

Expanding the Reach of Justice and Accountability in South Sudan

POLICY BRIEF

Intersections of Truth, Justice and Reconciliation in South Sudan

David K. Deng & Rens Willems

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University for Peace
UPEACE Centre The Hague



Cover photo: David K. Deng 2013 © Customary court proceedings in Akobo, Jonglei State

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Summary

This policy brief explores various options to consider in expanding the reach of justice and accountability processes as part of any post-conflict transition in South Sudan. The brief is structured in three sections. After a short introduction, the first section examines comparative state practice in the use of amnesties. Though often viewed as impediments to justice and accountability, partial or conditional amnesties can also provide a useful means of coping with widespread conflict-related abuses and states' inability to bring all suspects to trial. The second section presents survey data on perceptions of amnesties and the overlap between the victim and perpetrator population to try to understand the implications of conditional amnesties in the South Sudanese context. The third section provides policy options for South Sudan to consider in its transitional justice program moving forward, most notably, the use of alternative sentencing and referrals to customary justice mechanisms for certain categories of perpetrators who admit wrongdoing and seek forgiveness.

Introduction

The conflict that erupted in South Sudan in December 2013 has generated renewed interest in transitional justice, or the range of mechanisms that societies emerging from periods of conflict or authoritarian rule use to combat impunity and come to terms with the legacies of past human rights violations.¹ In August 2015, South Sudan's warring parties — the Government of the Republic of South Sudan and the Sudan People's Liberation Movement-in-Opposition (SPLM-IO) — signed a peace agreement that provides for an ambitious transitional justice program, including the formation of a Commission for Truth, Reconciliation and Healing (CTRH), a Hybrid Court for South Sudan (HCSS), and a Compensation and Reparations Authority (CRA).²

South Sudan presents a daunting environment for efforts to promote transitional justice. The region has been at war for 40 of the last 60 years, and the current conflict is characterized by some of the most intense violence that the country has ever witnessed. Numerous conflicts coexist and overlap in South Sudan, ranging from inter-communal conflicts over land and natural resources to more politically motivated conflicts associated with power struggles among the military and political elite. Senior figures on all sides have been implicated in abuses, and even if the political establishment can muster the political will to hold these individuals accountable, the

¹ The United Nations defines 'transitional justice' as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof." United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, U.N. Doc. S/2004/616 (23 Aug. 2004), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616.

² Intergovernmental Authority on Development (IGAD), Agreement on the Resolution of the Crisis in South Sudan (ARCISS) (Aug. 2015), available at <http://www.sudantribune.com/spip.php?article56093>.

logistical difficulties inherent in such an undertaking would present formidable obstacles.

Despite these challenges, a considerable demand for justice and accountability has emerged from sectors of South Sudanese society.³ People are dissatisfied with the way that past peace processes have rewarded belligerent parties with blanket amnesties (implicit or explicit) and political and military appointments while victims are left to suffer without remedies. Communities have little confidence in the ability of the state to protect them, and carry out violent attacks against neighboring communities in retribution for harm that was done to them and as a deterrent against future attacks. Meanwhile, since impunity is the norm, those carrying out revenge attacks can be confident that they will not be held accountable for their actions. The challenge for policy-makers is to develop a practical means of bridging the gap between people's desire and demand for those who have committed abuses to be held to account and viable mechanisms for doing so in the South Sudanese context.

This policy brief examines different possible approaches to justice and accountability in the wake of the December 2013 crisis with reference to survey data that the South Sudan Law Society (SSLS), the University for Peace (UPEACE) Centre The Hague and PAX compiled in 2015. The survey targeted 1,912 individuals in four locations — Juba town, Juba protection of civilian site (PoC), Wau town and Bentiu PoC — and sought to better understand their perceptions of and experiences with violence, particularly from the perspective of access to justice services. The policy brief recommends an approach that would strike a balance between the punishment of those who bear most responsibility for international crimes and leniency for those who acknowledge wrongdoing and seek forgiveness so as to extend the reach of justice and accountability mechanisms beyond what would otherwise be possible.

