

**BUILDING THE HOUSE OF GOVERNANCE
POLITICAL ACCOMMODATION IN SOUTH SUDAN**

TECHNICAL SUPPLEMENT

MAY 2012



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1. Introduction

This Technical Supplement expands upon the Briefing Paper *Building the house of governance: Political accommodation in South Sudan*. The purpose of this supplement is to present the technical approaches, quantitative techniques and comparative cases which can inform exploration and generation of technical options for political accommodation in South Sudan.

Section 2 of this supplement presents approaches to looking at prospects for political accommodation in South Sudan. *Section 3* describes the Briefing Paper's technical approaches to each of the six Strands of political accommodation. These approaches reveal the "building blocks" for coherent options and highlight opportunity areas. To shed light on the choices which the opportunity areas present, this section gives examples from other contexts which have faced similar choices. Lastly, to complement the constitutional analysis which forms one component of the Briefing Paper, *Section 4* presents in full the provisions pertinent to political accommodation in the 2011 Transitional Constitution of the Republic of South Sudan.

2. Assessing prospects for political accommodation

The first step in developing options is to consider the prospects for political accommodation as reflected in existing provisions and arrangements. To complement analysis at this stage of options development, *Section 2.1* compares governance arrangements under the 2005 Interim Constitution of Southern Sudan (hereafter referred to as the “Interim Constitution”) to the structures which emerged from the 2011 Transitional Constitution. *Section 2.2* then presents indicators and the concept of Lorenz curves for assessing prospects for political accommodation.¹

2.1 Comparing governance arrangements since the 2005 Interim Constitution of Southern Sudan

The following table and figures compare governance arrangements, and how they have changed, since the Interim Constitution.

Table 1. Attributes of the Government of Southern Sudan under the 2005 Interim Constitution and the Republic of South Sudan under the 2011 Transitional Constitution

ATTRIBUTE	GOVERNMENT OF SOUTHERN SUDAN (2005-2011)	REPUBLIC OF SOUTH SUDAN UNDER TRANSITIONAL CONSTITUTION
NATIONAL		
Political structure and decentralization	10 states and 79 counties.	As under the Interim Constitution.
Executive	A president, directly elected, who also serves as the first vice president of the Republic of the Sudan. A vice president, appointed by the president and approved by a two-thirds majority in the Southern Sudan Legislative Assembly (SSLA).	A president, directly elected, and a vice president, appointed by the president.
Electoral system	Direct election of the president; a mixed system of election to the SSLA, with 60 percent of seats elected through single-seat geographical constituencies, 25 percent proportional representation through women’s lists and 15 percent proportional representation through political parties’ lists.	As under the Interim Constitution, with election of the Council of States through the state legislative assemblies.
Legislative branch First chamber	A 170-seat SSLA.	A 332-member NLA: 170 from former SSLA; 96 returning from the National Assembly of the Republic of the Sudan, and 66 appointed by the president.

¹ Lorenz curves can be used in many ways to assess equity. For illustrations of how Lorenz curves can serve as a useful tool, please refer to Appendix II, which employs Lorenz curve analysis to examine how presidential appointments to the Council of States might affect political accommodation through the national legislature; and Appendix III, which employs Lorenz curve analysis to assess what choices about electoral constituencies might mean for political accommodation.

Legislative branch Second chamber	No second chamber.	A 50-member Council of States: 20 returning from the former Republic of the Sudan's Council of States, and 30 members appointed by the president.
Public participation	Broad provisions for public participation in formulation of development policy.	Broad provisions for public participation in creation of development plans, and during constitutional review [see Section 4 for full provisions].
Traditional and customary arrangements	No mechanism for formal consultation or integration at the national level, but an aspiration for a National Council of Traditional Authority Leaders (COTAL) in 2009 Local Government Act.	Aspiration for a national COTAL.
SUB NATIONAL		
Political structure and decentralization	Variable number of counties in each state, with payam and boma administrations forming the lowest levels of government.	As under the Interim Constitution.
Electoral system	Direct election of the governors; a mixed system of election to the state legislative assemblies, with 60% of seats elected through single-seat geographical constituencies, 25 percent proportional representation through women's lists and 15 percent proportional representation through political parties' lists.	As under the Interim Constitution.
Executive	Governors of 10 states, county commissioners for each of 79 counties.	As under the Interim Constitution.
Legislative branch	Directly elected state legislative assemblies.	As under the Interim Constitution.
Public participation	Broad provisions for public participation in formulation of development policy.	[See Section 4 for full provisions]
Traditional and customary arrangements	Consultations to develop state COTALs; recognition of customary law courts and councils under 2009 Local Government Act.	Development of state COTALs. Acknowledgement of traditional authorities, and aspirations to integrate them into the local government system.

Figure 1. Governance arrangements under the 2005 Interim Constitution of Southern Sudan

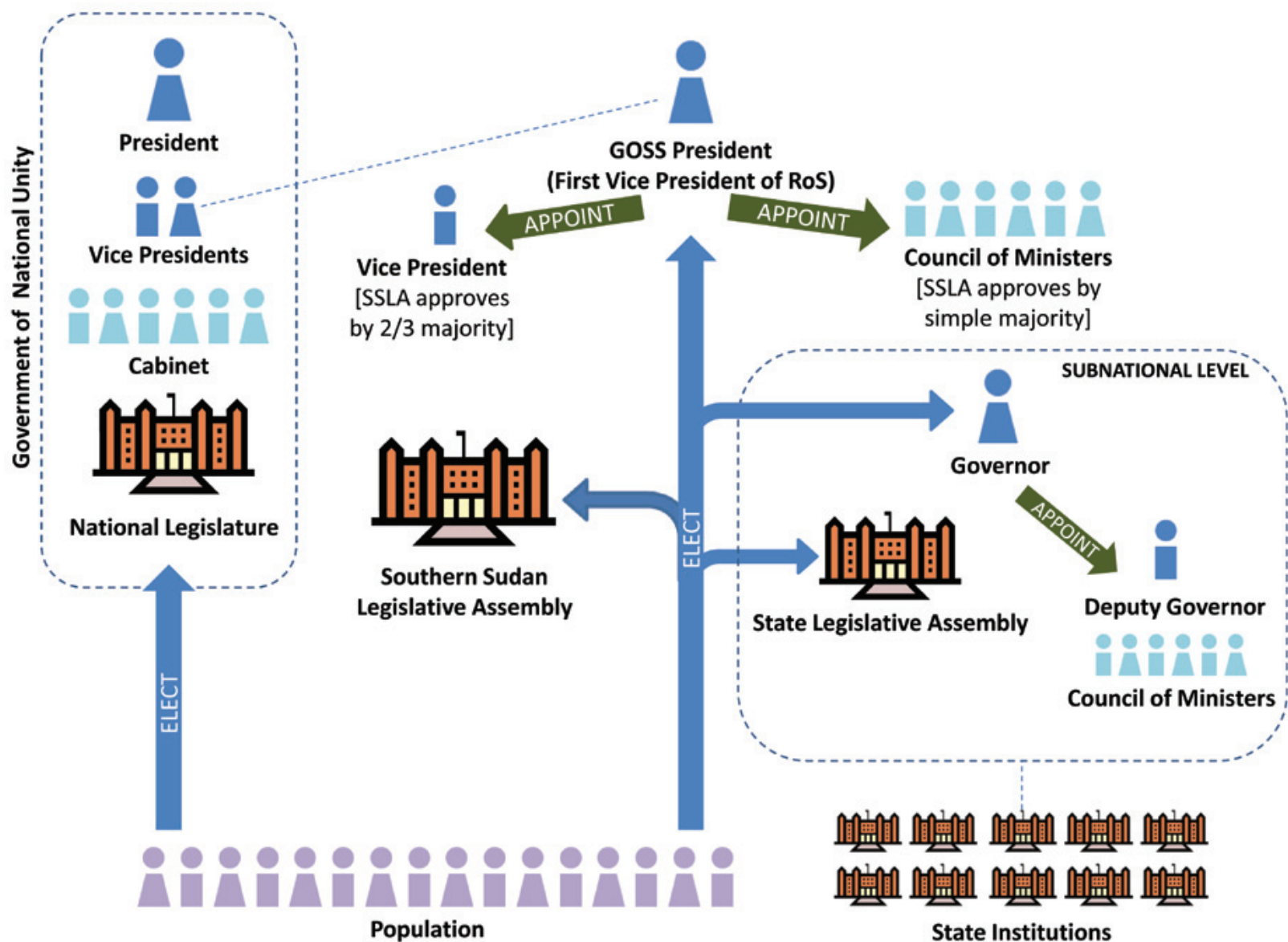
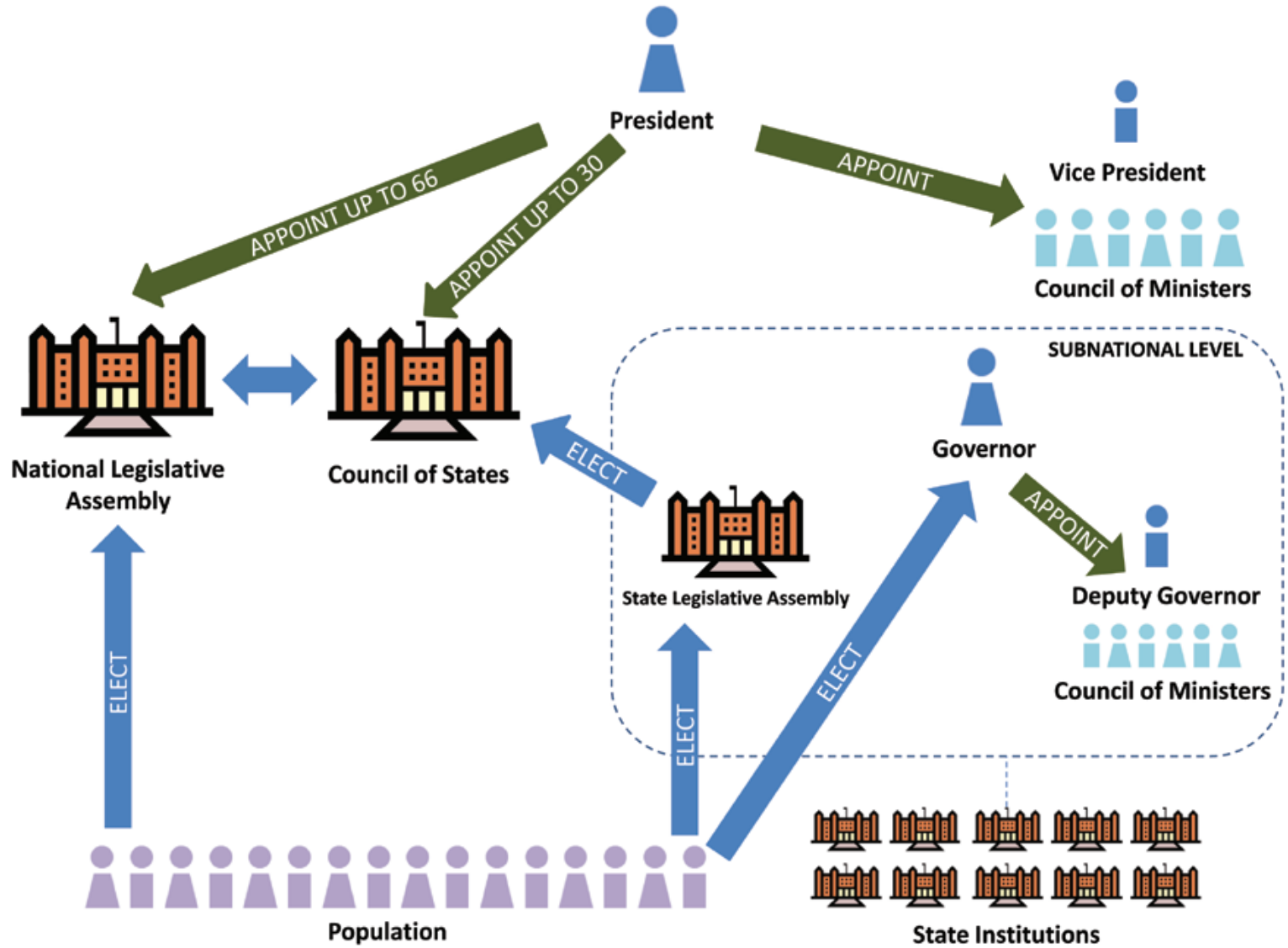


Figure 2. The Republic of South Sudan's transitional governance arrangements, established by the Transitional Constitution of the Republic of South Sudan (2011)



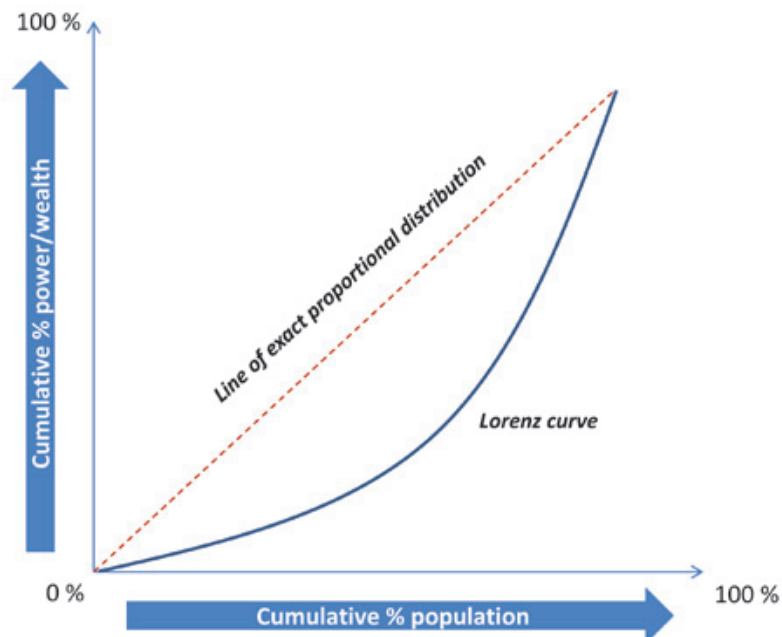
2.2 Indicators of political accommodation

Alongside other conceptual tools, indicators of equity can be used to assess prospects for political accommodation through particular arrangements. Three types of indicators include: (1) equity of political representation; (2) equity of political decision-making influence; and (3) degree of public participation.

A number of statistical tools can help quantify and assess the degree of equality/inequality in wealth sharing, resource allocation, political representation and political decision-making influence. These tools include distribution and equality curves (including the Lorenz curves, described below) and indices of equality/ inequality in distributions of political representation, resources and decision making.²

Lorenz curves: In any system which distributes power or resources, the level of equity in that system can be visualized using a simple but powerful tool: the Lorenz curve. The Lorenz curve is a *graphical representation of the distribution of power or resources among various constituent groups within a given population*. Lorenz curves are generated by plotting the cumulative population against the cumulative power or wealth each constituent group is allocated. In each graph, two curves are generated: a) the cumulative population, adding in series the groups from largest population share to smallest, which forms a straight line of exact proportional distribution (the dotted line); and b) the actual cumulative distribution of power/wealth (the curve below the straight dotted line – the Lorenz curve). In general, the greater the area between the Lorenz curve and the straight diagonal line of exact proportional distribution, the greater the level of statistical inequality in the system.

Figure 3. Lorenz curve



² The indices of equality/inequality used include the GINI Index, which provides a quantitative representation of the level of equality/ inequality in a system.

3. Building blocks and focus cases

This section lays out the technical building blocks, or options components, across Strands for assembling coherent options for political accommodation. This section:

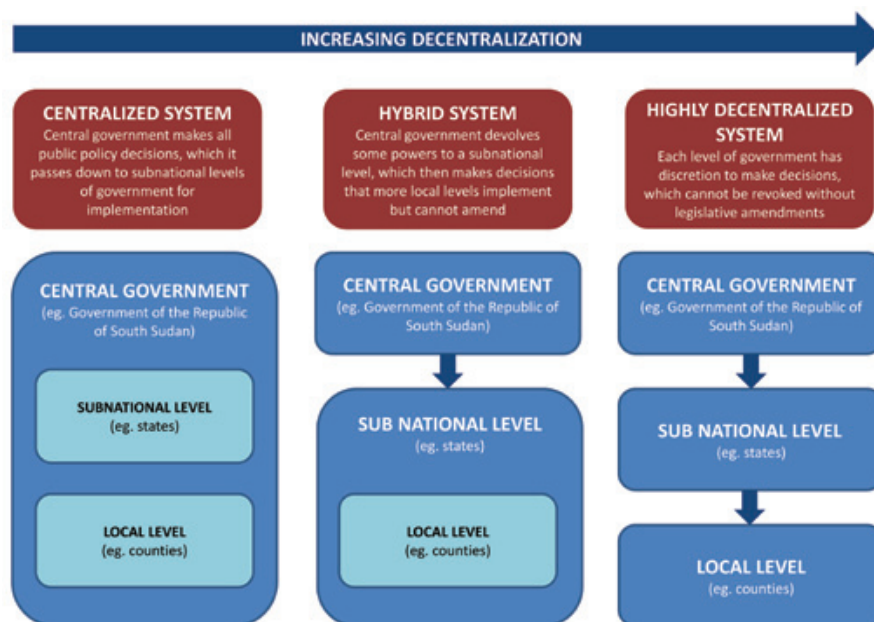
- Presents frameworks for making choices in each Strand.
- Identifies opportunity areas central to options design in South Sudan.
- Describes building blocks or “options components” in each Strand.
- Presents cases which shed light on political accommodation challenges. These cases do not offer recommendations or models for duplication, but illuminate opportunities and challenges.

