

## **The Government is bent on postponing the elections: a response to the statement of the Ministry of Presidential Affairs dated 14 April 2021.**

### **Introduction**

The Press Secretary of the President of South Sudan held a press conference on Wednesday, 14 April 2021, in which he distributed an 11-page document titled “Response to Peter Biar Ajak’s Senate Testimony” in the name of the Ministry of Presidential Affairs. The document was an attempt to respond to the statements made by Dr Peter Biar Ajak in his testimony before a Committee of the US Senate on 10 March 2021 in which he dealt with a number of issues regarding the Government’s abysmal record on human rights, democracy deficit and other related issues. This author would not have bothered to put pen to paper on the Government’s response to Dr Peter Biar Ajak’s testimony had it not been for the truncated and misleading way he was quoted by those who wrote the piece regarding his position on the general elections in 2015. To be sure, this response will be confined to this issue of the elections only as came in that response.

To begin with the same Ministry had previously responded to the same testimony on 22 March 2021 when the then Minister of Presidential Affairs, Nhial Deng Nhial, penned and signed a reply to it in a 4-page document. Such is the extent Dr Peter Biar Ajak’s statement has rattled the regime to warrant a response on the highest level twice within a month. On the topic under discussion, the elections, both documents argued strenuously for the postponement of the general elections stipulated in the Revitalized Peace Agreement 2018, a point Dr Peter Biar Ajak accused them of doing. So, what is the point? A significant difference between the two responses is that Minister Nhial Deng Nhial did not put words into other person’s mouths, so to speak, as the current unsigned document did.

### **The 2015 projected elections**

The paragraph on the elections (p. 3) opens with the following sentence: *“In 2014 and 2015, the Government pushed for general elections in order to end the 2013 conflict and restore democracy in the country.”* False. For one, elections are not held

to end conflict; elections are held when conflict is resolved and peace is restored in the country so that the people elect their leaders in peace. The said elections were only meant to legitimize the regime which term of office was running out in July 2015 as per the Transitional Constitution of the Republic of South Sudan 2011. It had nothing to do with restoring democracy let alone ending the war. This is why we opposed it. We gave reasons for that considered opinion. The Ministry claims that *“Dr Lam Akol, the then leader of the SPLM-DC, blasted the Government for announcing to conduct elections without implementing the Political Parties Law, 2012”* (p. 3), and a quote is conveniently chosen from a link to justify the claim (<https://www.voanews.com/africa/south-sudan-approve-517-million-2015-vote>).

This is cherry-picking to distort facts. The truth is that the link gives other reasons for objecting to carrying out the vote at that time. Below is the full quotation of the statement of Dr Lam Akol as reported by the Voice of America in that link.

#### Quote:

##### **Opposition leader: postpone the vote**

Opposition leader Lam Akol said that, if South Sudan's laws are followed to the letter, the vote should be postponed.

“According to the election law, political parties must be registered in accordance with the elections act of 2012. None has registered, including the ruling party itself,” Akol told *South Sudan in Focus*.

“So are you going to carry out elections in violation of the constitution and in violation of the law? The government did not swear in the body that regulates the different political parties. It is called the Political Affairs Council. It did not swear them in for two years,” Akol said.

The transitional constitution of South Sudan also calls for a census to be held ahead of the next general elections, to “determine the number of electoral constituencies for” those elections. Because of the ongoing conflict, that has not happened.

It also calls for a National Elections Commission to be set up to organize the vote. South Sudan has an electoral commission, but it is severely under-funded.

Akol said the money approved for the elections should be used to help the hundreds of thousands of South Sudanese who, because of the ongoing conflict, are in need of food and shelter.

"I think the government should have paid that money for those people because that is the priority -- to save lives, not to talk about diversionary issues," he said.

He said holding elections next year, after the country has been mired in conflict for the past 12 months, was unrealistic.

"In the first place, elections should be held when there is peace. You cannot have elections when people are still fighting. And people are displaced -- about two million people have been displaced," he said.

### Unquote.

Clearly the quotation above provided by the link lists a number of reasons for objecting to the vote on 30 June 2015, one of which is the formation of the Political Parties Council according to the Political Parties Act 2012. The others were more serious than that for they entailed violation of the Constitution and the National Elections Act. The response of the Ministry truncated the quotation to suit its purposes.

