

## BERICHTE / REPORTS

### The New Electoral Law in South Sudan

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**Abstract:** *South Sudan has taken an important step towards free and fair elections by the enactment of the National Elections Act, 2012 (NEA 2012). By committing to internationally recognized electoral standards the new country lays the foundation for a stable democracy truly based on the will of the South Sudanese people.*

*Based on the Transitional Constitution of South Sudan, 2011 (TCSS) the electoral system reaffirms the strong presidential system and confirms a tendency to centralize key powers within the national executive. While the President and the state governors are chosen directly by the people, for the elections to the bicameral parliament a mixed parallel system is in place. By combining a first-past-the-post system for 60 percent of the representatives in the National Legislative Assembly with the remaining 40 percent of members elected on the basis of proportional representation from women and political party lists, the electoral system attempts to be inclusive. In addition, the NEA 2012 implements a 25 per cent quota for women in all legislative and executive organs, which is guaranteed by the constitution. The upper house of the newly established bicameral system consists of members elected indirectly by the respective legislative assemblies in the states, thereby ensuring state representation on the national level. This mixed electoral system endeavors to avoid a system of “winner-takes-all” but nonetheless it foregoes the chance to introduce additional mechanisms to further facilitate the inclusion of other stakeholders by electoral means. In particular, smaller political parties and minorities will have difficulties to be adequately represented, a problem that could prove to be crucial in a country as ethnically diverse as South Sudan. In addition, this risks a continuation of the concentration of power in the current ruling party, the Sudan People’s Liberation Movement (SPLM).*

*Notwithstanding possible problems that might arise out of the electoral system, South Sudan still has to take several important steps before new elections can take place, including final border demarcation, a new population census and the demarcation of electoral constituencies. Furthermore, the implementation of the relatively complex electoral system under which each voter has to cast six different votes for elections*

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*on the national and state level, is hampered by the fact that South Sudan is one of the least developed countries in the world with a low literacy rate and very poor infrastructure. Due to these factors the upcoming general elections scheduled for 2015, will pose a big challenge to the newest country in the world on which its success as a democratic state will certainly be measured.*

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Ten months after becoming the world's youngest nation in June 2011, South Sudan has enacted its own electoral law to guide future elections. Based on the Transitional Constitution of South Sudan 2011 (TCSS) it builds on international electoral standards and tries to incorporate them into an electoral system based on the respect of human rights and genuinely democratic processes. The new National Elections Act 2012 (NEA 2012) relies largely on the system that governed the first democratic elections held in the then still united Sudan in 2010. It underlines the strong presidential system and establishes a mixed parallel system for the election of the lower house of the bicameral legislature. Although inclusivity and representativeness of government institutions will be crucial in a country as ethnically diverse as South Sudan<sup>1</sup>, the electoral system makes it relatively difficult for small political parties and minorities to gain adequate representation, strengthening the current predominance of the South Sudan People's Liberation Movement (SPLM).<sup>2</sup> This is further amplified by the fact that the NEA 2012 reinforces the strong presidential system set up under the TCSS and the tendency of the act to centralise key powers, which risks to be at the expense of a pluralist system that reflects the diversity of South Sudan.

### A. The Legal Framework for Elections in South Sudan

The TCSS recognizes the importance of elections and the need for a new electoral law for the new state by stipulating a tight timeframe for the enactment of a new elections law within three months after independence.<sup>3</sup> With seven months of delay the government enacted the new electoral law in April 2012.<sup>4</sup> In developing the act, the government met with electoral

1 There are more than 60 different ethnic groups in South Sudan, see *The House of Nationalities*, The House of Nationalities Leaflet, 2004. Available at <http://www.houseofnationalities.org/uploads/HoN%20Leaflet%20Oct2004.pdf> (last accessed 14 December 2012).

2 The Sudan People's Liberation Movement (SPLM) is by far the largest of the approximately 26 political parties in South Sudan. Based on its central role in gaining independence and forming the new country it is also the most popular and has an overwhelming majority in all government institutions. See for example *International Foundation for Electoral Systems (IFES)*, South Sudan Anniversary: One Year after Independence, Washington, DC 2012. Available at <http://www.ifes.org/Content/Publications/White-Papers/2012/South-Sudan-Anniversary-One-Year-after-Independence.aspx> (last accessed 12 November 2012).

3 Art. 197 (2) TCSS.

4 The South Sudanese Ministry of Justice had requested the International Foundation for Electoral Systems (IFES) for support in drafting the elections law. See *IFES*, note 2.

stakeholders to guarantee that all relevant perspectives were considered in the drafting of the law.<sup>5</sup>

The TCSS commits to establishing the Republic of South Sudan as a decentralized democratic state with a multi-party system<sup>6</sup> in which "Sovereignty is vested in the people and shall be exercised by the State through its democratic and representative institutions [...]".<sup>7</sup> To guarantee the implementation of such a democratic system, it explicitly provides for the right to participation and voting in art. 26 TCSS. In addition, the NEA 2012 contains general principles for democratic elections with which all interpretation and application of the act has to be consistent.<sup>8</sup> It thus enumerates preconditions for genuinely democratic elections that are required by most international human rights instruments, such as the secrecy of the ballot, transparency of the electoral process and administration, universal suffrage and the freedom of the vote.<sup>9</sup> In addition, the TCSS furthermore explicitly acknowledges the importance of other fundamental human rights for the effective realization of the right to democratic elections, reflecting the interdependence of democracy and human rights.<sup>10</sup> In particular the protection of the right of access to information (art. 32 TCSS), the freedom of expression and media (art. 24 TCSS), the freedom of assembly and association (art. 25 TCSS), the freedom of movement and residence (art. 27 TCSS) as well as equality before the law (art. 14 TCSS) are considered to be essential to guarantee a free exchange of ideas about public and political issues necessary for genuinely democratic elections.<sup>11</sup>

Despite South Sudan's strong commitment to a decentralized system of governance consisting of a national level, ten states and a local level of government<sup>12</sup>, the new electoral

5 See *The Carter Center*, Statement, Carter Center Commends South Sudan on Inclusive Approach to Foundational Democratic Laws, Emphasizes Key Issues for Consideration by Assembly, 16 November 2011. Available at <http://www.cartercenter.org/news/pr/sudan-111611.html> (last accessed 23 October 2011).

6 Preamble and Art. 1 (4) TCSS.

7 Art. 2 TCSS.

8 Sec. 5 NEA 2012.

9 Most international instruments, most importantly the ICCPR, recognize these requirements as necessary for elections to be genuinely democratic, see art. 25 ICCPR.

