



## AU Commission of Inquiry on South Sudan

Addis Ababa, Ethiopia P. O. Box 3243 Telephone: +251 11 551 7700 / +251 11 518 25 58/ Ext 2558  
Website: <http://www.au.int/en/auciss>

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**FINAL REPORT OF THE  
AFRICAN UNION COMMISSION OF INQUIRY ON SOUTH SUDAN  
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EXECUTIVE SUMMARY  
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**ADDIS-ABEBA, 15 OCTOBER 2014**

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**A. INTRODUCTION**

1. As part of its response to the crisis in South Sudan, the Peace and Security Council of the African Union (AU), at its 411th meeting held at the level of Heads of State and Government, in Banjul, The Gambia, on 30 December 2013, mandated the establishment of the Commission of Inquiry on South Sudan (AUCISS). In the said communiqué, the PSC requested:

[...] the Chairperson of the Commission, in consultation with the Chairperson of the African Commission on Human and Peoples' Rights (ACHPR) and other relevant AU structures, to urgently establish a Commission to investigate the human rights violations and other abuses committed during the armed conflict in South Sudan and make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all South Sudanese communities. Council requests that the above-mentioned Commission submit its report to Council within a maximum period of three months.

2. In specific terms, the AUPSC Communiqué mandates the AUCISS:
  - a) To investigate the human rights violations and other abuses committed during the armed conflict in South Sudan;
  - b) To investigate the causes underlying the violations;
  - c) To make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all South Sudanese communities with a view to deterring and preventing the occurrence of the violations in future; and
  - d) To make recommendations on how to move the country forward in terms of unity, cooperation and sustainable development;
  - e) To submit a report within a maximum period of three (3) months.
3. Pursuant to the AUPSC Communiqué, the Commission adopted the Terms of Reference (ToR) detailed in the Concept Note Relating to the Establishment of the AUCISS are to:
  - a) Establish the immediate and remote causes of the conflict;
  - b) Investigate human rights violations and other abuses during the conflict by all parties from 15 December 2013;
  - c) Establish facts and circumstances that may have led to and that amount to such violations and of any crimes that may have been perpetrated;
  - d) Compile information based on these investigations and in so doing assist in identifying perpetrators of such violations and abuses with a view to ensuring accountability for those responsible;

- e) Compile information on institutions and process or lack thereof that may have aided or aggravated the conflict resulting in violations of human rights and other abuses;
- f) To examine ways on how to move the country forward in terms of unity, cooperation and sustainable development;
- g) Present a comprehensive written report on the overall situation South Sudan to the African Union Peace and Security Council within a period of three (3) months from the commencement of its activities.
- h) Make recommendations based on the investigation on the following:
  - appropriate mechanisms to prevent a recurrence of the conflict
  - mechanisms to promote national healing and cohesiveness, particularly focusing on the need for all South Sudanese communities to live together in peace;
  - modalities for nation building, specifically focused on building of a functional political order, democratic institutions and post-conflict reconstruction;
  - accountability mechanisms for gross violations of human rights and other egregious abuses to ensure that those responsible for such violations are held to account.

4. The Commission interpreted its mandate to consist of four focal areas: healing, reconciliation, accountability and institutional reforms. The Commission approached its mandate in a holistic manner, emphasizing the interrelatedness of the mandate areas.
5. Following consultations, the Chairperson of the AU Commission formally announced the creation of the AUCISS on 7 March 2014 at the Headquarters of the African Union. The Commission is constituted as follows:

The Chairperson:

- i) H.E. Olusegun Obasanjo, Former President of the Republic of Nigeria.

Other members of the Commission:

- ii) Lady Justice Sophia A.B Akuffo, Judge of the Supreme Court of Ghana, President of the African Court on Human and Peoples' Rights.
- iii) Professor Mahmood Mamdani, Professor and Executive Director, Makerere Institute of Social Research, Makerere University, Kampala, Uganda, Herbert Lehman Professor of Government, Columbia University.
- iv) Ms. Bineta Diop, President, of Femmes Africa Solidarité (FAS), AU Chairperson's Special Envoy on Women, Peace and Security.
- v) Professor Pacifique Manirakiza, Professor of Law, University of Ottawa and Member, African Commission on Human and Peoples' Rights

6. The Commission was sworn in on March 12, 2014 and thereafter adopted a programme of work.

## **B. CONCEPTUAL FRAMEWORK**

7. Following its establishment, the Commission developed a conceptual framework to guide its work. The conceptual framework sets out the Commission's appreciation of its mandate including the focal areas of the commission's inquiry as well as key concepts and terms that frame the commission's work. These aspects include the Commission's understanding of its mandate as it relates to healing & reconciliation, accountability and institutional reforms.
8. In addition to the Conceptual Framework, the Commission also developed various policies to guide various aspects of its work. These include policies on: operational modalities; investigations; communication (includes dissemination of the Final Report); and confidentiality.

### **Temporal Jurisdiction**

9. The Commission had an open-ended mandate that ran from December 15, 2013, the day that armed hostilities broke out in Juba. In this regard, the Concept Note on the Establishment of the Commission provides that the Commission shall investigate human rights violations and other abuses during the conflict by all parties from 15 December 2013'. The other aspects of the Commission's mandate — reconciliation, healing and institutional reforms — are not time bound.
10. While temporally the Commission's mandate relates to events that flow from the eruption of violence in Juba on December 15, 2013, it is the Commission's view that the appropriate approach to our work relating to institutions as well as healing and reconciliation requires an examination of events before this date. Indeed, some respondents made the case in their submissions to the Commission.

### **Defining Key Terms**

11. The Commission's investigative mandate includes an inquiry into violations of human rights and other abuses. Violations of human rights are considered with reference to the Bill of Rights contained in South Sudan's Transitional Constitution as well as key norms in major international human rights instruments, including key African Union treaties such as the African Charter on Human and Peoples' Rights. The Commission's consideration of other abuses took into account the extent to which they may implicate violations under international humanitarian law.

