoting nation-building as all politics are shaped by tribe.⁹⁷ SPLM/A cannot, reasonably, ignore the fact that the country is home to a number of ethnic tribes which have been in constant conflict with each other over time. To help build up a socially cohesive society; the movement, starting from within its own ranks, must take the lead in consolidating the basic democratic institutions and political consensus. In order for South Sudan to emerge as a stable and a strong nation, concerted efforts to unite the country and provide legitimacy to its governance is highly needed.⁹⁸ D'Agoût highlights the reasons why civil wars erupt: they evolve around the control of territory and the resources within it; contest over the centers of power in the form of capital city, administrative headquarters, or financial centres.⁹⁹ Civil wars are the ultimate manifestation of the collective grievance due to inequality, political oppression, and competition over scarce resources. Failures by the state to respect the social contract and provide inclusive political and governance institutions, equitable development and distribution of resources to all groups in the society are seen as primary drivers of violent conflict. It is also argued that civil wars are used as a vehicle for amplifying political objectives such as a call for autonomy,

⁸⁸ Odoki B J (1991) 4

⁸⁹ Odoki B J (1991) 5

⁹⁰ Idem

⁹¹ Id.

⁹² South African Constitution 1996, available at <http://www.sahistory.org.za/drafting-and-acceptance-constitution> (accessed 15 August 2013)

⁹³ Wapakhabulo J F 'Uganda's experience in Constitution Making' available at <http://www.commonlii.org/ke/other/KECKRC/2001/33.html> (accessed 15 August 2013)

⁹⁴ Selassie B H 'Constitution Making in Eritrea: a process-driven approach' (2013)58 available at http://www.usip.org/sites/default/files/Framing%20the%20State/Chapter3_Framing.pdf (accessed 10 August 2013)

⁹⁵ Dzinesa A G 'Zimbabwe's Constitutional Reform Process: Challenge and Prospects' (2012) Institute for Justice and reconciliation

⁹⁶ Constitution of Kenya, available at http://en.wikipedia.org/wiki/Constitution_of_Kenya#Drafting_process_for_the_2010_Constitution (accessed 15 August 2013)

⁹⁷ Young J 'Sudan: liberation movements, regional armies, ethnic militias & peace' (2003) 425

⁹⁸ Jauhari A (2010)168

⁹⁹ D'Agoût M 'Understanding the lethargy of Sudan's periphery-originated insurgencies' (2013) 24 *Small Wars and Insurgencies* 57 – 83 at 59

control of the state apparatus, or formation of a new sovereign state.¹⁰⁰ The SPLM/A should not be blinded by short-term interests or claim more than anyone else, especially as far as a permanent constitution is at stake.

LeRiche and Arnold have realized that the SPLM/A tends to claim ownership in achieving liberation: thus its source of legitimacy and hence control versus calls for greater participation.¹⁰¹ Yet, ‘it is striking how little the stated objectives of the SPLM/A appear to reflect the views of the mass of the population, but also the views of its own membership.’¹⁰² It is incontestable that SPLM/A played a greater role in the liberation, and that it became the first and visible actor even after independence. Should it remain the only player on the scene? There is a wrong assumption in the liberation movement discourse that ‘some groups invariably have a higher level of political consciousness and greater commitment to armed struggle than other equally oppressed groups. The issue is not that some ethnic groups have a greater willingness to take up arms, but whether their leadership ensures others are not excluded from the political and military hierarchy.’¹⁰³

The problem within the SPLM/A has proved not to be that one tribe has assumed a dominant position, but that it has done little to fully embrace other tribes, thereby leaving it exposed to factionalism and strife. This has created many conflicts within and outside the SPLM.¹⁰⁴ The new constitution must correct these mistakes of the past. Young gives the words of wisdom acknowledging that SPLM still play a stabilizing role, but at the same time it must seriously and unequivocally consider accommodating others. The party-army must engender a greater sense of participation within more useful political forms, such as the assembly to avoid that the masses feel that they are stranded ‘on the other side of the river’; which may impede the country’s prospects.¹⁰⁵

Again, constructing a nation through a constitutional process should be distinguished from the greedy desire of some like re-election to office, enjoyment of resources, retention of privileges, and immunity from criminal prosecution.¹⁰⁶ In South Sudan where clearly there are strong conflicts of interest between short- and long-term requirements, the NCRC may have to adopt a ‘veil of ignorance’ and turn a blind eye to short-term interests. The commission cannot achieve a politically altruistic outcome.¹⁰⁷

The road is however still long and tortuous. Article 202 (1) and (2) of the Transitional Constitution (TC) provides that the President of the Republic after consultation with political parties, civil society and other stakeholders will appoint a chairperson, a deputy chairperson and members of NCRC. Criteria for the commissioners will be gender, political, social and regional diversity of South Sudan in recognition of the need for inclusiveness, transparency and equitable participation. On 9 January 2012, the President of the Republic of South Sudan, General Salva Kiir Mayardit issued Decree No.03/2012 appointing full-time and part-time members of the NCRC. The decree does not contain the terms of reference as contemplated in subsection (3) of the TC that “the terms of reference of the Commission, its procedures shall be detailed out in the instrument of the appointment.” The NCRC is tasked with “conducting a nation-wide public

