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RESEARCH FOR A PEACEFUL, JUST AND PROSPEROUS SOUTH SUDAN

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POLICY BRIEF

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South Sudan v James Dak: A Case of Travesty of Justice

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Summary

James Dak is a national of South Sudan who sought refugee status in Kenya in 2015 due to the civil war in South Sudan. In 2016, however, the Kenyan government cancelled his visa and returned him to South Sudan where he was charged with treason, among others, and sentenced to death. Fortunately, South Sudan's President, Salva Kiir, exercised his presidential clemency and pardoned him, along with other convicts. This paper notes the fact that Mr Dak has been set free but maintains that the case against him never seemed to have been proven for two principal reasons: the paucity of evidence to prove the charges (insofar as the evidence remains controversial) and the politics involved. The Court did not seem to have paid regard to these underlying issues.

The gist of the argument this paper makes is that Mr Dak has suffered injustice through combined violations of international refugee law and domestic constitutional law/criminal law and due process. This should alert the UN refugee agencies, such as the UNHCR, as well as human rights organisations, to step up their efforts to prevent such violations from occurring in the future.*

1 Introduction

The High Court¹ of South Sudan recently handed down the most politically sensitive decision in its history. The Court convicted a political prisoner, Mr James Dak, of a series of offences he had allegedly committed in relation to the civil war in South Sudan. The offences range from treason and publishing or communicating false information prejudicial to South Sudan to undermining the authority of or insulting the President of South Sudan, Salva Kiir Mayardit.²

* Special thanks to my supervisors, Dr Caitlin Goss and Professor Graeme Orr, for the helpful comments they provided on this paper.

¹ The High Court is the third court in South Sudan's court hierarchy. Its decisions may be appealed against before the Court of Appeal, which is second in the court hierarchy. The highest court in South Sudan (the Court of Cassation) is the Supreme Court.

² South Sudan Liberty News, *James Gatdet Dak Former Machar's Spokesperson is Sentenced to Death by Hanging within 15 Days* (12 February 2018) South Sudan Liberty News
<<http://www.southsudanliberty.com/news/index.php/latest-news/1703-james-gatdet-dak-former-machar-s-spokesperson-is-sentenced-to-death-by-hanging-within-15-days>>.

The Court awarded a separate penalty for each of the three offences. For treason, the most serious offence of all, the Court sentenced Mr Dak to death by hanging; for publishing or communicating false information prejudicial to South Sudan (which, for ease of exposition, is hereon referred to as ‘sedition’), Mr Dak received 20 years imprisonment; and for undermining the authority of or insulting the President, Mr Dak received one-year imprisonment. Mr Dak pleaded innocent to the charges. He was given a strict timeframe of 15 days within which to appeal against the decision. He lodged an appeal to South Sudan’s Court of Appeal, the success of which was uncertain. Fortunately, the President of South Sudan, Salva Kiir Mayardit, intervened and pardoned him, apparently as a gesture of his goodwill for peace and reconciliation.³ Yet serious doubts remain as to whether these charges have been proven. A close look at each of the three offences may reveal where the truth lies.

2 The Charges

2.1 Treason

Treason is a serious offence against the state in South Sudan. This is provided in section 64 of the *Penal Code*,⁴ the summary of which is provided. Section 64 (1) of the *Penal Code* proscribes treason as an offence against South Sudan, punishable by death or life imprisonment. Section 64 (2) specifies the elements of treason, which include overthrowing the President of South Sudan or conspiring with a foreign government to invade South Sudan. Finally, section 64 (3) provides what may be called a lawful means by which to initiate certain actions intended to improve the system of governance in South Sudan, although this has not been possible to do in practice.

Some may argue on moral ground that treason as an executable offence has no place in the 21st century. As a matter of fact, South Sudan has been chastised by human rights activists (Amnesty International being a leading voice) for retaining the death penalty under its *Constitution*.⁵ The *Constitution* authorises the death penalty for ‘extremely serious offences’ but it is silent as to what these offences may be. It may be inferred that the intention of the drafters of the *Constitution* was to leave it to the Parliament⁶ to legislate in respect to the particularities of these offences. In that regard, the *Penal Code* may be seen as serving this very purpose-filling the void.

