

STAKEHOLDERS SUBMISSION ON CONSTITUTIONAL MAKING PROCESS

The High-Level Mediation for South Sudan (Nairobi Talks)

Tumaini Initiative

(Building a foundation for stability and sustainable development of society)

Dated: 28th May, 2024

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Background:

The high level mediation for South Sudan (HLM-SS) was launched in Kenya on 9th May, 2024 with 6 African Heads of State and government in attendance calling for an end to a conflict that has crippled the country's economy and threatened its peace and stability. The HLM-SS is considered the last resort for South Sudanese politicians and armed actors to reach a lasting peace in the interest of the South Sudanese people. The mediation is led by veteran mediator of the 2005 Comprehensive Peace Agreement, General Lazarus Sumbeiywo, deputised by expert mediator Amb. Mohammed Guyo and supported by Sant'Egidio and IGAD through its Special Envoy Amb. Ismail Weis.

Purpose of the negotiations:

President William Samoei Ruto, during the launch of the HLM-SS at State House in Nairobi, stated the purpose of the negotiations. He said the goal of the HLM-SS is to secure a credible pathway to durable and sustainable peace for the Republic of South Sudan, the region, and the entire African continent. He added that it is to end conflict, and political instability, silence the guns, make peace, restore tranquillity and harmony, to enable South Sudanese achieve the peace and prosperity its people have long fought for. The President suggested that the HML-SS was an opportunity to design a future worthy of the vision of the people of South Sudan and was fueled by courage, goodwill, and determination to explore better ways of resolving conflicts.

Rationale:

Implementation of the 2018 Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) achieved limited progress. Even after three extensions, the R-ARCSS is highly unlikely to conclude with credible democratic elections by the end of December 2024. Several other agreements signed with different armed opposition groups remain unimplemented.

This prevailing situation in the country makes commitments South Sudanese made at independence “to establish a system of governance that upholds the rule of law, justice, democracy, human rights and respect for diversity,” write a Permanent Constitution and hold credible democratic elections remain a distant dream.

Consequently, South Sudan is increasingly trapped in a state of political impasse, economic meltdown, destructive insecurity, humanitarian difficulties, diplomatic isolation and potential state disintegration.

While the HLM-SS is not a silver bullet, and may not be expected solve all the issues of South Sudan, it presents a reasonable opportunity and platform for an incremental approach to trust-building process that requires patience, persistence, and a willingness to address the complex issues in a genuine and respectful manner.

CONSTITUTIONAL CONFERENCE

What it means:

Generally, a constitutional conference is a representative gathering aimed at drafting and promulgating a constitution. In the context of the Tumaini Initiative, Constitutional Conference is a process meant to assert the people’s will in the outcome of the process by expanding participation to adopt and endorse the outcomes as a constitutional agreement.

Justification:

- 1) To move away from political power sharing agreements that are not implemented to people-centred constitutional agreements whose content is supreme and not subject to expiry and political manipulations.
- 2) To ensure the people, whose representatives shall participate in the constitutional conference, shall be the owners and guarantors of the expected outcomes of the Tumaini Initiative.
- 3) To ensure the outcome of the Tumaini Initiative, a constitutional agreement, shall be a true social contract among the people and between the people and their government.
- 4) To ensure the outcome agreement of the Tumaini Initiative does not expire within a short timeline but defines the fate of the country for a much longer time.
- 5) To find lasting solutions to the multiple conflicts in South Sudan.
- 6) To enhance air tight accountability mechanisms for adherence amongst others as gaps challenging the implementation of the R-ARCSS

- 7) Lack of funding for critical mechanisms and activities of the R-ARCSS
- 8) To build trust amongst the parties and between the government and the people of South Sudan.
- 9) To address the persistent problem of violations of agreed commitments to individuals and groups.
- 10) To create room for discussions into the root causes of the conflict.
- 11) To forge a clear political direction of the country and the future which is far away from the rules of man, but the rules of law.
- 12) To build state values that are anchored in our sovereignty, its territory and national anthem.
- 13) To ensure political parties are free to form a coalition without coercion and repression with diverse interests of citizens.