10 See also *United Nations Human Rights Committee*, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 07/12/1996, CPR/C/21/Rev. 1/Add.7, paras. 12, 25 and 26. See also for example *Gregory H. Fox*, Democracy, Right to, International Protection, in: Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* 2008, online edition, [www.mepil.com](http://www.mepil.com) (last accessed 23 October 2012).

11 Section 5 (1) (c) NEA 2012. Similarly, the Human Rights Committee states that "Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected." *United Nations Human Rights Committee*, note 10, para. 12.

12 Preamble, arts. 1 (4), 47 TCSS.

framework corroborates the tendency of the TCSS to centralize key powers.<sup>13</sup> According to the TCSS elections at all levels of government fall within the competence of the national government.<sup>14</sup> This includes elections to local government institutions, which explicitly are to be organized and conducted by the National Elections Commission (the Commission). While the NEA 2012 regulates in detail the elections on the national and state level, it leaves it to the Commission to make rules and procedures for local government elections.<sup>15</sup>

## B. Electoral System

In general, the electoral system set up in the Interim National Constitution 2005 (INC), the Interim Constitution of Southern Sudan 2005 (ICSS) and the Sudanese National Elections Act 2008 (Sudan NEA 2008), which governed the first democratic elections held in the then still united Sudan in 2010, remains in place under the TCSS and the NEA 2012.

On the national level, the NEA 2012 governs the future presidential elections and the elections to the bicameral National Legislature consisting of the National Legislative Assembly (NLA) and the Council of States. On the state level it governs the elections of state governors and the members of the unicameral State Legislative Assemblies. Accordingly, the President and state governors are to be directly elected by a majoritarian two-round system.<sup>16</sup> For the elections to the NLA and the State Legislative Assemblies the NEA 2012 retains a mixed electoral system already used in the Sudan NEA 2008. Subsequently, 60 per cent of the 250 members of the NLA and of the members of the State Legislative Assemblies are to be elected according to a first-past-the-post system using single-seat geographical constituencies. The remaining 40 per cent of members are selected on the basis proportional representation from closed women and political party lists (25 and 15 per cent respectively).<sup>17</sup> The members of the Council of States are to be elected indirectly by the members of the respective state legislative assemblies, four in each state.<sup>18</sup>

13 The TCSS commits to decentralization in its Preamble and Art. 1 (4) TCSS. At the same time it centralizes the former decentralized judiciary, and gives the President far reaching powers towards the states' executives, see for example arts. 165 (2) and 101 (r) TCSS. See in this regard also *Kevin L. Cope*, *The Intermestic Constitution: Lessons from the World's Newest Nation*, *Virginia Journal of International Law*, Vol. 53, 2013 (forthcoming), pp. 31, 32.

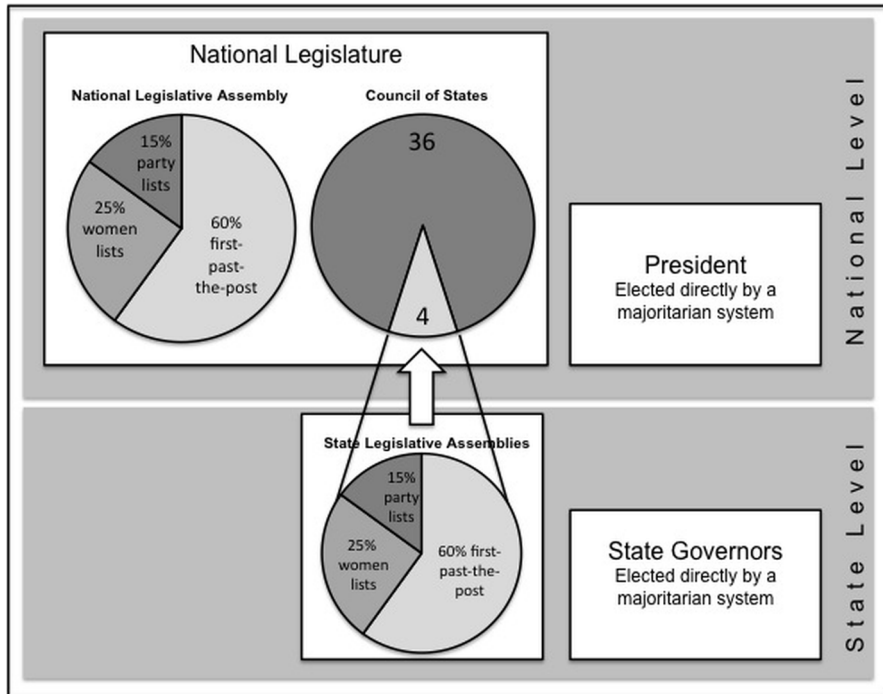
14 Schedule (A) No. 30 of the TCSS.

15 Art. 163 (6) TCSS, sec. 86 NEA 2012. While local government falls within the competence of the states according to Schedule (B) No. 3. of the TCSS, elections to these institutions nonetheless are to be organized by the National Elections Commission, Schedule (A) No. 30 of the TCSS.

16 Sec. 45 NEA 2012.

17 Secs. 60 (2) and (5), 61 NEA 2012.

18 Sec. 60 (3) NEA 2012.



The electoral system in South Sudan

Save for the current transitional period, all state institutions are to be elected for a five-year term.<sup>19</sup> A problematic aspect can be seen in the abolishment of the limit to two terms in office for the President that both the INC and the ICSS contained.<sup>20</sup> In particular in view of the dominant role of the President in the system of government established under the TCSS<sup>21</sup> it

19 Arts. 66, 100 (2), 164 (5) TCSS.

20 Art. 102 ICSS, art. 57 INC. Term limits are considered as an important instrument of democratization, in particular in post-conflict settings as they constrain the power of individual leaders and tend to promote political party alternation. See for example *Gideon Maltz*, The Case for Presidential Term Limits, *Journal of Democracy*, Volume 18/1 (2007), pp. 128-142.