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Hybrid Court for South Sudan (HCSS)

In August 2015, the warring parties in South Sudan — the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement-in-Opposition (SPLM-IO) — and other stakeholders signed the Agreement for the Resolution of the Crisis in South Sudan (ARCISS). The ARCISS provides for a Transitional Government of National Unity (TGoNU) that will be responsible for spearheading an extensive post-conflict stabilization and reform agenda over the course of a 30-month transitional period.

³ For more on perceptions of transitional justice in South Sudan, see David K. Deng *et al.*, *Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan*, South Sudan Law Society (SSLS), United Nations Development Programme (UNDP) (Jun. 2015), available at <http://www.undp.org/content/dam/southsudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf>; David Deng, Matthew Pritchard and Manasi Sharma, *A War Within: Perceptions of Truth, Justice, Reconciliation and Healing in Malakal POC*, South Sudan Law Society (SSLS) (Dec. 2015), available at https://radiotamazuj.org/sites/default/files/SSLS_A_War_Within_Dec_2015_.pdf.

Chapter V of the ARCISS, entitled, “Transitional Justice, Accountability, Reconciliation and Healing,” details the parties’ plans for combating impunity and addressing the legacies of past conflicts. Among the institutions provided for in Chapter V is a Hybrid Court for South Sudan (HCSS) that will be established to bring cases against “individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period.”⁴ Key attributes of the HCSS include the following:

- **Composition** – The HCSS is to be comprised of a combination of South Sudanese and African (non-South Sudanese) judges, lawyers and administrative staff. According to the ARCISS, the majority of judges in the HCSS will come from other African countries.
- **Role of the African Union (AU)** – The ARCISS places all major decisions regarding the design and staffing of the institution with the AU Commission.
- **Jurisdiction** – The HCSS is to have primacy over the national judiciary, meaning that it will be empowered to assert jurisdiction over cases whether or not investigations and prosecutions are being conducted in South Sudanese courts.

Dilemmas of Justice and Accountability in Post-Conflict Countries

Countries emerging from periods of protracted conflict face both political and technical challenges when trying to hold perpetrators of conflict-related abuses to account. The main political challenge is to generate the political will to bring cases against those who orchestrated the violence, as they often occupy senior political or military positions in the post-conflict state. From a technical point of view, international law requires that the state investigate and prosecute individuals responsible for violations of international human rights and humanitarian law, but the number of perpetrators in most conflicts is far too high to prosecute them all. As justice sectors in post-conflict states tend to be weak in comparison to the other branches of government, and are often one of the first casualties of the conflict, many post-conflict states simply lack the capacity to launch extensive prosecutions of conflict-related abuses.

When confronted with these dilemmas, post-conflict states have adopted a number of different approaches. At one end of the spectrum lies blanket amnesties for crimes committed during the conflict. In Sierra Leone, for example, the Lomé Peace Agreement included a provision purporting to grant amnesty to Foday Sankoh, the leader of the Revolutionary United Front (RUF), and all rebel combatants for crimes

⁴ See ARCISS, *supra* note 2.

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committed during the conflict.⁵ This prompted the United Nations (UN) representative signing the agreement to include a reservation next to his signature, stipulating that the UN was of the understanding that the amnesty would not apply to “international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”⁶ A few years later, the UN entered into an agreement with the Government of Sierra Leone to create the Special Court for Sierra Leone (SCSL) to try people responsible for international crimes committed during the conflict.

