## **Policy Brief**

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# The Revitalization of the ARCSS and the Prospects for Peace in South Sudan

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## Summary

This policy paper evaluates the prospects of peace in South Sudan within the context of the recently proposed revitalization process of the 2015 political pact. The paper broadly argues that the revitalization process is important, but it must contend with factors that led to the collapse of the original agreement. Highlighting this, the brief discusses how the design of the security arrangements and transitional justice mechanisms in the ARCSS might have led to the faltering of security and stability in the country. A new approach to the mediation process, which puts primacy on constructive diplomacy and provision of incentives to the parties and the combatants, and the need to popularize the agreement among the citizens to embrace the peace agreement, is suggested.

#### Introduction

Agreement is commendable because it has created hope for a possible resolution of the conflict in South Sudan. This followed nearly a year of uncertainty in the country after renewed fighting broke out in Juba in July 2016, thrusting the Agreement on the Resolution of Conflict in South Sudan (ARCSS) into a limbo. Although the pact is virtually dead after the ceasefire mechanism broke down, neither the mediators nor the TGONU partners have been willing to make such a declaration. One defense for the survival of the Agreement, although in near vegetative state, is the decision of the parties in the Transition Government of National Unity (TGoNU) to remain committed to it after the destructive events of 2016. Although citizens, who direly need peace, may be justifiably upbeat about the prospect for peace in IGAD's new initiative, the proposed peace revitalization process prompted a number questions that this policy review explores.

The brief first establishes what is meant by 'revitalization' in the context of a political settlement. Following the 31<sup>st</sup> Extra-Ordinary Summit of IGAD Assembly of Heads of State and Government on the 12<sup>th</sup> of June 2017 in Addis Ababa, Ethiopia, a Communique was issued that declared the intention to revitalize the Peace Agreement as follows:

...to urgently convene a High-level Revitalization Forum of the parties to the ARCSS including estranged groups to discuss concrete measures, to restore permanent ceasefire, to full implementation of the Peace Agreement and to develop a revised and realistic timeline and implementation schedule towards a democratic election at the end of the transition period; mandates the IGAD Council of Ministers to urgently convene and facilitate this forum in collaboration with relevant stakeholders; and directs the Chairperson of JMEC and the Executive Secretary of IGAD to provide the necessary secretariat and logistical arrangements.

From this statement, the revitalization of the Agreement has three discernable objectives. First, the IGAD Heads of State and Government want to restore permanent ceasefire. This is indeed an acknowledgement that the ceasefire mechanism as provided in ARCISS has broken down. Ceasefire is a critical element of any peace agreement without which there would be no agreement. Therefore, as well understood, the ceasefire mechanism for the ARCSS is in a serious state of disrepair and needs a lot of work to restore it. This makes it unsurprising that the IGAD mediators are currently seeking to give this a priority.

The second objective of the revitalization mechanism is the need for full implementation of the Peace Agreement. This is an apparent recognition of the fact that critical provisions of the Peace Agreement have been inadequately implemented while time elapses. Obviously, only a few would continue to invest time and other scarce resources in an effort that bears no real fruits. Essentially, the focus on the implementation of the Agreement is by definition the reason there is an agreement to begin with. An agreement that cannot be implemented is as good as no agreement. The IGAD mediators would serve the country well by ensuring that the Agreement is implemented in a more tangible way in order to restore the confidence of citizens in the peace process.

The final objective of the proposed revitalization is the need to come up with a revised realistic timeline and implementation schedule towards a democratic election in what is envisaged as the end of the transitional period. This accounts of course for the fact that the Agreement's 30 months' period ends in less than a year and many provisions of this Agreement are yet to be implemented. In order to fully implement the Agreement, it makes sense to look at the provisions of the Agreement that are not implemented and now reconstruct a new timeline for their implementation. This is imperative because the end of the transitional period is a time during which the country is deemed to have successfully come out of the crisis and now moving towards a more sustainable future. It would be reprehensible to cut corners and rush to an election without peace and stability. It befits the IGAD mediators and the parties to balance the need to transition the country into a new phase and the need to get to that new phase with substantially accrued social capital in the form of broader political consensus and a sense of unity.