21 The TCSS establishes a very strong presidential system. The predominant role of the president can be seen in particular in the power to appoint a high number of members of the legislature for the transitional period, wide ranging emergency powers (art. 190 TCSS) and expanded powers regarding the states, including the power to dissolve State Legislative Assemblies and to dismiss state governors in event of a crisis in the state (art. 101 (r) TCSS). In addition, the President can remove judges “for gross misconduct, incompetence and incapacity” (art. 134 TCSS). With no other branch or level of government being in a position to counterbalance the President’s position, this concentration of power risks to impede an effective system of checks and balances and gives rise to the danger of arbitrary presidential decisions. See in this regard also *Cope*, note 13, pp. 52, 53.

could be advisable to limit the tenure of this office to guarantee alternation in the highest executive office in South Sudan.<sup>22</sup>

For the transitional period, however, South Sudan decided not to hold elections but to rely on transitional institutions composed of members elected in the last Sudanese elections 2010<sup>23</sup> and presidential appointees. The incumbent President of the Government of Southern Sudan thus became the President of the newly independent state for the transitional period.<sup>24</sup> The 170 members elected to the Southern Sudan Legislative Assembly in 2010 became members of the new NLA, joined by ninety-six South Sudanese who were members of the National Assembly of the Republic of Sudan and an additional sixty-six members appointed by the President.<sup>25</sup> Similarly, for the transitional period, the Council of States is composed of the 20 South Sudanese who were representatives in the Council of States of the Republic of Sudan and an additional thirty members appointed by the President.<sup>26</sup>

For the initial period of the new and still fragile state the makers of the TCSS decided to forgo the expensive and administratively complex exercise of holding elections<sup>27</sup> and to avoid the political violence and instability often associated therewith. However, the TCSS not only abstains from requiring new elections directly after independence, but does not contain a specific timeframe or date regarding new elections during the transitional period at all. Instead, it sets a timeframe to hold elections implicitly by limiting the tenure of all transitional institutions to four years allowing those elected to office in 2010 to finish their term.<sup>28</sup> While this may increase the political stability of the new state, the continued reliance on already existing

22 There are lively discussions in the NLA on whether to re-introduce a presidential term limit in the permanent constitution according to talks of the author with several Members of Parliament in October 2012.

23 Due to irregularities in the election process, harassment and intimidation of opposition candidates the elections were considered to have fallen short of international standards for genuine democratic elections. See for example *The Carter Center*, Observing Sudan's 2010 National Elections April 11–18 2010, Final Report, Atlanta 2010. Available at <http://www.cartercenter.org> (last accessed 10 December 2011).

24 Art. 97 (2) TCSS. The former and current President thus is Salva Kiir Mayardit, who is also the leader of the SPLM.

25 Art. 56 (2) TCSS. The necessary downsizing of the expanded legislature after the transitional period could prove problematic considering the clientelistic politics in South Sudan and the policy to integrate opposing forces by distributing offices. See *Wolfram Lacher*, Staatsaufbau im Südsudan, SWP-Studien, S 19 (2011), p. 34. Available at [http://www.swp-berlin.org/de/publikationen/swp-studien-de/swp-studien-detail/article/staatsaufbau\\_im\\_suedsudan.html](http://www.swp-berlin.org/de/publikationen/swp-studien-de/swp-studien-detail/article/staatsaufbau_im_suedsudan.html) (last accessed 03 January 2012).

26 Art. 58 (2) TCSS.

27 The April 2010 elections in Sudan cost approximately 200 million US\$, see *Aly Verjee*, Race Against Time – The Countdown to the Referenda in Southern Sudan and Abyei, London 2010. Available at <http://www.riftvalley.net/?view=publications> (last accessed 3 January 2013). Even if new elections in South Sudan would be less expensive, they would still be a substantial burden for a developing nation like South Sudan.

28 The term of office for the transitional period is limited to four years from the day of independence (9 July 2011), arts. 66, 100 (2), 164 (5) TCSS. All existing office holders had been elected in 2010 for a term of five years, arts. 57, 90 INC, arts. 65, 102 ICSS.

institutions supplemented by presidential appointees might diminish the democratic legitimacy of the transitional institutions.<sup>29</sup>

### *I. Representation of Women*

A special feature in the TCSS is a constitutional 25 per cent quota for women in all legislative and executive organs "as an affirmative action to redress imbalances created by history, customs, and traditions" in its Bill of Rights.<sup>30</sup> With the guarantee of such a quota in the constitution itself South Sudan goes one step further in protecting women's rights than under the former Sudanese electoral system, under which only the regional ICSS had already foreseen such a quota for women.<sup>31</sup> On the national level the quota was contained in the electoral law, where it was limited to the National Assembly and the state parliaments only.<sup>32</sup> The TCSS now requires the 25 per cent quota to be realized in all legislative and executive organs on all levels of government, including the Council of States.

The NEA 2012 ensures the realization of this quota for women in all government institutions by requiring a special women list to elect 25 per cent of the members of the NLA and the state legislative assemblies.<sup>33</sup> Of the 40 per cent of seats that are to be elected based on proportional representation, 15 per cent of the seats in parliament are elected through normal closed party lists, 25 per cent of seats are elected through party lists comprised of female candidates only.<sup>34</sup> To ensure the constitutionally guaranteed quota for women in the Council of States, one of the four representatives elected by each State Legislative Assembly has to

29 This lack of legitimacy becomes even more problematic considering that these transitional institutions will have the final say in the enactment of the permanent constitution for the country, arts. 201-203 TCSS. The SPLM's current dominance of the transitional institutions increases the inherent danger of self-dealing and indicates the SPLM's reluctance to diminish its dominant position. Scheduling new elections prior to the adoption of the permanent constitution by the legislature would have provided the permanent constitution with more legitimacy. See in this regard *Cope*, note 13, p. 31. See also *Daniel Gruss and Katharina Diehl*, *A New Constitution for South Sudan*, Yearbook of Islamic and Middle Eastern Law, Volume 16, Leiden and Boston, Mass. 2012, pp. 69-90.

30 Art. 16 (4) (a) TCSS.

31 Art. 20 (4) (a) ICSS.

32 Secs. 29, 30, 31 NEA 2008.

33 Neither the TCSS nor the NEA 2012 stipulates any sanction mechanism to ensure the implementation of such a result-oriented quota. It could have been considered to provide for sanctions to follow up non-compliance. See in this regard *Stina Larserud and Rita Taphorn*, *Designing for Equality*. Best fit, medium fit and non-favourable combinations of electoral systems and gender quotas, Stockholm, 2007, p. 17.