These issues notwithstanding, trust amongst warring armed groups, government, other aggrieved groups and civil society requires a comprehensive policy framework that addresses the complex issues driving conflict.

Objectives:

The objective of the conference is to establish a permanent constitution. Based on the severity of contention, all outstanding issues will be suspended and to be resolved by one of the following mechanisms:

- a) A consensus committee formed by representatives of the dialoguing parties
- b) An independent arbitration mechanism
- c) A referendum exercise

The preparatory committee will be drawn from representatives of the mediation team of the HLM-SS, its secretariat and regional and international technical experts.

Delegation:

The conference may choose to have 5 representatives from each of the 179 counties of South Sudan Plus an agreed number of prominent personnel, technical experts, civil society, religious actors, traditional authority, persons with disabilities (PWD), women and youth groups. As well as representatives of armed and political actors including belligerent groups.

The selection process:

Should be based on a clear inclusion formula that safeguards:

- Ethnic representation
- Religious diversity
- Political parties
- Age groups
- Gender balance
- Ethnic Minority groups
- Technical expertise
- Diaspora and refugees

Terms of Reference for Constitutional Conference

The Process should develop a constitutional draft that is then shared through different consultative processes to ensure compliance with citizens views and aspirations for ownership.

(Clearly define the conference's mandate, powers, and limitations, Establish the scope of the constitution or revisions to be addressed and Set timelines and deadlines for the conference)

Pre-Conference Consultations:

- ❖ The current process should be considered part of the pre-conference consultations. Each group could be given a 3 day timeframe to identify the urgent issues, bills and policies without which there cannot be a permanent constitution.
 - a) Nationwide consultations: The National Dialogue can be used as a reference for the peoples views on the constitution. Pertinent issues can be drawn from the resolutions passed in the NDC.
 - b) Regional consultations: devise an acceptable mechanism and or virtual portal to for sustained consultations with Refugees and the diaspora
 - c) Existing consultation reports : Capitalise on recommendations from the consultations from the members of the NCAC & NCRC, as well as constitution specific recommendations of the NCAC and NCRC.
 - d) The secretariat can organise consultation meetings with stakeholders, experts, and interest groups physically and virtually to help enrich the consultations.
 - e) Retrospective data: the experts can also Collect and analyse submissions, reports, and research papers presented on the subject of permanent constitution making in South Sudan

Conference Venue and Logistics:

- ❖ Choose a suitable venue for the conference. Preferably the current venue of the HLM-SS as this would be considered a continuation of the HLM-SS. And logistical considerations including security and accommodation will be an expansion of the existing arrangements.

Conference Proceedings:

- ❖ Establish a chairperson or presiding officer to facilitate the conference. In this instance the HLM-Mediation team will continue facilitating the exercise as they have an established set of procedures for plenary sessions, committee work, break groups and decision making mechanism; through intra-party, tripartite and other forms of consultations.
- ❖ The mediation/presiding officer will adopt an incremental conflict building mechanism whose last resort would be the country's top leadership.

Drafting and Negotiation:

- ❖ Assigned technical experts will compile all the reflections gathered and present a first draft for negotiations, debates, consensus building, compromise and amendments. This can be done through thematic mini-workshops to develop a final draft which is subject to validation.

Adoption and Ratification:

- ❖ The final draft will then be presented for final validation through consensus and is passed by an act of parliament. Based on the severity of contention, all outstanding issues will be suspended and will be resolved by one of the following mechanisms:
 - d) A consensus committee formed by representatives of the dialoguing parties
 - e) An independent arbitration mechanism
 - f) A referendum exercise

Conference Evaluation:

- ❖ The evaluation for effectiveness is undertaken by all who were part of the conference together with the mediation team, the technical support and regional and international actors in their respective roles and responsibilities. Any areas identified for further review or reform can be addressed through a policy recommendation and the enactment of a bill or left to a referendum process.

CONSTITUTIONAL AGREEMENT PRINCIPLES

I. Preamble

This agreement sets the stage for a comprehensive and inclusive process to draft a permanent constitution that reflects the aspirations and values of the South Sudanese people, fostering a stable, democratic, and just nation.

