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Policy Brief

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Transitional Justice in South Sudan: A Case for Sustainable Peace, Accountability, Reconciliation and Healing

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Summary

The justice versus peace dichotomy or lack thereof has spawned both legal practice and international law literature for decades. As the debate pertains to the application of transitional justice specifically against the backdrop of mass political violence or civil wars, some jurists, legal practitioners and other scholars suggest that, on the one hand, justice and peace are mutually exclusive concepts. This implies that neither peace nor justice can be pursued without adversely impacting or displacing the other. Others, on the other hand, maintain that peace and justice are mutually reinforcing virtues, suggesting that the pursuit of one serves to augment the other. While the third school of thought acknowledges that both peace and justice are indispensable virtues for a dignified human life, it contends that an overreliance on the pursuit of justice at all costs is detrimental for sustainable peace. As well, it argues that justice should not be sacrificed on the altar of peace. In this regard, the third way proposes that the stringent standards of pursuing peace and justice should be relaxed in the interest of a balanced solution. Cognizant of the fact that South Sudan is a deeply divided and polarized country, this piece suggests that the most appropriate vehicle for pursuing transitional justice in South Sudan is in the form of truth, reconciliation and healing (TRH) and, perhaps, compensation but not through criminal prosecutions of the actions of key players in the recently concluded conflict. Failure to observe the delicacy of balancing peace and justice only operates to fester the conflict. That is in part because key actors in a mass political conflict are cushioned by their (ethnic) constituencies and in part because, generally, justice deferred solely for the sake of peace may actually breed more insecurity just as sacrificing peace for the sake of justice only yields incendiary results.

1. Introduction

Since 2020, South Sudan, the world's youngest country, has been making concerted efforts to recover its shattered soul following years of a protracted conflict that claimed at least tens of thousands of human lives and flashed down most of the country's socio-economic and political structures. The phrase "at least" connotes a significant caveat, having regard to the fact some (Western) sources estimate the war fatalities to be as high as 400,000 over a period of 5 years—beginning from 2013 to 2018 [Rolandsen, 2015; *The Sentry Report*, 2019; London School of Hygiene and Tropical Medicine, 2018].¹

The signing of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCISS) in 2018, however, paved the way for the formation of a new Unity Government (RGONU) in February. The R-ARCISS commits the RTGONU and the people of South Sudan to rebuild their country, in part, by pursuing modalities for fostering sustainable peace, create a conducive environment for boosting livelihood opportunities, and reconciling various groups and communities.

While the R-ARCISS presents a number of important provisions, Chapter V in particular provides for Transitional Justice, Accountability, Reconciliation and Healing. To that end, the R-ARCISS commits the RTGONU to pass an enabling piece of legislation with the view to establishing three main transitional justice institutions, namely the Commission for Truth, Reconciliation and Healing, the Hybrid Court, and the Compensation and Reparation Authorities.²

The establishment of these tripartite institutions is, thus, imperative, having as their principal objectives, first, of ensuring that perpetrators of mass atrocities committed by either side to the conflict are held accountable. Second, that justice is rendered to the victims (including, though impractical, the idea of compensating victims). Finally, that the people of South Sudan get the opportunity to reconcile and find healing from the traumatic experience of war and animus towards one another. But in many practical respects, the quest for peace or justice may yield incendiary results as discussed below.

Against this backdrop, this paper seeks to advance a proposition that in light of deep-seated divisions and polarization that exist in South Sudan, criminal prosecutions are more likely to erode the gains of, and even unravel, the R-ARCISS. For this reason, the most viable vehicle for implementing transitional justice in South Sudan is the truth, reconciliation and healing process. Finally, the paper provides policy considerations and recommendations for why this approach is rationally more justifiable and practical in the context of South Sudan.

2. Peace versus Justice: Mutually Exclusive or Reinforcing?

While both justice and peace are desirable virtues for a dignified human life and/or existence, a commitment to attaining the objectives envisioned by the R-ARCISS should take into consideration the long-term goals of concurrently pursuing sustainable peace and

¹ While a number of Western studies put the number of fatalities to at almost 400,000, this figure is yet to be established by official government sources.