## **Critical Questions**

While IGAD's efforts are laudable and deserve support and cooperation of all parties and the people of South Sudan at large, the new initiative raises many questions. Specifically, what are the chances of the Agreement being successfully rejuvenated and implemented as envisioned originally? How could an agreement that did not gain a lot of public support in the first place be made acceptable and attractive to ordinary citizens? What are the realistic incentives for the parties to actually implement the agreement in letter and spirit? Answering these questions is one that the process cannot do without. We offer our opinion on these questions by looking at two provisions in the Agreement: the provisions on security arrangements and the transitional justice.

It is our considered opinion that the Agreement has a good chance of being recharged, but this depends on many variables. Fundamentally, the Agreement was signed after a lot of hesitation on the side of the Government and when the President signed, he presented quite a number of objections, which were called, in diplomatic language, "reservations". This, among other things, include objection to the two-army arrangement, powers of the 1st Vice President, power sharing at the national level and power sharing at the state levels (Tiitmamer 2015). If the government (SPLM-in-Government) still holds these views, the revitalized agreement in the current form might face the same fate as the original ARCSS. To this effect, something that assuages the fears of the parties is ultimately called for. Moving forward, it would be unthoughtful to simply brush aside any objections raised by any party because in the end, they might end up implementing their objections and not the agreement as evident in the last two years. The SPLA-IO had also put forward some concerns, but these were also rejected in earnest and so they begrudgingly came to Juba to find themselves in a deathtrap. The nagging urgency to have an agreement should not trump the need for a real peace rooted in a pragmatic agreement. This being the case, the responsibility to bring peace in South Sudan lies squarely on the government and the oppositions. New initiatives, which are incentivized, ought to commit the parties to do everything in their capacity to ensure the return of peace in the country. The battered citizens look to the parties for stability and prosperity.

The question that follows is, how could an agreement that did not gain a lot of public support in the first place be made acceptable and attractive to the ordinary citizens? When this Agreement was signed in Addis Ababa on August 17, 2015 and later in Juba on August 26, 2015, it did not generate a significant or noticeable level of excitement among citizens. For those who were in Juba, the signing ceremony was similar in mood to a funeral of a very important person. Some of the people who attended the signing ceremony thought the President's signature was an act of surrender. In fact, the speech of the President then, was one that told his supporters that this Agreement was imposed on him and the government. This feeling and lack of enthusiasm for the agreement does not bode well for the revitalization process. For the agreement to have tangible effects on those who are heavily burdened by war, enough support to the agreement among the citizens must be garnered. How the newly proposed model deals with this condition is crucial.

This is where the National Dialogue and the revitalization process intersect. Since the National Dialogue grassroots consultations are on-going, the process of revitalization could benefit greatly by collaborating with the National Dialogue leadership so that the Peace Agreement could also be discussed and its positive attributes highlighted. The two processes could go a long way if they are intermarried because revitalization aims to achieve immediate cessation of hostilities and elite agreement, while the National Dialogue is promising to address the root causes and work on the long-term stability of the country. Peace is both the practical absence of fear and also

psychological absence of the same. This being the case, citizens must own the Peace Agreement, be excited about it, and be able to implement or demand its implementation. Without this, the Peace Agreement is as good as the paper on which it is written. It is essential that the mediators recognize the absence of citizens' support for the Agreement and so efforts must be exerted to bring them on board. The citizens don't necessarily have to be present on the High-Level Revitalization Forum; the parties ought to simply go out and tell the citizens that there is an agreement and that they intend on implementing it and they should highlight how the Agreement benefits citizens directly. More campaign to popularize the revitalized Agreement could be done through the National Dialogue process.