Note: one of the difficulties in analysing this case has been accessing the primary information- the facts. This is partly because South Sudan’s Judiciary has not yet developed an online database for reporting cases (that seems to be the case at least), and partly because the judgment containing the facts is written in Arabic as the author has been informed; which means that it would need to be translated into English in order to be useful for this analysis. So, the limited facts presented here are gathered from news reports.

³ Radio Tamazuj, *James Gatdet’s Lawyer Appeals against the Court Verdict* (27 February 2018) <<https://radiotamazuj.org/en/news/article/james-gatdet-s-lawyer-appeals-against-court-verdict>>.

⁴ *Penal Code Act*, 2008 (RSS), herein referred to as the *Penal Code*.

⁵ The *Transitional Constitution of the Republic of South Sudan*, (herein the *Constitution*) art 21.

⁶ South Sudan’s Parliament is called the National Legislature and it consists of two chambers- the National Legislative Assembly and the Council of States.

The issue in the present case is not that treason is unconstitutional. Rather, the issue is that the evidence, inciting violence and conspiring to overthrow the government of South Sudan, given in proof of treason is not without controversy.⁷ This is essentially about the J1 incident,⁸ the cause of which remains a subject of contention between the government of South Sudan and the rebel movement- the Sudan People's Liberation Movement-In Opposition (SPLM-IO). The government calls the incident another coup attempt by the SPLM-IO-another coup attempt in the sense that there is an *unsubstantiated* first coup attempt by the SPLM-IO out of which the current civil war in the country resulted.⁹ The SPLM-IO, *per contra*, characterises the incident as an assassination attempt on Dr Riek by the government.¹⁰

In an attempt to unearth the truth in this, independent observers (experts on conflict) have given their analyses of the incident but could not conclude whether or not there was an attempted coup.¹¹ This leaves room for speculation, at least for this paper. For example, it could be the case that the incident was caused by miscalculations, considering the high tensions that remained between the two militaries (South Sudan People's Defence Forces (SSPDF), known widely then as the Sudan People's Liberation Army (SPLA), and the SPLM-IO) after the formation of the Government of National Unity (GNU) in 2016.

Given that the cause of the J1 incident remains a contentious matter and may never be proven, given the politics involved, it is puzzling how the Court arrived at its conclusion to pronounce Mr Dak guilty of treason. This is a criminal case for which there is a high standard of proof- the beyond reasonable doubt standard.¹² From the limited and controversial evidence available, the Court could not have been satisfied beyond reasonable doubt that Mr Dak had committed treason.

2.2 Sedition

⁷ Sudan Tribune, *South Sudan Court Sentences Machar's Spokesperson to Death* (12 February 2018) <<http://www.sudantribune.com/spip.php?article64711>>.

⁸ The J1 incident refers to the fighting that occurred in Juba in 2016 between President Kiir's presidential guards and the SPLM-IO's contingent protection Dr Riek, the SPLM-IO's leader. The cause of the incident has been very controversial but both parties have accused each other of conspiracy.

⁹ Lauren Ploch Blanchard, *Conflict in South Sudan and the Challenges Ahead* (2016) *Congressional Research Service* <<https://fas.org/sgp/crs/row/R43344.pdf>>.

¹⁰ Sudan Tribune, *President Kiir's Coup Claim Not True: a Harmful Plan* (11 August 2016) <<http://www.sudantribune.com/spip.php?article59898>>.

¹¹ John Young, 'Isolation and Endurance: Riek Machar and the SPLM-IO in 2016-17' (2017) *Small Arms Survey* 12.

¹² The *Penal Code* does not expressly provide for the required standard of proof in criminal cases in South Sudan, but the reasonable doubt standard is implied to apply on the basis that South Sudan is a common law country, being a British colony.

