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REPORT

SUDAN

ASSESSMENT OF THE SOUTHERN SUDAN REFERENDUM ACT

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ASSESSMENT OF THE SOUTHERN SUDAN REFERENDUM ACT

THE SOUTHERN SUDAN REFERENDUM ACT PROVIDES A REASONABLE BASIS FOR SOME ASPECTS OF THE REFERENDUM OF SELF-DETERMINATION, BUT IT SUFFERS FROM INCONSISTENCIES AND DOES NOT PROVIDE SUFFICIENT DETAILS ON MANY IMPORTANT ASPECTS OF THE REFERENDUM. CONCERNS INCLUDE THE TURN-OUT REQUIREMENT, A DECISION BY MAJORITY OF ›VOTES CAST‹ INSTEAD OF ›VALID VOTES CAST‹, DOCUMENTATION TO REGISTER AS A VOTER, INSUFFICIENT REGULATION OF THE CAMPAIGN, INCOMPLETE RULES ON COUNTING AND AGGREGATION OF VOTES, WEAK MECHANISMS FOR COMPLAINTS AND APPEALS AND AMBIGUOUS PROVISIONS ON ELECTION OBSERVATIONS. THESE NEED TO BE ADDRESSED URGENTLY BY THE REFERENDUM COMMISSION THROUGH REGULATIONS. WHILE THE COMPREHENSIVE PEACE AGREEMENT WAS PREMISED ON THE REFERENDUM PROVIDING A CONCLUSIVE ANSWER ON THE SOUTH'S STATUS, THE REFERENDUM ACT INTRODUCED PROVISIONS THAT MAY RESULT IN AN INVALID AND THUS INCONCLUSIVE REFERENDUM.

EXECUTIVE SUMMARY

The referendum of self-determination of Southern Sudan scheduled for 9 January 2011 is considered by many as the defining event in the implementation of the Comprehensive Peace Agreement (CPA), signed in 2005, which ended two decades of civil war between North and South.

The integrity of the referendum process will be important, on the one hand to allow Southern Sudanese to express their will and on the other hand, because flaws in the process will make acceptance of the result more difficult to achieve, contributing to tension and possibly violence.

The poll will take place in a very challenging political context. The leadership of the Sudan People's Liberation Movement (SPLM), the dominant political force in the South, advocates secession, while the National Congress Party (NCP), the dominant political force in the North, argues for preserving the unity of Sudan. The risk of polarisation is high and, if the referendum follows the pattern of the April 2010 elections, the Northern and Southern governments are unlikely to act impartially. Indeed, the stakes were lower in the April elections, because both main parties expected to win elections in their respective areas; in the referendum only one side can prevail. Hence, it will not be easy to create an open campaign environment in which voters receive balanced information that would enable them to make informed choices.

The integrity of the poll is of crucial importance. A well organised and credible process should allow Southern Sudanese to freely express their will, thereby facilitating political acceptance of the result. Conversely, a poorly managed referendum could open the door to manipulation of the result, which, in all likelihood, would lead to disputed results. This scenario implies a risk of instability and violence.

The rules for the referendum are important: a legal framework that complies with international obligations lessens the risk of disputes arising before, during and after the process, and can facilitate acceptance of the outcome.

In general, the Act provides a reasonable basis for some aspects of the referendum. However, while some electoral issues are dealt with adequately such as the referendum question, and the structure and role of the election administration, a number of provisions are ambiguous. In addition, the Act leaves it to the Referendum Commission to regulate many important aspects of the process. To date, these regulations have not been adopted.

There are a number of specific issues and concerns, as follows:

01. TURN-OUT REQUIREMENT

The Act requires that for the referendum to be valid, at least 60% of the registered voters cast their vote (turn out to vote). If the turnout threshold is not met, the referendum is repeated under the same conditions within 60 days. The Act is silent on the course of action should a repeated referendum also fail to achieve the required turnout.

It is not unusual to find a turn-out requirement in a referendum law; although more commonly it is set at 50% or less of the registered voters. The few referenda on independence that have been held in recent years did not require a specific voter-turnout. Turnout requirements may decrease voter participation because they create an incentive for voters, who wish for a proposition to fail to boycott a poll instead of voting.

Where a minimum voter turnout is required, the accuracy of voter registers becomes even more important, because they provide the 100% figure against which the turnout is calculated. This may well make voter registration even more of a contentious issue than it already is. It is also essential that the voting arrangements allow all registered electors an equal and reasonable opportunity to vote.

A scenario in which anti-secession supporters mobilise a boycott which depresses turnout to below 60%, but where an absolute majority of registered voters still votes in favour of secession e.g. 58%, may lead to a deep sense of resentment; and as such it is unlikely to put an end to the question of the South's independence. In such a scenario it could be argued that the turn-out requirement resulted in a violation of the international obligation to provide the equality of the vote.

02. DECISION BY A MAJORITY OF ›VOTES CAST‹

Subject to meeting the 60% turnout requirement, the Referendum Act (article 41.3.)¹ provides that the referendum option that gains »a simple majority (50% + 1 vote) of the total number of votes cast (...)« (emphasis added) shall be considered to be chosen. This provision is problematic because it creates a situation whereby neither of the two options may achieve 50% + 1 vote, e.g. in a very close contest the number of invalid ballots could reduce the vote totals of both options to below 50%. While this may be an unlikely scenario, an inconclusive result would not generate political stability. It would have been preferable for the Act to have stipulated the need for 50% + 1 valid votes cast. Indeed article 66 (›commitment to the referendum results‹) mentions the majority of ›valid votes cast‹, leaving it unclear what the legislator intended.

03. DOCUMENTATION TO REGISTER AS A VOTER

Voter registration is likely to be among the most sensitive aspects of the referendum process. While eligibility is restricted to persons with Southern Sudanese origins or residence, they are entitled to register to vote in the North, or in specific third countries as well as in the South. The number of voters registered in the North and abroad may prove to be contentious, particularly in view of its relevance for calculating the turn-out (see above). Worryingly, international observers noted serious flaws in the voter registration process conducted prior to the April 2010 general elections.

The provisions on what documentation is required to prove one's identity when registering as a voter appear to be contradictory. Article 28.2. of the Referendum Act requires voters to provide written documentation, while article 26.1.b. also allows oral testimony by third parties. Oral testimony may be necessary in a context where many citizens do not possess any written documents, but the provisions should be clear to ensure uniform practice of voter registration.

04. INSUFFICIENT REGULATION OF THE CAMPAIGN

The Referendum Act obliges government bodies to give equal treatment to registered parties in voicing their opinions on the referendum options. However, the Act does not oblige government bodies, officials and public authorities to act neutrally. There is no provision prohibiting state bodies from actively campaigning and from using state resources to that effect. This is of concern in a context where the state authorities in both the North and the South have strong and opposing opinions on the referendum question.

