
SOUTH SUDAN'S TRANSITIONAL JUSTICE IMBROGLIO

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ABSTRACT

Transitional justice is usually defined as the means by which a society deploys a range of mechanisms to address past injustices. This paper argues that South Sudan's transitional justice process does not augur with this conception. The irreconcilable nature between the concept of transitional justice and political context of South Sudan renders transitional justice, in the case of South Sudan, inept to address past abuses. The paper does so by analyzing the three transitional justice mechanisms as they operate, at times, in isolation or in tandem with each other and conclude that the interaction and operation of the mechanisms conduce tensions that encourage policy makers to abandon, *en masse*, the transitional project but at the risk of attracting a referral of the Republic of South Sudan to the International Criminal Court via a United Nations Security Council Resolution. The paper also analyzes the possibility of the neighboring States' electing to exercise the doctrine of passive personality available to them, even though, such an option is likely to be undermined by regional and political dynamics.

Keywords: transitional justice; commission for truth reconciliation and healing; compensation and reparation authority, hybrid court for South Sudan

Introduction

As portended by many commentators, in December 2013, the Republic of South Sudan, following irreconcilable differences within its ruling party, the SPLM/A,¹ plunged into violent conflict. In order to address the devastating effects of the war, the Peace and Security Council of the African Union (AUPSC), following swift consultations with the warring protagonists, resolved in its 411th meeting,² *inter alia*, to emphasize two immediate requirements. First, it urged the conflicting parties to “engage in unconditional and inclusive dialogue in order to resolve the conflict.”³ Second, it suggested the establishment of “a Commission to investigate human rights violations and recommend the best ways to ensure accountability, reconciliation, and healing among all South Sudanese communities,”⁴ under the auspices of the AUPSC. These two obligations, pursued to their logical conclusions, culminated in the signing of the Agreement of the Resolution of the Conflict in South Sudan (ARCSS)⁵ in the latter half of 2015, and prior to that, the final report of the AU Commission of Inquiry.⁶

The report identified “the root of the crisis” as “unresolved grievances related to past conflicts.”⁷ To address this deficiency, the Commission of Inquiry argued that the Republic of South Sudan needs, as part of its political culture, to integrate reconciliation, accountability, and reparations⁸ into its governance structures. These recommendations were incorporated into Chapter V of the ARCSS under the rubric “Transitional Justice (TJ).” However, a lack of political will, fear of the unknown, limited knowledge, and tenuous proficiency in the precise scope of TJ by the peace actors collectively dissuaded politicians from engaging in the process. This myopia has arguably persisted as the *raison d’être* for non-implementation of TJ, a feat that exacerbated and eventually halted Chapter V of ARCSS when war erupted, once again, in 2016.

To protect the country from the devastation of the second phase of the conflict, another agreement was signed in 2018, this time with the nomenclature—the Revitalized-ARCSS (R-

¹ Hilde F Johnson, *South Sudan: The Untold Story, From Independence to Civil War* (IB Tauris 2016).

² Report of the Chairperson of the Commission on the situation in South Sudan: 411th meeting of the Peace and Security Council, Banjul, the Gambia.

³ *ibid* 2 [24]

⁴ *ibid* 3

⁵ Agreement of the Resolution of the Conflict in the Republic of South Sudan (2015)

⁶ Final Report of the African Union Commission of Inquiry on South Sudan (2015)

⁷ *ibid* [853]

⁸ *ibid* 6

ARCSS). Unsurprisingly, the successive agreement, like its predecessor, retained the provision of TJ. However, its implementation continues to be mired by intransigence.

The laxity to fully engage with various TJ mechanisms enshrined in the agreement demonstrates, on one hand, the obliqueness harbored by policymakers about the extent and impact accountability and justice may bear upon them; on the other hand, its persistence is testimony, perhaps, to the salience of TJ to the overall peace⁹ and state-building scheme.

In South Sudan, this bifurcated approach to TJ—policymakers hoping to pulverize it, and in defiance, civil society hoping to confect it—and the consequences likely to emerge from it, inevitably invites a zero-sum outcome that further fractures communities, and presumably invalidates TJ's strategic goals, which originally were intended to pacify, not inflame, societal relations—a consequence incompatible with the inherent logic and objects of reconciliation.

This paper argues that the infirmities inherent to the doctrine of TJ, coupled with South Sudan's societal shortcomings and practical realities, collectively render TJ, as envisaged in Chapter V of the R-ARCSS, burdensome to apply, ineffective in alleviating South Sudan's political challenges, and insufficient to restore its fragile social cohesion.