34 Sec. 60 (2) NEA 2012.

be a woman.<sup>35</sup> To achieve this, every member of the respective state legislative assembly has four votes of which one has to be cast for a woman.<sup>36</sup>

## II. Representation and Inclusiveness

The ethnic diversity and the problems that arose after the elections in 2010, after which failed opposition candidates even took up arms after their failure to be elected<sup>37</sup>, would seem to make it a priority for the new electoral law to facilitate making any future government as inclusive as possible. It remains to be seen whether the NEA 2012, which retains a mixed parallel electoral system for the NLA, will be able to accommodate such diverse interests any better in future elections. To facilitate the inclusion and representation of minorities and to ensure compliance with the 25 per cent quota for women it thus provides on the one hand for candidates elected directly from geographical constituencies, as well as candidates elected on the basis of proportional representation.

Considering the political realities in South Sudan, however, this system still bears the risk of favouring the already predominant SPLM while making it difficult for the opposition to gain adequate representation<sup>38</sup>. In particular, the majoritarian component using single-seat constituencies for the 60 per cent of representatives decreases the chances for candidates of

35 While 26,5 per cent of the members of the NLA are female, in the Council of States currently only 5 out of 50 members are women, see *Inter-Parliamentary Union*, Women in National Parliaments, available at: <http://www.ipu.org/wmn-e/classif.htm> (last accessed 28 November 2012). This in particular is unfortunate as for the transitional period the President appointed 30 of the members and could easily have made sure to implement the 25 per cent quota.

36 Sec. 60 (3) NEA 2012 reads: “[...] One representative shall be a woman. Every member of the State Legislative Assembly shall have four votes one of which must be cast for a woman. The top four candidates with the highest number of valid votes shall be declared elected.” In order to guarantee that one representative of each state really is a woman this provision has to be implemented to the effect that in case no woman is within the top four candidates with the highest number of votes, only the three top candidates and the female candidate with the highest number of votes are declared elected.

37 After the elections in 2010 several armed groups have launched insurgencies against the new government in Juba. See *Human Security Baseline Assessment*, Sudan Human Security Baseline Assessment, in: Small Arms Survey Sudan Issue Brief No. 18 (2011). Available at <http://www.smallarmssurveysudan.org/pdfs/HSBA-SIB-18-Armed-insurgencies-Greater-Upper-Nile.pdf> (last accessed 14 December 2012).

38 Currently approximately 90 per cent of the 332 seats in the NLA are held by the SPLM. While five opposition parties are represented in the NLA, most of them did not win their seats in the elections but were appointed to the NLA after independence. In addition the opposition still lacks both the resources to operate effectively as well as the necessary experience to formulate policies. See in this regard *Freedom House*, Freedom in the World 2012, South Sudan. Available at <http://www.freedomhouse.org/report/freedom-world/2012/south-sudan> (last accessed 05 December 2012).



small parties and minorities to win seats.<sup>39</sup> Small parties have better chances to gain representation over the party- and women's lists, which are now being elected on the national level.<sup>40</sup> But even for the seats elected on the basis of proportional representation there are several factors favouring larger parties. In particular the qualifying threshold for women's- and party lists of four per cent of valid votes for the lists,<sup>41</sup> introduced to avoid a fragmentation of the political landscape in a country as diverse as South Sudan, limits the chances of small parties. As the NEA 2012 furthermore does not allow for lists of alliances of parties but only for single parties, it will be difficult for the opposition to develop enough weight to challenge the hegemony of the SPLM.<sup>42</sup> In addition, small political parties are further disadvantaged by the requirements for the nomination of candidates. The NEA 2012 requires a women's- or party list to contain as many nominees as there are seats to be filled by the respective list.<sup>43</sup> This could be a big challenge for small political parties as they might not even have that many qualified candidates (for the NLA 100 seats are to be filled from the lists), in particular when only a small number of them have a real chance to win a seat. Moreover parties have to submit a deposit for each candidate on the list that only will be refunded if the four per cent qualifying threshold is met.<sup>44</sup>

To win a significant number of seats in the legislature and establish a political counterweight to the SPLM's dominance will thus remain a challenge for the opposition under the new electoral law. This might further be impeded by the fact that the opposition has yet to develop its structures and establish a stable basis<sup>45</sup> in South Sudan, an endeavour made even more difficult by the population's support for the current ruling elite due to having fought in the civil war and guided the country to independence.

39 See in this regard also *Gerard Mc Hugh*, National Elections and Political Accommodation in the Sudan, Governance and Peacebuilding Series, in: Conflict Dynamics International Governance and Peacebuilding Series, Briefing Paper No. 2 (2009). Available at [www.cdint.org/documents/CDI-Natl\\_Elections\\_and\\_Pol\\_Accommodation\\_in\\_the\\_Sudan\\_June\\_2009.pdf](http://www.cdint.org/documents/CDI-Natl_Elections_and_Pol_Accommodation_in_the_Sudan_June_2009.pdf) (last accessed 15 December 2012).

40 Sec. 60 (2) (b) and (c) NEA 2012. Formerly members of the national legislature were elected from party- and women's lists at the state level, Sec. 29 (2) (b) and (c) NEA 2008. The usage of a larger constituency should lead to a more representative legislature, see in this regard *Andrew Reynolds, Ben Reilly and Andrew Ellis*, Electoral System Design: the New International IDEA Handbook, Stockholm 2005, p. 77.

41 Sec. 63 (d) NEA 2012, Section 33 (4) NEA 2008.

42 In particular small parties could use alliances to pass the qualifying threshold. See in this regard *Dieter Nohlen*, Wahlrecht und Parteiensystem, Opladen & Farmington Hills 2009, p. 105.

43 Sec. 78 (3) NEA 2012.

44 Sec. 78 (5) and (6) NEA.

45 See about the structural weakness of the opposition *International Crisis Group*, Politics and Transition in the New South Sudan, in: Africa Report No. 172 (2011), p. 16. Available at <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/south-sudan/172-politics-and-transition-in-the-new-south-sudan.aspx> (last accessed 15 December 2012).

### C. Electoral Management

The electoral management established under the NEA 2012 consists of the National Elections Commission, High Committees, Returning Officers and Assistant Returning Officers. In particular with regard the appointment and removal of the members thereof the President wields considerable influence, which might risk compromising the independence of electoral management. In addition, by allocating important powers exclusively to the Commission, which are often accompanied by wide discretionary powers, the NEA 2012 further corroborates the tendency to centralise power on the national level.

