

How the AU can promote transitional justice in South Sudan

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The African Union is mandated to help South Sudan to ensure accountability for past human rights abuses through the establishment of a hybrid court. This mandate is derived from the Agreement for the Resolution of Conflict in South Sudan, signed in 2015. The agreement also makes provision for a Commission for Truth, Reconciliation and Healing and a Compensation and Reparation Authority. In the face of continued violence in South Sudan, how can the African Union assist in enabling an effective transitional justice strategy for the country?

Recommendations

- ▶ Promote a victim-centred approach to transitional justice.
- ▶ Insist on a ceasefire in South Sudan and promote psychosocial support as a precondition for successful victim participation.
- ▶ Promote the role of civil society, religious authorities, customary chiefs, the diaspora and the media in transitional justice.
- ▶ Act as a broker between Northern, Southern and regional partners to ensure comprehensive, well-funded and gender-sensitive support for transitional justice process.
- ▶ Expedite the establishment of the hybrid court and a prosecutorial strategy, with a focus on local ownership and national jurisprudence.
- ▶ Provide African transitional justice experts to contribute to the transitional justice set-up.
- ▶ Promote a coordinated approach between transitional justice mechanisms, and emphasise the importance of reparations.
- ▶ Encourage context-specific customary mechanisms to promote reconciliation.
- ▶ Adopt and implement the African Transitional Justice Policy Framework.
- ▶ Urge member states to ratify the Malabo Protocol and establish the African Court of Justice and Human and Peoples' Rights.
- ▶ Establish an African Trust Fund for Victims.

Introduction

Building sustainable peace in South Sudan will require a careful balance between re-establishing the rule of law, redressing gross human rights violations and building an inclusive vision for the future. The ongoing civil war poses a serious challenge to this process. South Sudan's latest peace agreement, the Agreement on the Resolution of the Conflict in South Sudan (ARCISS), makes provision for transitional justice mechanisms, but these remain at the inception phase.

The African Union (AU) is mandated through the ARCISS to support South Sudan in establishing a hybrid court – a joint effort by the AU and the government of South Sudan, aimed at addressing gross human rights violations under international law. The court will be made up of South Sudanese staff and personnel from other African countries. But transitional justice goes beyond the traditional idea of retributive justice, as this report will show. The South Sudanese Transitional Government of National Unity (TGoNU) is also mandated to establish a Commission for Truth, Reconciliation and Healing (CTRH) and a Compensation and Reparation Authority (CRA). It is important that the TGoNU takes a coordinated approach to transitional justice: how and when these processes are carried out will be vital in determining their success and ensuring the non-recurrence of violence.

Given its understanding of the context and the need for localised transitional justice solutions, the AU's role as a facilitator can now be maximised

This report¹ looks specifically at the role the AU can play in implementing and supporting a holistic transitional justice process in South Sudan. The AU has long been involved in the country, and is looking to scale up its support. Given its understanding of the context and the need for localised transitional justice solutions, the AU's role as a facilitator can now be maximised.

The South Sudanese government and the AU are jointly responsible for ensuring justice in the country, in particular through the establishment of a hybrid court. However, if victims' needs are to be genuinely addressed, wide-ranging consultations are vital. Transitional justice is most effective when it is victim-centred. Thus the hybrid court must be linked to other transitional justice processes, including the CTRH, CRA and traditional reconciliation mechanisms. Civil society should bolster these efforts.

Ensuring each of these processes is adequately resourced and supported will require a coordinated approach from the variety of stakeholders.

The report first provides an overview of South Sudan's transitional justice needs and outlines the AU's role in transitional justice on the continent, and in South Sudan in particular. It also cites lessons learned from other African countries that have undergone transitions, with a view to informing a

transitional justice strategy for South Sudan. The report then discusses the challenges and opportunities for implementing transitional justice processes in terms of the latest peace agreement. It finally makes policy recommendations on how the AU can implement a successful transitional justice strategy in South Sudan.

Violence begetting violence

This report will provide only an overview of South Sudan's complex history, as much has already been written on the topic.² Suffice to say, the country has witnessed various conflicts at different levels – from the local to the national, with the most recent eruptions of violence starting in July 2016.³

Moreover, accountability for gross human rights violations is an issue that, until now, has not been addressed. Some violations date back to pre-independence – to the civil war between the north and south of Sudan in the 1970s. In the 1980s the then leader of Sudan, Sadiq al-Mahdi, allowed armed militias free rein in the south. This led to mass killings, enslavement and rape of the southerners.⁴ Resistance grew through the establishment of the Sudan Liberation Movement/Army (SPLM/A) in 1983 by John Garang. A coup by Omar al-Bashir in 1989 only led to further repression in the south, with violence and abuses occurring on both sides.⁵

The civil war was ended through the signing of the Comprehensive Peace Agreement (CPA) by the SPLM/A and al-Bashir's National Congress Party in 2005. This led to the eventual independence of South Sudan in 2011. However, none of the atrocities that occurred for over half a century has been addressed or is likely to be addressed.