The Opposition did not stop at just making press statements, in fact, the SPLM-DC and its allies in the National Alliance deposited in January 2015 a constitutional case before the Constitutional Panel of the Supreme Court against the National Elections Commission. The facts of the case in that suit were as follows:

1. On the 31<sup>st</sup> of December 2014, the Chairman of the National Elections Commission held a press conference in which he announced that the General Election all over the country shall be held on 30 June 2015. However, Section 15(1) of the National Elections Act 2012, which he quoted as the basis of the announcement, demands that **"...the Commission shall announce and publish in the Gazette and the print media a notice of the holding of the election at least six months before the date of the election."**

The announcement has not yet been published as demanded by the law and hence the minimum period of six months is not met by the announcement of the Commission's Chairman on the said date.

2. Sections 5 and 6 of the Act spell out the requirements of democratic elections and the transparency and openness of the election processes. In particular, sub-section 5(1)(a) stipulates that: **"the authority to govern derives from the will of the people, and their will must be demonstrated through genuinely democratic elections, conducted by adult suffrage and a secret ballot"**.

The will of the people cannot be ascertained when the country is at the throes of a civil war in which close to two million citizens are displaced. No genuine democratic elections could be conducted when a big section of the country is inaccessible by the government. Peace is a basic pre-requisite for a genuinely democratic election that reflects the will of all the people of South Sudan.

3. Article 194 of the Transitional Constitution of the Republic of South Sudan stipulates that: **“The National Government shall during the Transitional Period conduct a population census the outcome of which shall, *inter alia*, determine the number of electoral constituencies for the next general elections”.**

No population census was conducted prior to the announcement of the Commission’s Chairman. This is a clear violation of the Constitution.

4. Section 38 of the Act states that: **“Immediately following publication of the results of each population census and in accordance with this Act and the Regulations, the Commission shall determine, based on population size:**
  - a) **The average population for geographical constituencies for each Legislative Assembly; and**
  - b) **The boundaries of the geographical constituencies in each state for election of members of each Legislative Assembly.”**

This clearly indicates that conducting the census is the only method the Commission shall use to determine the boundaries of the constituencies.

Therefore, whatever method the Commission has used for this purpose without a census is in breach of this section 38 of the Act.

5. Furthermore, Section 41(e) of the Act demands that the review of names and boundaries of constituencies **“shall be completed at least twelve months before a general election.”** This means that any new definition of names and boundaries of constituencies that would have arisen out of the result of the population census should have been completed at least one year before the announcement of the date of election. This has not taken place.
6. After the completion of the review of constituencies at least 58 days are required for the publication of the Commission’s report on the boundaries of the constituencies in the official Gazette and print media, submission to political parties and others, objections and appeals to the report, and courts decisions on appeals (See sections 42 and 43 of the Act, and the attached Schedule).

To date, no report on the boundaries of the constituencies has been submitted to the political parties by the Commission as is required by the law.

7. Section 55(3) of the Act provides that in the event that a candidate for election dies before and during polling day and new nominations are required, this would be done within 60 days of last day of nomination. This practically means that, the new polling day may be 60 days after the previous one.

In other words, the elections could be pushed two months beyond the date specified by the Commission's Chairman; that is to 30 August 2015. Thus the date the Commission is strenuously struggling to meet would have been overtaken.

8. The **Regulations** are an essential component of the electoral process. Many details of a number of electoral activities are left by the Act to be specified by the Regulations. For example see sections 35(a), (c) and (e), 50(2), 89 and 114(2). The regulations for the Electoral Campaign were to be spelt out in the Regulations.

However, the Commission has not published the **Regulations** yet. This means that the Commission is not ready to conduct elections.

9. Section 7 defines "Political Party" as a political party registered under the Political Parties Act 2012. These are the parties the Commission is to deal with in all the stages of conducting elections from beginning to end. So far, the Political Parties Council authorized by the Political Parties Act 2012 to register political parties is not ready to register them, and when it gets ready, 90 days would be required to complete registration from the day the Council declares its readiness. This could push the elections date to 90 days beyond that announced.
10. The announced date of the election is in the middle of the rainy season when most parts of our country are not accessible by roads. This means that the vast majority of the population will not take part in the exercise, rendering it unrepresentative of the will of the people.