05. COUNTING AND AGGREGATION OF VOTES

The procedures for the counting of votes in ›Referendum Centres‹ (polling stations) and the aggregation of results of polling results at higher-level election management bodies are adequate and the Act contains some positive measures, such as the presence of election observers throughout the process. However, the provisions are insufficiently detailed, in particular regarding transparency in the aggregation of polling results. International observers noted significant problems at this stage of the process during the April 2010 elections.

6. COMPLAINTS AND APPEALS

The Act does not deal adequately with the filing of election complaints and appeals. While provision is made for challenging individual polling results, it appears that the overall results

¹ Henceforth all articles quoted are those of the Referendum Act if not otherwise indicated.

cannot be appealed. There does not appear to be any provision for filing a complaint against the media's coverage of the campaign, thereby weakening the value of provisions on equal treatment. These factors, among others, raise concerns that in practice there may not be effective legal remedies available.

07. ELECTION OBSERVATION

Effective domestic and international observation of the referendum is vital to maintaining transparency. Unfortunately, provisions on the rights of observers are ambiguous and in need of revision.

RECOMMENDATIONS

While it would be preferable to address weaknesses of the Referendum Act through legislative amendment (such as the discrepancy between article 43.2. and 66 on the majority of ›votes cast‹ or ›valid votes cast‹), it may be possible for the Referendum Commission to deal with many of these through adopting regulations:

- Clarifying what is needed to identify oneself for voter registration and in particular whether oral testimony by a competent Chief from the County suffices.
- Stipulating that government bodies, officials and public authorities should not engage in campaigning for either referendum option.
- Elaborating the counting and aggregation processes in detail and providing for the publication of results at all levels in a timely manner. The regulations should grant observers and agents the right to receive a copy of the official result sheets, and provision for publishing results from polling level upwards on the internet.
- Permitting the filing of complaints to election administration bodies at any stage of the process. The provisions should enable all stakeholders (including voters and domestic election observers) to receive effective remedy for violation of any provision of the Referendum Act.
- Clarifying the role of domestic and international election observers in a manner which is consistent with the spirit of the international declaration of election observation.

The Referendum Act gives a potentially crucial role to the International Organization for Migration (IOM) in assisting with the registration of voters in Northern Sudan and abroad, as well as polling, counting and aggregation of results. The IOM should strive to take a pro-active role and help ensuring that the referendum is held according to Sudan's international obligations for democratic elections and referenda. The IOM should also define minimum conditions for its engagement to avoid providing legitimacy to a flawed process.

INTRODUCTION

Michael Meyer-Resende and Geoffrey Weichselbaum of Democracy Reporting International (DRI) wrote this report.² It follows a report, published in December 2009, assessing the framework for general elections in Sudan.³

This project is part of a region-wide DRI programme of assessing election frameworks. DRI is grateful for the financial support received for this project by the Federal Service of Foreign Affairs, Foreign Trade and Development Co-operation of the Kingdom of Belgium. The views expressed in this report are those of the authors. Electronic copies of this report, as well as a summary in Arabic, can be downloaded from DRI's website.

POLITICAL BACKGROUND

The referendum on self-determination for Southern Sudan is a milestone in the implementation of the Comprehensive Peace Agreement (CPA) signed in 2005 by the Government of Sudan and the Sudan People's Liberation Movement (SPLM). The CPA, created *inter alia* a power-sharing agreement between the SPLM and the National Congress Party (NCP) for an 'interim period' of six years, ending on 9 July 2011.⁴ The interim period was meant to 'make unity attractive',⁵ before the Southern Sudanese decided their future status.

The referendum is due to be held by 9 January 2011: *»Six months before the end of the six-year interim period, there shall be an internationally monitored referendum, for the people of Southern Sudan organized by Southern Sudan Referendum Commission in cooperation with the National Government and the Government of Southern Sudan (Interim National Constitution, article 222.1).«⁶*

According to article 222.2. of the INC, the options presented to the people of Southern Sudan are: *»a) confirm unity of the Sudan by voting to sustain the system of government established under the Comprehensive Peace Agreement and this Constitution, or b) vote for secession.«*

Since inception, the implementation of the CPA has faced delays, and key elements have yet to be agreed on by the two

parties. As far as the referendum is concerned, these include: legal reforms relating to freedom of expression and association,⁷ the demarcation of the border between Northern and Southern Sudan, and the creation of a referendum commission to determine the status of Abyei. Nevertheless, the two parties continue to express their commitment to the CPA and have – albeit with delays – passed some milestones, such as the holding of general elections in April 2010.

Following intense negotiations between the NCP and the SPLM, the National Legislature passed the Southern Sudan Referendum Act on 28 December 2009, although according to the CPA, it should have been approved by mid-2008,⁸ and the Referendum Commission sworn in soon after the enactment of the Referendum Act.⁹ Thus, preparations for the referendum are now taking place under significant time pressure.¹⁰ For the SPLM, the referendum was always the CPA's 'main prize', and it is not willing to contemplate its postponement to give more time for preparations, at least at this stage. However, some analysts believe that the SPLM will eventually accept short postponement when the organisational shortcomings arising out of the condensed timeframe become readily apparent, provided that the referendum is held before the start of the rainy season (any time from April).

The CPA foresees a separate referendum to ask the residents of the Abyei whether their area should retain its special status in the North or join the Southern state of Bar el Ghazal.¹¹ The CPA provides that the Abyei referendum should take place simultaneously with the Southern Sudan referendum, but at the time of writing this report, no agreement had been reached on setting up the Commission with responsibility for conducting the Abyei referendum.

2 The authors are grateful for the comments on a draft of this report by Jérôme Leyraud, IFES Country Director Sudan.

3 <http://www.democracy-reporting.org/programmes/middle-east/sudan.html>

4 *»For the purposes of this Constitution and the Comprehensive Peace Agreement, the Interim Period (of six years) shall commence as from July 9th 2005 (...).«* (INC, article 226.4).

5 Chapeau of the CPA.

6 Henceforth referred to as INC.

7 For more details see Democracy Reporting International / University of Juba, 'Assessment of Sudan's Electoral Framework – Final report' (November 2009), 'Human rights context', p. 19.

8 According to the CPA it should have been adopted by 'the beginning of the third

year of the Interim period' (CPA, 'Implementation modalities of the Machakos and power-sharing protocols', December 31st 2004).

9 Ibid.

10 The Chairperson of the Referendum Commission, Mohammed Ibrahim Khalil, indicated *»that lack of time remaining to prepare for the referendum was a major problem! (...)* He noted that while the Constitution gives the Commission twenty-four months [to prepare for the referendum] in practice it only has six months at its disposal«. Sudan Tribune website, 18 July 2010.