Some have argued that there was little forward thinking beyond gaining South Sudan's independence, which happened in 2011. The SPLM/A, which had been unified in its response against the government of Sudan, made little provision for how the new state would be governed in terms of power-sharing among the various ethnic groups or the distribution of wealth, beyond oil.⁶

The CPA was designed to address north–south issues but did not look to provide long-lasting political solutions. It was supposed to avoid ethnicising South Sudanese politics, but no national identity was subsequently cultivated or defined,⁷ and the development of South

Sudan's constitution was never adequately tackled.⁸ As such, there was never an effort to create a unified nation state, or redress past human rights violations.

Violence broke out in 2013. This was initially seen as a struggle between warring factions – one side loyal to President Salva Kiir and the other to former vice president Riek Machar – over the SPLM presidential candidacy, but it has increasingly taken on ethnicised dimensions.⁹ As the international community looked to build state institutions, political elites began to exploit tribal tensions, 'where the exclusion of competing tribal groups from power has become the principal aim of many protagonists'.¹⁰ While most observers view the conflict as a struggle for power between the Dinka and Nuer, it is more complex than this. With over 60 tribes in South Sudan, conflict dynamics vary across the country.

The hybrid court is an opportunity to show a willingness to act against impunity

In 2014 the AU initiated an investigation into gross violations of human rights. The findings of the AU Commission of Inquiry on South Sudan (AUCISS) report were only released a year later, with the AU stating that it was wary of impeding the peace process. However, the AU was criticised for complacency in delaying the release of the report – it was argued that its timely release could have brought more attention to the suffering in South Sudan.¹¹ The report called for a process of national healing and reconciliation, as well as political justice and reparations for victims.¹² Its findings pointed to large-scale abuses that occurred with impunity.¹³

The report's recommendations paved the way for external stakeholders to push for the inclusion of a hybrid court in the AUCISS – a joint responsibility of the South Sudanese government and the AU. The hybrid court is an opportunity to try leaders for gross human rights violations and thereby show a willingness to act against impunity.

However, it is also necessary to redress the underlying causes of the conflict, as noted by one of the commissioners of the AUCISS,¹⁴ the eminent African

scholar Mahmood Mamdani. Mamdani made a separate submission when the report was submitted to the AU, stating that the abuses were in fact structural and political (the report viewed the human rights abuses as criminal actions). He argued that this would require a different type of approach.¹⁵

As a result, transitional justice mechanisms were integrated into the ARCISS, which was signed in August 2015. Yet the ARCISS was largely ignored by its main signatories (Kiir on behalf of the government and Machar as the SPLM-in-Opposition leader). It also saw differing regional positions among Intergovernmental Authority on Development (IGAD) member countries, which are often blamed for aggravating the situation or preventing decisive action.¹⁶

Previously peaceful states and towns are now experiencing violence, with a proliferation of new actors taking up arms

The conflict reignited in July 2016, and South Sudanese civilians continue to be plagued by widespread insecurity and ongoing violence. Human rights abuses include enforced disappearances, arbitrary detentions, the beating and torture of detainees, and extensive sexual violence, especially against women and young girls. These acts have led to scores of deaths and injuries, the displacement of over two million people, loss of livelihood, food insecurity and a mental health crisis in the country.¹⁷

Previously peaceful states and towns are now experiencing violence, with a proliferation of new actors taking up arms. Conflict dynamics are changing, while localised conflicts that have existed for years add fuel to the fire. For example, in Jonglei state the migration of the Lou Nuer to access water and pasture for their cattle is a trigger for interethnic clashes with the Murle.¹⁸ These conflicts, which used to be resolved in traditional ways, are now increasingly being fought with guns.

What are South Sudan's transitional justice needs?

The ARCISS arguably did not address the needs of the broader population, thereby further entrenching exclusionary political arrangements. This has led to the militarisation of ethnic groups that felt excluded from the agreement.¹⁹ Most recently, Lt. Gen. Thomas Cirillo resigned from his position as deputy chief of staff for logistics and formed a new group, the National Salvation Front, with the aim of removing the Kiir regime.²⁰

A continued lack of accountability speaks to the need for a retributive justice process that will re-establish the rule of law in South Sudan. This would ideally include the domestic prosecution of perpetrators through criminal law.

However, the justice system is in disarray; there are only few county courts²¹ and little access to justice. The conflict has eroded core state institutions, including the rule of law infrastructure. There is a lack of trained and

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experienced judges, lawyers and prison staff.²² Many communities in South Sudan have little confidence in justice processes, and lack awareness of their legal rights or formal legal processes.²³

The South Sudan National Police Service (SSNPS) is responsible for internal security, but there are not enough trained police officers. In most cases competing private security companies and ethnically aligned militias undertake these tasks, meaning that investigations are not conducted by the relevant government body.²⁴

The lack of oversight and accountability in the police service has reinforced a culture of impunity for human rights abuses. It is clear that any efforts to re-establish the rule of law through transitional criminal justice processes cannot be undertaken by the South Sudanese alone. The SSNPS's predatory relationship with the community it is meant to serve has further eroded trust between state and society,²⁵ and a compact of trust must be re-established between the government and the general population.