This of course leads to another question, what are the realistic incentives for the parties to actually implement the Agreement in letter and spirit? It is to be admitted that the last Peace Agreement was reached with heavy-handed international pressure. The pressure was necessary, especially on the government, to create an environment that looks like a stalemate on the ground. This pressure worked in forcing the government to sign the agreement, but it didn't actually change facts on the ground. The fact was that the government had a clear military advantage in the field and so it felt that the armed opposition got a lot more than it actually deserved in terms of power sharing and security arrangement. This partly explains the violent confrontation that ensued following Dr. Riek's return to Juba 2016. Similarly, due to international pressure, the opposition returned to Juba without proper and adequate guarantees in place.

Looking at this with hindsight, it is clear that the pressure worked in temporarily getting the parties to lay their signatures on the Agreement, but the consequences of overlooking concerns of the parties have been largely devastating. In light of this experience, it is actually important for the international community to focus not only on threatening the parties with punitive measures, but also need to realize these largely do not work. It is to be recognized that these parties represent constituencies to which they must present something in the way of peace dividends. The international community should consider incentives for the warring parties, combatants, and the citizenry at large. This will go a long way in gaining confidence of the citizens and creating incentives for the spoilers of stability. This is not to suggest that threats should be withdrawn but that those alone might coerce transient compliance, which is not sufficient for consolidating peace in the long term.

The international community has been quite reprehensive in getting to the nitty-gritty of peace consolidation in South Sudan. There is an apparent degree of frustration and sometimes arrogance that gets in the way of a meaningful, result oriented type of diplomatic engagement. In fact, there is lack of appreciation of the dire situation in which South Sudan is, as futile attempts are made to try and force sense out of leaders who are heavily drunk with violence and warfare. The parties need a constructive engagement that mixes incentives and threats as well as a clear international plan for post agreement peace efforts, such as plans for economic revival and reconstruction. This is what the ordinary South Sudanese want to hear because they have heard enough of threats that have not amounted to a tangible peace experience on the ground. Sure, they may want to hang all the culprits who cause this suffering but such a project demands peace first. The time has now come for all to switch on their dialogue gears and efforts to push for an inclusive, productive peace in the country.

For a revitalization process to achieve tangible results, two provisions of the Peace Agreement are critical. These are Ceasefire and Security Arrangements and the Transitional Justice provisions. It is our view that the revitalization will not be successful without overhauling these provisions. We discuss these provisions below.

### **Ceasefire and Security Arrangements**

Many conflict resolution and peace-building programs seem to overlook the reality that the security arrangements is essentially the heart of the matter. This is mainly due to the fact that security arrangements of any peace deal to end the war are the most daunting in the negotiation and yet the most crucial for the success or collapse of an agreement. What a post-war country does with its fighting men from all sides of the conflict is also what makes or breaks the peace-building project. For this reason, the most recent South Sudanese peace agreement, the Agreement on the Resolution of Conflict in South Sudan (ARCSS), rightly placed the security arrangements squarely at the heart of the whole process, acknowledging that without it, the whole agreement may well be baseless.

The ARCSS sought a range of objectives. These include reconciling the warring leaders, setting up a transitional government of national unity, crafting mechanisms of accountability for war crimes, transitional justice mechanisms, and setting up plans for reconstruction, repatriation of refugees and the internally displaced persons, as well as reviewing the constitution so that the rule of law becomes the basis for a transition to democracy. But continued wrangling between the warring parties over the terms of this agreement delayed its implementation for about a year. The biggest sticking point was the security arrangements, which called for the demilitarization of the capital city, Juba, deployment of joint security forces within the town, cantonment of the rest of the armed forces, and a security sector reform.\(^1\) In principle, this was all fine, but in practice, how two antagonistic armies that had spent two and half years fighting each other in a vicious confrontation were going to maintain civility with each other within the limits of a single town was not explained. Many observers questioned the viability of this arrangement, but the mediators, using the all familiar liberal approaches to peace, insisted on the idea that there has to be a balance of power in order for the parties to stick to the agreement (Vhumbunu 2016).

