

# OPTIONS FOR POST-CONFLICT CONSTITUTIONAL ARRANGEMENTS IN SUDAN



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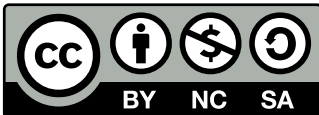
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Cover illustration: Sudanese weigh in on Peace Agreement in Blue Nile State. Sudanese partake in 'Citizen Hearings' in Musfa, Blue Nile State, on the border between northern and southern Sudan. The hearings are part of a 21-day process of popular consultations where residents can express whether the 2005 Comprehensive Peace Agreement (CPA) has met their expectations. Photo ID 462222. 25 January 2011. Musfa, Sudan. UN Photo/Tim McKulka. <[www.unmultimedia.org/photo/](http://www.unmultimedia.org/photo/)>. UN Photos, Flickr. The image has been cropped from the original.  
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# Contents

<b>Acknowledgements</b> .....	<b>iv</b>
<b>Executive summary</b> .....	<b>1</b>
<b>Introduction</b> .....	<b>4</b>
<b>Chapter 1</b>	
<b>Framing the process, identifying key preliminary issues</b> .....	<b>6</b>
1.1. Governing in the transition .....	6
1.2. Principles for a future constitution-making process .....	7
1.3. Matters related to constitutional arrangements .....	8
<b>Chapter 2</b>	
<b>Inclusion and decision making</b> .....	<b>10</b>
<b>Chapter 3</b>	
<b>The process of making a ‘permanent’ constitution for Sudan</b> .....	<b>13</b>
3.1. General principles and preliminary considerations .....	13
3.2. Key questions defining the path towards Sudan’s future permanent constitution .....	14
<b>Chapter 4</b>	
<b>Conclusion</b> .....	<b>22</b>
<b>References</b> .....	<b>24</b>
<b>About the authors</b> .....	<b>27</b>
<b>About the partners</b> .....	<b>28</b>
International Institute for Democracy and Electoral Assistance .....	28
Arab Association for Constitutional Law .....	29

# EXECUTIVE SUMMARY

Sudan will require a new permanent constitution to solidify national identity, find consensus, and sustain lasting peace. This paper focuses on questions related to the process of future constitution making. It is based on the assumption that there will be a negotiated peace in Sudan after which a constitution for the long term will be drafted. It also assumes that some form of transitional political arrangement will be agreed and implemented as a step in a peace process. It considers 'starting points', that is, preliminary matters that may require decisions before—or at the outset of—a constitution-making process. These include a government during a transition period, principles which a constitution is to honour, and constitutional arrangements such as devolution, security issues, transitional justice and land issues. It then discusses inclusion in a constitution-making process and questions of process design including sequencing and constitution-making bodies.

## Preliminary issues

The terms of a peace agreement often determine how a future constitution will be made. Principles that will guide or even bind a constitution-making process, securing various interests, may be included among these terms (as in the Juba Peace Agreement, JPA 2020). It is thus important to ensure that such elements of a peace agreement are carefully considered in advance and not added hastily with insufficient thought. The structure of any transitional government is critical in this context as that government is likely to have considerable influence over a future constitution. Elements of future constitutional arrangements requiring careful consideration include the form of devolution, security sector reform, economic reform, transitional justice and land matters.

## Inclusion

Inclusion in constitution making has two aspects: (a) inclusion in decision making—both in decision-making bodies and through 'vertical' programmes that draw in the views of the public; and (b) securing inclusive outcomes: constitutional institutions and processes that are inclusive. This paper focuses on the former, inclusion in decision making.

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**The structure of any transitional government is critical in this context as that government is likely to have considerable influence over a future constitution.**

Inclusion of conflict parties is necessary for peace and, if all factions are not prepared to participate at the outset, mechanisms to permit them to join later can be agreed. Inclusion of conflict parties alone is not enough, however. A constitution-making process should involve members of other sectors of society as well. This is often difficult to agree upon, especially if other groups are not well organized. Nonetheless, through good preparatory work, mechanisms can be agreed to ensure that women, marginalized groups and other relevant sectors of society, including the clergy and commerce, participate.

### Design of the process

Questions on designing a constitution-making process include ‘*by whom*’, ‘*when*’ and ‘*how*’ constitution making should be conducted. The building blocks are usually a peace agreement, a political settlement with an agreed understanding of how power is exercised, and a new constitutional dispensation. Added to these interlocking issues is the question of when elections should be held. Previous proposals for constitution making in Sudan, including those in the Constitutional Charter (Sudan 2019) and the JPA, are likely to be influential in any decisions.

*Sequencing:* Frequently, post-conflict constitution making consists of two stages. In the first stage a transitional constitution is agreed, sometimes called an interim constitution or constitutional declaration. That constitutional document then sets out how stage two, the drafting of a permanent constitution, will proceed. The Comprehensive Peace Agreement (CPA 2005) set up a two-stage process with an interim constitution followed by a process in which a new constitution was to be made. Similarly, in a ‘first stage’ after July 2019, the Constitutional Charter was adopted. That Charter set out the arrangements for a subsequent ‘stage two’ of drafting the new constitution.

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**South Africa’s two-stage process in the 1990s was different, as it sequenced elections after the first stage. An interim constitution was agreed during peace talks, then elections were held and the elected body drafted the permanent constitution.**

South Africa’s two-stage process in the 1990s was different, as it sequenced elections after the first stage. An interim constitution was agreed during peace talks, then elections were held and the elected body drafted the permanent constitution.

A two-stage process has advantages. It allows a legitimate government to hold office while a permanent constitution is drafted. More inclusive decision making is then likely to be possible in the second stage. Even if a two-stage process emerges in Sudan, which is likely, the question of whether to hold elections before the second stage needs to be answered. The answer is often linked to questions about how the constitution is to achieve legitimacy. If the constitution-making body is elected, it may give sufficient legitimacy to a new constitution. If not, a referendum may be necessary.

*Constitution-making bodies:* Two types of bodies may be involved in constitution making: (a) large, highly representative, single bodies (legislature or constituent assembly, for instance) that are usually elected; and (b) smaller bodies (commissions) that may be expected to have technical expertise. Relatively often, a smaller body prepares a draft constitution, and a larger body

debates and adopts it. Nowadays the mandate of a constitution-making body usually includes administering a programme of public participation.