11 *»Simultaneously with the referendum for Southern Sudan, the residents of Abyei Area shall vote in a separate referendum, which shall present the residents of Abyei Area, irrespective of the results of the Southern Sudan Referendum, with the following choices: (a) That Abyei Area retain its special administrative status in the north; (b) that Abyei Area be part of Bahr el Ghazal«* (INC, article 183.3). Since Bahr-el-Ghazal has been subdivided into several states, Abyei residents will choose between remaining part of the North or join Warrap state.

ANALYSIS OF THE LEGAL-ADMINISTRATIVE FRAMEWORK FOR HOLDING ELECTIONS

The following analysis is based on the official English translation from Arabic of the Referendum Act. DRI cannot attest to the accuracy of the translation.

01. RELEVANT INTERNATIONAL OBLIGATIONS FOR THE REFERENDUM

Sudan acceded to the International Covenant on Civil and Political Rights (ICCPR) in 1986. This report assesses the Referendum Act on the basis of obligations arising from the ICCPR, as well as good practices for referenda. The UN's Human Rights Committee (HRC), which is tasked to monitor states' respect for the ICCPR, adopted General Comments on many articles of the ICCPR. These provide an authoritative interpretation of the Covenant.

In the context of the referendum, two ICCPR articles are particularly relevant: The right of peoples to self-determination (article 1) and the right to vote (article 25). The referendum on self-determination of Southern Sudan falls under article 1 ICCPR. It is enshrined in the CPA and accepted by the Government of Sudan. The manner in which such a referendum should be carried out falls under article 25 ICCPR, which includes important principles, such as equality and secrecy of the vote.¹²

Article 25 of the ICCPR applies to referenda, as the UN HRC's General Comment on article 25 notes:

»Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b).«¹³

Beyond articles 1 and 25, all articles related to political rights are relevant to the process of deciding on self-determination. The UN HRC notes: *»Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.«¹⁴*

Sudan has also ratified the African Charter on Human and Peoples' Rights in 1986, which includes peoples' right to self-determination (article 20) and the right to participate freely in the government either directly or through freely chosen representatives (article 13).

02. THE REFERENDUM QUESTION AND TURNOUT REQUIREMENT

The referendum »shall be conducted in Southern Sudan and any other locations on 9 January 2011«¹⁵ (article 5). According to article 6, voters will be invited to choose between two options:

- i. »Confirmation of the unity of the Sudan by sustaining the system of governance established by the Comprehensive Peace Agreement and the Constitution, or
- ii. Secession«.

While in all probability it will be well known to eligible voters to which part of Sudan the secession question refers, it would have been preferable for »option ii« to state »secession of South Sudan«.

The Act establishes that the two options will be presented on a single ballot paper together with »two symbols referring to each of the referendum options« (article 36.2.b.), and that the referendum ballot should be »in a simple and clear form« (article 14.2.l.).

For the referendum to be valid »at least 60% of the registered voters (must have) cast their votes« (article 41.2.a.). In case the 60 % threshold is not reached, »the referendum shall be repeated under the same conditions within sixty days from the declaration of the final results« (article 41.2.b).

Establishing a minimum turnout requirement is not unusual, although referenda on independence in the last years did not include such a requirement.¹⁶ However, while other countries' referendum laws sometimes include such a requirement, it is more commonly set at 50% or less. In the European context, the Council of Europe's Venice Commission advises »not to provide for: (a) a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no [or], (b) an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.«¹⁷

Turnout requirements may actually depress voter participation because, as the Council of Europe notes, »it is in the interests of a proposal's opponents to abstain rather than to vote against it.«¹⁸ The following example, which also assumes a 60% turnout requirement, illustrates the point:

¹² *Inter alia* article 25 states: »Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote (...) by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (...)«.

¹³ General Comment 25 (1996), paragraph 6.

¹⁴ *Supra*, paragraph 9.

¹⁵ The preliminary provisions in Chapter One of the Act define »Southern Sudan« as »the geographical area comprising the constituencies of Bahr el Ghazal, Equatoria

and Upper Nile with the 1 January 1956 boundaries«. Historically, the South was composed of these three regions; subsequently they have been subdivided into ten states. »Other Locations« means »any referendum centres established by the Commission, out of necessity, outside Southern Sudan (...)«.

¹⁶ The referenda on independence of Eritrea (1993), Timor Leste (1999), and Montenegro (2006) included no turn-out requirement. They all had a high turnout: of 99%, 98% and 86% respectively.

¹⁷ Council of Europe, Venice Commission, Code of Good Practice on Referendums (2007), (CDL-AD(2007)008rev).

¹⁸ *Supra*, point 51.

Number of registered voters: 10,000,000						
	No boycott scenario			Boycott scenario		
	votes	% of vote	turnout	votes	% of vote	turnout
Against proposition	1,800,000	22.50%	76%	100,000	1.7%	59%
For proposition	5,800,000	77.50%		5,800,000	98.3%	
Did not participate	2,400,000			4,100,000		

In the example above, those that wish to defeat the proposition will lose if they cast a vote but invalidate the referendum (and hence defeat the proposition) if they engage in a collectively boycott of the poll, despite the fact that those against the proposition constitute less than one quarter of all registered voters. Such a scenario may cause a deep sense of resentment among the large majority who voted in favour of the proposition. This scenario also raises serious questions whether the votes of electors are given equal weight, which is a clear requirement under the ICCPR.

If the turn-out requirement is met, the option that gains »a simple majority (50% + 1 vote) of the total number of votes cast« (article 41.3.) shall be considered to be chosen. This provision is problematic because if there is a high number of invalid votes, neither option may reach the 50% +1 of »votes cast«. It would have been preferable for the law to have stipulated the need for 50% + 1 of valid votes cast and this is indeed the language chosen in article 66, leaving it unclear which formula applies. Serious consideration should be given to amending the legislation to avoid a scenario in which the referendum is invalidated on a technicality.¹⁹

While the Referendum Act sets out the legal consequences of a vote for unity or secession (article 67), it is silent on the question of what should happen in the event that a repeated referendum does not achieve a 60% voter turnout, or if neither option gains 50% + 1. This reflects the CPA's and the Interim National Constitution's underlying assumption that the referendum will conclusively resolve the status of the South. If technically »invalid« referenda are held, legally Sudan would continue to exist as one state. In terms of Sudan's domestic legal arrangements, the Interim National Constitution should remain in force until »a permanent constitution is adopted« (article 226.9. of the INC). However, in the event that an absolute majority of registered electors, i.e. over 50%, backed secession – albeit in a referendum considered legally »invalid« – it is unlikely that the issue would be considered as closed by the majority, which voted for secession.

