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Weekly Review

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South Sudan's Permanent Constitution-Making Process Negotiations: The Influence of International Law and Public Participation

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Summary

Based on interviews with actors closely involved in the discussions, this Weekly Review examines the influence of international law in the negotiations on South Sudan's permanent constitution-making process relating to public participation. While international law was infrequently referred to in the negotiations, much of what was discussed and agreed resonates with international law. This includes that the main deliberative body must be representative of all sectors of South Sudanese society, that there must be public consultation, that certain groups must be represented in decision-making bodies, and that women must enjoy guaranteed representation. It is difficult to draw firm conclusions as to the influence and effect of international law during the negotiations, however interview responses are consistent with the notion that international law contributed to process design choices and aspects of drafting, as well as to political pressure for certain outcomes. International law was actively followed where perceived as useful, neutral, and locally relevant. This can have implications for how decision-makers and advocates approach international law in future discussions on the specifics of public participation in South Sudan.

I. Introduction

On 21 December 2022, the President of South Sudan, Salva Kiir Mayardit, signed into law the Constitution Making Process Act 2022 (CMPA), following its passing by the Transitional National Legislature (TNA) earlier that year. The CMPA sets out a process for drafting and adopting South Sudan's first permanent constitution: the outcome of negotiations between the Parties and Stakeholders to the 2014-18 IGAD-led peace process, including the Government of South Sudan, armed opposition groups,

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political parties and civil society.² The agreed process reflects a balance between objectives applicable to constitution-making under any circumstances, though especially in the context of violent conflict as in the case of South Sudan. In particular, these include the need for broad public participation to ensure the new constitution's legitimacy; and the need to ensure the agreement and support of political elites for the new constitution's effectiveness, both in relation to governance and peace.

In balancing these objectives, the CMPA provides that the new constitution is to be drafted based on the results of public consultations and adopted by a (selected) National Constitutional Conference (NCC) "with representation from all sectors of South Sudanese society".³ However, the Act provides that the Parties and Stakeholders to the peace process will submit nominations for delegates to the NCC.⁴ Additionally, the Act allocates to the TNA – which includes representatives from the peace process Parties – the final power of approval.⁵ Proposals for a directly elected NCC, and for a popular referendum to ratify the new constitution, were ultimately set aside. Beyond a list of certain groups who must be represented,⁶ specific criteria for the selection of NCC delegates are yet to be determined.

In early 2022, the author travelled to Juba, supported by the Sudd Institute, to interview representatives of Parties, Stakeholders and other organizations closely involved in the negotiations that led to the CMPA. The research forms part of the author's ongoing PhD project on international law and post-conflict political transitions. The guiding research question is: (how) does international law affect who decides South Sudan's constitution? International law contains a range of norms, some of which are commonly understood to support the allocation of political power to 'the people,' others of which may favor the allocation of power to elites and external actors: notably, incumbent governments, armed groups, and international organizations.

The focus of this Weekly Review is on the first set of international legal norms and if and how they influence thinking in relation to public participation. It provides a summary and initial analysis of the interview materials and does not necessarily reflect the author's final conclusions.

II. Aspects of the negotiations and their resonance with international law

There are several aspects of the negotiations in which outcomes on paper and norms prevalent during the discussions resonate with international law. These include deciding the overall process (that the main deliberative body must represent broader society, that there must be public consultation), as well as who is to participate (that certain groups must

² The 2015 Agreement on the Resolution of the Conflict in South Sudan (ARCSS) set out the basic elements of a process; these provisions were largely mirrored in the 2018 Revitalised Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS). At a May 2021 workshop, Parties and Stakeholders agreed further details, upon which the CMPA was drafted.

³ Constitution Making Process Act 2022 (CMPA), ss. 16-17, 26-27, 33(1)(d).

⁴ CMPA, s. 21.

⁵ CMPA, ss. 16-17, 33(3)(a).

⁶ CMPA, s. 27(1).

be represented, that women must enjoy guaranteed effective representation). While it is difficult to trace their origins, that these outcomes and norms resonate with international law suggests potential international legal origins.

