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P. O. Box 34, Juba, South Sudan • Tel: +211 (0)956 305 780
Email: thesudd.institute@gmail.com • www.suddinstitute.org

Policy Brief

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Re-thinking approaches to the international constitutional assistance in South Sudan

Joseph Geng Akech

Summary

South Sudan is a country with longstanding history of international assistance. In fact, her hard-won independence was birthed in part through external financial and political backstopping. Certain international actors have since deepened their engagement by supporting constitutional designs dating as far back as 2005. They also continue to support humanitarian aid, capacity development, and policy space to strengthen public institutions. Aside from its enduring legacy, international constitutional assistance has been recognized under the Revitalised Peace Agreement, following which some United Nations agencies and Max Planck for International Peace and the Rule of Law have been providing constitutional assistance in varied forms.

This Policy Brief examines why international actors support constitutional reforms of a foreign country. It critiques approaches deployed by these actors and points out their successes and failures in South Sudan. It makes two strategic recommendations to maximize successes of international constitutional assistance in the 'permanent' constitution-making process:

- *There is a need to improve coordination between and among international actors on one hand and national actors, including experts, on the other. The existing coordination mechanism is cosmetic and requires further streamlining. One way to do this is to establish an independent coordination framework to serve as a platform for all actors; and*
- *Minimize tokenistic events, such as the ones often organized by the UN or NGOs. Instead, international actors should support comprehensive civic engagement and robust policy research, including national public opinion polls.*

1 The meaning and context of international constitutional assistance

International constitutional assistance is a framework by which foreign actors—United Nations, expert international organizations, and foreign governments with interest in a constitution of a particular country—provide assistance during its convening, drafting or adoption. The concept of constitutional assistance developed during post-colonial period, when the UN was required to hold in trust, certain territories which were yet to gain independence. It later developed into a fully pledged thematic area of post-conflict stabilization scheme to the point that, to-date, the UN developed a Guidance Note to streamline its constitutional assistance to member states.¹

¹ See Vijayashri Sripati, *Constitution-making under UN Auspices: Fostering dependency in sovereign lands* (2020) Oxford University Press.

Since then, international constitutional assistance has increased exponentially attracting not just the UN agencies, but also other specialized organizations, international constitutional experts, and think-tanks. In their toolbox of constitutional assistance lies a congregation of support items, including but not limited to:

- technical constitutional drafting, secondment of experts, capacity strengthening and training;
- financial aid and comparative research on pertinent issues; and
- political backstopping and mediating between protagonists who might contest constitution-making process or its outcome.

Often, international constitutional assistance is more professed in post-conflict contexts and in situations where a country lacks capacity and political capital necessary to independently steer its constitutional reform project.

The questions often raised are multifaceted, including on what have been the failures and successes of international constitutional assistance in South Sudan? How can successes be amplified under the ‘permanent’ constitution-making process?

The rest of the paper proceeds in three sections as follows. Section 2 discusses theoretical justifications for international constitutional assistance and examines two sub-questions: (i) why do international actors support sovereign constitutional reforms, and (ii) what “message” do they seek to “inject” into domestic constitutional regime? Section 3 critiques current practices by which international constitutional assistance is delivered in South Sudan pointing out its successes and failures. The aim of the critiques is to identify best practices in international constitutional assistance, including the question on what needs to change. The last section concludes with actionable recommendations.

2 Justifications for international constitutional assistance

One might ask why should foreign actors participate or influence a sovereign process such as constitution-making? Two reasons account for international involvement in constitution-making as briefly discussed below. They include domesticating international norms and addressing domestic capacity deficits.

2.1 Domesticating international norms

Constitutions are sovereign devices that express socio-political and legal intentions and aspirations of the people. Still, there are mechanisms for interacting with international order, be it trade, international law, or UN’s frameworks.² As such, the UN and other actors support constitution-making to ensure ‘alignment with the international normative frameworks such as good governance, human rights and the rule of law’.³ The “message” that comes with international “messengers” (actors) in a constitutional design process varies,

² Denis J. Galligan and Mila Versteeg, *Social and political foundations of constitutions* (2013) Cambridge University Press (discussing socio-political nature of constitutions and their inevitable internationalised outlooks).