² In fact, South Sudan has recently indicated that it is moving towards establishing the Hybrid Court to try the actions of those accused of perpetrating war crimes and crimes against humanity between 2013 and 2018.

justice. This consideration includes a concern that a rigid pursuit of justice or peace may practically undermine the underlying vision for durable peace or justice. It may, as well, obstruct the implementation of the R-ARCISS. That is, in the circumstances in which the impugned acts were committed in South Sudan between 2013 and 2018, an overly ambitious commitment to justice may only come to pass at the expense of sustainable peace and vice versa. This, consequently, may defeat the grand scheme, architecture, vision and object of the R-ARCISS.

Traditionally, the peace versus justice debate revolves around two contrasting schools of thought. The first postulates that peace and justice are mutually reinforcing concepts while the second predicates itself on the idea that peace and justice are—without any balance of convenience—mutually exclusive imperatives. To these two theories, there also exists a third mechanism: truth, reconciliation and healing. The third mechanism may be sought along the spectrum of the other two traditional schools. Each of these three schools is briefly discussed below.

2.1. Justice and Peace are Mutually Reinforcing Imperatives

Those who argue that peace and justice are mutually reinforcing concepts claim that attaining peace is much more than the end of war or violent conflict and that any meaningful search for peace can only be founded on rendering justice to victims and punishing the culprits. Otherwise, any peace agreement not predicted on justice is intrinsically vulnerable: being subject to collapse and reversing the gains of a peace agreement (Phil and Sylvie Good, 2019). Along this line, justice is seen as an essential element of realizing sustainable peace, having the ability to provide the necessary remedy to the victims of mass atrocities arising from political violence. Finally, proponents of the primacy of justice as a foundation for sustainable peace contend that an overreliance or focus on justice also serves vindication and retribution purposes against perpetrators of mass atrocities. It is along this line that peace and justice are seen as mutual imperatives. The contention that peace and justice are mutually augmenting clearly goes against the grain of a Latin legal philosophy that “*fiat iustitia pereat mundus.*” This philosophy is co-extensive with the idea that justice must be pursued at all costs, even if doing so culminates in bringing the world to an end (Krzan, 2016).

The proponents of the “no peace without justice” philosophy cite the pacifying effects of the 1947 Nuremberg and Tokyo Military Tribunals Trials in Germany and Japan, respectively. These two trials, against the operating minds of the Nazi regime and Imperialist Japan, are, in other words, often used to demonstrate how a robust commitment to the pursuit of justice ushers post-conflict societies into sustainable peace. This further suggests that courts must be part of the ultimate end to wars or violent conflicts. This can only come to pass as a function of prosecuting individuals most responsible for egregious atrocities in the face of mass political violence (Ohlin, 2009). Courts and criminal tribunals are, thus, an essential instrument of realizing sustainable peace (Blewitt, 2006).

This leads to the natural conclusion that justice and peace are not contradictory but mutually augmenting virtues, having the capacity to promote and sustain each other (UN Secretary, General, 2004). The implication is that where mass crimes are not addressed because the underlying cause of a violent conflict is only embellished, the victims’ calls for justice are only muted, leaving the odds largely stacked against the peace. Put differently, the danger of violence recurring, remains high.

Yet this claim must be understood against the backdrop of the fact that the two tribunals cited above were vehicles for delivering “victors’ justice” in the aftermath of World War II. Their paradigm and organizing principle precluded any significance of balancing demands for peace and justice in a situation where both sides enjoy equal arms (LeRiche, 2014).

2.2. Peace and Justice are Mutually Exclusive Imperatives

The proponents of the theory that justice and peace are mutually exclusive imperatives contend that, in the context of mass political violence, an overly ambitious commitment to the pursuit of justice does not only undermine the attainment of sustainable peace but also overlooks the significant role of key war architects (whatever their respective roles may have been during the conflict) in the negotiations that eventuate in the signing of peace agreements. This, proponents claim, suggests that much as it may be insisted that “*fiat iustitia pereat mundus*,” the search for a more sustainable peace is, by and large, premised, on ensuring that peace-mediators and its guarantors strive to bring together all military combatants and their constituencies. The interests of these groups must never be sacrificed on the altar of justice (Mbeki & Mamdani, 2014).