*Decision-making rules:* Constitution-making bodies should be inclusive, and decision-making rules influence how far this is achieved. Rules (or practice) may emphasize consensus or involve super-majorities because the founding document of a nation needs widespread support. Deadlock breaking mechanisms are also often considered, including (more rarely) a referendum as a deadlock breaker.

### **Conclusion**

The context at the end of hostilities as well as the country's longer history will play a significant role in determining a constitution-making process in Sudan. Most importantly, serious consideration of options and how they might work in advance can contribute significantly to securing a successful process.

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**Constitution-making bodies should be inclusive, and decision-making rules influence how far this is achieved.**



# INTRODUCTION

**Making a permanent constitution in Sudan will be crucial to solidifying national identity, finding consensus, and sustaining lasting peace as the country emerges out of a devastating war.**

Making a permanent constitution in Sudan will be crucial to solidifying national identity, finding consensus, and sustaining lasting peace as the country emerges out of a devastating war. Against the background of protracted civil unrest and a multi-layered military conflict, a future constitutional process in Sudan will have to tackle challenging questions that lie at the heart of the country's deep-rooted conflict. To contribute to thinking about making a constitution capable of ensuring a durable democratic outcome, this paper focuses on process-related questions. In so doing, it also identifies some issues that are likely to arise in a peace process that might influence a future constitution and so should be considered in advance of, or together with, constitution making. The range of issues that will need to be considered in establishing post-conflict government arrangements, agreeing on a constitution-making process, and writing a constitution is enormous. The paper merely highlights some and offers some options.

Options for constitution making cannot be fully discussed in the abstract. Realistic options need to be based on the context in which and for which a constitution is made. This makes it difficult to make concrete suggestions for Sudan until it is known who (what parties or factions) will be involved in peace settlements. But that does not mean options should not be explored; developing ideas about how to manage a transition to constitutional government prepares people to engage in more informed, nuanced, imaginative and flexible discussions once the real conversation starts. South Africa provides an example: the African National Congress (ANC) had worked on constitutional options for South Africa for many years before negotiations with the apartheid government started. As a result, although its members had never governed and many had spent years in jail, the ANC was able to negotiate with subtlety and understanding, and succeeded in reaching agreements that have endured. In that spirit, the primary goal of the paper is to promote further work and critical debate about constitution making in Sudan post-conflict.

The paper is based on the assumption that there will be a negotiated peace in Sudan after which a constitution for the long term will be drafted.<sup>1</sup> Different strategies would be necessary were there a victor who commanded enough power in Sudan to impose a constitution. The paper also assumes that some form of transitional political arrangement will be agreed on and implemented as a step in a peace process. We note that an agreement on transitional government may be recorded and formalized in different ways: the name is irrelevant. It may be included in a peace agreement like the 2018 Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) (IGAD 2018) or Yemen's 2011 Implementation Agreement; it may be through a constitutional declaration (Libya 2011; Sudan 2019); or, more formally, in a transitional constitution (South Africa 1993; Nepal 2007). It may also be less or more detailed. We treat these all as constitutional documents because they deal with the way in which power is accessed and exercised.

Chapter 1 of the paper considers starting points, highlighting issues that deserve further attention such as how a peace agreement might secure a better constitution-making process and what to avoid; how to manage a transitional period before a new constitution is agreed and elections can be held; what institutions can strengthen a transition; and the implications of a peace agreement binding future political decisions. Chapter 2 focuses on inclusion, while Chapter 3 raises process-related issues: What are the options for the process of making a constitution post-conflict? How might different sequencing options affect a constitution-making process?

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<sup>1</sup> The issues raised in this paper would also apply to a situation in which peace is secured by international actors and a transition is to some extent managed by them, as in Namibia in 1989–1990 and in Cambodia in 1991.

## Chapter 1

# FRAMING THE PROCESS, IDENTIFYING KEY PRELIMINARY ISSUES

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**There is significant path dependency in constitution making, which is usually determined to some extent by past practices. A post-conflict constitution-making process depends heavily on the peace settlement, however.**

There is significant path dependency in constitution making, which is usually determined to some extent by past practices. A post-conflict constitution-making process depends heavily on the peace settlement, however. Nowadays, a constitution-making process and principles binding constitution makers are often agreed in a peace process. Thus, advance thinking about what might be included in a peace agreement—and what should not be included—is important (see also Berghof Foundation and UN DPPA 2020).

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### 1.1. GOVERNING IN THE TRANSITION

As noted above, a peace agreement is likely to establish some form of transitional government. These arrangements will probably have a direct impact on a constitution drafted during the transition.

Accordingly, the design, composition and powers of a national transitional government and, perhaps, subnational governments (1.3.1: Devolution) need attention. Mechanisms for inclusion in a national power-sharing arrangement are relevant here (see Part 3 and Ladley 2024). But, if the interests of powerful elites are strong enough—and in post-conflict Sudan they may be—including representatives of other sectors of society in a transitional government is unlikely to be sufficient to secure a successful transition (i.e. one that provides the basis of a system that serves all Sudanese). The question, which cannot be answered in this paper, is what other arrangements can be developed in a peace agreement (including perhaps subnational arrangements, for example) to ensure that the transition is not merely used to maintain the interests of the dominant conflict parties.

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## 1.2. PRINCIPLES FOR A FUTURE CONSTITUTION-MAKING PROCESS

The constitution-making process and principles for a future constitution are often agreed in a hurry in peace processes, perhaps copied from arrangements in other peace agreements. In Sudan's case, the Juba Agreement for Peace in Sudan between the Transitional Government of Sudan and the Parties to Peace Process (JPA 2020) may be influential. Ideally, however, the process and any principles intended to guide it are informed by careful thinking before the negotiations. We discuss some options for the form of a constitution-making process in Part 4. Here the question is whether a peace agreement should include some principles for constitution making.

Constitutional principles to guide or bind future constitution makers have been used in several processes. Principles may be adopted to guide the peace process and then implicitly bind future constitution making—as in South Africa (CODESA Declaration of Intent 1991) and Democratic Republic of the Congo (the Declaration of Fundamental Principles of the Inter-Congolese Political Negotiations—UN Security Council 2001)—or deliberately drafted to inform and bind constitution making.