At the opposite end of the spectrum, a state may try to prosecute all individuals responsible for international crimes committed during the conflict. This was the approach initially adopted in Rwanda after the 1994 genocide. When it became apparent that the formal justice system could not try the many thousands of people suspected of genocide, Rwanda re-established a traditional court system known as *Gacaca* to adjudicate genocide cases. Communities at the local level elected judges to hear the trials of genocide suspects accused of all crimes except planning of genocide, and the *Gacaca* courts gave lesser sentences if the person was repentant and sought reconciliation with the community. By the time the *Gacaca* courts came to an end in 2012, more than 12,000 community-based courts had tried more than 1.2 million cases throughout the country.⁷ *Gacaca*’s legacy, however, is mixed. While it enabled the extension of justice and reconciliation far beyond what would have been possible through the formal justice system alone, the *Gacaca* process also fell far short of international standards in key areas, most notably defendants’ rights.

The ongoing peace process in Colombia is experimenting with an innovative approach to justice and accountability for international crimes. In September 2015, the Government of Colombia and the Revolutionary Armed Forces of Colombia (FARC) agreed to create special tribunals involving both national and international judges to adjudicate serious crimes committed during the conflict. Those who cooperate with the special tribunals and confess to their crimes would serve five to eight years under special conditions involving certain restrictions on personal freedom, though not in actual prisons. Those who admit wrongdoing after proceedings have been initiated would serve the same term but in ordinary prisons, while those who do not cooperate

⁵ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (1999), available at http://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf.

⁶ Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the possibility for justice*, Centre for Humanitarian Dialogue (HD Centre) (Nov. 2007), available at http://www.hdcentre.org/uploads/tx_news/89NegotiatingpeaceinLiberia-PreservingthepossibilityforJustice.pdf.

⁷ Outreach Programme on the Rwandan Genocide and the United Nations, *The Justice and Reconciliation Process in Rwanda*, Background Note (n.d.), available at <http://www.un.org/en/preventgenocide/rwanda/pdf/Backgrounder%20Justice%202014.pdf>; Human Rights Watch, *Rwanda: Justice After Genocide – 20 years on* (28 Mar. 2014), available at <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years>.

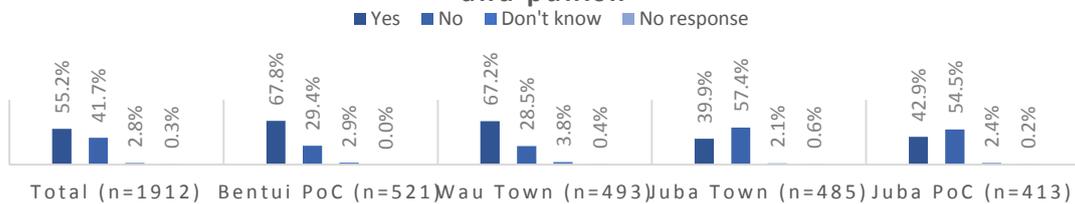
and are eventually found guilty could be punished with prison sentences of up to 20 years.⁸

As these examples demonstrate, countries emerging from periods of conflict have taken a variety of approaches to justice and accountability. Whatever approach South Sudan adopts, it is vital that the strategy be tailored to the context and responsive to the needs and aspirations of the South Sudanese people. The subsections below provide additional insight on how South Sudanese relate to some of these issues with reference to survey data compiled by the SSLS, UPEACE and PAX.

Perceptions of Amnesties and the Overlap of the Victim and Perpetrator Population

As noted above, amnesties are an important tool for post-conflict societies to consider in their efforts to promote justice and accountability. While blanket amnesties for international crimes are problematic on several levels, including the fact that they are prohibited by international law, partial amnesties or alternative sentencing can help to extend transitional justice policies far beyond what would otherwise be possible.