It is an offence under section 75 of the *Penal Code* to publish or communicate false information that has the potential of causing public disorder or violence, among other things. This offence attracts a maximum penalty of 20 years imprisonment.

Mr Dak was charged with sedition on the basis of the comment he published on social media in July 2016. The comment was taken to be one of the series of the events that sparked the J1 incident and was therefore construed to constitute sedition. Here is what the comment says:

BREAKING NEWS: Fighting erupted inside J1, President Salva Kiir's PALACE in the national capital, Juba. The President and his commanders attempted to arrest the First Vice President, Dr. Riek Machar Teny. This came after the President called for a meeting in his office with Dr. Machar and Vice President [second Vice President], James Wani Igga. This turned out to be a setup to arrest and possibly to harm Dr. Machar. Fortunately, Dr. Machar's bodyguards have managed to fight vigorously and rescued Dr. Machar. He is now safe! Meanwhile, fighting has continued.¹³

It is difficult to see how this comment could possibly incite violence, so as to constitute sedition. Clearly, Mr Dak was merely reporting what was already taking place at the J1. More substantively, the comment comes within the constitutional right to the 'freedom of expression and media' under article 24 of the *Constitution*. This article states that '[e]very citizen shall have the right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to public order, safety or morals as prescribed by law'.

It is apparent, of course, that the government of South Sudan is being influenced by its past (path dependency *qua* the military rule/mentality) and that might be the reason it has limited tolerance for freedom of opinion.

2.3 Undermining the Authority of or Insulting the President

Section 76 of the *Penal Code* makes it an offence to undermine the authority of or insult the President of South Sudan. Basically, the section criminalises criticising the President, which is what is dubbed in the *Penal Code* as making a false statement that may cause 'hostility towards', or 'hatred, contempt or ridicule of... the President'.¹⁴

As the facts of the case are not public, it is unclear what specific acts Mr Dak committed that constituted insulting the President or undermining his authority. Regardless, this paper argues that mere insult should not be prescribed as a legal offence for two reasons. One, the President of South Sudan is a political leader, meaning that he makes decisions that affect the lives, liberties, and interests of the people of South Sudan. For this reason, the people of South Sudan should be entitled to have a say in all the political decisions he makes, whatever the form the participation may take. To shield the President from public criticism and to criminalise criticism is to criminalise the freedom of communication and to potentially inhibit accountability which is sorely lacking in South

¹³ James Dak's Facebook comment as retrieved.

¹⁴ The *Constitution*, sec 76 (a) (i) and (ii).

Sudan. Of course, things can get heated up sometimes in the course of discussion but that is to be expected in politics. This does not justify shielding the President from public criticism through legal mechanisms or any other means.

Second, to regard the President of South Sudan as immune from public criticism is to place him above the law and politics. The President of South Sudan is not the fountain of the state. The only persons in human history who have been regarded as such are monarchs. For example, the reigning monarch of the United Kingdom, Queen Elizabeth II, ‘in whose name justice is carried out’ by the courts, is revered as the fountain of justice and symbolic embodiment of the nation of the United Kingdom.¹⁵ Even though it is arguable that such a constitutional monarch ought to be treated with utmost respect, such *lese majeste* laws (laws protecting the dignity of a monarch) have no place in protecting the political executive from criticism.

The source of justice and sovereign power in South Sudan should be the *Constitution*—which is the manifestation of the will of the people. This is expressly provided in article 3 of the *Constitution* which states: ‘[t]his Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the Country’.