If principles are desired, negotiators/parties need to decide how detailed they should be. They may be relatively general, simply capturing generally accepted elements of a democratic constitutional order—as in post-war Germany's Frankfurt Documents of 1 July 1948, Namibia's Principles concerning the Constituent Assembly and the Constitution of an independent Namibia (UN Security Council 1982) and Kenya in 2008 (Constitution of Kenya Review Act 2008). Or they may be more detailed, as famously in Schedule 4 of South Africa's post-Apartheid Interim Constitution where the 34 Constitutional Principles ranged from general ones to specific 'deals' on matters relating to pensions for civil servants, for example (South Africa 1993). When such principles are intended to bind future constitution makers, they might be considered undemocratic. Nonetheless, binding principles may be essential to securing a peace agreement—as was the case in South Africa, where the government would not give up its power without reassurances that its core interests would be protected in the future. They can also secure interests of marginalized groups that may not be respected by majority decision making.

Such principles will depend on the nature of the transition, but they can be considered in advance of negotiations. Again, take South Africa. In 1989, at the request of the ANC, the Organization of African Unity adopted the Harare Declaration<sup>2</sup> which captured the ANC's vision in setting out a principled framework for a transition from apartheid. Sudan's 2019 Constitutional Charter (articles 3–5) includes principles that may still be broadly agreed and that could form the basis of a set of principles to guide constitution making. In addition to general principles (that Sudan is a democratic, pluralist,

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<sup>2</sup> The Harare Declaration (OAU 1989) provided the basis of the Declaration on Apartheid and its Destructive Consequences in Southern Africa (UN General Assembly 1989).

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**Developing agreement on the core principles of a future constitution for Sudan and defining any red lines may help ensure that agreements are not merely focused on immediate needs and interests but provide the basis of durable peace.**

parliamentary state without discrimination etc.), article 5 contains the specific principle that certain crimes will not be extinguished by prescription. The JPA also lists principles (see in particular article 1). Neither document suggests that these principles bind future constitution makers, however.

Developing agreement on the core principles of a future constitution for Sudan and defining any red lines may help ensure that agreements are not merely focused on immediate needs and interests but provide the basis of durable peace.

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### 1.3. MATTERS RELATED TO CONSTITUTIONAL ARRANGEMENTS

#### 1.3.1. Devolution

Devolution (perhaps going as far as federalism) is likely to be on the agenda and may be a constitutional mechanism to manage the many conflicts in Sudan that are not the dominant conflict at the moment. Certain related decisions are likely to be needed before the constitution is finalized, some of which may be captured in transitional arrangements. The following questions should be considered:

- Will subnational (regional and/or local) governments be recognized or established in transitional arrangements (as in the Constitutional Charter)? What would their relationship to the central government be?
- Will any aspects of the Juba Agreement for Peace in Sudan (JPA 2020) be relevant?
- How will decisions about the boundaries and powers of subnational governments be made?
- How will such decision making relate to constitution making?<sup>3</sup>

#### 1.3.2. Other matters

Other matters will need attention for a constitutional settlement to work. In particular, a 'final' constitution may need to include transitional arrangements to ensure reform processes continue, possibly including:

1. *Security sector reform.* This is likely to start before constitution making but decisions related to security forces should inform constitution makers.
2. *Economic (fiscal) reform.* After 2019, the Sudanese Government undertook substantial structural economic reforms, including cutting subsidies and asserting civilian control of parastatals registered to the security sector

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<sup>3</sup> The JPA anticipated a 'System of Governance' conference to sort out regional matters. Although these are obviously constitutional matters and affect many aspects of a constitutional settlement, the conference appeared to be separate from the proposed constitution-making process.

(Baldo 2021). It is likely similar operations will be necessary post-conflict and, ideally, to be secured under fiscal arrangements in a constitution.

3. *Transitional justice*. Sudan has no prior experience with transitional justice mechanisms. Many questions, which may be included in a peace agreement, are to be tackled including the choice of mechanisms, reparations, reconciliation, accountability, the question of impunity, and the timeframe. Challenges will arise in negotiating peace and securing justice at the same time. Some form of transitional justice process will probably take place during constitution making. Its implications for constitution making will need consideration.
4. *Land*. If the constitution deals with land issues, what process can inform its approach?

This is not an exhaustive list—there are likely to be other substantive questions that could be identified in advance.

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## Chapter 2

# INCLUSION AND DECISION MAKING

In the context of peace agreements, government and constitution making, inclusion has two aspects: (a) inclusion in decision making—including ‘vertical’ inclusion through broad participation; and (b) inclusive outcomes, that is, establishing a constitution that creates inclusive institutions and processes. Here we focus on the former, inclusion in decision making, by considering reasons for inclusion—‘*why inclusion?*’—and what inclusion could look like—‘*who should be included?*’.

First, inclusion of conflict parties is necessary to secure peace. This requirement usually carries through to transitional government arrangements and constitution-making bodies. It may be argued (see e.g. Elster 1995) that constitution making should be undertaken at some distance from the heart of the conflict and, particularly, that it should be dominated by the general interests of the public, rather than by the interests of conflict parties. However, as noted above, if a constitution does not have the support of conflict parties, it is unlikely to be adopted and, if adopted, unlikely to be properly implemented.

Sometimes it is not possible to get all parties around the table at the outset. Thus, in Burundi, the 2000 Arusha Accords permitted non-signatory groups to sign on later. The JPA has a similar provision: articles 8 and 9 of chapter 8 allow new parties to sign the JPA on the condition that the ‘concerned sides’ agree. If a new party signs, it will be bound by all the responsibilities to which the original parties bound themselves. By contrast, in the negotiations leading to Sudan’s Comprehensive Peace Agreement (CPA 2005) a deliberate choice was made to restrict the negotiations to the two parties to the conflict. They insisted that the agreement was to be negotiated by them alone and rejected the inclusion of others, even on questions of constitutional relevance (see e.g. Juon 2020; Maboudi 2020; McEvoy, Todd and Walsh 2022). To avoid exclusion of conflict parties in the future, mechanisms for bringing parties into peace agreements will need to be worked out as a peace process emerges. The same applies to roles in transitional government at national or regional level.

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Nowadays, inclusion of the leaders of conflict parties alone is considered inadequate and broader inclusion is demanded. Self-interested reasons for broader inclusion include that even strong conflict parties usually need some support from the people and including others builds legitimacy. Broader inclusion usually also brings greater skills and experience to negotiating, governing and constitution making. More generally, as Rocha Menocal (2015) and Ladley (2024) among others argue, more inclusive processes may be more durable and political settlements and institutions that are more inclusive may lead to societies that are more peaceful, prosperous and resilient.