In our capacity as representatives of the people of South Sudan, and in recognition of their natural and inalienable right to establish a framework of government, we shall prepare the permanent constitution of South Sudan with an unwavering commitment to the principles of democracy, dignity, and territorial integrity. We recognise the historical experience of the South Sudanese people, who have endured a long and arduous struggle for liberation and independence. In honouring our past and building a future grounded in the aspirations of our people, we seek to address the historical experience of the South Sudanese people.

The sovereignty of South Sudan is vested in the people of South Sudan, in whose name and for whose benefit the powers of government shall be exercised in the manner and within the limits prescribed by the permanent constitution.

In a spirit of friendship, peace and solidarity with all peoples of the world, and in solemn declaration and affirmation of our commitment to freedom and democracy, independence, equality of opportunity, and prosperity, justice, probity, and accountability, we uphold the principle that all powers of government spring from the sovereign will of the people. We

affirm the principle of collective will and determination, the rule of law, and the protection and preservation of fundamental human rights.

Endeavouring to renew the union to strengthen freedom and democracy, independence, equality of opportunity, and prosperity, peace, in solidarity and openness towards the world, we commit to living our diversity in unity with mutual consideration and respect. We also express our determination to preserve traditional ways, mechanisms, and beliefs that are integral to our cultural heritage and social fabric.

Conscious of our common achievements and our responsibility towards future generations, we are certain that only those who use their freedom are free, and that the strength of the People are measured by the well-being of the weak.

With the objective of preparing and drafting a permanent constitution according to the best of our knowledge and belief, and in accordance with the expressed will of the people, the permanent constitution of South Sudan shall be the central legal document defining the fundamental norms for the establishment and exercise of state power, binding all state organs. As the supreme enactment of national law, the constitution claims precedence over all other laws and acts of the state, ensuring heightened validity and authority.

II. Establishment of State and Organs

The constitution will establish the state and its organs, ensuring their functionality to guarantee the state's stability and capacity to act. It serves both regulatory and organisational functions. Furthermore, it limits the power of the state and its organs, safeguarding citizens' freedoms by standardising objectives, tasks, and guidelines for state Actions.

III. Federal Structure and Governance

The permanent constitution will determine whether South Sudan will be structured as a federal state comprising 79 counties integrated into three, 10 States or administrative areas or specify alternative structures. In either case, the country will be governed in a decentralised manner according to the expressed will of the people. It will also define the system of governance, whether South Sudan will adopt a presidential system or a directorial system. The system of decentralised, federal governance is designed to ensure that the aspirations for self-determination and local agency are realised, and that state power is held in checks and balances. Importantly, native mechanisms for self-organisation and traditional approaches to conflict resolution shall be included throughout the entire process of drafting the permanent Constitution

IV. Subsidiarity Principle

The states exercise of developed powers shall be independent from federal legislation, thereby adhering to the subsidiarity principle. This principle ensures that states are *sui generis*, unless explicitly restricted by the federal constitution.

V. Relationship Between Confederation and Counties (provided a federal system is

The constitution will regulate the relationship between the Confederation and the counties, defining the structure and responsibilities of federal authorities and the fundamental rights and duties of citizens. This will ensure a clear and functional federal legal order.

VI. National Referendum for Constitution

Where deemed appropriate and not in conflict with the fundamental principles previously outlined, traditional and native notions and conceptual frameworks for self-government are included, with due recognition of their importance as key parameters for sustainable development. The permanent constitution will only come into force following a national referendum. It will incorporate lessons learned from the transitional constitution, addressing its conceptual and practical challenges to avoid future issues.

VII. Right of Referendum

The right of referendum will be enshrined in the permanent constitution, allowing voters to make final decisions on important decrees of the Federal Assembly. This ensures direct democratic participation in governance.