## **C. METHODOLOGY**

12. The Commission developed a policy detailing its working methods. This covers various aspects including collection and analysis of data, a research strategy driven by short term and long-term goals culminating in the final report. Aware that process does determine outcomes, the Commission's working methods adopted a deliberate gender dimension, integrating gender analysis into all aspects of its mandate and themes treated in this report. The

Commission's approach is informed by its knowledge that gender violations, and more specifically sexual violations, are often dismissed as an unfortunate consequence of conflict resulting in widespread impunity for crimes that may be committed and general tolerance of gender based violence and disregard for gender equality and women's rights in post conflict settings. Not only are women direct targets, they also suffer the consequences of conflict

13. Reference to gender in the work of the Commission includes understanding what happened to women, men, girls and boys in the conflict in South Sudan. However, given the general status of women and broader challenges of gender inequality in South Sudan, gender is quite often used to refer to issues relating to women and girls.
14. It is widely acknowledged that women and girls are disproportionately affected by conflict as casualties of violence, as internally displaced persons and as refugees. Violence against women and girls in conflict harms families, impoverishes communities and reinforces other forms of inequality. In addition, women and girls suffer direct violations of their physical integrity during conflict. The Commission explores gender with particular attention to the issues of women and girls across all its mandate areas. The AUCISS paid special attention to violations suffered by women and girls extending beyond sexual and gender based violence to consider loss of education, livelihood and land, forced labour, slavery and exploitation and trafficking of girls.
15. With respect to issues relating to children and youth, the Commission took a similar approach to gender. Children are abused and used in many different forms, sometimes manipulated by political and military actors.
16. On data collection, the Commission adopted the following methods: Key Informant Interviews (KII) and consultations with various groups, including with experts; Focus Group Discussions (FGDs); on-site visits; investigation and desk-top research. In keeping with its gendered approach to all aspects of its work, the Commission held special meetings (KII and FGDs) to obtain women and girls' perspectives on all mandate areas. In order to protect respondents, the Commission adopted appropriate modalities of work including the provision of safe spaces. In its investigative work, the Commission took security measures to ensure the protection of witnesses.
17. On research, the Commission was able, in addition to reviewing some relevant academic literature, to access reports of varying scope and depth published by other actors on the on-going crisis in South Sudan. These include reports published by South Sudanese organizations as well as international organizations.
18. The Commission faced numerous challenges relating to access to relevant information. What emerged early on was that some kinds of data such as reports published on the crisis in South Sudan by international organizations have been easier to access. Other types of information, particularly government reports (and documents generally) as well as reports published by South Sudanese organizations and intellectuals have been harder to come by.

19. With this in mind, the Commission's approach was driven in part by the necessity to access all available information including from hard-to-reach sources and the need to engage with at least some of the information contained in the published reports, while filling gaps identified, the objective being to provide a fuller narrative of the situation and as complete as possible a picture of violations of human rights and other abuses that have occurred in South Sudan since the start of the armed conflict and to observe at first hand the situation on the ground to be able to buttress the Commission's findings and recommendations.

#### **D. ACTIVITIES**

20. In discharging its mandate on investigating human rights violations and other abuses during the conflict, as well as to establish facts and circumstances that may led to and/or amount to such violations and crimes, the Commission met and held discussions with or conducted interviews with regional and international leaders, government and opposition officials, South Sudan citizens, victims, refugees, internally displaced persons (IDPs), civil society organizations and intellectuals. The Commission visited various sites including IDP camps; refugee camps; alleged scenes of crimes; government offices among others. The Commission also received leaders and other stakeholders at its offices in Addis Ababa.

21. During the first three months following its constitution, the Commission conducted several missions to South Sudan and neighbouring countries during the following dates; April 16 (Khartoum), April 23-30 (Juba), May 10-15 (Kenya), May 15-18 (Uganda); May 26-June 4 (South Sudan: Juba, Bor, Bentiu and Malakal), June 5-7 (Kenya: Kakuma Refugee Camp) and Khartoum; and 20 July – 11 August (Unity, Upper Nile, Jonglei, Central Equatoria State, Western Equatoria State, Lakes State, Western Bahr el Ghazar State, Northern Bahr el Ghazal State, Warrap State and Eastern Equatoria State).

22. The Commission was granted an extension of time of 3 months by the decision of the 23<sup>rd</sup> Ordinary Session of the Assembly of the AU held in Malabo from 26 to 27 June 2014 following the presentation of its Interim Report to the Assembly of Heads of States and Government. The Commission's request for extension of time was justified by the need to conduct more extensive consultations with different sectors of South Sudanese Society in all the 10 states as well as the Diaspora (Kenya, Uganda, Switzerland, United Kingdom) and to finalize investigations. During this second phase of the Commission's work, the Commission covered the entire country between July and August in its efforts to ensure that all parts of the society – particularly those parts of the country that were not the specific theatres of violence but had been, inevitably, affected by the conflict - were given the opportunity not only to offer their perspectives on the background to the crisis but to also air their views on the way forward for the country.

## **E. OVERVIEW OF THE REPORT**

### **I. Institutions in South Sudan**

23. The Commission considered reforms that have been undertaken or that are currently ongoing in select sectors that the Commission considers to be critical to building a strong state with the aim of not only instituting a functional state that can do that which states ordinarily do but also creating effective, accountable, inclusive and democratic governance. In particular, the Commission considered the following: the system of government; executive (national and state executive, the security sector, financial management of strategic resources); national and state legislature; the judiciary and justice system; political parties and; civil society and media.
24. In terms of structure, the focus on each institution outlines the current state of the institution, evaluates past and current reform initiatives and makes relevant recommendations while at all times integrating views gathered by the Commission from different sectors of South Sudanese society in consultations held there and from South Sudanese currently residing abroad, including neighbouring countries.

#### ***Findings Relating to Context of Reforms***

25. The Commission found that state-building initiatives, which largely took the form of ‘capacity building’ in the post CPA period, appear to have largely failed to deliver for a variety of reasons. Literacy levels as well as the lack of a skilled cadre have proved to be a major challenge that confronts capacity building initiatives, a major contextual factor that has shaped the state building process. Low levels of economic development have also undermined state building. The comparative limited experience with governance in South Sudan has posed serious challenges for capacity building. Additionally, those involved in state building – perhaps overwhelmed by how needed to be accomplished to establish a semblance of a functioning state – appear to have taken on too much at once.

#### ***Recommendations Relating to Context of Reforms***

26. The Commission recommends that efforts to build the technical capacity of institutions should be accompanied by broader efforts accelerate development. In this regard, focus could be directed to the agricultural sector, which is currently underdeveloped.
27. Having learnt that the low literacy levels in South Sudan have negatively impacted the state building project, particularly aspects related to capacity building, it is critical that the government and other actors invest in education.
28. It is the Commission’s view that it will take a significant amount of time to build strong, accountable, inclusive and efficient institutions, given that initial focus has been on those deemed to be essential for the establishment of a modern state. The Commission therefore recommends a review of past state

building efforts to facilitate prioritization. Equally it is recommended that donors should coordinate their activities better to avoid duplication of efforts and broaden the focus of the state building effort.