These security arrangements, more or less imposed by the international community that was too eager to see a peace deal signed, were all too likely going to become the death knell of the ARCSS. Concerns and reservations were expressed by many observers, but it all boiled down to deciding between a shoddy peace agreement or no agreement at all, and the former prevailed. The settlement appeared incredibly elusive. Similarly, the agreement was ambitious and offered little political capital or sufficient trust between the parties to garner success. Secondly, the agreement was coerced, resulting in a litany of complaints and reservations from the warring parties. It took a year to persuade both sides who reluctantly consent to move it forward. But when they finally accepted to proceed as agreed and Riek Machar Teny returned from exile to become the First Vice President once again, this provided yet another promise of a return to stability.

<sup>&</sup>lt;sup>1</sup> See chapter II article 5 of ARCISS

Observers and some South Sudanese alike remained apprehensive, however (Jok 2016a). Two armies under supposedly two presidents was time bomb a security arrangement. Lo and behold, within less than four months into the implementation of the agreement, fighting erupted again between the body guards of the President and the First Vice President inside the State House in July 2016, subsequently fraying into the rest of the city. The massive violence that carried on for days led to a death toll of over 500 people, destruction, and displacement of civilian population, with Riek Machar Teny, who now remains in South Africa, fleeing the country once again (Jok 2016b). Machar and forces were pursued into the Democratic Republic of the Congo, reigniting a war all over again. His armed opposition movement, Sudan People's Liberation Movement – in Opposition (SPLM-IO), split into two, with one side remaining in Juba to ostensibly serve in the transitional government. Machar's faction, however, concluded that the ARCSS is nothing but dead and continues to fight with the intent to overthrow the government of Salva Kiir Mayardit, exacerbating human rights violations, and humanitarian and economic crises in the country.

The deployment of forces of the warring parties impacts on the ability of ceasefires to hold. Poor security arrangements, as recently experienced in Juba, leads to escalation of conflict. That IGAD and AU lack the enforcement mechanisms for ceasefire compounds the problem. Although the IGAD Joint Monitoring and Evaluation Commission provides surveillance for security outcomes, unfortunately, it does not punish the culprits for any violations. Lastly, the underlying lack of political will from the warring parties partly explains repeated ceasefire violations, consequently resulting in an elusive peace in the country.

In an effort to revitalize the current agreement, detailed peace and security responsibilities and consequences for violation of any agreed upon commitments ought to be clearly documented and communicated to the warring parties. In the revitalized Agreement, the warring parties must lead the way in the design of ceasefire and security arrangements mechanisms. Thus, whether or not ceasefires hold needs to be anchored on tangible, measurable results. The noble objective of such a framework is that it fosters ownership and enforces relevant measures and holds the perpetrators accountable. What should be given due consideration is the deployment of two armies in the national Capital, Juba. The mediators have made it clear that this revitalization process is not a renegotiation of the Peace Agreement, which is fair enough, but what do you do with mechanisms that have shown to falter under the previous arrangements? This is the reason we believe this dual army in one country is unworkable and deserves another look.

## Transitional Justice Mechanisms Reconsidered

When talking about revitalization, it is important to ask the question, what aspects of the ARCSS are being revitalized? We argue in this section that the nature of transitional justice arrangement in ARCSS has contributed to the faltering of the Agreement and so it should be reconsidered. The reason is that some components of the transitional arrangement such as the hybrid court target personalities that are critical to the implementation of the Peace Agreement.<sup>2</sup> An op-ed

<sup>&</sup>lt;sup>2</sup> See chapter five of Agreement on the Resolution of Conflict in the Republic of South Sudan (ARCSS)

supposedly written by President Salva Kiir Mayardit and former 1<sup>st</sup> Vice President Riek Machar speaks to this.<sup>3</sup> We suggest that the hybrid court should be linked to the amnesty so that those who confess and apologize should be protected against prosecution (Maepa 2005).