3.1 Political structure and decentralization

3.1.1 Approach

Decentralization broadly encompasses “the transfer of authority and responsibility for public functions from the central government to subordinate or quasi-independent government organizations...”³ Decentralization, therefore, is a process which occurs along a spectrum. Figure 4 presents one way to view this spectrum.⁴

Figure 4. Decentralization spectrum



³ World Bank, *What is decentralization?* (accessed November 28, 2011); available at <http://www1.worldbank.org/publicsector/decentralization/what.htm>.

⁴ This graphic is adapted from Vivek Srivastava, *Strategic Options Paper on Decentralization: Political Considerations*, Technical Solutions, Presentation at World Bank Workshop on Strengthening Good Governance for Development Outcomes in Post-conflict Settings, Juba, June 18, 2008.

Political structures are generally viewed through three related dimensions of decentralization:⁵

1. Political decentralization constitutes how the voice of citizens is integrated into policy decisions and how civil society can hold authorities and officials responsible for the consequences of their choices.
2. Administrative decentralization constitutes how policies and decisions are made and how these are turned into outcomes in terms of distribution of resources.
3. Fiscal decentralization constitutes assignment of expenditures, revenues, transfers, and subnational borrowing to subnational governments.

Decentralization presents key choices both within each dimension and related to how the dimensions inter-relate.

Choices within dimensions

Political decentralization

There are many different configurations and types of subnational units which can comprise the political structure. For example a government could administer the State through a state, county, payam and boma system, or some other configuration. For any structure, choices are required about the definition of political boundaries.

Administrative decentralization

Administrative decentralization presents choices about the division of competencies and relationships between levels of government. There are three types of administrative arrangements for exercising competencies:

- Deconcentration, whereby local authorities serve as field offices of the central government, taking charge of policy implementation and administration, while the central government makes policy decisions.⁶ Subnational levels of government thus serve as agents of national government, with competence to execute but not to alter the decisions of the center.⁷
- Delegation, whereby local authorities have some responsibility and decision-making authority, but remain accountable to the central government in a principal-agent relationship.⁸ Delegation, therefore, is a weaker form of deconcentration since subnational levels of government have some decision-making authority if the central government

⁵ This definition derives from the World Bank Independent Evaluation Group, *Independent Evaluation Group Evaluation of the Bank's Assistance for Decentralization*, (Washington, DC: World Bank, 2007), 1.

⁶ Phillip Oxhorn, "Unravelling the Puzzle of Decentralization," in *Decentralization, Democratic Governance, and Civil Society in Comparative Perspective*, ed. Phillip Oxhorn, Joseph S. Tulchin, and Andrew D. Selee (Washington DC: Woodrow Wilson Center Press, 2004), 5.

⁷ Hon. Dr. Richard K. Mulla, Public Lecture to the Directorate of Decentralization and Inter-governmental Relations, Beijing Hotel, Juba, 10 May 2011, 2.

⁸ This definition derives from the World Bank Independent Evaluation Group, *Independent Evaluation Group Evaluation of the Bank's Assistance for Decentralization*, (Washington, DC: World Bank, 2007), 1.

issues such a mandate. However, the central government can revoke this mandate without legislative amendment.

- Devolution, whereby local government has responsibility, authority and accountability over specific policy areas, receiving some degree of political autonomy.⁹ Government can devolve powers either through legislation or constitutional provisions. Therefore, government can only revoke devolved powers through legislative amendment.

Fiscal decentralization

Fiscal decentralization presents key choices both about modalities for revenue transfers and financing subnational units, and methods for resolving fiscal imbalances. These decisions include:

- Whether the center finances subnational units through block grants, conditional grants or a combination of the two, contingent on population and human development needs.
- How, and the extent to which, units generate their own revenue.
- Arrangements for addressing horizontal and vertical fiscal imbalances, such as through equalization grants.
- Arrangements for compensating resource-producing units which might contribute disproportionately to national revenue.

Fiscal imbalances

Fiscal imbalances occur when a subnational government's ability to raise or attract revenue does not adequately match its formal competencies or puts it in an inequitable position compared to other subnational units.

A vertical fiscal imbalance denotes a situation in which a subnational level of government incurs a disproportionately large amount of responsibility compared to its share of revenue. The central government may address this type of imbalance with **conditional transfers** contingent on particular population or development indicators.

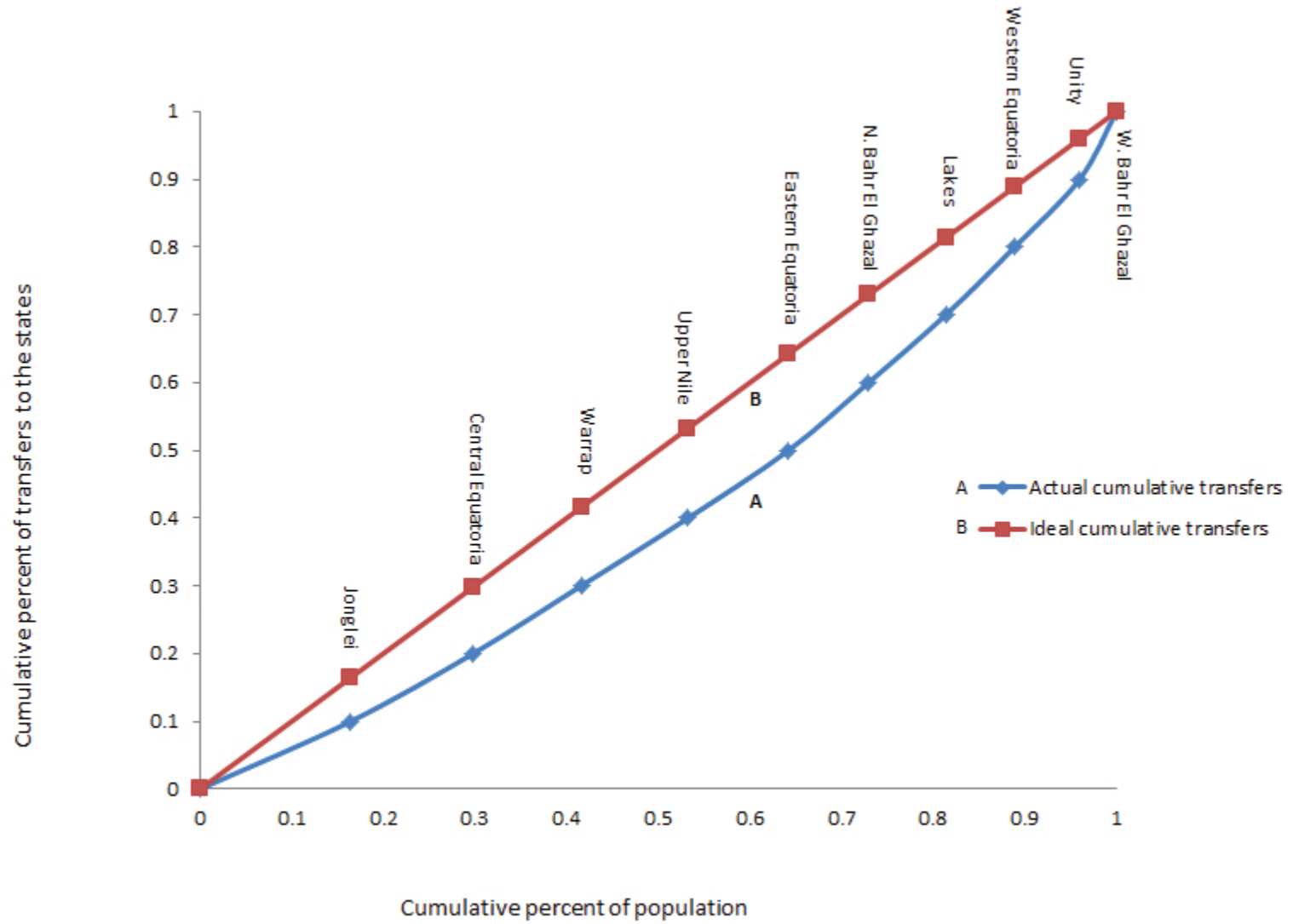
A horizontal fiscal imbalance denotes a situation in which some subnational units possess weaker fiscal capacities than others. The central government may address this type of imbalance through **equalization grants**.

Fiscal imbalances in South Sudan

Each of the ten states of South Sudan, regardless of population size, receives block grants of an equal amount, rather than grants allocated on the basis of an equity formula which takes population size and development outcomes into account. These block grants are distinct from the oil and other natural resource revenues which producing states might receive in accordance with article 178(1) of the Transitional Constitution.

⁹ Ibid, 1.

Figure 5. Lorenz curve: Equity of block transfers to the states



Source: Ministry of Finance and Economic Planning (transfers); National Bureau of Statistics (population)

The equal distribution by state of block grants creates a horizontal fiscal imbalance implied by the Lorenz curve in Figure 5.¹⁰

The Ministry of Finance and Economic Planning transferred a total of SSP 614,966,640 in the 2011 budget as equal block grants to the 10 states of South Sudan.¹¹ Jonglei (the biggest state), whose population and area size account for nearly 17 percent and nearly 20 percent of the national totals respectively, received the same amount as Western Bahr El Ghazal, whose population is about four percent of the total population, and Northern Bahr El Ghazal whose area size accounts for less than five percent of the total area. This means that the block grant transferred per person for Western Bahr El Ghazal is four times the funding per person allocated to Jonglei. While South Sudan's formula gives the 10 states exactly equal shares, other countries use indicators such as population, area size and development and security needs (e.g., poverty rate, access to health, education) to calculate transfers to the states. For an example, see the Ghana case study at the end of this section.

Interestingly, while the development indicators of the more populous states affected by this formula are clearly poor, the development indicators of the smaller states with higher per capita transfers are not necessarily better. Northern Bahr El Ghazal is the poorest state in South Sudan, while Warrap and Jonglei have identical literacy rates of 16 percent despite the fact that Warrap receives per capita transfers that are 40 percent higher than Jonglei's. Likewise, although Unity is an oil producing state and obtained the second highest per capita transfers, it is still the second poorest state in South Sudan.

The following table summarizes the key indicators for the 10 states of South Sudan.

¹⁰ The upper line indicates an equitable distribution of resources according to state population size, whereas the lower line indicates the actual cumulative distribution of resources from most populous state to least populous.

¹¹ Each state of the 10 states of South Sudan receives exactly 10 percent regardless of other indicators. The population data are drawn from the census of 2008, while the expenditures come from the 2011 budget. The government also provides conditional transfers to the state governments, which are earmarked for specific line activities. The analysis focuses on the block transfers.

Table 2. Key indicators across South Sudan's 10 states

State	Current transfers per capita	Percentage of the total population	Percentage of the total area (sq km)	Poverty rate (percent of state population below poverty line)	Adult literacy rate (percent of state population who can read and write)
Western Bahr El Ghazal	184.44	4.04%	14.13%	43.00%	34.00%
Unity	104.98	7.09%	5.87%	68.00%	26.00%
Western Equatoria	99.34	7.49%	12.31%	42.00%	33.00%
Lakes	88.39	8.42%	6.77%	49.00%	18.00%
Northern Bahr El Ghazal	85.31	8.73%	4.74%	76.00%	21.00%
Eastern Equatoria	67.87	10.97%	11.40%	50.00%	19.00%
Upper Nile	63.77	11.67%	11.99%	26.00%	45.00%
Warrap	63.21	11.78%	7.07%	64.00%	16.00%
Central Equatoria	55.72	13.36%	6.68%	44.00%	44.00%
Jonglei	45.26	16.45%	19.02%	48.00%	16.00%
South Sudan	74.45	100.00%	100.00%	51.00%	27.00%

Note: The population data are drawn from the census of 2008, while the expenditures come from the 2011 budget. These are the most recent data available. **Source:** National Bureau of Statistics; Ministry of Finance and Economic Planning.

Choices across dimensions

With effective balancing of choices across the three dimensions, decentralization can establish equilibrium between the claims and expectations of diverse population groups and the demands of effective government.¹² Conversely, poor alignment of decisions and execution across the three dimensions can lead to fragmentation, undermining effective political accommodation, such as through inequitable access to positions, services and resources.

In addition, the balance of choices across dimensions determines the levels of autonomy within a political structure. At one end of the spectrum, decentralization might create a structure which resembles a unitary State. This is a State with national and subnational tiers, in which the *national government is defined as sovereign over all its territorial units*.¹³ Alternatively, decentralization might create interactions which more closely resemble a federal State. According to one of several definitions, this is a State in which there are *two constitutionally established orders of government with some genuine autonomy from each other, and the governments at each level are primarily accountable to their respective constituencies*.¹⁴

As a cross-cutting choice, asymmetric arrangements for decentralization might be considered. For example, different subnational units might require different administrative arrangements or

¹² John-Mary Kauzya, *Decentralization: Prospects for Peace, Democracy and Development* (New York: United Nations Department of Economic and Social Affairs, 2005), 4.

¹³ Pippa Norris, *Driving Democracy: Do Power-Sharing Institutions Work?* (New York: Cambridge University Press, 2008), 168.

¹⁴ George R. M. Anderson, *Federalism: An Introduction* (Oxford: Forum of Federations and Oxford University Press, 2008), 4.

financing structures. Constitutional provisions might also provide for subnational units to “opt-in” or “opt-out” of particular relationships with the central government. Likewise, constitutional provisions could provide for different categories of subnational units, such that some have arrangements for special autonomy.¹⁵

3.1.2 Opportunity areas

Key opportunity areas for political accommodation include:

Political decentralization

- The desired levels of decentralization in a federal or unitary State, and the attendant structures required.¹⁶
- The nature and modes of representation of subnational political units at the national level.
- Models for allocating competencies between levels of government, including choices among allocation of competencies in the constitution, retrievable competencies (e.g., a devolved system of government), and à la carte competencies (i.e., in which constituent entities can take on competencies as their capacities permit).
- Dispute resolution mechanisms to mediate disagreements that arise between political units.
- Avenues for accommodating the interests of border communities and other groups which face barriers to representation and participation in governance structures.

Administrative decentralization

- Internal processes and decision-making rules within the bureaucracies of local government bodies.
- Scope and level of decentralization of administrative functions to subnational units.

Fiscal decentralization

- The degree and approach to fiscal decentralization, including needs- or quota- (e.g., population) based models and transfers between levels.
- Natural resource sharing arrangements among states, including equalization grants.

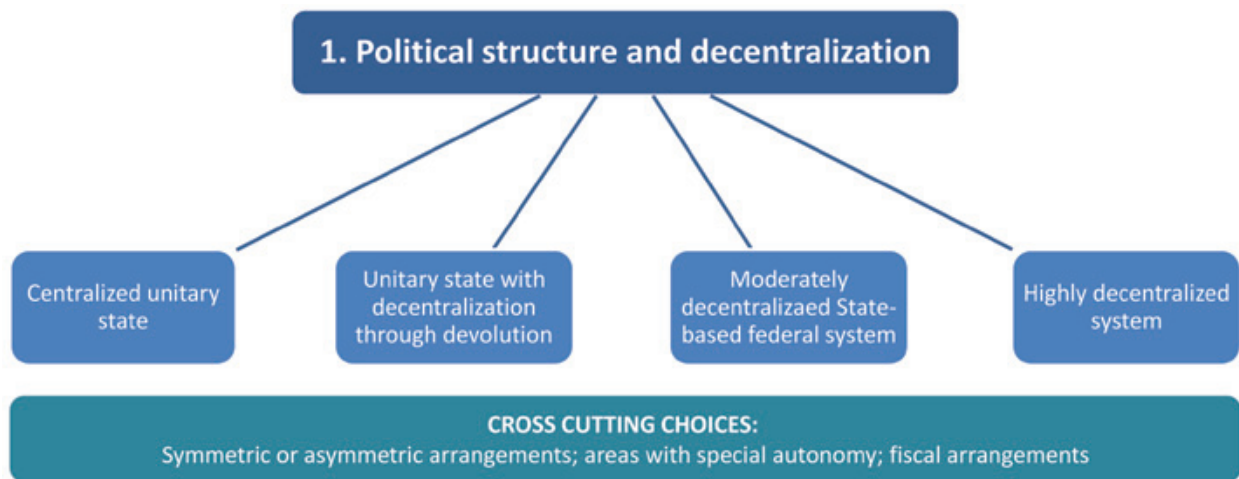
“Options components” in the area of political structure and decentralization are outlined in Figure 6:¹⁷

¹⁵ The status of Southern Sudan under the Comprehensive Peace Agreement presents one example of an asymmetric arrangement with a high level of devolution to one constituent part of the political structure.

¹⁶ See the Glossary for definitions of a federal State and a unitary State.

¹⁷ This only represents part of the spectrum of possible components, restricted to those for single entities with international personality.

Figure 6. Options components: Political structure and decentralization



3.1.3 Focus cases

Canada: Resolving horizontal and vertical fiscal imbalances

Canada presents a case pertinent to the Republic of South Sudan because it consists of provinces and territories, a sub-set of which produce valuable natural resources. The federal system of Canada allows the federal, provincial and territorial governments autonomy to determine their budgets and levels of spending, taxation and borrowing. Due to the way in which the federally-decentralized system is implemented, especially with regard to the systems for fiscal transfers, Canada experiences both vertical and horizontal fiscal imbalances. The Canadian federal government has developed a set of fiscal measures to rectify inequalities and mitigate tensions that arise from this diversity in the capacities of subnational units.

Canada’s Constitution Act of 1867 provided provinces with authority over areas such as social welfare, health care and education – all issues with major financial responsibility. In order to offset this large financial responsibility, the federal government introduced the Canada Health Transfer (CHT) and the Canada Social Transfer (CST) programs. These programs transfer block grants from the federal government to provinces and territories for the purpose of maintaining a national standard for health and social programs.

