

Building a Sustainable South Sudanese Model for Transitional Justice System

I would like to thank H.E. the President Salva Kiir Mayardit, H.E. First Vice President Dr Riek Machar Teny, Ministers, Technical Teams and Taskforce for organising this conference on transitional justice in South Sudan and inviting me to speak. The openness with which discussions have taken place demonstrates an impressive and positive trajectory for the country to embark on its reconciliation and healing process. A positive commentary that is not often associated with South Sudan but is a welcome development to move away from external perceptions and agendas of this country.

I suggest this conference represents South Sudan solutions for South Sudan's problems as you are taking ownership of the process that gives peace to your people. The people of South Sudan have a history of building peace initiatives. H.E President Salva Kiir Mayardit, reminded us of the peace processes in 1997 and 2005 and South Sudan is currently taking a leading role in trying to mediate peace in Sudan. As much as South Sudan is understood externally by the conflicts that have occurred, it also has a long history of internally driven peace initiatives.

In 1999 the Wunlit peace conference brought together hundreds of people from different communities to address the ongoing conflicts. Wunlit recognised the importance of bringing people together and the role dialogue plays in bringing peace. It was based on South Sudanese customary, traditional and religious practice. The President provided us with an excellent outline of 64 years of South Sudan's struggles and the unnecessary armed struggles of recent years. Yet, despite recent unjustified conflicts, South Sudan as a nation, rather than a region, is now driving its own Roadmap for peace. In August 2022, South Sudan embarked on a transitional roadmap on a pathway to elections. This Roadmap recognises the challenges ahead but also sets a marker for the country to forge its pathway to lasting peace. South Sudan is creating solutions to South Sudan's problems.

We have heard and drawn lessons from many speakers over the course of the last few days but ultimately, South Sudan must learn from these lessons and draw its own reconciliation and healing process that reflects the needs of the South Sudanese. Albie Sachs reminded us that any reconciliation process has to hold and to do this it must be birthed here in South Sudan: for the people and among the people.

This conference is called Building a South Sudan Model for Transitional Justice. Transitional Justice is designed to get you from A to B. You need patience for this journey. We were reminded by the representative from Sierra Leone that reconciliation is a process that goes beyond the truth commission so we must be alive to this reality, manage expectations and recognise this journey starts here. It will be uncomfortable, traumatic and challenging. But everyone involved has a responsibility to enable the freedom for these forums to occur. All South Sudanese should be included – not an easy feat across this vast country but logistical challenges should not prevent voices from being heard. As we heard from the wisdom and experience of Albie Sachs, a truth commission cannot carry a society but can ease the transition.

The Commission has a responsibility to take individual experiences and transform them into the national experience. Such a record enables social and political reconciliation. Acknowledging the pain that has occurred, creating an impartial record, and allowing the process to inform the future prosperity of South Sudan must be key objectives; however, this process and its outcomes should not bind the country in a past that is defined by conflict. The armed struggle is a key part of South Sudan's national history but it does not have to be its future. Providing people with the chance to give their voice in the truth telling process

for the nation of South Sudan and its future, will ensure a sense of ownership and authenticity. Sustainability is a key word here because whatever processes are created must last the nation and not burn up and destroy the nation.

The conference has touched on this, but for any transitional justice to take root and inform the future of the country we must recognise that there are two streams of justice. The first, is the ordinary justice process that permits development for the future and regulates the country now. The second, is the extraordinary justice system that includes a Commission for Truth, Reconciliation and Healing that deals with the past and is part of a conflict justice system. These are two distinctly different processes. Without investment in the first, the latter sits at odds with the prosperity of the nation. It is of limited use if citizens struggle have no access to justice. The ordinary justice system must function, providing a service to your new society. As we were reminded yesterday, there are many conflicts taking place in South Sudan related to such things as land, cattle, movement of people. These issues, combined with a proliferation of arms pose significant security issues. If people do not have access to justice for these crimes, then they will grow frustrated with the extraordinary justice process. Pressure from the international community to implement Chapter 5 mechanisms that prevents the Government prioritising investment in ordinary, national justice processes is unhelpful.

An important transition you are facing here is your movement from customary and sharia law, the previous justice systems your people experienced to a common law system. This takes time and resources. I will now turn to the extraordinary justice system.

Commission for Truth, Reconciliation and Healing (CTRH)

Putting aside the modalities, simply, the Commission's objectives should be to establish:

1. What happened?
2. Who did it?
3. Why did they do it?
4. How did they do it?
5. What were the consequences?
6. How can this be resolved for the better good of our society?

Those points reflect the main objectives of Article 5.2 of the Revitalised Peace Agreement of 2018. Does the draft Commission for Truth, Reconciliation and Healing Bill that has been provided to this conference achieve such objectives?

It does. It is a Bill entirely consistent with the Revitalised Peace Agreement. As we have heard, this work to date has been funded by the Government with donations from the sponsors of this conference (who deserve great credit for their sponsorship and support). We have also heard that the financing of the CTRH will be made from the next budget, no doubt once the National Legislative Assembly and the President have consented to the Bill entering into law.