#### I. *The National Elections Commission*

Based on the TCSS the NEA 2012 establishes the National Elections Commission consisting of nine members appointed by the President, subject to the approval of a two-third majority of the NLA who serve a six-year term.<sup>46</sup> While under the Sudan NEA 2008 women and civil society groups had to be represented in the Commission to guarantee its inclusiveness they now only have to be consulted with regard to its composition.<sup>47</sup>

Notwithstanding the parliamentary scrutiny of appointments, the President's influence on the Commission is considerable as he unilaterally appoints the Chairperson, Deputy Chairperson and Chief Electoral Officer from the elected members.<sup>48</sup> In addition, he appears to have wide discretionary powers regarding the termination of membership and removal of Commission members. Members can be removed from office on grounds of proven partiality, incapacity to perform or gross misconduct by the President upon recommendation of a two-third majority of the members of the Commission.<sup>49</sup> In this regard, however, the law remains silent on the fact whether such a report or recommendation is binding for the President, or

46 Art. 197 (1) TCSS. The duties of the Chairperson, Deputy Chairperson and Chief Electoral Officer are set out in secs. 17, 18 and 19 NEA 2012. The Commission was supposed to be appointed within one month after the adoption of the NEA 2012, sec. 10 (1) NEA 2012. However, this was only done in August 2012 and only 8 of the 9 Commission members were appointed as one highly qualified female candidate was rejected because she was three years younger than the mandatory minimum age of 35. At the time of writing, it was unclear when the last Commission member would be appointed. *Sudan Tribune*, South Sudan approves eight members of National Election Commission, 30 August 2012. Available at: <http://www.sudantribune.com/spip.php?article43739> (last accessed 12 November 2012).

47 Sec. 6 (1) Sudan NEA 2008.

48 Sec. 10 (4) NEA 2012 and Art. 197 (3) TCSS.

49 Unfortunately, the NEA 2012 does not indicate how this can be proven, or whether there has to be an investigation. In comparison, for the removal of High Committee members, an investigation is required. See sec. 26 (2) NEA 2012. In addition, membership of the Commission may terminate on grounds of absence for five consecutive ordinary meetings without an acceptable excuse or the conviction of a crime involving fraud, dishonesty or moral turpitude, sec. 12 (1)(a)(b) NEA 2012.

whether he has discretion to ignore it.<sup>50</sup> In particular, as there seems to be no legal recourse for Commission members to address their termination or removal, the risk of a Commission that could be easily destabilized is a possibility. In light of this, it remains to be seen whether the Commission will be able to work independently and impartially, however, for conducting truly free and fair elections<sup>51</sup>, it is imperative for South Sudan that it has an independent electoral authority.

## II. High Committees, Returning Officers and Assistant Returning Officers

At the state level, High Committees consisting of five members serving a six-year term are responsible to the Commission in administering and supervising elections.<sup>52</sup> Members of the Committees are appointed by simple majority in the Commission upon recommendation of the Chairperson of the Commission, giving the Chairperson considerable influence on the appointment.<sup>53</sup> This strong position of the Chairperson can also be seen with regard to the termination of Committee members<sup>54</sup>, causing the strong presidential influence regarding the Commission and its Chairperson to trickle down to these appointments.

The Commission furthermore appoints Returning Officers for each electoral constituency<sup>55</sup> who are responsible for supervising and administering all elections and referenda in the respective constituency. In consultation with the state Returning Officer<sup>56</sup> they are responsible for establishing polling centres and stations and for the appointment of officers thereof.<sup>57</sup>

50 The law states that the President “may remove” a Commission member, hence it appears that the President has discretionary powers, sec. 12 (2) NEA 2012.

51 See for example *United Nations Human Rights Committee*, note 10, para 20: “An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws (...)”. An electoral commission is responsible for managing key features relating to elections, for example, determination of voter eligibility, conduct of polls and counting of votes, see *Reynolds, Reilly and Ellis*, note 40, p. 5.

52 Sec. 25 (7) NEA 2012.

53 Sec. 25 (3) NEA 2012. The grounds for termination are identical to those of the Commission: repeated absence of five consecutive ordinary meetings without permission or acceptable excuse or being convicted of a crime involving fraud, dishonesty or moral turpitude, see sec. 26 (1)(2) NEA 2012. A report relating to such an event is submitted to the Commission, but it is not further stipulated how membership is subsequently terminated.

54 Members of the High Committee may be terminated by vote of two-thirds majority of the members of the Commission, after an investigation is conducted by a committee appointed by the Chairperson of the Commission. The law does not specify under what conditions an investigation might be conducted, or what the grounds are for possible termination. It appears to be the sole prerogative of the Chairperson of the Commission, see sec. 26 (2) NEA 2012.

55 Sec. 27 (1) NEA 2012.

56 The state Returning Officer is only mentioned in sec. 27 (2) (b) NEA 2012. It is unclear how the state Returning Officer is appointed and removed and what further powers he/she may have.

57 Sec. 27 (2)(a)(b) NEA 2012, The state Returning Officer is only mentioned in sec. 27 (2)(b) NEA 2012. It is unclear how the state Returning Officer is appointed and removed and what further powers he/she may have.

Returning Officers are supported by Assistant Returning Officers appointed by the High Committees with the approval of the Commission.<sup>58</sup>

## D. Electoral Procedures

### I. Population Census and Constituency Demarcation

Before any general elections can take place in South Sudan, the TCSS foresees the conduct of a new population census.<sup>59</sup> In particular after the disputes regarding the last census, which was conducted in Sudan and Southern Sudan in 2008<sup>60</sup>, and in light of estimated 300,000 refugees that have returned to South Sudan in 2011 alone<sup>61</sup> a new census as basis for constituency demarcation is essential to increase confidence in the electoral process and to guarantee fair representation. Although neither the TCSS nor the NEA 2012 set a specific timeframe for the conduct of the census, an implicit time line can be derived from the NEA 2012. The act states that the Commission will determine the geographical constituencies for the State Legislative Assemblies following the publication of each population census.<sup>62</sup> As any review of constituencies must be conducted 12 months prior to a national election,<sup>63</sup> this dictates that the census and drawing of boundaries must be conducted prior to April 2014 for the 2015 elections. The administrative effort connected with these tasks will be substantial, hence it is important to start with the organisation of the census as soon as possible.<sup>64</sup> Subsequently, based on the population size, the average population of each geographical constituency can be determined and the boundaries of the geographical constituencies can be defined.<sup>65</sup>

With regard to the demarcation of constituencies, the NEA 2012 sets up rules to guarantee fair and equal geographical representation to avoid the risk of gerrymandering. No geograph-

58 Sec. 29 (1) NEA 2012. The law is silent with regard to question as to which majority of the Commission is required.

59 See secs. 193 and 194 TCSS. It is only stipulated that a census will take place during the transitional period and the National Bureau of Statistics is tasked with its conduct.