Securing broader inclusion is often more difficult than securing the inclusion of conflict parties and dominant political factions. Ideally, there will be broader inclusion at each stage of a process with inclusion of women (article 1.20 of the JPA requires the inclusion of at least 40 per cent women), and groups that may not be adequately represented in conflict party and elite delegations. These include young people, people living with disabilities, ethnic minorities, civil society representatives, including the clergy, and representatives of different regions, including civil society delegations from areas in which conflict parties dominate. In some processes, traditional leaders also play a role.

It is easier to list groups than to determine who should be at the table or serve in a constitution-making body—who are the credible/legitimate representatives of different groups? The problem is particularly acute with the representation of civil society, for example women and youth, because, especially as a country emerges from conflict, these groups are often not strongly organized. Moreover, they are likely to be affiliated with one or another conflict party or elite group. Sudanese stakeholders have experienced difficulties in bringing different civil society groups together—in 2022, when civilians sought to move the process along by proposing a transitional constitution, different groupings could not agree.

Part of the solution may be to agree that every delegation should itself be diverse, including women and young people (as in the 2013 Yemen National Dialogue, for example (Murray 2013)). However, such an arrangement needs to be supplemented by other mechanisms as people will not be satisfied with the representation of conflict parties and elites only, even in ostensibly diverse delegations. Preparatory work among civilian sectors can build coalitions of groups that can avoid civil society participation being fragmented and contested.

Inclusion in decision-making bodies is not the only way in which different sectors may have influence in a process. Vertical inclusion—inclusion through contributions from the ground up—is also important. This is usually easier in a constitution-making process when violence is reduced. Thus, recent democratic constitution-making processes have included programmes of public education and enabled the public to engage with constitution makers. This has so far been absent in Sudan. What all constitution-making processes in post-independence Sudan have in common is that Sudanese civil society

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has not been actively involved, which led to constitutions marred by a lack of ownership and democratic legitimacy.

What is needed to render a constitution-making process inclusive? Inclusive processes can be achieved through representation in constitution-making bodies,<sup>4</sup> through a process of public consultations and public submissions, and ultimately through a referendum. Referendums are particularly problematic in post-conflict situations, however, and often increase division rather than building consensus and legitimacy.

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<sup>4</sup> Representation in constitution-making bodies is closely linked to rules of decision making, which will be addressed in the next section (3.2.3: Selecting constitution-making bodies and rules of decision making ).

## Chapter 3

# THE PROCESS OF MAKING A 'PERMANENT' CONSTITUTION FOR SUDAN

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### 3.1. GENERAL PRINCIPLES AND PRELIMINARY CONSIDERATIONS

A nationwide, open and inclusive constitution-making process could be the fulcrum for building national identity and forging a national consensus. The legitimacy of a future constitutional framework is likely to depend in part on the constitution-making process itself. The more process- and design-related issues are discussed and agreed in advance, the higher the probability that they will result in efficient and successful constitutional negotiations.

Here we raise some of the key questions to be answered in deciding on a constitution-making process. By looking at Sudan's previous constitution-making experience and other comparative processes, we hope to provide inspiration and ideas. We outline some of the key considerations regarding the place of a constitution-making process in a post-conflict transitional period and its possible design, addressing 'by whom', 'when', and 'how'. At the outset, it is important to reiterate that there is no standardized 'good practice' for constitution making; constitutional processes develop according to the context in a particular country. Context is especially relevant in a country emerging from prolonged conflict—where the process is usually conducted under considerable pressure (Brandt et al. 2011).

We start with Sudan's previous constitution-making processes, including that set out in its current interim constitution, the *Constitutional Charter for the Transitional Period* (Sudan 2019, hereinafter 'Constitutional Charter'), and the JPA. A challenge moving forward under this constitution, including the amendments to it as per the JPA, is whether it will be considered to be binding.<sup>5</sup> Whether or not the arrangements in the Charter or JPA prevail,

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<sup>5</sup> Non-signatories of the JPA, such as, for example, the Sudan People's Liberation Movement–North, are likely to oppose being bound by the existing constitutional framework. As mentioned above, however, articles 8–9 of chapter 8 allow new parties to sign the JPA.

critical reflection on the previously proposed designs for a constitution-making process in Sudan will help to inform future decisions. In addition, those designing the process will be able to draw from and be inspired by design choices made in other post-conflict contexts.

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## 3.2. KEY QUESTIONS DEFINING THE PATH TOWARDS SUDAN'S FUTURE PERMANENT CONSTITUTION

With war still raging in early 2024, it is difficult to predict the form of a future constitutional process. It will largely depend on the outcome of peace negotiations.

### 3.2.1. Sequencing a post-conflict transition in Sudan

Sequencing is crucial and, while there are different theoretical options for structuring a transitional process, negotiated transitions in practice rarely follow a linear trajectory from peace negotiations to a new constitutional arrangement. They are complex processes, defined by the context, and highly fluid, adapting as circumstances change.

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**While there is no 'one-path- its-all' sequence for a successful transition, comparative processes reveal several commonalities.**

While there is no 'one-path-fits-all' sequence for a successful transition, comparative processes reveal several commonalities. Three key building blocks commonly feature albeit in various forms, combinations and patterns: (a) a peace agreement, often preceded by earlier ceasefire/peace agreements to end the conflict; (b) a political settlement that captures an agreed understanding of 'how power should be constrained and exercised' (Bell and Zulueta-Fülscher 2016); and (c) a revised constitutional dispensation—which may emerge out of a phased process with a transitional and final constitution.

Ceasefire and/or peace agreements are usually the result of elite-driven negotiations. However, as noted above, a new constitutional framework ideally emerges from a more inclusive process with the goal of framing a new social contract for the people. The processes surrounding the key building blocks of a transition are deeply interlinked and often overlap, but they can also occur in separate forums and/or agreements (Suteu and Bell 2018). Sometimes a constitutional settlement, be it interim or permanent, can also simultaneously constitute a peace agreement. This was the case in South Africa's interim constitution.

Elections are another important component of any peace process. While elections are a means of involving the public and providing democratic legitimacy for a future government, the challenging question is their timing. After protracted conflict or regime change, holding elections may appear to offer a quick solution to restore democratic government. However, in the aftermath of conflict, sufficient time will be needed to re-create a conducive political landscape for political parties to (re-)group and for healthy political competition to (re-)surface beyond existing divisions among armed groups (Brahimi 2007). Moreover, a sound electoral process presupposes the

existence of a comprehensive legal framework, logistical preparations and reliable security arrangements. The timing of elections will also relate to the choice of the constitution-making process (see below).