The underlying causes of the conflict must be addressed, and economic and psychological redress for victims is crucial. In addition, more than 4.6 million people are currently affected by food insecurity²⁶ while economic growth is slow and heavily dependent on oil revenues.²⁷ Economic growth is vital for human development, and as long as the people in South Sudan are faced with this type of daily stressor they are unlikely to heal from the devastation of the conflict.

Transitional justice is thus a crucial factor in South Sudan's eventual recovery. It encompasses a range of processes and mechanisms that can be used to promote justice, accountability, peace and reconciliation.²⁸

While in the past there have been some efforts to promote dialogue and reconciliation through traditional and customary systems, for example in areas such as Wunlit, Lilir and Jonglei, these have been localised rather than feeding into a national effort.²⁹

South Sudan's current transitional justice framework

As mentioned above, the 2015 peace deal developed a transitional justice framework for South Sudan. Chapter

five of the ARCISS deals with transitional justice and provides for the:³⁰

- Commission for Truth, Reconciliation and Healing (CTRH)
- Hybrid Court for South Sudan (HCSS)
- Compensation and Reparation Authority (CRA)

It also makes provision for the lustration (the barring of abusive and corrupt officials from public office) of those convicted by the hybrid court.³¹

The ARCISS outlines the AU's role in establishing the hybrid court. The AU has since established a roadmap for the establishment of the HCSS,³² but this will require substantial funding and support from the international community and internally in South Sudan. Regional buy-in is also critical – it has been argued that IGAD's lead in the peace talks (carried out under the principle of subsidiarity, whereby regional organisations are the first responders) has held back the AU engagement.³³

The main stakeholders leading the peace negotiations, including IGAD, continue to push for the ARCISS's implementation

On 14 December 2016 Kiir announced the start of a process of national dialogues, which he argued was intended to link 'political settlements with grassroots grievances, redefine unity, address issues of diversity, agree on a mechanism for sharing resources and enhance reconciliation', among others.³⁴

Donors are divided on whether this is an attempt to deflect attention from the peace agreement,³⁵ while the AU has recognised that the national dialogues, if carried out legitimately, could be a critical initiative for resolving South Sudan's challenges.³⁶ This process is now underway, and Kiir has sworn in the steering committee and declared a unilateral ceasefire.³⁷

Meanwhile, the main stakeholders leading the peace negotiations, including IGAD, continue to push for the ARCISS's implementation. On 12 June 2017 IGAD released a communiqué reaffirming this support.³⁸ On 19 June the European Union (EU) – an active monitor of and donor to the ARCISS – urged the AU to move forward

with the establishment of the hybrid court. It also welcomed the recent extension of the mandate of the United Nations (UN) Commission on Human Rights in South Sudan (UN Resolution 34/25), which will continue to collect and preserve evidence of human rights violations.³⁹

For its part, the AU has welcomed a decision by IGAD to convene a High-level Revitalization Forum of the Parties to the ARCISS.⁴⁰

Clearly, there is a strong moral imperative to put an end to the violence.

South Sudan's multi-layered history means that there cannot be a one-size-fits-all approach. Determining the parameters for transitional justice will be difficult

Donors are tiring of providing support to South Sudan amid continued corruption, mismanagement and ethnic polarisation by elites. Transitional justice is therefore imperative. But, as noted above, South Sudan's multi-layered history means that there cannot be a one-size-fits-all approach. Determining the parameters for transitional justice will be difficult. What should be the starting and cut-off dates for investigations and truth telling? How will consultations consider regional dynamics and influences? Should there be localised reconciliation processes that build on different customary approaches?

The AU's transitional justice mandate

In addition to the AU's mandate in the ARCISS, the organisation has a moral and legal responsibility to ensure justice on the African continent. The AU has stated that the ARCISS is the only viable option to address the numerous challenges in South Sudan. It has also said that the national dialogues should pave the way for healing, reconciliation and justice.⁴¹ Given the limited funding available, the national dialogues should be an entry point for transitional justice in South Sudan.

It should be noted that the AU's rejection of impunity is derived from its Constitutive Act (2000) Article 4 (o), which emphasises 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassinations, acts of terrorism and subversive activities'.⁴² South Sudan acceded to the Constitutive Act on 27 July 2011, when it became the 54th member state of the AU.⁴³

The issue of accountability is somewhat controversial. In recent years, some countries, such as South Africa and Burundi, have criticised the International Criminal Court (ICC), alleging that it is unfairly biased against African states.⁴⁴ The AU has supported this stance, while adding that this 'must not be construed as blanket opposition to justice but rather as recognition that imposing justice while ignoring legitimate African concerns may be detrimental to justice'.⁴⁵



