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To cite this article: Katrin Seidel & Timm Sureau (2015) Introduction: Peace and constitution making in emerging South Sudan on and beyond the negotiation tables, Journal of Eastern African Studies, 9:4, 612-633, DOI: [10.1080/17531055.2015.1105438](https://doi.org/10.1080/17531055.2015.1105438)

To link to this article: <https://doi.org/10.1080/17531055.2015.1105438>



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Published online: 07 Dec 2015.



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Introduction: Peace and constitution making in emerging South Sudan on and beyond the negotiation tables

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(Received 15 January 2015; accepted 24 September 2015)

By way of introduction to this special collection, this article addresses the question: Does the 'emerging' state South Sudan need a 'permanent' constitution, especially in light of the ongoing negotiations on the mode of statehood? We shed light on the resulting dilemma between the hasty production of a 'permanent' constitution and the idea of deriving its authority from the will of the people, implying the existence of a certain societal consensus. An analysis of a peace conference over land tenure clearly demonstrates that regional and national consensus on issues to be inscribed in a 'permanent' constitution could not be reached. During this conference, a 'processual solution' permitted not only for the continuation of negotiations, but also for the integration of all involved actors. By contrast, the *de jure* makings of both the Transitional Constitution which currently serves as the preliminary normative frame of the new state, and the upcoming 'permanent' constitution show that many actors are ousted from the decision-making process. Furthermore, actors on, off, and beyond the constitution-making table negotiate within the normative frames of international actors, even if these frames and the mode of statehood are still under negotiation. The current political and military re-negotiations can be seen as an opportunity to fundamentally rethink the constitution-making endeavour. The paper argues that a slowing down of the constitution making and a 'processual solution' to the dilemma – without an immediate claim to consent on substance – seems to be a more appropriate 'solution'.

Keywords: South Sudan; constitution making; peace-making; land; negotiation table; models

When South Sudan declared its independence from the Republic of the Sudan on 9 July 2011, amidst the thundering applause of the crowds, President Salva Kiir Mayardit held up an oversized reddish book, the Transitional Constitution of the Republic of South Sudan (TCRSS)¹ as a symbol of the new state's existence. Shortly thereafter, the president mandated the National Constitution Review Commission (NCRC) to draft a 'permanent' constitution, which was supposed to be finally adopted in 2015, meanwhile the production period had been extended until 2018.² Even though the country

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fulfilled the declarative international law requirements for a 'state', the current devastating political and military (re-)negotiations unveil that the context for constructing an internal sovereignty is not in place, due to a lack of infrastructure, danger of the resource curse, militarization of society and fragmented authority structures as Samson Wassara thoughtfully analyses in this special collection.³

In an inversion of the idea that the constitution represents the will of the people, constitution making in South Sudan needs to be seen as part of internationalized 'post-conflict (re-) construction' efforts and has become a crucial normative tool of state formation within the context of broader 'Rule of Law' (RoL) frameworks.⁴ It revolves around the construction of sovereignties in an attempt to control territorial borders, to define clearly an interior, and to convince people that this imagined interior exists.⁵

Accordingly, even though external actors have influenced the making of constitutions throughout history,⁶ during the last two decades their roles of peacebuilding after violent conflicts has often been extended to constitution making.⁷ Since constitutionalism and RoL are commonly seen as the 'antithesis of arbitrary rule',⁸ constitution making has been fetishized⁹ and has turned into 'the dominant paradigm for state governance in the international arena'.¹⁰ It has become what Christopher May calls *Grundnorm*¹¹ and Daniel Bonilla Maldonado the 'basic grammar of constitutionalism' structuring the politico-legal discourse and the 'use of concepts like people, self-government, citizen, rights, equality, nation, and popular sovereignty'.¹² Thereby, it 'socialise [s] elites and legislators into the Rule of Law mind-set'¹³ whereby enormous normative transfers take place: constitutions, institutions, and state-making techniques.

Since the 1990s the proclaimed so-called 'third wave of constitutionalism'¹⁴ seems to follow the problematic logic that the 'adoption of the appropriate constitution is sine qua non [not only] for development',¹⁵ but also for 'credibility with external donors'.¹⁶ Moreover, the existence of a constitution is believed to solve ethnic problems.¹⁷ The predefined assumptions stand in contradiction to the plural legal realities and degrade the proclaimed 'participation of the broad spectrum of civil society'¹⁸ to a catchword.

In South Sudan non-violent and violent political and military negotiations on South Sudan's modality of statehood are still ongoing, despite the joint peace- and constitution-building efforts of many local, national, and international actors. Thereby, the Transitional Constitution of 2011 is used as legitimizing tool by political actors, as we will demonstrate. This instrument seems to fuel the political struggle as well as the violent negotiation.

Accordingly, we identify a general dilemma and ask: does a new state – the emerging South Sudan – need a 'permanent' constitution, a constitution that is supposed to be the 'supreme law of the land',¹⁹ representing national values and ideas? The basic underlying assumptions of an 'emerging' state and of a 'permanent' constitution are themselves mutually exclusive: on the one hand, the absence of an agreement on how the society should function and even of processes how to negotiate such issues, and on the other hand, the predetermination of those ideas and values in the constitution. Nonetheless, the technical assistance and models²⁰ provided by international actors regulate the constitution-making process in a way that reduces the chances of substantially assessing and integrating the interests of the different parts of the segmented society while proclaiming the idea of the so-called local ownership.²¹ One can therefore say that the actors in the institutionalized forums negotiate within the normative frames of the international actors, even though these frames are *de facto* still under negotiation.

We will therefore argue that a slowing down of the constitution making and a – what we call – ‘processual solution’ (a consensus on the continuation of an open-ended, flexible negotiation process of contested issues) to the aforementioned dilemma without any claims to consent or specific substance seems to be a more sensible approach. Cynically, the current political and military re-negotiations can be also seen as an opportunity for rethinking the entire constitution-making endeavour.

To demonstrate our position, we draw upon two examples of negotiations of statehood at different levels of government: we first take a look at a regional peace conference; and afterwards at South Sudan’s constitution-making processes. The peace conference on a land conflict in Eastern Equatoria State (EES) elucidates one of the controversial issues, land tenure over which a plurality of perceptions and concepts exist. Nonetheless, it is in the course of being determined in the ‘permanent’ constitution. The analysis of the historical and socio-economic factors that led to the conflict and the multiplicity of discourses presented during the peace conference provide a concrete example of the plural notions on the nature of land tenure. No regional and certainly no national societal consensus has yet been reached, and a ‘processual solution’ could be an option, especially for post-war situations with such a multiplicity of factors and actors.