VIII. Separation of Powers

A fundamental principle of the federal constitutional state is the separation of powers, aimed at preventing the abuse of power by limiting and controlling it. State power will be divided among several bodies that check and balance each other, securing individual and political freedoms. This principle aligns with the traditional doctrine of state functions:

- Legislation (parliament/legislature)
- Enforcement (government and administration)
- Judiciary (courts/)

IX. Guiding Principles for the Constitution

The permanent constitution will be drafted in accordance with the following basic principles:

- Good governance
- Peace and security
- Self-determination and agency
- Unity in diversity
- Inclusion and representation
- Human rights
- Rule of law
- Democratic principles
- Gender equality
- Consensus and legitimacy
- National reconciliation
- Addressing historical and current grievances
- Achieving social justice

X. Revision of the Permanent Constitution

Once the permanent constitution comes into force, it may be revised wholly or partially. A total revision calls into question the entire constitution, necessitating a new date. A partial revision does not require re-dating. In order to ensure clarity and transparency, procedures for revisions ought to distinguish between mandatory and optional referendums. Decrees subject to a mandatory referendum must be put to a constitutional vote, whereas those under optional referendum go to vote only upon request. The majority of laws are subject to a preliminary referendum prior to their implementation. Some laws may be subject to a subsequent referendum following their enactment. The specific details of these procedures will be outlined in (e.g.) the Political Rights Act??

XI. Supremacy of the Federal Constitution

The permanent constitution shall be the supreme law of South Sudan. All laws, ordinances, and decrees of the Confederation, counties, and communes must comply with it. They must not contradict the federal constitution. Any other law found to be inconsistent with any provision of this Constitution shall be void to the extent of the inconsistency. The constitution may be revised at any time, but amendments must not contravene mandatory international law.

The permanent constitution will enshrine the principles of the rule of law, codify a consensual definition of the state and nationhood, and territory, thereby establishing a legal framework that guarantees a fair and just society. Its framework will respect the fundamental tenets of governance, the protection of freedoms and the equitable administration of justice, while also upholding the principles of the rule of law.

Constitutional Making Process Implementation

Focus	Recommendation	Task to be undertaken	By who	Timeline	Budget
Linkages (R-ARCSS and Tumaini Initiative)	The linkages between R-ARCSS and Tumaini Initiative must be reflected in the final outcome documents from the High Level Mediation	Writing the provisions of High Level Mediation for South Sudan	Tumaini Initiative	D-Day +3 Days	
	Political decisions are required on matters of R-ARCSS implementation and conduct of Elections	Leadership decisions	Government Tumaini Initiative	D-Day +3 Days	

Constitutional civic education	Early conduct of civic education is required	Developing civic education materials	NCRC	D-Day + 30 days	
NCRC Budget	<p>Upon conclusion of Tumaini Initiative, within a period of 90 days at least 50% of the proposed NCRC budget is disbursed to NCRC</p> <p>Resources mobilisation</p>	D-Day + 30 days	Government	D-Day + 30 days	
NCRC Independence	<p>Operationalization of NCRC code of conduct,</p> <p>Informal engagement and networking,</p>	Enforcing compliances for self-regulation	NCRC	D-Day +18 Months	
Constitutional Drafting Committee (15 members)	<p>a) 12 South Sudanese</p> <p>6 practical lawyers (2 shall be female lawyers)</p> <p>3 Regional experts (one female expert)</p>	Establishment of CDC	<p>Government</p> <p>Tumaini Initiative</p> <p>Kenya-constitutional body</p>	D-Day +60 days	
Opposition parties in Nairobi peace talks	Incorporation of Nairobi Talk parties into National Constitution Review Committee	Restructuring, Reconstitution of NCRC	<p>Government</p> <p>Tumaini Initiative</p>	D-Day 7 days	

Venue	Hybrid Venue for the constitutional making (<i>Review of the adopted constitutional making parameter's in Nairobi alongside the Tumaini Initiative</i>)	Taking action for setting constitution making	Government Tumaini Initiative	D-Day 7 days	
NCRC Reputation	NCRC should promote transparency and accountability including access and dissemination of information on the constitutional making process on regular basis	Enforce public participation	NCRC	D-Day +18 Months	
Constitution making	Public participation, constitutional drafting and adopting	Facilitating Constitutional making process	NCRC Tumaini Initiative	D-Day +18 Months	
Review of Performance	NCRC shall provide periodic reporting on their performance	Publishing reports	NCRC	D-Day +18 Months	
Implementation of the adopted constitution	Strategy for the implementation of the third stage of civic education (when constitution is adopted) –legal timeline (E.g. Kenya 5 years)	Constitutional dissemination	NCRC	The 18 months	