Even if these offences were sufficiently proven, however, Mr Dak would still be covered by the *Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access (CoH)*, which was signed in December 2017 between the government and various rebel groups, including the SPLM-IO.¹⁶ Article 9 (2) (c) of the CoH, for example, requires all the parties to the conflict to release the... ‘Prisoners of War [and] all political prisoners and detainees’ they hold. There is no question that Mr Dak was a political prisoner within the meaning of article 9 (2) (c) of the CoH agreement. A political prisoner, as Amnesty International (AI) defines, is ‘a member or suspected member of an armed political group who has been charged with treason or “subversion”’...¹⁷ As a matter of fact, AI had condemned the court decision as ‘completely unacceptable’ and urged the court to quash the decision immediately.¹⁸ This statement reflects AI’s stance on the death penalty, which opposes the death penalty regardless of the nature of the crime.¹⁹

¹⁵ British Monarchist Society, *Duties, Right, and Powers of H.M. The Queen* (2012)

<<https://bmsf.org.uk/about-the-monarchy/the-queen/duties-rights-and-powers-of-h-m-the-queen/>>.

¹⁶ Intergovernmental Authority on Development (IGAD), *Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access 2017*, art 9 (2) (b) and (c).

¹⁷ Amnesty International, *Amnesty International Handbook* (Amnesty International Publication, 1st ed, 2002) 21.

¹⁸ Sarah Jackson, *South Sudan: Quash the Death Penalty for Former Opposition Spokesperson* (13February2013)

<<https://www.amnesty.org/en/latest/news/2018/02/south-sudan-quash-death-sentence-for-former-opposition-spokesman/>>.

¹⁹ Amnesty International, *Five Reasons to Abolish Death Penalty* (9 April 2018)

<<https://www.amnesty.org.au/5-reasons-abolish-death-penalty/>>.

The conviction violated article 9 (2) (c) of the CoH agreement under which Mr Dak should have been set free. This violation of the CoH agreement left many people to wonder whether the conviction had political motives behind it- a genuine concern.

3 Alleged Politicisation of the Case

The SPLM-IO and opinion commentators of varied backgrounds have alleged that Mr Dak's conviction was 'politically motivated'.²⁰ By 'politically motivated', they mean political interference in the case. They justify their claim by pointing to the fact that Mr Dak has been critical of the government since the war began in 2013, as well as the fact that the conviction was carried out in violation of the CoH agreement.²¹ Supporting this claim is also the fact that President Kiir excluded Mr Dak from his 2017 presidential general amnesty to the political prisoners in the country.²² The President did not explain his decision but his Press Secretary, Ateny Wek Ateny, reported in the media that Mr Dak did not qualify for the amnesty because he was undergoing a court process.²³ This is odd because the amnesty was intended as a gesture of goodwill for peace, reconciliation, and healing. This meant that all the political prisoners, including Mr Dak, should have been amnestied.

Political interference in judicial functions, which is the main allegation in this case, is not something unheard of in South Sudan. There have been cases of judges resigning from office on the account of political interference in their roles.²⁴ In 2017, for example, Supreme Court Justice Kukurlopita resigned from office, citing a multitude of reasons for his resignation, among them political interference. His Honour's resignation letter states, in part:

Over the years, despite our efforts individually and collectively, the independence of the judiciary in the Republic of South Sudan has become a mockery and pasquinade. The judiciary lacks institutional independence and the independence of Judges and Justices in performing their function is interfered with and hence the guarantee of the independence of the judiciary by the Constitution and the law is a fallacy... The war in South Sudan cannot be used as an excuse to interfere and silence the judiciary. If anything, [the] judiciary must stand tall during war periods where so many rights are in jeopardy and to protect those rights. It is difficult for the judiciary to properly administer justice and guarantee the supremacy of the rule of law, respect and observation of human rights and freedoms and strengthen the system of good governance. I

²⁰ Mabior Garang Mabior, Chairman, SPLM-IO National Committee for Information and Public Relations Mobile Office, Sudan People's Liberation Movement- In Opposition, 'On the Death Penalty Handed Down to James Gatdet Dak' (Press Release, 12 February 2018).

²¹ Ibid.

²² Radio Tamazuj, *Presidency Says Kiir's Amnesty Didn't Include James Gatdet* (28 May 2017) <<https://radiotamazuj.org/en/news/article/presidency-says-kiir-s-amnesty-didn-t-include-james-gatdet>>.