Would you accept it if amnesties are given? 'Giving amnesties' means an official decision not to prosecute and punish

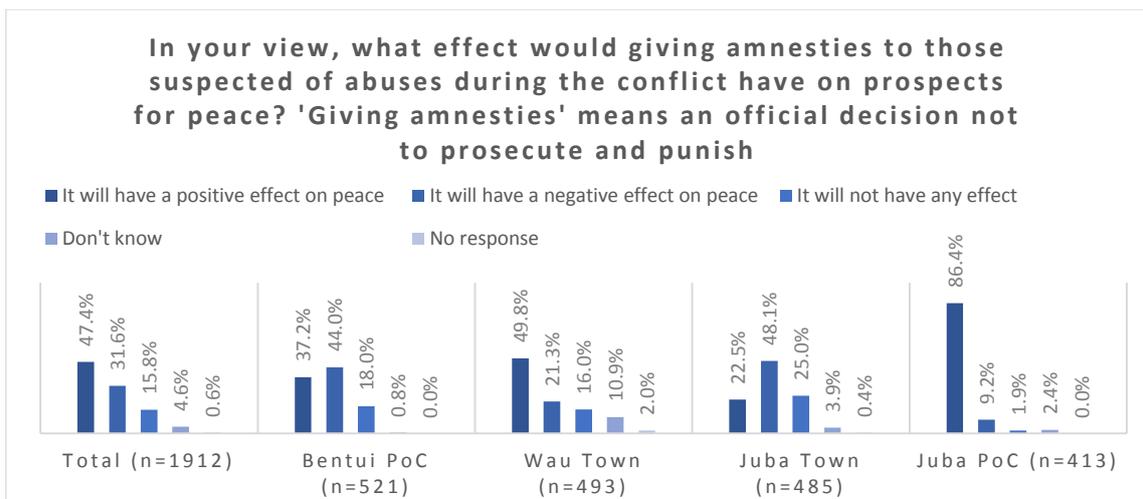


Survey data suggests mixed feelings on amnesties among populations in South Sudan. While a majority (55%) of respondents said that they would accept if amnesties were given to people responsible for conflict-related abuses, a sizeable minority (42%) said that they would not accept amnesties.⁹ Such pronounced opposition to amnesties is somewhat surprising in the context of an ongoing conflict, in which people would presumably be more likely to accept amnesty as a necessary concession in order to stop the violence.

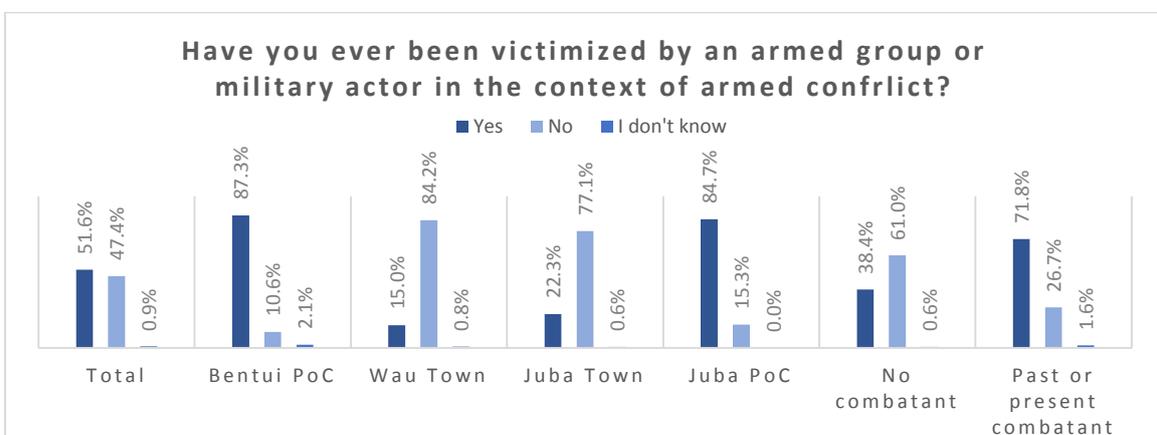
⁸ Colombia Peace, *English Summary of the September 23 Government-FARC Communiqué on the Transitional Justice Accord* (23 Sep. 2015), available at <http://colombiapace.org/2015/09/23/english-summary-of-the-september-23-government-farc-communicue-on-the-transitional-justice-accord/>.