These complexities have not been taken much into account in the constitution-making process of South Sudan, which has instead been pushed through at an enormous speed by several national and international actors, as we will see in the second part of this paper. The current national normative frame of reference for the ‘transitional’ period, the TCRSS, and the process of its creation serve as ‘a handmaiden of the party in power, as a means to the retention of power’,²² supporting Yash Ghai’s much earlier assessment. We shed light on these processes and demonstrate how this threatens the idea that the constitution ‘derives its authority from the will of the people’²³ as not only stipulated in the TCRSS but also demanded by many local actors, who are mostly excluded from the *de jure* constitution-making negotiation table.

A regional peace conference on a land dispute

A peace conference dealing with a land issue, held in Torit in April 2012, illuminates one of the many possible political and ideological claims and concepts that should find their way into normative frameworks such as the constitution. The significance of property is aptly summarized by Benda-Beckmann, Benda-Beckmann, and Wiber as ‘a vital element in the political organization of society[. R]uling elites have put much energy into regulating and changing property regimes themselves’²⁴ allowing them to increase the control over rural areas. Property rights have been a cornerstone of any constitution making ever since the rise of the nation state.²⁵ However, ‘[t]op-down initiatives cause land reform programs to miss out [...] the existing socioeconomic and cultural matrices of land on the ground’²⁶ as we show here, but also with complex interrelations between land, identity, and subjectivity that Andreas Hirblinger carves out in this special collection.²⁷ As a result, state-led land reform programmes are likely to be highly contested by those affected, given the plural notions of land-property relations. Sometimes so contested that in our case, the participants of the peace conference opted for a ‘processual solution’, that is, the continuation of the negotiations instead of a normative solution legally clarifying the status of the land.

Sketching the conflict of Ame Junction

The concerned strip of land is called Ame Junction and lies at Juba's main supply road. Since the 1970s, it has been a bone of contention between some M̀a'di²⁸ and Acholi of Panyikwara, while some elders claimed it had been a common hunting ground. Tensions rose when settlers were directed to the region in the course of a repatriation campaign for people who had left during the first civil war,²⁹ a process that ultimately led to several peace conferences and meetings. According to a position paper of the Acholi Community Council, '[t]he first attempt in the recent history [to solve the issue of land-ownership] was in 1983 when representatives of Acholi, Bari, Lolubo and M̀a'di met at Ayii'.³⁰ A few years later, in 1988, a peace conference followed the 1986 murder of a M̀a'di politician.³¹ In the following peace agreement, a section on land issue was included, emphasizing the importance of land in the M̀a'di–Acholi relations. A technical committee was mandated to demarcate the 'boundary of the two tribes'.³² Such demarcation processes are extremely difficult since even the concept of border can be under question as Günther Schlee has thoroughly described. Mobile pastoralists' lives

have always been difficult to reconcile with the views of the state and their sedentary neighbours regarding the relationship between a 'people' and 'their land' i.e. with the assumption that bounded surface areas are inhabited by [one] particular ethnic groups.³³

Several conferences about Ame Junction followed in the years 1990, 2001, 2002, two in 2008, and one in 2009³⁴ involving land border issues between the two communities. Commenting on the settlement of refugees and resulting minor conflicts in Ame in 1991, Simon Simonse wrote that these conflicts 'should be considered a signal of alarm for the time that large numbers of Acholi and M̀a'di will return to their homes [and suggested that] it may be advisable to link the two issues in coming peace initiatives'.³⁵ During the rest of the 1990s, Ame Junction was a major passing point for all kinds of armies and militias. For reasons of safety, the junction was abandoned so that interest in the land decreased and it did not come to any renewed conflict. With the Comprehensive Peace Agreement (CPA) of 2005, the road became again an asset, economically and socially, and people started to settle close to it. In 2008, as in 1979 and 1991, returnees settled close to Ame Junction; in 1979 and 2008 this was organized by the United Nations High Commissioner for Refugees (UNHCR) and the returnees were coming back from the East African countries,³⁶ in 1991, following the split of the Sudan People Liberation Movement/Army (SPLM/A) a huge number of Dinka refugees were settled in that region.³⁷ As in other regions, the settlement of returnees had a high impact on ongoing land issues³⁸ and non-violent forms of conflict intensified. The case was brought before the county commissioner, who did not however publically react to it.

In March 2010, 'in order to ensure the conduct of a free and fair elections',³⁹ President Salva Kiir decreed that most governors would be removed from their post and replaced by a caretaker governor, limited in power, until the April 2010 election. The caretaker governor of EES, Brigadier General Johnson Juma Okot, exceeded his limited executive powers and changed the administrative boundaries. The same day, he responded positively to the demands of the 'Acholi community of Obbo'⁴⁰ for a new administrative district (*payam*)⁴¹ to be called Iwire, which would encompass the contested land and intensify the existing dispute over this land. The M̀a'di community responded immediately by stating that the land of the new *payam* would encroach on their ancestral land and the creation of the *payam* should therefore be stopped.

After the May 2010 elections, the new governor, Louis Lobong Lojore, found himself in a difficult position, in that he would either offend the Acholi by annulling his predecessor's decision, or the Mâ'di by not doing it. He therefore decided to inaugurate the *payam* in late August 2010, but not to issue a warrant of establishment.⁴² As a reaction, a number of Mâ'di created a roadblock which was forcefully removed by government soldiers. To investigate the land issue, the governor created a commission in September 2010,⁴³ whose report stated that both communities had no solid evidence to prove their land ownership. Continuing the same approach of balancing interests, the governor decided not to publish the paper since it would antagonize both sides, and for one year, nothing happened.

In September 2011, fears were rising over a shutdown of oil production, since '[t]he leadership's patrimonial "big tent" strategy had become unsustainable without the oil rents, and the cracks in the political settlements [...] were becoming more visible'.⁴⁴ The Minister of Interior decided two measures with unintended consequences. First, austerity measures were introduced allowing the returnee diaspora (or *reasporea*) entrepreneurs in Juba to mitigate their stigma as profiteers of the independence they did not fight for as described by Rens Twijnstra in this issue. Second, to increase revenues for the national budget, the Minister of the Interior decided to strengthen tax control with a control point set up at Ame Junction. One month later, low-ranking government Acholi officials began to measure out plots of land around the junction. This further cementation of the land status provoked a roadblock, with Mâ'di youths pulling Acholi out of buses and beating them. The SPLA cleared the road, with one of the officers shot in the process. SPLA soldiers – allegedly belonging to the Acholi community – responded and in the process two members of the Mâ'di community were shot and killed as well. The following eruption of violence led to houses being burned down, and several people being killed or injured; in the end, one Acholi and four or five Mâ'di died. After a month, both communities asked the Catholic Diocese of Torit (CDOT) to organize peace talks, which took place in April 2012 in Torit.