Supporting this proposition, Part I of this paper highlights the incongruity between South Sudan's current socio-political structures and the modern doctrine of TJ. Part II contends that the exigencies of TJ in South Sudan, rather than conferring complementarity, expose inherently untenable and profound tensions between peace and accountability. Part III examines the anomaly that emerges when the precepts of the Hybrid Court for South Sudan (HCSS) intersect the edicts of the Truth and Reconciliation Commission (TRC). Part IV highlights how the disparate notions of compensation and reparations codified in the peace agreement not only modifies, but also obfuscates the genuine intention and meaning of restitution in the psyche of a local South Sudanese—the prospective recipient of justice and accountability. Part V serves as an indictment—if not an interrogation—of the subtle inclusion of economic crimes within the ambit of the HCSS. Part VI explores the plausibility of applying a passive personality jurisdiction by foreign courts in the event that the parties to the agreement become apprehensive, unwilling, and unable to implement the terms of the Hybrid Court, which carries within it the risk of a United Nations Security Council (UNSC) referral of the

⁹ *ibid* 6

Republic of South Sudan to the International Criminal Court. Part VII elucidates the possibility and ability of the parties to the agreement to leverage the amending provisions to partially or wholly expunge Chapter Five of the peace agreement. Finally, I conclude by recommending the need to strongly consider an approach informed and rooted in South Sudanese traditional practices that deeply resonates with the vast majority of locals as much as their leaders, while asserting that such a quest aligns more with the locals' conception of justice and truth.

Accordingly, this paper aims not to prescribe a definitive set of solutions to South Sudan's TJ imbroglio; rather, it seeks to initiate further discussions on how best to approach and effectively deliver justice and, in a meaningful and sustainable manner, restore the deteriorating social bonds eroding South Sudan's social fabric.

I. Doctrine of Transitional Justice

"TJ is a concept and a process encompassing diverse legal, political, and cultural instruments and mechanisms"¹⁰ that communities deploy to "confront legacies of widespread or systematic human rights abuses as they transition from repression or civil war to a just, democratic, or peaceful order."¹¹ Therefore, "as a justice informed by prior injustice and infused with transformative dimensions—justice caught between the past and the future, between backward-looking and forward-looking"¹²—this definition, at its very basic premise, assumes an epistemological framework whose utility is predicate on an elapse of a transitional period. However, for a society that has, for a substantial period, experienced intermittent conflicts, what exactly is a "transition?"

In most cases and contexts, the term "transition" carries multiple meanings. However, in recent years, the term, particularly in the realm of TJ, has predominantly implied "transition to democracy."¹³ Unfortunately, "much of the literature has assumed that transition is tantamount to transformation and that one equates with the other."¹⁴ Regardless of the meaning, neither description fits the context of South Sudan, given that it exudes a unique character

¹⁰ Anja Mihr 'An introduction to transitional justice' in Olivera Simić (ed), *An Introduction to Transitional Justice* (2nd edn, Routledge 2020)

¹¹ Frank Haldemann, 'Another King of Justice: Transitional Justice as Recognition' (2008) 41 *Cornell Int'l LJ* 675

¹² *ibid* 10

¹³ Arthur Paige, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 *Hum Rts Q* 321

¹⁴ Joanna R. Quinn, 'Whither the Transition of Transitional Justice' (2014) 8 *Interdisc J Hum Rts L* 2014

within its TJ spectrum. It is neither at peace nor at war. South Sudan signed a peace agreement (R-ARCSS) that is relatively holding, yet it has not completely rid itself of hostilities and violence. It also has a security arrangement under the terms of the peace agreement, yet its various armed groups and security agencies remain ununified. South Sudan has temporally continued to exist in the past, although its body politic remains in the present. Ironically, this duality implies that South Sudan's past is also its present. Doctrinally, since the success of any TJ mechanism depends on a "clear break from the past," it would then follow that the temporal immutability South Sudan faces, coupled with its idiosyncratic state of affairs, invariably diminishes the spark necessary to activate the contraptions of TJ, as requisitioned by the provisions of Chapter V of ARCSS.

With such an impasse, the parties to the peace agreement have, shall, and will, ineluctably, continue to influence the "pace and nature of the transition,"¹⁵ potentially even disrupting the process in its entirety.