There are many reasons to avoid rushing into early elections post-conflict. A cautious approach is noticeable in the JPA which makes elections at the end of the transitional period dependent on achieving a number of milestones, such as 'an agreed plan for the return of IDPs and refugees, ... holding the national Constitutional Conference, conducting a census, issuing the law on elections and political parties, and establishing the elections commission' (JPA 2020 article 13.1). Similar conditions with respect to the timing of elections were included in the CPA (articles 1.8.4 and 1.8.5).

### 3.2.2. The question of process design: How many stages?

It is helpful to think of post-conflict constitution making in stages. Under a one-stage process, a permanent constitution is drafted in the peace process, perhaps while the country is governed by international forces (e.g. Namibia 1989–1990 and East Timor 2001–2002).

Most post-conflict constitution making has more than one stage. Two-stage processes (or processes with more than two stages) take many forms but a critical distinction is whether the permanent constitution is finalized before or after elections. The classic example of a two-stage process is South Africa which had its first democratic elections between the two stages. There, the Interim Constitution (South Africa 1993) was drafted by unelected negotiators and adopted by the white South African Parliament. The Interim Constitution set up a process for making the final constitution after elections (the second stage). The critical element of this two-stage process was that it allowed the final constitution to be drafted and adopted by a democratically elected body. As noted above, however, the most significant elements of the negotiated deal were protected in the second stage by the Constitutional Principles.

The sequence applied following the resolution of the decades-long conflict between the Government of the Sudan and the Southern Sudanese SPLM/A (Sudan People's Liberation Movement/Army) in 2005, can also be described as a two-stage process. Elite-driven negotiations led to the 2005 CPA, which included a transitional political settlement and foresaw a two-stage constitutional process (with an interim constitutional arrangement followed by a more permanent constitution for the country).<sup>6</sup> Article 2.12.4 of chapter II of the Power Sharing Agreement anticipated the newly formed National Constitutional Review Commission (NCRC) drafting a 'Legal and Constitutional Framework' within six weeks, which—after adoption by the Sudanese National Assembly and the SPLM Liberation Council—became the *Interim National*

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**Most post-conflict constitution making has more than one stage. Two-stage processes (or processes with more than two stages) take many forms but a critical distinction is whether the permanent constitution is finalized before or after elections.**

<sup>6</sup> Articles 1.8.1–1.8.3 further provided for a national population census to be completed by the end of the second year of the interim period, with elections scheduled thereafter. Articles 1.8.4 and 1.8.5 then offered a possibility for review of the proposed deadlines by the parties in light of certain electoral timing considerations, i.e. questions of resettlement, reconstruction and a consolidation of the Peace Agreement. See also the Matrix on the Implementation Modalities of the Machakos and Power Sharing Protocols of the Comprehensive Peace Agreement (CPA 2005: 141).

**The building blocks of this multi-faceted transition consisted of a peace agreement that included a transitional political settlement, drafting an interim constitution, and subsequently adopting a permanent constitutional arrangement.**

*Constitution of the Republic of the Sudan* (INC, 2005).<sup>7</sup> The second stage was to involve a participatory and inclusive constitutional review process during the six-year interim period to provide a more permanent constitutional arrangement (CPA article 2.12.10). In sum, the building blocks of this multi-faceted transition consisted of a peace agreement that included a transitional political settlement, drafting an interim constitution, and subsequently adopting a permanent constitutional arrangement. Elections were not required before the new permanent constitution was drafted.

Sudan chose a similar course of action in July 2019 when, a few months after the overthrow of President Omar al-Bashir, the Forces for Freedom and Change and the Transitional Military Council in Sudan signed the *Political Agreement for the Establishment of Governing Structures and Institutions in the Transitional Period* (Political Agreement 2019) and adopted the Constitutional Charter (Sudan 2019). The latter was to serve as the supreme law of the land and guide a transitional period towards a civilian-led government.<sup>8</sup> The Charter was amended in November 2020 to include the terms of the JPA,<sup>9</sup> which set up a new transitional power-sharing agreement and a prolonged transitional period.<sup>10</sup> Although the legality of the 2020 amendments of the Charter is disputed, the amended Charter confirmed that the country had again planned a two-stage constitution-making process.<sup>11</sup>

Since independence, Sudan's history of constitution making has been marked by a pattern of two-stage processes. Of Sudan's short-lived constitutions of 1956, 1964, 1973, 1985, 1998, 2005 and 2019, only two were permanent constitutions designed to stay in force beyond a short interim period—those adopted in 1973 (lasting until 1985) and 1998 (lasting until 2005), which were crafted under the leadership of Presidents Jaafar al-Nimeiry and Omar al-Bashir, respectively. Looking into the future, is the proposed framework of a two-stage process for making a permanent constitution, as outlined in the Constitutional Charter, relevant for Sudan's post-war dispensations?

<sup>7</sup> Similar arrangements were foreseen for South(ern) Sudan in that an Interim Constitution for Southern Sudan (ICSS) was to be drafted. The right to self-determination for Southern Sudan via referendum was further guaranteed in Part XVI of the INC.

<sup>8</sup> While the JPA consists of a first part, i.e. the *Agreement on National Issues*, which prevails over the 2019 Constitutional Charter in case of conflict, the remaining parts of the JPA consist of several bilateral agreements between the transitional government and various parties, which are binding only on those signatories (see also Davies 2022). A similar sequence was mapped out for post-conflict Syria in the Geneva process of 2012, which embraced a comparable trajectory from a political settlement to a staged constitution-making process followed by elections (UN Security Council 2012).

<sup>9</sup> The amendments to the Constitutional Charter based on the JPA were approved in 2020 in a joint session of the Sovereign Council and the Council of Ministers. However, the Constitutional Charter provides in article 78 that it can be amended only through a two-thirds majority of the Transitional Legislative Council (Al-Ali 2021).

<sup>10</sup> In essence, the November 2020 amendments to the Constitutional Charter extended the timeline for the transitional period to 39 months, increased the members of the Sovereign Council, granted signatories a 25 per cent representation in the cabinet and the legislature, and allowed members of the armed forces to run for office in elections. Article 79 was added to underline the supremacy of the JPA over the Constitutional Charter.

<sup>11</sup> References to the permanent constitution-making process are included in the *Agreement on National Issues*, but also appear in other parts of the JPA, such as the *Blue Nile and Kordofan Agreement*. A similar process occurred in the Central African Republic, where a peace agreement was signed between the warring parties in January 2013 that included a transitional political settlement. Only six months later, in July 2013, an interim constitution was put in place, which was replaced by a final constitution in 2015.

