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Organisation Internationale de Droit du Développement

ANALYTIC REPORT ON THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN

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International Development Law Organization (IDLO)

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EXECUTIVE SUMMARY

This Report provides an analysis of the Transitional Constitution of the Republic of South Sudan (TCRSS) of 9 July 2011, produced by a group of independent scholars on behalf of the International Development Law Organization (IDLO).

Our major recommendations concern the degree of presidential power, legislative-executive relations and the decentralized system of governance. The presidency is strong, particularly with regard to appointment and emergency powers. On the other hand, the legislature has the power to vote no confidence in individual ministers. If the intention is to retain a presidential system, we recommend a more conventional model of presidentialism in which the legislature must cooperate on many appointments and in emergency rule, but has no power to remove individual ministers, except in the case of impeachment for severe misconduct.

The three-house scheme of the legislature, with the two houses combining to form a third, is not ideal. It would be better to move to a truly bicameral system, with a co-equal House of Regional States, while allowing for joint sessions or resolutions of the two houses for major tasks such as constitutional amendment or impeachment of the president. We believe that a true bicameral system would contribute to national unity and good governance. We also recommend a number of clarifications to legislative process, even if the current scheme is retained.

With regard to the decentralized system of governance, we recommend that the drafters consider carefully the model of government at the devolved level and whether or not it is desired to leave choice to the States. In addition, the rather complex allocation of powers might be simplified. There might be a process of certification of the state constitutions by the Supreme Court, to ensure conformity with the final constitution.

We offer several drafting suggestions with regard to the Bill of Rights and the section on Fundamental Objectives and Guiding Principles. We note that the citizenship provision, as currently drafted, has some ambiguities but seems very restrictive toward persons born in South Sudan of non-Sudanese parents, and persons who have resided in the South Sudan for an extended period. We are also concerned that, since South Sudan citizenship came into existence only in 2011, the current provision will technically cover very few people.

We recommend some further provisions to enhance the independence of independent commissions. Further specificity with regard to the emergency provisions, with greater parliamentary and judicial oversight, is advisable. We also recommend greater detail on the process of concluding international agreements.

INTRODUCTION

1. This Report provides an analysis of the Transitional Constitution of the Republic of South Sudan (TCRSS) of 9 July 2011, produced by a group of independent scholars on behalf of the International Development Law Organization (IDLO). The team analyzed the provisions of the TCRSS in light of comparative practice and international norms. We understand that, in accordance with Art. 202 therein, the TCRSS is being reviewed by the Constitutional Review Commission (CRC). This Report is designed to facilitate the work of the CRC.

2. The TCRSS was based in part on the Interim Constitution, which was a document produced for a semi-autonomous region which was emerging from decades of war. It was produced in the context of the struggle for national independence, which has now been achieved. That Constitution in itself is remarkable for its commitment to transparency and rights. The Permanent Constitution, however, is the foundation for a new democratic republic. It must provide a basis for national integration and effective governance, and endure changes in administration and unforeseen challenges. This requires a fresh look at all the constitutional institutions and structures, as well as the preamble. It is in this spirit that we proceed.

3. If we might be permitted an initial comment on the process of revision, we note that, according to the schedule outlined in Arts. 202 and 203, the CRC is to present a proposed Draft Constitutional Text and Explanatory Report by January 9, 2013. This means that the CRC has little more than six months to complete the task, as well as engage in a major program of civic education. While we do not have information on how the CRC is internally organized, we think it might be advisable to have a small working group that has primary responsibility for the draft, with other members to be involved in other activities, including the consultation process required by Art. 202(8).

4. As a general matter, we note that, in comparative terms, the TCRSS has concentrated a good deal of power in the president. This concentration is understandable in the current political context but hardly desirable for the long term. The president has a virtual monopoly in appointing many of the officers under the constitution; his emergency and commander in chief powers are very strong. He cannot be summoned to the legislature and is in a strong position to resist the extraordinary power of impeachment even if conflict were to arise with the legislature. As a general matter, constitutions should not be written for particular individuals, who inevitably

will transfer power to others, but instead should be built with an idea as to how the institutions will operate ten or twenty years from now. We also note that the TCRSS contemplates a several-year transitional period governing the current regime. It might be advisable, then, to devise a model of checks and balances for the long term success of the constitutional system.

5. Another issue for close scrutiny is the system of devolution. While not explicitly federal, the structure of government contemplated is similar to that of many countries that have divided power between center and states and is appropriate to a country as large and diverse as South Sudan. It is also in accordance with some recent trends elsewhere in Africa. This division can be effective regardless of whether the state is nominally federal or unitary. Our recommendation is to strengthen the Council of States to ensure an optimal balance of local and central interests.

6. The TCRSS was drafted in a situation of great pressure. Even if the CRC decides not to make institutional changes, there is a need for consolidation, clarification, and elimination of duplication. In addition, all references to transitional institutions and interim arrangements must be revised for the Permanent Constitution. We suggest that the drafters include a new section or Schedule on transitional provisions at the end of the Permanent Constitution.

7. Our report has the following sections: General Principles; Bill of Rights and Fundamental Objectives; the Political System; Public Finance; Courts; Independent Commissions; Peace and Security; State of Emergency; and Amendment. We provide a list of some typographical errors and inconsistencies at the end of the Report. Specific recommendations are indicated by the use of underlining and are summarized at the end of the Report.

I. GENERAL PRINCIPLES

A. Introductory provisions

8. Art. 1(5). The rule of law is mentioned in the Preamble and at various other points: the people/institutions are required to act in terms of the rule of law (judges must apply it; citizens, the police, security services etc. must adhere to it). However, it is not made a general and legal principle binding the state. Art. 1(5) might be amended to include reference to the rule of law as one of the foundational principles.

9. Art. 3 asserts the supremacy of the Constitution and states that the Constitution 'shall have a binding force'. More commonly, a constitution, like other laws, speaks in the present tense and so this would read: 'binds all persons….' This rephrasing would also add clarity and emphasis. More substantively, we recommend that the drafters supplement this statement by asserting that 'law or action inconsistent with the Constitution is invalid'.

10. Art. 4(3) provides a duty to resist those who seek to overthrow the government. Such clauses, in our experience, have had little impact, and offer some danger in that coup-makers sometimes justify their efforts as being in defense of the constitution. Indeed, coup-makers in countries such as Mali, Togo and Uganda have utilized such rights. We suggest that the CRC consider deleting this clause. If the clause is retained, one might consider reintroducing the phrase "if no other remedy is available" that was utilized in the Interim Constitution.

11. Art. 5 lists sources of legislation, a phrase not typically used in national constitutions. This provision presumably served an important purpose before secession when the South distinguished itself from the North in its avoidance of using Islam as a source of law. However, the provision has now lost this value and, because it is open-ended, it seems to serve little purpose. In particular, the final line saying that "any other relevant source" is a source of legislation is very vague and leaves the operative effect unclear. Notably, this formulation does not exclude Islam as a source of legislation. We are not sure that this provision is necessary, and suggest that the CRC consider deletion.

B. Language

12. Art. 6 (Language) understandably establishes English as the official working language. It continues to state that English is 'the' language of instruction for (all) education. This provision permits of no deviation without a constitutional amendment. However, there are ongoing debates concerning the best language for education, particularly at primary level, and many argue that English should be introduced gradually rather than immediately. To allow government to consider fresh arguments and new evidence, it may be wise to leave more room to maneuver while, of course, asserting the primacy of English so that its contribution as a unifying language is not sacrificed. We suggest adding the word principal, so the article would state that English shall be "the principal language of instruction."

C. Religion

13. Art. 8(1) contains a clause providing for a separation of church and state. It then says that religion shall not be used for divisive purposes. This language seems to have been taken from the Comprehensive Peace Agreement (Machakos Protocol), and is understandable given the history of the region. Nevertheless, it is not clear whether this is a restriction on state action or a basis for it: could the state use this to penalize religious activity that it deems divisive? If this provision is regarded as enforceable by the state, it could potentially be a significant power at odds with the extensive rights for religious freedom admirably offered in Art. 23.

II. BILL OF RIGHTS AND FUNDAMENTAL OBJECTIVES

A. General Comments

14. The drafters might consider including a clear method for limiting rights. The majority of rights included in the Bill of Rights do not allow for any limitations. The cases in which limitation are allowed are not actually defined, and simply stipulate rights "save in accordance with the law." This clause allows the legislature to limit rights in any way it sees fit, undermining the very idea of a right. In addition, there is no general limitation clause that specifies the general circumstances under which rights might be limited, outside of the emergency provision in Art. 190. The large majority of the world's constitutions allow for the limitation of rights under certain well-defined circumstances: it is simply not realistic to not allow for any limitations whatsoever. Rights, after all, are almost never unlimited and are commonly balanced against each other. In fact, the absence of limitation clauses is considered to be a notable problem for the African Convention on Human and People's Rights.[1] Without allowing well-defined limitations, there is a danger that the Bill of Rights becomes a list of hopes and aspirations rather than a bill of justiciable rights. Therefore, the CRC might consider offering specific constitutional guidelines for limiting rights, rather than having such limitations established after the fact, through judicial interpretation or, perhaps more likely, through subsequent executive action or legislation.

15. There are two common ways in which Bills of Rights can provide for limitations, both of which would be subject to application by the courts in the exercise of judicial review. The first, newer method is through the inclusion of a general limitation clause as in the Canadian, Kenyan and South African constitutions. Section 36 of the South African constitution provides:

> *1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -*
>
> *a. the nature of the right;*
> *b. the importance of the purpose of the limitation;*
> *c. the nature and extent of the limitation;*

[1] Christof Heyns, *African Regional Human Rights System: The African Charter*, 108 Penn St. L. Rev. 679 (2003-2004)

d. the relation between the limitation and its purpose; and
e. less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

16. The second option would be to provide a precise list of limitations in each right provision. This approach is common in many older common law constitutions that were drafted under the auspices of the British colonial office as well as in the European Convention on Human Rights and Fundamental Freedoms. For example, Art. 5 of the Constitution of Botswana defines the right to personal liberty as follows:

5. Protection of right to personal liberty

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say—

(a) in execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he has been convicted;

(b) in execution of the order of a court of record punishing him for contempt of that or another court;

(c) in execution of the order of a court made to secure the fulfillment of any obligation imposed on him by law;

(d) for the purpose of bringing him before a court in execution of the order of a court;

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana;

(f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years;

(g) for the purpose of preventing the spread of an infectious or contagious disease;

(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(i) for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he is being conveyed through Botswana in the course of his extradition or removal as a convicted prisoner from one country to another;

(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Botswana or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Botswana in which, in consequence of any such order, his presence would otherwise be unlawful; or

(k) for the purpose of ensuring the safety of aircraft in flight.

17. Among these two options, the specific limitation clauses with each provision provide rather specific guidance to each of the branches of government on when rights might be limited. The general limitation clause, by contrast, leaves a lot of discretion to the judiciary in balancing different rights against each other. We lean toward the latter but the CRC should debate which is most appropriate for South Sudan. As currently provided, the "save in accordance with the law" clauses included in Arts. 22, 24, 26, 27, 28, 30, 33 and 34 provide no guidance, but instead provide a blanket authorization to the government and legislature to limit these rights. They do not offer any "limits on limitations." On the other hand, the language in Art. 25(2), which allows law "as is necessary in a democratic society," provides more of a limitation. This language might be used in a general limitation clause that applies to the entire Bill of Rights.

18. As a general matter, the Bill of Rights is rather ambitious, and places Sudan at the forefront of the world's rights-respecting democracies. For a young country faced with deep poverty and numerous other challenges, it may be wise to add language to the effect that some of the socio-economic rights are to be achieved progressively over time, resources permitting, rather than immediately. In particular, the requirement to provide free and compulsory education at the primary level (Art. 29) as well as free health care and emergency services for all citizens (Art. 31) might not be feasible in the immediate future. If the government is unable to uphold certain parts of the Bill of Rights, it could cause the other parts to lose legitimacy. One could draw on the language in the International Covenant on Economic, Social and Cultural Rights (ICESCR), to the effect that the rights are to be fulfilled by the Government "to the maximum of its available resources" and that measures should be taken "with a view to achieving progressively the full realization" of these rights. Currently, such a qualification is made with the right to housing, but not with public healthcare and education.