To correct horizontal fiscal imbalances, section 36(2) of the 1982 Constitution Act establishes that *“Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”* This mandate led to the Equalization Program of Canada which, through federal fiscal transfers, enables less wealthy provinces to provide their populations with comparable public services at comparable levels of taxation. This program is funded by unconditional block grants from the federal government¹⁸ through an “equalization formula.” The formula approximates how much

¹⁸ Jay Makarenko, “Equalization Program in Canada: Overview and Contemporary Issues,” *Government and Institutions*, 24 April 2008 (accessed 14 May 2011); available at <http://www.mapleleafweb.com/features/equalization-program-canada-overview-and-contemporary-issues>

revenue per person each province is able to raise¹⁹ against a national standard based on the average incomes of all 10 provinces. If a province is below the national standard, it will receive funds to elevate it up to the average. In 2008 the federal government transferred \$12.9 billion to the provinces through the equalization program.²⁰

Ghana: Direct fiscal transfers to the district level

Like the Republic of South Sudan, Ghana has traditionally faced challenges to equitable, effective and efficient delivery of services at the local level. Ghana has sought to tackle these challenges, with mixed success, through a package of fiscal transfers which the national government channels directly to districts, minimizing the extent to which intermediary levels handle funds.

Ghana is an example of a unitary State with certain powers and functions assigned to the district level. While the national parliament serves as the main legislative body, district assemblies (DAs) constitute the principal political and administrative authorities at the local level, with powers to raise revenue.²¹ The constitution and Local Government Act of 1993 mandate revenue-sharing between the central government and the DAs, which take the form of a) direct central to district transfers and b) authority to raise revenue at the district level.

Block transfers: The main transfer mechanism is the District Assemblies Common Fund (DACF). The constitution mandates that a minimum of five percent of total national revenues must go into this fund, which the government distributes quarterly among the DAs according to a formula approved by parliament.²² The variables which determine the formula include measures of equity of income, population density, district need and district revenue generation. The DACF administrator determines the weight of each variable within the formula.²³ For most regions, DACF transfers comprise the largest proportion of DAs' revenues.²⁴ However, the DAs have limited discretion over DACF funds, which they must spend "only on projects which form part of the [central government-] approved development plan for the district."²⁵

Internally generated funds (IGF): The constitution and the Local Governance Act (1993) establish district assemblies' powers to raise revenue internally by levying taxes and fees, issuing licenses and borrowing. Sources from which DAs are authorized to collect taxes or fees include: goods at local markets; animal raising and slaughtering; taxis; food and drink kiosks; and many forms of self-employment.²⁶ IGFs make up a small proportion of DA revenues – in 2004 the national aver-

¹⁹ The 2007 formula is based on measures of each province's fiscal capacity, including indicators for personal income tax, business income tax, consumption tax, property tax and natural resources. Ibid.

²⁰ Department of Finance, Canada, *Federal Transfers to Provinces and Territories* (accessed November 2011); available at <http://www.fin.gc.ca/access/fedprov-eng.asp>

²¹ In total, there are three metropolitan assemblies, four municipal assemblies and 103 district assemblies.

²² Article 252, *Constitution of the Republic of Ghana*, 1992.

²³ Recently, equity and need have dominated the formula, with the other variables counting for less than 10 percent weight in aggregate. Samuel Benin, Godsway Cudjoe and Tewodaj Mogues, *Do External Grants to District Governments Discourage Own-Revenue Generation?* International Food Policy Research Institute Discussion Paper #00934 (Washington DC: IFPRI, 2009), 11.

²⁴ Table 1, Ibid: 10.

²⁵ Article 87, paragraph 2, *Local Government Act*, 1993, Act 462, Laws of the Republic of Ghana.

²⁶ For a full list see the Sixth Schedule of the *Local Government Act*, 1993, Act 462, Laws of the Republic of Ghana

age was 16 percent ²⁷ A framework document issued in 2008 by the Ministry of Local Government and Rural Development notes that, “Currently, IGFs are the only funds over which [district assemblies] have total control.”²⁸

The system of block transfers directly to the DAs without passing through an intermediary level presents an option to enhance efficiency of financial transfers. This might have relevance to the funding of county administrations in South Sudan.

3.2 Electoral system

3.2.1 Approach

The design of the various systems for election of members of the institutions established under the Transitional Constitution represents an important opportunity to accommodate a broad range of political perspectives, and to foster inclusive and participatory governance arrangements. If the design of the electoral system can contribute to this accommodation, it will provide significant incentives for all political parties, civil society constituencies and the people of South Sudan to actively support and participate in elections.

This technical supplement uses “electoral systems” in a broad sense to include forms of representation (majoritarian and proportional), systems for translating raw vote totals into electoral outcomes to decide who will hold public office for the term, and the electoral institutions and processes (including the resolution of electoral disputes) that can make elections an effective tool of political accommodation.

Electoral system design can be approached through assessing the merits for political accommodation of systems categorized into four families, as shown in Figure 7.

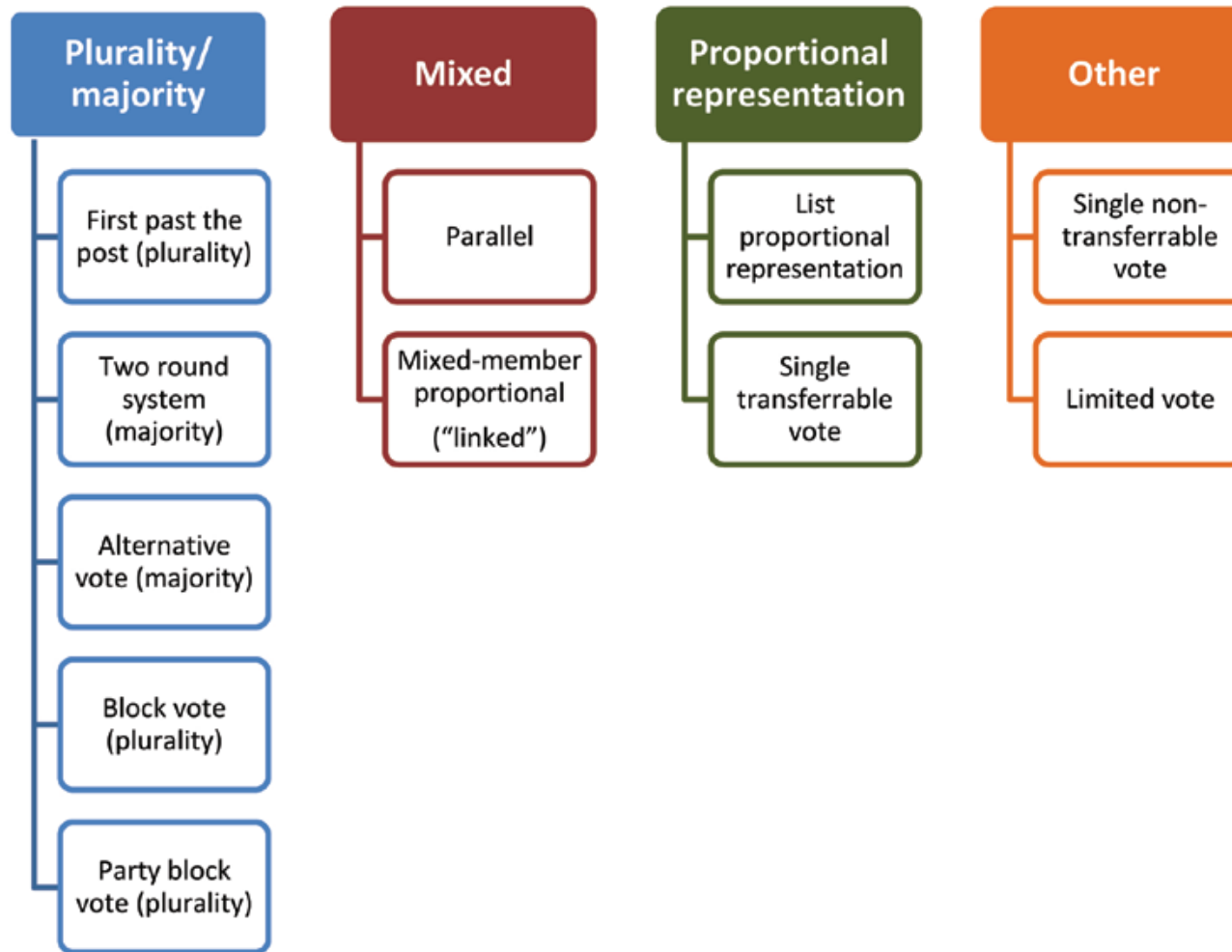
For each of these systems, the following variables present key choices:

- Seats per district: In a proportional representation system, smaller parties potentially have an advantage in gaining greater representation the more seats per district (though other factors may remove this advantage). In majority/plurality systems, larger parties potentially have an advantage in gaining greater (and often disproportional) representation the more seats per district.
- Size of elected body: In general, the larger the elected body the more representative and greater potential for smaller parties to win seats.
- District population size: Matching population size with constituency seats determines how equitable the number of seats is across electoral districts.

²⁷ Table 1, Samuel Benin, Godsway Cudjoe and Tewodaj Mogues, *Do External Grants to District Governments Discourage Own-Revenue Generation?* International Food Policy Research Institute Discussion Paper #00934 (Washington DC: IFPRI, 2009), 10.

²⁸ Ministry of Local Government, Rural Development and Environment, *Intergovernmental Fiscal Decentralisation Framework* (Ghana: Government of Ghana, 2008), 15.

Figure 7. Electoral system families



Note: This graphic draws on International IDEA's set of electoral system families, and several other organizations/authors use this classification. International IDEA also includes Borda Count under the "Other" family. However, Borda Count is not typically included in other electoral system analysis, and thus has been omitted in this typology. Andrew Reynolds, Ben Reilly and Andrew Ellis, *Electoral System Design: The New International Idea Handbook* (Stockholm: International Idea, 2005), 28.

Table 3. Electoral system families

Plurality/ Majority	Mixed	Proportional representation (PR)	Other
<p>First past the post: The winning candidate is the one who gains more votes than any other candidate, even if this is not an absolute majority of votes. The system uses single-member districts and the voters vote for candidates rather than political parties.</p> <p>Block vote: Used in multi-member districts. Electors have as many votes as there are candidates to be elected. The candidates with the highest votes win the seats. Usually voters vote for candidates rather than parties and in most systems may use as many, or as few, of their votes as they wish.</p> <p>Party block vote: Uses multi-member districts, where voters cast a single party-centered vote for a party of choice, and do not choose between candidates. The party with the most votes will win every seat in the electoral district.</p> <p>Alternative vote: A preferential system used in single-member districts. Voters use numbers to mark their preferences on the ballot paper. A candidate who receives an absolute majority of valid first-preference votes is declared elected. If no candidate achieves an absolute majority of first preferences, the least successful candidates are eliminated and their votes reallocated according to their second preference until one candidate has an absolute majority. Voters vote for candidates rather than political parties.</p> <p>Two-round system: A system in which a second election is held if no candidate or party achieves a given level of votes, most commonly an absolute majority, in the first election round. Can be used in single or multi-member districts.</p>	<p>Mixed member proportional (“linked”): A mixed system where the choices expressed by the voters are used to elect representatives through two different systems – one list PR system and (usually) one plurality/majority system – where the two systems are linked such that the list PR system compensates for the disproportionality in the results from the plurality/majority system.</p> <p>Parallel system: A mixed system in which the choices expressed by the voters are used to elect representatives through two different systems – one PR system and (usually) one plurality/majority system – but in which no account is taken of the seats allocated under the first system in calculating the results of the second system.</p>	<p>List proportional representation: Each party or grouping presents a list of candidates for a multi-member district. The voters vote for a party, and parties receive seats in proportion to their overall share of the vote.</p> <p><u>Closed List:</u> Winning candidates are taken from the lists in order of their position on the lists. <u>Open List:</u> Voters can influence the order of the candidates by marking individual preferences.</p> <p>Single transferrable vote: Preferential system in which the voter ranks the candidates in a multi-member district and the candidates that surpass a specified quota of first-preference voters are immediately elected. In successive counts, votes are redistributed from least successful candidates, who are eliminated, and votes surplus to the quota are redistributed from successful candidates, until sufficient candidates are declared elected. Voters normally vote for candidates rather than political parties, although a party list option is possible.</p>	<p>Single non-transferrable vote: Voters cast a single vote in a multi-member district. The candidate with the highest vote totals are declared elected. Voters vote for candidates rather than political parties.</p> <p>Limited vote: A candidate-centered electoral system used in multi-member districts, in which electors have more than one vote, but fewer votes than there are candidates to be elected. The candidates with the highest vote totals win the seats.</p>

- Electoral formula and thresholds: Low thresholds increase small party inclusion but can also increase fragmentation in an elected body.
- Special arrangements for minorities/women: Quotas for minorities can increase representation of otherwise marginalized groups.
- Ballot design: Policy makers can choose a ballot system where voters can express preferences for particular parties or for individual candidates.

Multi-party politics

The ways political parties associate, appeal for members and compete for positions are essential to how electoral systems function. Political parties can serve as vehicles to manage and create order among diverse interests. When formed freely, political parties provide outlets for discussion and expression of many types of perspective and ideology. Debates between parties offer fora for people to consider competing arguments, understand other viewpoints and make informed decisions in elections. Without these avenues for deliberation, people risk expressing the diverse interests which inevitably make up society in less peaceful ways.

Yet, political parties can also increase tensions by appealing to supporters' fears about diversity. Sec-tarian messages, for example on ethnicity and religion, can persuade members to be less tolerant of other views or communities. In such cases, leaders can use political parties to mobilize supporters to exclude or undermine the interests of other groups. Therefore, multi-party politics can either build mutual conciliation, or it can divide and conquer. This means that political party regulations, along with safeguards for the freedoms of speech and association, are central to building political accommodation through the electoral system.

Note: Multi-party politics also affect the *legislative branch* and *public participation*. Political parties shape internal behavior in legislatures, and they also offer an avenue for public participation through their membership structures.

3.2.2 Opportunity areas

Key opportunity areas for political accommodation include:

National Elections Commission

- Formalized involvement of civil society representatives and political parties in nominating and/or endorsing the composition of the National Elections Commission.
- Structuring membership of the commission in a way that builds in representativeness of geographical areas (states or regions), and/or political parties, including a possible quota for the minimum number of women representatives.
- Qualified majority decision-making procedures for certain key decisions of the commission.

System for elections

- The percentage of seats elected through the proportional representation system (i.e., through the political parties' and women's lists) could be increased – for example, from 40 percent to 50 or 60 percent – to give the smaller parties a better chance of winning seats.
- The majoritarian and proportional segments could be linked so that each party's share of seats in the legislature is not as distorted by the results of the majoritarian contests.

Single or multi-seat constituencies

- The use of multi-seat constituencies (two-seat or larger), which may achieve a greater degree of accommodation through possible election of candidates representing smaller, but still significant, voter constituencies/groups.
- The option to use existing counties (currently 79 in number), or groups of counties to be defined in the future, as the multi-seat geographical constituencies, with an upper ceiling (for the most populous counties) and lower threshold (for the least populous counties) for the number of seats per constituency.²⁹

Local government elections

- The development of a robust legal framework for local government elections to occur in line with the Local Government Act, which may require new legislation and/or amendment of the Act.
- Mechanisms and provisions in legislation to create a system through which women can compete equitably for representation both as commissioners and members of local government councils.
- Collaboration between the National Elections Commission and state high committees to consider the relationship and potential alignment between constituencies for national elections and constituencies for local government elections.

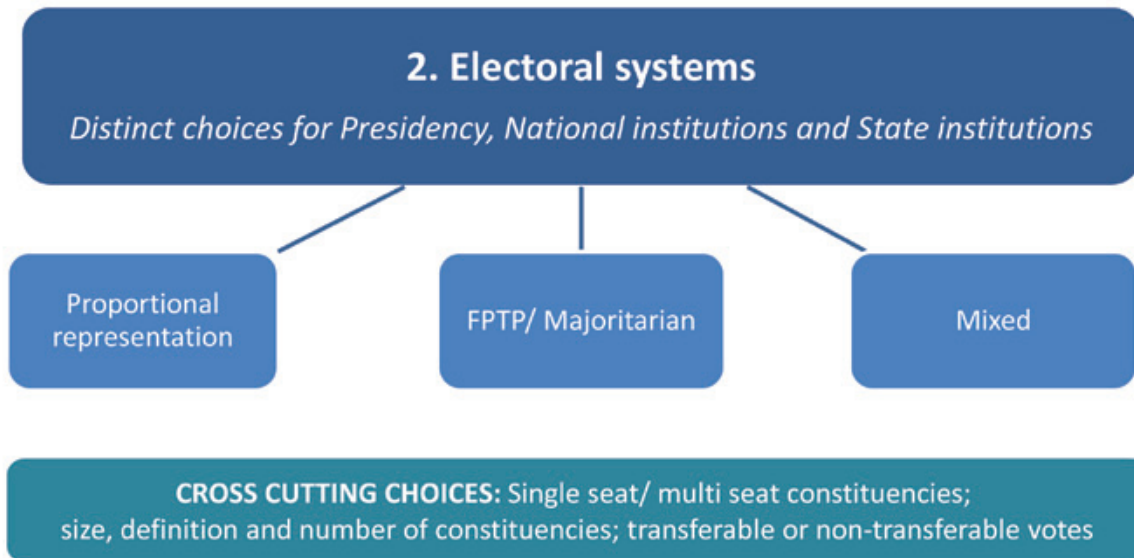
Election of members of the Council of States

- The use of different types of direct systems in each state to elect members of the Council of States.
- Including a provision in the electoral law such that at least one of the four delegates to the Council of States must be a member of a non-majority party (in addition to the gender quota of at least one female).

Drawing on the families in Figure 7, “options components” in the area of electoral systems are outlined in Figure 8:

²⁹ See Appendix III for an illustration.