There are, therefore, ten reasons given as to why those particular elections (not all elections at all times) should be postponed. Top among which were the exigency of the attainment of peace, compliance with the Constitution and adherence to the National Elections Act for the conduct of a genuinely democratic election that reflects the will of all the people of South Sudan. The regime wanted a partial election in the middle of a war when two million of our people were refugees and most remaining in the country were inaccessible either because of the war or as the time set for the vote was in the middle of a rainy season. What democracy is it talking about?

It was this constitutional case, not pleading from the Opposition or some civil society organizations, that forced the Government then to put off the elections.

It is interesting to note that the regime now stresses the absolute necessity of conducting a population census before the election takes place when it was ready to forego that in 2015. What has changed?

If the Government was serious about conducting a census, it would have by the beginning of the Transitional Period served notice to the National Bureau of Statistics, the body responsible for conducting the census, to start with the preliminary preparations for conducting one. We are not aware that the Government did so. Which then is the organ of the Transitional Government that is engaging the United Nations Population Fund as the Ministry claims?

### **Why the Elections must be held on time?**

The conditions in the country in 2015 were totally different from what they are currently. There is now a peace agreement in place that committed all signatories to holding elections 34 months into the Transitional Period. We should simply respect our commitments. However, it doesn't need a genius to conclude that the regime (read SPLM-IG) lacks the political will to implement the Revitalized Peace Agreement. It stonewalled the implementation of the security arrangements that should have been completed in an eight-month Pre-Transitional Period causing its extension twice (in May and November 2019) resulting in a Pre-transitional Period of 17 months and ten days. Yet, no unified army or organized forces in sight as we write. The formation of the Transitional Government of National Unity both on the national and sub-national levels should have been completed during the Pre-Transitional Period. Yet, 17 months plus were not enough to do so, even now with additional 13 months the process is not completed. The National Legislature is not reconstituted and States assemblies are still absent. The Transitional Constitution incorporating the peace agreement that should have set the pace for the beginning of the Transitional Period is nowhere to be seen. In fact, the current set-up is *ultra vires*. Not a single activity, absolutely none, in the implementation matrix slated for the 13 months now gone of the Transitional Period has been implemented. For instance, the workshop on the constitution-making process organized jointly by the

Joint Monitoring and Evaluation Commission and the Max Planck Foundation in January 2021 was boycotted by SPLM-IG and another meeting scheduled to take place in February was put off as the SPLM-IG continued to refuse participation. Yet, the Ministry has the audacity to claim that *“constitution making process, which is required for legitimizing elections is now being finalized”*(p. 5)! This workshop was critical for the formulation of the legislation that will guide the process of writing a permanent constitution which is a pre-requisite for holding the elections. After putting one obstacle after another against the processes that lead to holding a free, fair and credible election, the regime turns around and argues that the same requirements must be met first to hold an election. It is overplaying its hand in abusing the intelligence of our people. But this is not more than an ostrich-like behaviour; the game is too transparent to be missed by the naked eye. The bad news for the regime is that even at this moment it is still possible to hold a credible election as we shall show below. The claim that *“the parties to the R-ARCSS proposed extending the elections to 2023”* (p. 5), is untrue. Let the Ministry inform the public which Parties did so.

### **Conduct of the Elections**

When the Parties to the Revitalized Peace Agreement agreed that elections shall be held 34 month after the commencement of the Transitional Period, they did so in full grasp of the activities and timeframe leading to the elections. There was nothing preposterous about it as the Ministry asserts. The process was made to stall consciously and deliberately.

In the current situation where the Parties have failed to implement the reforms needed in order to create impartial government institutions, especially, the national army, national law enforcement organized forces, and the judiciary, the only available option is to have the elections conducted by an international body (e.g., UN). There is nothing novel here. The first parliamentary elections in Sudan in 1953 were conducted by an international commission (an Indian who was the Chairman, Briton, Egyptian, American and three Sudanese). This is the only way to guarantee that no party would claim rigging if it loses.

The following are the activities in the Agreement that will help create a conducive atmosphere for the conduct of a free and fair election.

1- Reconstitution of the TNLA and Council of States

This is the Transitional National Legislature that will adopt the laws related to the elections and finally adopt the Permanent Constitution on the basis of which the elections will be conducted.