Before explaining how the transitional justice arrangements are an impediment to full implementation of the Peace Agreement, we first consider what is meant by transitional justice generally and in the South Sudanese context. Transitional justice mechanisms are "sets of judicial and non-judicial measures that have been implemented by different countries in order to redress the massive legacy of human rights abuses." (International Center for Transitional Justice –ICTJ, 2015). These mechanisms involve "array of processes designed to address systematic or widespread human rights violations committed during periods of state repression or armed conflicts" (Olsen et al. 2010). The process includes "recognition for the victims and [the promotion of] possibilities for peace, reconciliation, and democracy" (Reiter et al. 2013; Olsen et al. 2010).

Transitional justice mechanisms include trials (prosecutions), truth commission, reparations, amnesties and lustration measures (Reiter et al., 2013, Olsen et al. 2010). These measures usually address human rights violations, genocide, war crimes, crime against humanity and other serious crimes within two main contexts, namely transition from authoritarian regime to democracy and transition from armed conflicts to peace. In short, transitional justice is carried out to address the wrong of the past, heal and move the society to a peaceful and stable future.

A successful implementation of the transitional justice mechanism depends on an environment that has a strong culture of the rule of law and a strong winner who is willing to implement reforms (Olsen et al. 2010). Europe has more successful cases of transitional justice mechanisms because of the presence of these conditions. However, Africa has the least successful cases of transitional justice mechanisms, particularly trials, because they are designed through a negotiated settlement which only compels parties to work in a unity government.

The obstacle usually is that there are no tools for the implementation as the parties to agreement are usually the same ones who are suspected of having committed crimes. This makes it difficult to prosecute them while still in power. The only country in Africa where this dilemma was overcome is South Africa. In this case, the transitional justice mechanisms were designed to provide some security guarantees to the parties to implement the agreement. Instituted through the Promotion of National Unity and Reconciliation Act, number 34 of 1995, the South African Truth and Reconciliation Commission (TRC) was authorized to (1) investigate the identity, fate and whereabouts of the victims of human rights violations, (2) compensate and rehabilitate the victims, and (3) give amnesty to perpetrators who confessed about offences committed and recommended prosecutions for those who were not granted amnesty (Maepa 2005). Confessing and apologizing is a crucial aspect of truth and healing. This in itself can do away with most of the animosities that usually happen in repressive or civil war context. Memorialization is also important so that the next generations learn and never repeat such acts.

<sup>&</sup>lt;sup>3</sup> See the Op-Ed allegedly written by President Kiir and former 1<sup>st</sup> Vice President Riek in the New York Times. Days after its publication, Machar said he was not consulted on the content but the Office of the President, which submitted the Op-Ed to the New York Times insisted Machar was consulted and gave his consent. Follow the link to the article https://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html

ARCSS contains four transitional justice mechanisms, namely trials, truth commission, reparations and lustration. To implement these processes, the Agreement mandates the creation of three institutions; Truth, Reconciliation and Healing Commission (TRHC), the Hybrid Court for South Sudan (HCSS), and Compensation and Reparation Authority (CRA). These institutions supposedly promote truth, reconciliation, healing, compensation and reparation. In particular, ARCSS requires HCSS to investigate and prosecute cases of genocide, crimes against humanity, war crimes and other serious crimes. What is more, is that the agreement stipulates that anyone indicted or convicted through the HCSS process must be excluded from the Transitional Government of National Unity (TGONU) and future governments. The Truth, Reconciliation and Healing Commission is on the other hand mandated to "inquire into all aspects of human rights violations and abuses, breaches of the rule of law and excessive abuses of power," and to recommend processes and measures for reparation and compensation and should as well draw best practices from existing traditional mechanisms. The Compensation and Reparation Authority is to administer Compensation and Reparation Fund (CRF), which the TGONU is mandated to establish.