We have also been provided with the Report of the Technical Committee on the Establishment of the CTRH Chaired by Mrs Alokiiir Malual Aguer. This is an important report compiled from focused group discussions, questionnaires, interviews throughout South Sudan. The report details the excellent work of this Committee and is part of the history behind the CTRH. It has laid the foundations for the truth telling process to begin. Speakers in this conference have enjoined the Government to consult with the people and that has been done and commitment reinforced by Ministers present during this conference. The report also sets out further points to assist the Commission when it is appointed on how it is to operate.

My comments on the draft CTRH Bill are as follows:

Adding a preamble to the context and providing a statement to the citizens of South Sudan as suggested by Justice Albie Sachs is a very good idea and should be considered. There are also some drafting points that I will respectfully submit to the Hon. Minister of Justice and Constitutional Affairs for consideration that are too fine to be raised in this forum. However, there are main points I raise with respect:

- (i) The Government to establish a body of persons consisting of academics, eminent persons, religious leaders and civil society organizations, to conduct selection of the commissioners, for appointment by the President of the Republic.
- (ii) Under the *Powers and Functions of the Commission*, I would explicitly say that inquiries of the Commission may take place in the capital or any other place necessary for it to fulfil its objectives. The point was raised yesterday regarding the important role local officials play in bringing their communities into the transitional justice process and this message must be heeded for the aims and objectives of reconciliation and healing to hold.
- (iii) Articles 2(a), 9(3) and 12 so far as they apply to the quality of Commissioners should be consolidated.

- (iv) Remove an age minimum of 45 years for qualification to be a Commissioner. I come from a country where the Prime Minister is aged 43. Young people are key to the future of South Sudan so they must be recognised and included in all the transitional justice processes.
- (v) Increase the number of Commissioners involved. As you are bound by the Peace Agreement to 7 of which at least 3 are women; appoint 11 Deputy Commissioners, of which at least 3 should represent the religions of South Sudan; and a minimum of 6 Women.
- (vi) Provide the Chairperson in *Functions and Duties* with the power to ensure good order and conduct of its hearings, proceedings, operations and business to achieve the objectives of the Bill.
- (vii) Clear provisions on powers of the Commission to summon any person to give testimony.
- (viii) Statements to the Commission should be under oath. This is essential to get to the truth.
- (ix) All licensed media outlets in South Sudan should be allowed to cover the CTRH processes, without interference or censorship.
- (x) Amnesty provision for persons who fully and truthfully inform upon all crimes committed or for which they were responsible. Granting of amnesty

will be conditioned on the power of the Commission to issue financial penalties. This will be means tested and the sequestered funds given to the Reparations fund and distributed as returning their ‘debt’ back to the victims of South Sudan.

- (xi) There needs to be a temporal scope for the CTRH that is not too far back in time, otherwise it overly extends the work of the Commission and delays its report. For that reason, 2011, the date of independence and the creation of the state of South Sudan be the commencement for its inquiries. I am concerned though, that the historic communal conflicts should not be overlooked as they persist today, as we were told yesterday. The Commission should consider context to inform itself and make its recommendations.
- (xii) As much as there needs to be a preparatory period for the CTRH, there needs to be a finality to the work of the Commission by which time its business has been finished. Perhaps, 4 years: 6 years in the Bill is too long and risks frustrating its objectives. This will be contentious as the more the CTRH is wanted to achieve the more time it will need. However, the Ministry of Justice should establish a body to continue handling the unfinished cases of the CTRH.

- (xiii) Clear guidelines need to be included on the sharing of information between the CTRH and any future court or you risk undermining trust in the integrity of the CTRH and deterring people from coming forward.
- (xiv) Storage of the evidence and archiving of the materials on behalf of the nation need to be included as an impartial public and historical record accessible to all. These materials will be an essential part of South Sudan's history for generations to come and learn from the past to prevent conflict occurring again in the future.
- (xv) It is unclear in Article 7(20) what the Executive should be enjoined to do upon production of the Commission's final report and its conclusions and recommendations. What is the final outcome?

Compensation and Reparation Authority Bill

We have heard repeatedly over the course of the last few days that Reparations are about Repair. Real reparations are about repairs for the good of the nation. Repairing the nation - communities as well as people. War has been present in the region of South Sudan for the last 64 years so, taken literally, everyone is a victim, albeit to vastly different degrees. Getting the issue of Reparations right is imperative or you risk creating further divisions.

How do you remedy the harm and address the harm that conflicts have caused? These are highly emotive and complex issues that need to be internally driven. South Sudan understands the needs and requirements of its people. This process needs to be transparent and expectations need to be managed. In this respect, discussions on material and financial reparations need to continue beyond this conference. Socio-economic justice is imperative for the future of the nation. The interruption of economic development caused by the unnecessary conflicts in recent years has exacerbated this but there is now an opportunity to redress this through the Roadmap and transitional justice processes.