SOUTH SUDAN ACCEDED TO THE CONSTITUTIVE ACT ON 27 JULY 2011, WHEN IT BECAME THE 54TH MEMBER STATE OF THE AU

The AU and its member states have been reluctant to indict sitting heads of state, for reasons of ‘stability’,⁴⁶ as in the case of the Special Tribunal for Sudan. However, this is changing. Sierra Leone’s Special Court successfully prosecuted former Liberian president Charles Taylor, and the International Criminal Tribunal for Rwanda (ICTR) found former Rwandan prime minister Jean Kambanda guilty of crimes relating to genocide.⁴⁷ Moreover, the conviction of former Chadian dictator Hissène Habré at the Extraordinary African Chambers in the courts of Senegal in May 2016 was the first time a domestic court of another African country found a former head of state guilty of crimes against humanity.⁴⁸

In July 2014 the AU adopted the Malabo Protocol, which expanded the jurisdiction of the African Court of Justice and Human and Peoples’ Rights to include international crimes. Nine countries had ratified the protocol as of May 2017⁴⁹ – 15 ratifications are required for it to enter into force.⁵⁰

The AU has also developed the draft African Transitional Justice Framework (ATJF), which recognises that African countries have to fight impunity, promote accountability, and foster reconciliation and social healing.⁵¹ The ATJF has not yet been adopted, but will be critical in moving forward the AU’s role in transitional justice on the continent. It calls for coherence and coordination, both internally within the AU and externally. Internally this includes departments such as the Legal Affairs Department, the African Governance Architecture and the Post Conflict Reconstruction and Development division. Uniquely, it also calls for the timing and sequencing of transitional justice initiatives.⁵² This is important – the AU’s formal involvement in transitional justice in South Sudan only consists of helping to establish a hybrid court, but it cannot focus on this alone.

The appointment of former Mali president Alpha Oumar Konaré as the AU High Representative for South Sudan is aimed at strengthening the AU’s contribution towards ending the conflict in South Sudan. More specifically, Konaré has to maintain close contact with the South Sudanese parties and other stakeholders, cooperating with the leadership of IGAD, African stakeholders and members of the Ad Hoc High-Level Committee to facilitate a collective and coordinated African approach.⁵³

Lessons learned from transitional justice efforts in Africa

Africa has been witness to a variety of transitional justice mechanisms – from international and domestic trials to truth and reparation commissions. There is no one-size-fits-all approach to transitional justice, but lessons learned point to the need for a coordinated⁵⁴ and victim-centred approach.

The UN special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence argues that there are both epistemic and legitimacy arguments for victim participation in transitional justice. Epistemically, there is a need to capture victims’ sense of justice, ensure a fit between their measures and needs, and examine alternatives for redress. In terms of legitimacy, participation can be seen as an empowerment of victims, contributing to making them visible and creating an equalising effect.⁵⁵ As such, there is a need for victim participation in the design, implementation and monitoring of all transitional justice measures.⁵⁶ It is vital to recognise the victim as the holder of rights.⁵⁷

There is a need for victim participation in the design, implementation and monitoring of all transitional justice measures

It has been argued that three fundamental conditions enable the success of victim participation: security conditions that prevent victims from facing coercion; robust forms of psychosocial support; and capacity building of victims so that they can understand their rights.⁵⁸

The South African experience demonstrated that truth does not necessarily heal.⁵⁹ Psychosocial support is vital to support victims, and enhance their willingness to participate.⁶⁰ In terms of capacity building, South–South cooperation could be particularly helpful in ensuring the transfer of knowledge among victim communities.⁶¹

Trials can contribute to the recognition of victim’s rights.⁶² Yet experience on the African continent has shown that trials are more likely to occur when there is a change of leadership. This can raise criticisms over partiality, where trials are seen simply as a tool for holding the predecessor regime accountable rather than advancing the rule of

law. This was an accusation levelled at the ICTR in Rwanda.⁶³ In Liberia, the Truth and Reconciliation Commission (TRC) proposed the prosecution of a number of individuals, including President Ellen Johnson Sirleaf. There was thus little political incentive for the president to consider any kind of trial, and accountability in Liberia remains a major concern.

However, the possibility of prosecution at a later stage is not precluded.⁶⁴ Moreover, states have the duty to investigate and prosecute human rights violations, and under international law cannot offer amnesties, even though this is common practice.⁶⁵

Yet even with the required political will, trials are often seen as divisive, costly and time-consuming.⁶⁶ In Rwanda the ICTR only managed to prosecute a few perpetrators, leaving the majority of victims unsatisfied. In addition, it was accused of failing to engage its primary audience – ordinary Rwandans – and largely excluding victims from the trials.⁶⁷

International trials are unlikely to resonate with the general population or to develop the internal legal capacity of the country in question

International trials often require external funding and support, and in the interests of stability are held outside the relevant country. They are thus unlikely to resonate with the general population or to develop the internal legal capacity of the country in question.⁶⁸ Sierra Leone's hybrid court was accused of failing to build the national capacity of the judiciary and shape national jurisprudence.⁶⁹