19. The 'Bill of Rights' and 'Objectives and Guiding Principles' are listed in separate sections, with the latter being nonjusticiable. Further thought might be given to the organization of these two parts. Various provisions under Objectives and Principles are framed as rights and arguably should be in the Bill of Rights. For example, Arts. 38(2) and (3), on academic freedom and private schools, might be moved into the Bill of Rights. Art. 39(4) on the separation of children from parents might be combined with Art. 17(1)(c). Art. 41 on the right to a clean environment might be moved up, although we recognize that justiciability is complicated with regard to this right. On

the other hand, the parts of Art. 31 (public health care) that do not confer rights might belong in the Objectives and Principles.

20. The CRC may consider specifying in more detail what kind of obligations the Bill of Rights imposes upon the state and private individuals. In terms of obligations on the state, a distinction is commonly made between: 1) the responsibility to *respect* (i.e., refrain from taking action that violates the rights enshrined in the constitution), 2) the responsibility to *protect* (i.e., to take positive steps to protect the rights enshrined in the constitution, including the responsibility to protect individuals from each other; for example, if there is private discrimination, the government should take action against that), and 3) the responsibility to *fulfill* (i.e., to take positive action to gradually fulfill the rights in the constitution, primarily in the context of socio-economic rights). Currently, Art. 9 suggests that all of these three are envisioned by the Constitution, but the language could be made clearer. In particular, it might be advisable to use the language of the responsibility to "protect" and "fulfill", as it ties into a well-developed jurisprudence in international human rights. In terms of obligations on private actors, the CRC should consider whether it is intended for the constitution to apply horizontally (in other words, bind private parties) or only vertically (binding only the state). If the latter approach is taken, it might allow, for example, private parties to engage in discrimination on the basis of gender or some other protected category. Horizontal application is still relatively rare in constitutions around the world, but Sec. 8 of the Constitution of South Africa provides an example.[2]

> *1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*
> *2. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*
> *3. In order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).*
> *4. A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.*

[2] Examples of more indirect horizontal application can be found in the decisions of the Irish Supreme Court and the German Constitutional Court. For an overview see Danwood Chirwa, *The Horizontal Application of Constitutional Rights in Comparative Perspective,* Law, Democracy and Development 21 (2006). See also Kenya's 2010 Constitution but note that its horizontality provision is problematically wide.

21. The CRC might consider further specifying the rights which are to be non-derogable in times of emergency. Art. 189 allows the president to declare a state of emergency, conditional upon approval by the National Legislature. Art. 190 allows derogation from the Bill of Rights, but insulates specific rights from this derogation, including "the right to life, prohibition against slavery, prohibition against torture, the right to non-discrimination on the basis of race, sex, religious creed, the right to litigation or the right to fair trial (emphasis added)." (Note that ethnic origin should be added to this list in Art. 190.) The CRC might consider whether these rights ought to be insulated from derogation in whole or in part, as well as which parts would be insulated. For example, some (though not all) of the elements of the right to a fair trial are exactly the kind of things that might be derogated in times of emergency. For example Art. 19 (4), which states that a "person arrested by the police as part of an investigation may be held in detention for a period not exceeding of 24 hours", may be impossible to fulfill in emergency conditions. Making these prohibitions more specific makes the prohibition of non-derogation stronger with respect to the parts that do not allow for any derogation whatsoever. Sec. 37 of the South African Constitution provides an example of how the constitution could specify which parts of each right are non-derogable.

22. The CRC should consider specifying that the constitution should be interpreted in line with South Sudan's treaty obligations**.** Art. 9 (3) specifies that "all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill of Rights." Most of the rights enshrined in the treaties that South Sudan might ratify or accede to are likely to be duplicated in the constitution. However, on some occasions, there might be conflicting interpretations of the treaty rights (as articulated by the relevant treaty bodies) and the rights enshrined in the constitution. The CRC might consider specifying how such conflicts should be resolved. One way to do so would be to add a provision stating that the constitution should be interpreted in line with its treaty obligations. As a related point, the CRC might consider adding "customary international law" to Art. 9 (3), as South Sudan is bound by the norms of customary international law in any case.

B. Article-Specific Comments

23. Art. 14 provides the bases for equal protection regardless of "race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status."

It does not include disability. Art. 29 on education, by contrast, provides for "access to education without discrimination as to religion, race, ethnicity, health status including HIV/AIDS, gender or disability." Art. 29 and Art. 14 could be harmonized to a comprehensive list, cross-referenced in Art. 190, and might also be made consistent with Art. 122(5)(a) on nondiscrimination in adjudication. Furthermore, we suggest that these lists of protected statuses be made open-ended, by using the phrase "without discrimination on grounds *such as* race, ethnic origin . . ." This would mean that the principle would apply to new forms of social discrimination that arise in the future.

24. Art. 12 prohibits arrest and detention except for specified reasons in accordance with procedures prescribed by law. The word "arbitrary" is missing from this provision, which is a key concept to define the lawfulness of arrests and detentions.

25. Art. 19(4) on fair trial refers to bail but fails to specify when there is a right to bail. This needs to be made specific. The 24-hour period may be unrealistic in the context of South Sudan; 48 hours is a generally acceptable period in international practice. Art. 19(3) should also include the right to be tried in a language that the accused understands or to have an interpreter provided by the state at no charge and present during all court sessions.

26. Art. 19(6) contains two sentences that contradict each other: if there is a constitutional right to be tried in ones own presence, there should be no possibility of trial in absentia. Note that a general limitation clause as suggested in paragraph 15 above would allow some flexibility to deal with trials in absentia and other aspects of trials.

27. Art. 20 on the right to litigation is quite extensive. It does not even contemplate excluding de minimis claims. Does it prohibit court fees? If not, this might be made explicit. Court fees may be useful to discourage frivolous cases. Note again that a general limitation clause as suggested in paragraph 15 above would allow the legislature to deal with such issues.

28. Consideration should be given to adding the right to just administrative action. Such rights appear in the constitutions of Namibia and South Africa, for example. sec. 33 of the constitution of South Africa provides:

    1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
    2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
    3. National legislation must be enacted to give effect to these rights, and must

a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
c) promote an efficient administration.

Problems in implementing the South African provision were addressed in the provision in the Constitution of the Cayman Islands, which we recommend. Art. 19 provides that:

1. All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

2. Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.

29. Art. 21 on the death penalty might add a clause for mandatory review by the Supreme Court of all death sentences. This will ensure uniform application of the penalty throughout the country. This may be what is intended by Art. 126(2)(h) under the Supreme Court jurisdiction (see para. 129 below).

30. The CRC might consider removing or revising substantive restrictions on the right to form or join political parties in Art. 25 (3), which stipulates that "[n]o association shall function as a political party at the national or state level unless it has… b) a programme that does not contradict the provisions of this constitution." Considering the rather broad range of substantive issues covered in Parts II and III of the Constitution, this provision makes it easy for a future government or court to declare that a party program contradicts the provisions of the Constitution. A better formulation, if a restriction is required, would be "a programme that is consistent with the basic values of the constitution." For example, under the current reading of Art. 21, a party arguing for the abolition of the death penalty could be deemed to contradict the constitution. While Art. 25 (3) appears to have the objective of restricting anti-democratic parties aimed at overthrowing the constitutional order, the current phrasing of Art. 25 (3) could be prone to abuse by ill-intending future leaders, and there is a history of abuse of similar provisions under African constitutions. We further note that Art. 25(3) seems to contemplate no political parties based on ethnicity. The history of ethnic party bans in Africa suggests that they are mostly ineffective. Our own recommendation would be to encourage that parties have broad ethnic basis through the registration requirements, to be elaborated in the electoral law. For example, the code may require that, in order to obtain registration, a party must have the signatures of a specified number of people

(say, 2000) in half of the states of the country. Note that there must be a clear limitation clause to facilitate such legislation (see discussion in paras. 14-17 above).

31. Art. 26(2) provides for a right to vote or be elected. Surely the right to stand for election is adequately covered in Art. 26(1). Also, there is no right to actually be elected, but rather to stand for election.

32. Art. 32 on the right to access information allows the government to withhold information for reasons of public security or to protect the right to privacy of any person. This is a broad limitation; in some countries, the privacy of government actors has been used to justify nondisclosure. Thus, at a minimum, the language should read "any private person." More generally, this is an area that is often left to the courts to balance the interest in nondisclosure with the interest in accessing information. So one could phrase the language as, for example, "cause a significant interference with the right to privacy of any private person." Note, again, a general limitation clause would allow such matters to be resolved and avoid the need for the Constitution to contemplate all possible eventualities.

33. Art. 35 seems to give the objectives section horizontal effect. "All levels of government and their organs, institutions and citizens." We note that the formulation is awkward. All citizens are citizens of South Sudan, and there is no subnational citizenship. Better phrasing might be "All levels of government, their organs and institutions, and all citizens."

34. As a possible addition, the Constitution could include an obligation for the government to protect different groups from ethnic violence. Inter-ethnic fighting has, alas, been a major issue in South Sudan. An obligation for the national government to intervene and protect different groups from each other might alleviate some of the ethnic tensions, and deter a spiral of ethnic mobilization.

C. Citizenship

35. As a general matter, we think that the citizenship provision would be best framed in the Bill of Rights. Many of the rights are directed at citizens, so it might make sense to define citizenship at the outset of the section.

36. The citizenship clause is unduly limited. Implicitly, Art. 45 provides for no *jus soli* citizenship, even for children born of lawful, long-resident aliens. Many countries do not have so broad an exclusion from citizenship as the one proposed here. Instead,

Art. 45(1) provides that citizenship comes from being born to a South Sudanese mother or father. This formulation is problematic. Since the country is new, South Sudanese presumably refers to those people who customarily resided in the area, but a more precise definition would be useful, especially for the transitional phase. Independence constitutions usually included technical provisions establishing the citizenry.[3] Drafting such provisions is particularly tricky in the case of South Sudan, as so many southerners live(d) in the North and some northerners live in the South. We believe that Art. 25 of the Referendum Act may have had a definition of citizenship that might be useful.[4] In particular, persons who have resided in the South Sudan for an extended period ought to be able to become citizens. Similarly, South Sudanese long resident in the North who are returning home, but have difficulty proving their ancestry, could well end up stateless. It will be very important to have a liberal approach to citizenship claims. The current article does not do so.

37. We think that Art. 45(2) and (3) should be reconsidered. Many of the rights apply to all people. Indeed, South Sudan's international obligation is to apply rights to all persons (a general limitation clause, described above in para. 15, would permit the state to limit certain rights, such as the right to free education, to citizens or permanent residents). The specific statement in Art. 45 that citizens are guaranteed rights may cause some confusion.

38. Art. 46 provides for duties of the citizen. One reading of this clause is that it provides duties that can be enforced by the state. Certain of the obligations placed on citizens here are broad and impractical. Are citizens intended to combat corruption actively? Could they be apprehended if they did not? Perhaps the more general language of Art. 46(1) would be sufficient.

39. Art. 97(4)(a) seems misplaced; it belongs with the citizenship provisions. However, the whole of Art. 97(4) may be unnecessary in the Permanent Constitution depending on progress on Abyei.

[3] Such provisions could be included in a set of transitional provisions, if it was desired to keep them out of the main text.

[4] Our understanding is that this provided for two types of eligibility: those who had at least one parent descended from an indigenous tribe of Southern Sudan, or permanent residents since 1956.

III. THE POLITICAL SYSTEM

A. Decentralized System of Governance

i. General

40. While the constitution is not explicitly federal, the states have substantial powers, both exclusively and concurrently with the national government, and these cannot be withdrawn without constitutional amendment. There are three levels of government, and the scheme is generally symmetric, with the exception of the transitional status of Abyei. We believe that this is a good model for South Sudan because of its scale and diversity.

41. The states are accorded considerable powers by Schedule B including cultural and religious matters, health care (but see schedule C), intrastate business and labor regulation, education through the secondary level, agriculture, intrastate transport, and family matters. Although the national government has overarching power to set standards and norms, and thus promote uniform national policies, clearly states are not intended to merely implement state laws. They have their own serious responsibilities. Further, Art. 48(2)(b) provides that the national government must "respect the power devolved to the states and local governments". Again, we think this is entirely appropriate.