This leads to an important conclusion that in the event of a conflict between the concurrent pursuit of peace and justice, the pursuit of peace must supersede the quest for justice. In this regard, an overly ambitious pursuit of prosecuting perpetrators of mass atrocities in a post-conflict society more is likely to undermine the realization and implementation of any peace agreement. That is because prosecuting perpetrators of political violence tends to be seen by their supporters as an *en masse* prosecution of their entire constituencies. Such optics are more likely to torpedo the chances of political settlement in post-conflict societies (LeRiche, 2014, *supra*). In fact, peace negotiators may themselves fear being arrested or prosecuted following the signing of peace, especially if they (and they often) are perpetrators themselves. For this reason, an insistence on accountability may inhibit or obstruct efforts for ending conflicts or wars (Gissel, 2015, and Hayner, 2000, Skaar, 2018).

More importantly, a stringent demand for accountability tends to undermine the ability of any sitting government to defend itself from an armed opposition. For instance, if a legitimate government is ever to assert its authority without being able to protect itself against violence or threats of violence from any violent opposition, then the concept of a legitimate government falls asunder. This may make all governments vulnerable and engender long-term instability. The stakes could not be higher especially in developing countries. That is because no country would be able to use force to defend itself. Yet all governments should be able to enjoy a modicum of latitude to deploy the legitimate use of force not only to protect themselves but to keep law and order (LeRiche, 2014, *supra*). Imbued by this approach, the Truth and Reconciliation Commission for Sierra Leone in 1999, emphasized that “those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict” (Report, vol. 3b, Section 11).

This view is, as well, in sync with scholarship on the enduring tensions between the two ideals. On the one hand, an insistence on prosecution or pursuit of justice is tantamount to the prolongation of violent conflicts or hostilities. The pursuit of peace, on the other hand, requires that mediators and guarantors of peace resign themselves to some form of injustice (D’Amato, 1994). A stringent pursuit of prosecution operates as a disincentive for peace, having the potential to inspire a prolongation of conflicts and eventuate in the commission of even more atrocious crimes (Clark, 2012). In this connection, the task of ending violent

conflicts and wars requires peace negotiators and mediators, as well as guarantors of peace, to remain seized and vigilant about assuming the shoes of a prosecutor (Anonymous, 1996).

In short, advancing the cause of peace and justice, especially in fragile post-conflict societies such as South Sudan, demands strategic considerations and planning with the view to integrating both peace and accountability carefully, having regard to proper sequencing and timing of implementing agreed upon items in the peace agreement (Krzan, 2016, *supra*, 2009). Seen as such, a more balanced solution may be explored along the spectrum of values relating to peace and justice (UN, SG, 2004, *supra*).

2.3. Truth, Reconciliation and Healing and Rehabilitation: Customizing the Application of Transitional Justice to the Specific Needs of South Sudan

In the context of applying the concept and practice of transitional justice to a deeply divided post-conflict society such as South Sudan, customizing the concepts of transitional justice or the justice versus peace debate to specific domestic needs is part of the inherent dilemma that peacemakers and human rights advocates have to grapple with.

While a criminal justice system is generally more appropriate in terms of exacting accountability and rendering justice directly to victims of mass political violence, the pursuit of justice must also be examined from the standpoints of both its salutary effects (especially on society) and deleterious effects (especially on an individual perpetrator or victim). Notably, the quest for peace and justice demands the establishment of a more inclusive and comprehensive process that seeks to strengthen institutional structures, promotes the rule of law as well as law and order (LeRiche, 2014, *supra*).

A more pertinent opinion on this matter was jointly issued by the former President of South Africa, Thabo Mbeki, and Professor Mahmood Mamdani in An Op-ed published in the *New York Times*, in 2014. In their article entitled, “Courts Can’t End Wars,” the authors underscore that in the face of mass political violence, criminal accountability ought to be placed on the backburner. That is because, in their view, actions of key political leaders should be decriminalized as much as possible in order to resolve the underlying causes of violent political conflicts. Such a contention is plausible in light of the fact that in the course of political violence, the premium should be placed on the search for truth, reconciliation, healing and (one may add) rehabilitation, rather than criminalizing the behavior of the operating minds of political conflicts.

If the premise of the argument put forth by both Mbeki and Mandani is any guide, it stands to reason that what South Sudan needs, especially in its early stages of state-formation, is not criminal prosecution but a truth, reconciliation and healing (TRH) program that mirrors what was done in other African countries, such as South Africa, Mozambique, Sierra Leon and Rwanda between mid-1980s and early 1990s. This is why the two authors went on to suggest that, besides a truth and reconciliation approach that builds the society from the bottom up, South Sudan should also continue with the “Big Tent” policy as part of political settlement of the conflict. Doing so, they stress, would bring together all military combatants, whatever their respective roles may have been during the conflict.