At the same time, conflict often breaks down justice systems or leaves them highly politicised and lacking independence. It could thus be argued that prosecutions outside the country are less likely to be affected by a compromised judiciary or country conflict dynamics, and that accountability should not be compromised.⁷⁰ The international trial of Taylor in The Hague, for example, led to a successful prosecution and arguably forced spoilers to compromise on Liberia's peace agreement.⁷¹

The extent to which prosecutions are possible depends on the context and political reality, including the scale of wrongdoing and the degree to which it was systemic or state-sponsored.⁷² Rwanda's domestic trials were so unsuccessful that it turned to the gacaca courts – a community-based and decentralised traditional system that focuses on truth and reconciliation.⁷³

It is important that a prioritisation strategy for prosecutions is developed, including 'the easiest cases, high-impact cases, symbolic/emblematic/paradigmatic cases, most serious violations and most responsible perpetrators',⁷⁴ and that trials are not seen as one-sided.

Given the limitations of trials, truth commissions have also been used as a way of addressing the past. A truth commission investigates, documents and

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reports on human rights abuses over a specific period of time. Their mandates have also expanded to include an analysis of underlying causes and the broader context, as well as to making recommendations on legal reforms.⁷⁵ Yet this expansion can be problematic when truth commissions are not adequately resourced or supported by multidisciplinary expertise, or do not have a long enough preparatory period.⁷⁶

In Africa truth commissions have been used to varying degrees of success. The South African Truth and Reconciliation Commission (TRC) was borne out of the notion that reconciliation, rather than retribution, was required to move the country forward.⁷⁷ It was the first truth commission to be granted quasi-judicial powers, with the ability to grant amnesties and carry out investigations. The premise was that those who did not tell the truth would be prosecuted. Ultimately, many perpetrators did not come forward⁷⁸ and the South African TRC was criticised by many for failing to make true the threat of prosecutions. However, it did promote truth telling through its 'carrot and stick' approach.⁷⁹

The Sierra Leonean Truth and Reconciliation Commission, on the other hand, was not tied to the Special Court that had been established, leading to limitations on its effectiveness.⁸⁰ It was more successful than the court in establishing the root causes of conflict and the institutional underpinnings that enabled the conflict in the first place, but was generally considered ineffective.⁸¹ Nevertheless, it had good working practices, including developing special rules of procedure to address women victims' needs⁸² and organising reconciliation activities according to chiefdoms.⁸³

Truth commissions have, however, also been used as political tools to avoid accountability. This was argued in the case of Kenya's Truth, Justice and Reconciliation Commission, where politicians failed to establish a special tribunal and criticised the efforts of the ICC.⁸⁴ Instead, some politicians suggested that the Truth, Justice and Reconciliation Commission could provide some form of accountability, much to the dismay of human rights activists.⁸⁵

Uganda, Zimbabwe and Nigeria have all had truth commissions, but their reports were never made public, arguably undermining the main purpose of such a commission – to provide public acknowledgement of

the victims. The involvement of civil society in truth commissions is particularly helpful in terms of following up on the implementation of their recommendations.⁸⁶

Truth commissions also increasingly focus on reconciliation, but they cannot do this alone. Perpetrator-victim pardon procedures are warned against, as they can place an undue burden on victims.⁸⁷ Reconciliation is defined as 'at minimum, the condition under which individuals can trust one another as equal rights holders again or anew'.⁸⁸

Experiences have shown that reparations are important, as they provide victims with tangible benefits

In promoting reconciliation, traditional mechanisms should not be ignored – past experience has pointed to their utility. The gacaca process was largely preferred by ordinary Rwandans⁸⁹ and helped speed up the enormous backlog of genocide-related cases.⁹⁰ In Mozambique the Gorongosa people engaged in forgiveness and reintegration rituals that promoted reconciliation despite government denial.⁹¹ In Uganda traditional justice mechanisms have been used by civil society organisations to foster a culture of dialogue and inclusiveness, promote a sense of unity among communities and arguably act as a deterrent to others who wanted to commit similar crimes.⁹²

However, it should be cautioned that traditional mechanisms are also culture specific and may vary according to tribe and ethnicity. Moreover, if structures are not formalised they may lack the political authority to have significant impact.⁹³

Experiences on the continent have also shown that reparations are important, as they provide victims with tangible benefits that address the consequences of violations during armed conflict. More importantly, reparations uniquely focus on the situation of the victims. Yet despite a normative acknowledgement of the need for reparations, the implementation of reparation programmes is grossly lacking – with serious ramifications for trust between citizens and state across many generations.⁹⁴

Reparations often come in the form of material compensation. South Africa aimed to address the socio-economic inequalities that had arisen from its apartheid system through the Reparations and Rehabilitation Committee of the TRC. The committee was created to provide reparations in lieu of legal-based compensations, but it was problematic and limited in scope.⁹⁵ One of the greatest criticisms of the South African process was that South African businesses, which largely benefitted from apartheid, were never made to pay reparations.⁹⁶