42. Art. 47(b) ought to read "…render public services directly and through local government." The current wording implied that *all* state services will be rendered through local government, but in fact some such as those relating to police, land, hospitals will be surely rendered by the state government.

43. Art. 50(2) states "The National Government shall be the institution around which the people of South Sudan are politically, economically, socially and culturally organized." This sentence is a bit clumsy; indeed it may be the case that people have more cultural and social connection with their local governments. We suggest deleting the clause.

44. Several provisions of the constitution, such as article 36(4), state that the "composition of governments shall take into account ethnic, regional and social diversity in order to promote national unity and command national loyalty", or words to similar effect. The CRC might consider examining how Nigeria's comparable

provisions for taking into account "the federal character" of the country (i.e., ethnic diversity) have worked out. Originally, these provisions functioned to include those who would not otherwise have been included. Later, they gave rise to an array of group claims that unduly restricted government action.[5]

45. We wonder whether there ought to be a mechanism for admitting new states, for example if existing states split apart or combine together. Many developing countries with devolved governments have experienced such shifts, and it is advisable to anticipate them by laying out the procedures and criteria in the Constitution. It may be advisable to require a constitutional amendment for the admission of new states, so as to avoid political manipulation of state boundaries for short-term interests.

46. See paras. 112-118 for further discussion of the public finance aspects of devolution.

ii. State Constitutions

47. The Constitution contemplates a model in which states each have their own constitution. These are already written, as we understand it, in accordance with Art. 164. Going forward, these state constitutions might be rewritten and there is a need to ensure that final state constitutions are produced in conformity with the final permanent Constitution. It might be advisable to have a process of certification by the Supreme Court that the state constitutions are in fact in conformity. This would be consistent with Art. 126(1) which says that the Supreme Court is the "custodian" of the state constitutions. South Africa's Constitution (Sec. 144) requires provincial constitutions to be 'certified' as compliant with the national constitution. The Western Cape province's constitution was certified by the South African Constitutional Court and its experience might be helpful. In the course of the certification process, the Western Cape Constitution was amended in a number of ways to bring it in conformity with the national constitution.

iii. State Governments

48. Arts. 164 and 165 sketch the roles and procedures of the State legislatures and executives. In some ways these differ from those of the national legislature and executive (for instance, a State Assembly may remove a governor by a vote of no confidence while there is no similar procedure in the national legislature). The question of whether or not there should be alignment between systems at the two levels of government is always a difficult one, and a number of issues arise. There are

[5] One of Nigeria's best political scientists, Rotimi Suberu, has written on this issue.

some advantages to allowing the States to determine their own structures. For example, states can experiment with new models and, if they are successful, the national government may follow suit. There may also be democratic models that are more suitable to a particular State's needs. On the other hand, there are also some advantages to requiring uniformity as well as alignment with the national government structure, so that systems at both levels are either presidential or parliamentary. The main advantages of uniformity in this context are that (i) intergovernmental coordination may be easier, and (ii) the states can serve as training grounds for politicians where they learn to play by the rules before they ascend to the central level. It is harder to serve this political socialization function if the two levels of government are organized on totally different principles.

49. If the intention is to have a similar system at both levels, the question of alignment of electoral terms should be considered. The possibility provided in the TCRSS of a State Assembly calling an election through a vote of no confidence means that State elections will not always be at the same time (see further discussion of this in the next paragraph). Again there are advantages and disadvantages. Alignment of elections across the levels of government may assist in building a stronger party system. On the other hand, if national and State elections are held simultaneously, issues relevant to the States may receive less attention, weakening the ability of the States to fulfill the considerable tasks allocated to them under the Constitution.

50. In permitting votes of no-confidence, Art. 164(4) (and Arts. 57(i) and 118 which we discuss below) introduces an unconventional element into the constitutional system. Art. 164(4) permits a State legislature to precipitate an election by passing, with a 2/3rds majority, a "vote of no-confidence" in the Governor. This approach departs from the conventional presidential model because, although the Governor is directly elected by the people of the State, he or she is also politically responsible to the Assembly. On the other hand, the approach departs from the classic parliamentary model because the Governor is directly elected and because the no-confidence vote requires a super majority. We are concerned that, as currently drafted, Art. 164(4) confuses lines of accountability by mixing these two models. Moreover, the concept of a "no-confidence vote", which is drawn from the practice of parliamentary systems and which usually signals that the government does not command majority support in the legislature, may lead to uncertainty about how the system is intended to work. In addition, the ability to trigger a new election by no-confidence vote contradicts the implication in Art. 164(5)(a) that legislative terms are intended to be fixed. The

organization of State level government and its alignment with the national system should be carefully considered.

51. On the other hand, we do think that it is worth having some concrete mechanism by which State Assemblies can protect constitutional government. The usual approach in presidential systems is to give the legislature the power to dismiss the chief executive officer (and other members of the executive) through a process of impeachment. This is clearly distinguishable from a no-confidence procedure because (i) impeachment is permissible only in defined situations (when the executive breaches the constitution or commits a major crime, for example) and requires a high burden of proof before the official is removed; and (ii) the process is more elaborate than a single vote in the House. If the intention is to use the equivalent of a presidential system in the States, we suggest reconsideration of Art. 164(4). For the same reasons, we think that Art. 165(4), which allows State Assemblies to dismiss Ministers on political grounds, should be reconsidered.

52. If the current scheme is maintained, we note that Art. 164(4)(b) calls for a "snap election" if the government loses the vote of no-confidence. Increasingly, snap elections—i.e., those with very short campaign periods—are regarded as unfair in the sense that those who trigger them may do so because they have a momentary advantage to exploit. Consideration might be given to providing reasonable minimum campaign periods rather than referring to a snap election. For these reasons, the term 'snap election' should be reconsidered and a clear provision should be included in the provisions on elections requiring a reasonable (60 day) period between the date an election is announced and the polling day.

53. The TCRSS has little to say about the State Assemblies, although they play a crucial role in the formation of the national legislative chambers. In our view, the more explicit the intention of the constitution makers, the better. Two issues are particularly important here:

    (i) Representation: if the intention of the drafters is to allow each State Assembly to organize itself according to whichever principle it prefers, then we recommend that this be said explicitly, for instance, in chapter 1 of part Eleven, probably in Art. 164. The very idea of having states implies that a certain degree of diversity in state organization is tolerable and may even be welcome, as citizens of the states make their own choices and experiment with different arrangements.

(ii) Size: it may be wise to stipulate a maximum size for legislatures. If State legislatures have the power to expand in size at will, considerable resources may be diverted to maintaining them. (This issue also highlights the importance of setting out clearly who has the power to determine the number of constituencies if a constituency electoral system is used.)

54. Art. 165(2) states that the Governor, the highest executive in the state, "shall appoint and relieve the Deputy Governor, Advisors, and state Ministers in consultation with the President and in accordance with the state constitution." The Interim Constitution did not require "consultation with the President" in appointing state officials (Art. 164). This provision is an unnecessary infringement on states' prerogatives – especially given the spirit of decentralization in the TCRSS. We recommend returning to the formulation of the Interim Constitution. We also note that "consultation" is an ambiguous term, which does not indicate whether the President has the ability to reject a choice of the Governor.

B. Legislative-Executive Relations

55. This is a strongly presidential constitution. Among other things, the president has considerable powers to appoint and dismiss governmental officers. Sometimes appointments of high officials can be made without legislative approval, and the President is involved in aspects of State government (see para. 54 above). More checks and balances might be desirable. At the same time, there are some anomalies that appear to be vestiges of a parliamentary system, and may undermine the separation of powers system. These should be clarified.

56. In this regard, the Legislative Assembly is empowered to vote no-confidence in individual ministers (Arts. 57(i) and 118). This contradicts the spirit of the presidential system, according to which the President is the head of government and the ministers serve at his/her will. But consistency is not really what matters. There are not many constitutions in the world that designate the President as the head of government while also allowing for the legislative assembly to remove individual ministers by a vote of no confidence. Prominent contemporary cases include Peru, South Korea and Sri Lanka, and an important historical case was Chile under the 1893 constitution. Given how infrequent this provision is, it has not been widely studied. But one study of Chile from the promulgation of the constitution through the constitutional breakdown of 1925 attributes much of the instability of the period to this constitutional provision. We recommend that, if the presidential system is

retained, the no-confidence vote in Arts. 57 and 118 should be removed from the constitution. On the other hand, consideration should be given to an impeachment procedure for ministers. See discussion in para 51 above.

57. Art. 101(c) is one of several provisions that empower the president to appoint officials without legislative concurrence in confirming those appointments. See also Arts. 153, 182(9). Many constitutions attempt to share this power between branches—or even more broadly, with judicial commissions, an independent civil service commission,[6] the bar, or other elements of civil society—in order to reduce the possibility of executive dominance of other institutions. We recommend greater use of checks and balances in in appointments. This can take the form of legislative approval of nominees put forward by the president; composing bodies that involve multiple appointing authorities; or restricting appointments to a list provided by an external body. See for example Art. 182(10), which makes the directors of the central bank "responsible to the president," and compare Arts. 186(5) and (6) on the Auditor General. The independence of certain bodies could benefit from some constitutional reinforcement. Most central banks are constitutionally independent of political authorities, so as to achieve a stable currency and provide confidence in monetary policy. The "phrase responsible to the president" in Art. 182(10) should be deleted. Another very important matter for consideration is the terms of appointment of the Electoral Commission under Art. 97. See para. 136 below.

58. Art. 56(3) provides that the ministers "shall participate" in assembly deliberations (without voting), admitting of no choice in the matter. Art. 57(f) contemplates a different approach allowing the legislatures to summon ministers when necessary. This seems more sensible, as ministers usually can not afford the time to participate in all assembly deliberations. If this quasi-parliamentary element is desired we suggest amending 56(3) to "may participate...." This would relieve ministers of the obligation to be present all the time, allowing them to come in when necessary, and, in conjunction with Art. 57(f), would allow MPs to summon ministers.

59. It is implicit in the TCRSS that members of the Legislative Assembly (but not of the Council of States, as per Art. 62.4) may serve as ministers. If so, this should be made explicit, and it should be clear what their role in the Assembly would be during their tenure as ministers. In most presidential systems, members of the legislature are not allowed to serve as ministers but rather must resign if they join the government. A

[6] Note that the Civil Service Commission in Art 140 is appointed by the President so does not operate as an independent check on executive power.

number of problems arise if ministers are permitted to remain in the egislature: they may neglect their constituencies; members of the legislatures may seek to please the President in the hope of securing a (lucrative) Cabinet position; the President can neutralize opposition in the Legislature in constituting the Cabinet; and so on. Overall the legislature is weakened in this arrangement.

60. Art. 101(g) allows the president to "prorogue" the national legislature, in consultation with the speaker (presumably of the Assembly alone, though possibly of the Council of States?). But the legislature has a fixed term. Under what circumstances could it be prorogued? Along the same lines, the President should not have the power to "adjourn" the Legislature. Giving the executive power to shut down the legislature, outside the context of emergencies, is inconsistent with a system of separation of powers. We recommend deleting these provisions. If retained, these powers should be limited to the "agreement" of the speaker, rather than "consultation" so as to be consistent with Art. 68(3).

61. Nowhere in the TCRSS is it stated that the legislative chambers may meet without being convened by the president. Again this subjects the legislature to the will of the executive and among other things undermines the safeguards relating to executive orders contemplated in Art. 86. We suggest that Art. 68 should state explicitly that the Houses can be convened by the Speaker either on his or her decision or at the request of a substantial number of MPs, say 1/3 or 50%. We also suggest the specification of the number of days that the legislature must meet each session. This does not preclude the calling of emergency sessions or the extension of sessions.

62. According to Art. 112, the Legislative Assembly must approve "appointment of the Ministers of the National Government" by a resolution. Is this a resolution for each minister separately or for the government as a whole? We note also that the phrase "simple majority of vote of all members" should be replaced either with majority of members present and voting, or majority vote of all members. The former is the default rule under Art. 76. We believe that the drafters of the TCRSS intended to refer to the majority of all members for Art. 112 (including those absent), and this is the approach that we recommend.