Reviewing the Compensation and Reparation Authority Bill I make the following points:

- (i) It is not clear what category or class of victim should be included. The Bill variously refers to “consequence of the conflict”, “redressing injustice”, “constitutes injustices”, “as a result of sexual violence”, “destroyed by the conflict” and “verification by database”. These categories need defining. Is it to be a Reparations act that correlates to the scope of the CTRH? If it is, it should expressly link to the CTRH Bill. If not, it needs an eligibility

article that is clear. Again, a preamble would be important to establish its context and purpose.

- (ii) The Bill must contain clear structures such as the governing body, secretariat and the staff.
- (iii) Establishment of a Fund for the purpose of providing victims with services.
- (iv) Provisions of communal services rather than personal reparations.
- (v) Involvement of faith based, traditional or religious leaders in the reparation process.
- (vi) Establishment of victims' support and memorial centers.

Individual reparations can be given at the same time as the CTRH is operating. Collective reparations are not so easy to award before the completion of the Commission's work. Reparations on a wider scale would likely be made following the public release of the CTRH report.

With regards to a Hybrid Court, I outline important issues to consider based on my own experiences as an international criminal barrister who has been involved in many war crimes tribunals over the past 27 years

Sequencing

Truth will be found in a truth commission, not a hybrid court. A court does not provide you with the truth. You do not get the truth from a court case; you only get guilt of one side over another which is the story of the conflicts to date. A court produces a judgment on facts limited to specific issues framed by a criminal charge. A truth commission gives you a forum to hear everyone's truths. Over the course of a conflict, there are many victims and many perpetrators and for people to live together again in peace – neighbour with neighbour, we need to confront these uncomfortable and painful truths to help build trust. Trials also take years, decades meaning a country is anchored to its conflict instead of progressing. There is no requirement under the Revitalised Peace Agreement 2018, for a Hybrid Court to operate at the same time as a CTRH. If it did it would obstruct the CTRH getting to the truth. Any attempt to establish and operate both the CTRH and Hybrid Court simultaneously will result in a dilution of funding, political will and resources, it will defeat the expectations of the people. This has happened in other tribunals such as Sierra Leone.

The impetus for a Hybrid Court comes from the international community. It is a prescriptive model for transitional justice that seemingly 'ticks the box' for

accountability. Yet, it is short-sighted in a country struggling to maintain peace and foster reconciliation with a struggling justice system. The cost in creating and sustaining a hybrid court is significant. Lessons from previous courts are instructive. Financially the costs of international and hybrid courts are excessive. The Special Court for Sierra Leone cost \$300 million dollars, the Special Tribunal for the Lebanon cost \$1billion with only 1 trial heard, 1 conviction and 3 acquittals. The ICTY cost \$1.2billion and lasted 24-years, and it is still ongoing with something called the Residual Mechanism with judges and staff. The ICTR cost \$2billion and the Extraordinary Chambers in Cambodia exceeded \$300million with only 3 convictions. These figures do not include the residual costs – millions per year, involved following court’s completion. If a Court is not called for under a Security Council resolution it is funded by voluntary contributions meaning funding is not guaranteed and tied to donor country contributions.

Alongside the financial costs, the drain on South Sudan’s judicial resources to staff a hybrid court would be significant. It would draw qualified staff away from the domestic judiciary at a time when South Sudan does not have enough judges to fulfil its own domestic judicial requirements and is looking to bolster its domestic institutions and expertise.

A hybrid Court also means foreign judges deciding South Sudanese cases – does that provide effective justice when internationals are involved? Having internationals outside your scope is not necessarily a recipe for success. I was defence counsel for President Kenyatta at the International Criminal Court, a case exclusively based on false witnesses and inadequately investigated. At the UN court for the former Yugoslavia I was defence counsel in the Gotovina and Cermak case, if you want to see an example of a misplaced case go on to YouTube and see my cross-examination of the Prosecution’s expert witness that collapsed in 10 minutes. The very first case at the Yugoslavia Tribunal was that of Dusko Tadic and in which I was also defence counsel. We exposed in that case a false witness called L, planted by a foreign power that covered one-third of the charges and was entirely false.

Before ending, I would like to commend the conference organisers and South Sudan for ensuring a platform for discussions on how to include and represent victims in the transitional justice processes in South Sudan. As the speakers yesterday reminded us, practitioners looking after the interests of victims are not normally included in the planning for transitional justice mechanisms. We have heard discussions on what we mean by Justice and Reparations and although

drawn from other experiences, we have had the opportunity to consider what this means for South Sudan. These issues will continue beyond this conference but a dialogue has begun and we are understanding the challenges and opportunities in creating South Sudan solutions for South Sudan's problems.

There is much to do and I urge all of you to support the work of the Honourable Justice Ruben Madol Arol Kachuol Minister for Justice and Constitutional Affairs.

A handwritten signature in blue ink that reads 'Steven Kay KC.' with a horizontal line under the name 'Steven'.

Steven Kay KC

9BR Chambers

London

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