

Re: Consensus Towards Permanent Constitution-Making Process and National Elections in South Sudan

1. Objectives of the Paper

1.1 The main objective of the paper is to outline possible consensus on the sequencing of the Permanent Constitution- Making Process (CMP) and elections in South Sudan in accordance with timeline established by the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan,2018 (R-ARCSS). The Permanent Constitution making was supposed to be completed within twenty-four (24) months of the beginning of the Transitional Period, to guide the elections, which were supposed to be held sixty (60) days before the end of the Transitional Period.

1.2 More importantly, the Transitional National Legislature (TNLA) was to transform into a Constituent Assembly on the first date of the twenty-seventh (27th) month of the Transitional Period for the purpose of adopting the Permanent Constitution, after which the TNLA will stand dissolved.

1.3 Now, implementation of the R-ARCSS got delayed by some constraints which necessitated extension of the Transitional Period, while progress was made, especially in relation to enactment of the Permanent Constitution-Making Process Act,2022.

1.4 The Extension Agreement of August,2022 which extended the Transitional Period up to 22 February, 2025.

2. Current Status of R-ARCSS Implementation

- 2.1 In relation to the CMP, the reconstitution of the National Constitutional Review Commission (NCRC) which is supposed to be made forty-five (45) days from the enactment date of the CMP law has not taken place up to this date.
- 2.2 The population census, required by the provisions of Article 194 of the Transitional Constitution of the Republic of South Sudan, 2011 (as amended) has been delayed and there is no hope that it will take place any time soon.
- 2.3 The election law has been enacted by the TNLA, however, the National Elections Commission, an institution which is responsible for the conduct of the general elections has not been reconstituted or operationalized at all levels of the Government.

3. Legislative Frameworks Necessary for Conduct of Elections

- 3.1 South Sudan has never held elections since it gained independence from Sudan in July 2011. The TCSS, 2011 mandates adoption of a permanent constitution for the independent South Sudan. The process was initiated in 2012 but prematurely came to halt when conflict broke out in December, 2013.
- 3.2 There are main laws, necessary for the conduct of elections in South Sudan:
 - (a) Permanent Constitution;
 - (b) National Elections Act, 2012 (as amended, 2023) and
 - (c) The Political Parties Act, 2012 (as amended 2022).

4. Possible Scenarios Underpinning the Constitution Making Process

Despite the Extension Agreement, 2022, failure to reconstitute the NCRC shall mean further delays in the CMP and the conduct of elections in South Sudan where further extension of the Transitional Period is no longer possible. Also, given the delay in the CMP, there is a considerable risk that no permanent constitution will be adopted resulting in delay of holding elections, thereby raising a prospect for different reactions from the public and the political actors in the country.

More importantly, conduct of elections of the new government on the basis of the TCSS, 2011 (as amended) may raise divergent legal views and be perceived as trumping future options under a Permanent Constitution, particularly in terms of the system of government. Holding an election under the current circumstances without adoption of the Permanent

Constitution would be perceived as a violation of the R-ARCSS and hence may not provide for secure and enabling voting environment.

In absence of clear guarantees, be it in relation to the elections or presence of a legal framework which would govern a postponed CMP, the celebrations of elections could lead to state of lawlessness and eruption of violence and this can erode the fragile stability in the country.

Therefore, as a possible options from the forgoing analyses, we are proposing the following scenarios:

Scenario 1: The Elections are held in time in accordance with Extension Agreement with the postponement of the Constitution Making Process, until after the elections

This scenario raises several challenges, both legally and politically. From legal standpoint, it directly contradicts the sequencing established by the R-ARCSS, which provides that the National Election Commission (NEC) within sixty (60) days prior to the end of the Transitional Period shall organized elections in accordance with provisions of the Permanent Constitution.

More problematically, this scenario raises the question of the legal basis upon which such elections would be held. In the absence of the Permanent Constitution, the TCSS,2011 remains in place as the Constitution of the country. If the elections are held on the basis of the TCSS, the question of the nature of the resulting institutions and their relation to obligation vis-à-vis the Constitutional Making Process is unclear. To the degree that the holding of the elections was meant to prompt the end of the Transitional Period, the authorities emerging from elections heled in absence of a Permanent Constitution are bound to have an uncertain status. On the one hand, they will succeed an unelected, transitional government, but, on the other, they will still be operating under a transitional constitution, the TCSS.