60 The Government of Southern Sudan questioned, amongst others, the statistics for the north stating that the number of Southern Sudanese was inaccurate, see for example, *International Crisis Group*, note 45, p. 28.

61 See for example *United Nations High Commissioner for Refugees*, Global Appeal 2012-2013 on Sudan, p. 79. Available at <http://www.unhcr.org/4ec230fc16.html> (last accessed on 11 December 2012).

62 Sec. 38 (a) NEA 2012.

63 Sec. 41 (1) (a), (c), (e) and (f) NEA 2012.

64 At the time of writing, no efforts had been undertaken to start the process. Any census in South Sudan will be a complex and lengthy method considering the lack of infrastructure.

65 Sec. 38 (a) and (b) NEA 2012. In sec. 41 (1) (e) NEA 2012 it is stipulated that the Commission shall review the names and boundaries of constituencies at intervals of not less than eight years and not more than 12 years. This is a rather long time span, especially if one takes the possible demographic changes in South Sudan into account, for example, the influx of more refugees (from Sudan or elsewhere) or resettlement of people due to regional conflicts in South Sudan.

ical constituency can cross state borders and geographical features, population distribution and physical movements have to be considered.<sup>66</sup> Moreover, deviations from the electoral or national divided regarding the total population in each geographical constituency are permissible only up to 10 per cent. Under exceptional circumstances, which are unfortunately not defined, this can be increased up to 15 per cent.<sup>67</sup>

As geographical constituencies for the state assemblies<sup>68</sup>, and for the election of the National Legislative Assembly are determined separately<sup>69</sup> the administrative burden on a state with little administrative resources will be considerable.

## II. Registration and Voting

Another prerequisite for elections is to identify who is eligible to vote and the subsequent adequate registration of the voters. The NEA 2012 requires voters to be a South Sudanese national, at least 18 years old, be registered in the Electoral Register and be of sound mind.<sup>70</sup> While residence is generally required, South Sudanese residing outside South Sudan who meet the requirements for registration and are in possession of a South Sudanese passport are given the possibility of external voting in presidential elections and referenda.<sup>71</sup>

In order to realize the citizens' right and responsibility to be registered, the Commission is tasked to prepare the Electoral Register<sup>72</sup>, which will certainly be a challenge for a country

66 This is particularly important considering the prevalence of pastoralist communities and transhumant movements in South Sudan. See in this regard *Concordis International*, *Crossing the Line: Transhumance in Transition Along the Sudan-South Sudan Border*, 2012. Available at <http://www.concordis-international.org/files/Concordis%20International%20-%20Crossing%20the%20Line%20FINAL.pdf> (last accessed 3 January 2012).

67 Sec. 41 (b) NEA 2012.

68 The amount of members of all of the state assemblies combined shall be no more than 400. The Commission, according to the population size, allocates the members to the states, see sec. 61 NEA. Here again, the importance of the census can be observed again.

69 Sec. 39 NEA 2012.

70 Sec. 33 NEA 2012. According to the TCSS, citizenship is acquired on the basis of *ius sanguinis* and double citizenship is allowed, see Arts. 45 (1)(4) TCSS. The Nationality Act 2011 further elaborates on the matter of citizenship, see in this regard *Kathrin Maria Scherr*, *Legal Implications of Sudan's Separation: the Question of Citizenship*, in: *Heinrich Böll Foundation and Toni Weis* (ed.), *Sudan After Separation, New Approaches to a New Region*, Berlin 2012, p. 101.

71 See sec. 34 (2) and (3) NEA 2012. Similar to the Sudan NEA 2008, the NEA 2012 does not provide the possibility of external voting in the legislative elections on the national level. From a comparative perspective, it is common for external voters to vote in the national legislative and executive elections, and sometimes also in referenda. In certain jurisdictions (for example Algeria and Ireland) it is even possible to also vote in sub-national elections. See *Andrew Ellis, Carlos Navarro et al.*, *Voting from Abroad*, *The International IDEA Handbook*, Stockholm 2007, pp. 4, 234 and 239.

72 Sec. 35 (a) NEA 2012.

like South Sudan where outside the capital of Juba there is virtually no infrastructure.<sup>73</sup> In addition, South Sudan has many pastoral communities<sup>74</sup>, few citizens are in possession of official papers and the high number of IDPs and influx of refugees<sup>75</sup> make this task even more difficult.<sup>76</sup> Another aspect increasing the administrative burden of the Commission might be the fact that the Electoral Register is only to be revised before any election or referendum takes place. In this regard, yearly updates of the register as foreseen under the NEA 2008 would have perhaps been a more prudent and efficient solution.<sup>77</sup>

### III. Media and Campaigning

The NEA 2012 sets out detailed regulations for media usage during electoral campaigns<sup>78</sup>, thus acknowledging the importance of the media in the democratic process. To guarantee equal access to the media, all state media are obliged to provide free media services to the Commission, which is in turn distributed amongst all parties and independent candidates to aid the relevant campaigns.<sup>79</sup> In addition, media outlets are obliged to inform about any space or airtime that has been paid for to publish electoral campaign materials.<sup>80</sup> Since South Sudan does not yet have an established independent media<sup>81</sup>, which is an essential feature for the

73 Many areas in South Sudan are accessible by air only, due to the lack of infrastructure, see for example *The Guardian*, South Sudan's oil production hasn't trickled down to basic services, 2 January 2012. Available at <http://www.guardian.co.uk/global-development/2013/jan/02/south-sudan-oil-basic-services> (last accessed 2 January 2013).

74 See for example, *Concordis International*, note 66, and *Food and Agricultural Organization of the United Nations*, The FAO Component of the Consolidated Appeals, 2013 South Sudan, Rome 2012. Available at <http://www.fao.org/emergencies/appeals-and-funding/appeals/consolidated-appeals-2013/southsudan2013/en/> (last accessed 28 December 2012).

75 It is estimated that South Sudan has approximately 350.000 IDP's, see CIA Factbook on South Sudan. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/od.html> (last accessed 13 December 2012).

76 These factors could in particular prove to be problematic with regard to the precondition for registration that a citizen (i) must have been a resident of the geographical constituency for a period not less than three months before closure of the Electoral Register or (ii) be a citizen that originates from said geographical constituency, sec. 34 (2) NEA 2012.