Compounding this anomaly is the fact that "TJ processes often lead to the construction of a victim–perpetrator dichotomy."¹⁶ In the case of South Sudan, this distinction became more pronounced when the war incrementally assumed a tribal dimension, impelling the warring parties—desperate for manpower—to turn to their own kith and kin for recruitment and replenishment. The corollary of such a stratagem is that with sudden shifts in the war theater and frequent changes in battlefield control, both the civilian populace and the marauding forces, depending on the frequency of these shifts, doubled as both victims and perpetrators. This idiosyncrasy blurs not only the plurality of violence, but also "renders invisible the role" played by tribal agents that remained not only neutral but also benevolent, charitable, and altruistic, at a time when doing so was a rarity.

Beneath this tribal parochialism also lie cultures, customs, and traditions that play a vital role in addressing and administering the challenges posed by TJ. These three paradigms can also—depending on their utility—foster peace or contribute to the very problem.¹⁷ This precariousness is further complicated by the fact that South Sudanese society is not only

¹⁵ Laurel E Fletcher, Harvey M. Weinstein and Jamie Rowen, 'Context, Timing and Dynamics of Transitional Justice: A Historical Perspective' (2009) 31 Hum Rts Q 163

¹⁶ Margarida Hourmat, 'Victim-Perpetrator dichotomy in transitional justice: The Case of Post-Genocide Rwanda' [2016] 4(1) Narrative and Conflict: Explorations in Theory and Practice
<<https://journals.gmu.edu/NandC/article/view/1334>> accessed 12 March 2025

¹⁷ David Kaulemu, 'Culture, Customs, Traditions and Transitional Justice' in Moses Okello and others (eds), *Where Law Meets Reality: Forging African Transitional Justice* (Pambazuka Press 2012)

coming to terms with past human rights violations, but also ethnic and tribal divisions that have been the root cause of these violations.

A more challenging fact is that, in divided post-conflict societies such as South Sudan, TJ processes are often intertwined with “conflicting” and “competing” memories of past violence as well as multiple truths.¹⁸ Such tensions are frequently exploited by powerful elites, their supporters—and occasionally—the perpetrators themselves, to “interpret” and “re-interpret” history, “memories” and “truths” through the “often highly politicized lens of the present.”¹⁹ The consequence of the politicization of TJ processes, as such and at that stage, is that it raises a definitional contest as much as a dilemma,²⁰ creating an “interpretive monopoly”²¹ of the core meaning of TJ, its component parts and constitutive elements. Once political actors assert their dominance and secure control over TJ processes, what was purely meant to be a transformative social, economic, and legal exercise becomes amenable to, and at risk of, expeditiously metamorphizing into an unadulterated form of political paternalism that only guarantees outcomes exclusively reflective of the interests of the ruling class—and occasionally—that of the perpetrators; interests that are usually at odds with victims’ interests. Ultimately, this conflation only serves to erode the policy objectives of TJ.

Even more pernicious, in societies lacking a fundamental “transition” and are deeply fragmented, where transformation remains highly contested, the operationalization of TJ depends on a loose governing coalition—whose members—in most cases, are accused of perpetrating the very violence.²² In this context, the impetus to deliver justice is usually shrouded in ambivalence that is rooted in fear against self-incrimination. This reality and consciousness have, and continues to drive South Sudan’s decision-making processes as much as it haunts its TJ experience.

II. Tension between Peace and Justice

In the aftermath of a rapturous conflict, nothing usually vexes the TJ process, more than the

¹⁸ Patricia Lundy, ‘Paradoxes and challenges of transitional justice at “local” level: Historical Enquiries in Northern Ireland’ (2011) 6 *Contemp Soc Sci* 89

¹⁹ *ibid* 18

²⁰ Nicola Palmer, Phil Clark and Danielle Granville, *Critical Perspectives in Transitional Justice* (Intersentia Publishers 2012)

²¹ An interpretive monopoly refers to a situation where a single entity, holds the exclusive authority to interpret the laws, thereby creating a hierarchical power structure and barring others from developing different interpretations.

²² Thomas Obel Hansen, ‘Transitional Justice: Towards a Differentiated Theory’ (2011) 13 *Or Rev Int’l L* 1

conciliation of “peace” and “justice.”²³ From this divergence, two schools of thought emerge. On one end of the spectrum “some scholars, and indeed policy makers, view ‘peace’ and ‘justice’ as simply in conflict with each other.”²⁴ Meanwhile, the other contends that “peace and justice mutually reinforce virtues, suggesting that the pursuit of one serves to augment the other.”²⁵ The Commission of Inquiry in South Sudan recognized this intrinsic challenge, yet favored the former over the latter by reposing that “peace must be established first, before attempts are made to address the rest”²⁶ of the processes.