In this connection, it is plausible to contend that customizing the application of transitional justice in the context of South Sudan is better workable if a premium is placed on the

traditional justice system involving truth, reconciliation and healing. Both Mbeki and Mamdani believe that the TRH process is far superior to criminal justice system approach when dealing with issues arising from mass political violence. Again, that is because, in light of the fact that almost all perpetrators of political conflict have (ethnic) their constituencies, criminal prosecutions of key actors in the conflict are more likely to be construed as a form of witch-hunt. For this reason, prosecuting such actors potentially undermines the quest for sustainable peace generally and the implementation of a peace agreement specifically.

Nevertheless, in the face of the magnitude of violence that South Sudan has had to endure, especially between 2013 and 2018, one would be remiss to dismiss the idea that some form of accountability is unavoidable.

In a fragile and deeply polarized country such as South Sudan, however, accountability can hardly be achieved by adopting an adversarial approach to justice. Rather, a more customized approach that is consistent with traditional justice values such as but not limited to the concepts of truth (an admissions of guilt), reconciliation, forgiveness and healing, as well as compensation in rare circumstances, may be more suitable (LeRiche, 2014, *supra*). A conception of justice encompassing such values can be found among many communities in South Sudan.

Matthew LeRiche and Marc Nickkle have specifically identified the concept of *puk/pug* among the Dinka. *Pug* aims at ensuring that perpetrators of violence must be made to pay compensation for wrongful death. Where *pug* has not been undertaken as sanctioned by customs, a cycle of revenge killing may ensue. That also suggests that failure to observe the framework of customary justice inherently perpetuates violence in the form of revenge killing on the part of the victim's relatives (LeRiche, 2014, *supra*). The net result is an endless cycle of violence among different groups. Furthermore, unlike criminal prosecution, *pug* involves the participation of communities on both sides of the conflict (Nickkle, 2001). And its outcomes, one may add, are realized in the form of a win-win (not one of win-lose) solutions that are normally associated with criminal prosecution.

For this reason, an approach to the transitional justice framework in South Sudan should primarily be premised on TRH, having regard to the fact that South Sudan is a deeply divided and polarized society where the application of an adversarial (criminal) justice may produce incendiary results. If South Sudan takes the path of criminal prosecutions against the alleged perpetrators of violence and mass crimes, it cannot be an exaggeration to underscore that perpetrators will feel betrayed by those on whose behalf they purportedly responded. That is, the likelihoods of feeling that they were being used by the State or political leaders as an end cannot be exaggerated. Furthermore, their respective constituents are likely to see criminal prosecutions as a witch-hunt and may react in a way that may well unravel the R-ARCISS.

3. Conclusion

The foregoing demonstrates that the peace versus justice dichotomy requires a balance of convenience. In assessing what appears to be an inverse relationship between peace and justice, this piece has emphasized that neither the rigid principle of “*fiat iustitia pereat mundus*” nor the idea that justice must be sacrificed on the altar of peace is helpful in realizing both justice and sustainable peace in a post-conflict South Sudan.

For this reason, a more balanced approach to the peace versus justice dilemma in the specific context of South Sudan can be found by adopting a third way in the form of truth, reconciliation and healing, not by criminalizing the actions of key political players in the conflict. Failure to observe the delicacy of balancing peace and justice only operates to ferment the festering of violent conflicts. That is because justice deferred solely for the sake of peace may actually breed more insecurity just as sacrificing peace for the sake of justice only yields incendiary results.

4. Policy Considerations and Recommendations

In light of the deep-seated divisions and polarization that exist in South Sudan today, it is critical to ensure that an approach to transitional justice in South Sudan is one that preserves as much as possible the imperatives of both peace and justice. The implementation of the R-ARCISS' provisions on transitional justice should not push the boundaries too far. With this in mind, it is important that the RTGONU and the international community consider the following policy considerations and recommendations.