¹⁰⁰ Idem 59

¹⁰¹ LeRiche M & Arnold M *South Sudan: from Revolution to Independence* (2012) Hurst & Company London 213

¹⁰² Young J “Sudan: liberation movements, regional armies, ethnic militias & peace” (2003) 424

¹⁰³ Idem 425

¹⁰⁴ Idem 425

¹⁰⁵ Idem 424

¹⁰⁶ Böckenförde M Hedling N and Wahiu W *A practical Guide to Constitution building* (2011) 4

¹⁰⁷ Idem

information sharing and civic education programs on constitutional issues, soliciting experts' assistance, collect views and suggestions from all relevant stakeholders, and review"¹⁰⁸ the TC.

The 45 members¹⁰⁹ of the NCRC are distributed in a manner that 9 members are appointed on a full-time basis and 36 members on part-time. Professor Akolda Ma'an Tier is the Chairperson and Dr. William Othwon Awer is the Deputy Chairperson. The SPLM has 4 full-time members and 22 part-time members; NDF has one full-time member and no part-time member; UDF one full-time member and one part-time member; and SANU one member and no part-time member. Other 9 political parties are represented on part-time basis. While political parties are unequally represented in the commission; the civil society and the faith based groups are each represented by one member. Women are fairly represented. It is obvious that the SPLM took the lion's share in the commission. The commission is already unbalanced and infringes article 202(1) of the TC as some appointments were made not with the Presidential Decree, but by other means.

Article 203 (3) of the TC establishes a National Constitutional Conference made of many layers of the South Sudanese population, including political parties; civil society, women, youth, faith-based, organizations; people with special needs; traditional leaders; war widows and veterans and war wounded; business leaders; trade unions; professional associations; the academia and other categories to be determined.

The National Constitutional Conference shall approve the Draft Constitutional Text and the Explanatory Report (6); which shall be tabled before the National Legislature (8). The Speaker shall thereafter present the adopted Constitution to the President for assent and signature (8). Visibly, the National Legislature may overturn the popular inputs or simply ignore them. Referendum may be the better alternative before ratification by the President.

The timeframe given by the TC to the NCRC to write and submit to the President of the Republic a draft constitutional text and explanatory report after one year¹¹⁰ 202(4) is unrealistic by all standards.¹¹¹ It has even been delayed. The delay was due to, among others, the government failure to avail the necessary budget, technical resources and premises for the NCRC's work.¹¹² The Parliament approved a meagre

¹⁰⁸ Akol Z D 'A Nation in Transition: South Sudan's Constitutional Review Process' (2013) The SUDD Institute 4

¹⁰⁹ According to Diing Akol, the NCRC comprises 55 members, 44 of whom representing political parties with the remaining 11 being shared 7, 2, 2 by the civil society organizations, faith-based groups, and a supposedly non-party affiliated Chairperson and Deputy Chairperson; Akol Z D 'A Nation in Transition: South Sudan's Constitutional Review Process' (2013) The SUDD Institute 4

¹¹⁰ Akol Z D (2013) 1

¹¹¹ In Uganda for example, the 1995 Constitutional making process started in August 1988. It may even be fair to say that it started in 1986 with the promulgation of Legal Notice No.1 of 1986. It therefore took 9 years to complete. Uganda, though it went through a period of instability, was far better than South Sudan (See Wapakhabulo J F 'Uganda's Experience in Constitution Making' (2001). Zimbabwe still experiences constitutional stalemate, and the process is deadlocked (See Dzinesa A G 'Zimbabwe's Constitutional Reform Process' (2012). In Kenya, the demand for constitutional change started in 1993 (see Chitere P and cie *Kenya Constitutional Documents: a comparative analysis* (2007) CMI Reports, IPAR Working Paper No.7 available at www.cmi.no/publications (accessed 14 August 2013); before a permanent constitution was signed into law on 28 August 2010, (See the National Council for Law Reporting, *The Constitution of Kenya (2010)* also available at www.kenyalaw.org (accessed 14 August 2013). The Eritrean constitutional process started in April 1994 and followed a four-stage Stage One involved organizing the commission, raising funds, educating the public, and initiating drafting work. Phase Two consisted in public education on the commission's role and constitutional concepts, drafting a full report and considering public opinion. Phase Three aimed at broad public debate on the draft and submission of the draft to the National Assembly for consideration. Phase Four was again for public debate and submission of draft to constituent assembly. The constitution was ratified in May 1997; Selassie B H 'Constitution Making in Eritrea: a process-driven approach' (2013) 59 - 65 available at http://www.usip.org/sites/default/files/Framing%20the%20State/Chapter3_Framing.pdf (accessed 10 August 2013)