Figure 8. Options components: Electoral system



3.2.3 Focus case: Kenya

Kenya’s constitution came into force following a referendum in August 2010, reforming governance arrangements in an effort to rectify structures which had failed to mitigate conflicts between groups which felt marginalized by the system. Reform of Kenya’s electoral system may hold important lessons for the Republic of South Sudan, because, like South Sudan, Kenya had to grapple with contentious decisions about how to draw electoral boundaries.

Prior to 2010, Kenya’s electoral system comprised of 210 single-seat geographical constituencies, which returned members to a unicameral parliament through FPTP voting. This system was open to gerrymandering, or manipulation of constituency boundaries for political gain, with acute imbalances in population distribution between districts.

The electoral system as introduced by the 2010 constitution and elaborated in the 2011 Elections Act provided for far-reaching reforms. The Constitution created a bicameral legislature comprised of a National Assembly and Senate. The National Assembly is to be elected through a blend of 290 single-seat constituencies, 47 single-seat county constituencies for the election of women, proportional representation lists and party appointments according to the proportion of geographical constituencies parties attain. The Senate is to be elected through 47 single-seat county constituencies, party appointments and proportional representation lists.

To mitigate tensions over constituency boundaries, Art. 89 of the constitution provides for an independent electoral boundaries commission. This article includes provisions for public participation and for people to contest decisions of the commission.³⁰

³⁰ Key provisions include: Art. 89(7): In reviewing constituency and ward boundaries the Commission shall— (a) consult all interested parties; and (b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota; Art. 89(10): A person may apply to the High Court for review of a decision of the Commission made under this Article. *Constitution of Kenya*, 2010.

3.3 Executive

3.3.1 Approach

The executive branch of government comprises a cluster of arrangements and organs. Among other dimensions, election/ appointment to these organs, internal decision-making procedures and the executive's relations with other branches shape governance structures' facility for political accommodation.

Executive structures can be disaggregated into the following components:

- Chief executive, which can consist of: a president alone; one or more deputies, such as in South Sudan where the presidency consists of HE President Salva Kiir and HE Vice President Riek Machar; or a president and prime minister, such as in France where the president has power principally over international affairs and the prime minister over domestic affairs. Some systems entail direct popular election of the president, while others, like in South Africa, require parliament to elect the president. A president often makes decisions with the assistance of appointed aides.
- Cabinet or Council of Ministers, which advises the president and often comprises all (as in South Sudan) or a selection (as in the UK) of ministers.
- Ministries, which form the sectorial departments of the executive.

3.3.2 Opportunity areas

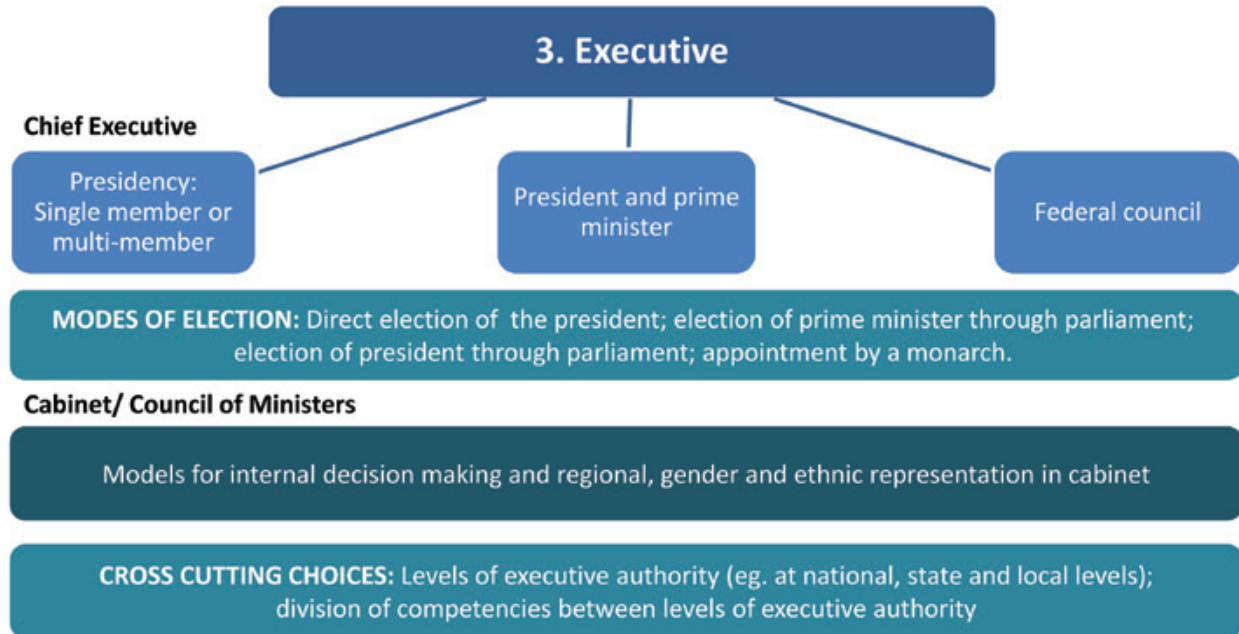
Key opportunity areas for political accommodation include:

- Incorporation of provisions in the national elections bill for double qualification in presidential elections, such that the president would require both an overall majority and a particular geographical spread of votes.³¹
- Representation in the Council of Ministers of constituencies which may not achieve a high degree of political representation in the legislative branch through elections. This may include quotas for women.
- Definition in the constitution of the permissible type and scope of presidential decrees.

“Options components” in the area of the executive are outlined in Figure 9:

³¹ This is also a feature of Strand 2 on the electoral system.

Figure 9. Options components: Executive



3.3.3 Focus cases

South Africa: A presidential parliamentary republic

The presidency of South Africa differs from the classic archetype of a presidential system, constituting an arrangement which may be referred to as a “presidential parliamentary republic.”

In most classical presidential systems, the president is directly elected by the people and thus holds significant legitimacy unrelated to the legislature. By contrast, in a parliamentary system, the prime minister is typically the head of the majority party or coalition in parliament, such that the legitimacy of the prime minister rests in the confidence of the parliament (members of parliament can pass a motion of “no confidence” and remove the prime minister from office).³²

South Africa’s executive structure takes from both models; the president is elected by the national assembly and represents the dominant party in parliament, but cannot be removed from office on the basis of a no confidence vote. The South African president can only be removed due to a serious violation of the constitution or law, serious misconduct or inability to perform the functions of office.

Kenya: Double qualification of the presidency

The 2010 Kenyan constitution moved away from direct election of the president by national majority to a system of double qualification. Article 138 stipulates the conditions of this arrangement: *(4) A candidate shall be declared elected as President if the candidate receives— (a) more than half of all the votes cast in the election; and (b) at least twenty-five per cent of the votes cast in each of more than half of the counties.*

³² In some systems, the legislature can also vote to impeach the president.

The rationale for this provision is that a successful president must appeal and remain accountable to geographically-dispersed groups. This mitigates the risk of an ethnic majority or large minority returning a president, and incentivizes the presidency to accommodate a broader range of interests.

3.4 Legislative branch

3.4.1 Approach

The scope for political accommodation through the legislative branch depends on the shape and functions of its composite bodies, how powers are distributed between houses, if multi-cameral, and internal decision-making procedures.

Legislative institutions can be classified in three categories:

1. Unicameral legislatures have only one legislative chamber, like the former Southern Sudan Legislative Assembly.
2. Bicameral legislatures,³³ where two chambers share legislative powers and each play a role, not necessarily equally, in consenting to proposed laws. The first chamber, like the National Legislative Assembly, tends to hold primary legislative responsibility, and have the capacity to initiate legislation on taxation and oversee government budgeting.³⁴ The second chamber, like the Council of States, shares some powers with the first chamber. Second chambers often play an approval, review or advisory function and in some cases can initiate legislation. Second chambers can be elected, like the U.S. Senate, appointed or consist of a blend of elected and appointed members.
3. Consultative councils are appointed committees which advise on, but rarely pass or enforce, legislation. Such councils include Saudi Arabia's *Majlis as-Shura*.

Key technical choices for any legislative arrangement include:

- How members are appointed or elected to legislative institutions.
- The distribution of competencies between chambers and levels.
- The relationship/ separation between the legislature and the executive.
- Internal decision-making procedures in each chamber.
- The nature of public participation in the production of legislation.

³³ Various other forms of multicameralism have also existed, such as tricameralism in the former Yugoslavia. However, most multicameral systems remain bicameral.

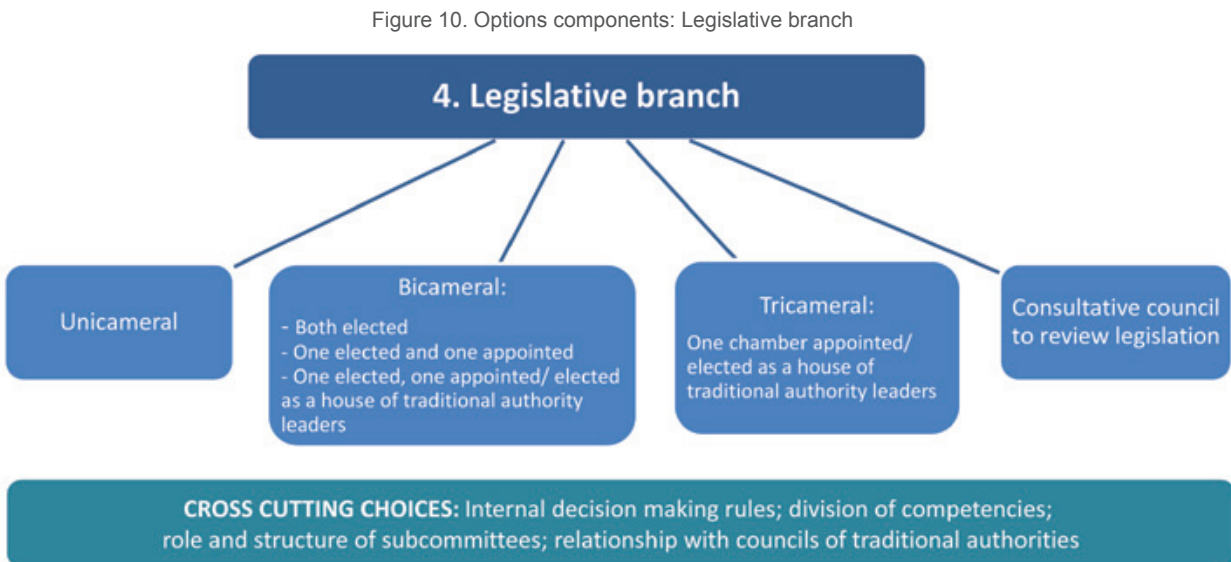
³⁴ John Uhr, "Bicameralism," in Bert A. Rockman, Sarah A. Binder and R. A. W. Rhodes, *The Oxford Handbook of Political Institutions* (Oxford: Oxford University Press, 2008).

3.4.2 Opportunity areas

Key opportunity areas for political accommodation include:

- Use of qualified majority voting formulae (for decision making on certain pre-agreed issues) to support cooperation and collaboration among parties.
- Creation of a dedicated body within the legislature or a formalized process for consultation with organizations representing specific interest groups (border/ counties, youth, veterans, women, traditional authorities, etc.) when considering related legislation.
- Creation of public information campaigns and opportunities for written and oral submissions.
- Clarification of competency divisions between the two houses, particularly on whether both can initiate legislation.
- Development of mechanisms for the national legislature to interact with or incorporate representatives of traditional and customary arrangements.
- Special provisions moderating the voting rights and privileges of appointees.

“Options components” in the area of the legislative branch are outlined in Figure 10:



3.4.3 Focus cases: Qualified majority voting in Burundi and Northern Ireland

Burundi and Northern Ireland present examples of how internal decision-making rules can potentially build cooperation between majority groups and minorities in a national legislature. In both contexts, the legislatures are polarized, and consist of a dominant party alongside large minorities who are disproportionately affected by particular decisions. Burundi and Northern Ireland have each used qualified majority voting (QMV) rules to safeguard the interests of their minorities and incentivize cooperation between groups that otherwise have the potential to engage in disputes leading to deadlock.

The arrangements in Burundi and Northern Ireland may hold important lessons for the South Sudan National Legislative Assembly's rules of procedure, especially in cases where some groups have limited representation but are acutely affected by certain decisions. For example, QMV options might prove useful for:

- Blocs of women's representatives, when particular decisions disproportionately affect women.
- Geographical blocs of representatives, which occasionally find themselves in deadlock.

Burundi

Burundi presents a case of a country recovering from conflict where two groups consistently have divergent interests, and, due to demography, one of those groups dominates in representation.

In 2000, Hutu, Tutsi and Twa population groups constituted an estimated 85, 14 and one percent of the total population of Burundi, respectively. If the members of the National Assembly were to be elected in exact proportion to their demographic constituencies then the Hutu group could be expected to secure 85 percent of the seats, the Tutsi group 14 percent and the Twa group one percent.

The Arusha Peace and Reconciliation Accord of 2000 mandated a "... *reorganization of the State institutions to make them capable of integrating and reassuring all the ethnic components of Burundian society.*"³⁵ Accordingly, Burundi's post-transition constitution created a quota system, allocating 40 percent and 60 percent of the seats in the National Assembly to the Tutsi and Hutu ethnic groups, respectively.³⁶ The intent of this disproportionate or quota-type allocation was to reflect minority group interests in a manner that goes beyond simple proportional representation.

However, this allocation of seats alone would not have achieved political accommodation were simple majority decision-making procedures to be employed in the National Assembly. The post-transition constitution of Burundi therefore mandated that legislation must be enacted by two-thirds majority of members of the National Assembly.³⁷ This combination of allocation of 40 percent of seats in the National Assembly to the minority Tutsi group (15 percent of the population) and the two-thirds majority decision-making procedure guaranteed a veto for the Tutsi community in the Assembly. In practice, the Tutsi community gained a 50 percent stake in legislative decision making (were Tutsi representatives to vote as a single bloc).

Note: The Burundi model for QMV creates formal rules for blocs based on ethnicity. Where ethnic divisions exist, such a system risks hardening those divisions, because representatives must associate themselves with one or other group. This could exacerbate tensions among ethnic groups in some contexts. However, the Burundi model demonstrates how the QMV formula can

³⁵ Article 5(2), *Arusha Peace and Reconciliation Accord*, 2000.

³⁶ Article 13, *Accord de Partage de Pouvoir au Burundi*, August 2004. The protocol also provided that the Twa ethnic group would be allocated three seats in the National Assembly.

³⁷ Article 175, *Post-Transition Constitution of the Republic of Burundi*, 2005.

work, and need not be applied only to ethnically-defined blocs. Alternatives include blocs of men and women and those defined by the geographic origin of representatives.

Northern Ireland

Northern Ireland is an area with special autonomy where communities have been in conflict linked to religious and ideological differences. In 1998, the Northern Ireland Peace Agreement (the “Belfast Agreement”) mandated the creation of a legislative assembly on the basis of arrangements that would ensure key decisions were taken on a cross-community basis.³⁸

Most of the parties elected to the Northern Ireland Legislative Assembly in June 1998 represented one of two main political ideologies/perspectives:

- The “Unionist” perspective, associated with parties which secured 53.7 percent of seats, largely representing Protestant communities.
- The “Nationalist/ Republican” perspective, associated with parties which secured 38.9 percent of seats, largely representing Catholic communities.

To ensure that both Protestant communities and Catholic communities’ interests were safeguarded, and that both communities could cooperate in the legislature, the Belfast Agreement created a system of cross-community support or “parallel consent.” This arrangement provides for QMV rules which apply only to special resolutions. These include: a menu of pre-defined resolutions on special issues, such as budgetary matters; and resolutions which are submitted as a “Petition of Concern.”³⁹

According to the rules for voting on these special resolutions:

1. Members of the legislature must declare themselves “Nationalist,” “Unionist,” or “Other.”
2. For a resolution to pass it must gain a) an overall majority among both “Nationalists” and “Unionists,” or b) support from 60 percent of all members voting, provided that at least 40 percent of Nationalists and 40 percent of Unionists vote in favor.⁴⁰

Note: The advantage of this system is that it treats two communities which have been in conflict with political equality. However, Northern Ireland’s system of QMV discriminates against representatives who are unaffiliated with the main parties to the conflict. Those who declare themselves as “Other” have little influence in the legislature. If South Sudan’s National Legislative Assembly were to consider arrangements for QMV like this, the benefits of cross-community support would have to be weighed against the risks of disadvantaging representatives unaffiliated with a particular community.

³⁸ These provisions are contained in Strand One, Paragraphs 1 and 5(d) of the *Northern Ireland Agreement*, 1998.

³⁹ These are resolutions which are submitted on the basis of a petition supported by at least 30 members of the legislature.

⁴⁰ I.1.5., *Northern Ireland Act*, Laws of the United Kingdom, 1998.

3.5 Public participation

3.5.1 Approach

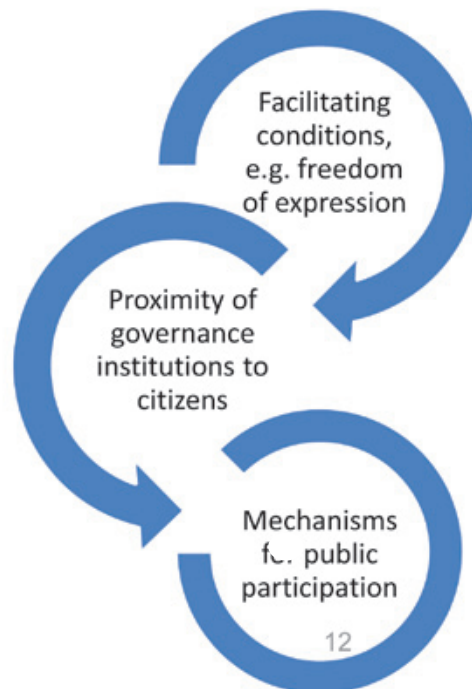
Public participation forms a central component of political accommodation because it distinguishes the approach from power-sharing constructs which are generally constrained to conciliation among elites. While elections offer discrete moments for citizens to register their preferences, durable conciliation requires ongoing arrangements and processes for the public and their political representatives to collaborate and deliberate on an ongoing basis.