²³ Ibid.

²⁴ Mark A Wek Deng, 'The Importance of Judicial Independence to the Administration of justice: the Case of South Sudan: Policy Brief' (2016) *Sudd Institute*.

testify to the people of South Sudan that the judicial system in the country is no longer capable of delivering justice in accordance with the Constitution and the law, as expected by our people.²⁵

This testimony adds weight to the popular view that the government may have arbitrarily influenced the court decision to convict Mr Dak. In fact, it has been alleged that the judge who presided over the case is an *amicus imperium*, meaning he sympathises with the government.²⁶

On top of the controversial nature of the charges are the procedural issues that arose in the case relating particularly to the right to a fair trial- the right of an accused to be heard in a language that he or she understands and the right to legal representation. These issues are worth noting as they seem to confirm the overall unfairness perceived in the case.

4 The Right to be heard in a Language that one Understands versus the Right to Legal Representation

Both the right to be heard in a language that one understands and the right to legal representation are guaranteed under the *Constitution*²⁷ and the United Nations (UN) covenants known as the International Bill of Rights.²⁸ For example, article 14 (3) (f) of the ICCPR states that in determining a criminal charge against a person, he or she shall be entitled to ‘free assistance of an interpreter if he cannot understand or speak the language used in court’. Both of these rights are components of the principle of fair trial, which ensures fairness, equality before the law, and certainty in the court process.²⁹

The trial proceedings in the present case were conducted in the Arabic language, in which Mr Dak is not lettered. Nor was he afforded the assistance of an interpreter as the law requires. This, *stricto sensu*, constitutes a denial of the right to a fair trial, which is a substantive right. It meant that Mr Dak may not have had the linguistic capacity to defend himself against the charges.

²⁵ Justice Kukurlopita Marino Pitia, member of the Supreme Court of South Sudan, ‘Resignation as Justice of the Supreme Court of the Judiciary of South Sudan’ (Press Release, 14 November 2017) *Monitor* <<http://www.monitor.co.ug/blob/view/-/4186638/data/1809405/-/112durpz/-/Sudan.pdf>> .

²⁶ South Sudan Liberty News, *James Gatdet Dak, Former Machar’s Spokesperson is Sentenced to Death by Hanging within 15 Days* (12 February 2018) South Sudan Liberty News <<http://www.southsudanliberty.com/news/index.php/latest-news/1703-james-gatdet-dak-former-machar-s-spokesperson-is-sentenced-to-death-by-hanging-within-15-days>> .

²⁷ The *Constitution*, art 19 (6).

²⁸ These refer to the *International Covenant on Civil and Political Rights* (ICCPR) (adopted 16 December 1966, entered into force 23 March 1979) 999 UNTS 171; *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; and *Universal Declaration of Human Rights* (adopted 10 December 1948).

²⁹ Ian Langford, ‘Fair Trial: the History of an Idea’ (2009) 8 *Journal of Human Rights* 37.

English, in which the trial ought to have been conducted, is ‘the official working language in...South Sudan’.³⁰ It is a disregard of the *Constitution* for the High Court, and, indeed, any court of South Sudan, to conduct hearings in the Arabic language. This ought to be treated as a serious issue because it brings courts’ fidelity to the *Constitution* into question. As custodians of the *Constitution*, the courts not only have the duty to interpret the *Constitution*, they must themselves observe the *Constitution* in all respects and must be seen to be doing so.