As if this prioritization of “peace” over “justice” was not problematic enough, the President of South Sudan, in an attempt to incentivize the call for peace, issued decrees—in 2013 and 2018—regarding a “general amnesty to heads of different arm groups.”²⁷ The effect of the issuance of such amnesties is that, qualitatively, it abates a more fundamental question: is justice best achieved by the arrest and prosecution of perpetrators, or by reconciling victims and perpetrators in favor of establishing justice?²⁸ Unclogging this quagmire customarily trots a wedge, in almost even proportions, between adherents and adversaries of absolutions.

Granting amnesty, according to proponents, breeds the necessary “climate of trust that could provide a basis for reconciliation.”²⁹ This is especially true because “documented perpetrators who would inevitably face criminal prosecution are most likely to embrace the promise of amnesty and confess their crimes”³⁰ thereby “revealing the hidden truths,”³¹ a crucial step to bring closure to victims.

Advocates also maintain that blanket and “strict punishment for violations may serve to maintain rather than reconcile the differing recollections and attitudes of various communal

²³ Richard Falk, ‘Criminal Accountability in Transitional Justice’ (2000) 12 Peace Rev 81

²⁴ Johanna Herman, Olga Martin-Ortega and Chandra Lekha Sriram, ‘Beyond Justice Versus Peace: Transitional Justice and Peace Building Strategies’ in Karen Aggestam and Annika Björkdahl (eds), *Rethinking Peacebuilding* (Routledge 2012)

²⁵ Santino A Longar, ‘Transitional Justice in South Sudan: A Case for Sustainable Peace, Reconciliation and Healing’ (2018) The Sudd Institute Policy Brief <https://docs.southsudanngoforum.org/sites/default/files/2021-02/602b9d3319101_TransitionalJusticeInSouthSudanACaseFor_Full.pdf> accessed 12 March 2025

²⁶ Final report of the African Union Commission of Inquiry on South Sudan, para [883]

²⁷ Roth K and Myers JJ, Human Rights Watch World Report 2017. New York: Seven. 2017

²⁸ Krista K Thomason, *Transitional Justice as Structural Justice: Theorizing Transitional Justice* (Routledge 2016)

²⁹ Louise Mallinder, *Amnesty, Human Rights and Political Transitions* (Hart Publishing 2008)

³⁰ Uti Ojah Egbai and Jonathan O Chimakonam, ‘Protecting the Rights of Victims in Transitional Justice: An Interrogation of Amnesty’ (2019) 19 AHRLJ 608

³¹ *ibid* 30

or political groups from which the conflict arose.”³² A position appears more precarious when there is no clear victor in a conflict. Proponents have increasingly argued that international law does not prohibit the efficacy of amnesty in achieving peace.³³ International law has an opposite effect. Additional Protocol of the 1977 Geneva Conventions propagates for “authorities in power to endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict.”³⁴ Finally, proponents argue that the blanket freedom that accrues to perpetrators resulting from amnesties is far less important than the benefits gained when the perpetrators are involved in creating new laws, building new institutions, and reconstructing a social contract for a society whose fabric has severely tethered and withered away.

Meanwhile, opponents assert that providing amnesty offends “the right of redress, the rule of law and deterrence of human rights violations,”³⁵ This is because human rights and international criminal laws impose on the State a duty to prosecute, provide victims with the right to remedy, and investigate human rights abuses.³⁶ Obligations that often restrict a state’s ability to grant amnesties.

Opponents also maintain that amnesties have, strategically, been deployed as a protective device to shield the “powerful from the judgment of the law.”³⁷ A course that is not permitted when dealing with serious breaches of international law or *jus Cogen* norms.³⁸

Evidently, introducing amnesties into the TJ context of South Sudan, like elsewhere, creates tensions that pull the entire TJ process in two different directions: prosecute or immunize. Amidst this chaos, a pertinent question is how does one exactly reconcile these two seemingly polar opposites? Such incompatibility, as the commentators say, is difficult to marry. However, this assertion is absolutely wrong. The reality is somewhat more complex than that. In all actuality, resolving this paradox largely depends on the acquiescence between the government and African Union, upon formulating the terms of the required memorandum of understanding between the two entities. It dictates the gradation and scope of various conflicts,