1. Deciding the overall process: broad societal representation and public consultation

When asked about the main objectives of the constitution-making process, respondents were unanimous in stressing that the constitution must reflect the will of ‘the people’.⁷ As a means of achieving this, during the negotiations, electoral processes were considered but ultimately deemed inessential provided there was broadly inclusive representation in the NCC. The NCC was initially to be an *elected* body but later became *selected*.⁸ According to several respondents, a popular referendum to ratify the new constitution was also discussed but decided against due to practical and security concerns. It was agreed that a referendum would not be necessary as the NCC would represent the people. Ultimately it was decided that the NCC would be “an inclusive deliberative body with representation from all sectors of South Sudanese society”, comprising at least 1,000 delegates.⁹ Additionally, it was agreed that public consultation would take place before and after publication of the draft.¹⁰

Much of what was discussed and finally agreed resonates with international law. That electoral processes appear to have been the presumptive starting point is consistent with the traditional emphasis placed on voting as a means of political participation in international law: the right to (external) self-determination has commonly been understood to be exercised by referendum;¹¹ the right to participate in political affairs has traditionally been equated primarily with the right to vote.¹² That ultimately broad societal inclusion was considered the overriding objective – and electoral processes optional (if perhaps preferred) – resonates with the flexibility recognized by international bodies in respect of how the right to participate in public affairs may be implemented. It also resonates with the more recent provision in the African Charter on Democracy, Elections and Governance (ACDEG) that constitutional change shall “reposit[e] on national consensus, obtained, if need be, through referendum” (it is unclear from the text when such a need arises).

2. Deciding who is to participate: representation of certain groups

The CMPA lists categories of persons that are to be represented in the Revitalized National Constitutional Review Commission (R-NCRC), NCC Preparatory Sub-Committee, and

⁷ Notably (R-)ARCSS provides that “The process of permanent Constitution-making shall be led and owned by the people of South Sudan.” (ARCSS, chapter 6, art. 8; R-ARCSS, art. 6.13).

⁸ ARCSS, chapter 6, art. 5.3; R-ARCSS, art. 6.9.

⁹ Resolutions of the Workshop on the Permanent Constitution-Making Process for the Republic of South Sudan 2021; CMPA, ss. 26-27.

¹⁰ CMPA, s. 33.

¹¹ Daniel Thürer and Thomas Burri, ‘Self-Determination’ in *Max Planck Encyclopedia of International Law* (online at 22 December 2022).

¹² See Gregory Fox, ‘The Right to Political Participation in International Law’ (1992) 17(2) *Yale Journal of International Law* 539, 552-560.

NCC.¹³ All lists include ‘women’, ‘youth’ and ‘people with special needs.’ Among other groups, both the R-NCRC and NCC Preparatory Sub-Committee are also to include ‘ethnic minorities’,¹⁴ and the NCC is to include ‘internally displaced persons’ (IDPs) and ‘refugees and people from the diaspora’.¹⁵

These categories are recognized under international law, either as requiring protection, or efforts to ensure their participation in political and peace processes. Such groups are commonly also listed in policy documents identifying international ‘best practice’ based on international law.¹⁶ The UN ‘soft law’ declaration on minorities recognizes the need to protect ethnic minorities, as well as their right to participate effectively in political life.¹⁷ The 2009 African Union Kampala Convention on IDPs obliges states to prevent their political exclusion.¹⁸ The 1951 Refugee Convention recognizes rights of protection in respect of refugees.¹⁹ International conventions on the rights of women, as well as persons with disabilities, requires states and parties to take measures to ensure their effective participation in political affairs.²⁰ Moreover UN Security Council resolutions on women, peace and security, and youth, peace and security, encourage states to support the representation of women and youth in peace processes.²¹

3. Deciding who is to participate: guaranteed 35% representation of women

The CMPA provides that 35% of members of the R-NCRC, CDC and NCC Preparatory Sub-Committee shall be women (this quota is not specifically mentioned in relation to the NCC).²² These specific requirements build on a general 35% quota for the participation of women in government set out in the Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS), which itself builds on an earlier 25% quota established under the 2011 Constitution.²³

¹³ CMPA, ss. 10(1), 23(1), 27(1).

¹⁴ CMPA, ss. 10(1), 23(1).

¹⁵ CMPA, ss. 27(1).

¹⁶ See United Nations, Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes, April 2009, 4; Office of the United Nations High Commissioner for Human Rights, *Human Rights and Constitution Making* (United Nations, 2018), 19.

¹⁷ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 18 December 1992, arts. 1(1), 2(2).