In this context, public participation encompasses the mechanisms and systems through which *the public influences and shares control over priority setting, policy making and resource allocations on an ongoing basis*. Public participation lies on a *continuum* from co-opting people into passive involvement in a conciliation process to direct decision making. The public includes all people, regardless of citizenship rights, affected by governance arrangements in a given territory.

Prospects for public participation can be assessed through three inter-locking dimensions:

1. Facilitating conditions, such as freedom of information and transparency.
2. Proximity of governance institutions to citizens.
3. Mechanisms for public participation.

Figure 11. Interlocking dimensions of public participation



Mechanisms for public participation can also be analyzed in the context of five characteristics:

- Architecture: Technical attributes and configuration of the mechanism.
- Legal and normative framework: International, domestic and traditional normative and legal underpinnings of participation pertinent to the mechanism.
- Level: Stage at which the mechanism provides an access point for participation.
- Constituencies: Included and excluded sectors of the public.
- Proximity to political accommodation: Causal link between the mechanism and political accommodation.

3.5.2 Opportunity areas

Key opportunity areas for political accommodation include:

- Enhancement of participation in the production of legislation, for example through:
 - Explanatory memoranda outlining public participation during the preparation of legislative bills.
 - Required publication of agendas and proposed laws with a comment period.
 - Consultative/advisory groups or boards.
 - Freedom of information legislation.
- Enhancement of participation in executive decision-making, such as through “parliamentary questions” to the president or open councils.
- Creation of special provisions for the participation of youth in public affairs, for example through:
 - Creation of public discussion fora for youth, such as “youth parliaments” or youth citizens juries to discuss public policies.
 - Direct engagement of parliamentarians with youth as a special constituency, such as through town hall meetings targeted at youth.
- Incorporation into the constitution or legislation provisions for citizen-initiated referenda.
- Recognition of the rights of citizens to bring an issue to a supranational court or arbitrator.
- Consideration of the option to conduct a referendum to endorse the constitution.⁴¹

⁴¹ This has the benefit of ensuring widespread public ownership, as per the 2010 constitutional referendum in the Republic of Kenya; to introduce the requirement for a referendum in South Sudan would however require an amendment of the Transitional Constitution.

3.5.3 Focus cases

Switzerland: The right of initiative

The 1999 Swiss constitution lists four provisions for direct public participation, including popular initiatives calling for complete or partial revision of the constitution, mandatory referenda and optional referenda. Referenda are *required* to ratify legislation passed by the Federal Assembly in the following instances: amendments to the federal constitution; accession to organizations for collective security or to supranational communities; and certain emergency federal acts.⁴²

Anyone may initiate a popular initiative or optional referendum; 50,000 signatures of persons eligible to vote or the support of eight cantons will initiate the process to revise/repeal a federal act, a federal decree, or certain international treaties (a constitutional amendment requires 100,000 signatures).⁴³ In order for a referendum to pass, the initiative must receive a majority of votes. For amendments to the constitution and mandatory referenda, the referendum must additionally pass in a majority of the cantons (i.e., a majority of votes in a majority of the cantons).⁴⁴

South Africa: Constitutionally mandated public participation in legislative processes

South Africa's constitution and the activities of its constitutional court present an example of how a constitution can mandate public involvement in the legislative process at all levels of government, and how such provisions might be implemented in practice.

According to the 1996 South African constitution, national and provincial legislatures are required to conduct business in an open and public manner at both plenary sessions and committee meetings. The constitution does provide the legislative bodies the right to regulate public access as needed, but only as it is "*reasonable and justifiable to do so in an open and democratic society.*"⁴⁵ The constitution further requires that constituents have the right of access to any information held by the State.⁴⁶ The Promotion of Access to Information Act introduced protections on certain information, including materials pertaining to national security or defense and certain State financial records.⁴⁷

The most commonly used mechanisms to encourage public participation are public hearings and the collection of oral/written comments regarding specific pieces of legislation. At the national level, draft bills are first published in the Government Gazette prior to being introduced in parliament. Announcement in the Government Gazette also typically includes an invitation for public comment.⁴⁸ The parliamentary committees reviewing the legislation may then call for oral

⁴² Article 140, *Federal Constitution of the Swiss Confederation*, 1999.

⁴³ Articles 138, 139, and 141 of the *Federal Constitution of the Swiss Confederation*, 1999. Article 141 states that "If...any 50,000 persons eligible to vote or any eight Cantons request it, the following shall be submitted to a vote of the People...international treaties that (1) are of unlimited duration and may not be terminated; (2) provide for accession to an international organization; (3) contain important legislative provisions or whose implementation requires the enactment of federal legislation."

⁴⁴ Article 142 states "The result of a popular vote in a Canton shall determine the vote of the Canton." *Federal Constitution of the Swiss Confederation*, 1999.

⁴⁵ Articles 59, 72, and 118, *Constitution of the Republic of South Africa*, 1996,

⁴⁶ Article 32 (1), *Constitution of the Republic of South Africa*, 1996,

⁴⁷ For a full list of restrictions, see Articles 33-46, Promotion of Access to Information Act, No.2, 2000.

⁴⁸ See Rule 241, Rules of the National Assembly, 6th edition (2008); Rule 186, Rules of the NCOP, 9th edition (2008).

submissions or further written submissions, hold public hearings or initiate other methods for the voicing of public opinion.⁴⁹ Public hearings are typically announced five days to three weeks ahead of time via individual invitations and advertisements in newspapers, public spaces and on radio.⁵⁰

In 2006, the constitutional court ruled that if the public is not engaged on a given piece of legislation, it can be found constitutionally invalid and may be struck down.⁵¹ Parliament must provide opportunities for participation, ensure access to information and facilitate learning and understanding so that ordinary citizens can meaningfully participate.⁵² In a separate case, the court also acknowledged that while public participation must be included, the submissions received are not binding and parliament may pass legislation even if it goes against public opinion.⁵³

Participation at the provincial level is determined by each provincial legislature and thus includes a variety of approaches, including public hearings, submissions and the use of youth or women's parliaments and workshops to educate constituencies on the legislative process.⁵⁴ Some legislatures have even created a public participation unit to ensure adequate measures are taken to engage the public.⁵⁵

The National Council of Provinces (NCOP) also launched a public participation initiative in 2002 called "Taking Parliament to the People." This program provides constituents with the opportunity to directly engage ministerial and parliamentary representatives from all levels of government. The program visits each province at least once during the NCOP's five-year term, and includes five days of public hearings, specialized meetings, site visits and an address by the president. The program brings the public, traditional leaders, and national, provincial and municipal government representatives together to discuss policy issues and service delivery.⁵⁶ Topics of discussion are identified by constituents in preliminary meetings and often include road infrastructure, provision of electricity, unemployment, land reform, school infrastructure and provision of health care.⁵⁷

⁴⁹ See Rule 23, Joint Rules of Parliament 4th edition (2008); Rule 103. Rules of NCOP, 9th edition (2008).

⁵⁰ Susan de Villiers, *A People's Government, The People's Voice: A Review of Public Participation in the Law and Policy-Making Process in South Africa* (Cape Town: The European Union Parliamentary Support Programme, June 2001), 44.

⁵¹ Constitutional Court of South Africa, *Doctors for Life International v. The Speaker of the National Assembly and Others*, CCT 12/05, August 17, 2006, Media Summary, 3.

⁵² Constitutional Court of South Africa, *Doctors for Life International v. The Speaker of the National Assembly and Others*, CCT 12/05, August 17, 2006, Judgment, 72.

⁵³ Constitutional Court of South Africa, *Merafong Demarcation Forum and Others v. President of the Republic of South Africa and Others*, CCT 41/07, June 13, 2008, Media Summary, 2.

⁵⁴ See Gauteng Legislature, *Public Participation* (accessed 17 May 2012); available at <http://gpl.gov.za/index.php/legislative-business/core-functions/public-participation.html>; Mpumalanga Legislature, *Children's Parliament* (accessed 17 May 2012); available at <http://www.mpuleg.gov.za/main.php?id=421&menu=11>; Mpumalanga Legislature, *Women's Parliament* (accessed 17 May 2012); available at <http://www.mpuleg.gov.za/main.php?id=425&menu=11>.

⁵⁵ These include the Gauteng Public Participation and Petitions Unit, Western Cape Public Participation Directorate, and Mpumalanga Public Participation Unit.

⁵⁶ Parliament of the Republic of South Africa, *National Council of Provinces concludes its final stage of taking parliament to the people* (October 25, 2007), (accessed 5 May 2012); available at <http://www.info.gov.za/speeches/2007/07102609451003.htm>.

⁵⁷ National Council of Provinces, *Report: Taking Parliament to the People Programme*, Free State Province, 15-19 November 2010, 5.

3.6 Traditional and customary arrangements

3.6.1 Approach

Traditional and customary arrangements are evolved customary practices and governance institutions, either formal or informal, founded on laws that derive from customs and cultures of indigenous people. Given that these arrangements can play important service delivery functions and administer justice, they present an influential avenue for political accommodation. Moreover, traditional and customary arrangements can directly assist in mediating and reconciling political interests and perspectives, and serve as a conduit for channeling political interests into formal governance arrangements.

3.6.2 Opportunity areas

Key opportunity areas for political accommodation include:

- Clarification of powers of councils of traditional authority leaders (COTALs), including vetoes, ability to propose legislation, budgetary authority and administrative powers.
- Clarification of the role of traditional authorities as administrators relative to local government organs.
- Clarification of division of competencies between local government and traditional authorities, especially regarding justice and taxation.
- Development of procedures that allow for a national COTAL and national legislative assembly collaboratively to address disputes related to traditional authorities.

3.6.3 Focus case: Ghana

Similar to the Republic of South Sudan's Transitional Constitution, Ghana's constitution recognizes the institution of the chieftaincy and traditional processes of succession as legitimate customary law.⁵⁸ The constitution creates a National House of Chiefs as well as regional houses of chiefs in each region.⁵⁹ The regional houses have jurisdiction to hear appeals regarding succession of chiefs as well as cases regarding paramount chiefs. Also, they are charged with compiling "customary laws and lines of succession applicable to each stool or skin in the region."

Each regional house sends up to five paramount chiefs from their region to the National House of Chiefs. The National House hears appeals of cases from the regional houses. Members of the National House are charged with a "progressive study, interpretation and codification of customary law", leading to a "unified system of rules of customary law", as well as the elimination of "outmoded and socially harmful" traditional customs.⁶⁰

⁵⁸ Chapter 22 Articles 270 (1) and 277, *Constitution of the Republic of Ghana*, 1992.

⁵⁹ Article 274 (3c-f), *Constitution of the Republic of Ghana*, 1992.

⁶⁰ Articles 272 (b-c), 273 (1), *Constitution of the Republic of Ghana*, 1992.

In addition, chiefs are given a voice in each branch of the central government. The Council of State, which advises the president, includes the president of the National House of Chiefs.⁶¹ Parliament cannot begin debate on a bill that affects the institution of the chieftaincy “without prior reference to the National House of Chiefs.”⁶² In the judicial branch, the National House of Chiefs sends one representative to the Judicial Council, which proposes improvements to the judicial system and acts as a forum for discussion of Ghana’s judicial system.⁶³ The National House of Chiefs also sends representatives to various functional bodies, including the Prisons Service Council and the Lands Commission.

However, chiefs face restrictions in their political activity, limiting the interplay of tribe and politics. Chiefs are expressly forbidden from taking part in “active party politics,” and a sitting chief cannot be a member of parliament and must abdicate their chieftaincy in order to seek election.⁶⁴ In addition, political parties are required to “have a national character” to avoid ethnic, religious or regional-based parties. Despite these formal restrictions, chiefs may still play informal roles in party politics, due to their control over land, their wealth and their status as cultural leaders. However, the separation of political and traditional authority reduces the involvement of chiefs in local partisan politics.⁶⁵

⁶¹ Article 89 (2b), *Constitution of the Republic of Ghana*, 1992.

⁶² Article 106 (3), *Constitution of the Republic of Ghana*, 1992.

⁶³ Articles 153 (m) and 154 (1a-b), *Constitution of the Republic of Ghana*, 1992.

⁶⁴ Article 276 (1), *Constitution of the Republic of Ghana*, 1992. However, a chief may be appointed to public office if he/she is qualified.

⁶⁵ Richard Crook, *The role of traditional institutions in political change and development*, CDD/ODI Policy Brief No. 4 (Accra: Ghana Centre for Democratic Development, 2005).

4. Provisions pertaining to political accommodation in the 2011 Transitional Constitution

POLITICAL STRUCTURE AND DECENTRALIZATION	
Pream	We, the people of South Sudan... Committed to establishing a decentralized democratic multi-party system of governance in which power shall be peacefully transferred and to upholding values of human dignity and equal rights and duties of men and women.
1(4)	South Sudan is governed on the basis of a decentralized democratic system and is an all embracing homeland for its people...
36(1)	All levels of government shall promote democratic principles and political pluralism, and shall be guided by the principles of decentralization and devolution of power to the people through the appropriate levels of government where they can best manage and direct their affairs.
47	South Sudan shall have a decentralized system of government with the following levels: (a) the National level which shall exercise authority in respect of the people and the states; (b) the state level of government, which shall exercise authority within a state, and render public services through the level closest to the people; and (c) the local government level within the state, which shall be the closest level to the people.
48(1)	(1) The following principles shall guide the devolution and exercise of powers: (a) affirmation of the need for norms and standards of governance and administration at the state and local government levels that reflect the unity of the people of South Sudan while recognizing their diversity; (b) acknowledgement of the roles of the National Government and the states in the promotion of the welfare of the people and protection of their human rights and fundamental freedoms; (c) recognition of the need for the involvement and participation of all people of South Sudan at all levels of government as an expression of unity; and (d) pursuit of good governance through democracy, separation of powers, transparency, accountability and respect for the rule of law to enhance peace, socio-economic development and political stability.
48(2)	The National Government shall: (a) exercise its competencies in accordance with this Constitution and the law; and (b) respect the powers devolved to the states and local governments.
49(1)	In the administration of the decentralized system of governance, the following principles of inter-governmental linkages shall be observed: (a) the linkage between the National Government and the local government shall be through the government of the relevant state; (b) in their relationships with each other or with other government organs, all levels of government shall observe the following: (i) respect each other's powers and competences; and (ii) collaborate in the task of governing and assist each other in fulfilling their respective constitutional obligations; (c) government organs at all levels shall perform their functions and exercise their powers so as: (i) not to encroach on or assume powers or functions conferred upon any other level except as provided for in this Constitution; (ii) to promote co-operation by rendering assistance and support to other levels of government; (iii) to promote communication and coordination between all levels of government; (iv) to adhere to procedures of inter-governmental interaction and comity; (v) to respect the status and institutions of other levels of government; and (vi) to promote amicable settlement of disputes before resorting to litigation;(d) the harmonious and collaborative interaction of the different levels of government shall be within the context of national unity and for the achievement of a better quality of life for all.
49(2)	Any two or more states may agree on mechanisms or arrangements to enhance inter-state co-ordination and co-operation.
55(1)	The National Legislature represents the will of the people of South Sudan and shall foster unity and nationhood, exercise legislative functions, oversee the Executive, and promote the decentralized system of government.

59(a)	The Council of States shall be competent to... initiate legislation on the decentralized system of government and other issues of interest to the states and pass such legislation with two-thirds majority of all representatives;
59(e)	The Council of States shall be competent to... request statements from Governors and national Ministers concerned regarding effective implementation of the decentralized system and devolution of powers and any other issues related to the states;
162(1)	The territory of South Sudan is composed of ten states governed on the basis of decentralization.
166(3)	The President shall establish a Local Government Board under his or her office to review the local government system and recommend the necessary policy guidelines and action in accordance with the decentralization policy enshrined in this Constitution.
169(8)	Revenue sharing shall reflect a commitment to devolution of powers and decentralization of decision-making in regard to development, service delivery and good governance.

ELECTORAL SYSTEM

56(1a)	Members of the National Legislative Assembly shall be elected through universal adult suffrage in free and fair elections and by secret ballot.
56(1b)	The National Elections Law shall determine the number of members and composition of the National Assembly.
64	(1) When a vacancy occurs in respect of any seat in the National Legislative Assembly or the Council of States, the Speaker of the appropriate House shall, in writing, notify the National Elections Commission within ten days from the occurrence of that vacancy. (2) A by-election to fill the vacancy shall be held by the National Elections Commission within sixty days following occurrence of the vacancy. (4) No by-election to fill a vacancy shall be held within the three months prior to the next general elections.
97(1)	There shall be a President for the Republic of South Sudan who shall be directly elected by the people of South Sudan in general elections according to this Constitution and the provisions set forth by the National Elections Commission in accordance with the electoral law.
163(6)	Elections to the local government institutions shall be organized and conducted by the National Elections Commission in accordance with the provisions of this Constitution and the law.
165(1)	There shall be a governor for each state elected by the residents of that state in compliance with the requirements prescribed by the National Elections Commission and in accordance with this Constitution and the relevant state constitution.
194	The National Government shall during the Transitional Period conduct a population census the outcome of which shall, inter alia, determine the number of electoral constituencies for the next general elections.
197(1)	There shall be established within one month after enactment of the National Election Law, an Independent Commission which shall be known as the National Elections Commission.
197(2)	There shall be enacted a National Elections Law within three months following the adoption of this Constitution.