2- Adoption of the Constitutional Bill prepared by the NCAC that incorporates R-ARCSS into the Transitional Constitution of South Sudan 2011.

The new Transitional Constitution is pivotal as it enshrines important principles agreed upon by the Parties to the Agreement.

3- Permanent Constitution

The constitution-making process is dealt with in Chapter VI of the agreement. Articles 1.20.5 and 6.4 make it clear that it is on the basis of the permanent Constitution that elections will be held. According to Article 6.4, this process shall be completed within two (2) years of the Transitional Period.

(a) Convening the workshop for the Parties to agree on the details of conducting the Constitution-making process

(b) Enact legislation to govern the Constitution-making process

(c) Reconstitute the National Constitutional Review Commission

(d) Appoint a preparatory committee for the convening of the National Constitutional Conference

(e) Convening the National Constitutional Conference

The National Constitutional Conference shall discuss the principles and elements of the Permanent Constitution and adopt a constitutional text.

This constitutional text and an explanatory report shall be submitted to the President for enactment.

(f) Transforming the TNL into a Constituent Assembly

(g) Tabling the Constitutional Text before the Constituent Assembly

(h) Adoption of the Permanent Constitution

4- Demilitarization of the Civilian Areas

The troops of the Parties to the Peace Agreement should have vacated the civilian areas immediately upon the signing of the Agreement. However, SSPDF is still occupying some villages and other civilian areas. The



demilitarization of the civilian areas is necessary so that the civilians move back to their homes.

5- Resettlement of the IDPs and refugees

As soon as the civilian areas are vacated by the military, the IDPs and refugees will be encouraged to go back home.

6- Provision of security to the population

Since the unified police is not in place yet, the Regional Protection Force (RPF) within UNMISS should initially be tasked to provide protection to the civilian population that do not trust government's security organs. In the meantime, unified police on the level of the State will be trained to take over from UNMISS at a later stage upon graduation.

7- The Judiciary

The judiciary plays a central role in ensuring that elections are free and fair. It adjudicates on all the complaints arising from the conduct of all aspects of the elections. Therefore, it is absolutely necessary to have an independent, impartial and credible judiciary in the country.

Here a number of interrelated judicial activities must be completed in time for the elections. These are:

(a) Formation of the ad hoc Judicial Reform Committee

The JRC is provided for in Articles 1.17.3 and 1.17.4 and should have been formed in the first three months of the Transitional Period.

(b) Review of the Judiciary Act

This will be in light of the recommendations of JRC.

(c) Establishment of the Constitutional Court

This is in accordance with Article 1.17.7. The Constitutional Court has the sole authority to adjudicate on all matters connected with the interpretation and application of the Constitution.

8- Census

Article 1.2.14 mandates the RTGoNU to conduct a National Population and Housing Census before the end of the Transitional Period. This practically means that the results of the census should be out before the commencement of the elections process to guide the demarcation of the constituencies. The remaining time to the elections of 21 months may not be sufficient to conduct a credible and dependable census, especially that

millions of South Sudanese are still internally displaced or in refuge. Therefore, the census can be carried forward and the constituencies be demarcated on the basis of voters register or on the basis of 2008 census.

9- Laws that need to be in place before the elections

(a) Political Parties Act

(b) National Elections Act

10- Conduct of the elections

Beginning on 22 December 2022 and ending not later than on 22 February 2023.

### **The Way Forward**

It is still possible to carry out the 10 activities listed above which are the essential requirements for conducting a free, fair and credible election in the time remaining. If it is not possible to carry out any of them in the timeframe given creative alternatives can be worked out by the Parties to and the Guarantors of the agreement. However, our guiding overarching priority must be to conduct elections on time. No party should be allowed cling to power through deceptive means.

In 2010, it was thought that the time was too short to conduct the referendum on the self-determination for the people of South Sudan as stipulated in the Comprehensive Peace Agreement 2005 that was earmarked for 9 January 2011. With determination and commitment it was done against all odds with an unqualified success. This was why we have a country today. The will of the South Sudanese and their determination cannot be defeated by a few power hungry individuals who will use every trick in the book to cling to power while our country plummets into an abyss. In this age, only elections grant legitimacy to any democratic government.

**Dr Lam Akol.**