In Sierra Leone the UN Peacebuilding Fund contributed to reparations for victims. However, these were not seen as sufficient in meeting the wider and varied needs of the population.⁹⁷

There is limited awareness of the peace agreement among the South Sudanese population, and of transitional justice in general

Reparations should also consist of symbolic measures such as memorialisation, seen in national monuments and commemorative celebrations. This addresses the intangible aspects of conflict, such as culture, dignity and collective identities.⁹⁸ Symbolic reparations can start the process of healing and reconciliation.⁹⁹ South Africa and Rwanda both considered memorialisation an important part of their transitions, but their efforts raised questions over subjectivity.¹⁰⁰

Reparations can also speak to restitution (restoring a victim to a state similar to that experienced before the violations had occurred), and can include measures such as the restoration of human rights. Morocco did not address accountability and focussed primarily on compensation – its Equity and Reconciliation Commission granted reparations to over 3 000 people¹⁰¹ – but participants were made to sign an agreement not to identify any perpetrators. While the commission made progress in restoring victims' rights, including recommendations on women's inheritance rights, the process was not considered transparent or fair and arguably failed to deter future violations.¹⁰²

The importance of linking development and restitution has been noted, but these need distinct functions – restitution needs to speak directly to victims' rights.¹⁰³

Reparations also speak to guarantees on non-repetition. This has primarily been seen as vetting (whereby the integrity of individuals is scrutinised to determine their suitability for public employment) in order to rid the state and institutions of abusers and collaborators who were part of the conflict.¹⁰⁴ In Liberia the entire army was disbanded, and only those without a record of human rights abuses were allowed to join the new army.

Vetting can be risky – those who committed the crimes may see continuing violence as necessary for self-preservation, and vetting may further weaken



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fragile institutions.¹⁰⁵ Moreover, the focus on vetting has detracted from more important conversations on institutional reform, including security sector reform and greater civilian oversight mechanisms.¹⁰⁶

Challenges and opportunities for transitional justice through the ARCISS

As mentioned above, there is a need for a victim-centred and coordinated approach to transitional justice. Although there is limited awareness of the peace agreement among the South Sudanese population, and of transitional justice in general, initial research has shown that there is an appetite for discussion on these issues.¹⁰⁷

While the ARCISS makes provision for a hybrid court, a truth commission and a reparations commission, these will need to be better defined through close consultations with local stakeholders, including customary chiefs, the church, women and the youth. South Sudan also has a large diaspora, which must be engaged in any transitional justice process. The national dialogues may provide an opportunity to do this. Yet any engagement should be aware of the potential to further polarise actors, and adapt strategies accordingly.

The current context in South Sudan does not lend itself to a victim-centred approach – security remains an issue, psychosocial support is lacking, and there has been limited capacity building for victims. These issues need to be addressed with urgency.

Another major challenge for an effective transitional justice strategy is resources (financial and personnel). As such, donors need to understand that they cannot cherry-pick the elements of transitional justice that they most agree with – all elements need to be supported equally.

Commission for Truth, Reconciliation and Healing

The CTRH has been given a quasi-judicial role, with the mandate to investigate all human rights violations and excessive abuses of power in South Sudan, as well as the circumstances and causes of the conflict since 2005.¹⁰⁸ As the experience of Sierra Leone has shown, it is imperative that the work of the CTRH be coordinated with that of the hybrid court and the CRA. The CTRH may wish to share evidence with the court, but it is also required to recommend on the right to remedy.

There has been some progress in setting up the CTRH. In December 2016 the Ministry of Justice and Constitutional Affairs established a technical committee tasked with organising a national consultation process to establish the CTRH.¹⁰⁹ Women's groups offered to lead the process, which is encouraging, since women have been particularly affected by sexual and gender-based violence in the country.

Civil society organisations in South Sudan have developed a five-year strategic plan for promoting truth, justice, healing and reconciliation. The Transitional Justice Working Group (TJWG) has also been created and will act as an interface between civil society and national and international transitional justice stakeholders.¹¹⁰

The CTRH has begun with initial consultations to identify the scope and mandate of its work. It should not begin its quasi-judicial work until other transitional justice initiatives, such as the HCSS, are also ready. It is important that the CTRH is not cited as an accountability mechanism that can deter the establishment of the hybrid court.

Donors need to understand that they cannot cherry-pick the elements of transitional justice that they agree with

The TJWG has called for the CTRH to be held prior to the national dialogues, to prevent the two processes from being confused and the creation of credibility issues. However, the national dialogues appear to be moving forward, and can provide a basis for defining a common narrative for South Sudan.