03. REFERENDUM ADMINISTRATION

The Referendum Act establishes the Southern Sudan Referendum Commission (hereafter the »Commission«) as an indepen-

dent referendum management body, based in Khartoum.²⁰ The Commission »shall ensure and guarantee that all voters, without discrimination, enjoy the exercise of their right to express freely their opinion in a secret referendum on self-determination to be conducted in accordance with the provisions of the Constitution and this Act« (article 14.1).

The Commission's only function is to organise and supervise the referendum on Southern Sudan's self-determination. Unless otherwise foreseen by the INC²¹, other referenda shall be administered by Sudan's permanent National Election Commission (NEC).²²

According to the Referendum Act (article 14.2.a.), the Commission shall, *inter alia*, »organize and monitor the referendum (...) in cooperation with the Government and the Government of Southern Sudan.« Its competencies include, *inter alia*, to:

- »develop, revise, approve and keep the referendum register and issue registration cards and ballots«;
- »determine the static and mobile registration centres«;
- »issue regulations for the referendum and take the executive measures required«;
- »determine measures, regulations, timeline, registration and polling centres for the referendum, as well as the measures to ensure maintenance of order, freedom, fairness and secrecy in the conduct of registration and polling and to oversee all of the above accordingly«;
- »control the sorting and counting of ballots, the aggregation of the preliminary referendum results and declaration of the referendum final results.«²³

The Commission is composed of nine members: The Chairperson, the Deputy Chairperson and seven members. The members are appointed by the President of the Republic (currently Omar Hassan Al-Bashir), with the approval of the First Vice-President (currently Salva Kiir, of Southern Sudan). The Commission members are approved by the National Legislature with simple majority. Membership to the Commission will expire at the end of the interim period. After the adoption of the Referendum Act it took around six months for the Commission to be appointed.

The President of the Republic can remove a Commission member with the approval of the First Vice President (article 12). He can do so in case of »repeated absence for five con-

19 In this context it is noteworthy that the Council of Europe's »Venice Commission«, an expert body, advises against quorum and threshold requirements in referendum laws. See: Code of Good practice in Referendums (2006), point III.7. Sudan is not associated to the Venice Commission.

20 »The Commission shall be financially, administratively and technically independent and shall perform all its duties and powers as provided for by this Act with the utmost degree of independence, impartiality, transparency and integrity, and no one shall interfere in its affairs, duties, competences or limit its powers« (article 9).

21 A separate Referendum Commission shall be established for the holding of the referendum on the status of Abyei.

22 »The National Elections Commission shall be the only body to assume the following functions: (...) c. organize and supervise any referendum in accordance with this Constitution without prejudice to Articles 183 (3) and 220 (2) herein« (INC, article 141.2).

23 Article 14.2.

secutive meetings without permission or acceptable excuse, upon a report by the Commission to the Presidency», or in case of »conviction for a crime related to honesty of moral turpitude based on a notification made by the Commission«. Article 12.2. also establishes that »the President of the Republic, with the consent of the First Vice-President, may issue a decree to remove any of the members due to incompetence relating to the Commission's powers, competences and procedures on the recommendation of the Commission.« The Act guarantees the immunity of Commission members. It can be lifted with permission by the Presidency in case a member is caught in a criminal act (article 17).

The Commission takes its decisions by a simple majority vote, providing that a quorum (a majority of members) is present. In event of a tied vote, the chairperson of the meeting has a casting vote.²⁴ Only the Commission Chairperson and the Deputy Chairperson are required to perform their duties on a full-time basis.

Commission members must be Sudanese by birth, »be well-known for independence, competence, non-partisanship and impartiality, at least 40 years of age, be of sound mind, be literate, has not been convicted of a crime involving honesty or moral turpitude even if pardoned« (article 10.2.).

The Commission has a Secretariat whose Secretary General is appointed by the President of the Republic with the consent of the First Vice President »on recommendation by the Commission« (article 19.1.). The Secretariat General is »answerable to the Commission in the performance of its executive, administrative and financial functions of the Commission in accordance with the regulations« (article 19.2.).

The Commission »shall have an independent budget to be prepared according to the standards adopted by the State. Such budget shall be approved by the Commission and submitted by the Chairperson of the Commission to the Presidency of the Republic for inclusion within the annual general budget of the State« (article 20.1.).

While these provisions are adequate, the test is in their implementation. In order to carry out a credible referendum process, it will be important to provide the Commission with adequate human and financial resources. The April elections suffered from inadequate resourcing and this negatively affected the NEC's ability to organise elections.²⁵

At the next lower level of the election administration, there is the Southern Sudan Referendum Bureau in Juba (hereafter the »Bureau«). The Bureau is headed by the Deputy Chairperson of the Commission (*ex officio*) and has four additional members to be appointed by the Commission upon the recommendation of the Bureau Chairperson. While there is merit in »binding« the

two Commissions together through the Deputy Chairperson, the workload of the Deputy Chairperson of the Commission will be significant.

The Bureau plays a key role in the referendum process in Southern Sudan, by coordinating between the Commission and the High Committees for Referendum in each of the ten states of Southern Sudan.

The State High Committees are the next lower level of the election administration. The Bureau »directly supervise the work of the High Committees for Referendum in Southern Sudan to ensure fairness and transparency of the referendum process relating to registration, polling, sorting, counting, and aggregation and declaration of results« (article 18.3.b.). It also »proposes to the Commission the appointment of High Committees for referendum in Southern Sudan States« (article 18.3.c.). In »other locations' (i.e. Northern Sudan and some third countries), there are no High Committees.

Below the State High Committees, there are Sub-Committees for Referendum at county levels in Southern Sudan. They are appointed by the High Committees upon approval by the Bureau.

Upon recommendation by the Sub-Committees, the High Committees shall form **Referendum Centre Committees** in the counties »to conduct registration, polling, sorting, counting and declaration of results« (article 23.2.).

Outside Southern Sudan (in the North and some third countries) there are Referendum Centres to be appointed by the Commission. The Act is not explicit, but some articles imply that the Commission would also establish Sub-Committees outside Southern Sudan.²⁶ This would be reasonable, because the Commission may not have the capacity to directly deal with a potentially large number of Referendum Centres.

Commission Structure

Southern Sudan

Referendum Commission, Khartoum
 Southern Sudan Referendum Bureau, Juba
 Referendum High Committees in the States of Southern Sudan
 Referendum Sub-Committees
 Referendum Centres (Polling Stations)

Outside Southern Sudan

Referendum Commission, Khartoum
 Referendum Sub-Committees (law not clear)
 Referendum Centres (incl. Polling Stations)

24 Usually the Commission Chairperson will chair meetings. In his absence meetings are chaired by the Deputy Chairperson of the Commission.