Discourses at and away from the negotiation table

The land conflict erupted when low-ranking government officials attempted to demarcate the land. The selling of the land would have changed the status from 'community' or 'public' land to 'private' land. These categories are the three types of land tenure as stipulated in the Transitional Constitution (2011)⁴⁵ and The Land Act (2009).⁴⁶ They were explained to the participants of the peace conference by the chairperson of the Land Commission, Robert Ladu Loki: 'We have community land that belongs to [...] all the tribes [...] secondly you have private land, some of you have houses [...] in Torit, these are gazetted areas. [...] Thirdly, public land that is under the government.'⁴⁷ In the outcome of the peace conference none of these were inscribed, as none was seen as sufficiently acceptable by all parties. This non-acceptance is not surprising. Since the CPA in 2005, land laws are subjects of tension in discussions by different leaders of different communities and government officials, Deng and Badiye have elaborated on these issues.⁴⁸

From 'public' to 'community' land

Days before the peace conference, Governor Louis Lobong already mentioned that he viewed the land as 'public' land, since it lies on an important road of South Sudan.

Recognizing the importance of stability and peace and the role of the two communities in this regard, he emphasized that this was no longer a possible point of view.⁴⁹ During the conference, he distanced himself from the low-ranking government officials and from the attempt to turn the land through demarcation and subsequent selling of the plots into private land. Addressing them, he said:

you can only reach the consensus or identify the borders by sitting together and dialogue [...]. Even in this conference, it is not the facilitator, nor the government, nor the UNMISS, or anybody else, or the national commission of land that will come and tell you: this is your borders.⁵⁰

He thus transferred responsibility for the land to the two communities, thereby making it into ‘community’ land of the two groups in question.

The ciriba ritual

The Acholi Community speaker proposed a ritual known as *ciriba* as solution. An Acholi Panyikwara subchief explained the ritual and the resulting dilemma as follows:

We want to make traditional performance rather than lying in the paper. Then we make and it is the end of the conflict. [...] If there is somebody claiming the land as his, that person will get lost in the bush until he dies. [...] If we are wrong the landlord will die, then we leave the land. If they are wrong, their landlord will die and they leave. [...] We, as Acholi leaders, were told not to make it because we don't want the Mâ'di, our people, on our land to die. [...] They marry our people, we marry theirs. We want a peace agreement.⁵¹

The conclusion of the Acholi community position paper is that – taking the death of the Mâ'di as granted – the land should be granted to the Acholi. The ritual as a means of solving the conflict is supposedly lethal for one of the participants and was thus, in the quest for peace, not an option, even for those who had originally proposed it.

The colonial argument

The speaker who presented the position paper drafted by the Mâ'di Community Council (MCC) proposed a more legalistic approach towards solving the conflict. According to him, the

land [was] traditionally, locally, nationally and internationally demarcated to the Mâ'di people according to the January 1, 1956 administrative map which is [...] a reference in matters dealing with border demarcation as stated in the Comprehensive Peace Agreement and the Transitional Constitution.⁵²

With this, the MCC referred to the borders of Sudan that were in place when Sudan attained independence from Anglo-Egyptian rule.⁵³ The MCC thus used a colonial approach to the division of territory and demanded from the government that it annulled ‘the decree that created the said Payam’.⁵⁴

The Acholi Community Council position paper rejects a land issue as the root cause for the ongoing conflict: ‘But why should there be a land dispute when the ethnic boundaries have not been tampered with? We in the Acholi area have remained within the confines of our territories.’⁵⁵ Accordingly, the root cause of the

misunderstanding could be found in the way the district boundaries were set up, because '[t]he local government centres did not correspond to ethnic boundaries. They were decided for the convenience of the British administrators'.⁵⁶ The paper cites the diary of a British army captain, who wrote that 'it is difficult to make the boundary here as the Acholi, Mâ'di and Latuka all mix near their tribal limits which are thus almost impossible to define'⁵⁷ and concludes that there were 'no 1956 boundaries to go back to as far as ethnic boundaries are concerned'.⁵⁸ This is only partially correct, since the British administration during the Condominium government did create maps based on ethnic boundaries,⁵⁹ but did not adapt these for the creation of districts, nor were the maps precise.

Both position papers thus find legal and normative arguments – via references to the CPA and the TCRSS – to defend their positions. The main propositions that were made to determine the detailed meaning of community land were either unviable (both sides did not want to risk lives) or had a reasonable counterargument (or at least did not have the map of 1956 showing the boundaries).

Away from the negotiation table

Two observations are crucial towards understanding these negotiations and their outcomes. First, even though emotions ran high during the peace talks, the situation looked different during breaks for coffee and lunch. People did not generally separate along ethnic lines nor did they continue to play up their differences. In later private conversations, several influential urban figures from both sides explained that they would actually rather be running their businesses in Juba and Torit than attending conferences. They were only there for the sake of the community and due to their representative position in the community. Cherry Leonardi in this special collection calls this the performative aspect of negotiations.⁶⁰ She analyses the history of similar meetings and their role in the formation of the understanding of the (concept) state. The second addresses this very issue of representation. Several people casted doubt on whether a peace conference in Torit, some 100 kilometres away from Ame Junction, could actually solve the border issue:

The peace conference should be here [at Ame Junction], to do it in Torit is a waste of time [...]. Then you can see the land physically [and] ask: what is the name of that mountain and of that big tree? But in the paper you cannot ask that question.⁶¹

Outcome of the peace conference

Two statements comment on the outcome of the peace conference:

The mediator: The conference culminated in a peace agreement, which was received with jubilation from the state government and the participants.

Journalist from Torit: An empty agreement was done and no substantial solution was found!⁶²

This apparent contradiction can be explained by looking at the factors and discourses that contributed to the conflict. Land that had possibly been a hunting ground changed status and purpose several times. The two civil wars drew attention to Ame Junction as the roads there were also a major corridor for the redeployment of

troops and thus dangerous for civilians. The civil wars and their interruptions also led to a flow of refugees, who came back as returnees and resettled at Ame Junction during more peaceful times, as it was easily accessible. During such times of peace, proximity to the road was of personal socio-economic interest, as access to services, the selling and vending of goods, and travel to Uganda and Juba was far easier. It seems that the central government twice interfered unintentionally: through the installation of a caretaker governor, who was supposed to guarantee fair elections and who then decreed the establishment of Iwire *payam*, and through the establishment of a checkpoint in the course of strengthening security and increasing tax revenue in order to counterbalance the decreased revenues resulting from the oil shutdown.

The governor's discourse shifted the status of the land from 'public' to 'community' land, referring to the types of statuses proposed by the TCRSS. The representatives of one of the two communities proposed performing the *ciriba* ritual to determine ownership, but also rejected the solution as it involved someone's death. Both sides, appealed to documents produced during colonial times to justify their positions and to claim ownership. Away from the table, the concern was raised that a lasting solution could be found only on site at Ame Junction itself just as a number of representatives from both sides acted less as adversaries or proponents of violent action, but rather as colleagues, making dialogue more likely than continued violence.