63. Both the National Legislative Assembly (Art. 57(d)) and the President (Art. 101(p)) have the power to ratify international treaties, the latter with the approval of the former. The process of concluding international agreements should be clarified. In doing so, consideration should also be given to whether all international agreements require the positive ratification of the Legislature before becoming binding. The term

'international agreement' covers many routine matters relating to, for example, trade agreements and consular matters, and it is cumbersome to require them to be individually ratified.

C. National Legislature

64. The legislative power is, strictly speaking, composed of three chambers: (a) the Legislative Assembly; (b) the Council of States; and (c) the National Legislature. The Legislative Assembly is directly elected (universal adult suffrage); the Council of States is indirectly elected by State Assemblies; and the National Legislature is composed of the first two bodies sitting together, but voting separately. Three-house legislatures, with the two main houses combining to form a third, are unusual, though not unknown in comparative experience (e.g. Indonesia). Generally, however, the joint sittings of the "third" house are limited to major episodic constitutional processes like amendment, impeachment, and declaring a state of emergency. The South Sudan National Legislature has a wide set of tasks. It would be better to move to a truly bicameral system, while allowing for joint resolutions of the two houses for major tasks. Joint sittings can be used for ceremonial purposes.

65. Within the current scheme, the relationship of the two legislative houses to each other is complex, probably unduly so. The Legislative Assembly has the usual legislative functions, but the Council of States has powers that seem limited to matters concerning decentralization. This arrangement, which follows Germany and South Africa in many ways, introduces great complexity to the legislative process (as both Germany and South Africa have experienced). In addition, the Council also can "legislate [by itself?] for the promotion of a culture of peace, reconciliation and communal harmony among all the people of the states" (Art. 59(f)) and can issue "directives" to guide "all levels" of government in accordance with the devolution provisions (Art. 59(b). The relationship between the Assembly and Council, obviously intended to limit the Council of States to devolution matters, looks as if it is built for future uncertainty and conflict between the houses.

66. In most federal systems and in many unitary states (for example, Namibia), the house of the states (or provinces or regions) forms part of a fully bicameral legislature, as an emblem of the importance of the sub-national units. This allows geographically concentrated groups to have a direct way of ensuring their voices are heard, and can help integrate diverse countries. Our own view is that a fully empowered Council of States will contribute to national unity and effective governance. The constitutional

scheme in general lacks special provision for Sudan's ethnic pluralism, particularly for guarding against the domination of one or two large ethnic groups at the center. Enhancing the powers of the Council of States, the house that represents regional majorities and minorities in the states, could be a means to this end.[7] It would also lead to greater scrutiny and quality of legislation.

67. If there is a preference for a more specialized second chamber as in the TCRSS, the constitution needs to specify its powers very clearly to avoid the considerable difficulties that, for example, the South African National Council of Provinces has experienced. Confusion over jurisdictional questions can cause delays in making important decisions and raise opportunities for obstructive constitutional challenges to national laws.

68. It seems that the drafting strategy employed in the TCRSS was to introduce minimal provision regarding each of the two independent assemblies and more detailed provisions for the National Legislature. The assumption may be that the provisions for the National Legislature should apply to each of the two chambers separately. We recommend against this strategy on the grounds that it introduces many ambiguities and, consequently, the source of possible conflict. We suggest the following structure:

    - Definition of the Legislative Power
    - Legislative Assembly
        - Establishment
        - Formation
        - Term
        - Competency
        - Quorum and decision rule
        - Organization (principles about committees)
    - Council of States
        - Establishment
        - Formation
        - Term
        - Competency
        - Quorum and decision rule

[7] For similar purposes, serious thought might be given to electoral systems, both executive and legislative, at all levels, that encourage candidates to broaden their base of support beyond that of their own ethnic groups. See para 30 above and further discussion below

        - Organization (principles about standing and ad hoc committees)
    - National Legislature
        - Establishment
        - Procedures
        - Competency

69. We also recommend that the competencies of the Council of States and National Legislature be specified explicitly. Ideally, the Council of States would be a full legislative participant. If not, however, it should be clearly stated that all residual authority be given to the Legislative Assembly. Either way, both Art. 55(3) and Art. 59 can be compressed and redrafted.

70. The powers of the Council of States in Art. 59, in particular, could be specified with greater clarity. Art. 59(a) allows the Council of States to initiate and pass legislation on the "decentralized system of government and other issues of interest to the states" (what sorts of issues?) with a two-thirds majority of the full house. Must the National Legislative Assembly concur, or is this an exclusive power of the Council of States? Presumably the former, as per Art. 60, but this should be cross-referenced in Art. 59.

71. Art. 59(b) states that the Council of States may "issue resolutions and directives" to "guide all levels of government in accordance with Arts. 47, 48 and 49," which deal with devolution and "Inter-Governmental Linkages." What exactly is contemplated by these instruments, and what is their legal effect? Can the Council of States issue executive or administrative guidelines without concurrence from the government? Can it direct the central government ("all levels of government") in its dealings with the states? Usually 'guidelines' and legislative resolutions are not binding. This subsection is opaque.

72. Art. 59(c) gives the Council of States power to "oversee national reconstruction, development, and equitable service delivery in the states." The precise meaning of oversight is not clear. In general, in presidential systems, the legislature conducts an oversight role through powers such as investigative hearings conducted by specialized legislative committees, which have the power to call witnesses and obtain evidence. We are not fully sure about the meaning of "oversight" in the South Sudan context. Does the Council of States supersede state legislatures and executives in these matters? One interpretation of this provision is that it provides a mechanism through which the States act collectively in ensuring that nationally enacted norms and standards enacted in terms of Sch. A item 39 are properly implemented in States.

However, this is far from clear and it raises complicated questions of democratic accountability – are State governments accountable to the National Legislature or to their State Assemblies and electorates? Para. (d) speaks of "monitoring" issues concerning refugees and internally displaced persons, as well as reconstruction of disaster and conflict areas. Is anything more than an information function contemplated here? And para (f) accords power to "legislate" to promote a culture of peace and harmony among the Sudanese people. Does "legislate" mean legislate by the Council of States itself or only with the concurrence of the National Assembly?

73. Unlike the Legislative Assembly, the Council of States represents the units of the federation, and not their people (or so we assume given the nature of its competences and the way it is elected). Unlike constituencies, which require periodic adjustment to ensure the equality of votes as population shifts occur, the boundaries of States are fixed (barring the creation of new units). Thus, we advise that the constitution state the number of representatives per state to be elected by the State Assemblies. As currently drafted, the method of selection to the Council of States will be determined by the National Elections Law (Art. 58(1)(b)) and this will in turn put the decision in the control of Legislative Assembly. This is not ideal, in the event that institutional rivalry emerges between the two houses.

74. We should note that the principle of selection makes the Council of States highly likely to reflect the interests of the states. Pursuant to article 58(1)(a), members of the Council of States are to be indirectly elected "by their respective States [*sic*] Assemblies". Direct popular election of the Council of States would have diluted their state representative functions. So, while direct election may be more common around the world, indirect election seems at least equally appropriate for South Sudan. This is particularly the case if States are to implement national laws as will occur if the national legislature exercises its Sch. A item 39 power to set norms and standards.

75. Art. 63(1)(f) provides for removal of members who leave the party under whose mandate they are elected. This is directed at so-called floor crossing, and is a provision generally believed to empower party leaders at the expense of individual representation. The ability to defect to other parties is an important safeguard against executive overreach, but also can allow a rich powerful party to "buy" members of smaller parties, undermining effective opposition (as famously occurred in India and, in Africa, in South Africa, Malawi and Zambia). We see arguments both for and against the provision.

76. Art. 69(7) is either innocuous or unenforceable. The assemblies are political houses and, as such, are likely to contain partisan divisions. What does it mean to require "broad inclusiveness" in the distribution of offices? There is not a feasible enforcement mechanism for this provision. Instead, the goal can be achieved through specific provisions. For example, one possibility is to consider Deputy Chairmanship positions in the legislative committees, which would be held by minority parties. In some systems, a share of committee chairmanships is held by opposition parties, in accordance with seat shares in the legislature. Another approach is that of South Africa's Sec. 57(2), which requires that the rules and orders of the National Assembly must provide for "participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;" and "financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively." In addition, provision should be made to ensure that that the legislative staff is representative of the diversity of the country.

77. In general, we advise a uniform use of language describing the legislators: "members" instead of "representatives" or vice versa. "Representatives" is also used in Art. 60(e). Art. 85(3) uses both: "by a two-thirds majority of all members and representatives of the two Houses."

78. Art. 71 defines formally the role of minority leaders. We strongly urge that the method of selection be that all members from parties not represented in the government shall jointly elect the minority leader. Automatically granting the minority leadership to the second strongest party might lead to internal tensions in the opposition. If the opposition is fragmented, the second largest party may in fact be a very small party. The opposition members themselves should be able to choose.

79. Art. 71(2)(a) deals with the business of the legislature in which the executive has no role. Therefore, the reference to the president and VP should be deleted. In addition, reference to the "Minister designated to lead Government Business" seems to be a holdover from the parliamentary system, and is not referred to elsewhere in the Constitution. We suggest deleting it.

80. Art. 72 (Committees of the National Legislature). We suggest the explicit and mandatory establishment of an Inter-House standing committee. This article leaves it to the assemblies' discretion (72(3)), but such a committee is required to resolve questions in Art. 60(b). This article also establishes a Parliamentary Service

Commission, the function of which is not clear. Generally it is wise to spell out the functions of bodies established in the constitution. If this is not done, the constitutional provisions in fact serve little purpose, or may be manipulated to unintended ends. If the role of the Parliamentary Service Commission is to provide support services to the legislature that might be made explicit. Such support services would be highly desirable, as an independent research and analysis capacity is important to ensure that the legislature can play an independent role in policy-making. Consideration might also be given to naming this body a Legislative Service Commission as the legislature is not referred to as a parliament.

81. Art. 82(3) refers to the punishment of those who refuse orders of the legislature to appear or submit documents. This is an important power, but the words "without lawful justification" should be added to the description of the offense. In addition, it is unconventional for a constitution to declare that someone commits "an offense punishable by law." Perhaps it would be better to say that the legislature shall pass a law stipulating the punishments.

D. The Legislative Process

82. As currently written, the legislative process in the TCRSS is unclear. This is a very important area, and one that we think should be made as explicit as possible. The CRC should first choose one of two broad alternatives: to design a symmetric bicameral system, which we recommend; or to maintain the basic logic of the TCRSS with the Legislative Assembly as the preponderant house and the Council of States as the house specialized in and limited to matters of interest to the States.

83. Things to pay attention to if the symmetric bicameral alternative chosen include: (1) allowance for the introduction of any bills in either house; (2) the decision rule, which is typically the same for both houses; (3) and a mechanism for reconciling bills once they have been considered by both houses. If the current TCRSS scheme is retained, the process has to be thought out in every step. The most important aspects are (1) the composition and decision-making rule of the inter-house committee that will decide if a bill is of interest to the states; (2) the role of the Legislative Assembly if the Council of States changes a bill it has approved (one that is of interest to the states) or if a bill is introduced directly in the Council of States; and (3) the types of bills that should be approved by the Council.

84. The following comments are directed to clarifying the current scheme of the TCRSS, which is necessary. Art. 60 (b) states that if a bill is found to "affect the interest of the states," it must be referred for the Council of States "for consideration." Must the

Council of States then agree to the bill for it to become law? More importantly, as noted above, determining the "interest of the states" is not always easy. Perhaps the Council of States is intended to be limited to matters which touch on Sch. B or C matters and other issues (such as electoral law for States, the civil service, financial laws affecting States); if so this should be spelt out very clearly. As a general matter, the line between State and national matters is difficult to draw, and can raise difficult constitutional questions. Again, we note that this problem would disappear if the Council of States was a co-equal house. If the CRC decides to keep the current formula, it might look at Secs. 74-76 of the Constitution of South Africa 1996 and consider the problems that even these, much more explicit provisions have raised.