The concern however is that this design does not provide incentives for the parties, who are accused of committing some of the most egregious crimes, to implement the Agreement. This compels the parties to pick and choose what they think is in their best interest in the Agreement. Our previous analysis of transitional justice mechanisms applied globally shows that the ARCSS transitional justice mechanisms fall short of what is considered best practices (Tiitmamer 2016). Empirical evidence illustrates that no single or some random selection and combinations of transitional justice mechanisms can work (Reiter et al 2013). Mechanisms must carefully be studied with regards to contexts, where appropriate ones are selected and combined and implemented on the priority basis of what is practically possible to get the positive outcomes of. Combination or a formula that has achieved the results in most cases include either (1) amnesty and trials or (2) amnesty, trials and truth and reconciliation commission. The ARCISS has left out amnesty, which is important an incentive. Regardless of what one thinks of it, amnesty secures peace when it is applied in the middle of civil war or when applied conditionally to achieve reforms. For example, it has been proven to work in motivating officials of authoritarian regimes to step aside on condition that they would be pardoned for their roles in the past atrocities. In addition to being an incentive, it saves resources as it is infeasible for the country to prosecute just about everybody.

Apart from the design of the transitional justice mechanism that does not provide incentives, the agreement excludes previous periods in which serious atrocities were committed. Looking at the conflict that erupted in December 2013 in isolation from the previous conflicts is a grave mistake. To us the current conflict is an extension of the previous conflicts. So providing justice for those who have been wronged in this conflict without providing justice for those who were wronged in the past does not solve the problem. This presents the ARCSS as a bias agreement, that is not inclusive. The Comprehensive Peace Agreement (CPA) that ended the war between the North and South failed to the provide transitional justice. However, the good thing about it was that it was not selective about which periods to bring perpetrators to justice. For a transitional justice to be fair and inclusive in the context of South Sudan, it must include all periods of conflicts since 1955 when major conflicts started.

We advocate for a transitional justice provision that fosters incentives for peaceful transition. All empty threats of indictment and sanctions do not cultivate an atmosphere of compromise. Besides, threats of exclusion of certain leaders is contrary to the principle of inclusivity the IGAD and other peace partners have called for. Exclusivity of certain leaders does not also cultivate an atmosphere of cooperation. Give incentives, not exclusion. Chapter Five on transitional justice arrangement should be revitalized by amending the Agreement to include time frameworks before 2013 and to provide for amnesty and protection for those who confess and apologize to the victims as was the case in South Africa. Amnesty should be included through a national legislation and used to secure reforms and truth. Those who cooperate to implement peace and facilitate transformations should be given amnesty while those who do not cooperate face trials. Stability and peace should be prioritized as this provides the greatest good for the greatest number of people, according to John Stuart Mills. At the end of the day, what matters is what works to achieve an inclusive peace.

#### Conclusion and Recommendations

In summary, the IGAD mediators want a new mechanism because the old one is evidently not working. They want to renew the spirit of the Peace Agreement so that all the provisions are implemented to achieve stability in South Sudan. This paper largely appraises the proposed revitalization of the Agreement and raises a number of critical questions that should be considered during this process. The revitalization process is important, but it must contend with factors that led to the collapse of the original Agreement. Doing this avoids the same pitfalls and allows for a robust rejuvenation of the Agreement leading to a lasting peace in South Sudan. The Ceasefire and Security Arrangements is critically important and so getting the parties to recommit to its tenets and principles and achieving permanent ceasefire is critical for peace in the country. The transitional justice mechanisms on the other hand, if not sequenced appropriately, could serve as an impediment to peace and security in the country. This follows from the fact that the leaders, who are signatories to the Agreement, are fearful that they could be charged and prosecuted under these mechanisms and therefore would be reluctant to implement related provisions. Prioritizing constructive diplomacy and providing incentives for the parties, the combatants, and citizens at large to embrace the peace agreement is, therefore, suggested.

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#### **About the Sudd Institute**

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.

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