EXECUTIVE

56 (2)(c)	Notwithstanding the provisions of Article (1) above, during the transitional period the National Assembly shall consist of... such additional number of members appointed by the President not exceeding sixty-six.
58 (2)(b)	Notwithstanding the provisions of Article (1) above, during the transitional period, the Council of States shall consist of... thirty (30) members appointed by the President.
85(1)	Any bill approved by the National Legislature shall not become a law unless the President assents to it and signs it into law. If the President withholds assent for thirty days without giving reasons, the bill shall be deemed to have been so signed.
85(2)	If the President withholds assent to the bill and gives reasons within the aforementioned thirty days, the bill shall be re-introduced to the National Legislature to consider the observations of the President.
86(1)	In case the National Legislature is not in session, the President may, on an urgent matter, issue a provisional order having the force of law.
86(5)	Notwithstanding sub-Article (1) above, the President shall not make any provisional order on matters affecting the Bill of Rights, the decentralized system of government, general elections, annual allocation of resources and financial revenue, penal legislation or alteration of administrative boundaries of the states.
87(1)	The President shall cause to be presented to the National Legislative Assembly, before the beginning of the financial year, a bill for the allocation of resources and revenue in accordance with the provisions of this Constitution. The National Legislative Assembly shall convene to approve, modify or reject that bill.

88(1)	The President shall cause to be presented to the National Legislative Assembly before the beginning of the financial year, a bill on the general budget...
88(1)	The President shall cause to be presented to the National Legislative Assembly before the beginning of the financial year, a bill on the general budget...
88(7)	In the event that the National Legislative Assembly fails to pass the budget bill within a period of forty-five days, the President shall issue a presidential decree on the budget for that year, and such budget shall be deemed to have been passed by the National Legislative Assembly in accordance with the provisions of this Constitution.
90(1)	Notwithstanding the provisions of Article 86 (5) herein, the President may in the public interest, make a presidential order having the force of law, providing that the imposition of any tax, or fee or the amendment thereof shall come into force, pending submission of a bill requiring the same to the National Legislative Assembly.
94(2)	[Interim Provisions] The President shall appoint: (a) All the ninety six South Sudanese who were elected from South Sudan to the National Assembly of the Republic of Sudan to become members of South Sudan National Legislative Assembly; (b) The President shall appoint such additional number of members not exceeding sixty-six.
95	There shall be established in the Republic of South Sudan a National Executive consisting of the President, Vice President, Ministers, and Deputy Ministers.
96	The Executive shall exercise the executive powers on all matters as set forth in Schedules A, C and D read together with Schedule E of this Constitution and any other competence conferred upon it by this Constitution and the law.
97(1)	There shall be a President for the Republic of South Sudan who shall be directly elected by the people of South Sudan in general elections according to this Constitution and the provisions set forth by the National Elections Commission in accordance with the electoral law.
97(4)	Pending a final solution on its status Abyei Area, the territory of the nine Ngok Dinka chiefdoms transferred from Bahr el Ghazal Province to Kordofan Province in 1905 as defined by the Abyei Arbitration Tribunal Award of July 2009, is accorded a special administrative status under the Office of the President of the Republic of South Sudan.
100	(1) The tenure of the office of the President of the Republic of South Sudan shall be five years. (2) Notwithstanding Article (1) above, during the transitional period the tenure of the office of the President of the Republic of South Sudan shall be four years from July 9, 2011.
101	[On the functions of the President]
108	(1) There shall be established a National Council of Ministers. (2) The National Council of Ministers shall compose of the President, the Vice President and Ministers. (3) The President shall ensure that at least twenty-five percent of members of the Council of Ministers are women.
109	(1) The National Council of Ministers shall be the highest executive authority in the Republic. (2) Without prejudice to the powers conferred upon the President by this Constitution, decisions of the Council of Ministers shall prevail over all other executive decisions. Such decisions shall be adopted by consensus or simple majority. (3) Membership of the National Council of Ministers shall not be combined with membership of a state Executive or Legislature.

LEGISLATIVE BRANCH

54	(1) There shall be established a National Legislature composed of the following: (a) the National Legislative Assembly; and (b) the Council of States. (2) The National Legislature shall conduct its business as prescribed in this Constitution in joint sittings of the two legislative Houses, chaired by the Speaker of the National Legislative Assembly and deputized by the Speaker of the Council of States. (3) Vote count shall be separate for each House and governed by the quorum specified in this Constitution. (4) Each House shall sit separately to conduct its business as prescribed in this Constitution. (5) The National Legislature, as well as each of its Houses, shall make its own Conduct of Business Regulations.
56	(1) (a) Members of the National Legislative Assembly shall be elected through universal adult suffrage in free and fair elections and by secret ballot. (b) The National Elections Law shall determine the number of members and composition of the National Assembly. (2) Notwithstanding the provisions of Article (1) above, during the transitional period the National Assembly shall consist of: (a) all members of the Southern Sudan Legislative Assembly; (b) all ninety six South Sudanese who were members of the National Assembly of the Republic of Sudan, by virtue of their membership in that Assembly; and (c) such additional number of members appointed by the President not exceeding sixty-six. (3) Members of the Council of Ministers who are not members of the National Legislative Assembly shall participate in the deliberations of the Assembly but shall not have the right to vote.

57	[On functions of the National Legislative Assembly]
58	The Council of States shall consist of: (1) (a) Members of the Council of States shall be elected through their respective States Assemblies; and (b) The National Elections Law shall determine the number of members of the Council of States. (2) Notwithstanding the provisions of Article (1) above, during the transitional period, the Council of States shall consist of: (a) all South Sudanese who were representatives in the Council of States of the Republic of Sudan, by virtue of their membership in that Council; and (b) thirty (30) members appointed by the President.
59	[Competencies of the Council of States]
68	[On sessions of the National Legislature]
69(7)	[On officers of the National Legislature] Each House shall consider broad inclusiveness in the election and apportionment of its officers and staff.
71	(1) The political party holding the second highest number of seats in each House shall elect from among its members the Minority Leader of the respective House. (2) In relation to the conduct of business of each House, the Minority Leader shall: (a) rank fourth in protocol after the President, the Vice President and the Speaker, in that order within each House; and (b) have the right of second reply, after the Minister designated to lead Government Business in each House, to an address to the House by the President. (3) The Conduct of Business Regulations of each House shall provide for the effective participation of the Minority Leaders in their respective Houses.
76	Resolutions of the National Legislature or either of its two Houses shall, whenever possible, be taken by unanimity or consensus. Alternatively, resolutions shall be passed by simple majority of those present and voting, save in cases where this Constitution provides otherwise.
85(3)	The bill shall become law if the National Legislature again passes it by a two-thirds majority of all members and representatives of the two Houses, and the assent of the President shall not be required for that bill to come into force.
164	[On State Legislative Assemblies]
182(7)	The Bank of South Sudan shall be headed by a Governor and assisted by two Deputy Governors, appointed by the President and approved by two-thirds majority of members of the National Legislative Assembly present and voting.

PUBLIC PARTICIPATION

16(4)(a)	All levels of government shall... promote women participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs, and traditions;
26	(1) Every citizen shall have the right to take part in any level of government directly or through freely chosen representative, and shall have the right to nominate himself or herself or be nominated for a public post or office in accordance with this Constitution and the law.
32	Every citizen has the right of access to official information and records, including electronic records in the possession of any level of government or any organ or agency thereof, except where the release of such information is likely to prejudice public security or the right to privacy of any other person.
36(5)	All public offices shall be held in trust for the people and all persons in positions of leadership and responsibility shall be answerable to the people in their work and duties.
37(2)(d)	All levels of government shall... promote private initiative and self-reliance and take all necessary steps to involve the people in the formulation and implementation of development plans and programs that affect them and to enhance as well their right to equal opportunities in development;
48(1)(c)	The following principles shall guide the devolution and exercise of powers... recognition of the need for the involvement and participation of all people of South Sudan at all levels of government as an expression of unity;
57	The sittings of the National Legislature or either of its two Houses shall be open to the public; its proceedings shall be published and may also be broadcast. However, the National Legislature or either House may decide according to its Conduct of Business Regulations that certain deliberations take place in camera.

82	<p>(1) The National Legislative Assembly or any of its committees may summon any public official or any person within South Sudan, other than the President, to testify or give opinion before it.</p> <p>(2) Inquiry on any matter that falls within the direct responsibility of the National Government may only be made after notifying the President.</p> <p>(3) Any person who refuses to appear before the National Legislative Assembly or any of its committees or refuses to produce any document as required under sub-Article (1) above commits an offence punishable by law.</p>
166(6)	<p>The objects of local government shall be to:</p> <p>(a) promote self-governance and enhance the participation of people and communities in maintaining law and order and promoting democratic, transparent and accountable local government;</p> <p>(b) establish the local government institutions as close as possible to the people;</p> <p>(c) encourage the involvement of communities and community based organisations in the matters of local government, and promote dialogue among them on matters of local interest;</p> <p>(d) promote and facilitate civic education... (j) involve communities in decisions relating to the exploitation of natural resources in their areas and promote a safe and healthy environment...</p>
169(1)	<p>The National Government shall promote, support and encourage decentralized broad based and balanced and participatory economic development based on the principle of subsidiarity and devolution of governmental functions and powers to the appropriate levels where the people can best manage and direct their own affairs.</p>
169(3)	<p>The National Government shall promote and encourage the participation of the people in the formulation of its development policies and programs.</p>
171(9)	<p>Communities and persons enjoying rights in land shall be consulted in decisions that may affect their rights in lands and resources.</p>
195	<p>(1) Pursuant to Schedule A (30) herein, the President, or the National Legislature, through a resolution passed by more than half of all its members, may refer for a referendum any matter of public interest.</p> <p>(2) Any matter submitted for a referendum shall be deemed to have been approved by the people of South Sudan if it has obtained more than half of the number of votes cast.</p> <p>(3) Any matter which has been approved by the people of South Sudan in a referendum shall have authority above any legislation. It shall not be annulled save by another referendum.</p>
202(2)	<p>National Constitutional Review Commission: The President of the Republic shall, after consultation with the Political Parties, civil society and other stakeholders appoint the Chairperson, Deputy Chairperson and members of the Commission.</p>
202(5)	<p>The Commission shall be established with due regard for gender, political, social and regional diversity of South Sudan in recognition of the need for inclusiveness, transparency and equitable participation. Each member of the Commission shall have the requisite competence and technical expertise and experience to contribute to fulfilling the mandate of the Commission.</p>
202(6)	<p>The Commission shall review the Transitional Constitution and collect views and suggestions from all the stakeholders including any changes that may need to be introduced to the current system of governance.</p>
203(1)	<p>Upon the presentation of the Draft Constitutional Text and Explanatory Report by the Commission, the President of the Republic shall, after consultation with relevant stakeholders, constitute and convene a National Constitutional Conference comprising delegates representing the following categories:</p> <p>(a) Political Parties; (b) civil society organizations; (c) women organizations; (d) youth organizations; (e) faith-based organizations; (f) people with special needs; (g) Traditional Leaders; (h) war widows, veterans and war wounded; (i) business leaders; (j) trade unions; (k) professional associations; (l) the academia; and (m) other categories to be determined.</p>

TRADITIONAL AND CUSTOMARY ARRANGEMENTS	
5	The sources of legislation in South Sudan shall be: (a) this Constitution; (b) written law; (c) customs and traditions of the people; (d) the will of the people; and (e) any other relevant source.
33	Ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures. Members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law.
166 (6)(i)	The objects of local government shall be to... acknowledge and incorporate the role of Traditional Authority and customary law in the local government system;
167	(1) The institution, status and role of Traditional Authority, according to customary law, are recognised under this Constitution. (2) Traditional Authority shall function in accordance with this Constitution, the state constitutions and the law. (3) The courts shall apply customary law subject to this Constitution and the law.
168	(1) Legislation of the states shall provide for the role of Traditional Authority as an institution at the local government level on matters affecting local communities. (2) Legislation at the National and state levels shall provide for the establishment, composition, functions and duties of councils for Traditional Authority leaders
171 (8)	[On Land Tenure] All levels of government shall institute a process to progressively develop and amend the relevant laws to incorporate customary rights and practices and local heritage.

Appendices

Appendix I: Electoral system design and political accommodation in the Republic of South Sudan

Discussion Note
28 February 2012

Introduction

The Transitional Constitution of the Republic of South Sudan (“the Transitional Constitution”) mandated the enactment of a national elections law in the months following its formal adoption in July 2011.⁶⁶ The design of the various systems for election of members of the institutions established under the Transitional Constitution represents an important opportunity to accommodate, or to bring into the political sphere and take account of, a broad range of political perspectives, and to foster inclusive and participatory governance arrangements.

As an independent State, the Republic of South Sudan has promising prospects. Yet citizens and their representatives cannot take these prospects for granted; societies that have emerged from conflict often discover that, to build sustainable peace, they must take further steps to reconcile the interests of groups that feel excluded. This endeavor demands that citizens and their representatives establish foundations for inclusion via governance choices that promote effective political accommodation.

If the design of the electoral systems can achieve this accommodation, it will provide significant incentives for all political parties, civil society constituencies and the people of South Sudan to actively support and participate in elections, to support the governments that result from those elections and to work together to resolve the challenges that the country faces. On the other hand, the design of the electoral systems could also heighten feelings of exclusion among some sectors of South Sudanese society, causing the level of conflict to rise, and affecting the new nation’s prospects for stability and prosperity.

Beyond the immediate task at hand of establishing a sound electoral law that will contribute to the accommodation of diverse political interests, the Transitional Constitution provides for the establishment of a National Constitutional Review Commission that is mandated, among other tasks, to review the Transitional Constitution, including possible changes to the systems of governance.⁶⁷ To the extent the review process leads to consideration of new or modified governance arrangements, the electoral law may need to be amended in the future to reflect any new governance arrangements.

This note highlights issues and options for consideration in designing the electoral systems for South Sudan that can lead to the most effective accommodation of political interests.

⁶⁶ Article 197(2), *Transitional Constitution of the Republic of South Sudan, 2011*.

⁶⁷ Article 202(6), *Transitional Constitution of the Republic of South Sudan, 2011*.

Electoral systems and political accommodation

The electoral system in South Sudan is one of six Strands or avenues which can accommodate – or reconcile – competing political interests and perspectives. Political accommodation is about bringing political interests into the “house” of governance and taking fair account of them. The other avenues of political accommodation are: political structure and decentralization; executive; legislative branch; public participation; and traditional and customary arrangements.

Weaving these six Strands together, a focus on political accommodation can provide more and better opportunities to reconcile competing political interests than a singular or disjointed focus on “power sharing,” electoral system design, legislative decision-making procedures or other areas.

In this note, we are using the term “electoral systems” in a broad sense to include forms of representation (majoritarian and proportional), the systems for translating raw vote totals into electoral outcomes in terms of deciding who will hold public office for the term and the electoral institutions and processes (including the resolution of electoral disputes) that can make elections an effective tool of political accommodation.

Issues and options for consideration

This section highlights eight issues for consideration in design of the electoral system and the drafting of the National Elections Act for the Republic of South Sudan that can contribute to successful political accommodation.

The National Elections Commission

The composition and the decision-making procedures in the National Elections Commission (NEC) at all levels will be critical to ensuring the independence and (political) impartiality of the commission and the acceptability of electoral outcomes to all participants. If the NEC and its state, county and local representatives, as well as those involved in the resolution of electoral disputes, can be seen as neutral arbiters, they can enhance the potential for elections to promote political accommodation.

The draft text of the National Elections Act (2012) (Chapter 2, Article 8(1)) stipulates that a nine-member commission will be appointed by the president, to be approved by a two-thirds majority of the National Assembly, taking into account consultation with civil society groups and women, and including representation of these groups. Article 22.3 stipulates that the five-member state high committees are to be elected and appointed by the chairperson of the commission with the approval of a simple majority vote of the commission members, taking into consideration consultations with women and civil society groups. Article 14.3 specifies that decision-making in the commission will be by a simple majority.

Options for consideration

- More formalized involvement of civil society representatives and political parties in nominating and/or endorsing the composition of the commission (including in the designation of the chair and deputy chair) could be introduced; this might include the public posting of names of those being considered for the commission and an invitation for comments and objections.
- A professional administrator could be designated chief electoral officer by the commission rather than being a member of the commission and designated by the president.
- The membership of the commission could be structured in such a way as to build in representativeness of geographical areas (states or regions), and/or political parties, including a possible quota for the minimum number of women representatives.
- The selection of state high committee members could include consultations within each state, and the selection of chiefs for polling stations could be carried out by the high committee, which is more familiar with individuals at the local level than is the NEC.
- For certain key decisions of the commission, highly-qualified majority decision-making procedures could be used, perhaps requiring two-thirds or three-quarters of the members to agree for the decision to be made.

Forms of representation

The draft text of the National Elections Act (2012) specifies parallel majoritarian and proportional representation (PR) systems of election for the national and state legislative assemblies (Chapter 4, Article 35.2). For each legislative assembly, 60 percent of the seats are filled using single-seat geographical constituencies, and 40 percent using political party and women's lists (15 and 25 percent, respectively). This is the same system which was used in the national elections held in 2010.

Single-seat geographical constituencies mean that in any one constituency, a political party must receive the highest number of votes to secure the single seat, and other parties are excluded from representation. Under proportional representation, parties win seats in close proportion to their share of the votes. The current system combines, but does not link, majoritarian and proportional representation.

Members might consider the benefits of putting in place a system that will more effectively promote political accommodation. There are two ways in which the system could be made more accommodating of the variety of political forces in South Sudan – either by increasing the proportion of seats in the assemblies that are elected through proportional representation, or by linking the two forms of representation so that the awarding of proportional seats makes up for the disproportionality in the majoritarian seats.

Options for consideration

- The percentage of seats elected through the proportional representation system (i.e., through the political parties' and women's lists) could be increased – for example, from 40 percent to 50 or 60 percent – to give the smaller parties a better chance of winning seats. Alternatively, the majoritarian and proportional segments could be linked, as they are in Germany, New Zealand, Lesotho, Mexico and a few other countries, so that each party's share of seats in the legislature is not as distorted by the results of the majoritarian contests.