⁹ Other surveys by the SSLS have also documented considerable opposition to amnesties. One survey involved 1,525 individuals in 11 locations across six states and Abyei and found that 60 percent of respondents opposed amnesties. See *Search for a New Beginning*, *supra* note 3. Another survey that involved 1,178 individuals in the Malakal PoC found that 69 percent of respondents opposed amnesties. See *A War Within*, *supra* note 3.

The pronounced opposition to amnesties demonstrates people’s frustration at the way past peace processes have rewarded armed groups with amnesties and political and military appointments while their victims are left to suffer without redress. This approach has been criticized for creating a marketplace for insurrection that legitimizes violence as a tool to further one’s political ambitions. Indeed, survey data shows that many people do not believe that amnesties contribute to lasting peace. Overall, 48 percent of respondents thought that amnesties would have either a negative effect (32%) or no effect (16%) on prospects for peace, while 47 percent thought that it would have a positive impact on prospects for peace.



When asked if they would require anything from perpetrators before they could be given amnesties, respondents emphasized confessions (45%), changed behavior (42%) and apologies (42%). An additional 30 percent of respondents said that perpetrators should provide compensation to their victims prior to receiving amnesties and 25 percent said that perpetrators should be subject to trial before receiving amnesties (or pardons). Respondents that reported victimization by an armed actor were more likely to require trials and compensation as prerequisites for amnesties than those that did not report victimization.



In addition to public support or opposition to amnesties, another factor to consider is the sheer number of victims and perpetrators in South Sudan and the extensive overlap between victim and perpetrator populations. More than half (52%) of survey respondents said that they have been victimized in the past by an armed group or military actor in the context of conflict. One-third (33%) of respondents identified either as current (28%) or past (5%) combatants, demonstrating the extent to which South Sudanese society has been militarized in current and past conflicts. Moreover, respondents who identified as past or current combatants were almost twice as likely to report victimization than respondents who were never combatants, suggesting a high degree of overlap between victim and perpetrator populations.

Expanding the Reach of Justice and Accountability Mechanisms

A number of policy options emerge from this overview of comparative practice with regard to amnesties, South Sudanese views on the topic and the overlap between the victim and perpetrator population. From the outset, it is important to acknowledge that the HCSS will probably not be able to adjudicate more than a few dozen cases at most, and that resources at that level are best invested into cases against those who bear greatest responsibility for the most serious crimes. Even if parallel prosecutions were to be initiated in the national judiciary, due to human and financial resource constraints in the courts, police and prisons, the formal system too could only address a small portion of the crimes committed during the conflict.

One option to consider in order to expand the reach of justice and accountability could be some form of alternative sentencing along the lines of what is being planned with the special tribunals in Colombia. Under this approach, individuals who do not fall into the category of those most responsible for international crimes could admit wrongdoing and seek forgiveness from their victims in return for a mitigated or alternative sentence. This approach would seem to align well with the survey data presented above, which indicates that many South Sudanese would be willing to forego prosecutions if the perpetrator confesses, apologizes and pays compensation to his or her victims.

In fact, there is some precedent for restrictions on personal freedom falling short of full incarceration in South Sudan. For example, many prisons in South Sudan will allow certain inmates to sleep at prison at night but move freely during the day. Such restrictions could be combined with a requirement to perform community service or provide reparations to victims to help remedy the harm they suffered. If carefully designed with appropriate oversight mechanisms, such a program could provide a practical means of promoting accountability despite the underdeveloped institutional framework of South Sudan.

Another approach that could help to alleviate the burden on the formal system and extend justice and accountability mechanisms to the local level would be to involve

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customary institutions in transitional justice efforts. Customary justice mechanisms are often thought to be more accessible, both culturally and geographically, than formal justice mechanisms. Customary law's oral basis and the flexibility of procedural and evidentiary norms facilitate the direct involvement of participants. Proceedings are also rapid and focused on issues of fact, reducing the exorbitant costs associated with more formal justice mechanisms.