³ Joseph Geng Akech, ‘Foreign influence and the legitimacy of constitution building in South Sudan’ (2022) Unpublished Doctor of Laws thesis, University of Pretoria) at 69.

but it is often dressed up in form of human rights, rule of law, good governance and democracy, or what is indefensibly called “standards of civilization”.⁴ Effectively, international constitutional “messengers” tend to engage in a constitutional design to promote adoption of a liberal “message” commodified in a “globalized market” of constitutional transfers.⁵ International constitutional assistance aims to ‘export’ free market, good governance, the rule of law, and civilized social practices.⁶ Facilitated by technology, trade, and geopolitical interests, international constitutional messengers may encourage domestic constitutional makers to adopt an entire, partial or specific segment of foreign constitutional structural edifice, norms or values.⁷

2.2 Domestic capacity deficits—tech and finance

Another justification for international involvement in constitution-making is its complex and expensive nature and the fact that local capacities are normally constrained, divided, and incapacitated. In need, post-conflict countries like South Sudan evidently have limited financial and technical capacity to successfully complete constitution-making process without external support. In fact, international actors have long engaged in the South Sudan’s constitutional reform processes, starting with the 2005 Interim Constitution of Southern Sudan and the 2011 Transitional Constitution. In both cases, a group of international actors such as Public International Law and Policy Group (PILPG), Max Planck Foundation for International Peace and the Rule of Law (Max Planck), International Development Law Organization (IDLO), National Democratic Institute (NDI), and a US law firm, Latham and Watkins, provided counsel, capacity building and constitutional drafting.⁸ Funding for operation of these international actors would come from key partners, particularly the Troika (US, UK and Norway), European Union, and the United States Agency for International Development (USAID), among others.

International assistance in constitutional reforms has been granted impetus by the Revitalized Peace Agreement which stipulates far-reaching reforms agenda, including adopting a new constitution. Unlike before, this time, international assistance in constitution-making is not optional. The Revitalized Peace Agreement enjoins ‘[an] institute renowned internationally for constitution making’ to be of assistance to the South Sudanese constitution makers.⁹ The parties to the Revitalized Peace Agreement later nominated Max Planck which has historical ties with South Sudan, having provided constitutional assistance

⁴ Vijayashri Sripati, ‘The United Nation’s role in post-conflict constitution-making processes: TWAAIL insights’ (2008) 10 *International Community Law Review*

⁵ Günter Frankenberg, ‘Constitutions as commodities: Notes on a theory of transfer’ (2013) 4 *Comparative Law Review* at 17.

⁶ Vijayashri Sripati (n 1 above).

⁷ Ebony Centre for Strategic Studies, ‘Do you want to follow our footsteps, South Sudan? Considerations for a constitutional transplant’ (2022), Policy brief published in collaboration with the author.

⁸ See generally Cindy Daase, ‘Making the client’s peace: “Privatizing” peace? global law firms offering pro bono services in post-conflict settings’ (2014) 21 *Indiana Journal of Global Legal Studies* at 423. See also Kevin Cope, ‘South Sudan’s dualistic constitution’ in Denis J. Galligan and Mila Versteeg (eds.) *Social and political foundations of constitutions* (2013) at 702 and Maya Steinitz, ‘Internationalized pro bono and a new global role for lawyers in the 21st century: Lessons from nation-building in southern Sudan’ (2009) 12 *Yale Human Rights and Development Journal*.

⁹ Article 6.8 of the Revitalised Agreement on the Resolution of Conflict in the Republic of South Sudan, 2018.

during interim and transitional constitution-making processes—to facilitate a workshop on constitution-making legislation.¹⁰

Other actors such as United Nations Mission in South Sudan (UNMISS), United Nations Development Program (UNDP) and International Institute of Democracy and Electoral Assistance (International IDEA) have an eminent role to play in the ongoing constitution-making. They have, in fact, already been providing varied assistance such as sponsoring workshops, capacity building activities, conducting comparative studies, and seconding experts to the relevant rule of law institutions.¹¹

3 Critiquing current practice and structure of international constitutional assistance in South Sudan

In constitution-making terms, the standards by which international constitutional assistance ought to be adjudged is the UN Guidance Note. Accordingly, international constitutional assistance should be based on the following principles:¹²

- fostering peacebuilding and sustainable human development;
- ensuring national ownership and reflecting local context;
- promoting international norms and standards;
- mobilizing and convene a wide range of expertise; and
- promoting effective implementation [of the resulting constitution].

International actors engaged in constitution-making have operationalized these principles through several ways, including seconding technical experts to support drafting, as well as financial and political backstopping. Nonetheless, international involvement in constitution-making in South Sudan is a mixed bag of successes and failures, among which key achievements include:

- promoting transnational transplant of international bill of rights as witnessed during both interim and transitional constitution-making processes;
- technical support in terms of constitutional drafting, capacity strengthening and financial assistance; and
- mediating between and among protagonists during constitutional design processes.

These successes, notwithstanding, there are two key structural and substantive failures.

¹⁰ Max Planck, ‘Pre-consultation meetings for the workshop on the permanent constitution-making process in South Sudan’ (2021) <<https://www.mpfpr.de/2021/04/23/pre-consultation-meetings-for-the-workshop-on-the-permanent-constitution-making-process-in-south-sudan/>> (accessed 6 December 2022);

¹¹ See; UNMISS, ‘United Nations Mission in South Sudan’ (2021) <<https://unmiss.unmissions.org/south-sudan-begins-constitution-making-process-supported-united-nations>> (accessed 6 December 2022) and International IDEA, ‘Supporting the federalization process in South Sudan’ <<https://www.idea.int/news-media/news/supporting-federalization-process-south-sudan>> (accessed 6 December 2022).