### ***Findings Relating System of Government***

29. The Commission found a disconnect between the legal framework on decentralization and practice, with several aspects of decentralization not implemented or dysfunctional. Practice distorts the delicate balance of power between national and state government in the sense that national government intervenes in the functioning of state governments in ways that appear to lack constitutional sanction.
30. The devolved system of government in South Sudan has both unitary and federal elements; essentially a ‘hybrid system’, in part because states lack competence in judicial power and that national executive possesses limited control over states. Functionally, local governments are linked to states, which have the constitutional mandate to create and finance local government units. States receive a share of 15% of national revenue while the national government retains 85%.
31. The relationship between states and local government is problematic: states exercise de facto control over local government and provisions on election of certain local government officials have not been respected. Local government, which is a key center of service delivery, faces serious financial, human and physical resource constraints, resulting in lack of capacity to deliver services.
32. With respect to the contentious debate on federalism, the Commission found that there is a sharp divide among South Sudanese on the system of government, and that support for or opposition to federalism appears to take an ethno-regional pattern. It was also noted that views on federalism are not necessarily informed, and that the context in which the debate is unfolding (during conflict) has a bearing on the direction of the debate. It is however notable that despite this divide among ordinary South Sudanese, there is emerging political consensus among the negotiating parties in the IGAD-led mediation process that a new constitutional dispensation to be established should be based on principles of federalism taking into account the context and the views of ordinary South Sudanese.

### ***Recommendations Relating to Context of Reforms***

33. It is the Commission’s view that whether a system is denominated ‘federalism’ or ‘decentralization’, it is the ‘content’ of the system in terms of adequate devolution of resources, decision-making power and guarantees against undue interference in devolved units by the center as well as commitment to the implementation of the constitutional text that matters. The demands for federalism in sections of society are essentially about popular participation, service delivery, and guarantees for autonomy for South Sudanese in different parts of the country to decide on local priorities based on the principle of subsidiarity.



34. In view of existing gaps between the constitutional text and its implementation, the Commission recommends that political actors should commit to give full effect to the current constitution (during the transitional period) until a new one is adopted. This should limit or eliminate interference by the national executive in the affairs of state executives and legislative assemblies and facilitate the evolution of functional local governments at county and lower levels.
35. The Commission recommends that consideration should be given to repealing provisions that empower the President to remove elected governors, to dismiss or suspend legislatures and to summon or prorogue the National Assembly. These changes can be effected through minimal reforms pending the outcome of the constitutional review process.
36. In view of the expressed desire to consider systems of government cited by respondents such as the United States, Canada, Nigeria and Kenya, the Commission recommends that these systems should be studied, and the best elements that suit the context of South Sudan adopted, taking into consideration 'best practice' relating to issues considered. Political actors and drafters should resist the temptation to import 'models' deemed to have worked elsewhere without due consideration being given to context. It should however be noted that the scope and extent of devolution of executive, legislative and judicial function determines the nature of the federated state.
37. Irrespective of the devolved system that is eventually agreed upon by relevant actors, the Commission recommends that care should be taken to craft an arrangement in which the rationale for its adoption – empowering the periphery politically and economically through equitable sharing of resources and decision-making power – is not undermined.
38. While there may be need to create new units to accommodate diversity recommended by citizens and the emerging political consensus, consideration should be given to the risk of spreading resources too thin thereby depleting limited resources meant for development.
39. The Commission recommends that whatever system is created, care should be taken not to threaten the corporate existence of the nation.

#### ***Findings Relating to National and State Executive***

40. The Transitional Constitution establishes a powerful Presidency and while the text of the constitution affirms the doctrine of separation of powers, several factors (including weak legislature, lack of commitment to separation of powers and independence of the judiciary and structural links between the legislature and the executive) result in an overly powerful executive.
41. The Commission found that the fact that the President has the power to remove some state officials, often without proper controls, is one cause of instability.

### *Recommendations Relating to National and State Executive*

42. The Commission recommends that the future Constitution should establish a well- balanced system of separation of powers with adequate checks and balances. This should be achieved through: empowering and strengthening the capacity of the legislatures at both levels of government; subjecting major executive appointments to legislative approval; strengthening the judiciary (ensuring structural and financial independence from the political branches) and adherence to separation of powers, cultivating a culture of respect for judicial independence and rule of law.
43. The Commission recommends that the process of removal of the Vice President should follow the process of appointment of the Vice President and should be subject to the same conditions.

### *The Security Sector*

#### *Findings Relating to Army (SPLA)*

44. The Transitional Constitution provides a clear vision in relation to the nature and orientation of the armed forces to be installed in South Sudan following transformation. In particular, it provides that the SPLA:

[...] shall be transformed into the South Sudan Armed Forces, and shall be non-partisan, national in character, patriotic, regular, professional, disciplined, productive and subordinate to the civilian authority as established under this Constitution and the law.
45. The Commission found that prior to the outbreak of violence on December 15, 2013, South Sudan had a large standing army estimated to be 200,000 and 45,000 veterans. The Commission also heard that there are a reported 700 generals. It was noted that the necessity for a large army is in part attributed to a doctrine that holds that overwhelming force is require to win military contests, and as such, numbers matter and that view is in part linked to the militaristic philosophy that underpinned SPLA throughout the war of liberation.
46. The influence of the military appears to pervade nearly all spheres of life in South Sudan, including politics, governance and public life. A significant percentage of elected leaders at the top level are former military. For instance, it was established that 8 out of 10 elected governors are ex-military.
47. Reforms of the army and police have so far been decoupled, with the former being regarded as security sector reforms (SSR), while police reforms have been regarded as part of ‘rule of law sector’. The narrow conception of SSR has had unintended consequences: the South Sudan National Police Service (SSNPS) and other organized forces effectively became the destination for personnel demobilized from the SPLA. The result has been that the core objectives of the SSR projects – reducing force numbers to enhance efficiency

and affordability – were undermined. The Commission found that the need to create a professional national army and police may require the pursuit of alternative models of neutralizing militia, eschewing the dominant approach adopted in the post CPA period of absorbing fighters into the SPLA and police.