85. An anomaly within the current scheme is that whereas the assent of the Council of States is required only when the Legislative Assembly passes a bill that affects the interests of the states, the Council of States (as part of the National Legislature) is called to reconsider *any* bill that has been rejected by the President under Art. 85.2. This seems contrary to the spirit intended by the drafters, although we may be wrong. The choice should be made consciously if it is indeed intended.

86. According to Art. 60, an Inter-House Committee scrutinizes any bill passed by the Legislative Assembly; if it finds that the bill affects the interests of the States, the bill is referred to the Council of States. The Council of States can amend the bill or pass it as is. If it amends the bill (with the amendments being approved by a 2/3 majority of members (Art. 60(c)) or approves the bill without amendments, the bill is sent for presidential assent. This process leaves no chance for the Legislative Assembly to determine if it accepts the amendments. Furthermore, it is not clear what happens if the Council of States rejects the bill: presumably it is returned to the Legislative Assembly.

87. If the current structure for the joint seating of the two chambers as the National Legislature is retained, Art. 54(3) stipulates the decision rule and quorum for the National Legislature: "Vote count shall be separate for each House and governed by the quorum specified in this Constitution." The decision rule in the Council of States is not completely clear. Art. 59(a) indicates that legislation "on the decentralized system of government and other issues of interest to the states," which must be considered by the Council of States, is to be approved by a two thirds majority of "all representatives." But it is not entirely clear that this exhausts all the legislative activity of the Council of States. Thus, we suggest that the two thirds majority be framed as a general decision-rule for the Council of States in legislative matters.

88. Art. 76 is entitled Legislative Resolutions. If it indeed refers to law-making it contradicts Art 59(a) which requires the Council of States to decide on laws by a two thirds majority. In addition, Art. 74 refers to all decisions in the Assembly. Perhaps it is intended to refer to resolutions that do not make law. If so, the word 'Legislative' should be removed from its header.

89. Art. 84 spells out the standard legislative process in Westminster-style legislatures. In so doing it limits the possibility of innovation in the South Sudan Legislature. We suggest that the provision sets out the principles of law making – that in all but urgent matters opportunity is given to the houses to consider both the principles underlying a proposed law and its specific provisions. Then the standing rules can set out the precise procedures. In addition, Art. 84(2) is not particularly clear. Moreover, it requires all Bills to go to a committee. In some urgent cases there may be reason to short cut this part of the process. Finally, Art. 84(4) captures the parliamentary practice of allowing a legislature to change its procedure at any point. This provision undercuts clauses (1) – (3) and would not be necessary if those provisions are amended and the details of legislative procedure are left to standing orders. We recommend deletion of Art. 84(4) and streamlining of the process.

E. System of Representation

90. We are aware that the National Elections Act is in the process of being enacted. Unfortunately, we do not have access to its contents. The comments that follow, therefore, are made with full awareness that some of them may be rendered moot by decisions already taken in the National Elections Act.

91. The TCRSS does not stipulate the general principles for qualification as a voter. "Universal adult suffrage" is mentioned in Art. 56, but this still requires the definition of "universal" and "adult." Adults are normally defined as those at least 18 years of age, but some constitutions grant the right to vote to those who are at least 16 years of age, or restrict it to those who are at least 21 years of age. These restrictions are not necessarily undemocratic and should be considered for inclusion in the constitution.

92. Art. 56(1) requires elections for the Legislative Assembly to be free and fair and by secret ballot but in no other case is any standard set for elections. Consideration should be given to including a general set of standards to apply to all elections. These might include a requirement that votes be counted at polling stations and results announced promptly as well as the requirement of a reasonable period between the announcement of the election and polling day as suggested in para. 52 above. The

Kenyan Constitution, Arts. 81 and 82, provides an example of what might be included.

> 81. The electoral system shall comply with the following principles—
> (*a*) freedom of citizens to exercise their political rights under Article 38;
> (*b*) not more than two-thirds of the members of elective public bodies shall be of the same gender;
> (*c*) fair representation of persons with disabilities;
> (*d*) universal suffrage based on the aspiration for fair representation and equality of vote; and
> (*e*) free and fair elections, which are
> (i) by secret ballot;
> (ii) free from violence, intimidation, improper influence or corruption;
> (iii) conducted by an independent body;
> (iv) transparent; and
> (v) administered in an impartial, neutral, efficient, accurate and accountable manner.
>
> 82. (1) Parliament shall enact legislation to provide for—
> (*a*) the delimitation by the Independent Electoral and Boundaries Commission of electoral units for election of members of the National Assembly and county assemblies;
> (*b*) the nomination of candidates;
> (*c*) the continuous registration of citizens as voters;
> (*d*) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections; and
> (*e*) the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote.
> (2) Legislation required by clause (1) (*d*) shall ensure that voting at every election is—
> (*a*) simple;
> (*b*) transparent; and
> (*c*) takes into account the special needs of—
> (i) persons with disabilities; and
> (ii) other persons or groups with special needs.

93. It is understandable that decisions about the specific size of the assembly and the specifics of its composition be left to statute although it is wise to set a maximum limit to the size of the assembly to avoid easy increases by politicians. The CRC should first consider whether to say anything about the basic principles of representation in the constitution, such as a requirement that the electoral system strive for the principle of equal representation in the voting scheme. Although it does not explicitly commit itself to a particular type of electoral system for the Legislative Assembly, the

TCRSS does so implicitly when it requires the holding of by-elections to fill vacancies (Art. 64; it seems that a similar provision was maintained in the National Elections Act). By-elections only make sense in single-member district majoritarian systems (or in the majoritarian portion of a mixed system). This provision should be deleted.

94. There is no single correct electoral system. There are some advantages to stating the basic choice of electoral system (as majoritarian, proportional representation, or mixed) in the Constitution, in that it protects against self-serving manipulation by majority parties, but also some disadvantages in terms of reduced flexibility. The choice should be made in a careful manner to best reflect the conditions in South Sudan. There is a large literature in the field and many experts with their own views.

F. Executive

95. Art. 86 concerns provisional orders, which may be issued by the President when the legislature is not in session, and will have the force of law. These are to be submitted to the legislature at the first session after issuance. This makes it very important to have regular sessions of the legislature. If not confirmed, they lapse, but also "have no retrospective effect." This could lead to regulatory traps if regulated parties have to absorb significant costs to obey the provisional order. There ought to be a safe harbor for parties that comply in good faith with a provisional order that then lapses. An alternative reading of the clause is that it is the *lapsing* that has no retrospective effect, in which case the problem we refer to disappears. Either way, greater clarity would be helpful.

96. The presidential order must be submitted to the "appropriate House" as soon as it is convened (Art. 86(2)). The assumption is that decrees on matters affecting the states will be considered by the Council of States; everything else by the Legislative Assembly. Who decides about ambiguous cases? Is this the Inter-House Standing Committee? If so this should also be made explicit. Our recommendation that there be general provision for such a committee (see para. 80 above) would resolve this.

97. There are no term limits in the constitution. While term limits are hardly required in democratic practice, they are advisable. They raise the costs of agglomerating power and remaining in office. See, for example, the case of Mamadou Tandja in Niger two years ago, or Abdoulaye Wade in Senegal earlier this year, each of whom tried to extend their terms but failed. We thus recommend the inclusion of a two-term limit for the presidency. A term limit provision should carefully state whether it is permanent in that a candidate can never run again, or whether re-election after a term out of office is possible. It should also clearly state how much of a partial term

can be served without constituting a full term. For example, is a term served by a vice president who assumes office after the death of the president a 'term'? Some constitutions designate that it will be treated as a term if the vice-president accedes earlier than the midpoint of the departed president's term.

98. The provision in Art. 97(3) that claims that the president "represents the will of the people" is only partially correct, and potentially dangerous. The president is the only person with a fully national mandate, to be sure, but the legislature as a whole also "represents the will of the people." Removing the phrase from 97(3) is advisable.

99. The provisions for presidential impeachment and removal, as detailed in Art. 103, set a high standard and may ensure that impeachment never occurs. First, 2/3rds of all members of the legislature must charge the president with treason, gross constitutional violation or gross misconduct. Then a specially designated panel, appointed by the President of the Supreme Court, will evaluate the allegations, and report to the constitutional panel of the Supreme Court, which will render a verdict. The President appoints the President of the Supreme Court without consultation with the Judicial Service Commission. And so this nested mechanism allows the President several chances to influence the relevant decision-makers.

100. The impeachment process should be very carefully laid out. Art. 103(3) refers to an impeachment "notice" that is not actually mentioned in Art. 102(2). Is there a notice of removal after the President has been deemed to have "forfeited the office" in Art. 102(5)? Another anomaly the President is entitled to appear at the hearings of the special tribunal and to be represented by a lawyer, but there is no reference to a hearing at the constitutional panel which is to have the final word on the matter. This rather unusual mechanism of a closed-door final stage should be reconsidered. We recommend a hearing at the final stage.

101. There are several references to a Medical Commission in the discussion of removing high officers. This could be a very important body as its experts (sitting as a medical board) must decide if the president is to be removed for infirmity or incapacity. But there is no explanation of how the Commission itself is to be appointed, or how the medical board is selected.

102. Art. 101(r) allows the president to remove a state governor or to dissolve a state assembly under certain circumstances, but it specifies no definite standards or process that must be met. We understand the logic of this provision to be to provide for protection in the event of a government that is unable or unwilling to govern. The

CRC might consider provisions of the Indian constitution regarding presidential rule, although these, too, have been criticized for allowing excessive presidential power to interfere in State political matters. In the United States, save for the essentially unused federal guarantee of "a republican form of government" in the states, there is no authority whatever for the president to become involved in state government arrangements. One appropriate device to consider for the current scheme would be to require the Council of States to approve the removal of governors.

103. The South African Constitution (Sec. 100) provides that when a province cannot or does not fulfill an executive obligation, the national government may ensure fulfillment of the obligation. It may do this either by issuing a directive to the provincial executive describing the extent of the failure and any steps necessary to meet the obligation, or by assuming direct responsibility for the obligation. Critically important are the limitations on this power. The national government may only assume responsibility for matters within provincial competency in order to: (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) maintain economic unity; (iii) maintain national security; or (iv) prevent a province from taking unreasonable action prejudicial to the interests of another province or to the country as a whole. In addition, notice must be given to the Upper House (comprised of representatives from each province) within 14 days of the assumption of regional responsibilities by the national government, and the intervention must end unless it is affirmatively approved by the Upper House within 30 days. The Upper House must then review the intervention regularly and make any appropriate recommendations to the national executive. Judicial review is also available to ensure the intervention is not arbitrary. As a result of these limitations and safeguards, national intervention in South Africa has not been abused and, in fact, has come to be perceived by the provinces as often being within their best interest.

104. Art. 104(1) provides for the president to appoint the vice president, subject to legislative confirmation. The CRC could consider the advantages of a joint presidential-vice presidential electoral ticket. A joint election for these two offices can help to foster national unity by, for example, broadening the ethnic representativeness of the executive branch. It also avoids the rather common practice of a presidential candidate securing votes by dishonestly promising multiple people the position of vice president. If kept as is, note that Art. 104(2) does not state whether the president's appointment of a new vice president, if that office falls vacant, also requires legislative confirmation.

105. Presidential and legislative elections are meant to be concurrent (5-year terms for all, with no indication that they should occur at different dates). Art. 102, however, calls for new elections when the office of the president becomes vacant, with the office temporarily assumed by the Vice-President. This will make the elections non-concurrent. If the suggestion in para. 104 to have a joint ticket is adopted, we suggest adding language here to indicate the Vice President will assume office for the remainder of the presidential term.

IV. PUBLIC FINANCE

A. Money Bills

106. Art. 89 prohibits any member of the National Legislative Assembly from proposing a money bill that is not "sponsored" by a minister. This raises two concerns. First, the definition of a money bill, as a bill including something that may 'have the effect of' imposing a charge on the public revenue etc., is very wide, potentially covering any bill that might require any spending by the executive and that might change a tax. Second, the executive's determination of what is a money bill is conclusive.

107. The first problem means that it is possible that MPs will have virtually no legislative powers. Indeed this is the practice in many East African countries which took over the 1911 Westminster definition of a money bill. Departing from practice in Westminster, in these countries the definition is read as meaning that any law that might cost something anytime in the future is a money bill, for which the consent of the executive is required. At a minimum "have the effect of" should be deleted.