As regards legal representation, Mr Dak’s legal team withdrew from the case a few days before the trial proceedings commenced, leaving him with no alternative but to appear *pro se* (self-representing). His legal team cited the following as the reasons for withdrawing from the case- indeed, serious allegations which are consistent with the popular view about this case:

We decided to leave the trial process because of some reasons. One of the main reasons is that the trial process is unfair. Number two the charges levelled against James were purely political crimes. They are not criminal offences against the state. Thirdly, the procedures are not fair. We have a problem with the procedures followed by the prosecution.³¹

While it is the case that the government of South Sudan has limited resources to meet its responsibilities, it has a constitutional duty to provide legal representation through legal aid in cases where a person cannot afford a lawyer.³² The failure to provide Mr Dak with legal representation may well be attributable to this lack of resources; however, it remains a denial of the right to a fair trial provided in the *Constitution*. Mr Dak as a lay-person could not have been expected to understand the technicalities involved in the legal process.

5 Concluding Remarks

South Sudan v James Dak presents an important lesson. Drawing from the above evidence, Mr Dak seems to have suffered an *injustice* in the hands of the Kenyan and South Sudanese authorities. For instance, the Kenyan government never gave a credible reason for revoking his refugee status and deporting him to South Sudan. The statement that he became an ‘inadmissible’ person in Kenya given in defence of the decision sounds more like a pretext.³³ Whatever the reason, the Kenyan government was under obligations under both the *1951 Refugee Convention*³⁴ and African Union *Refugee*

³⁰ The *Constitution*, art 6 (2).

³¹ Sudan Tribune, *Lawyers for Jailed Machar’s Spokesperson Pullout over Unfair Trial* (18 January 2018) Sudan Tribune < <http://www.sudantribune.com/spip.php?article64518>>.

³² The *Constitution*, art 19 (6).

³³ Aljazeera, *Fears after Kenya Departs South Sudan Rebel Spokesman* (5 November 2016) <<https://www.aljazeera.com/news/2016/11/fears-kenya-deports-south-sudan-rebel-spokesman-161104164614835.html>>.

³⁴ *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (*Refugee Convention*).

*Convention*³⁵ not to return Mr Dak to South Sudan where he was at risk of persecution for Convention grounds.³⁶ The deportation violated the principle of *non-refoulement* (a rule of international law that prohibits states not to return a refugee to the frontiers where his life or freedom might be at risk) embodied in the said instruments.³⁷

With regard to the conviction in South Sudan, it remains questionable whether the charges have been proven. Two reasons account for this doubt: the paucity of evidence to prove the charges and the politics involved. Up until the time of his detention, Mr Dak was a vocal member of the SPLM-IO and had been openly critical of the government since the war began in 2013. As such, it is possible that he might have been targeted for his opinion and political affiliation. This would not be an isolated case, however. Cases of targeted arrests are not uncommon in South Sudan. For example, recently, a South Sudanese PhD student from Cambridge University, Peter Biar Ajak, was arrested after engaging in what the authorities probably perceived as political activism- a dangerous undertaking in politically less tolerant societies.

Overall, the case has a message for the wider community of nations: that there can be a greater risk of harm to individuals where violations of international refugee law occur alongside violations of domestic constitutional law/criminal law and due process. This should serve as a lesson for the UN refugee agencies, such as the UNHCR,³⁸ as well as international human rights organisations, to step up their monitoring efforts to stop these acts wherever they occur.

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The Sudd Institute is an independent research organization that conducts and facilitates policy relevant research and training to inform public policy and practice, to create opportunities for discussion and debate, and to improve analytical capacity in South Sudan. The Sudd Institute's intention is to significantly improve the quality, impact, and accountability of local, national, and international policy- and decision-making in South Sudan in order to promote a more peaceful, just and prosperous society.

About the Author

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³⁵ *Convention Governing Specific Aspects of Refugee Problems in Africa* (adopted 10 September 1969 (entered into force 20 June 1974)) (*AU Refugee Convention*).

³⁶ The concept of Convention ground refers to the five reasons listed in article 33 (1) of the *Refugee Convention* for which a person may be persecuted. These include 'race, religion, nationality, membership of a particular social group or political opinion'.

³⁷ See, for example, *Refugee Convention* art 33 (1); *AU Refugee Convention* art II (3) and (4).

³⁸ United Nations High Commissioner for Refugees (UNHCR).