Under the R-ARCSS, overseeing the adoption of a Permanent Constitution is a key obligation of the transitional government. One major reason for this is that the very nature of the system of government and the institutions that conform to it, are understood to be a decision which belongs with the people, who should be at the origin of all powers of the State. To the degree that the TCSS was not adopted on the basis of participatory process in which the people had their say, holding elections under the current constitutional framework

binds the people to a system of government that they played no part in choosing back in 2011. This in turn has a direct impact on the democratic mandate of the future elected authorities, who will continue to operate on the basis of fundamental rules that were not written by the people.

In relation to the constitutional making process, the adoption of the Constitutional Making-Process Act, 2022 was a key milestone that was met by the R-TGoNU under the R-ARCSS. It was developed in accordance with principles enshrined R-ARCSS, both in terms of the process by which it was conceived and its contents, which captures the principle of a people-led process as mandated by the peace Agreement.

Lastly, in the absence of a population census, the determination of electoral constituencies will not be likely to reflect current demographics, amidst significant numbers of displaced people. Politically, the election of a new government on the basis of the TCSS maybe perceived as trumping future options under the Permanent Constitution, particularly in terms of system of the government. It is unclear what holding of the elections would imply in terms of the power-sharing arrangements that are currently in place under the R-ARCSS. Amidst a contracted civic space, it is doubtful that the circumstances under which the elections would be held will be perceived as enabling a fair electoral process. Likewise, it is unclear that a secure voting environment will be provided.

Therefore, in absence of the clear guarantees, be it in relation to elections themselves or the or the framework that would govern a postponed constitution making process, the celebration of elections could likely lead to the eruption of violence.

Scenario 2: The Constitutional Making Process (CMP) is Completed before the elections are held. Assuming that the NCRC was to be reconstituted in September, 2023, the CMP would require to be completed within a little less than twelve (12) months.

While this scenario will not alter the sequencing of the process as foreseen in the R-ARCSS and the Extension Agreement, the main challenge is with respect to the feasibility of the remaining timeframe, particularly if the requirements built into the CMPA are to be met, that is ensuring a participatory and inclusive public process of constitution-making involving civic education and public consultations. The main risk that moving forward with such option would entail is that it may lead to a contracted CMP that does not meet the requirements of inclusiveness and participation as

guaranteed under the -RARCSS, which is likely to have a negative impact on the perceived legitimacy and acceptance of the resulting Constitution by the people.

However, it is to be noted that the promulgation of the TCSS,2011, was completed within five (5) months, which is an indication that the remaining twelve (12) months in the developed Action Plan of the current leadership of NCRC would be sufficient to meet the requirements of Article 6.13 of the R-ARCSS, which mandates that the CMP process shall be *“led and owned by the people of South Sudan”*. *What is required is for the Parties Signatory to the Agreement to recommit themselves to the Roadmap, by fast-tracking the establishment of the mechanisms provided for in CMPA by reconstituting the NCRC, establishment of the Political Parties Council and the reconstitution of the National Elections Commission.*

The tight timeframe under this scenario give way to temptation of pushing a Permanent Constitution that not only lacks a participatory and inclusive process in its genesis but is further *“imported and imposed”* by elites, rendering the making of the Constitution a top-down rather than bottom- up process. This could further impact the perceived fairness of the electoral process itself, which would have as legal basis a document lacking legitimacy in the eyes of some political actors and the public at large.

Scenario 3: The sequencing of the CMP and the elections is held in accordance with R-ARCSS but the Transitional Period is extended to allow the CMP enough time

From the legal perspective, this option has the advantage of clarity, as it would not raise questions with respect to the legal basis upon which national elections are held. However, this scenario would require an **“extension agreement”** to be signed by all the parties to the R-ARCSS. Such extension may not sit well with the people of South Sudan. It is also not clear what reactions the postponement of the elections could elicit among the public, especially since awareness around the rationale and significance of adopting a permanent constitution prior to elections is not necessarily widespread.