As outcome of the peace conference, the representatives of the M'àdi and Acholi communities produced a communiqué⁶³ that lacked an actual solution in the sense of a mutually agreed border. Instead, the communiqué states the following: 'We understand that other conferences and/or forums shall be convened by the ICC [Inter Church Council] in the shortest possible time to critically examine the key issues raised in this conference.'⁶⁴

To return to the seeming contradiction of the two statements about the peace conference: in a way, the journalist was right in claiming that no substantial solution, that is, a clear verdict clarifying the land title, had been found. However, 'state registration and titling [...] may even be a source of insecurity'⁶⁵ and could have triggered further conflict. Instead, continued negotiation has been put forward as a solution so that the absence of a 'substantial solution' (journalist) can be 'received with jubilation'⁶⁶ (mediator). This 'processual solution' may have been the only resolution to allow the incorporation of the multitude of presented discourses, demands, grievances, and past and future socio-economic factors that have been influencing the conflict since the late 1970s, and may influence it in the future.

A constitution with a substantive juridical solution to the problem might have put the outcome and the continuation of the peace talks in danger and might have contributed to the escalation of the conflict. The 'processual solution' with continued negotiations made it possible to maintain the peace and allowed both groups to retain strategic control over negotiations and over the dynamics of their borders.

Constitution making in emerging South Sudan

Such complexities do not seem to have been taken much into account with regard to the current constitution-making efforts in South Sudan. Instead of taking these and analogous challenges seriously and pursuing a procedural approach to constitution making several national and international actors have been pushing the constitution making ahead with enormous speed.

The making of the transitional constitution of South Sudan

The South Sudanese public received the TCRSS with mixed feelings. It was quite evident that the draft had been thrown together quickly without the participation of many actors and without addressing many of the concerns raised beforehand.⁶⁷ Criticisms were, for instance, directed towards the two-third dominance of the ruling Sudan People's Liberation Movement (SPLM)⁶⁸ within the *Technical Committee to Review the Interim Constitution of Southern Sudan, 2005*. This proved to be convenient as a two-third quorum was required for the adoption of the draft of the TCRSS.⁶⁹ The political reality since 2012 has shown that President Salva Kiir used his excessive power enshrined in the TCRSS to his favour. Since Riek Machar's announcement to run for presidency, Kiir ousted his vice president, as well as his entire cabinet,⁷⁰ and 8 out of 10 state governors and appointed 'caretakers'.⁷¹ Moreover in February 2015 the National Legislative Assembly (NLA) extended the tenure of the president office, of its own and of the *Constitutional Review Commission* until 2018.⁷² This shows how the TCRSS has become a power tool with unpredictable effects on the governmental arrangement. The TCRSS making process has thus already demonstrated how some members of the ruling party, the SPLM attempt to control the process and to secure comfortable positions at the negotiation table.

Certainly, the way crucial laws and the TCRSS were drafted might be at least partly due to political pressure and time constraints, since the documents were supposed to enter into effect upon South Sudan's declaration of independence. Only two days prior to independence, the Nationality Act provided the criterions and loopholes for gaining citizenship, determining the possible citizens of the future state, whose consequences Ferenc David Marko describes in this special collection.⁷³ The adoption of the Transitional Constitution by the parliament was pushed through only a few days before the declaration of independence even though crucial issues regarding the political order, such as government structure, the distribution of state functions, and issues involving the distribution of powers between the federal and state governments⁷⁴ remained unresolved. During a last seven-hour legislative debate, many members of parliament (MPs) complained about the haste in which the draft was negotiated behind closed doors. The TCRSS draft was even referred to polemically as the 'SPLM constitution'.⁷⁵ Concerned MPs were reassured that full participation and discussions of all contentious issues would be constitutionally guaranteed by the NCRC and subsequently by the National Constitutional Conference.⁷⁶ The TCRSS outlines the process of how to achieve the objective of a 'permanent' constitution⁷⁷ with the proclaimed goal of 'providing the new nation with a more people driven constitution'.⁷⁸

En route for a 'permanent' constitution

The drafting of a 'permanent' constitution has been delegated to the NCRC, consisting of 54 members.⁷⁹ The South Sudan Civil Society Alliance, an umbrella organization of more than 200 of South Sudan's civil society organizations, successfully fought for a voice in the NCRC.⁸⁰ However, the composition of the NCRC reveals that 43 of its members represent political parties while 26 were appointed by the SPLM.⁸¹ As was the case for the TCRSS drafting, the ruling political party and its alliances carved out for themselves a privileged position for the negotiation of the political leeway necessary to assert significant control over the constitution-making process.

Moreover, the NCRC's mandate is again limited to 'reviewing' not 'revisiting' the constitutional document. The constitution-making design discloses another dilemma: it seems to prevent a citizens' driven constitution since the governmental actors debate rather among themselves not only in the NCRC. Whatever input from the citizens will arise during the National Constitutional Conference it will be decided afterwards in the NLA by the politicians. The 'timeline' has become an obstacle as well. By August 2012 the NCRC chairperson Akolda M. Tier admitted, the commission⁸² 'is in a state of coma' due to a dearth of key resources such as financial means and appropriate locations. Additionally, accommodating the aims of having a pluralist commission and at the same time the people who have knowledge and experience in constitutional matters seemed to be problematic.⁸³ Many informants – including members of the SPLM political leadership – expressed their dissatisfaction with the constitution making conducted so far due to a 'lack of political will',⁸⁴ but regarded it as a 'national duty' to continue working within the NCRC.⁸⁵ Members of Civil Society Organizations (CSOs) criticized the prevailing view that 'a constitution is an agreement between political parties'⁸⁶ instead of including all the people and doing it in public.⁸⁷

The appointed South Sudanese actors placed at the NCRC negotiation table, were also joined by several international actors. Some 'partner organizations such as IDLO [International Development Law Organization], PILPG [Public International Law & Policy Group], UNMISS [United Nations Mission in the Republic of South Sudan]'⁸⁸ are explicitly invited by a presidential order. In the following section we will explore why certain international actors are specifically named by a presidential order and who is in fact negotiating the constitution.

International actors and their models

As Sara Kendall explains, 'the process of producing state constitutions has transformed into a veritable industry [...] whereby constitutional technicity – exemplified in the provision of technical expertise – has become a central feature'.⁸⁹ The offered services come with a range of normative international benchmarks and conflict-resolution mechanisms,⁹⁰ and are interwoven with political and economic interests. The dependency of post-war constitution making on international funding may increase pre-existing tensions between external and national actors' agendas. The 'clients' attempt 'to entrench offered rule of law scheme into pre-modelled constitutional frames in the hope of shoring up international legitimacy but also in the hope over time rule of law becomes fused with local legal culture'.⁹¹ Drafters are therefore not only prone to apply model constitutional frameworks but also create 'procedural objectivities'⁹² through supporting guidelines and activity plans. In this way, 'ostensibly neutral, elementary procedures are introduced, which are supposed to correspond to an unproblematic reality of facts and data',⁹³ masking underlying presumptions.