Comparing parallel and linked systems

The text of the Draft Bill specifies parallel majoritarian and proportional representation (PR) systems of election. One alternative is a “linked” majoritarian and proportional representation system. The following example demonstrates the distinct outcomes of these options.

Example: Consider elections to an assembly of 200 seats:

- 60% or 120 seats are elected through single-seat geographical constituencies.
- 40% or 80 seats are elected through proportional representation lists.

PARALLEL SYSTEM

If Party A receives 70% of all votes, both in majoritarian and proportional contests, as well as more than 50% in every geographical constituency, they will receive all 120 of the single-seat geographical constituency seats and roughly 70% or 56 of the proportional representation seats. This gives Party A 176 of the 200 seats (88%).

LINKED SYSTEM

If Party A receives 70% of all votes, both in majoritarian and proportional contests, they will receive all 120 of the single-seat geographical constituency seats. This equals 60% of the total 200 seats and so entitles Party A to no more than 20 of the 80 proportional seats. This gives Party A 140 of the 200 seats (70%).

Single- or multi-seat geographical constituencies

The draft text for the National Elections Act (2012) specifies the use of single-seat geographical constituencies to elect 60 percent of members of the national- and state legislative assemblies. The use of single-seat geographical constituencies for the election of members of the Southern Sudan Legislative Assembly (SSLA) in the elections held in 2010 did not translate voter preferences to seats (representation) as effectively as possible, as illustrated in Figure 12 below.

The ability of single-seat geographical constituencies to accommodate political interests and perspectives depends on, among other factors: (i) the way in which the geographical constituency is drawn/defined; (ii) the homogeneity of the constituency in terms of party/ethnic/tribal/other cleavages; and (iii) the proportion of the overall population in the constituency (i.e., its relative size).

Whereas single-seat constituencies only provide for election of the candidate who secures the most votes in a constituency (and not second, third or lower-placed candidates), multi-seat constituencies (again depending on how they are drawn, homogeneity, etc.) can potentially accommodate representatives from communities/voter constituencies that may not constitute the majority but that still have significant support. In constituencies that manifest sharp divisions, a multi-seat approach can have significant benefits in preventing localized conflict resulting from communities feeling excluded from representation.

Options for consideration

- The use of (three-seat or larger) multi-seat constituencies may achieve a greater degree of accommodation through possible election of candidates representing smaller, but still significant, voter constituencies/groups.
- The existing counties (currently 79 in number), or groups of counties to be defined in the future, could be used as the multi-seat geographical constituencies, with an upper ceiling (for the most populous counties) and lower threshold (for the least populous counties) for the number of seats per constituency.

Fielding candidates on political parties' and women's lists

The currently proposed system for fielding candidates on political parties' and women's lists requires individual parties to present their respective lists at the national level (Chapter 4, Article 35.2).

Options for consideration

- A provision to enable alliances of political parties to field combined lists may result in increased representation from smaller parties (through alliances) in the national and state legislative assemblies. The party alliance would still be required to present a list of candidates on the political party/alliance list in order of preference.
- Allowing parties to present incomplete lists could enable smaller parties to compete.
- Allowing voters to vote for one party's party list and another party's women's list would increase the likelihood that voters would feel effectively represented.
- The relative advantages of parties presenting lists at the state and national levels could be explored. Presentation of party lists at the state level could better reflect the composition of interests in geographical areas. When combined with a lower qualifying threshold (as outlined below), state-level lists have the potential to accommodate a wider range of regional interests which national lists may crowd out. However, state-level lists also risk leaving groups, which might be fractured among several states, without effective representation. National-level lists mitigate this risk because they provide advantage to all political parties by facilitating a national platform or forum, thereby encouraging political parties to appeal to national rather than localized interests.

Qualifying threshold for political party and women's lists

Any political party or women's list must currently receive four percent of the valid votes cast (for that list component) to be eligible to compete for a seat in the national or state legislative assembly (*Chapter 4, Article 38(3)*). Depending on the number of seats allocated to each political party or women's list, and especially in a situation where there is currently a single dominant political party and a range of smaller parties, this qualifying threshold may reduce the ability of smaller parties to secure seats from the relevant lists.

Options for consideration

- The qualifying threshold for political parties' and women's lists could be lowered to two or three percent.

Linkages with local government elections

The Southern Sudan Local Government Act (2009) outlines the need for local government officials to be elected in a general election every four years, with specific reference to county commissioners, county councils and mayors. Given the fact that local government officials are currently unelected, steps will need to be taken in line with the Local Government Act to establish the criteria for the size and number of constituencies, as well as the timing of local government elections.

To ensure that electoral systems at all levels enhance political accommodation, interested citizens and policy makers might consider how provisions in the draft National Elections Act link to or support prospects for local government elections.

Options for consideration

- The timing of local government elections in relation to national elections might be defined in the National Elections Act according to a timeframe that supports voter education and awareness of the distinct electoral competitions.
- The NEC and the state high committees might collaborate to consider the relationship and potential alignment between constituencies for national elections and constituencies for local government elections.

Election of members of the Council of States

The draft text of the National Elections Act (2012) stipulates a system of indirect election of members to the Council of States, with each state legislative assembly returning four members of the council.

This system of indirect election to the Council of States will generally ensure (depending on the details of the system of voting) that the political majority in the state legislative assembly will be reflected in the composition and party affiliations of the four members elected to the Council of States. Other contexts use direct election to both the second chamber (senate/council/other)

and the lower chamber (i.e., assembly/house of representatives) in bicameral systems to overcome this situation. Especially in situations where there are one or two dominant political parties, and when single-seat geographical constituencies are used to elect a significant percentage of the members of the state legislative assembly, the indirect system of election will reflect the majority of the state legislative assembly.

Options for consideration

- The use of different types of direct systems of election could be explored for the election of members of the Council of States in each state.
- The law could establish that the four delegates to the Council of States must include at least one member of a non-majority party.

Referendum

The draft text of the National Elections Act stipulates that all matters referred to the citizens are to be considered approved if they receive more than half the votes cast. However, there may be matters of significant importance that engender strong disagreements between key political forces in the country and/or between different regions of the country.

Options for consideration

- It may be useful in discussions on the permanent constitution to consider setting a higher threshold for approval of controversial issues submitted to referendum, or to consider setting a double-majority requirement: a majority of voters, and a majority of voters in a majority of states. Another option for consideration would be a requirement that a majority of registered voters approve controversial matters submitted to referendum.
- It may be important to exclude certain matters from referendum, such as any restriction of the rights enumerated in the Bill of Rights. Some nations exclude foreign policy and tax matters from referendum.

Conclusion

Recognizing that the development of a national elections law is an urgent requirement for the Government of South Sudan, and that in any case the electoral law may ultimately have to be modified based on the outcome of the future constitutional review process, the current drafting process represents an important opportunity to achieve the highest possible level of political accommodation through the electoral system, thereby promoting the stability and prosperity of the country. This drafting process can also assist in highlighting issues which may need to be considered in the context of the national constitutional review process.

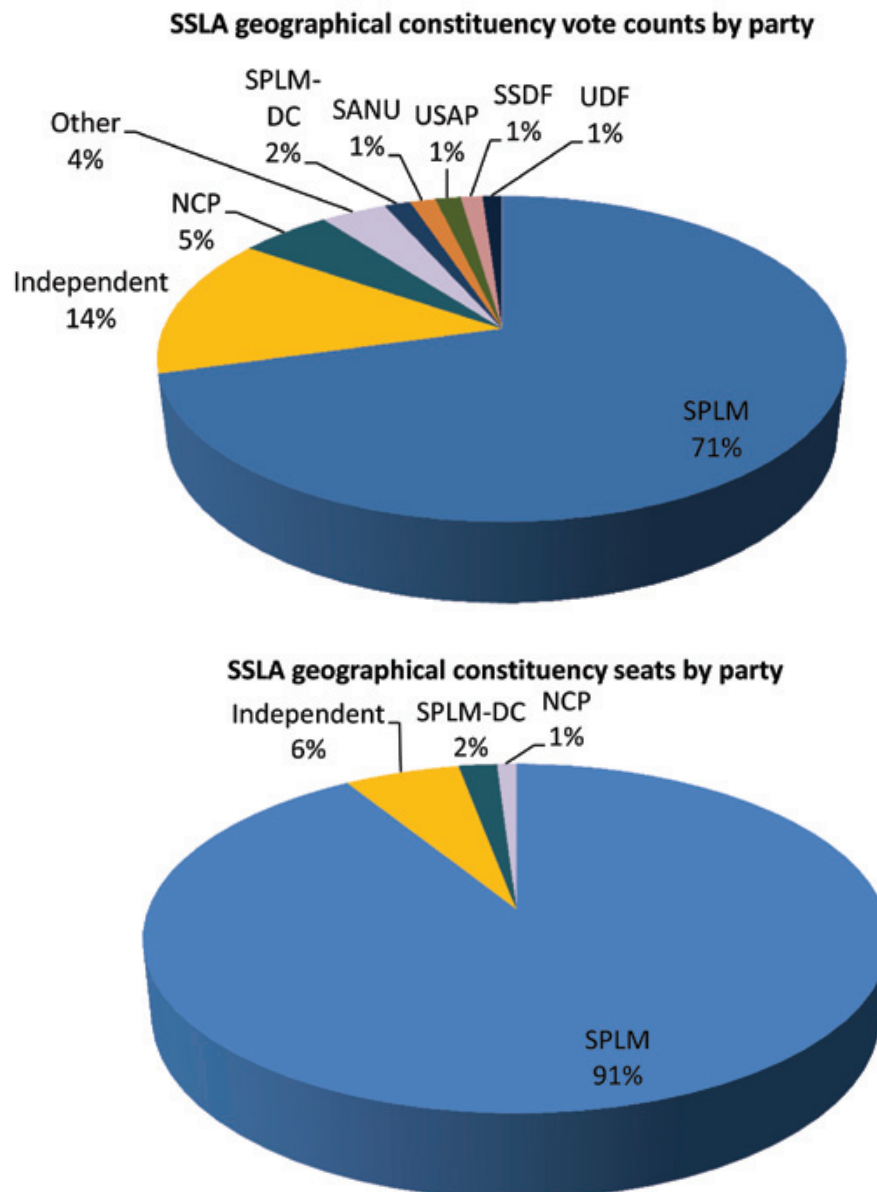
The issues and options highlighted in this paper illustrate some areas where more optimal accommodation and participation can be achieved in the near term, and can therefore provide incentives for active participation of political parties and civil society constituencies in future elections. Active participation and mechanisms which promote fairness in the administration of

the elections and more equitable representation of the various political forces in South Sudan can in turn enhance the potential for the first national elections of the Republic of South Sudan to have a peaceful and democratic outcome which will help to cement national unity.

Southern Sudan Legislative Assembly (SSLA) geographical constituency seats election results 2010

The following charts compare the SSLA geographical constituency votes by party (top), i.e., voters' choices, and resulting seats secured by party (bottom) for the SSLA geographical constituencies in the elections held throughout South Sudan in 2010 (Source: National Elections Commission of the Republic of the Sudan).

Figure 12. Translation of votes to seats in April 2010 election



Appendix II: Implications for political accommodation of presidential appointments to the national legislature

The Transitional Constitution stipulates that the president can appoint up to 66 members (20 percent) of the National Legislative Assembly and up to 30 members (60 percent) of the Council of States.⁶⁸ The appointees to the two chambers of the national legislature have the potential to produce divergent outcomes for political accommodation, dependent on who the appointees represent and how they behave. On the one hand, appointments offer a mechanism for the president to positively discriminate in favor of minorities whose interests would otherwise be marginalized. However, appointees also offer the potential to dilute the influence of minority groups who hold few seats.

Taking the Council of States as an example, this analysis examines how different approaches, criteria and interests related to how members are appointed affect prospects for political accommodation. The following Lorenz curves explore this by mapping a) what “ideal” representation should look like, if the population distribution in each state translated into a proportional number of seats, and b) what actual representation looks like.

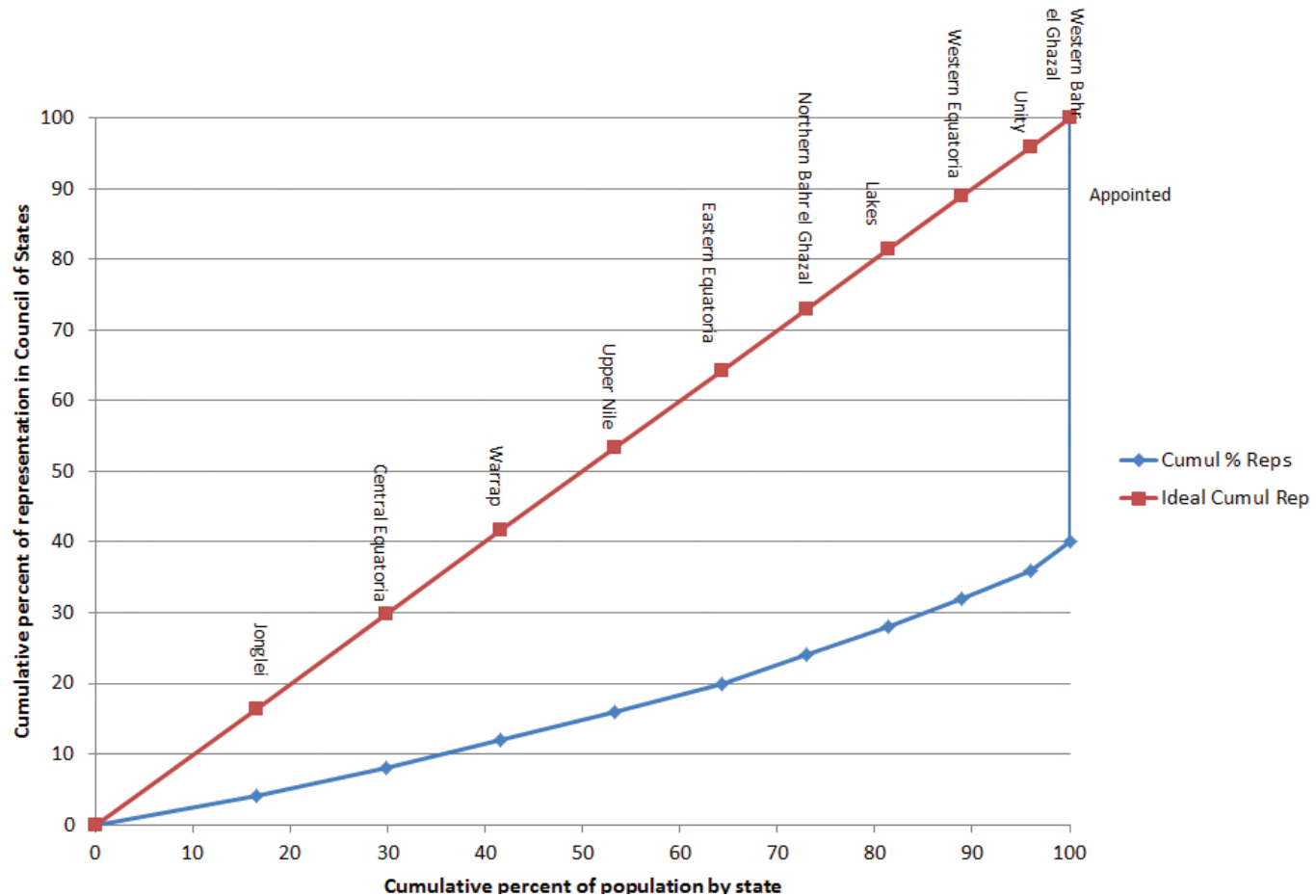
At least three assumptions can be made about appointees. Each assumption delivers a different Lorenz curve and suggests different conclusions about prospects for political accommodation (see Figures 13, 14, and 15).

The nature of appointees influences the degree of equity of representation and decision-making in the Council of States. These Lorenz curves show that when a majority of members are appointed, prospects for political accommodation through a legislative institution hinge on how appointees are selected and how they behave in light of their mandates. In short, the creation of a second chamber as currently constituted has potential either to strengthen or undermine prospects for effective political accommodation. One “equitable” option could be to appoint additional representatives in proportion to the percentage of the vote secured by political parties in the elections to the National Legislative Assembly (rather than the party percentages of seats).

⁶⁸ Article 56 and 58, *Transitional Constitution of the Republic of South Sudan, 2011*.

Assumption (1) supposes that the appointees represent no constituency. Under this assumption, appointees represent zero percent of the population and form an 11th category of representative in addition to the 10 states. The validity of assumption (1) depends on the rationale for the appointments. The president might choose to construct a Council of States of appointees untied to political constituencies, with the goal of creating an advisory body less partisan than the legislature.⁶⁹ If this is the case, a Lorenz curve which exhibits a low level of representativeness might not necessarily undermine political accommodation.