25 »Although the NEC was established as far back as November 2008, various stakeholders expressed a broad range of concerns at the lack of preparedness for elections that took place in April 2010. The NEC was reported to be understaffed (...) and extremely late in formally adopting important procedural and operational decisions.« European Union Election Observation Mission to Sudan, Executive and Legislative elections 2010, Final Report, p. 21. Also »(...) an additional problem was the varying capacity and resourcing, both financial and technical, of the state

high elections committees (SHCs). Several SHCs, particularly in Southern Sudan, reported delayed receipt of funding from the NEC to support electoral activities and training (...). The Carter Center, »Election Observation mission, Sudan, Presidential, Gubernatorial and legislative, April 2010,« Preliminary Statement, 17 April 2010. p. 13.

26 On the one hand article 23.3. mentions that the Commission establishes Referendum Centre Committees outside Southern Sudan. The articles on voter registration also imply that there are only Referendum Centres outside Southern Sudan. On the other hand article 23.4. could be understood to mean that there are also Sub-Committees outside Southern Sudan.

04. THE RIGHT TO VOTE (INCLUSIVE VOTER REGISTRATION)

According to article 25 a person shall meet the following conditions to be able to vote:

1. »Born to parents both or either of whom belongs to any of the indigenous communities residing in Southern Sudan on or before 1st January 1956«²⁷, or »whose ancestry is traceable to one of the ethnic communities in Southern Sudan«. Alternatively a person has to be
2. »permanently residing, without interruption, or whose parents or grandparents are residing permanently, without interruption, in Southern Sudan since the 1st of January 1956;
3. has reached 18 years of age;
4. be of sound mind;
5. registered in the Referendum register.«

There is no requirement that a voter must be a Sudanese citizen. Given the large number of potential voters who are IDPs or refugees and without proof of citizenship, the legislator possibly wanted to avoid their disenfranchisement.

According to article 28, voters are registered in a »referendum register«. Registration is a right and an »individual responsibility«. The Commission prepares the referendum register in the »manner and time prescribed by regulations« (article 29.a.). These regulations are yet to be adopted by the Commission.

According to article 26 anybody may register who fulfils the eligibility requirements set out in article 25 (see above), is not registered elsewhere and possesses an ID or another identification document, or an officially approved certificate, or an ID document issued by the UNHCR. Details shall be determined by regulations.

The Act is however not clear, because in addition to article 26, article 28 also deals with proving a voter's identity, but in more restrictive terms. In particular article 28 requires written documentation, while article 26.1.b. states that the identity of a voter can also be proved by »a direct oral or written testimony by the concerned Chief from the County« (article 26.1.b.). Voter registration is politically sensitive, and the procedures should be unambiguous. The Commission should seek to clarify this point through regulations.

Eligible electors will be registered at the Referendum Centres in Southern Sudan or in »other locations« (i.e. Northern Sudan and some third countries). Not all eligible voters can register and vote outside Southern Sudan (see below).²⁸

The Referendum Commission publishes a preliminary register according to timelines that it determines in a regulation. »Registered voters' can object to entries of the register, either

concerning themselves or others. The law does not indicate how somebody who is eligible to vote but who has not been registered (and therefore cannot be considered as a »registered voter«) may file an objection to his/her omission. This may be addressed in regulations.

Objections can be lodged within seven days of the publications and should be »considered« within five days by a committee appointed by the Chief of the Referendum Centre Committee in each Referendum Centre. The Referendum Centre Committee shall publish a list with all corrections and deletions, within 15 days »following the determination of all objections« (article 30.3.a.). Voters who are concerned by deletions and corrections can object to them during this display period. After deciding on these objections, the changed data shall be submitted to the High Committee or the Commission.

Anybody who feels aggrieved by a decision on correction or deletion may appeal to a competent court²⁹ within one week of the decision. The court should rule within one week. It is positive that the law provides for a judicial remedy. However, the provision could lead to parallel appeals being made at the same time, i.e. to a court and to a registration centre. This could result in contradictory decisions. Also, the way the provision is phrased, it would not be possible to appeal to a court in case that the election administration corrected or deleted a name in response to another complaint during the 15-days period. This judicial remedy thus remains incomplete.

The Commission shall prepare the final referendum register and make it public three months before the start of polling. At that point no more objections can be made. The Commission shall make the final register available for inspection and it may give any person a copy against payment of a fee.

Referendum centres may also be in »other locations« established outside Southern Sudan, i.e. in Northern Sudan or some third countries.³⁰ Such centres shall be established for at least 20,000 »registered voters«. It is not clear how the election administration can know the number of registered voters before the registration starts. If there are less than 20,000 voters, the centre should be established in the capital of that state of Northern Sudan or in the capital of the foreign country concerned.

According to article 27.3., registration and voting outside Southern Sudan are not permissible for some categories of voters, namely:

- Anybody with ancestry in Southern Sudan before 1956, »but who was not residing permanently, without interruption, in Southern Sudan before the 1st of January 1956.«
- Permanent residents of Southern Sudan or those whose parents or grandparents are residing permanently in Southern Sudan since 1956.

²⁷ Sudan became independent on 1 January 1956.

²⁸ »County« is defined in the preliminary provisions of the RA as the »administrative unit of local administration of Southern Sudan«.

²⁹ Article 2 determines »competent court« as follows: »The court determined by the President of the National Judiciary or the President of Southern Sudan Supreme

Court, as the case may be, to be competent to rule on appeals and contraventions filed in accordance with the provisions of this Act.«

³⁰ Article 2 defines »other location« as: »Any referendum centres established by the Commission, out of necessity, outside Southern Sudan in the areas densely populated by the people of Southern Sudan namely Northern Sudan, Ethiopia, Kenya, Uganda, Australia, Britain, United States of America, Canada and Egypt«.

The provisions narrow down the categories of persons who can vote outside Southern Sudan and reflect a concern in Southern Sudan, that many voters may register and vote outside Southern Sudanese territory and thus outside the oversight of the Southern Sudanese government, claiming some link to the South. Those who reside outside Southern Sudan and are not eligible for registration and voting outside Southern Sudan, will have to travel to the South for the purposes of registration and voting.

The motivation for these provisions is understandable, but given that there is no systematic civil or residence registration in Sudan it will be difficult to ensure that these provisions are implemented accurately.

Article 27.5. calls on the ›chiefs‹ of Referendum Centres in the North to »co-ordinate with organizations formed by the people of Southern Sudan in that location and with the International Organization for Migration (IOM) to assist in the organization and supervision of the procedures of registration, polling, sorting, counting and declarations of results.« The same applies for voters abroad (article 27.6).