One of those supporting tools is a 2009 guidance note on 'United Nations assistance to constitution-making processes' which states:

Certain elements of a constitution-making process require careful early advance planning to be carried out successfully in an inclusive, participatory and transparent fashion. The UN should advise national actors of these requirements and assist them to begin the process in a timely fashion, taking into account the country-specific circumstances.

In particular, the creation and implementation of public education and consultation campaigns require advance planning.

Attached to this guidance note is an *example* of a constitution-making process timeline.⁹⁴

This guideline reflects international policy discourses on ‘local ownership’: ‘The common people in war-torn societies are [...] expected to participate, to be consulted and have their say on the formulation of new constitutional frameworks.’⁹⁵ However, even though public participation is regarded as a crucial element in a sustainable constitution making, it rather seems to be the ethos of participation that serves as a process of integration than an actual significant source of legal ideas.⁹⁶ Symbolic participation may stimulate ‘talks’ and discussions among the people on constitution (-making) whereby a certain legitimacy is produced through the feeling of participation and through processes of ‘naturalization’. The concept of ‘ownership’ includes both, in the narrow sense, the national government and its institutions and, in the broader sense, a form of popular participation.⁹⁷ We will show in the following that ‘[d]omestic autonomy and ownership of the process are seen as expressions of the end result, while during the actual process “ownership” is curtailed through notions of shared “ownership” or by external supervision’.⁹⁸

The NCRC action plan and ideas of local ownership

The influence of international actors on the constitution-making process becomes visible in the 2013-2014 NCRC Action Plan. Within the constitution-making project, such plans and schedules determine what actions are viewed as necessary to achieve the goals, as well as the conditions, timing, and personnel involved. The plan follows the aforementioned UN guidance note and the attached example of a process, in terms of its general structure, activities, and timeline. The plan has been adapted to the above-mentioned prolonged process and to the country-specific setting. It now takes into account specific geographical conditions such as the rainy season, which does not allow for many activities for the NCRC outside of more accessible cities. Three interrelated components are involved in the sequencing: (1) civic education and public consultation proceedings; (2) constitutional review proceedings; and (3) NCRC deliverables. Furthermore, the Action plan attempts to determine temporality by sequencing time in which the respective activities are expected to be fulfilled as well. Specific project management language is used as well, making particular use of procedural verbs such as organize, execute, consult, recruit, create, constitute, and produce. This language reflects a linear process and objective procedures.

Moreover, the NCRC Activity Plan shows how ‘local ownership’ is ingrained and translated into the local setting. With regard to the idea of ‘national ownership’, the plan determines responsible actors and implementing actors. By and large, the NCRC is defined as the responsible actor whereas the international partners are *de jure* implementing actors. However, activities relating to technical assistance and to special expertise are constructed conversely, for example, international actors such as IDLO and IFES (International Foundation for Electoral Systems) are responsible for creating public submission databases, providing thematic research conducted by sub-committees, recruiting thematic experts for research on South Sudan, producing comparative studies, recruiting constitution-drafting experts, etc. Within the context of this division of labour, the question arises as to who actually owns the process?

Even though it is the NCRC that officially owns it as part of the national elites – as they are accountable for its outcome – strategic key (procedural) activities such as recruiting, establishing, drafting, and finalizing are carried out by international partners.

This brings us back to the issue of the ‘popular ownership’ mentioned in the UN guidance note. The NCRC Action Plan foresaw civic education and public consultation campaigns of about six months in length. The TCRSS stipulates that ‘[t]he commission shall review the Transitional Constitution and collect views and suggestions from all the stakeholders on any changes that may need to be introduced to the current system of governance’.⁹⁹ The NCRC is further mandated to reconcile traditions, social values, and different ‘customary’ laws with the state laws of South Sudan and the accepted principles of international law.¹⁰⁰ Following the Activity Plan schedule, the NCRC launched a civic education programme to involve the public in the 10 states of South Sudan in the constitution making in July 2013.¹⁰¹ Due to a continuous lack of funding,¹⁰² the process floundered and the campaign was doomed to failure. Moreover, the December 2013 crisis ‘has increased such lack of funding, [has] limited the availability of technical support and has restricted the NCRC’s ability to continue implementing its civic education and public participation campaign due to security concerns’.¹⁰³ The NCRC chairperson admitted after three years: ‘in any event constitution making process is not a switch on switch off operation’.¹⁰⁴ Moreover, he emphasized the significance of civic engagement and questioned the chosen constitution-making design which does not seem to fulfil the proclaimed idea of a ‘peoples driven constitution’.¹⁰⁵ According to him:

The current constitutional making process could be a real basis and catalyst for a durable peace in the country; Acknowledging the need for the people of South Sudan to be given the opportunity in determining their socio-economic and political destiny through nationwide civic education, we strongly recommend that the mandate of the commission be extended for a period not less than three years subject for review when a permanent peace is realised in the country.¹⁰⁶

It remains to be seen how the current political negotiations are impacting the continuation of NCRC’s work, what effects the general re-shuffling now taking place among the presidential appointees will have, and what an amended action plan will look like.

But it is generally questionable whether the civic education and public consultation tools will go beyond a mere awareness campaign on the constitution-making process of the (inter)national elites. Moreover, one could ask how the NCRC will deal with the idea of ‘popular ownership’ while following the convincing logic of the procedures of objectivity. A conceptual dilemma exists between the public consultation process and the application of the ‘technical game’¹⁰⁷ as, for example, the timetable draft is not open and flexible enough for the introduction and re-evaluation of ideas which might arise within the public consultation process. However, the NCRC is not the only negotiation table hosting South Sudan’s constitution-making processes.

‘Towards the constitution of Zol Meskin’

When one was walking through Juba in 2013, the capital city of South Sudan, one cannot help but noticed huge billboards posted at two main roads, visible to all who enter or leave the city, promoting ‘The Constitution of *Zol Meskin*’ (Juba

Arabic for ‘common person’). On the signs, four images symbolize the long struggle for self-determination: Bush [Civil War] – CPA – Referendum – Independence. At the lower part of the board one can read the plea: ‘And now our Constitution – let us shape our destiny – be part of the process’. The billboards had been part of a campaign called ‘Towards the Constitution of *Zol Meskin*’, launched by 18 South Sudanese CSOs a few months after the declaration of independence. The project aimed ‘to contribute towards a constitution that reflects the will of the people’¹⁰⁸ and to promote the idea of popular ownership, funded by international non-governmental organizations such as the Open Society Initiative for Eastern Africa. Anticipating that the actual ‘permanent’ constitution process will be conducted in a rather exclusive manner similar to how it had been conducted during the TCRSS drafting, civil society actors are prepared to partly fill the gap by promoting a comprehensive dialogue, and collected views in all 10 states for inclusion in the constitution. About 1200 citizens were consulted via so-called focus groups comprising representatives of traditional authorities, women’s groups, youth groups, civil society, state assemblies, religious groups, MPs, and local government actors. These categories are similar to those one can find in the TCRSS when it comes to the composition of the National Constitutional Conference,¹⁰⁹ which will be the official negotiating table once the NCRC concludes its draft of the ‘permanent’ constitution. The general findings were subsequently passed on to the NCRC.¹¹⁰ Major issues relate to land ownership and to land tenure system, with opinions ranging widely from ‘Land should be given to the community and not to the government’¹¹¹ to ‘Land should be controlled by the government not the community’.¹¹²