¹⁸ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 23 October 2009 (‘Kampala Convention’), art 3(1)(b).

¹⁹ Convention Relating to the Status of Refugees, 28 July 1951.

²⁰ Convention on the Rights of Persons with Disabilities, 30 March 2007, art 29(b); Convention on the Elimination of Discrimination against Women, 18 December 1979 (‘CEDAW’), art. 7. See also: Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003 (‘Maputo Protocol’), art. 9.

²¹ UN Security Council resolution 1325, 31 October 2000, operative paragraph 1; UN Security Council resolution 2250, 9 December 2015, operative paragraph 1.

²² CMPA, ss. 10(5), 17(2), 23(2).

²³ R-ARCSS art. 1.12.1; Transitional Constitution of the Republic of South Sudan 2011, arts. 108(3), 142(3), 163.

While international law provides no specific quota(s), it nevertheless supports, and in some circumstances, requires, policies of affirmative action to ensure the effective representation of women. UN Security Council resolution 1325, for example, “[u]rges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict”,²⁴ while the Convention on the Elimination of Discrimination Against Women (CEDAW) requires States Parties to “take all appropriate measures to eliminate discrimination against women in the political and public life of the country”.²⁵ The ‘Maputo’ Protocol to the African Charter on Peoples’ Rights provides that “States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action...”²⁶

III. Did international law influence the thinking behind these outcomes?

That these outcomes resonate with international law does not of course mean that they were necessarily the result of international legal influence. In relation to the categories of persons that had to be represented, for example, several respondents confirmed that they were at least partly drawn from groups already recognized in domestic instruments: in particular, R-ARCSS and the 2011 Transitional Constitution. Moreover, the outcomes and norms resonate not only with international law, but also with these instruments. R-ARCSS, for example, provides that the constitution making “shall be led and owned by the people of South Sudan.”²⁷ while the 2011 Transitional Constitution explicitly recognizes the right of political participation, and the obligation to promote the participation of women in public life.²⁸

However, these instruments were themselves at least partially the product of international influence: international actors were significantly involved in the negotiations and drafting of both.²⁹ The constitutional right of political participation was likely drawn from international law. The constitutional obligation to promote the participation of women in public life may have also been, although notably the Sudan People’s Liberation Movement (SPLM) had adopted a policy of affirmative action for women as early as 1994:³⁰ there may therefore have been a domestic basis. In South Sudan, the line between what is international and domestic can be unclear; this is reflected in the constitution’s monist approach to international human rights law, whereby “[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of [the constitution]”.³¹

²⁴ UN Security Council resolution 1325, OP 1. The legal effect of this resolution has been the subject of debate.

²⁵ CEDAW, art. 7.

²⁶ Maputo Protocol, art. 9.

²⁷ R-ARCSS, art. 6.13.

²⁸ Transitional Constitution of the Republic of South Sudan 2011, arts. 16, 26.

²⁹ See e.g. Kevin L. Cope, ‘The Intermestic Constitution: Lessons from the World’s Newest Nation’ (2003) 53(3) *Virginia Journal of International Law* 667, 702.

³⁰ Resolution 16, SPLM/SPLA First National Convention, Chukudum, 12 April 1994.

³¹ Transitional Constitution of the Republic of South Sudan 2011, art. 9(3).

IV. How and why was international law influential?

Regardless of whether international law led to the specific outcomes identified, interview responses suggest that international law *did* influence thinking during the negotiations. This is despite the fact that it was explicitly cited hardly at all. There are three main ways in which this took place. The first is through the involvement of international actors. One respondent explained how during the negotiations international experts gave presentations on certain issues and how they had been addressed elsewhere, sometimes citing the international legal basis for a particular approach; some of these approaches were likely taken up by delegates. Other respondents mentioned that international actors were also directly engaged in drafting parts of the relevant agreements; international law likely informed this work. Several respondents emphasized that delegates considered international law to be useful, both for reaching a negotiated agreement, as well as for peace and effective government. International law could provide a basis for discussions where there were ‘gaps’ domestically; that this was the first time South Sudan had embarked on a permanent constitution-making process meant that delegates were more open to drawing on international law as a source of guidance.