³² Tom Hadden, *Punishment, Amnesty and Truth: Legal and Political Approaches in Democracy and Ethnic Conflict, Advancing Peace in Deeply Divided Societies* (Palgrave MacMillan 2004)

³³ No source of international law as prescribed by Art 38 of the ICJ

³⁴ Additional Protocol I to Geneva Conventions, Art 6(5)

³⁵ Mallinder (n 29)

³⁶ Orlaith Minogue, ‘Peace v Justice: The Utility of Amnesties’ (2010) 29 *Crim Just Ethics* 306

³⁷ Ronald C Slye, ‘The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible’ (2002) 43 *Va J Int’l L* 2002

³⁸ *Jus Cogen* norms are fundamental, universally binding principles of international law from which no exception can be made. Also, known as peremptory norms of international law.

and characterizes whether a conflict in question falls within the purview of humanitarian, human rights, criminal, and domestic laws.

The segregation and attribution of culpability along such a gradation logically necessitates the following. First, since international humanitarian law, unlike international human rights law, permits amnesties,³⁹ it then follows that individuals designated under these laws will be exempted or prosecuted, respectively, depending on whichever legal divide they fall under. Second, there is a growing consensus that amnesties, in any form, do not extend to violations of war crimes, crimes against humanity, and international criminal law.⁴⁰ Essentially, this can be attributed to critics purporting that “domestic amnesties are thus presumptive injustices in the name of a domestic good”⁴¹—mainly the provision of security and restoration of sovereignty. Third, international human rights treaties provide in some manner a “right to remedy,”⁴² which does not refer “directly to a State’s obligation to investigate or prosecute under international law. However, they do acknowledge an individual’s right to a remedy when rights have been violated.”⁴³ Viewed as such, a State’s obligation to proffer a “remedial right” by implication, undoubtedly, carries within it a binary obligation to prosecute. However, to reconcile the discrepancy—whether to prosecute or offer amnesty—requires that States and international organizations ensure that before granting amnesty, a State must first determine “whether there exists an international law obligation to prosecute the particular offense.”⁴⁴ Should a duty exist then, incidentally, no amnesty is permitted. Conversely, should the duty to prosecute be absent, then an amnesty clause will be engaged.

III. Nexus between The Hybrid Court for South Sudan and Truth & Reconciliation Commission

The R-ARCSS mandates the revitalized government to establish a Truth and Reconciliation Commission (TRC),⁴⁵ with the aim of “inquiring into all aspects of human rights

³⁹ *ibid* 37

⁴⁰ Leila Nadya Sadat, ‘Exile, Amnesty and International Law’ (2005) 81 *Notre Dame L Rev* 955

⁴¹ Max Pensky, ‘Amnesty on Trial: Impunity, Accountability, and the Norms of International Law’ (2008) 1 *Ethics and Global Politics* 1

⁴² Sanjin Ibrahimbegovic, ‘The Concept of Amnesty in the Crossfire between International Criminal Law and Transitional Justice’ (Doctoral dissertation, University of the Western Cape 2009)

⁴³ Naomi Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ (1990) 78 *CLR* 449

⁴⁴ Michael Scharf, ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’ (1996) 59 *LCP* 41-61

⁴⁵ The Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan [R-ARCSS], Art 5.2.1

violations and abuses, breaches of the rule of law and excessive abuses of power, committed against all persons in South Sudan by State, non-State actors, and or their agents and allies.”⁴⁶ The TRC will have retrospective temporal jurisdiction spanning from the time the agreement was signed to July 2005.⁴⁷ Moreover, the entire TRC process is puritanically a South Sudanese affair under the exclusive aegis of R-TGoNU.

Meanwhile, the AUC is mandated to establish the HCSS and is tasked with the responsibility of “investigating and, where necessary, prosecuting individuals bearing responsibility for violations of international law and/or applicable South Sudanese laws.”⁴⁸ However, unlike TRC, which has retrospective temporal jurisdiction, HCSS is endowed with prospective temporal jurisdiction covering crimes committed from 15 December 2013 to the end of the transitional period, whenever that period is.⁴⁹ Additionally, unlike TRC, which is an exclusively South Sudanese affair, HCSS, as the name suggests, is hybrid, not only in name but also in composition as well as its applicable substantive law.⁵⁰ In contrast to South Africa’s TJ process, which “encouraged witnesses to testify in exchange for amnesty or immunity from prosecution, or Sierra Leone’s process, which promised full amnesty to combatants on all sides,”⁵¹ South Sudan’s TJ processes offers no such concession.