48. The Commission also found that the implementation of the current DDR program has faced numerous challenges, including inadequate funding, lack of political will. The Commission noted, however, that the DDR program gets the fundamentals right: the core objective articulated in Objective Force 2017 and as well as the Strategic Plan 2012-2017 of creating an affordable, effective and accountable armed force provides the vision foundation upon which to build the program.
49. The Commission is of the view that the efforts undertaken by the Government of the Republic of South Sudan in the post-independence period to neutralize militias should be revisited with a concerted effort on the removal of arms in the hands of private citizens.

***Recommendations Relating to Army (SPLA)***

50. The Commission recommends a comprehensive view of Security Sector Reform (SSR) and the adoption of a new conceptual approach that includes the armed forces and police as well as relevant aspects of the justice sector that ordinarily fall under ‘rule of Part of the transformation process of the SPLA must include not only reducing numbers, but also developing a more professional, specialized, affordable and efficient armed force.
51. In view of the fact that the entire transformation project is undoubtedly, expensive and long-term process, it is critical that resources be mobilized but more importantly, the political will to transform be cultivated.
52. The Commission recommends that reform efforts should align with the constitutional commitment to create a diverse, national army under effective centralized command.
53. To create a diverse national army that reflects ‘the face of South Sudan’, the Commission recommends that consideration be given to recruitment quotas by way of a formula to be agreed upon.
54. To limit the militarization of civilian institutions and public life in general, it may be necessary not only to delink military service and politics but also to undertake concrete measures to reform and delink the army from the SPLM, the most dominant political party with which it has been linked ideologically and in practice from the start. The Commission is aware that reforms of the SPLM had commenced at the start of the crisis in December 2013 with the adoption of relevant instruments necessary for the registration of the party as a separate entity. It is recommended that these and other relevant reforms should be carried to their logical conclusion.

55. The Commission recommends the strengthening of parliamentary oversight of the security forces in general and effective measures to structurally delink – other than at the top level of policy direction – political leadership from the military. Equally, the structural conflation of politics and military requires deeper consideration.
56. The Commission recommends measures to degrade the ability of political leaders to mobilize and arm militias, as has been the case in the past.
57. In addition, if one of the root causes of conflicts has been what is seen as an unfair and exclusionary state, the Commission recommends that the development of broader reforms that institute political and economic justice to strengthen and create a more sustainable SSR.
58. The government should prioritize the DDR programme.
59. The Commission recommends a comprehensive security review as necessary in order to reorient, not only the broader SSR process, but also the DDR program, which is currently based on force reviews of the Interim Period and the Objective Force 2017 of 2011.
60. Given the large numbers of young people in the armed forces, any demobilisation process must include the development and implementation of programmes that will provide alternatives to young people, especially men, to violence and conflict. These programmes could include, amongst others, vocational training for those demobilised from the military and police services as well as micro-finance for self-employment of tradesmen. The Commission also recommends consideration of primary and secondary school curricula that emphasises and prioritises peace building and human rights.

#### ***Findings Relating to South Sudan National Police Service (SSNPS)***

61. The existing legal framework (anchored on the Police Act of 2009 and the Transitional Constitution) covers the fundamental elements relating to the SSNPS. However, there are critical gaps in the legal framework, in part because the Police Act predates the Constitution.
62. The Commission found that the SSNPS has a history of violation of human rights, which is partly a result of the influence of the military and that training has not included human rights.
63. On gender, it was noted that while by some estimates 25% of SSNPS personnel are female, the Commission found that female officers are often relegated to lower administrative roles and that there is no meaningful programme to assure meaningful career development.
64. It is the Commission's view that conceptually and practically, the distinction between SSR (which excludes the police) and reforms of the 'rule of law sector (which includes the police, prisons and judiciary) is problematic and

should be eliminated. This would permit a more comprehensive and conceptually sound approach to SSR.

65. Further, while defence has enjoyed significant budgetary allocation (40% of national budget), the SSNPS has had to compete with other government units for limited funds. In addition, it was noted that the bulk of the police budget (over 80%) goes to salaries and conditions of service, leaving little for capital outlay equipment and human performance capacity improvement.
66. The SSNPS continues to be the destination of excess SPLA personnel considered fit to serve. This has resulted in low 'force quality' of the SSNPS.
67. There is a huge discrepancy in terms of remuneration between the SSNPS and SPLA and that the disquiet associated with the transfer of personnel from the SPLA to the SSNPS – where it is reported that some transferred soldiers believe they will eventually return to the SPLA – is linked primarily to the terms of service within the SSNPS.
68. The Commission found that the SSR programme in South Sudan has enjoyed the participation of various actors including international organizations and individual countries and that as a consequence, the initiatives undertaken by multiple SSR participants have not always aligned with government-led initiatives.

***Recommendations Relating to South Sudan National Police Service (SSNPS)***

69. The Commission notes that the essentials for police reforms which are clearly expressed in the SSNPS Reform Plan, are in place and that the challenge remains one of marshaling political will and necessary resources to carry through the reform program.
70. The Commission recommends that the legal framework governing the SSNPS should be reviewed to reflect recent developments. This should include provision for a coordination mechanism provided for in the Constitution. Equally, there is need for clarity in terms of demarcation of jurisdiction between national and state police, including regulation of recruitment and training at both levels.
71. Reform efforts to create a modern and streamlined police service should be accompanied by a budgetary increase commensurate to the extensive roles that the SSNPS performs, which now includes border control. In addition, the creation of specialized police units should be prioritized.
72. To impart a new ethos in the police service, the Commission recommends that the foundational training for the police should include adequate coverage of human rights (including gender, women's human rights and the rights of the vulnerable in society), particularly its practical application to police work as well as emphasis on its civilian role.