The second way is through the advocacy of civil society. Respondents explained how civil society organizations (CSOs) actively campaigned to push the general 25% quota up to 35%, and to ensure its explicit application to each of the three decision-making bodies as provided in the CMPA. In their campaign, CSOs drew frequently on international law. Respondents described how CSOs developed a public awareness-raising campaign based on CEDAW, the African Charter on Human and People’s Rights, the Maputo Protocol and UN Security Council resolution 1325. CSOs also held training and dialogue with political leaders and decision-makers, in which they cited the same. According to several respondents, such engagement and advocacy efforts often had a mobilizing effect. In the words of one respondent, “the more women are aware of [their international legal rights], the more they tend to claim what is rightfully theirs.” It may be through their advocacy, CSOs increased political pressure towards support for the 35% quota: respondents said that some delegates were likely concerned that not supporting an (increased) quota for women’s representation would ‘look bad’, whether in front of a local or international audience.

Finally, there is evidence to suggest that certain international legal norms were already widely accepted and were therefore followed out of a belief in their correctness, importance, or even as a matter of course. One respondent, for example, explained that during the negotiations there was a short discussion about the need to have a constitution consistent with international norms, and in particular African regional norms; no particular norms were specified, however, as “everybody understood what we meant.” A former delegate similarly described the right to participate in constitution-making and the provisions of ACDEG as “going without saying.” In respect of public consultation, several former delegates confirmed that there wasn’t much discussion about this as it was “obvious” that it had to happen: “everybody knew that it would be there”. Relatedly, a number of respondents suggested that delegates actively followed international norms due to a belief that doing so would contribute to South Sudan’s reputation as a “modern society” and

member of the “community of nations”. In the words of one former delegate: “[w]e don’t want to remain behind”.

Respondents emphasized, however, that not all international law was equal. Specific legal norms had to be accepted as relevant in South Sudan before they could be influential. In this respect, while some international legal norms were considered truly global (and therefore relevant), others were “seen as reflecting the dominant views of the West.” Intentional legal norms reflected in African regional instruments were more likely to be considered relevant in South Sudan. Respondents noted further that international law was more likely to be influential where it was perceived as ‘neutral’, and not playing to the political interests of certain international or domestic actors.

V. Conclusion and implications

While only a preliminary analysis, this Weekly Review has identified several ways in which international law likely influenced thinking during the negotiations on South Sudan’s permanent constitution-making process: through the involvement of international actors, through the advocacy of civil society and through prior acceptance by delegates. It has also explored several aspects of the negotiations in which this influence may ultimately have impacted outcomes in relation to public participation as reflected in the CMPA. These include that the main deliberative body must represent broader society, that there must be public consultation, that certain groups must be represented in decision-making bodies, and that women must enjoy guaranteed 35% representation. In this way, international law likely contributed to shaping – if not fully defining – the concept of public participation reflected in the Act.

This Weekly Review has also identified a range of factors that may affect the extent to which international law is likely to be influential and impact upon negotiations and decision-making. Importantly, political actors may often follow international law not because of a sense of legal obligation but rather because they consider it useful, or as a result of domestic or international political pressure. Interview responses suggest also that international law will be influential where it is perceived as locally relevant and politically neutral. This has implications for future discussions on the specifics of public participation under the CMPA. While the Act sets out much of the constitution-making process, many details remain to be decided, including how public consultation will be conducted, criteria for the selection of NCC delegates and rules of procedure for the NCC. In resolving these issues, international law on public participation can provide guidance, helping to mitigate against the risks of elite capture,³² and to promote an inclusive and participatory constitution-making process. However, by whom, how, and which international law is raised matters. In this respect, approaches that emphasize the usefulness of international law, make it locally relevant and linked to specific outcomes, and that mobilize domestic and international political support, may be the most effective.

³² See e.g. Joseph Geng Akech, ‘Elite Capture and Popular Participation in South Sudan’s Constitution Making?’, IACL-AIDC Blog (13 December 2022), <https://blog-iacl-aidc.org/new-blog-3/2022/12/13/elite-capture-and-popular-participation-in-south-sudans-constitution-making>.

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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 to promote a more peaceful, just, and prosperous society.

Author's Biography

William Underwood is a doctoral (PhD) candidate in international law at Stockholm University and a visiting PhD researcher at the Sudd Institute. His thesis examines how international law influences processes of constitutional change after armed conflict. A former Australian diplomat, he holds master's degrees in international law from the University of Melbourne, and in peace and conflict studies from Uppsala University.