The CTRH will face a number of challenges, such as determining the appropriate use of traditional dispute resolution mechanisms. In South Sudan the main purpose of justice is to provide compensation for the loss of life or to restore social equilibrium.¹¹¹ Customary compensation takes different forms, with ethnic communities such as the Dinka, Nuer and Shilluk using cattle while the Zande, Bari and Anyuak use money. Controversially, the Lotuho offer a girl from the perpetrator's family in compensation.¹¹² Traditional processes also focus on putting pressure on the family and community to restrain their members from committing crimes.¹¹³

In drawing on traditional dispute resolution mechanisms, the CTRH will have to ensure that these conform to human rights standards. It will also have to consider hybrid models of traditional processes that are acceptable to the various ethnic groups. Moreover, it is important that donors support these initiatives and not only provide funding for the hybrid court.

Hybrid Court for South Sudan

The HSS has met with resistance from within the South Sudanese governing elite, many of whom are wary of being prosecuted. Minister of Information Michael Makuei said that it would undermine peace,¹¹⁴ and the government has stated that it would rather opt for a mediated peace, truth and reconciliation process.¹¹⁵ However, international law and the AU's legal statutes are such that prosecutions cannot be avoided.

A prosecutorial strategy needs to be developed in conjunction with consultations with victims, and it needs to be well publicised

The hybrid court is expected to deal with genocide, crimes against humanity, war crimes and other serious crimes under international law.¹¹⁶ It proposes that the majority of personnel come from African states other than South Sudan and does not make allowances for a statute of limitations¹¹⁷ or the granting of pardons, immunity or amnesty.¹¹⁸ This will annul any previous amnesties given by Kiir.

The agreement also states that, regardless of official capacity or superior orders, no one shall be exempt from criminal responsibility and the defence of superior orders is not valid.¹¹⁹ International partners will thus have to give practical consideration as to whether Kiir should be indicted as sitting head of state. If Kiir is prosecuted he will make little effort to cooperate on any transitional justice matters, but the possibility of prosecution can also be deferred until later while capacity-building support for the new political leadership is provided.

A prosecutorial strategy needs to be developed in conjunction with consultations with victims, and it needs to be well publicised. South Sudan's justice system lacks the capacity and resources to carry out domestic trials – hence the need for a hybrid court. Given that most personnel will not come from South Sudan, it is unlikely that the court will have an impact on the majority of the population or contribute to national jurisprudence. It will, however, signal to perpetrators that they cannot continue to act with impunity.

The South Sudanese government has agreed to domesticate legislation for the court by the end of November 2017.¹²⁰ It remains to be seen if this will translate into action. Moreover, the establishment of the hybrid court will require significant resources.

THE ARCISS MAKES
PROVISION FOR
REPARATIONS FOR
CRIMES COMMITTED

after
December
2013

Compensation and Reparation Authority

The CRA is arguably the most important part of the transitional justice arrangements, but so far is also the most neglected. As has been argued previously, reparations provide tangible benefits to help citizens rebuild their livelihoods.¹²¹

The establishment of the CRA will require huge amounts of resources and the executive body¹²² will need to consider who will be responsible for footing the bill (especially considering the government is already bankrupt) and how this payment will take place. In Senegal, the Trust Fund – set up by the AU – is struggling to find resources to make financial reparations following the verdict against Habré.

The agreement also only makes provision for reparations for crimes committed after December 2013, but if reparations are to be successful and prevent discontent they should be comprehensive in addressing economic disparities and the legacies of inequality.¹²³

Although the ARCISS primarily conceives of reparations as financial compensation, other forms such as memorialisation should not be ignored. Vetting is risky, but reparations should also be viewed in the context of broader security sector reform.¹²⁴

The way forward: supporting an AU transitional justice strategy

The AU must promote and support a victim-centred approach. In particular, the needs of women should be taken into account, as they have been differently and disproportionately affected by the conflict. Victim consultations are therefore essential and must be wide-ranging. Moreover, in promoting a victim-centred approach, the AU can consider experience sharing with victims from other African countries to build capacity.

Security and psychosocial support are fundamental preconditions for such an approach. The AU must continue to insist on a ceasefire and ensure it is implemented, while emphasising the need for donors to provide resources for psychosocial support.¹²⁵ Transitional justice cannot take place in an environment where there are ongoing abuses, since one of its basic premises is the guarantee of non-recurrence.¹²⁶

The AU should support the work of the TJWG and civil society in transitional justice initiatives, but should also engage customary chiefs, religious leaders and the media. In addition, it should consider how the South Sudanese diaspora can be used to implement transitional justice strategies, including drumming up support for transitional justice. Not only do members of the diaspora understand the South Sudanese context but they can also contribute intellectually and/or financially. The announcement of the national dialogues should be seen as an opportunity for beginning such discussions.

The AU should solicit the support of neighbouring countries to arrest perpetrators who have left the country

The AU needs to provide long-term assistance to the TGoNU in order to implement an effective transitional justice strategy, drawing on many resources. For this to happen, donors need to be on the same page, which involves looking beyond criminal justice initiatives to supporting other transitional justice processes. In particular, truth seeking and reparations are important for victims. Here the AU can play a significant role in acting as a broker between Northern and Southern development partners – drawing attention to the wide-ranging support that is needed and publicising the need for transitional justice initiatives both in South Sudan and outside the country. In particular, the AU should solicit the support of neighbouring countries, as their assistance will be required in arresting perpetrators who may have left the country, and in developing narratives that transcend borders.