73. The Commission recommends that consideration should be given, within a broader reform program, to comprehensive police vetting program for human rights compliance. The Commission notes that ensuring that the force is populated by personnel who demonstrate respect for basic human rights is not only a constitutional imperative, but has the practical function of enhancing public trust in this critical institution. While South Sudanese women are included amongst the ranks of police, there is a need to more deliberately implement policies of capacity building and development for women in the service who will play more active roles. For instance, women police officers have been trained to investigate cases of sexual exploitation and other abuses but have limited opportunity to use this training. This is something that will need to be addressed within the police service. Moreover, in the various consultations with women, the Commission heard that more women in the police service were a necessity at the community level because women are closer to the people and issues affecting the people.
74. In view of continued reliance on personnel from outside the SSNPS to provide security until the SSNPS attains required force strength, quality and competence, the Commission recommends that appropriate mechanisms be established for coordination of functions between services (including the army) with appropriate channels for sharing of information. Within the police, the Commission recommends a review of the Police Act of 2009, to align with the constitutional provision for a coordinating mechanism.
75. Broader security sector reforms and particularly reforms of the SSNPS should be gender-sensitive. The Commission expresses support for reported initiatives to facilitate the registration of a Staff Association for female police officers.
76. In the Commission's view, it is vitally important for international actors to align their objectives and coordinate with government-led initiatives. This would facilitate broader coverage and a more efficient use of limited resources.
77. The Commission recommends that current literacy programs run by both government and international partners should be intensified and expanded and that police training should be performance improvement related and needs-based rather than demand-driven as has been the case for some of the initiatives undertaken so far.

### ***Findings and Financial Management and Strategic Resources***

78. It was clear from the various consultations of the Commission that the absence of equitable resource allocation and consequent marginalization of the various groups in South Sudan was a simmering source of resentment and disappointment underlying the conflagration that ensued, albeit the implosion of the conflict was brought about by the political struggle by the two main players. The Commission found that struggle for political power and control of natural resources revenue, corruption and nepotism appear to be the key factors underlining the break out of the crisis that ravaged the entire country.

Economic aspects of the conflict, such as control of natural resource (oil) has been a source of frustration among different tribes and the diaspora, who cannot benefit from the dividends of independence and especially from their country's natural resources.

79. South Sudan's Transitional Constitution, Petroleum Act and Petroleum Revenue Management Act set out laudable standards for equitable economic development and of governance for the management of its oil wealth, and in creating institutions and legal frameworks for the management of the petroleum industry. The Petroleum Management Act sets reporting standards for Government and has the potential to ensure an accountable and equitable industry. However, the Commission expresses concern about allegations of corruption, inequitable resource distribution and lack of accountability.

***Recommendations Relating to Financial Management and Strategic Resources***

80. In order to realise the development potential of its oil resource and ensure sustainable development, the Government of South Sudan needs to make key decisions on the implementation of resource governance and the processes of resource management. This requires a willingness to be held accountable for the proceeds and management of the wealth created by the oil and the extractive industry to limit opportunities for corruption, and political will to commit to transparency in the process.
81. The Commission recommends that consideration should be given to increasing the portion of oil revenues retained by resource-producing states, particularly in favour of affected communities. A portion of these revenues should be earmarked for education in general and girl child education and empowerment of women in particular
82. The Commission recommends that the government commit to the implementation of the provisions of the Petroleum Revenue Management Act relating to Future Generations Fund.
83. The Commission also recommends the development of a national strategy for resource management and sustainable development taking into account environmental and community issues, the management of government revenues, and wider economic concerns. Such a strategy should ideally benefit from consultation from a wide range of stakeholders including, but not limited to, relevant government ministries, affected communities and civil society.

***Findings Relating to National and State Legislatures***

84. The Commission found that there are structural linkages between the executive and the National Legislature, which weakens separation of powers and the system of checks and balances established under the Transitional Constitution. In this regard, it was noted that the legislature lacks control of its calendar and that the President has the power to summon, prorogue and dismiss the National Legislature. The President is also constitutionally

empowered to dismiss State Legislative Assemblies. This has resulted in a weak legislature at national and state level.

85. In terms of oversight functions, the Commission finds that the near total control of the ruling party of the legislatures poses challenges for oversight besides the fact that the emerging committee system in the National Legislature is inadequately developed and financed.
86. The Commission also found that there are concerns about the size of the National Legislative Assembly, with a number of respondents urging for a downsizing of the SSNLA. The remuneration of MPs was linked to reported low levels of morale, which impacts the performance of their constitutional functions.

### ***Recommendations Relating to National and State Legislatures***

87. To establish effective checks and balances, the Constitution must provide for separation of powers while adequately empowering the legislature to act independently.
88. At a normative level, the constitutional design should proceed from the position that constitutional power is shared power, and the right balance of separation of powers between the three branches of government as well as a system of checks and balances should be established, informed by the system of government adopted.
89. Structural independence of the legislature from the executive should be assured, particularly in the case of a presidential system of government prevailing in South Sudan. This requires that the legislature be able to control its own agenda and calendar. A review of the president's current powers to summon, prorogue or dismiss parliament is necessary.
90. The legislature should be enabled to access adequate resources – financial, human and physical – to build up its capacity over time to adequately discharge its legislative and oversight mandates. Capacity building initiatives already in place should be scaled up to empower individual members, as well as staff.
91. In terms of oversight functions - the mainstay of the legislature's oversight work in representative democracies- the Commission finds that the near total control of the ruling party of the legislatures poses serious challenges in addition to the fact that the new committee system practice in the National Legislature is inadequately developed and financed and should be developed further and strengthened.
92. Consideration should be given to reviewing terms and conditions of work of members of both national and state legislatures. Improving conditions of work of members is likely to contribute to improved performance, as members would be able to fully dedicate themselves to their core mandate.



93. On the question of the size of the legislature, the Commission is of the view that ultimately this is a decision that the people of South Sudan will have to make, considering all relevant factors, including the need to ensure adequate representation of all sectors and interests in the highest bodies of democratic decision-making. The ongoing constitutional review process provides an opportunity for these and other issues to be considered.
94. State legislatures constitute an important institution within the broader architecture of governance, despite the fact that they currently appear to occupy a station of relative obscurity and neglect. It is critical that their capacity be strengthened to enable them serve the vital oversight function at the state level.
95. In the context of the current debate on devolving more resources and decision-making power to the states, consideration must be given to strengthening accountability and oversight mechanisms at state level, and state legislatures constitute a core pillar in that process. Investment should be made in building their capacities and developing the necessary physical infrastructure.