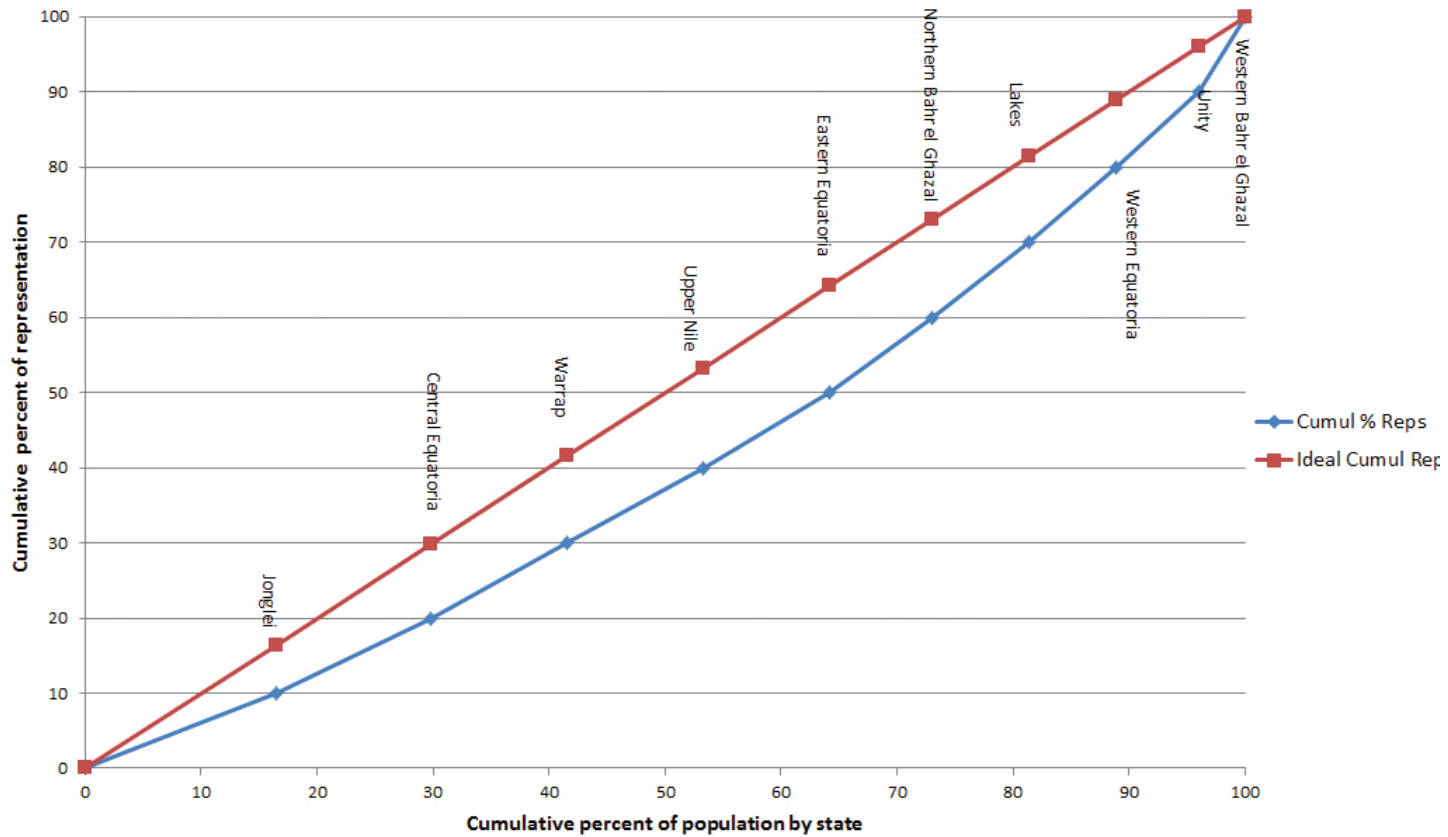
Figure 13. Lorenz curve for Council of States - Assumption (1)



⁶⁹ In the past, this has been one rationale for appointments to the UK House of Lords.

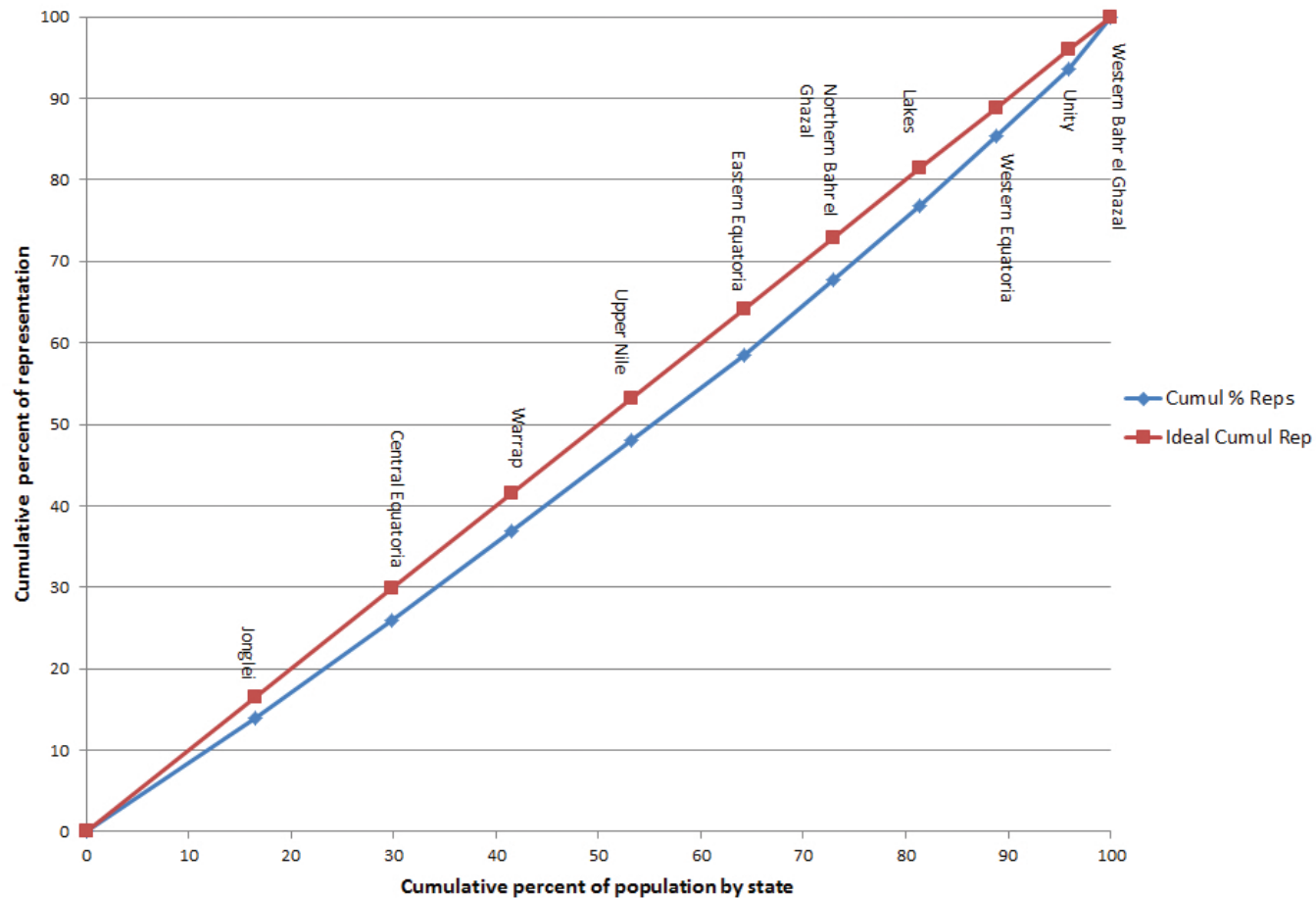
Assumption (2) supposes that the president selects appointees and motivates them to represent each state unit equally. In this case, the 30 appointees to the Council of States are equivalent to each of the 10 states delivering an additional three representatives to the council.

Figure 14. Lorenz curve for Council of States - Assumption (2)



Assumption (3) supposes that the appointees represent the population equitably as one constituency. In this case, the appointees operate as if each state has additional representation from the 30 appointees in proportion to their population share.⁷⁰ Again, the validity of this assumption depends on the rationale of the appointments and the political checks within the Council of States on the appointees.

Figure 15. Lorenz curve for Council of States - Assumption (3)



⁷⁰ For example, Jonglei, with 16.45 percent of the population, receives additional representation equivalent to delivering five extra members to the council.

Appendix III: Assessing county-based constituencies for national elections

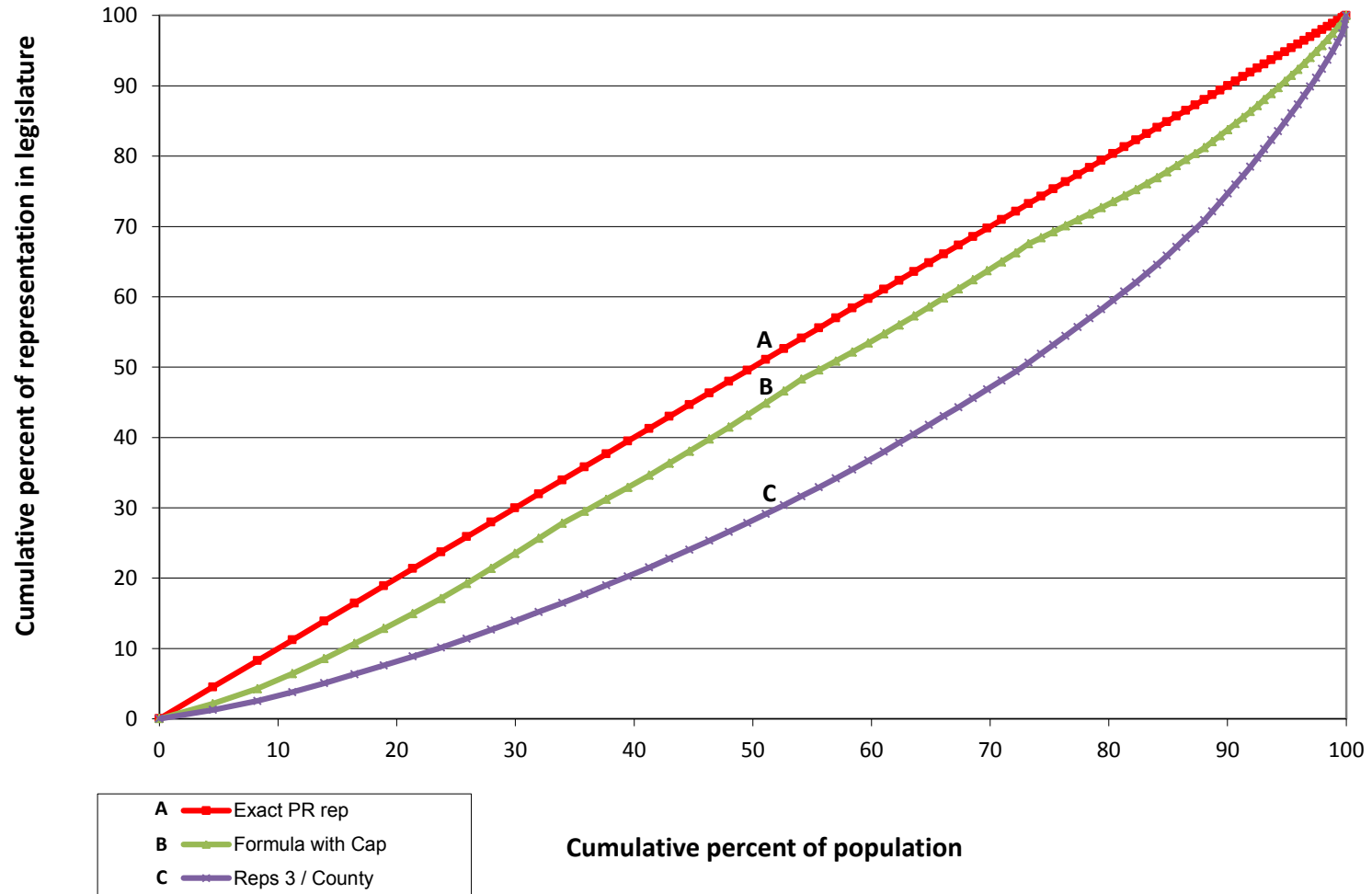
A range of county-based arrangements might be considered for defining electoral constituencies in the Republic of South Sudan. As an example, this section assesses the equity of representation which one variation might deliver.

This example presents the merits of a system which would employ the Republic of South Sudan's 79 counties as a basis for elections to the National Legislative Assembly. According to this example, the counties operate as multi-seat constituencies, such that counties with larger populations are allocated more seats than those with smaller populations. The allocation of seats is subject to a weighted floor and ceiling, such that no county, regardless of population, can have fewer than two representatives and no county can have more than five representatives.

Using household data from the 2008 census, the following Lorenz curve illustrates the potential equity of representation of this county-based model. Line A shows perfect equity of representation of the population, through cumulatively adding the populations from the largest county to the smallest. Line C demonstrates representation if each county, regardless of population, elects three members to the National Legislative Assembly. Line B illustrates representation if every county elects two to five representatives, contingent on population.

The area between line A and the curves represents the degree of equity in the distribution; the smaller the area, the more equitable the distribution. The proximity of line B to line A shows that multi-seat county-based constituencies might significantly enhance equity of representation in the legislature. The option potentially provides for greater representation of smaller ethnic groups, or those distributed across constituency lines, as opposed to single-seat constituencies.

Figure 16. Lorenz curve – Electoral constituency representation in South Sudan for county-based model



Glossary

Administrative decentralization: How policies and decisions are made, and how these are turned into outcomes in terms of distribution of resources.

Bicameral legislature: A legislature comprising of two legislative chambers, with each playing a role, not necessarily equally, in consenting to proposed laws.

Considerations: A distillation of people's needs, perspectives and aspirations which manifest themselves as political interests.

Decentralization: The transfer of authority and responsibility for public functions from the central government to subordinate or quasi-independent government organizations.

Deconcentration: A form of administrative decentralization in which local authorities serve as field offices of central government, taking charge of policy implementation and administration, while the central government makes policy decisions.

Delegation: A form of administrative decentralization in which local authorities have some responsibility and decision-making authority, but remain accountable to the central government in a principal-agent relationship.

Derivation principle: A constitutional provision that requires national government to return a given percentage of natural resource revenues to resource-producing states.

Devolution: A form of administrative decentralization where local government has responsibility, authority and accountability over specific policy areas, receiving some degree of political autonomy.

Equalization grant: A financial transfer made from the central government to a subnational level of government, in a situation where some states, provinces or counties are poorer than others. The purpose of the transfers is to ensure that all subnational governments can deliver the same level of services to their populations, without some states, provinces or counties being disadvantaged.

Equity: Fairness, based on the impartial distribution of representation, power or resources according to need, rather than arithmetic equality between particular units.

Federal State: While there are many competing definitions, the Forum of Federations proposes that the essence of all federal States is that there are two constitutionally established levels of government with some autonomy from each other, and the governments at each level are primarily accountable to their respective electorates.

Fiscal decentralization: The assignment of expenditures, revenues, transfers, and subnational borrowing to subnational governments.

Gerrymandering: The act of manipulating political and/or electoral boundaries in order to gain an unfair advantage, for example by dividing minorities between constituencies or creating

population imbalances between political units so that some groups have less representation than others.

Horizontal fiscal imbalance: A situation where some subnational units possess weaker fiscal capacities than others.

Inclusiveness: A condition such that the diversity of population groups and interests, regardless of their size, has access to representation or the means to express their views in political institutions.

Opportunity area: Potential arrangements or choices within a specific Strand with the potential to enhance political accommodation.

Option: A governance arrangement comprised of complementary choices across each Strand of political accommodation.

Political accommodation: The objectives, processes or outcome of mutual conciliation around competing political interests and perspectives.

Political decentralization: How the voice of citizens is integrated into policy decisions and how civil society can hold authorities and officials responsible for the consequences of their choices.

Presidential parliamentary republic: A system where a national legislature elects a president who serves as both head of state and head of government. Unlike a prime minister, the president cannot be removed by a vote of no confidence in the legislature.

Public participation: The mechanisms and systems through which the public influences and shares control over priority setting, policy making and resource allocations.

Representativeness: A condition such that the people chosen to act or make public decisions on behalf of a population are proportionate in number and allegiance to the social groupings which comprise the population.

Social contract: A tacit and implicit agreement among citizens to cooperate for social benefits, usually by sacrificing some individual freedom in return for State protection and services.

Strand: One of six focal areas or pillars of governance institutions through which political interests can be pursued and accommodated.

Unicameral legislature: A legislature comprising of only one legislative chamber.

Unitary State: A State with national and subnational tiers, in which the national government is defined as sovereign over all its territorial units.

Vertical fiscal imbalance: A situation where a subnational level of government incurs a disproportionately large amount of responsibility compared to its share of revenue.

About Conflict Dynamics International

Conflict Dynamics International is an independent, not-for-profit organization which works to prevent and resolve violent conflict, and to alleviate human suffering resulting from conflicts and other crises around the world. The organization, founded in 2004, works to fulfill its mission through conflict resolution activities, mediation support, and humanitarian policy development organized across three program areas: (I) Peacebuilding in Transition States, (II) New Frontiers in Humanitarian Policy, and (III) Pressure Points for Conflict Prevention and Resolution.

Conflict Dynamics works directly with parties to conflict and the people and communities whom its work is designed to assist, as well as with international organizations and academic institutions, in a neutral and impartial manner.

As part of its ongoing initiative, Political Accommodation in the Sudan and South Sudan, Conflict Dynamics conducts policy-directed research and consultation/outreach activities to explore, develop and “feed in” technical options – based on innovative approaches and concepts – to achieve effective accommodation of political interests and perspectives.

Conflict Dynamics’ initiative on political accommodation employs a modular architecture consisting of three interconnected streams of work: Political accommodation in the Republic of South Sudan; Political accommodation in the Republic of the Sudan; and frameworks for economic and political interactions between South Sudan and the Sudan.

This Briefing Paper is the fourth in Conflict Dynamics’ Governance and Peacebuilding Series. The other publications in the series are:

- *Envisioning the Future: Options for Political Accommodation between North and South Sudan following the Referendum*, September 2010
- *National Elections and Political Accommodation in the Sudan*, June 2009
- *Electoral Reform in Sudan and Prospects for Peace in Darfur: Implications of the National Elections Act 2008 for the Darfur Political Process*, October 2008

Any views on this document would be most welcome. Please send comments to southsudan@cdint.org.

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