- (i) First, mass political violence is largely driven by key political actors or perpetrators who respond to the call or purport to protect the interests of certain constituencies. Since their constituencies see them as surrogates of their own welfare, it would be counterproductive to approach the case of transitional justice in South Sudan through criminal prosecutions. Rather, what is advisable to pursue in the context of South Sudan is the program of truth, reconciliation and healing (and compensation where necessary). That is because any effort to pursue criminal prosecutions operates to advertently or inadvertently undermine the interests of sustainable peace, just as any approach that places a premium on the primacy of peace undermines the cause of justice. For this reason, the application of transitional justice principles must be customized in such a way that contextualizes specific domestic justice system that promotes the search for truth, reconciliation, healing and forgiveness, not retribution or vindication.
- (ii) Second, the RTGONU and the international community should not ignore the resolutions of events and parallel domestic processes that are intended to achieve the same results as transitional justice. For instance, the South Sudan National Dialogue process, which ended in December 2020, took nearly 4 years to complete. It meticulously collected a huge amount of data, both from the grassroots and political elites. It sought people's views on the best ways for assuring a prosperous and peaceful country by focusing on major thematic issues such as governance, economic and structural reforms, as well as modalities for building strong and vibrant public institutions. It also sought to promote social cohesion among different groups and communities. The process received remarkable reception from all quarters of South Sudan, except among some political elites. More importantly, the objectives of the National Dialogue paralleled those of the R-ARCISS. Since the National Dialogue does not, in pith and substance, contradict or frustrate the spirit, scheme and framework of the R-ARCISS, it is a complementary process to the R-ARCISS. In fact, one may add that the scope of the National Dialogue is far wider than that of the R-ARCISS, considering that the scope of the latter is limited to accommodating the interests of parties to the conflict, while the former covers the interests of the wider public, having the ability to accommodate all the voices of the people of South Sudan with the view to addressing varying grievances. So considered, the National

Dialogue resolutions epitomize the decision of the sovereign people of South Sudan, representing all ten states and three administrative areas. For this reason, an approach to transitional justice should ensure that it does not negate or controvert any settlement process or framework that the people of South Sudan have accepted as legitimate and conciliatory. The resolutions of the National Dialogue should be factored into consideration in carrying out the precepts of transitional justice in the country. In making this recommendation or public policy consideration, this paper is mindful of the fact that an imperfect obligation in the form of TRH runs the risk of failing because it has no legal teeth: it is lacking in prosecutorial powers. Yet one may ask whether the fear of the failure of the TRH process is potentially greater than the fear of a return to war. This piece argues that the latter would be more catastrophic.

- (iii) Thirdly, in pushing for the implementation of the R-ARCISS' provisions on transitional justice in South Sudan, the RTGONU and international community should enlist the support of regional and continental bodies to press upon them the superiority of TRH over criminal prosecutions. It is this paper's considered position that criminal prosecutions are more likely to open a Pandora's Box in the region and beyond. The putative precedent established by criminal prosecutions arising from the practice of a hybrid court in South Sudan could very well snowball into a practice that may not bode well for most countries in the region, considering that the ingredients for the nature of mass political violence and their attendant atrocities seen in South Sudan are ripe and readily discernable in almost all countries in east Africa and beyond, notwithstanding differences in the magnitudes and frequencies of occurrence of such crimes in each country.
- (iv) Despite the policy consideration and recommendation in (iii) above, it is worth noting that South Sudan should take the process of transitional justice very seriously. It does not matter how long this process takes. What is important is that some form of justice to the victims and personal accountability should not and cannot be avoided. For instance, even if they escape jail time, all individuals—military or political leaders—accused of war crimes or crimes against humanity in the course of the 2013-2018 conflict should be barred from running or holding any public office. Through the TRH process, the people of South Sudan have the power to bar from holding any public office anyone deemed to be an obstacle in advancing the greater good. This ban should not be limited to those most responsible for violence and mass crimes but also anyone found to have engaged in egregious conduct of economic corruption and plundering of natural resources, etc.
- (v) Where necessary, some of the crimes committed between 2013 and 2018 should be tried by means of traditional legal system. For instance, matters of cattle theft or destruction to a private property during the war can be tried through traditional court systems where some form of compensation can be exacted.
- (vi) Finally, as a matter of public policy, the idea of reparations or compensation for damages incurred between 2013 and 2018 should not be part of the transitional justice accountability. That is because it is often difficult to quantify the volume of damages in the face of civil conflict as well as determining which side was responsible for which damages. Second, in a developing country such as South

Sudan which, for example, continues to struggle to pay its civil servants, effecting compensation would place an undue financial burden not only on the government itself, but also on the next generations of South Sudan. In light of the inability of the South Sudanese Government to even satisfy its own basic domestic and international obligations, it stands to reason that making compensation part of the TRH package is clearly impractical.

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