5. What is the possible way forward

The above analyses reveal serious delays in the implementation of the Revitalised Agreement, while at the same time the talks of elections are gaining momentum. In view of Scenario (1) and or (3) what could be a feasible way forward? The way forward is the **“Consensus Agreement”**, which could provide for a compromise solution given the conflicting positions expressed by the main political

actors so far. The main purpose of such Agreement would be to present all parties with sufficient guarantees should national elections precede without adoption of the Permanent Constitution.

More importantly, a Consensus Agreement would help in providing a clarity as to the framework within which the CMP would unfold following the elections, preventing the winner from acting unilaterally and doing away with procedures enshrined in the CMPA. In view of the guarantees under the CMPA, such Consensus Agreement would likely reduce the risk of unrest and violence irrespective of the results of the elections. It would touch upon the procedural dimension of the CMP, while equally containing several substantive principles, largely drawn from the R-ARCSS, which would inform the process of making a Permanent Constitution for South Sudan. The Consensus Agreement could also allow for other outstanding aspects of the Peace Agreement which the parties consider important to pursue, to be carried over into the post-transitional period by way of constitutional anchoring with their incorporation into the TCSS.

Some of the most important substantive guarantees to be observed in case the Consensus Agreement is to be reached are:

- (a) What is the minimum legal consideration to be taken into account in pursuit of options available for altering the projected sequencing of the permanent constitution and general elections as foreseen in the R-ARCSS?
- (b) What guarantees are needed for holding elections in the country without adoption of the Permanent Constitution?

Any compromise reached through the Consensus Agreement would require implementation of the following reforms:

(a) Constitutional Reforms

Prior to the holding of general elections, the minimum reform necessary would include reforms limiting emergency powers; separation of power and full implementation of the R-ARCSS.

(b) Legislative Reforms

Which include implementation of the necessary legislative reforms as contained in the R-ARCSS to level the political playing field, including the civic space for all political parties in the country; streamline of the proportional voting system stipulated in the National Elections Act, 2023 (as amended) which should include establishment of elections dispute resolution mechanism.

(c) Other reforms

Is to include addressing of security concerns of the political forces participating in the elections as per Chapter II of the R-ARCSS; consensus on the adoption of the Permanent Constitution after conduct of the general elections, provided that complying with the core principles contained in Chapter VI of the R-ARCSS and enhancement of collaboration with regional and international organizations such as the African Union and United Nations to monitor the elections and to provide security guarantees to the political parties and the voters.

In line with the forgoing prepositions, guarantees to the political forces, citizens, and the international community should include the following:

- (i) Any consensus agreement between the parties to the R-ARCSS should respect and observant of the principles contained in the R-ARCSS;
- (ii) Any political agreement to adjust the timeline and sequencing of the R-ARCSS must be sign by all political parties and the international guarantors to leverage the trust of the public; and
- (iii) Any consensus agreement must protect and promote all reforms enshrined in the R-ARCSS, including the transitional justice processes.

In conclusion, section 6 of the Constitution Making-Process Act,2022 mandates that the permanent constitution making must ensure supremacy of the people of South Sudan; initiate federal and democratic system of the government; guarantee peace, stability, national unity and territorial integrity of the country. To achieve these goals and objectives, the Roadmap for Implementation of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan mandates the government observant of the twenty-four (24) months to be dedicated for Permanent Constitution-Making, however, substantial period of the twenty-four months has lapsed before the reconstitution of the NCRC.

The Constitution Making Process is highly technical, sensitive and require time and conducive environment, above all it also need a nation-wide civic education. As an alternative way forward, the current leadership of NCRC has developed an “Action Plan”¹ which takes into account the various stages of the Constitution Making Process.² In the event the Transitional Period cannot be extended,

¹ Internal Rules of Procedures

² Proposed Action Plan (Strategic Outcome No.2)

the goal for writing a "*Permanent Constitution*" can still be achieved, provided that the NCRC is urgently reconstituted and its operation budget is released³.

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³ Budget for Constitutional Making Process