¹² United Nations Secretariat, ‘Guidance Note of the Secretary-General: United Nations assistance to constitution-making processes’ (2020) at 2-5 <https://peacemaker.un.org/sites/peacemaker.un.org/files/SG%20Guidance%20Note%20on%20Constitutional%20Assistance_2.pdf> (accessed 26 November 2022).

Primarily, despite an intimate engagement of influential international actors (Max Planck, International IDEA, Inter-Governmental Authority on Development (IGAD), Troika and European Union) during the interim and transitional constitution-making processes, the Transitional Constitutional arguably failed to yield constitutional democracy. One of the reasons for this failure is the inherent duality in the constitutional structure problematized by Kevin Cope who argues that the Transitional Constitution was adopted by two sets of actors with disharmonized interests: the SPLM dominated local experts on the one hand and international actors on the other.¹³ The former was concerned with structural power while the latter implanted robust international bill of rights but without corresponding institutional or contextual frameworks. Such a constitutional duality created misaligned interests wherein a domineering executive clawed back the bill of rights by operative mechanisms of article 101 of the Transitional Constitution.

Finally, international, and national actors lack effective coordination from which to engage and influence constitution-making. While some UN agencies have thus far established a Technical Working Group, it remains an ineffective platform (i.e., mostly dominated by combative activists) rather than a forum for substantive, strategic engagement. This requires expansive Working Group to include South Sudanese experts, civil society organizations, and research think-tanks.

On the other hand, the government has not established a coordination platform through which all international actors engage in constitution-making. There is thus a need for all actors supporting constitution-making process to work together in a coordinated and transparent manner. International assistance is needed on certain thematic issues but on which stakeholders and parties to the Revitalized Peace Agreement are yet to reach a consensus.¹⁴ What exists on the side of the government is a National Task Force established by the Minister of Justice and Constitutional Affairs to assist him in certain matters related to chapters 5 and 6 of the Revitalized Peace Agreement.

Furthermore, the above initiatives run a risk of becoming mere window-dressing strategies for contest of space, influence, and recognition in the constitution-making process. This requires a rethinking of a constitutional assistance to coordinate efforts and resources for quality and widely owned outcomes.

4 Rethinking international constitutional assistance: Recommendations

I have thus far discussed the meaning and justifications for international constitutional assistance. For South Sudan, international involvement is a key success factor as it comes with much-needed financial assistance, technical expertise, and political context. However, there is a need to learn from previous failures to avoid legitimizing a constitutional outcome incapable of entrenching democracy and strong institutions. This Weekly Review, therefore,

¹³ See generally Kevin Cope, 'South Sudan's dualistic constitution' (n 8 above).

¹⁴ Joseph Geng Akech, 'The unresolved aspects of the Revitalised Peace Agreement and their implications on constitution-making in South Sudan' (*Weekly Review*, September 21, 2022) *The Sudd Institute*.

makes two main recommendations to harness “best” practices and successes of international constitutional assistance during the ‘permanent’ constitution-making process.

4.1 Strengthen coordination among international actors engaged in constitution-making

Broadly, the UN should sustain its ongoing coordination mechanism while bringing on board other expert organizations such as International IDEA and Max Planck, which bring unique experiences to the table. Going forward, leveraging on each other will be key since it is unlikely that each agency will have political, technical, and financial leverage to effectively support constitution-making.

In addition, supporting national experts’ coordination to interface with international constitutional expert counterparts remains critical an element of required coordination. This is important given that constitution-making is not an all-international actors’ affair. It must involve national experts, including civil society, to harness their contextual and technical wealth of knowledge, experience, and expertise.

4.2 Avoid tokenistic workshops on constitution-making

Many agencies have since been supporting workshops on constitution-making process. Whereas capacity strengthening is crucial, workshops that are run by individual agencies could be impactful if organized through a coordinated process aimed at a particular outcome. Workshops should be streamlined to ensure that there is a return on investment, indicating there are clear outcomes, and that progress is evaluated using evidence.

About Sudd Institute

The Sudd Institute is an independent research organization that conducts and facilitates policy relevant research and training to inform public policy and practice, to create opportunities for discussion and debate, and to improve analytical capacity in South Sudan. The Sudd Institute’s intention is to significantly improve the quality, impact, and accountability of local, national, and international policy- and decision-making in South Sudan in order to promote a more peaceful, just and prosperous society.

Author’s biography

Joseph Geng Akech is an Adjunct Assistant Professor of Law at the University of Juba. He holds a Doctor of Laws (LLD) in constitutional law, and he has published widely in constitutional designs, human rights, and transitional justice. He may be reached on e-mail: josephgakech@gmail.com.