#### ***Findings Relating to the Judiciary and Justice Delivery System***

96. At constitutional level, there is a normative commitment to independence of the judiciary, and all arms and levels of government are constitutionally mandated to 'execute decisions of the judiciary'. The challenge, it was established, is that rhetorical commitment to the principle is unmatched by practice. Independence of the judiciary is undermined by the conduct of various state actors. In this regard, the militarization of public life was identified as a major problem. Equally, at a structural level, there are weaknesses in the normative framework supportive of the principle of independence of the judiciary. The legal regime relating to the appointment of judges was identified as an area of concern.
97. Legal pluralism practiced in South Sudan poses particular problems for legal certainty. It emerged that customary courts presided over by chiefs and elders sometimes apply statutory rules while formal courts refer to and apply customs of various communities in South Sudan.
98. It was also noted that the limited reach and capacity of the state institutions such as the judiciary are such that huge swathes of the territory and sections of the population live beyond the reach and protection of the law. The Commission found that formal justice has a limited reach, and statutory courts lacks human, financial and physical capacity to deliver justice. Thus, South Sudanese face serious challenges related to access to justice.

#### ***Recommendations Relating to the Judiciary and Justice Delivery System***

99. To entrench the rule of law, one must first build a strong and capable state, one that is able to monopolize the use of force, and enforcing the law. As such, the entire state-building project, particularly as it relates to entities or 'actors in the rule of law sector' has bearing on the rule of law.

100. In view of the role of the judiciary in entrenching the rule of law, it is vitally important to establish a strong, independent judiciary with a national reach.
101. In practice, a culture of respect for the independence of the judiciary must be cultivated, beginning with overt gestures from the executive and the legislature.
102. The Commission recommends that the regime on appointment of judges be clarified, with clear criteria for such appointment, discipline and removal provided.
103. While the Commission acknowledges the recent shift in policy that facilitated the recruitment and retraining of judges, more should be done to build up the capacity of the judiciary. Financial resources allocated to the judiciary should be increased to enable the judiciary to recruit more judges and other judicial staff, develop necessary physical infrastructure and expand the reach of mobile courts instituted as an interim measure.
104. It is the Commission's recommendation that consideration should be given to 're-linking' chiefs' courts with formal justice system, essentially, responding to the constitutional call that recognizes customary law as a source of law within South Sudan's tradition of legal pluralism. It is the Commission's opinion that this would address several problems associated with customary courts and the challenges that hamper their dispensation of justice
105. Unifying formal and customary courts would facilitate the establishment of a supervisory framework. The natural and logical step to take would be to link these courts to magistrates' courts, which could be empowered to confirm or endorse certain categories of decisions made by the customary courts, especially where human rights issues are implicated or in relation to the imposition of certain sentences or awards by the customary courts. This would build on the existing appellate structure within customary courts.
106. The Commission recommends alignment of the process and outcomes of adjudication in customary courts with constitutional principles, human rights and other high ideals, including a modern conception of 'justice'. Their independence should be guaranteed. It is the Commission's view that this should not result in higher courts imposing themselves and replacing decisions made by customary courts. Rather, what is proposed is a system of collateral review, in terms of which the higher court defers to the customary court on the law but ensures that the decision is in keeping with human rights. A process could be established such that whenever a human rights issue emerges during the course of litigation before a customary court, it is removed to the competent formal court for direction on relevant human rights issues and remanded back for final decision on the law.
107. To address the challenge related to ascertaining customary rules, the Commission recommends the ascertainment of customary law of various

communities in South Sudan, which entails ‘writing down’ in a loose form, rather than a code, is proposed. This way, judges (including magistrates) (statutory courts) that interact with decisions of customary courts would be able to know what the law is without being required to apply it rigidly.

108. It is also recommended that chiefs and customary law adjudicators in customary courts should be trained. Such training must necessarily include human rights, management of cases and proceedings in their respective courts.

### ***Findings Relating to Political Parties***

109. There is adequate regulatory framework governing the activities of political parties although several elements require attention. The right to form and join political parties is provided for in the Constitution and there are currently about 20 legally registered political parties (with several still to be registered), their contribution to the political process is severely constrained.

110. The Commission established that the context of South Sudan manifests a shallow political culture, and that political discourse – like many aspects of public life – display a degree of militarization. For a variety of reasons, the ruling party, the SPLM, is the dominant political party in South Sudan. Opposition political parties are weak, lack a national presence partly for lack of resources and they do not always practice issue-based politics.

### ***Recommendations Relating to Political Parties***

111. The Commission recommends that all political actors as well as civil society and ordinary South Sudanese should work towards the expansion of the democratic space and to cultivate and deepen political culture. The African Union and the international community should support this process.

112. With the adoption of the Political Parties Act and the National Elections Act, foundational rules for governing the activities of political parties have been established. The Commission however recommends that the Political Parties Council should be activated to facilitate the registration of all political parties in South Sudan.

113. The Commission recommends that to strengthen the nascent multiparty democracy in South Sudan, consideration should be given to establishing a framework to finance political parties based on appropriate criteria.

114. Having found that in addition to political parties, civil society and media are not fully developed and thus lack the capacity to hold government to account, it is imperative that the leadership in South Sudan commits fully to principles of accountability, transparency and responsive government. It is shown that while there appears to be a gap between rhetorical commitment and practice.

115. The Commission believes that South Sudan's multiparty democracy could be strengthened with the emergence of a strong opposition, which is difficult to fathom with the proliferation of political parties.
116. The Commission recommends that political parties should take responsibility for the evolution of the democratic process and deepening of democracy in South Sudan. The Commission believes that as the dominant political party, the SPLM has a special responsibility in this regard. It is recommended that consideration should be given to building party structures, institutionalization and strengthening of internal democracy.
117. The Commission recommends the cultivation of a culture of accommodation of alternative views, particularly on important national matters, which could enhance political participation, which is critical for a nascent democracy.
118. The African Union, international community and donors should consider supporting capacity building efforts of and for all political parties.

#### ***Findings Relating to Civil Society and the Media***

119. The role of civil society as part of the process of engineering a new South Sudan as the country moves forward is key. It was established that during the conflict of the past two decades, civil society, comprised variously of non-governmental organisations, religious groups and charitable organisations, occupying the space between the state and the individual, have worked to fill the lacunae of government in providing both essential and pastoral services to most communities in the area that is now South Sudan. Their role has remained crucial in the newly independent country, particularly in galvanizing citizen' participation in various peace processes. It is therefore inevitable that they are a part of the process of any institutional reforms that will set the basis for healing and reconciliation.
120. The Commission also finds that the media plays a critical role in holding government to account, facilitating political participation in multiparty democracies through the provision of information, educating the public particularly in a context of high levels of illiteracy and where the majority of the lives in hard to access rural areas. However, the media operates in an increasingly challenging environment where debate has been stifled, particularly as it relates to matters considered contentious by the government.