77 Sec. 35 (b) NEA 2012. Under the Sudan NEA 2008 the Electoral Register was updated every year, see sec. 23 (b) Sudan NEA 2008.

78 See secs. 89 and 90 NEA 2012. Furthermore, it is stipulated that the campaign period shall not exceed 50 days, see sec. 87 (1) NEA 2012.

79 Sec. 89 (1) (2) NEA 2012. The law, however, leaves it up to the Commission to determine the criteria for the distribution of the free media services.

80 Failure to comply with this obligation is an electoral offence, sec. 142 (1) NEA 2012.

81 See for example, *BBC News*, South Sudan Profile (Media). Available at <http://www.bbc.co.uk/news/world-africa-14019206> (last accessed 13 December 2012).

conduct of free and fair elections<sup>82</sup>, it remains to be seen as to whether the media will in fact be able to play its unique and independent role during elections.

In addition to the media regulations of electoral campaigns, the NEA 2012 also strives to set up a fair and transparent system of campaign financing. In particular with regard to donations to electoral campaigns, strict rules have to be followed. Donations that exceed 20.000 South Sudanese Pounds<sup>83</sup> must be declared to the Commission and donations from foreign countries or any “foreign body” are prohibited.<sup>84</sup> In addition, a fixed ceiling for expenditures on electoral campaigns is supposed to promote equal opportunities of all political parties and candidates.<sup>85</sup> Not only the private funding of electoral campaigns is regulated by the NEA 2012, the act also stipulates the matter of government funding to political parties in proportion with their election results.<sup>86</sup> While this could be a positive development considering the fact that public funding is not yet very common in Africa<sup>87</sup>, in the current set up in South Sudan this provision could prevent competition and subsequently impede the development of a more pluralistic political landscape. It remains unclear whether government funding will be provided only after the upcoming elections in 2015 or already during the transitional period based on the results of the 2010 elections. In the latter case this would disadvantage the opposition from the start of the newly independent country as opposition parties failed to win significant support in the last elections.<sup>88</sup> Moreover, given the current power balance this regulation could make it difficult for any smaller party to access the political arena at all, thereby impeding the chance of political change.

82 *United Nations Human Rights Committee*, note 10, para. 25: “free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”

83 At the time of writing the South Sudanese Pound traded at 1\$= 3,19 SPP, see <http://www.bloomberg.com/quote/USDSSP:CUR/> (last accessed 15 December 2012). In 2011, South Sudan’s GDP per capita was \$2,100, see CIA Factbook on South Sudan, note 75.

84 Sec. 91 (1) and (3) NEA 2012. The law, however, is silent as to whether donations exceeding 20.000 South Sudanese Pounds must be published.

85 Sec. 91 (5) NEA 2012.

86 Sec. 91 (4) NEA 2012.

87 See for example *Reginald Austin and Maja Tjernström (eds.)*, *Funding of Political Parties and Election Campaigns*, IDEA Handbook Series, Stockholm 2003, pp. 25-26 and pp. 209 -213.

88 Opposition parties as well as observers criticized disadvantages and harassment of opposition candidates in the last elections. In addition, many Southern Sudanese perceived only a united South Sudan as being able to achieve independence, so Southern opposition parties postponed their disputes until after the referendum on self-determination. See in this regard amongst others *European Union*, *Election Observation Mission to Sudan, Executive and Legislative Elections 2010, Final Report*, 28 June 2010. Available at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/document/s/afet/dv/201/201007/20100713\\_finreportsudan\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/document/s/afet/dv/201/201007/20100713_finreportsudan_en.pdf) (last accessed 3 January 2013). See also *International Crisis Group*, note 45, p. 4, as well as *Anja Dargatz*, *Elections and Conflict in Sudan*, Berlin 2011. Available at <http://library.fes.de/pdf-files/iez/08448.pdf> (last accessed 10 October 2011).

#### IV. Polling

With regard to the actual voting, the NEA 2012 commits to ensuring the freedom and secrecy of the vote. To enable as many voters as possible to cast their vote and participate in the democratic process polling stations are to be established in each constituency as are convenient by the responsible Returning Officer with the approval of the Commission.<sup>89</sup> To accommodate the needs of pastoral communities the NEA 2012 foresees the establishment of special “mobile polling centres.”<sup>90</sup> While this certainly is an interesting feature to increase democratic participation in an environment like South Sudan, the law unfortunately does not further define these mobile polling centres.<sup>91</sup> It is therefore yet to be observed how this will be implemented in future elections in South Sudan. To enable the large parts of the population that are illiterate to cast their votes, ballots are to use symbols next to the names of candidates or parties for easy identification.<sup>92</sup> In addition, the NEA 2012 explicitly calls for international, national and regional observation to guarantee truly democratic elections in accordance with the law.<sup>93</sup>

#### E. Dispute Resolution

To ensure the legitimacy of the electoral process and the confidence in the democratic system, timely, fair and effective mechanisms to resolve electoral disputes are crucial.<sup>94</sup> To guarantee truly free, fair and genuine elections without any intimidation, coercion or fraud the NEA 2012 therefore provides for court adjudication in disputes relating to constituency demarcation, registration, nomination, campaigns, and election results to ensure that the electoral process complies with the law. The NEA 2012 assigns the responsibility to adjudicate most of such objections to the judiciary of South Sudan.<sup>95</sup> Objections against the demarcation of geographical constituencies boundaries,<sup>96</sup> as well as objections against election results<sup>97</sup> are to

89 See sec. 31 (1) NEA 2012. It would perhaps have been advisable to incorporate the amount of polling stations according to the amount of people who are allowed to vote in a particular constituency.

90 Sec. 31 (3) NEA 2012.

91 It does remain to be seen however, how this article is interpreted in conjunction with sec. 102 (c) NEA because it is also stipulated that a polling centre has to remain in the same place for the duration of the polling and announcement of result.

92 Sec. 53 NEA 2012. In South Sudan only 27 per cent of the population are literate, amongst women the literacy rate is even as low as 16 per cent, see CIA Factbook on South Sudan, note 75.

93 Sec. 147 (1) NEA 2012.

94 Such mechanisms are considered to ensure that electoral conflict is dealt with by institutional means in order to prevent the danger that in particular the losers of elections resolve to taking up arms. Effective adjudication of electoral disputes can thus significantly contribute to reducing potential for armed conflict and electoral violence. See also *Ayman Ayoub and Andrew Ellis (eds.)*, Electoral Justice: The International IDEA Handbook, Stockholm 2010, p. 3.