108. The fact that the executive's determination is dispositive removes an important check on executive power and undermines constitutionalism. The legislature has no way to constrain a wide interpretation such as referred to above, and this places the interpretation of an important provision of the constitution into the hands of the executive. We suggest that this restriction be removed. In any case, the title is misleading, as private member bill implies private interest.

B. Distribution of Budget Authority Across Chambers

109. One of the competences of the National Legislature is to "authorize annual allocation of resources and revenue" (Art. 55(3)(d)). One of the competences of the National Legislative Assembly, in turn, is to "approve budgets" (Art. (57)(c)). The TCRSS clearly sees the two as distinct activities. Art. 87 states that the President must present, before the beginning of the financial year, "a bill for the allocation of resources and revenue in accordance with the provisions of this Constitution." Art. 88, in turn, regulates the budget proposal, which must be presented at the beginning of the financial year (Art. 88(1)) and must contain, among other things, "detailed estimates of proposed revenue and expenditure for the forthcoming year" and a "statement of the general budget, any reserve funds, transfers thereto or allocations

therefrom." Although the text is not very clear, it appears that Art. 87 deals with the division of revenue between the national government and States as anticipated by Arts. 37 and 169 while Art. 88 deals with the national budget, meaning the portion of the overall revenue that is allocated to the national level of government and to be spent by it. This interpretation is supported by (i) the fact that Art. 55(3)(d) stipulates that it is a function of the National Legislature to pass the Art. 87 Bill and (ii) the need to have an allocation of funding to the states that is separate from the national budget. If this is correct, and the tricameral system is maintained, Art. 87 should also refer to the National Legislature and not the National Legislative Assembly. If a bicameral system is adopted, whether or not the Council of States has plenary power, the role of each chamber in both the overall division of revenue and the national budget needs to be clarified. In addition, redrafting is recommended to clarify what Art. 87 refers to (currently Art. 169 (5) – (8) and 179(f)).

110. Art. 88(7) gives the president the upper hand by stipulating the default budget to be that of the president's budget. Art. 90(3) seems to contradict it, however. Perhaps one of these could be dropped.

111. According to Art. 54(3), when the National Legislature meets, the two chambers that compose it vote separately (with quorum verification equal to the one that is required for their regular business). This allows one of the chambers to veto the preferences of a majority in the other chamber. As mentioned above, the National Legislature is also in charge of authorizing annual allocation of resources and revenue, which means that the Council of States may veto the decision of the majority of the Legislative Assembly. To the extent that this is not distinct from the budget, which is under the authority of the Legislative Assembly (Art. 57(c)), it is important to be sure that the constitution does indeed want to grant the Council of States this veto power over the national budget.

C. Fiscal Devolution

112. The main objectives in this regard should be to (i) ensure adequate sources of income for states; (ii) a reliable mechanism for equalization; while (iii) limiting the taxing powers of the States that might be misused. Some institutional arrangements are in place (such as the revenue sharing bill (Art. 87) and the Fiscal and Financial Allocation and Monitoring Commission) but there is considerable ambiguity.

113. The equitable sharing of national wealth mentioned in Art. 37(3) seems to be a critical part of the system of devolved government as it is currently formulated. If the scheme remains as it is, it is not appropriate to cast this as an unenforceable guiding

principle. Instead, as the language of Art. 37(3) suggests, it should be a binding (if weakly justiciable) obligation on the national government.

114. States have considerable responsibilities (including education and health) and four sources of revenue: (i) revenue they raise themselves through taxes or user charges ('own revenue')(Art. 179); (ii) 2% of net (national) mineral revenues (oil producing states only – in total 20% of net oil revenue goes to these States) (Art. 179(f)); (iii) an equitable share of national revenue (Art. 169); and (iv) loans, grants-in-aid and foreign aid (Arts. 179 and 184). Each of these is discussed in successive paragraphs below. As explained below, concerns may be raised as to the adequacy of the revenue for States; the wisdom of the taxing power allocated to States; and the uncertainty of the equitable share.

115. Art. 179 appears to give the States virtually unlimited tax raising power. The only taxes clearly excluded are taxes allocated to the national government by Art. 177(2). Although these are clearly the major revenue raising taxes, states are permitted to impose a state personal income tax and are further left to use their imagination to create new taxes. Such taxing power could be used in ways that demand excessive amounts from the poor (consider field taxes, wheelbarrow taxes etc.), or that interfere with national economic policy and make doing business difficult (Art. 187 may deal with this by protecting interstate commerce but it would need to be enforced and it is not clear how effective it would be in restraining in-state taxes). It would be wise to consider a scheme in which the State taxing power is controlled and coordinated with national taxes. In this regard, Art. 169(9) may be intended as a general regulatory provision, permitting the national government to regulate all taxing power. However, although its intention seems to be to allow some overall control of the tax system, it is not clear that it permits the national government to legislate on State taxes. This should be explicit. Moreover, the power to regulate does not extend to a power to nullify a constitutional right to tax. Thus, although this provision could presumably place considerable constraints on State taxing power, it may not directly prohibit any particular tax. Finally we note that the inclusion of Art. 169(9) in a list of general 'guiding principles' leaves some doubt about its legal status.

116. Oil revenue sharing appears to be based on the principle of derivation (i.e., payments to oil-producing states) under article 178(1). Do States without oil have any claim on oil revenue? In other oil-rich countries, this issue has proved to be a significant source of conflict. We suggest that the CRC obtain specific technical advice

on this matter. As a minor, related point, it is unclear what the word "communities" means in Art. 178(1)(b).

117. The equitable share is presumably intended to operate as an equalizing mechanism and to ensure that all States can fulfill their functions. Some attention is paid to its calculation, and indeed, this is the main task of the Fiscal and Financial Allocation and Monitoring Commission (FFAMC). Nonetheless, the Constitution seems not to give the States a secure claim to this share. In Art. 37(3) it is an unenforceable guiding principle. The provisions in Art. 169(5) – (10) are mere 'Guiding Principles for Development and Equitable Sharing of National Wealth'.

118. Art. 184 wisely requires that State borrowing should not undermine national macro-economic policy goals. It indicates that this will be achieved through specifications set by the Bank of South Sudan. This provides very little flexibility in the matter. In general, the Bank sets monetary policy (Art. 182(2)) but not fiscal or economic policy, which should be left to the political branches. Consideration should be given to permitting this matter to be dealt with through national legislation.

119. Schedules A-C make clear that local governments are mainly creatures of the States, as in the United States (see Schedule B(3)); the Schedules divide powers only between the national government and the States. See also Arts. 49(1); 166(1). The local governments do, however, have powers to levy and collect fees and taxes (Art. 166(7)). In fact, all three levels of government have taxing power, opening the way to the imposition of redundant taxes on a relatively poor population and making it considerably more difficult for the national government to manage a unified economy. It is not clear to us which level of government—state or national—makes the law under which local government can impose taxes.

V. COURTS

120. The judiciary is a unified body. It has four levels, most of the details of which are left to legislation. We understand that there has been a conscious decision not to adopt a special constitutional court. There is also a judicial service commission (sometimes, but not always, referred to as a National Judicial Service Commission) with a role in recommending judicial candidates and disciplining and removing judges. Because these roles are specified in the Constitution, they may be included in Art. 132 on the Commission. The Commission is to provide a check on presidential removal of judges, and so we recommend that some members be appointed by a mechanism other than presidential appointment. For example, some members might be appointed by legislative supermajority or by the courts themselves. The bar might be involved in judicial appointments.

121. The Chief Justice is referred to as the "president of the Supreme Court" in Art. 103 and Art. 127. We understand that this is not uncommon in East Africa, but as a matter of clarity we query whether this second title is really necessary? The alternative is to vest all the powers clearly in the Chief Justice.

122. The relationship between 122(8), which gives the Chief Justice the responsibility of "administration" and 122(9), which empowers the legislature to provide for "overall administration", is unclear. The judiciary is headed by the ChiefJjustice, who is responsible for its administration, according to article 122(8). But how does this then relate to the responsibilities of the National Judicial Service Commission created by article 132(1), whose appointment and powers, except for those in article 133(2) and in article 134, are left to statutory specification? It would be best to do some considerable clarification of these matters in the Constitution itself. There are principled arguments for investing power in a National Judicial Service Commission, and these should be carefully considered.

123. Art. 122(5)(d) admirably encourages voluntary reconciliation agreements. This is fine insofar as civil cases are concerned, and also may be appropriate for minor crimes in which customary dispute resolution involves compensation; but for major criminal cases, this may be problematic. It seems to encourage plea bargaining and perhaps customary practices which allow families to resolve complaints sometimes contrary

to the wishes of the victim. This might interfere with the rights of victims and the public if pursued as a constitutional requirement.

124. The budget of the judiciary is dealt with twice in different terms in Arts. 90 (5) and 124(2). The provisions require special treatment of that budget, presumably to avoid the well-known problem of executive reluctance to fund judiciaries, but might be drafted more clearly to avoid confusion. If Art. 90 is taken as the dominant provision, the idea seems to be a budget that is first approved by the Judicial Service Commission (Art. 124(2)), then sent through the legislature in the ordinary way and approved by the President. After that, however, the judicial budget would not be combined with that of a government department but would be paid directly out of the consolidated fund. However, this reading forces the text. The notion of a 'charge on the consolidated fund' usually means an appropriation is not required. In other words, the budget of the judiciary would not be part of the national budget. This seems totally unworkable. Charges work for fixed amounts (salaries) are the best example. There is no reason to exclude Parliament from a discussion of the budget of the judiciary. Redrafting Art. 124(5) to include the positive assertion that the Judicial Service Commission and the Assembly must approve the budget would make it clearer. In addition, the meaning of 'charges' needs to be clarified.

125. Arts. 124(4) and 124(7) seem repetitive insofar as they both require decisions that made without fear or favour. Perhaps clause (7) could be restricted to immunities.

126. The meaning of Art. 124(8) stating that judges "shall not be affected by their judicial decisions" is unclear. This may be referring to the idea that judges will not be liable for their decisions, should someone seek to hold them responsible. We suggest redrafting.

127. Consideration might be given to amending Art. 124(9) to state that salaries may not be reduced.

128. In terms of the competences of the Supreme Court (Art. 126(2)), paras. (f) and (g) refer to criminal jurisdiction over the President and other high officials. Impeachment, as contemplated by Art. 103(5) is slightly different than a criminal proceeding and is not truly the same as exercising criminal jurisdiction over the President. The sanction for impeachment is removal from office, not criminal punishment in accordance with ordinary principles of criminal law.

129. Art. 126(2)(h) seems to contemplate mandatory review of death sentences, even without appeal. Otherwise there is no reason to have a special provision. Perhaps this should be made clear. Art. 126(2)(j) refers to "original and final jurisdiction" for interstate disputes while Art. 126(2)(c) refers only to "original jurisdiction" for constitutional dispute resolution. The two should be made consistent.

130. Art. 126(3) states the Supreme Court shall sit in panels and specifies a nine member panel for constitutional matters. However, we note that the Court is an 11-member court and may become larger. We strongly recommend that provision be made for en banc sittings, especially in constitutional matters, or otherwise when the Supreme Court itself or the Chief Justice believes it would be appropriate. This may be necessary to resolve conflicts between different panels on interpretation. Such a provision would ensure that judges are not hand picked for controversial constitutional matters and would serve to protect the legitimacy of the court.

131. Art. 129 might include a clause stating that the Court of Appeals shall hear cases appealed from lower courts.

132. Art. 133(1) should limit the president to appoint the Chief Justice "from among the justices of the Supreme Court." Art. 133 might also provide for long terms for the judges. Life tenure, subject to a mandatory retirement age, is a common provision, and it is advisable to include it in the Constitution to prevent a sitting government to change it by law.

133. Art. 134 on judicial removal might be spelled out in further detail. The International Commission of Jurists provides some internationally accepted standards in this regard. For example, one might state that removal is possible "upon complaint by a member of the public, the anti-corruption commission or the judicial service commission". The procedure might require a "full and fair hearing" and set a high standard of proof.