#### ***Recommendations Relating to Civil Society and the Media***

121. The Commission recommends that the government respects freedom of expression and of the media enshrined in the Transitional Constitution and to remove any restrictive rules, procedures and practices that impede the enjoyment of these rights.
122. While the government has a right to regulate the space within which civil society operates, it should eliminate rules and practices that impede free

operations of civil society organisations and to refrain from alleged harassment of civil society leaders.

123. Having established that civil society plays a critical role in peace and reconciliation processes both at community level and the ongoing IGAD-led mediation process, the Commission recommends that the government should support the civil society activities aimed at facilitating harmonious coexistence among South Sudanese communities. The Commission believes that such activities contribute to wider efforts to transcend the challenges of diversity and intra/inter-ethnic rancor.
124. Having found that civil society in South Sudan, particularly in grassroots organisations such as CBOs and FBOs are relatively weak, the Commission recommends that the government, the international community and donors should consider supporting initiatives aimed at building their capacity to hold national and local government to account and facilitate political participation at both levels of government. In view of existing capacity constraints, particularly at state and local government level, and in recognition of the fact that many of these organisations already contribute to provision of services, government should consider deploying the capacities of grassroots organisations to facilitate service delivery.

## **II. Examination of Human Rights Violations and Other Abuses During the Conflict: Accountability**

125. The Commission's inquiry and investigations focused not only on the key areas in the four states that have been the main theatres of violence but also extended to other places where violations could have occurred or where relevant evidence may be found. The sites of investigations included Juba and its environs, Bor (Jonglei), Bentiu (Unity), Malakal (Upper Nile), rural areas surrounding these major towns, and Kakuma refugee camp in Kenya. Time constraints precluded visits to refugee camps in Ethiopia (Gambella), Sudan, and Uganda. Site visits to alleged theatres of violence were undertaken where permitted. In particular, the Commission visited Gudele joint operation centre, Tiger Battalion barracks, Juba Teaching Hospital, New Site burial site, Giyada Military Hospital, Bor Teaching Hospital, St Andrews burial site, Bor burial site, Malakal Teaching Hospital and Malakal burial site. Forensic reviews of the stated sites were undertaken and documentation carried out. Witness or survivor injuries were also examined by the forensic doctors and forensic evidence was collected at crime scenes or incident sites.

### ***Findings Relating to Violations of Human Rights and Other Abuses (violations IHL)***

126. The Commission found cases of sexual and gender based violence committed by both parties against women. It also documented extreme cruelty exercised through mutilation of bodies, burning of bodies, draining human blood from people who had just been killed and forcing others from one ethnic community to drink the blood or eat burnt human flesh. Such claims were registered during interviews of witnesses of crimes committed in Juba.

Elsewhere, witnesses of crimes committed in Bor Town, also provided evidence of brutal killings and cruel mutilations of dead bodies. In Malakal town, reports of abduction and disappearance of women from churches and the hospital where communities had sought refuge during the hostilities that began in December 2013 were rife. In Unity State, Bentiu, the capital has been the focus of much of the fighting, having changed hands several times between government and opposition soldiers during the course of the conflict. Bentiu town is largely destroyed. In Leer county, the Commission heard testimony of civilians, including children and teenagers killed, houses, farms and cattle burned, and of sexual violence.

127. Overall, the Commission found that while there was limited active conflict in all states visited, tensions remain high in the three most conflict affected states of Upper Nile, Unity and Jonglei. Many respondents talked of fear and all stakeholders and interlocutors noted a level of anxiety of an impending attack by one side or the other. Life for civilians in all three state capitals of Malakal, Bentiu and Bor has not fully returned to normal. The majority of civilians remain either in UNMISS protection of civilian sites (POCs) or in inaccessible locations in the surrounding villages and rural areas. Guarantees of security remain a great concern for civilians.
128. The Commission found that most of the atrocities were carried out against civilian populations taking no active part in the hostilities. Places of religion and hospitals were attacked, humanitarian assistance was impeded, towns pillaged and destroyed, places of protection were attacked and there was testimony of possible conscription of children under 15 years old.
129. The Commission found that unlawful killings of civilians or soldiers who were believed to be *hors de combat* (no longer taking part in hostilities), were committed in and around Juba. The people killed were either found during the house to house searches or captured at roadblocks.
130. The Commission found that violations of human rights and other abuses in relation to massive and indiscriminate attacks against civilians and civilian property were carried out in Bor town. Visible evidence of torched non-military objects like houses, market place, administration houses, hospital and hospitals form the basis of the Commission's conclusion that these crimes were committed. The Commission also found that civilians were targeted in Malakal, which was under the control of both parties at different times during the conflict. Serious violations were committed in Malakal Teaching Hospital through the killings of civilians and women were raped at the Malakal Catholic Church between 18th and 27th February 2014. In Bentiu the Commission heard testimony of the extremely violent nature of the rape of women and girls – that in some instances involved maiming and dismemberment of limbs. Testimony from women in UNMISS PoC Site in Unity State detailed killings, abductions, disappearances, rapes, beatings, stealing by forces and being forced to eat dead human flesh.
131. Based on its inquiry, the Commission finds that there are reasonable grounds to believe that acts of murder, rape and sexual violence, torture and

other inhumane acts of comparable gravity, outrages upon personal dignity, targeting of civilian objects and protected property, as well as other abuses, have been committed by both sides to the conflict.

132. The Commission found that the context in which these violations and crimes were committed is a non-international armed conflict (NIAC) involving governmental (and allied) forces and SPLM/IO fighters.
133. The Commission's investigations as well as information received from various sources, including its consultations, leads the Commission to conclude that there are reasonable grounds to believe that serious violations of human rights have occurred and that serious violence of other abuses have also occurred, which, given the context in which they have occurred - may amount to violations of international humanitarian law.

### **Finding on the Crime of Genocide**

134. The Commission finds that based on the information available to it, there are no reasonable grounds to believe that the crime of genocide has occurred.
135. Despite the seeming ethnic nature of the conflict in South Sudan, the Commission, during its consultations with various groups and individuals did not have any reasonable grounds to believe that the crime of genocide was committed during the conflict that broke out on December 15, 2013.