Despite the stark differences between the two mechanisms, there is also a much more obvious commonality and complementarity. HCSS, established by AUC, is mandated “to investigate and, where necessary, prosecute individuals bearing responsibility for violations of genocide, crimes against humanity, war crimes, other crimes under international law, or applicable South Sudanese laws.” The inclusion of “applicable South Sudanese Laws” and “other crimes under international law,” euphemistically, is a blanket order for prosecuting anything and everything.⁵² This point has been reinforced by the granting of supremacy and independence of HCSS over domestic courts.⁵³

Again, while HCSS is expected—for prosecutorial purposes—to conduct its own

⁴⁶ *ibid* 45, Art 5.2.2.1

⁴⁷ *ibid* 45, Art 5.2.2.3.1

⁴⁸ *ibid* 45, Art 5.3.1.1

⁴⁹ *ibid* 48

⁵⁰ *ibid* 5

⁵¹ William A Schabas and Shane Darcy, *Truth Commissions and Courts* (Springer Netherlands 2004)

⁵² R-ARCSS, Art 5.3.1.1

⁵³ *ibid* Art 5.3.2.2

investigations,⁵⁴ it can also rely on the determinations of the CTRH to “identify perpetrators of violations and crimes,”⁵⁵ as prescribed by the terms of the peace agreement.

IV. Disparate Concepts of Compensation & Reparation and Interlinkages to the TRC

Unlike prosecutions directed toward perpetrators with an intention to punish and deter, reparation and compensation are victim-centered and aimed at redressing the harm caused to victims.⁵⁶ In recognition of the devastating effects of the war and its brunt on the civilian population, parties to R-ARCSS opted for the creation of a Compensation and Reparation Authority (CRA)⁵⁷ that would administer a pool of funds, the Compensation and Reparation Fund.⁵⁸ Structurally, the CRA receives victim applications from CTRH and determines the compensatory and reparative relief to be awarded to an aggrieved party or successful applicant.⁵⁹ In a Perceptions Survey conducted in 2016,⁶⁰ more than half of the respondents (52%) attested to prior victimization, with a disproportionate 23% having awareness of CRA. The significant discrepancy between respondents’ sense of victimization and their inability to draw a linkage for a compensatory mechanism as a remedy is symptomatic of a broader skepticism that TJ is a “complex legal construct, often entangled with political, social and moral contentions.”⁶¹

The key to deconstructing these contestations begins with precisely identifying the size and type of compensation to be extended to purported victims. Generally, in redressing harm for victims of gross human rights violations, “the remedial human rights approach is implemented through five types of reparation”:⁶² restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition.⁶³ In South Sudan, the R-ARCSS empowers the National Legislature to determine the type and amount of compensation to be

⁵⁴ *ibid* 53

⁵⁵ *ibid* Art 5.2.2.3.3

⁵⁶ Luke Moffett, *Transitional Justice and Reparations: Remediating the Past?* Research Handbook on Transitional Justice (Edward Elgar Publishing 2017)

⁵⁷ R-ARCSS, Section 4.1

⁵⁸ *ibid* 57

⁵⁹ *ibid* Section 4.2(f)

⁶⁰ Rens Willems and David Deng, ‘Perceptions of Transitional Justice’ PAX Protection of Civilians report 2016 <<https://protectionofcivilians.org/report/perceptions-of-transitional-justice/>> accessed 12 March 2025

⁶¹ *ibid* 56

⁶² *ibid*

⁶³ *ibid*

awarded to an injured party.⁶⁴ However, the extension of compensation, in the form of material and financial support, to both legal and natural persons,⁶⁵ coupled with the temporal retrospectivity of CTRH, effectively condemn R-TGoNU to a position where it must assume an indeterminable liability for an indeterminate number of people, when considering the vast scale of looting and destruction during the conflict. With the knowledge that most businesses looted were uninsured and the risk of liability could multiply, the government has enough reasons to deter South Sudanese policymakers from engaging in the process.