Two-stage processes stretch the transition (Berghof Foundation and UN DPPA 2020). Moreover, as the example of Nepal shows, a political settlement may also not be fully secured in a constitutional process. Under such circumstances, further negotiations or constitutional amendments are required. In a first stage, transitional constitutions can play an important role in the political settlement process and provide a temporary legal basis for governing during the transitional period. Note that, in this context, the format and title of documents is less important than their content. Interim political arrangements may, for example, also be agreed upon outside the framework of an interim constitution or a peace agreement in a separate, stand-alone document.

The political arrangement captured in the transitional instrument then allows a negotiated constitutional settlement to be reached over several stages, providing time for initial proposals to be tested, perhaps, and for peacetime political arrangements to settle down to some extent (Bell and Zulueta-Fülscher 2016; Zulueta-Fülscher and Bisarya 2018). The advantage of this trajectory is that it provides time not only to negotiate a lasting political settlement, but also to conduct a more inclusive process (Zulueta-Fülscher and Bisarya 2018).

Thus, a host of arguments speak for a staged constitution-making process in Sudan. A transitional constitutional arrangement could offer the time to arrive at a wide-ranging political settlement and to negotiate a more permanent constitution for Sudan based on a participatory, legitimate and inclusive process.

If a two-stage process is chosen in Sudan, should elections precede or follow the adoption of the permanent constitution?

Even after an initial settlement, there is likely to be ongoing pressure on the warring parties to quickly come to (yet another) more permanent political settlement to consolidate any gains and avoid spoilers threatening a peaceful transition with a return to conflict. Moreover, a hastily agreed transitional political compromise might increase demands to move to elections quickly to secure a legitimate government, rather than delaying elections while extensive constitution- and consensus-building processes are undertaken. This may suggest a two-stage process, with elections to be held before the second stage.

In contemplating whether or not to hold elections before the second stage in a two-stage process, consideration might be given to:

1. *How a constitution would be adopted (and legitimized).* Nowadays, a constitution is often adopted through a referendum. Referendums, however, can be divisive and used to undermine whatever fragile consensus is built through peace negotiations and constitution making.

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**If a two-stage process is chosen in Sudan, should elections precede or follow the adoption of the permanent constitution?**

Namibia, South Africa and Tunisia chose, instead, to establish their elected legislatures as constitution-making bodies.

2. *The demands of the people of Sudan.* Whether their demands for a people-driven, legitimate and inclusive constitutional process will be better met before or after elections.
3. *Minority protections.* How to ensure that post-election constitution making, which is likely to be driven by a democratically elected government, does not override minority interests that may have been protected in a peace agreement and transitional arrangements. Will parties to a peace agreement trust that a future constitution-making process will protect their interests? Can mechanisms be developed to reassure them?

**Establishing a clear and reasonable timeframe for drafting a final constitution is important.**

Establishing a clear and reasonable timeframe for drafting a final constitution is important because, among other things, until the constitution is completed, 'normal' politics and government are not possible and long-term institutional arrangements cannot be properly established. Timeframes are seldom honoured, however. Thus, in setting a timeframe, some flexibility is necessary while at the same time providing incentives for reaching a conclusion.

### 3.2.3. Selecting constitution-making bodies and rules of decision making

One of the most important goals of the transitional period in Sudan is building an integrated constitutional process to establish and draft a new democratic constitution for Sudan that safeguards all rights and freedoms for all Sudanese people, drawing upon lessons from Sudan's history, including relevant provisions from the Bill of Rights in the Constitutional Declaration and other relevant sources of law and policy in Sudan (JPA 2020: Title 3 *Two Areas Track Agreement between the Transitional Government of Sudan and Sudan People's Liberation Movement – North/The Revolutionary Front* article 8.17).

The composition, mandate and decision-making process of constitution-making bodies, including the way in which a constitution is finally adopted, are matters that influence the legitimacy of constitution making and its chances of success. With respect to the institutional framework, an initial question is whether to concentrate the mandates of a text's drafting, deliberation and adoption in one body or to divide these functions among several bodies. Two types of bodies usually take a central role in the drafting and adoption of constitutions: (a) parliaments, constitutional/constituent assemblies, or bodies acting as both (Namibia 1989, South Africa 1994, Tunisia 2011); or (b) a combination of constitutional commissions/committees (or similar) and legislatures or assemblies (Uganda 1995, Rwanda 2003, Kenya 2005).

In addition to drafting, constitutional/constituent assemblies usually have the final decision-making power over the constitutional text, thus combining the functions of drafting, debating and adoption of the constitutional text in one body. In some countries, a further legitimization of the constitution through a direct popular referendum is required (Iraq 2005, Chile 2022). Membership in constituent/constitutional assemblies is typically, though not exclusively, determined by direct or indirect elections (Ecuador 1998, East Timor 2001,

Bolivia 2009), as is the case for parliaments whose members are elected in regular parliamentary elections. More recent examples of elected constituent assemblies can be found in Tunisia (2014) and Nepal (2015).

An alternative option is to attribute the drafting of a constitution to a smaller body, usually an appointed expert committee or commission, often selected by the executive and/or the political parties (Rwanda 2003, Kenya 2000 and 2008, Fiji 1997 and 2012). Apart from drafting the constitutional text, such bodies may also manage a civic education and public consultation process. Such appointed bodies are usually not the final decision makers; their proposals require final approval by the legislature and sometimes also a referendum. Unusually, in Kenya (1997) as well as in Zambia (2003) the commission's draft was reviewed and revised by a national conference before it went to Parliament for approval.

Expert committees may also support the work of a constituent assembly, legislature, or a specialized committee or commission. This was the case during the drafting of Sudan's Interim National Constitution in 2005: a technical committee of seven representatives from each party to the CPA was tasked with assisting the NCRC in preparing the draft constitutional text (CPA 2005: 141 – Implementation Matrix). A similar process is foreseen in South Sudan's permanent constitution-making process as set out in the 2022 Constitution Making Process Act. This includes a technical body of experts, the Constitutional Drafting Committee (CDC), among the institutions that are to spearhead the process. The CDC is to provide technical legal advice (South Sudan 2022).