134. Art. 135 might describe the director of public prosecutions in more depth, protect his or her independence and provide him or her with a duty to act only in accordance with the law. The director of public prosecutions must have some institutional protections, especially with regard to individual prosecution decisions. A framework for this should be included in the Constitution to avoid conflicts between the prosecutorial authority and the executive. Other countries, such as South Africa and Kenya have such provisions, but ambiguity in the language in the South African Constitution has caused some problems.

VI. INDEPENDENT INSTITUTIONS

135. A major trend in constitutional development is the creation of independent institutions to monitor government action and ensure accountability. The TCRSS is consistent with this trend, with many such institutions outlined in Part Nine. We think the general thrust of this movement is admirable. But in other jurisdictions some such institutions have raised considerable problems, ranging from being ineffective to imposing considerable financial burdens on states; the common lesson is that they need to be designed very carefully. Our major suggestion is to distinguish truly central institutions whose functions demand independence that is protected by the constitution and for which more detail in the constitution is desirable, from other commissions for which details can be left to statute. In the former category we would include the Judicial Service Commission, the Anti-Corruption Commission, the Human Rights Commission, the Electoral Commission, and the Audit organization (or Auditor General).

136. A related point is that many of the listed commissions have no specified functions (for example, the Land Commission). If it is not clear what the commissions will do, they can be established by ordinary law when their role is clearer. Some commissions are not intended to be permanent (e.g. Relief and Rehabilitation; Demobilization, Disarmament and Re-integration). If this is the case, there may be no need to mention them in the constitution at all. Alternatively, they can be covered in transitional provisions in a schedule, as was done in the South African Constitution for a post-apartheid land claims process. If a commission with a temporary mandate is mentioned in the body of the constitution, then a constitutional amendment would be necessary to dissolve it. This problem could be resolved by a stipulation that some commissions can be dissolved by the Legislative Assembly (without a constitutional amendment) or a provision stipulating that they dissolve after a fixed time unless their life is expressly extended. It is worth noting that in the long term it is rather clumsy to have such redundant provisions in the body of the constitution.

137. Some of the independent commissions simply state that the president will appoint the members in accordance with the Constitution (e.g. Art. 140 on the Civil Service Commission) or law (e.g. Art. 148 on the Relief and Rehabilitation Commission) or both (e.g. Art. 149 on the Demobilization, Disarmament and Reintegration Commission), while others (the Anti-Corruption Commission in Art. 143(2)) have

details about the voting rule for legislative approval. But, for the former, the constitution in fact provides no procedure. One possibility would be to have a single formula for all commissions laid out in Art. 142. Examples of appointment mechanisms that enhance institutional independence may be found in South Africa (multiparty Parliamentary Committees with a high threshold of approval), Nepal (1990: a special committee of persons with high integrity and high office to act as a constitutional appointments committee under the President), and Kenya (salaries commission appointed through multiple appointing authorities).

138. As with appointment, a single formula for removal might be useful. Members of the Anti-Corruption Commission can be removed by a two-thirds majority in the National Legislative Assembly. More specific language that avoids removal on partisan political grounds, such as the following, is worth considering:

> *Commissioners may only be removed for clear incompetence, incapacity or on grounds of unlawful conduct, after a finding to that effect by a committee of the National Legislative Assembly and an absolute majority/two-thirds majority vote in support of the removal.*

139. For the Judicial Service Commission and the Civil Service Commission, and perhaps similar bodies, it might be desirable to provide expressly for them to have the power to issue rules and regulations, provided those are consistent with constitutional and statutory authority.

140. Art. 139(i) on the Civil Service Commission might be included in the general principles of 138. In general, the language of the paragraphs of Art. 139 should be made parallel. There is a tension between Art. 138(2) which gives a closed list of merit-based criteria for appointment to the civil service and Art. 139(1)(i) which gives a different list and emphasizes that that the civil service must be representative of the country.

141. The National Elections Commission is to be appointed by the President in 'accordance with the Constitution and the law' (Art. 197). We see nothing further in the Constitution about the Elections Commission. Thus, the only constitutional constraint on the procedure for selecting its members is the assertion that it is independent. Given its role and the importance of a Commission that all candidates for election and voters can trust absolutely, it is desirable to include provisions securing its independence in the Constitution. Vesting the appointment in the president is not desirable. Mechanisms to enhance independence could include long terms for commissioners, staggered terms to prevent one president from appointing

all the members, high barriers to removal, appointment mechanisms that include a role for the legislature, and a prohibition on recent party affiliation or membership (in the last five years, for example).

142. No size is set for the Elections Commission. There is some evidence that smaller elections commissions function in a more efficient and legitimate manner. The CRC might consider a cap on the number of members, to no more than five or seven.

143. No provision is made for the demarcation and regular review of constituency boundaries. Ideally this is done by an independent body but *not* the electoral commission (as the inevitable controversy concerning boundaries may politicize the electoral commission and the electoral commission does not have the expertise for boundary demarcation). A permanent commission is not required. Instead, the constitution might stipulate regular review of constituency boundaries (say between 8 – 12 years) and an independent Boundary Commission established on an ad hoc basis but following procedures that secure its independence to carry out the task. Provision might be given to maintaining electoral constituency boundaries for a period of at least 18 months before an election. Kenya's experience in this regard is noteworthy.

144. Anticorruption Commission members are to be appointed by the President with approval by a simple majority in the National Legislative Assembly. The sensitive and controversial nature of the job suggests that a more rigorous appointment process should be considered. As with the Electoral Commission, mechanisms such as long and staggered terms for commissioners, high barriers to removal, and appointment mechanisms that include a role for the legislature might be considered. In addition, general requirements of transparency and financial disclosure will help this Commission to do its job.

145. Art. 144(1), on the functions of the Anti-Corruption Commission, is unclear in several ways. First, the division of labor between the Commission and the Ministry of Justice should be clarified. Perhaps the first clause, referring to the powers of the Ministry in public prosecution, should be struck, and a clear reference made to the fact that the prosecutor does not have jurisdiction while the Commission is seized of a case. Second, Art. 144(1) (b) does not say whose corruption is to be prosecuted, nor whether the Commission is limited to prosecuting public officials. Other countries, such as Indonesia, have witnessed battles over prosecution, with the ordinary prosecutorial process being used to displace an independent commission that was

seen as too effective and vigorous. The division of labor between the Commission and prosecutorial authority should be clear.

146. The functions of the Anti-Corruption Commission in Art. 144 include to "(b) Investigate and prosecute *only* cases of corruption" [emphasis added] and "(c) combat administrative malpractices [sic] in public institutions". We wonder how the Commission is to combat administrative malpractice without investigating it. Art. 144(1)(d) speaks of "such" public officials, but there is no prior referent. Presumably what is meant is "such public offices referred to in that Article." We wonder, further, if the Commission must or may publish the declarations it receives under Art. 144(1)(d). All this needs clarification. Finally, in listing the functions, there is no catch-all phrase "perform other functions as determined by law."

147. Art. 144(2) immunizes judicial decisions from the commission's scrutiny. Is it intended that those decisions shall be exempt from scrutiny even if it is alleged that they were the product of corruption? This is advisable if the CRC is confident that other mechanisms to remove corrupt judges will be sufficient.

148. Art. 120 refers to a confidential declaration of assets and liabilities. We learn in Art. 144 that this is to go to the Anti-Corruption Commission but the Commission should be mentioned in Art. 120.

149. Art. 146, on the functions of the Human Rights Commission, provides for monitoring, investigating, reporting, recommending, etc., but does not accord the Commission any authority to adjudicate cases or to make any binding decisions. In some other countries, such commissions may adjudicate, for example, cases of alleged ethnic or religious discrimination, subject to judicial review. Such provisions, if adopted in South Sudan, could help assure minorities that they will be treated fairly. In any case, the Human Rights Commission should be clearly given the power to refer cases to for prosecution or to a court.

150. Consideration should be given to a part-time Salaries Commission that sets the salaries of top constitutional officers (President, members of the legislatures, judges etc.). Establishing an independent commission protected by the Constitution for this function avoids allegations that self-interest drives salary packages. The Commission need not be full-time nor need it sit every year.

151. Art. 186 states that the Auditor General is responsible to the President (although he/she can be removed by either President or National Legislative Assembly). As this

officer is responsible for verifying reports supplied by the executive and reporting on them to the Legislature, this line of responsibility seems wrong. Consideration might be given to enhanced provisions for independence, as per the discussion of the Electoral Commission and Anti-Corruption Commissions above. See paras. 141 and 144 above. In addition, should audited reports on state spending not go to States (where the officials who spend are)? Further clarification would be helpful here.

VII. PEACE AND SECURITY

152. The TCRSS prohibits the raising of other armed or paramilitary forces (Art. 151(3)), which is desirable given South Sudan's history. The Sudan People's Liberation Army is to be recognized as the national armed force of South Sudan (Art. 151.1 and 151.2) and is to be "subordinate" to (Art. 151.2) and respect and abide by civilian authority (Art. 151.6). However, the means of subjecting the armed forces to civilian government control is not described – it would be helpful to add some detail here – for example will there be an oversight committee? There might be included an obligation of the President to report regularly to the legislature on any use of the armed forces.

153. The TCRSS states that one of the duties of the armed forces is to "uphold this constitution" (Art. 151.4.a). Upholding the constitution is a duty not restricted to the armed forces, but to every South Sudanese citizen (Art. 46.1) so it is not clear what particular duties are imposed on the armed forces by including this clause. The danger here is that the armed forces could take it upon themselves to decide and enforce against the civilian government measures which the government may take but the armed forces alleges are unconstitutional as part of "upholding" the constitution. The word "uphold" might therefore be replaced with "respect and abide by" so as to ensure that they have no enforcement powers to take action against people alleged to have breached the constitution. In addition, the Constitution might add in Art. 151 or 152 a requirement that the armed forces be non-partisan.

154. A minor point, but the inclusion of the word "basic" before "human rights" (Art. 151.6) is unnecessary – the armed forces should be required to respect all human rights, as the police (Art. 155.6) and prisons service are required to do (Art. 156.2). It is not clear why the armed forces should be subject to a lower standard of human rights. It would also be useful to make provision in the Code of Conduct section (Art. 152) for the armed services to abide by and be bound by human rights.

155. The President serves as the commander in chief of the armed forces (Art. 153.1) and has the power to appoint, dismiss or retire officers of the armed forces (Art. 153.2). It is worth considering whether these powers should be subject to approval by the Council of Ministers upon the recommendation of the concerned Minister, as it is for the appointment of the Inspector-General of Police and the Director-General of the

Prisons Service, as this provides for some oversight against arbitrary appointments or dismissals by the President.

156. The TCRSS also states that a consultative body called the "National Armed Forces Command Council" is to be established (Art. 154.1) but the duties or composition of such body are not described, instead left to be prescribed by law (Art. 154.2). Considering the important role that the body may play in the affairs of the country, it might be advisable to detail its composition, duties and role in the Constitution itself.

157. The TCRSS provides for a police service (Art. 155.1). Again, as with the armed forces, one of the tasks of the police is to "uphold the Constitution". For the reasons cited above, this might be modified to "respect and abide by the Constitution".

158. The TCRSS makes provision for an entity called the "National Security Service" (Art. 160). The mandate of this entity is to "focus on information gathering, analysis and advice to the relevant authorities" (Art. 159(e) and "the internal and external security of the Country and its people"). There is some ambiguity: is security the responsibility of the National Security Service or the armed forces? As currently drafted, there is potential for the obligations of the armed forces and National Security Service to conflict. And how does the responsibility for ensuring security reconcile with its constitutional mandate to gather information? The National Security Service's primary function should thus be clarified.

159. Each of the two organs of the National Security Service is to be headed by a Director-General who is to be appointed by the President upon the recommendation of the "Security Council" (Art. 160.2.b). For consistency, this should be changed to "National Security Council". It is also important to clarify the relationship of the National Security Council to the "National Armed Forces Command Council" so as to prevent conflict between their respective functions, which may potentially overlap.

VIII. STATE OF EMERGENCY

160. The President may declare a state of emergency (Art. 189.1) "upon the occurrence of an imminent danger". It should be clarified here whether "danger" is restricted to the list that follows ("whether it is war, invasion……"). Ideally, the interpretation of danger should be restricted to these events so as to avoid potential abuse. "Imminent danger" might thus be replaced with the phrase "public emergency which threatens the life of the nation", from the Paris Standards, which is further defined there as "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed." The interpretation of this phrase would then benefit from insight gained through the experience of other countries.