### ***Recommendations Relating to Violations of Human Rights and Other Abuses (Violations of IHL)***

136. The Commission recommends the establishment of an *ad hoc* African legal mechanism under the aegis of the African Union which is Africa led, Africa owned, Africa resourced with the support of the international community, particularly the United Nations to bring those who bear the greatest responsibility at the highest level to account. Such a mechanism should include South Sudanese judges and lawyers.<sup>1</sup> The Commission has identified possible alleged perpetrators that might bear the greatest responsibility using the standard of 'reasonable grounds' to believe that gross violations of human rights and other abuses have occurred during the conflict (see the highly confidential list not publicly available as part of this report).<sup>2</sup>
137. The Commission believes that with appropriate reforms, both military and civilian justice can and should contribute to establishing accountability. The Commission therefore recommends that immediate reforms of civilian and military justice be initiated. While it is believed that a long-term reform process

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<sup>1</sup> One of the members of the Commission Professor Mahmood Mamdani was of the opinion that the only and most appropriate option in relation to accountability is political accountability, which he interprets to mean that political leaders identified as a subject for formal criminal investigations should be excluded from holding office for the duration of the investigations and for the duration of any criminal proceedings arising from such investigations.

<sup>2</sup> The highly confidential list will be submitted directly to the Peace and Security Council of the African Union.

of the judiciary is necessary (see section recommendations related to the judiciary above), a minimalist approach can be adopted with respect to the criminal justice system.

138. Based on the central role played by customary justice in facilitating access to justice in South Sudan, and the views expressed by South Sudanese that this institution must play a role in reconciliation at community level, the Commission recommends that an appropriate role should be fashioned for traditional justice and conflict resolution mechanisms, to be established in relationship with formal accountability processes as well as the peace and the national healing, peace and reconciliation. The Rwandan experience with *Gacaca* could be instructive.
139. The Commission's inquiry established that South Sudanese traditional justice mechanisms combine retributive and restorative remedies which include payment of compensation in modes acceptable by litigants, often cattle. The notion of civil accountability i.e. compensation to an individual for loss suffered, is indeed one of the key features of South Sudan's indigenous justice systems. More importantly, the moral authority and legitimacy inherent in the traditional systems, as understood and valued by the South Sudanese people has a valuable role to play in healing and reconciliation and appeasing the deeply felt grievance occasioned by violations suffered by individuals and communities.
140. The Commission therefore recommends the creation of a national reparations fund and programme linked appropriately to these traditional justice mechanisms, to benefit victims of gross human rights violations. Eligibility for reparative measures undertaken (including rehabilitation and psychosocial assistance should not be limited to the period to which the Commission's mandate relates (from December 15, 2013) but can include victims of past human rights violations. While certain elements, particularly psychosocial assistance and other appropriate forms of interim reparations should be implemented immediately the broader reparations programme can be linked to the work of a future Truth Commission.

### ***Findings Relating to Healing and Reconciliation***

141. The Commission found that the multiple conflicts and repeated violations of human rights experienced in South Sudan have wrecked relations between and among communities, and generated many victims. It also established that the policy of amnesty adopted by the government after the signing of the CPA left the past unexamined, conflicts unresolved and their impacts, partly represented in victims and survivors of human rights violations unaddressed.
142. The crisis has occasioned massive displacement of South Sudanese (a reported 1.5m). Many of those displaced have live in multiple protection sites and IDP camps around the country while others have taken refuge in neighbouring countries.



143. The Commission's consultations disclosed that many South Sudanese take the view that reconciliation is dependent upon justice, which is broader than criminal justice. The view was expressed that those who have committed atrocities should be prosecuted, and that victims and communities are unlikely to embrace reconciliation otherwise, given the culture of impunity in South Sudan.

### ***Recommendations Relating to Healing and Reconciliation***

144. The Commission believes that the only sustainable solution to facilitate the return of IDPs and refugees to their homes, is dependent upon a political settlement in the ongoing mediation process. The Commission urges all actors to work towards a speedy resolution of the crisis.

145. The Commission recommends that warring parties should facilitate the movement of IDPs in and out of the camps in their respective areas of control.

146. It is the Commission's view that it is necessary to establish a structured process to provide an opportunity for South Sudanese to engage with their history, to discover the truth about the conflicts and human rights violations of the past, and to attend to the needs of victims. This is the only way to foster healing, peace and reconciliation in South Sudan, and to forge a common future. Such a body should lead to truth, remorse, forgiveness and restitution where necessary, justice and lasting reconciliation being achieved.

147. The Commission recommends that such a structured process must involve and include women as key stakeholders, and that processes and procedures operated by a future mechanism should be gender-sensitive.

148. Overall, it is recommended that there is a need for a national process, however organised, to provide a forum for dialogue, inquiry and to record the multiple, often competing narratives about South Sudan's history and conflicts; to construct a common narrative around which a new South Sudan can orient its future; to uncover and document the history of victimization and to recommend appropriate responses.

149. The Commission urges all sectors of South Sudanese society and relevant regional and international actors to unite around the process of national reconciliation, which is necessary for the restoration of sustainable peace, social cohesion and stability.

150. The Commission recommends that the Truth and Reconciliation should be established in relationship with 'hybrid' mechanisms such as Wunlit with a mandate to investigate human rights violations and to drive a national peace and reconciliation process. Unlike Wunlit, such hybrid mechanism should be comprehensive, rather than localized. Such mechanisms would operate under the national mechanism, which should develop guidelines that seek to among others, align the operations of grassroots mechanisms with human rights and other identified ideals.

151. The Commission also recommends the establishment of a framework for memorialization as part of the broader process of reparations. This process should be inclusive and participatory.

*On Sequencing Peace and Justice*

152. The Commission's discussion of the relationship between peace and justice concluded that while they should be conceived as complementary, comparative experience shows that the two notions are often in tension, and that the context in which relevant processes unfold is critical: while some contexts allow for reconciliation processes and justice, particularly criminal justice measures to be undertaken at the same time, multiple factors in other contexts militate against such an approach. In these contexts, sequencing offers an alternative approach that responds to the imperatives of justice and the need to reconcile and establish stability in post conflict societies.

153. Having considered the specific context of South Sudan, the Commission recommends that consideration should be given to sequencing of peace and justice, with the result that certain aspects of justice allow for the establishment of basic conditions, including restoring stability in South Sudan and strengthening of relevant institutions. This should facilitate necessary reform of the criminal justice system in order to implement some of the Commission's recommendations on accountability. These necessary reforms to civilian and military justice should, in the context of broader institutional reforms, facilitate the institution of reconciliation measures.