Setting aside the structural defects inherent in the CRA mandate, the contested nature of victim reparation is necessary because “the way victim reparations are conceptualized in a given society has important implications for the interpretation and construction of the past.”⁶⁶ Accordingly, victim reparation should be viewed as a social process, one which vacillates from an “interpretation of the past and leads toward a re-interpretation of that past.”⁶⁷ In South Sudan, this is evidenced by the proclivity of citizens demanding that compensation and reparation, as provided for by R-ARCSS, be extended to victims of the 1991 Bor massacre, which if taken into consideration, unlocks the temporal jurisdiction of the CRA back past 2005 up to the signing of ARCSS allotted timeframe. Notwithstanding, the absence of a clear choice of redressal or compensation for victims from the National Legislature need not be a limitation in compensating injured parties; rather, it should be seen as an opportunity to provide the government with a broader choice to adopt a remedial measure for victims with much flexibility, as they are constantly evolving in legal theory and practice.⁶⁸

Consequentially, while the overt goals and normative premises underlying redress and reparations are simple, the actual implementation of reparation policies often proves contentious and complex.⁶⁹ In the human rights sphere, the right to reparation is constructed as an obligation of the State.⁷⁰ Such characterization neglects the practical operationalization of reparations in post-conflict societies. This murkiness, typically in the case of South Sudan, has created a situation where the realization of reparative goals has become heavily dependent on

⁶⁴ R-ARCSS, Section 2.2.2.5

⁶⁵ *ibid* 59

⁶⁶ Jemima Garcia-Godos, ‘Victim Reparations in Transitional Justice—What is at Stake and Why’ (2008) 26 *Nord J Hum Rts* 111

⁶⁷ *ibid* 66

⁶⁸ Marten Zwanenburg, ‘The Van Boven/ Bassiouni Principles: An Appraisal’ (2006) 24 *NQHR* 641

⁶⁹ Aurelien Pradier, Maxin Rubin and Hugo Van der Merwe, ‘Between Transitional Justice and Politics: Reparations in South Africa’ (2018) 25 *SAJIA* 301

⁷⁰ Sunneva Gilmore and Luke Moffett, ‘Finding A Way to Live with the Past: Self-Repair, Informal Repair, and Informal Reparations in Transitional Justice’ (2021) 48 *J L & Soc’y* 455

political actors' intentions. Pragmatically, budgetary constraints ordinarily undermine reparation programs, thereby making restrictions a necessity.

Therefore, in the absence of some clearly-defined minimum legal standards, the urgency for prioritization and specificity in the face of resource limitation has the potential to be exploited by shrewd politicians to provide justifications for political maneuvering that favors or deprives specific groups or interests, in addition to “delimiting those who are eligible and determining when the transition ends.”⁷¹ One of the strategies to curtail such an effect gaining traction and eventual entrenchment is to devise a reparative mechanism that allows for a “victim agency and calls for a more participatory bottom-up approach to constructing justice and reparation.”⁷² However, this aspect is missing in the South Sudanese compensation and reparation scheme.

Adding to the structural challenge is the fact that in transitional societies, dichotomization of victims and perpetrators is not always obvious. In most cases, the opposite is true, in that within the messy reality of conflict, “perpetrators can be victimized and victims can be responsible for victimizing others.”⁷³ In South Sudan, this duality of perpetrator–victimhood and its transient vacillation is increasingly ubiquitous when the apparent change of power and control of territory among the warring belligerents is intermixed with the deep-seated tribalism that shaped and dominated the conduct of violence and the operation of the war.

Cross-pollination from victim to perpetrator and back is salient to the analysis of who the injured party is and whether a purported party that doubles both as a victim and perpetrator is entitled to a compensatory award within the scope of CRA. The corollary of such a contemplation is that in the absence of robust procedural guidelines and regulatory safeguards or inadequate appraisal mechanism, the risk of depriving a deserving party of a remedy is a possibility that likely leads to a double loss, or double jeopardy, in the local context. Concomitantly, the risk of a perpetrator who benefitted from the spoils of war getting rewarded, even when they themselves may have suffered loss at some point, is a reality that leads to an instance of double recovery, in a civil law context. Both processes—double jeopardy and

⁷¹ *ibid* 56

⁷² *ibid* 70

⁷³ Luke Moffett, ‘Reparations for Guilty Victims: Navigating Complex Identities of Victims-Perpetrators in Reparation Mechanisms’ (2016) 10 *IJTJ* 146

double recovery— are strong foundational legal principles prohibited by South Sudan’s laws. Both specters are realities; the CRA must grapple with it as it engages with the process of segregation of parties deserving compensation, which could prove cumbersome.