A Women’s National Constitutional Conference, held in May 2013, brought together ‘South Sudanese women from women civic groups, CSOs, academia, activists, politicians, government officials and ordinary citizens’, who drew up their ‘South Sudan Women Constitutional Conference Recommendations’¹¹³ to be presented to the NCRC. Generally speaking, this negotiation table sought to ‘advocate for ensuring women’s social, economic and political empowerment at all societal levels. It shall also include the reviewing of local laws including the property and inheritance rights systems to ensure that they are in line with the Constitution and international agreements’.¹¹⁴

In addition, the South Sudan National Youth Forum for Dialogue and International IDEA¹¹⁵ have jointly organized another meeting in Juba in August 2013 to work out effective strategies for civil society contributions to the ‘permanent’ constitution. The Sudan Council of Churches (SCC) also participated in ‘awareness creation and training on constitutional review process and collected issues which will need to be acted upon by the [...] NCRC’.¹¹⁶ Beside other issues, the SCC expressed its concerns about land grabbing dynamics in Juba and other parts of the country and proclaimed that ‘[I]and must maintain its public nature, for the common good of all citizens, but not for sale’.¹¹⁷

Studies have also been conducted by international consultancy agencies as part of their RoL projects.¹¹⁸ In one case, the National Democratic Institute for International Affairs joined with United States Agency for International Development in November 2012. With regard to land and property rights, they submitted findings from 600 participants (46 focus groups) across the 10 states. Participants views range from community ownership and government ownership to private ownership with a tendency towards government ownership since ‘the government is better positioned to regulate land and properly and fairly distribute land, to develop land and to adjudicate claims

for land'.¹¹⁹ Furthermore, the idea of the 'government's right to confiscate land for public use is supported [...] as long as fair compensation is provided',¹²⁰ private use was rejected. However, there is a large disagreement to government ownership: 'Land must belong to the communities because they know the rightful owners since land was given to them by their ancestors and because they will utilize it better than government.'¹²¹ Moreover, '[w]omen's ownership of land is endorsed by both male and female participants, although the male participants are more likely to place limits on women's ownership'.¹²²

Not unlike the peace conference in Torit, the negotiations in the various forums show that the issues of property rights and land are highly controversial. The variety of existing notions and conceptual views on land relations needs to be taken into consideration if a state-led regulated land tenure system is to have a chance of being accepted by the people and implemented through local administrators. How difficult that is and how contested the concept of local administrators is, we have seen in the first part of this paper.

These various negotiation forums show how the broader idea of popular ownership reflects the plurality of normative ideas on statehood. The surveyors utilized methodology and normative tools such as selected focus groups, moderator guidelines, and questionnaire templates (comprising closed questions) as well as predefined legal categories similar to the models used at the NCRC negotiation table whereby the views are channelled. Despite being bound to the 'technical game', the spaces of negotiations and range of participants are broadened and less bound to governmental actors.

The mantra of 'public ownership'

As seen above, the actual constitution-drafting process is chiefly a matter for the ruling national elite and international actors, within the normative frames of reference set by international actors. The manifold models, templates and guidelines, of how a 'permanent' constitution should be produced have been brought in by actors working for international organizations and are focused on cooperating with the people in central political positions. These models are contributing to the institutionalization of the South Sudanese state, with which actors try to mask their agency for power. The national actors involved are prone towards applying constitutional frameworks, creating procedural objectivities, and utilizing elementary procedures such as guidelines and templates, and in effect adapt their normative frameworks to international ones. They work towards bridging this gap through the endless repetition of the mantra of public ownership, with its participatory ideas. This idea of 'public ownership' seems to have become rather a tool of gaining legitimacy. It produces symbolic participation¹²³ instead of providing CSOs or actors such as the ones involved in the peace conference with actual direct participation.

Being relegated to a second tier of negotiations, civil society actors created various citizens' constitution-making forums with the hope and desire of participating in the official state-making process. The plurality of voices and ideas demonstrated once again the processual character of ongoing negotiations with no definite consensus on issues such as land ownership. It is hoped that the actors at the official NCRC negotiation table will consider and integrate the outcomes and suggestions of the various CSO forums into the constitution-making process. However, the influence of the few appointed NCRC members, representing civil society and serving as voices for the people on the ground, seem to have been reduced instead to a 'rubber stamp'

function, with their signatures becoming a formality in the face of the majority voting system.¹²⁴ This situation only serves to increase tensions and potential conflicts as many actors feel increasingly excluded despite all the efforts made to win a place at the negotiation table.

Conclusions

We have dissected the opening dilemma: Why does the ‘emerging’ South Sudan need a ‘permanent’ constitution? As demonstrated, there is lack of a regional and even much less of a national consensus on the ideas and values that could be inscribed in a ‘permanent’ constitution. The selected examples of the peace conference and the constitution-making process have demonstrated that, in a highly segmented South Sudan, negotiations on the mode of statehood are still ongoing. Questions such as land ownership have not been at all resolved as a variety of concepts and perceptions of land and land distribution continue to exist. In the case of the peace conference analysed above, and during the public consultations on the constitution making, it became clear that there was no national consensus either on the nature of land tenure and how to draw boundaries, or on the mode of statehood and the mode of dealing with diverse interests and claims. The outcome of the peace conference had been chiefly procedural, allowing the actors involved to continue to negotiate the issues without agreeing on substantive solutions that could have expelled many actors from the negotiation table.

Instead, the opposite has come to pass with regard to pre-fabricated constitution-making processes. Some governmental actors, through their claims to sovereignty, have carved out privileged roles for themselves in the negotiation of political spaces and in terms of defining the content of conditions of sovereignty.

A ‘processual solution’ – without any claims to consent on substance – can prove to be viable and allows for the easier integration of different views. In a similar vein, the NCRC’s rush to draft a ‘permanent’ constitution serves only to keep many actors from participating instead of integrating them.

The hitherto constitution making efforts have shown that the ‘recipes’ of the international actors are not working. One reason for this can be seen in the underlying assumption to perceive South Sudan as a ‘re-construction state’ instead of a ‘construction state’, assuming a certain degree of institutionalization, which de facto does not exist. Currently, the international ‘technical support’ has shifted from state actors to ‘non-state actors’ such as CSOs, religious and traditional authorities which will set in motion new dynamics.

Without the massive international funding and ‘ideas’ of how to produce a constitution, South Sudan governmental actors are forced to rely on themselves and have started rethinking their constitution making. The ‘crisis’ unveils that South Sudanese actors need to reflect on the internal political dynamics and root causes of the ‘crisis’ and to negotiate on the fundamental issues to be inscribed in the constitution. The extended transition phase until 2018 without any kind of supreme law of the land, while refraining from using a constitution as a symbol of state and thus relieving the pressure to produce one quickly seems to be a first step forward.