¹¹² Akol Z D (2013) 4

amount of 9 million South Sudan Pounds in July 2012¹¹³, six months after the appointment of the NCRC. The funds were not yet released in the first half of March 2013.¹¹⁴ Against the delay, Pr. Akolda worried that the commission would not be able to carry out “civic education on the constitution issues in the states.”¹¹⁵ In January 2013, parliament extended the commission’s mandate for two more years up to December 2014.¹¹⁶ The commission also experiences difficulties in its engagements with the citizens due to weather, security and language; even transport from one state to the other and within.¹¹⁷ It is unquestionable that more extension beyond December 2014 will be needed. In any event, there is no point of rushing a process that claims ‘to ensure long-term sustainability, wider participation and the production of quality constitution that all citizens can accept as legitimate and fair, therefore meriting their subscription.’¹¹⁸ If the process is rushed, the possibility of not having an inclusive and consulted draft constitution is high¹¹⁹; which proves dangerous for the country.¹²⁰ Patience is needed from all corners of South Sudanese society; even if that means extending the transitional period.

5. Conclusion

The constitution – making process in South Sudan is a serious undertaking. It cannot happen overnight. The process is too complicated, demanding and even sophisticated for the country. Yet it is possible and requires a lot of energy, imagination and sacrifice of each and every South Sudanese.

South Sudan went through a history of neglect and marginalization punctuated by internal ethnic conflicts in addition to an extreme poverty. People fought for long so that their voices could be heard. The armed conflicts brought new divisions. Yet the people’s ideal was achieved when the government in Khartoum accepted to sign the CPA in 2005. The agreement gave more autonomy to the South and a possibility for referendum as to whether Sudan will remain united in a New Sudan or whether South Sudanese needed secession and independence. Through a referendum, the people overwhelmingly voted for secession, and the country accessed to full sovereignty by proclaiming its’ independence in 2011. The independence came in the background of many unresolved challenges, including border disputes between South Sudan and Sudan, especially over the Abyei region; fuelling a possible resumption of fighting between both states, in addition to Sudan’s temporal closure of the oil pipeline; preventing the new nation of revenues. Security remains elusive in some states where armed groups still rampage with impunity. The country is poor and infrastructures are in ‘complete disarray.’¹²¹ Everything is a need including a coherent and harmonised legal order. The country’s constitutional order was built upon an Interim Constitution which, upon independence was voted in a Transitional Constitution, yet with no popular participation.

¹¹³ Idem

¹¹⁴ Waakhe Simon Wudu ‘Constitutional Review Funds Not Yet Released: Chairperson’ (2013) available at <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/10002/Constitutional-Review-Funds-Not-Yet-Released-Chairperson.aspx> (accessed on 10 August 2013)

¹¹⁵ Idem

¹¹⁶ Id.

¹¹⁷ Kasmiro S ‘Dozens Offer Input for South Sudan Constitution’ (2013) available at <http://www.voanews.com/content/south-sudan-constitution-hearing-first-/1693194.html> (accessed 15 August 2013)

¹¹⁸ Akol Z D (2013) 6. A report of the two Committee of Legislation and Justice of the NLA (National Legislation Assembly) and Legislation purports that a permanent constitution may be in place on 8 July 2015 at the end of the transition period; see *Report of the two Committees of Legislation and Justice of the NLA and Legislation, Legal Affairs & Human Rights of the Council of States on the Transitional Constitution (Amendment) Bill, 2013* (Second Reading), Monday, 25 February 2013, para. 1

¹¹⁹ *Report of the two Committees of Legislation and Justice of the NLA* (2013) para. 4

¹²⁰ *Report of the two Committees of Legislation and Justice of the NLA* (2013)

¹²¹ Ranganathan R & Briceno-Garmendia C M (2011) 1

A specific sustainable constitution must be drafted in a way that attempt to overcome the many difficulties and problems that subsist. As some suggest, the process will require extraordinary commitment, effort, time, and resources.¹²² South Sudan may take guidance from the best practices in constitution making elsewhere, frame and calibrate its constitution to the specifics and needs of its people. Everyone, individually or through representation must have a say in the process from its start to its end without rushing, short-cutting, manipulating or designing it in a way that favours some to the detriment of others. Personal, group, tribal and short-time interests must be relegated to the background.

The current ruling SPLM/A and its affiliates have a great responsibility to facilitate a process in which they should participate rather than believing that they own it or that they should be the principal beneficiaries. It is about the destiny of the people of South Sudan and the betterment of the life of future generations. Dominant political, administrative and traditional forces must take the lead by opening up enough space for others in a spirit of nation-building and state stability. If the constitution making process fails or is manipulated by the current power-holders, the country may again descend into anarchy or simply fail.

¹²²Kusek J Z and Rist R C *Ten Steps to a results-based monitoring and evaluation system* (2004) The World Bank Washington 38
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