Voter registration will be among the most challenging and sensitive aspects of the referendum process, in particular because the number of voters registered can affect the turnout percentage and thus the validity of the referendum. This increases the incentive for manipulation of the voters register. Consequently the international community should pay close attention to the registration issue, and, if possible, deploy observers to monitor the process.

The provisions on what documentation is required to register as a voter are ambiguous. The Commission should clarify this and remove a potential source of controversy.

Generally, the Commission will need to regulate many details of voter registration which are not included in the Referendum Act.

05. RULES ON ELECTION CAMPAIGNING, CAMPAIGN FINANCING AND ACCOUNTING

The Referendum Act includes only general principles for the conduct of the referendum campaign. Article 7 provides that »the different levels of governance shall commit to creating a conducive environment for conducting the referendum«, *inter alia*, by:

- Providing an »appropriate environment and security conditions«;
- »Freedom of expression for all the people of Sudan in general and the people of Southern Sudan in particular to enable them to dispense their views on the referendum

through mass media or any other means«;

- »Freedom of assembly and movement to all people of Southern Sudan in accordance with the provisions of the Constitution and this Act«;
- »Ensure that, in accordance with the Political Parties Act 2007, the registered political parties, organizations and gatherings adhering to the Comprehensive Peace Agreement are given equal opportunities in voicing their views on the referendum options, if they are willing to do so.«

Article 46 stipulates that during the campaign period »any government official or public authority shall treat all groups and individuals equally and with the utmost impartiality.« The Act does not however commit all state authorities to strict neutrality in their official capacities. In other words, while the state authorities should treat everybody impartially (provide equitable media access, provide public spaces for rallies, etc.), there do not seem to be any requirements regarding voicing their own opinions and using state resources for that purpose.

This could be problematic. While it is accepted that state bodies can legitimately hold an opinion on a referendum question, which they may make known, there should be restrictions to avoid excessive one-sided campaigning by state authorities. This is particularly relevant in Sudan, where the main parties have clear views on the issue at question but where there is not a clear separation between ›party‹ and ›state‹ and there are high risks of the use of state resources for campaigning.

The Referendum Act only includes general rules on campaigning and does not provide any restriction on possible campaigning by state bodies and the use of state resources for this purpose. This is a crucial gap in a context where most state bodies have strong preferences for either referendum option. The Election Commission should fill this gap by adopting regulations that restrict the campaigning by state bodies.

06. RULES FOR MEDIA COVERAGE DURING THE CAMPAIGN

The media coverage of the referendum options will be of vital importance if voters are to make well-informed choices. The EU EOM's media monitoring for the April 2010 presidential elections, concluded that public and private media (TV, radio, the printed press) were mostly biased towards the incumbents, both in Northern and Southern Sudan.³¹ There exists therefore a serious risk that voters will not be exposed to both sides of the argument and critical debate on the two options.

The Act provides for a ›Referendum media programme‹ to inform voters on the referendum procedures. This will be implemented by an »independent and impartial media committee« (article 45.4.). Somewhat confusingly, the Act also uses the term

31 »Media monitoring results«, European Union Election Observation Mission to Sudan, Executive and Legislative elections 2010, Final Report, p. 33.

›media programme‹ for the official campaign period, during which the media face certain obligations.

The »Commission, the Government and the Government of Southern Sudan shall provide and guarantee equal opportunities and just treatment in the State-owned media for the advocates of the two options of the referendum« (article 45.2.). Furthermore, the Commission »shall define the rules and guidelines required to guarantee the utilization and making use of all sorts of media to carry out the media programme« (article 47.1.). Although article 47 mentions ›all sorts of media‹, the other provisions of the Act only refer to state-owned or public media.

The Referendum Act does not include any provision allowing for filing complaints on the media coverage (whether public or private). Commission regulations on campaigning in the media should clarify private media's obligations during the campaign, and provide a clear entitlement to file media-related complaints and procedures for their resolution. Ideally, a body should be empowered to review complaints and at the same time to independently monitor coverage of the referendum options in public and private media.

The Referendum Act guarantees freedom of expression during the media campaign: »it is not permissible to restrict the freedom of expression, directly or indirectly by whatever means and methods including abuse of power in the State-owned media without prejudice to freedom of expression and dissemination of information and viewpoints« (article 45.3.). Nevertheless, it is of concern that the controversial ›Journalism and Press Publication Act‹ may be used to curtail the freedom of expression as it criminalises infringement of the Journalism and Press Publication Act.³² Some of its provisions are restrictive and are not clearly worded - thereby providing scope for arbitrary prosecution.

The Act does not include any provision on filing complaints on the media coverage (whether public or private). The Referendum Commission should provide regulations for filing media related complaints.

07. POLLING PROCEDURES

Polling will take place in Referendum Centres (i.e. polling stations). The Referendum Commission »shall issue regulations for organization of polling procedures, provided that polling shall take place in seven days, except where the Commission decides to extend such period for substantive reasons so that voters can exercise their right to vote with the utmost degree of freedom and secrecy.« (article 36.1.).

Holding the referendum over a week could raise concerns about the poll's integrity, in particular because ballot boxes must

be stored safely through many nights. Multiple days of polling also contributes to referendum staff's fatigue and could impact the quality of the process. The April 2010 general elections were held over five days, but the voting was far more complex at the time (8 ballots in the North and 12 ballots in Southern Sudan). For the referendum, only one ballot will have to be cast. The Commission should consider the security risks associated to a long polling period and ensure security of polling materials during the entire polling period.

According to article 36.8., specific security committees will be set up in the North and the South of the country. In Southern Sudan, these committees shall be constituted of the Southern Sudan Police and the National Security Services. In Northern Sudan, the government shall form security committees constituted of the National Police and the National Security Services. According to article 36.8.c. »the security committees (...) shall perform their functions according to the instructions issued by the Commission.«

At the time of writing this report, the Commission has not issued a regulation setting out voting arrangements and procedures. The regulation ought to detail opening and closing procedures, verification of ballot boxes and election materials, counting and the completion of polling protocols.

The Act stipulates that voters mark their ballot by »applying his or her fingerprint in secret on the symbol of his or her choice on the ballot« (article 36.3.). Voters also mark their fingerprint next to their name in the Voter Register of a given Referendum Centre to indicate they have received a ballot.

The Commission can adopt regulations to address »polling procedures for people with special needs« (article 36.4.), but it is not clear if this could also be used to provide for voting by persons who are physically unable to reach the Referendum Centres, such as war wounded, the aged or infirm, hospitalised persons, and those in detention that have not been convicted.