161. Art. 189.3 states that the National Legislature is to approve the declaration of a state of emergency by the President, and assumes that approval will occur. What if it does not? Does the emergency need to be approved by a competent court? We recommend that both the declaration of emergency and measures derogating from normal constitutional requirements be subject to both parliamentary and judicial review.

162. There is also provision for automatic lapse of the emergency after 30 days (Art. 191.a) or other time, as specified by the National Legislature or earlier, if the President has lifted the declaration (Art. 191 b & c). Provision should also be made that in the event that the National Legislature has approved the emergency for longer than 30 days, the President must seek continuing approval of the National Legislature every 14 days after the initial approval. This is to prevent a situation where the President has obtained the approval of Parliament for continuing a state of emergency, for say, 2 months and it becomes clear within two weeks that a state of emergency is no longer truly necessary and therefore approval should be revoked. If there is no requirement to revert to Parliament every few days, then the President would be able to continue his emergency powers for a period between the first approval and before expiry, when, as the Paris Standards contemplate, the emergency would no longer be "strictly required". It is also worth considering whether there should be a maximum duration of emergency which can be authorized by legislative fiat – for example, a provision that the legislature can authorize an

emergency for a maximum of three months at each time before a fresh approval is required may be advisable.

163. The TCRSS states that upon declaration of a state of emergency, the President may suspend the Bill of Rights (Art. 190. .a), dissolve or suspend any institution of the National Executive (Art. 190.b), dissolve or suspend any of the state organs or suspend such powers (Art. 190.c.) and take any measures deemed necessary to the state of emergency (Art. 190.d). The Constitution ought to clarify what precisely these "measures" are. Otherwise, there may be nothing to constrain the executive claiming significant powers for itself in a time of emergency; abuse is possible. Just to make it clear, the president would have the complete power to dismiss the cabinet, and legislative and executive entities at the sub-national level (Art. 163.1) in an emergency. This may be too broad; the power might be restricted to strong showings of government failure and presumably be subject to judicial review. As a general rule any derogation measure must be strictly necessary for the purposes of the derogation, and like limitations, no more than that needed to achieve its purpose. For example, while detention without trial maybe allowed, certain minimum requirements must be allowed and periodic review by an independent tribunal.

IX. AMENDMENT

164. Art. 199 requires the support of 2/3rds of each House to amend the Constitution. We want the drafters to be clear that, as drafted, the President has no role in constitutional amendment. We understand that this provision applies to the TCRSS but for a permanent document consideration might be given to more inclusive and rigorous amendment provisions. More recent constitutions tend to distinguish technical provisions which may need more frequent revision from provisions that set out the underlying principles of the state (founding provisions, the bill of rights, principles relating to open and transparent government, devolution of powers etc). The latter then are harder to amend and usually require some popular involvement: often a referendum but usually at least a formal requirement on the legislature to inform the public and to engage with it.

165. Consideration might be given to making certain provisions unamendable, or stating that the fundamental democratic nature of the state may not be modified. Many countries have such restrictions, either in the constitutional text or as a matter of judicial practice.

X. TYPOGRAPHICAL ERRORS AND OTHER MINOR ISSUES

The second sentence of article 10 repeats, nearly verbatim, article 9(4) and can be eliminated in either place.

Art. 16(4)(a): promote women's participation in public life and ~~their~~ representation …

Art. 17(1)(f): administrations→administration

Art. 19(4): and if not released on bond is to be produced in court.

Art. 25(3), 37(3), 47(a), 103(2), 155(3), 155(7), 156(3), 157(3): why is national capitalized? This is inconsistent through the text. In some places, such as 157(5) and 158(5) national is not capitalized when referring to a proper name.

Art. 26(1): should read freely chosen representatives (plural) or a freely chosen representative

Art. 34(2): should be 'this right'

Art. 36(1): we would suggest, as a drafting matter, "All levels of government shall be based on and promote democratic principles and political pluralism. All levels of government shall be guided by the principles…"

Art. 43(a): specially→especially

Art 43(a) is rather awkwardly written: "for the purposes of consolidating universal peace and security, respect for international law, treaty obligations and fostering a just world economic order". It is not clear whether consolidating modifies all subsequent clauses. We suggest redrafting.

Art. 46(2) there is a numbering typo as between subparagraphs (f) and (g).

The National Government structure defines three government "organs." The "organs" exclude independent commissions, the public attorneys, or the civil service, though these probably would constitute discrete organs in a functional sense. We wonder if the article might more clearly refer to the entities as branches rather than organs.

Art. 69(8)(a) cross refers to Art. 69.

Art. 139 lists values and principles but the structure of the phrases are not parallel. E.g.(c), (f) and (i) are descriptive statements about the civil service. Some editing is in order here.

Art. 159 specifies that “National security” shall be subject to the authority of the Constitution and subordinate to civilian authority. The reference to “National security” should be changed to “National Security Service” as this is likely a typographical error.

Art. 162(2) (“The constitutions of the states shall conform to this Constitution”) is wholly captured by Art. 3(2) (“The states’ constitutions and all laws shall conform to this Constitution.”)

Art. 184(1)(b): ‘Neither the National Government nor the Bank of South Sudan shall guarantee borrowing by any state government without their prior approval’ may be intended to read ‘Neither the National Government nor the Bank of South Sudan shall guarantee borrowing by any state government without the prior approval of its legislature’.

SUMMARY OF RECOMMENDATIONS

1) The rule of law might be considered for inclusion as one of the foundational principles in Art. 1(5). (¶8)
2) Art. 3 might include a statement that "law or action inconsistent with the Constitution is invalid."(¶9).
3) The duty to resist and the article on sources of law might be removed. (¶¶10-11).
4) Art. 6 might designate English as the "the principal language of instruction". (¶12)
5) Well-defined limitation clauses for the bill of rights might be included. (¶14-17)
6) Social and economic rights might include provision that they are to be fulfilled by the Government "to the maximum of its available resources" and that measures should be taken "with a view to achieving progressively the full realization" of these rights. (¶18)
7) The sections on rights and fundamental principles should be harmonized. (¶19)
8) Specific rights should be marked as non-derogable in times of emergency. (¶21)
9) A clause should be added specifying that the constitution should be interpreted in line with South Sudan's treaty obligations. (¶22)
10) The bases for nondiscrimination in Art. 29 and Art. 14 could be harmonized to a comprehensive list, and might also be made consistent with Art. 122(5)(a) on nondiscrimination in adjudication. (¶23)
11) Consideration should be given to adding right to just administrative action. (¶28)
12) Mandatory appeal of death sentences to the Supreme Court could be specified. (¶29)
13) Substantive restrictions on the right to form or join political parties should be removed; instead broad-based political parties should be encouraged through registration requirements, to be elaborated in the electoral law. (¶30)
14) The citizenship provision would be best framed in or before the bill of rights. Citizenship as currently provided is vague and unduly limited. (¶¶36-37)
15) Art. 47(b) ought to read "…render public services directly and through local government. (¶42)
16) A procedure for introducing new states, produced by mergers or splits of existing states ought to be considered, possibly requiring constitutional amendment. (¶45)
17) There might be a process of certification by the Supreme Court that the state constitutions are in fact in conformity with the Permanent Constitution. (¶47)
18) The organization of State level government and its alignment with the national system should be carefully considered (¶¶48-52)
19) The Presidential role in the appointment powers of state governments outlined in Art. 165(2) should be reconsidered. (¶54)
20) Provisions on legislative dismissal of individual cabinet members should be eliminated and replaced with an impeachment process. (¶ 56)

21) There should be greater use of legislative approval of appointments, and other checks and balances. (¶56)

22) The role of ministers in the Assembly, and the fact that they seem to be allowed to retain their seats, should be made explicit. We suggest deleting Art. 56(2) in favor of Art. 57(f). (¶¶ 58-59)

23) The legislature should be able to meet without formal convocation by the president in Art.68. (¶60-61)

24) The process of concluding international agreements should be clarified. (¶63)

25) We urge a move to a truly bicameral system, while allowing for joint resolutions of the two houses for major tasks. (¶¶64-72))

26) The number of representatives per state to be elected by the State Assemblies can be designated now. (¶73)

27) It might be advisable to provide for Deputy Chairmanship positions in the legislative committees, which would be held by minority parties. (¶76)

28) Minority leaders should be selected by all parties not represented in the government. (¶78)

29) Art. 71(2)(a) should refer to the protocol of the government, not the "order within each House." (¶79)

30) An Inter-House Standing Committee should be explicitly required and provided for, and the role of the Parliamentary Service Commission defined.(¶80)

31) The words "without lawful justification" should be added to the description of the offense of refusing legislature orders to appear. (¶81)

32) The legislative process for bills affecting states needs clarification (¶¶84-86)

33) A general decision rule for the Council of State should be added. (¶87)

34) Art. 84(4) can be deleted and the legislative process in Art. 84 might be streamlined. (¶89)

35) Consideration should be given to including a general set of standards to apply to all elections. (¶92)

36) We believe the constitution implies a single-member district-based electoral system in Art. 64, which should be deleted pending careful study of electoral systems. (¶93)

37) There ought to be a safe harbor for parties that comply in good faith with a provisional order that then lapses. (¶95)

38) Inclusion of a two-term limit for the presidency is advisable. (¶97)

39) The final stage of impeachment and removal of the president should be slightly clarified. (¶100.)

40) Presidential intervention in state government should require the Council of States to approve the removal. South Africa's experience is relevant here. (¶¶102-103)

41) The commission could consider the advantages of a joint presidential-vice presidential electoral ticket. (¶104)

42) Provisions on Private money bills should be less restrictive. (¶¶106-108)

43) The division of revenue bill referred to in Art. 87 should probably refer to the National Legislature and not the National Legislative Assembly. (¶109)

44) Arts 88.7 and 90(3) on the default budget should be harmonized. (¶110)

45) More detail on taxes to be imposed at each level is advisable; in particular the system might seek to control State taxing power and not allowed to overlap with national taxes. (¶¶119,115)

46) We suggest that the CRC obtain specific technical advice on oil revenue. (¶116)

47) State borrowing might be regulated by law, rather than solely by the Bank of South Sudan. (¶118)

48) Judicial administration responsibilities should be clarified. (¶122)

49) The provisions on the judicial budget should be harmonized and clarified. (¶124)

50) The Supreme Court should be allowed to sit en banc in nonconstitutional cases. (¶130)

51) Judicial removal might be spelled out in further detail. (¶133)

52) More detail on the independence of the prosecutors is a good idea. (¶134)

53) It is possible to distinguish truly essential commissions, which should be enshrined in the constitution, from others which could easily be left to statute. (¶135)

54) A single formula for appointment and removal for independent commissioners might be considered. (¶136-138)

55) Given its role and the importance of a Commission that all candidates for election and voters can trust absolutely, it is desirable to include provisions securing the independence of the Electoral Commission in the Constitution. (¶141)

56) A Boundary or Redistricting Commission can be set up on a periodic basis. (¶143)

57) The division of labor between the Anti-Corruption Commission and Prosecution should be clear.(¶145)

58) The Human Rights Commission should be clearly given the power to refer cases to the prosecution or court. (¶149)

59) Consideration should be given to a part-time Salaries Commission that sets the salaries of top constitutional officers. (¶150)

60) The armed forces and police might be required to “respect and abide by” rather than “uphold” the constitution so as to ensure that they have no enforcement powers to take action against people alleged to have breached the constitution. (¶¶153, 157)

61) It is worth considering whether Presidential appointment powers for the armed services should be subject to approval by the Council of Ministers upon the recommendation of the concerned Minister. (¶155)

62) The National Security Service’s primary function should be clarified.(¶158)

63) The relationship of the National Security Council and the National Armed Forces Command Council should be clarified.(¶159)

64) The predicate for a state of emergency should be clarified. (¶160)

65) We recommend that both the declaration of emergency and measures derogating from normal constitutional requirements be subject to both parliamentary and judicial review. Derogation should be clearly laid out. (¶161)