At this juncture, it is difficult to predict how a future constitution-making process will be decided in Sudan. Instead of attempting to outline all possible avenues that decision makers in Sudan could choose from, inspiration might be drawn from recurring patterns in Sudan's previous experiences with constitution making. Part of the question is whether the framework outlined in the 2019 Constitutional Charter and the JPA 2020 is still a viable option.

Reflecting on Sudan's most recent proposal, the Constitutional Charter included only some general parameters regarding constitution making, stating that the process should take place during the transitional period and a national Constitutional Conference is to be held before the end of the transition (Sudan 2019 articles 8.9 and 8.10). Further details on the composition of the

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**Under the JPA Agreement on National Issues, the composition of the Constitutional Conference shall be based on 'fair and equal representation, on the bases of gender, diversity, geography, and age,' (article 9.7).**

Constitutional Conference are outlined in the JPA,<sup>12</sup> which stipulates that the constitutional process starts with the national Constitutional Conference.<sup>13</sup>

Under the JPA Agreement on National Issues, the composition of the Constitutional Conference shall be based on '*fair and equal representation, on the bases of gender, diversity, geography, and age*' (article 9.7) with detailed selection criteria for its members to be established by a Commission for the Constitutional Conference and Constitution Drafting (article 9.3). This also applies to similar regional Constitutional Conferences.<sup>14</sup> The JPA underlines that '(t)he future "permanent" constitution of Sudan shall be the result of a constitution-making process that ... is transparent, participatory, inclusive and covers all topics' (article 1.28). In addition to the agenda to be covered by the National Constitutional Conference (article 9.1),<sup>15</sup> the JPA also foresees a 'System of Governance Conference' during the transition to discuss issues relating to Sudan's future federal structure and regional system of governance (JPA article 10 and, for example, Agreement on Blue Nile and Kordofan article 31). As noted above, this conference appears to be separate from the constitution-making process despite dealing with questions of constitutional relevance: the JPA fails to clarify how the mandate of the two conferences will interrelate and leaves many other questions unanswered.

Looking further back in Sudan's history of constitution making and as noted above, after the CPA was signed the NCRC drafted a new constitutional text. The NCRC was composed of 60 appointed members whose representation was based on the power-sharing formula for the National Assembly and

<sup>12</sup> As noted above, in 3.2.2: The question of process design: How many stages?, by virtue of its article 21.2, the JPA was incorporated into the Constitutional Charter and prevails in case of conflict between the two. See also article 24.1 Title 2 of the JPA, the Darfur Agreement between the Transitional Government of Sudan and Darfur Parties to Peace, which also confirms the supremacy of the JPA over the Constitutional Charter.

<sup>13</sup> References to the permanent constitution-making process are spread throughout the JPA and can be found not only in the first part, the Agreement on National Issues (ANI), in articles 1.28 and 9.1–9.7. but also, for instance, in the Blue Nile and Kordofan Agreement, which underlines the need to conduct an integrated constitutional process to draft a new constitution for Sudan during the transitional period (article 8.17). According to article 7 of the JPA '(A)ll terms of the Track Agreements and annexes shall be binding on the signatory Parties to the respective agreement and annexes, if any'. However, there are other provisions in the JPA's bilateral agreements that affect a future nationwide constitution-making process, causing a degree of legal uncertainty as to their binding force at the national level (Davies 2022).

<sup>14</sup> The Agreement on Blue Nile and Kordofan further underlines that the constitution-making process shall draw on the lessons from Sudan's history, relevant provisions of the bill of rights in the Constitutional Declaration and other relevant sources of law and policy in Sudan. See also article 104 of Title 3 of the JPA, the Two Areas Track Agreement between the Transitional Government of Sudan and the Sudan People's Liberation Movement – North/The Revolutionary Front. In South Sudan, the Peace Agreement (R-ARCSS) of 2018 provided for a similar committee, the Preparatory Sub-Committee for convening a National Constitutional Conference (NCC), which is tasked with preparing the NCC during the constitution-making process in South Sudan (R-ARCSS article 6.6).

<sup>15</sup> Article 9.1 declares that the Constitutional Conference shall determine 'how Sudan shall be governed, address the issues of nation-building, and reach a social contract to build a new system based on democracy, citizenship and social justice'. Moreover, article 9.5.8 highlights the debate on 'how to approve the permanent national constitution' as one of the many agenda points (which also cover questions of governance, citizenship, foreign policy, etc.) to be discussed by the National Constitutional Conference.

included civil society representatives. A technical committee prepared a text for the NCRC (article 2.12.5).<sup>16</sup>

Similar choices of predominantly executive-appointed, expert commissions overseeing the drafting of a constitutional text defined the processes leading to Sudan's short-lived constitutions of 1973 and 1998, and marked the unsuccessful attempts of drafting a constitutional framework in 1957–1958 and 1968.<sup>17</sup> Is it time to re-think the choice of constitution-making bodies in Sudan's impending constitution-making process?

While inclusivity in constitution making should be reflected in the composition of constitution-making bodies, their rules of procedure, including decision-making rules, will also have a decisive impact on the legitimacy of the process and the outcome, the final constitution. Constitution making will require not only elite buy-in, but also broad consensus of all the parties involved in the negotiations. Depending on the constitution-making bodies, decision making will take a consensus or a majoritarian form. Rules of decision making play a crucial role in consensus-building during the process and, if decided in advance, may provide guarantees to marginalized or smaller groups to ensure that they are not sidelined. Requiring full consensus is problematic, allowing individuals to block an entire process. In South Africa, an important element of the negotiations was the adoption of the principle of 'sufficient consensus', which was never spelt out but in practice required agreement of a significant number of parties in addition to that of key players. This approach ensured support from the two main parties and prevented smaller groups from using a veto to block the process.

Where consensus or a required majority cannot be reached, deadlock breaking mechanisms need to be agreed upon beforehand to avoid a stalemate resulting in the entire process coming to a standstill. Options include using courts as an arbiter on divisive procedural issues; postponing contentious questions for future resolution by using sunrise or sunset clauses (India 1950, Uganda 1995); outside mediation; or lowering the majority requirement to pass decisions with a smaller majority than initially agreed (Yemen National Dialogue 2013). Sometimes processes permit using referendums as a deadlock breaking mechanism (South Africa 1993, Kenya 2000).