95 While objections are usually to be made to the electoral management bodies first, it is usually a court of law that decides about the objection in the last instance.

96 Sec. 43 NEA 2012.

97 Secs. 111, 112, 122, and 123 NEA 2012.



be adjudicated by the Supreme Court, as are appeals against the rejection of the nomination of candidates for the Presidency, the office of Governor or the Council of States.<sup>98</sup> All other complaints and objections are to be decided by a “competent court”,<sup>99</sup> meaning that the Chief Justice has the power to designate the court of competent jurisdiction.<sup>100</sup>

The NEA does not contain any conclusive provisions regulating the adjudication of complaints during polling, the counting of votes and the declaration of results. Instead the act largely leaves it to the Commission to enact regulations specifying procedures for such complaints.<sup>101</sup>

In addition, the NEA foresees criminal punishment for corrupt or illegal practices and electoral offences as well as for other contraventions to the electoral law. Such electoral offences are punishable by a fine or up to two years imprisonment by a court of law.<sup>102</sup>

Due to this somehow vague and inconclusive system of dealing with electoral complaints it will be challenging for both South Sudan’s judiciary and the Electoral Commission to develop an efficient and transparent system to resolve electoral disputes that could contribute significantly to the credibility of election results as well as containing election-related conflicts.

## F. Conclusion

The enactment of the NEA 2012 is an important step for South Sudan. The commitment to free and fair elections contained therein is essential to build a state truly based on the will of the people. However, to foster a peaceful and stable democracy it will be crucial whether South Sudan will succeed to accommodate the diversity existing within its pluralistic society. By establishing a mixed electoral system, the electoral law tries to achieve inclusivity and representation and to avoid a system of “winner-takes-all” that could leave parts of the population marginalised. Notwithstanding this mixed system, it foregoes the chance to introduce

98 Secs. 51 and 69 NEA 2012.

99 This includes appeals against the rejection of the nomination as a candidate for the NLA and the State Legislative Assemblies, Sec. 81 NEA 2012, and objections about the registration process, sec. 36 NEA 2012.

100 Interpretation according to Sec. 7 NEA 2012.

101 Secs. 103 (1) and 105 (11) NEA 2012. The only case that is regulated in the NEA 2012 itself is that an agent in a polling station whose request for a recount of votes is denied may submit a written objection to the presiding officer of the polling station who has to attach the objection to the polling and counting report, sec. 107 (5) NEA 2012. As the Act does not specify what ultimately happens with the objection it remains largely unclear how objections and complaints during these stages of the electoral process are to be handled.

102 Secs. 131-146 and 156 NEA 2012. In particular any form of corruption, undue influence, obstruction of voters or election officials, electoral fraud, intimidation or coercion are prohibited and punishable under the NEA 2012. All criminal punishments contained in the NEA 2012 are imposed by regular courts, with the electoral law leaving it to the Chief Justice to determine which courts shall be competent to try electoral offences, secs. 146 and 7 NEA 2012.

additional mechanisms to further facilitate the inclusion of other stakeholders by electoral means, risking a continuation of the current hegemony of the SPLM.

Prior to the next elections it will be crucial for the government to include as many political actors as possible, regardless of the current distribution of power, in particular if one considers the popular perception that other political actors are excluded from power by the SPLM based on ethnic criteria.<sup>103</sup> Up until now the SPLM appears to be very willing to include other political stakeholders on a voluntary basis, but its dominance in all positions of power for the transitional period makes it easy to avert any commitment to binding rules for doing so in the future.<sup>104</sup>

The conduct of the elections scheduled for 2015 will be a complex endeavour for the young nation and important tasks need to be tackled as soon as possible for them to take place in time. In particular due to the persistent unresolved issue of border delimitation with the Republic of Sudan<sup>105</sup> the conduct of a new population census and the demarcation of constituencies will be difficult to finish in time. The implementation of the relatively complex electoral system in a country with a literacy rate as low as 27 per cent and a very poor infrastructure will pose additional difficulties.<sup>106</sup>

South Sudan's first general elections will thus be a big challenge on which the new country's success as a democratic state will certainly be measured. The NEA lays the foundation

103 See *Jok Madut Jok*, Diversity, Unity, and Nation Building in South Sudan, United States Institute of Peace Special Report 287 (2011). Available at: <http://www.usip.org/publications/diversity-unity-nation-building-in-south-sudan> (last accessed 15 November 2012).

104 The President in particular strives to include people from other political parties and civil society in his appointments to important institutions, e.g. about one third of members of the National Constitution Review Commission are not members of the SPLM. See Presidential Decree No. 03/2012 for the Appointment of full-time and part-time members of the National Constitutional Review Commission, (NCRC) 2012 A.D. of 9 January 2012. In addition, the government for example reached out to other political parties at the consultative forums on both the Elections Act and Political Parties Act, see *The Carter Center*, Carter Center Commends South Sudan on Inclusive Approach to Foundational Democratic Laws, Emphasizes Key Issues for Consideration by Assembly, 16 November 2011. Available at <http://www.cartercenter.org/news/pr/sudan-111611.html> (last accessed 11 December 2012).

105 In particular the issue of the status of Abyei remains unresolved. As negotiations about holding a referendum to decide whether Abyei will be part of South Sudan or the Republic of Sudan are stalled due to continuing controversies about the criteria concerning the eligibility to vote in the referendum it remains to be seen whether the referendum will take place in time. See *Sudan Tribune*, Sudanese foreign minister predicts additional time over Abyei, 5 December 2012. Available at <http://www.sudantribune.com/spip.php?article44746> (last accessed 14 December 2012).

106 Significant development challenges face South Sudan. Over half of the population lives below the poverty line, and human development indicators are among the worst in the world. Most of Sudan lacks access to safe sources of water and transportation is difficult due to the lack of roads the poor quality of existing roads with less than 2 percent of paved roads. See in this regard *Rupa Ranganathan and Cecilia M. Briceño-Garmendia*, South Sudan's Infrastructure - A Continental Perspective, The World Bank Policy Research Working Paper No. 5814 (2011). Available at <http://elibrary.worldbank.org/deliver/5814.pdf?itemId=/content/workingpaper/10.1596/1813-9450-5814&mimeType=pdf> (last accessed 14 December 2012).

for genuinely democratic elections; it will now depend on whether the guarantees contained therein will be successfully implemented in order to ensure that the 2015 elections are truly free and fair, reflecting the diversity and will of the South Sudanese people.