08. OUT-OF-COUNTRY VOTING

The Act provides for the possibility for Southern Sudanese, who live abroad, to register and to vote there under certain conditions (see above chapter on the right to vote). The Act provides little detail on the procedures for out-of-country voting, only noting: »When the referendum is being conducted in any location outside the Sudan with due consideration to the powers and competences of the Chief of the Referendum Centre, the Chief of the Centre shall coordinate with organizations and associations of the people of Southern Sudan in that country and the International Organization of Migration (IOM), with the participation of the country hosting the refugees and immigrants or expatriates from Southern Sudan in the procedures of registration, polling,

³² Article 24 of the Journalism and Press Publication Act establishes that sanctions and penalties ranges from apologies to fines but also criminal liability of the editor-in-chief for »whatsoever published on the newspaper«.

sorting, counting and declaration of the results« (article 27.6).

Generally it is positive that Southern Sudanese abroad, many of whom are refugees, are enfranchised. However, many important aspects are not addressed by the Act. This gap will have to be filled through the adoption of regulations by the Referendum Commission.

The Referendum Act gives a potentially crucial role to the International Organization for Migration (IOM) in all aspects of out-of-country-voting, as well as voting in Northern Sudan. The IOM should take a pro-active role and help ensuring that the referendum is held according to international standards for a democratic referendum. The IOM should also define minimum conditions for its engagement to avoid providing legitimacy in case the process is flawed from the outset.

Positively, Southern Sudanese abroad can participate in the referendum, but the Act provides few details. This area will need detailed regulation by the Commission.

The International Organization for Migration (IOM) may play a key role in the referendum process as far as voting outside Southern Sudan is concerned. It should take a pro-active role to help ensuring that the referendum be held according to international obligations and also define minimum conditions for its engagement, to avoid providing legitimacy to a process if it is flawed from the outset.

09. COUNTING OF VOTES

Votes are counted in the Referendum Centres immediately after the polling is closed. The Referendum Act details the responsibility and role of the Chief of the Referendum Centre during the opening of ballot boxes and the sorting of ballots. The sorting and counting may not be stopped or postponed »until all ballots in all ballot boxes are sorted and counted« (article 38.3.). Accredited observers and media representatives are entitled to attend the entire processes of sorting and counting of votes. The Chief of the Referendum Centre shall prepare five original copies of the detailed results, announce the results and display one copy publicly at a visible place in the Referendum Centre (article 40.1.), while he passes the other four copies on to the County's Sub-Committee. The Act indicates that »regulations shall determine the procedure for submitting and recording objections during the processes of sorting, counting and declaration of results« (article 38.7.).

Regulations on counting should also elaborate the counting procedures, as the law does not provide sufficient detail. The Act does not foresee that official sheets indicating the results are given to accredited observers. The Commission regulation should make provision for this, also to put observer groups

in a stronger position to substantiate their findings about the counting process.

The Voting and Counting procedures are adequate as far as they go, but many details will need to be regulated by the Commission. Observers should be given official copies of result sheets.

10. AGGREGATION AND PUBLICATION OF RESULTS

International observers criticised the result aggregation process during the April 2010 elections in Sudan. The EU EOM noted: »Overall, the aggregation of preliminary polling station results was not in accordance with procedures in over half of the cases.«³³ The EU notably criticised the low level of compliance with the obligation to display result figures at the polling stations and noted that »the whole process was delayed and became untrustworthy and results were untraceable.«³⁴ The Carter Centre indicated that »the tabulation process was chaotic and lacked transparency throughout the country, raising serious questions about the accuracy of election results.«³⁵ The lack of transparency was compounded by the lack of access of observers to Tabulation Centres.³⁶

Given the polarised political context, all possible measures should be taken to ensure that the process of counting, aggregating and publishing results is fully transparent. This may serve to enhance public confidence in the referendum's outcome. A repeat of the flaws that characterised these crucial phases in the April elections could lead to a serious escalation in political tension.

According to the Referendum Act, the results are »declared« at all levels of counting and aggregation (article 41). The Act does not however specify what constitutes a »declaration«. This should be detailed in regulations by the Commission. In the interest of transparency, the regulations should require declarations to be made in written form and include all data from the lowest level upwards e.g. the declarations made by Sub-Committees should include the results of each Referendum Centre³⁷ in the county in addition to the aggregation of those results, and so on for each level. Ideally the data should be presented in tabulated form. This would enable any interested party to verify the addition of votes and to compare individual results against results collected by referendum options' advocacy groups³⁸ or observers.

The Act requires the Referendum Commission to publish »preliminary results«. If there are no appeals against these, they are considered to be final (article 41). In other countries the term »preliminary results« usually refers to results, which have been gathered quickly by the competent body, but have not been thoroughly verified. In many jurisdictions, the competent body will then issue »preliminary« (or »provisional«) results, usually

33 EU EOM Final Report, p. 45.

34 EU EOM Final Report, p. 6.

35 p.3 Statement of 10 May 2010, »Carter Center reports wide-spread irregularities in Sudan's vote tabulation and strongly urges steps to increase transparency«.

36 *Supra*, p.3.

37 If more than one ballot box is used in a referendum centre, the result of each box should be declared by the sub-committees.

38 See more details hereunder: »Domestic / International Observation«.

based on official documents, before it issues fully verified ›final results‹ some time later. The advantage of issuing preliminary results is that electors are able to see the ›general trend‹ of the outcome as announced by a competent authority. It is a potential concern that the Referendum Act does not provide for preliminary results in this sense, as the official process of aggregating the results on the basis of forms is likely to be time consuming and if the Commission waits to receive all official documents before announcing the it is likely that an ›information vacuum‹ will occur.

The aggregation of results from different Referendum Centres is one of the most important phases of the referendum process. The Referendum Commission should learn the lessons from the April 2010 elections, and ensure that the aggregation of the results is as efficient and transparent as possible, thereby contributing to public confidence.

The Commission should adopt regulations that provide more details on how the aggregation process is carried out. For the sake of transparency, it will be imperative that all results are promptly published at all levels in all detail and that agents of advocacy groups and observers are provided with official result sheets.

11. COMPLAINTS AND APPEALS, ENFORCEMENT OF ELECTION RIGHTS

The Act provides for complaints and appeals to be filed during the voter registration phase and after the preliminary announcement of results. It provides no remedies for all possible violations of the Referendum Act, for example provisions related to the campaign or the conduct of media.

According to article 38.7., the regulations (to be adopted by the Referendum Commission) ›shall determine the procedure for submitting and recording objections during the processes of sorting, counting and declaration of results.« Beyond article 38.7. there are no provisions regulating objections against the work of the higher-level election bodies, which aggregate the results.