Acknowledgements

Our special collection on Emerging South Sudan: Negotiating Statehood is based on a same-titled workshop, held at the Max Planck Institute for Social Anthropology (MPI) in Halle

(Saale), Germany in September 2013. Many thanks to all presenters, discussants, and participants who discussed the presented ideas. We further want to express our gratitude to the editorial support during the different stages of writing, to the anonymous reviewers and the main editors of this journal for their thoughtful comments.

Disclosure statement

No potential conflict of interest was reported by the authors.

Funding

We would like to thank the Department 'Law & Anthropology' and 'Integration & Conflict' of the MPI for supporting and financing this project.

Notes

1. GoSS, *The Transitional Constitution of the Republic of South Sudan (TCRSS)*.
2. GoSS, *The Transitional Constitution, 2011 (Amendment) Bill 2015*.
3. Wassara, "South Sudan: state sovereignty challenged at infancy."
4. RoL reforms have become a vehicle through which certain notions of law are promoted, partly imposed by dominant international actors (May, "The Rule of Law as the Grundnorm," 75; May, *The Rule of Law*, 134–59).
5. See Anderson, *Imagined Communities*, 6; Sharma and Gupta, *The Anthropology of the State*, 226.
6. Schauer, "On the Migration of Constitutional Ideas," 901ff.
7. See Dann, "The Internationalized Pouvoir Constituant," 424.
8. McIlwain, *Constitutionalism*, 24.
9. Adelman, "Constitutionalism, Pluralism and Democracy in Africa," 74, 78.
10. Grenfell, *Promoting the Rule of Law in Post-conflict States*, 15.
11. May, "The Rule of Law as the Grundnorm," 75.
12. Maldonado, *Towards a Constitutionalism of the Global South*, 1.
13. May, "The Rule of Law as the Grundnorm," 75.
14. Akiba, *Constitutionalism and Society in Africa*, 9.
15. Adelman, "Constitutionalism, Pluralism and Democracy in Africa," 78.
16. Fombad, "Challenges to Constitutionalism," 3.
17. Adelman, "Constitutionalism, Pluralism and Democracy in Africa."
18. Akiba, *Constitutionalism and Society in Africa*, 10.
19. Art 3(1) TCRSS.
20. Models can be understood as an 'analytical representation of particular aspects of reality created as an apparatus or protocol for interventions in order to shape this reality for certain purposes' (Behrends, Park, and Rottenburg, *Travelling Models*, 1–2).
21. The catch-all concept of 'intellectual' ownership emerged within the debate on development assistance. Ownership emphasizes that the people of 'developing countries' must own their policies and programs to be successfully implemented (Sannerholm, *Rule of Law after War and Crisis*, 120–2).
22. Ghai, "Constitutions and the Political Order in East Africa," 406.
23. Art. 3(1) TCRSS.
24. Benda-Beckmann, Benda-Beckmann, and Wiber, "The Properties of Property," 2.
25. Sikor and Müller, "Limits of State-Led Land Reform," 1311.
26. *Ibid.*, 1309.
27. Hirblinger, "Land, political subjectivity and conflict."
28. Mā'di is also spelled Ma'di and Madi in documents written by the Mā'di Community Council.
29. Interview with Acholi Subchief in Juba, Gudele, February 8, 2012 [conducted by T. Sureau]; Kaunda et al., *Comprehensive Report on Acholi and Madi*, 5.
30. Acholi Community, "Landgrabbing – a Taboo among the Acholi," 11.
31. Mā'di Community Council, "Position Paper on the Acholi-Mā'di Conflict," 20.

32. Acholi and Mā'di Community, "Peace Agreement Between the Acholi and Mā'di Tribes," 6.
33. Schlee, "Territorializing Ethnicity," 2.
34. Simonse, "Conflicts and Peace Initiatives in East Bank Equatoria," 20. Acholi Community, "Landgrabbing – a Taboo among the Acholi"; Mā'di Community Council, "Position Paper on the Acholi-Mā'di Conflict."
35. Simonse, "Conflicts and Peace Initiatives in East Bank Equatoria," 20.
36. Kaunda et al., *Comprehensive Report on Acholi and Madi*.
37. Simonse, "Conflicts and Peace Initiatives in East Bank Equatoria," 5.
38. Badiey, "Strategic Instrumentalization of Land Tenure."
39. Presidential Order GOSS/PD/J/006/2010, March 2, 2010, Juba.
40. Kaunda et al., *Comprehensive Report on Acholi and Madi*.
41. The *payam* (administrative district) was approved in Decree CT/GO/EES/T/SCR/1.B.6 issued by Governor Juma Okot on 30 April 2010.
42. Interview with Louis Lobong Lojore, Office of the Governor, Torit, April 11, 2012 [conducted by T. Sureau].
43. See Governor's Decree no. 18/2010 – GO/EES/T/1.B.5.
44. Twijnstra, "Recycling oil money."
45. Art. 171 TCRSS.
46. Government of Southern Sudan, *Land Act, 2009*, Sec. 9-12.
47. Robert Ladu Loki, Peace conference, CDOT-Compound, Torit, April 16, 2012 [recorded by T. Sureau].
48. Badiey, "The Strategic Instrumentalization of Land Tenure," 68; Deng, "Land, Community, and the Constitution."
49. Interview with Louis Lobong Lojore, Office of the Governor, Torit, April 11, 2012 [conducted by T. Sureau].
50. Louis Lojore Lobong, Peace conference, CDOT-Compound, Torit, April 16, 2012 [recorded by T. Sureau].
51. Interview with Acholi Panyikwara subchief, Ame Junction, February 27, 2012 [conducted by T. Sureau].
52. Mā'di Community Council, "Position Paper on the Acholi-Mā'di Conflict in South Sudan," 14.
53. On 1 January 1956, Sudan officially gained independence from its colonial rulers (Johnson, *The Root Causes of Sudan's Civil Wars*, 21–2). The external and internal borders of the British administration are often used as a point of reference in land conflicts, so, for example, in the *Comprehensive Peace Agreement*, 66.
54. Mā'di Community Council, "Position Paper on the Acholi-Mā'di Conflict," 15.
55. Acholi Community, "Landgrabbing – a Taboo among the Acholi," 10.
56. *Ibid.*, 9–10.
57. Kelly, "Diary of Captain Kelly," 15.
58. Acholi Community, "Landgrabbing – a Taboo among the Acholi," 13.
59. Johnson, "Decolonising the Borders in Sudan," 176.
60. Leonardi, "Points of order?"
61. Interview with Acholi Panyikwara subchief, Ame Junction, February 27, 2012 [conducted by T. Sureau].
62. E-mail from the mediator, April 24, 2012; notes from a phone call with the journalist, April 24, 2012.
63. Representatives of the Mā'di community and Representatives of the Acholi community, "Inter Church Committee of Eastern Equatorial State."
64. *Ibid.*
65. Sikor and Müller, "Limits of State-Led Land Reform," 1309.
66. E-mail from the mediator, April 24, 2012; notes from a phone call with the journalist, April 24, 2012.
67. Interviews with B. An-Na'im, University of Juba, Khartoum, April 3, 2011; with K. A. Adiebo and S. M. Lubang, University of Juba, Juba, April 6, 2011 [conducted by K. Seidel and J. Moritz].
68. Seidel and Moritz, "Transitional Constitution," 92.