Another important feature of customary justice mechanisms is their use of ritual to reconcile conflicting parties. Under customary law, reconciliation typically takes place after a trial determining both liability and sentencing. The traditional authority will then facilitate a post-trial ceremony to assist the conflicting parties in overcoming any lingering bad feelings. In addition to post-trial reconciliation, some communities have specific rituals and ceremonies outside of the customary legal process for cleansing combatants when they return to civilian life.

Customary institutions could be involved in any number of ways. For example, statutory courts could refer cases in which the accused admits wrongdoing to customary courts for the determination of compensation and to facilitate reconciliation. Indeed, customary justice mechanisms have well-established rules for determining amounts to be paid in compensation for different harms, including murder and other forms of serious bodily injury. Traditional authorities have also been known to negotiate collective compensation from one community to another in circumstances where it is difficult or impossible to determine individual liability.

Another possibility could be to adjudicate some of the less serious offenses in customary courts. While the adjudication of international crimes in customary courts would raise the same due process concerns associated with the *Gacaca* process, given the absence of formal justice services throughout much of the country, traditional authorities are often the only source of dispute resolution services that are available. Providing them with a formal mandate and the support of the state could serve to revitalize institutions that have been sorely impacted by decades of conflict.

Of course, there are pitfalls to consider when harnessing customary institutions in this manner. Customary institutions are often criticized for being male dominated spaces that marginalize and discriminate against women and girls. There may also be concerns about the ability of traditional authorities to enforce decisions against individuals who wield political or military power. Furthermore, customary institutions often struggle with disputes that cross community boundaries, where different customary laws apply and the traditional authority may not have as much control over the non-local party. In such circumstances, traditional authorities from the communities concerned will sometimes sit together on a single court so as to enable the application of customary laws from the various communities and maximize enforcement authority.

Another approach that could help to alleviate the burden on the formal system and extend justice and accountability mechanisms to the local level would be to involve customary institutions in transitional justice efforts.

Concluding Remarks

Securing a lasting solution to the conflict in South Sudan will require people to grapple with the underlying governance failures that enabled the conflict to become so entrenched. Among these failures is the state's inability to provide meaningful justice services to communities in conflict and a disregard for the role that historical grievances play in driving violence. However, it is also important that policy-makers take into account the serious constraints of the transitional period, including the humanitarian crisis, lingering insecurity and the role that senior political and military figures on all sides have played in conflict-related abuses.

Furthermore, the sheer size of the victim and perpetrator populations and the manner in which they overlap favors an approach that balances a need to punish those responsible for international crimes so as to demonstrate the state's commitment to human rights and rule of law and strengthen its legitimacy in the eyes of the people, while acknowledging that no state, much less one as young and underdeveloped as that of South Sudan, could prosecute everyone implicated in serious human rights abuses. In order to expand the reach of justice services beyond that which is available through a strict application of rules of criminal justice, this brief recommends that the Transitional Government of National Unity (TGoNU) and its international partners:

- Publicly voice support to Chapter V of the ARCISS and engage relevant stakeholders, including the AU, UN and national justice sector institutions, in a discussion about how best to approach justice and accountability for international crimes.
- Initiate a national dialogue that allows people to express their preferences for truth, justice and reconciliation and consider a possible role for various forms of partial amnesties or alternative sentencing.
- Examine already existing practices relating mitigated and alternative sentencing in customary and statutory courts and determine how they could be incorporated into efforts to prosecute crimes committed during the conflict.
- Engage extensively with traditional authorities in conflict-affected areas to determine an appropriate modality for involving customary institutions in efforts to promote justice and accountability.
- Examine how customary and statutory courts typically treat confessions and apologies and consider how these practices could be incorporated into the transitional justice program.

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