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**Where consensus or a required majority cannot be reached, deadlock breaking mechanisms need to be agreed upon beforehand to avoid a stalemate resulting in the entire process coming to a standstill.**

<sup>16</sup> The constitution-making process under the CPA did not involve any direct popular participation as the NCRC was to draft the text by drawing upon relevant experiences and documents as presented by the parties (CPA article 2.12.6). The NCRC was also tasked to draft model constitutions for the states of Sudan, which were to be in compliance with the INC and the ICSS, as far as relevant (CPA article 2.12.11). See also Point 58 of the Implementation Modalities of the Machakos and Power Sharing Protocols of the CPA, p. 167. In terms of the drafting of a more permanent constitutional framework, the CPA again tasked the NCRC to organize an inclusive constitutional review process during the six-year interim period. However, this time the CPA demanded that the process must provide for political inclusiveness and public participation (CPA article 2.12.10 and Point 45 of the Implementation Modalities, p. 162). In the end, the INC was officially suspended in 2019.

<sup>17</sup> In 1957 and 1958 two successive commissions had been set up to work on a draft constitution for Sudan before General Abboud took power in 1958. The drafting attempt by a national commission in 1968 came to a halt with the military coup by Lt. Col. Nimeiry in 1969. In 1972 a People's Assembly had been appointed to adopt a constitutional text, which had been drafted by the government. In 1997, a National Constitutional Committee prepared a draft text which was presented to the National Assembly for adoption and subsequently voted on by the people in a referendum in 1998 (Babiker and el-Battahani 2023).

## Chapter 4

# CONCLUSION

When Sudan emerges out of a devastating war, deeply divided by profound civil discontentment and a complex military conflict, what will be the feasible options for post-conflict constitutional arrangements?

In answering this question, the paper has tentatively discussed some options and highlighted relevant considerations for a future constitution-making process, based on the assumption that a peace agreement, including a viable political settlement, would provide the country with the foundations for a peaceful transition. The preceding paragraphs have hinted at the manifold design and sequencing choices, but also ensuing challenges. The options covered are derived from Sudan's own history and experience with constitution making, but also from comparative examples from the region and beyond. The range of questions to be addressed in this context reaches far beyond what can be covered within the confines of this paper. Some of the issues have therefore only been mentioned briefly, others have been left out entirely.

The key questions raised are:

- What arrangements for government during a transition would be most conducive to a robust constitution-making process—and what should be avoided, if possible?
- Should principles for future constitution making be agreed and, if so, what should they be?
- Should a peace settlement include provisions for making a permanent constitution? If so, how detailed should those provisions be? How should they be secured? And, what should they be?
- What other processes within the peace process should be coordinated with the constitution-making process and how should the coordination be managed?

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- How can regional (subnational) actors be involved?
  - Should a new constitution-making process be similar to processes previously used in Sudan? If so why—and how should it be adjusted? If not, what process might work better?
  - If a two-stage process is adopted, what are the benefits and challenges of holding elections between the stages? How can challenges be addressed?
  - What constitution-making bodies should be used? On each possible approach, how can buy-in by the critical elites be secured?
  - What elements of a constitution-making process can build the legitimacy of the constitution?
  - How can the period leading up to peace and a transition to democracy be used to build unity in civil society with respect to the process of constitution making?

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**Kathrin Maria Scherr** is a comparative constitutional lawyer with more than 15 years of experience in the fields of constitution making, institution-building, governance and judicial reform. She is currently Managing Director and Head of Sub-Saharan Africa Projects at the Max Planck Foundation for International Peace and the Rule of Law (Heidelberg, Germany) where she designs, manages and implements large-scale rule of law assistance programmes. In this capacity, she has worked in Afghanistan, Armenia, Azerbaijan, Georgia, Iraq, Jordan, Mali, Palestine, South Sudan, Somalia, Sudan, Togo and Zimbabwe. She previously worked at the World Bank in Washington DC and at the European Court of Justice in Luxembourg, among others. In 2012, she was seconded as constitutional expert to the Joint Constitution Unit of the United Nations Development Programme Somalia/United Nations Political Office for Somalia (UNPOS) to work on the constitution-building process in Somalia. She is Editor-in-Chief of the *Max Planck Yearbook of United Nations Law* and serves as Member of the Academic Advisory Board of the *Journal of Constitutional Law in the Middle East and North Africa*.



# About the partners

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## **INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (INTERNATIONAL IDEA)**

### **Who we are**

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with 35 Member States founded in 1995, with a mandate to support sustainable democracy worldwide.

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## **THE ARAB ASSOCIATION FOR CONSTITUTIONAL LAW (AACL)**

The Arab Association of Constitutional Law (AACL) is the first regional network of constitutional experts in the Arab region. Established in 2013, it aims to contribute to good governance and democratic transformation by promoting intra-regional networking and the exchange of expertise. It strives to provide objective, grounded, and forward-thinking analysis of the region's constitutional frameworks and to apply its expertise to support constitutional and legal reform efforts.

The AACL brings together leading legal scholars, judges, lawyers, parliamentarians and civil society activists specialized in constitutional law, electoral systems, peacebuilding processes and human rights. Its membership includes prominent experts in constitution-building who have participated in the negotiations or drafting of constitutions across the Arab region, including in Algeria, Egypt, Iraq, Libya, Morocco, Tunisia and Yemen.

The AACL organizes and participates in a large number of initiatives, including regional conferences and dialogue sessions in collaboration with renowned experts, decision-makers, and prominent universities and think tanks in the Arab region and beyond. AACL annually holds an Academy of Constitutional Law for young scholars from the region. It is the editor of the *Journal of Constitutional Law in the Middle East and North Africa (JCL-MENA)*, a double-blind peer-reviewed bilingual journal that offers scholarly analysis on issues related to constitutional developments throughout the region.



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This discussion paper, *Options for Post-Conflict Constitutional Arrangements in Sudan*, was prepared and presented at a seminar organized by the International Institute for Democracy and Electoral Assistance (International IDEA) in Sudan in cooperation with the Arab Association for Constitutional Law (AACL). Given the importance of the subject in Sudan's current history and constitutional future, two constitutional experts; Christina Murray and Kathrin Maria Scherr, were carefully selected based on their extensive experience and knowledge of the constitutional environment in Sudan.

The content of the study was discussed in an expert round table with constitutional experts from different legal and political backgrounds, from Africa and Europe, as well as the Arab and Islamic regions. The study discussed the current constitutional reality and the possible constitutional options for producing a permanent Sudanese Constitution that suits the post-conflict situation in Sudan. The paper also discussed key questions defining the path toward Sudan's future. Therefore, this study is significant for constitutionalists and those interested in political reform issues in Sudan, including local, regional and international policymakers.