69. Art. 10(1) NCRC Internal Rules of Procedure, 2012; *Report of the Technical Committee*, 2011.
70. Art. 112(1), 117(1) TCRSS.
71. Art. 104(2) TCRSS.
72. TCRSS 2011 (Amendment) Bill, 2015.
73. Marko, "Negotiations and morality."
74. Southern Sudan Legislative Assembly. Presentation of the Transitional Constitution of the Republic of South Sudan, 2011 by H. E. J. L. Jok, Minister of Legal Affairs and Constitutional Development Ordinary Sitting no. 18, May 7, 2011, Juba [recordings provided to K. Seidel by NLA on May 2, 2013].
75. Southern Sudan Legislative Assembly. 'The Transitional Constitution of South Sudan. Ordinary Sitting no. 25, Second Session on July 6, 2011', Juba [recording provided to K. Seidel by NLA on 2 May 2013].
76. A National Constitutional Conference is to deliberate on the NCRC draft and gather public. Subsequently, 'the President shall deliberate and adopt' (Art. 203 TCRSS).
77. Art. 202-3 TCRSS.
78. Akol, Juba Lecture Series 2013 on 'Building the Constitution in South Sudan', University of Juba, Juba, March 6, 2013 [recordings provided to K. Seidel by Rift Valley Institute].
79. Presidential Decrees: RSS/PD/J/02/2012, January 21, 2011; RSS/PD/03/2012, January 9, 2012; RSS/PD/J/09/2012, February 29, 2012; RSS/PD/J/36/2012, May 28, 2012, Juba: GoSS.
80. Presidential Decree RSS/PD/J/36/2012, May 28, 2012, Juba: GoSS; Interview with H. Swaka, Handicap International, Juba, 10 April 2013 [conducted by K. Seidel]; Tier, A. M. 2013. 'Constitutional Review in South Sudan', NCRC, Juba, April 20, 2013 [recorded by K. Seidel].
81. Presidential Decree RSS/PD/J/03/2012, January 9, 2012, Juba: GoSS.
82. Akolda M. Tier. A Note on the Present State of the NCRC, August 2, 2012, Juba [unpublished].
83. Ibid.
84. Interview with G. N. Aciek, Juba University, Juba, April 14, 2013 [conducted by K. Seidel].
85. Interview with A. R. Thiik, Nyakulan Cultural Center, Juba, April 8, 2013 [conducted by K. Seidel].
86. Tier, Juba Lecture Series 2013 on 'Building the Constitution in South Sudan', University of Juba, Juba, March 6, 2013 [recoding provided to K. Seidel by Rift Valley Institute].
87. O. Adigo, Juba Lecture Series 2013 on 'Building the Constitution in South Sudan', University of Juba, Juba, March 6, 2013 [recoding provided to K. Seidel by Rift Valley Institute].
88. See Sec. 14(7) Presidential Decree RSS/PD/J/02/2012, January 9, 2012, Juba: GoSS.
89. Kendall, "Constitutional Technicity," 2–3.
90. Eriksson and Kostić, "Peacemaking and Peacebuilding," 6; Sannerholm, *Rule of Law after War and Crisis*, 103–4; Humphreys, *Theatre of the Rule of Law*, 7, 9–11; Kendall, "Constitutional Technicity," 9–10.
91. Grenfell, *Promoting the Rule of Law*, 13.
92. Rottenburg, *Far-Fetched Facts*, 140.
93. Ibid., 137.
94. Ki-moon, "Guidance Note of the Secretary-General," 6–7.
95. Sannerholm, *Rule of Law after War and Crisis*, 124.
96. Klug, "South Africa's Experience in Constitution-Building," 70–1.
97. Sannerholm, *Rule of Law after War and Crisis*, 121–2.
98. Eriksson and Kostić, "Peacemaking and Peacebuilding," 6; Chesterman, "Ownership in Theory and in Practice"; Narten, "Post-conflict Peacebuilding and Local Ownership," 254.
99. Art. 202(6) TCRSS.
100. Kulluel, "Kiir Names Constitution Review Team."
101. See Mandil, "NCRC Launches Nation-Wide Civic Education Campaign."
102. See Radiomiraya, "Review Commission Decries Lack of Funds."
103. IDEA, "Amid Conflict and Crisis."

104. NCRC, "Update on the Activities of the Commission and Request for Extension the Mandate" (RSS/NCRC/LT/No.108/2014), Juba, December 19, 2014 [unpubl.].
105. Conversation with Akolda M. Tier, NCRC, Juba, May 14, 2015 [conducted by K. Seidel].
106. NCRC, Timelines for Constitutional Review Entities in Other Countries, March 23, 2015 [unpubl.].
107. According to Rottenburg, *Far-Fetched Facts*, 142, the '[t]echnical game is not an instrument of hegemony, but the only code available for carrying out transcultural negotiations'.
108. South Sudan Law Society, "Constitutional Development."
109. The NCC will comprise delegates representing political parties, CSOs, women organizations, youth organizations, faith-based organizations, people with special needs, traditional leaders, etc. (Art. 203(1) TRCSS).
110. Interviews with P. G. Manyon, South Sudan Law Society, Juba, April 3, 2013, April 9, 2013 [conducted by K. Seidel].
111. Benitu dialogue on the constitution-making process, Benitu, Unity State, February 4–17, 2013 [provided to K. Seidel by SSLA].
112. Bor Dialogue on the Constitution from March 25 to 27, 2013, Bor, Jonglei State [provided to K. Seidel by SSLA].
113. National Women Conference South Sudan, "South Sudan National Women Conference on Constitution Making."
114. *Ibid.*
115. IDEA, "Symposium."
116. SCC, "Pastoral Letter on the National Constitutional Review of the Transitional Constitution."
117. *Ibid.*
118. For the role of civil society and rule of law promotion, see Humphreys, *Theatre of the Rule of Law*, 204–7.
119. Cook, Nelson Moro, and Yabang Lo-Lujo, "From a Transitional to a Permanent Constitution", 54–5.
120. *Ibid.*, 58.
121. *Ibid.*, 54–5.
122. *Ibid.*, 58.
123. Klug, "South Africa's Experience in Constitution-Building," 70–1.
124. NCRC, "The National Constitutional Review Commission Internal Rules of Procedure," 2012.

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