As far as judicial remedies are concerned, the Act only provides for appeals to be filed against the results published by the Referendum Commission, the highest body of the election administration. Article 43.1. stipulates that any voter can lodge an appeal against ›the preliminary results declared by the Commission« in a Referendum Centre where he/she voted. The appeal should be submitted to ›the court‹ within three days from the date of the declaration of the preliminary results by the Commission and the Court shall decide within a week of reception. According to article 2 ›court‹ means the National Supreme Court or the Supreme Court of Southern Sudan. The Referendum

Act does not clarify which of the two Courts has jurisdiction in these cases. Possibly this is clear from other laws. If not, there would be significant potential for confusion on a highly sensitive matter.

In addition, it is not clear what role the Referendum Centres ought to play in this process. Possibly the legislator meant to make appeals easier for voters, by allowing that they be lodged at Referendum Centres, close to the voters. In that case the Referendum Centres would have no other task than forwarding an appeal to the Supreme Court. However, this procedure appears to be unrealistic and ineffective. It would not be reasonable for a voter to appeal against the result in a Referendum Centre all the way up to a Supreme Court.

The Act provides no remedies at interim levels: i.e., there is no provision allowing a complaint to be filed with the election administration concerning the aggregation of referendum results by the higher levels of the election administration. Likewise, there is no provision to appeal to courts against those results e.g. those published by a Sub-Committee. The system does not provide for an effective remedy against falsification of election results and is therefore not ›self-correcting‹. Any mistakes that may occur at lower levels of aggregation could only be remedied at the end point of the aggregation: i.e., by appealing to the Supreme Court against the overall final results. This puts an unrealistic burden on the Supreme Court, as potentially it would have to investigate and decide on a large number of cases on individual Referendum Centres. In addition the Supreme Court would be tasked to solve all these cases within a week.

Article 14.2.i. stipulates that the Commission should cancel the referendum results in any Referendum Centre if so decided by the Court ›if it is proven that there was any corruption regarding the correctness of procedures in that centre.« It should then reorganise the polls in that Referendum Centre within seven days of the Court decision.³⁹

Article 14.2.i. addresses ›cancellation of results by the Referendum Commission. It is not clear if the Supreme Court should use the same criteria (proven corruption). At any rate, the criteria are not sufficient, because there may be instances where results were based on an incorrect vote count or aggregation of results, rather than corrupt practice and because there may have been cases of corruption of procedures, which had no measurable influence on the results.

The Commission should make use of its regulatory powers to provide procedures for filing complaints against election results at all levels of the counting, aggregation and declaration phases.

Beyond the weaknesses in the system of legal redress, it must be noted that serious concerns exist regarding indepen-

³⁹ A number of articles (53 to 60) deal with sanctions for illegal practices and offences against provisions of the Referendum Act. However, these only address individual liability and do not deal with the question of their impact on the referendum process.

dence of the judiciary in Sudan.⁴⁰ According to the EU EOM to the April elections, »the independence of the judiciary in Sudan in dealing with election cases (...) was doubted by the great majority of the lawyers and political party representatives (...).«⁴¹

There are no adequate provisions for effective legal remedies, in particular regarding filing petitions against official election results. Voters can file complaints at Referendum Centres regarding the counting of votes and results and they can file an appeal with the Supreme Court against the national results, but there are no means of remedying an error or fraud, which takes place during the aggregation of results between the Referendum Centres and the National Referendum Commission.

Similarly there appears to be no provision to challenge the legality of decisions taken by referendum administration bodies. Provision should be made for decisions and regulations adopted by the Commission to be challenged in court e.g. as regards the compatibility with the Act, or concerning voters' rights.

To address this lack of effective remedy, the Commission should adopt regulations that would, at a minimum, allow voters to lodge complaints directly with all bodies of the election administration.

12. DOMESTIC / INTERNATIONAL OBSERVATION

Observation of the whole referendum process, including voter registration, is vital for transparency. The role of party agents, normally of crucial importance in ensuring political confidence in the polling and aggregation processes, is not clear. While observation by parties as »referendum options advocacy groups« may be possible, the Act is not clear regarding their rights and duties and how they will be designated.⁴² The role of domestic and international non-partisan observers and media should also enable independent scrutiny to the process.

The Act states that »the referendum process shall be conducted under international, regional and local observation«, namely by those countries that sponsored the CPA, but requests from other organisations should also be accepted (article 61). Article 61.2. provides that the Commission »shall constitute observation Committees« from various groups, including: legal counsellors of ministries, ex-public service employees, civil society organisations and local, regional and international observers.

The wording of the law is unclear, because it suggests that the Commission »constitutes« such observer groups. However, if the Commission »constituted« such groups they could not be

considered to be independent. The Commission should rather accredit such groups.

Article 62 details the rights of observers, which include observation of registration, sorting and counting of votes, and ensuring that they are carried out fairly and impartially. They are allowed to »visit and inspect the registration, polling, sorting and counting centres at any time without previous notice.«

These are important safeguards, but the Act is narrow in that it focuses only on observation of some aspects of the referendum, while omitting others. It does not, for example, mention in particular that observers may also follow the campaign, including the conduct of media. The International Declaration of Principles for Election Observation⁴³ makes clear that observers should have the right to follow all aspects of an election.

According to article 62.2., observers should not interfere with the work of the election administration, which is a reasonable restriction. The Commission is tasked to adopt additional regulations on the accreditation of observers (article 61.4.). These should clarify the ambiguous language of the Act on the Commission »forming« observer committees (see above), and also for monitoring groups composed of nominees of »advocacy groups«, as well as introducing additional safeguards of transparency, such as handing official result sheets to observers. Regulations should also facilitate accreditation of local observer groups, which may only wish to observe some regions. For example accreditation by sub-committees would make the process easier for such groups.

Referendum observation will be crucial for the transparency of the process. When regulating observation in more detail, the Referendum Commission should clarify ambiguous language of the Referendum Act and stipulate that referendum observers are given access to the result aggregating levels and that they be given official result sheets at all levels of counting and aggregating the results.

40 The 1989 coup »opened up a situation in which the judiciary's independence was significantly undermined. The implementation of a new Islamic Constitution led to the extension of NCP influence over the judiciary, which is now widely seen as poorly trained and corrupt. (...)«. Bertelsmann Stiftung, Bertelsmann Transformation Index 2008 – Sudan Country Report, p. 7.

41 EU EOM Final Report, p. 37. 42 Article 57 mentions »referendum options' advoca-

cy groups«, but the Act never specifies what they are, how they would be accredited and what their rights and obligations would be. In practice, such groups should be allowed to monitor the referendum and play a similar role as »party agents« in an election process.

43 DRI endorsed the International Declaration of Principle for Election Observation. The declaration can be downloaded here: <http://www.ndi.org/node/13494>

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