The AU can use the political gravitas of Konaré together with Joint Monitoring and Evaluation Commission Chairperson President Festus Mogae and UN Special Envoy to South Sudan Nicholas Haysom to build this support in the international community.

The AU and the South Sudanese government need to forge ahead in establishing the hybrid court as a means of signalling an end to impunity, but they must recognise that there are serious limitations to this approach.

The ARCISS makes provision for the hybrid court to use the report of the AU Commission of Inquiry on South

Sudan and draw on other documents, reports and materials, including but not limited to those in the possession of the AU.¹²⁷ Given this mandate, the AU can begin to develop a prosecutorial strategy and gather the necessary resources (personnel and financial) to facilitate its activities.

For the hybrid court to be a success, it must be locally owned. If the South Sudanese government does not provide domesticated legislation for the hybrid court, establishing it in South Sudan may be difficult, particularly given ongoing human rights violations that will make information gathering, witness protection and the preservation of evidence difficult. One concern is that the court will need to try some of the actors engaged in its establishment.¹²⁸

The AU will have to weigh up the pros and cons of locating the hybrid court outside South Sudan. It is critical that the court is independent

It is also critical that the court is independent. Therefore, the AU will have to weigh up the pros and cons of locating the hybrid court outside South Sudan.

The AU must consider ways in which to build support for the court among the South Sudanese and to ensure that the population remains informed even if the court is located outside the country. One way to do this is by ensuring in-depth and objective media coverage, such as broadcasting trials on the radio or engaging in TV talk shows.

As the HCSS and the CTRH require personnel from other African countries, the AU could begin drawing up lists and databases of African experts. The independence of these experts will be critical. The AU will also need to consider how this can be used to build domestic capacity.

It is essential that the hybrid court coordinate with the CTRH, as perpetrators may not have an incentive to tell the truth if they fear prosecution. In addition, if the evidence collected by the truth commission does not meet a legal standard of proof, it can be used to develop a common narrative. Past experiences on the continent have shown that coordination, sequencing and timing between different processes are essential. A truth-telling process on gross human rights violations cannot begin until the trials have finished, as it has the potential to prejudice the legal process and put victims at risk. In the initial stages, truth telling for localised conflicts should be promoted until the hybrid court is up and running.

In addition, there is a need for context-specific reconciliation mechanisms, as these have proved useful in garnering the support of the local population and played an important mediation role among disputing clans.¹²⁹ Here the AU can encourage the use of traditional mechanisms that have thus far been ignored in the peace process.¹³⁰

An important caveat for the use of traditional mechanisms is that they were never meant to address mass crimes, and their scope should be fairly



THE AU MUST CONSIDER WAYS IN WHICH TO BUILD SUPPORT FOR THE COURT AMONG THE SOUTH SUDANESE AND TO ENSURE THAT THE POPULATION REMAINS INFORMED EVEN IF THE COURT IS LOCATED OUTSIDE THE COUNTRY

limited. The AU can assist in fostering community-based accountability mechanisms that will lead to reconciliation and integration. This needs to be tied to the hybrid court, truth commission and reparations committee. The specific concerns of women should be addressed at this level as well.

International law and past experiences on the continent have shown that reparations are critical in providing tangible benefits to victims and addressing socio-economic inequalities that otherwise may lead to further violence. At the same time, failing to fulfil promises of reparations may lead to disillusionment.

The AU will need to work with the government and a variety of stakeholders, including the UN Peacebuilding Fund and international financial institutions, to ensure that the CRA does not fall by the wayside. Indeed, the framework for reparations should be embedded in the high court statute, since victims will be participating at the hybrid court not only as witnesses but also as independent parties to the proceedings.

The government must contribute financially to show it is serious and committed to the process. It can raise this

funding by eliminating corruption and putting in place more stringent accounting mechanisms to convince the international community of its sincerity.¹³¹ The CTRH and the CRA will also have to work hand in hand to ensure legal recommendations are made on issues such as land redistribution and women's inheritance rights. Basic social services should also be provided, while a broader strategy for security sector reform is imperative. Finally, strategies for memorialisation should be considered.

The government must contribute financially to show it is serious and committed to the process

In the long term the AU must adopt the ATJF It should continue to urge member states to ratify the Malabo Protocol, make the African Court of Justice and Human and Peoples' Rights operational, and establish a trust fund for victims. In this way, it will show that it is serious in promoting effective transitional justice and putting an end to impunity.

Notes

- 1 This report is part of a broader project called 'Enhancing African responses to peacebuilding' by a consortium of three partner organisations – the Institute for Security Studies (ISS), the Peace Research Institute Oslo (PRIO) and New York University's Center on International Cooperation (CIC). It is derived from research carried out from 9–17 February 2017 in Addis Ababa, Ethiopia and Juba, South Sudan with 28 international, local and donor institutions.
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