V. Should the Hybrid Court for South Sudan Deal with Economic Crimes?

“To carry out its investigations” the HCSS is permitted to draw upon the report of the African Union Commission of Inquiry in South Sudan, other existing documents and materials from entities and sources it deems necessary for investigative purposes.⁷⁴ The data collection and compiling of evidence led the Geneva-based Human Rights Council—through resolution 31/20—to establish the “Commission of Human Rights in South Sudan” in March 2016, with a mandate to “determine and report facts and circumstances, collect and preserve evidence and clarify responsibility for alleged gross violations...as well as providing accountability with a view of ending impunity”⁷⁵ by providing information and records to all the mechanism of Chapter V of the ARCSS, “including the HCSS once established”⁷⁶ in tandem with the African Union.

While the mandate of the Commission for Human Rights in South Sudan is limited to human rights abuses, most of the Commission’s recent publications have widely reported economic crimes. The Commission’s competence to furnish the HCSS with evidentiary supply combined with the court’s jurisdiction to prosecute individuals found violating “other South Sudanese laws,”⁷⁷ the HCSS court’s operational distinction and independence from the national judiciary,⁷⁸ and its superiority over South Sudan national courts,⁷⁹ if construed within its proper context, implies that while the HCSS is empowered to only prosecute individuals breaching international and South Sudanese laws as far as concerns human rights, such a conferral does not extend to economic crimes. Therefore, using these broad powers to include economic crimes within the court’s jurisdictional ambit is an exercise, I argue, that does not only expand these purported powers of the court beyond its true construct, but also, expends the elasticity of the regime of substantive laws beyond its limit.

⁷⁴ R-ARCSS 3.6.1

⁷⁵ Commission for Human Rights in South Sudan Report, 2019 A/HRC/40/69

⁷⁶ *ibid*

⁷⁷ *ibid* 5

⁷⁸ *ibid* 77

⁷⁹ *ibid* 78

Inasmuch as no perpetrator(s) of human rights violations, given the scope of TJ in South Sudan as envisaged in Chapter V of ARCSS, should go unpunished, the utility of the powers conferred on the variant mechanisms of Chapter V arguably attract liability on persons suspected to have engaged in economic crimes. However, this function is best left to the South Sudan Anti-Corruption Commission (SSACC); anything short of that is tantamount to the usurpation of SSACC's powers.

Prudence would therefore require that the South Sudan TJ process completely refrain from intruding into the economic crimes' domain. Therefore, viewed as a whole, the HCSS should not accept, despite the temptation, to indulge in crimes that exclusively deal with economic crimes.

VI. International law and Applicability of Doctrine of Passive Personality

The doctrine of passive personality in international law encompasses the ability of any State to protect its citizens by punishing perpetrators of any crime committed against them by a foreign national in a foreign country⁸⁰; that is, the exercise of criminal jurisdiction solely based on the nationality of a victim. Since the crimes falling under the jurisdictional scope of HCSS include those, in some instances, committed against foreign citizens, notably Ethiopians, Kenyans, Sudanese, and Ugandans, stagnation of the operationalization of HCSS has provoked, in some quarters, the thought of whether these countries should bring proceedings against South Sudanese persons suspected of having committed atrocities against foreign nationals by the governments and countries of victims.

However, such a proposal must wrestle with the tension that exists between the doctrine of passive personality, which implicitly infringes upon the sovereignty of a State, on the one hand, and the principle of non-interference—a doctrine that prohibits States from interfering in the internal affairs of other States—on the other.⁸¹ This bizarre disconnect can however be overcome once and if a prosecuting foreign State can satisfy that the perpetrating State is “unwilling” and equally “unable” to prosecute the offenders, which are, in this case, its citizens residing in its territory, then the doctrine of passive personality can be activated. Naturally, a

⁸⁰ Geoffrey R Watson ‘The Passive Personality Principle’ (1993) 28 Texas Int'l L J 1

⁸¹ Regula Echle, ‘The Passive Personality Principle and the General Principle of Ne Bis in Idem’ (2013) Utrecht L Rev 56

passive personality regime conduces an arrangement where the State of the victim can assume “responsibility,” but has no “obligation” to prosecute.⁸²

In countering the “unwilling and unable” legal test, host countries have been arguing that non-exercise of exclusive prosecutorial jurisdiction by a host State entails no possibility of a concurrent jurisdiction to replace it, much less, the assumption of that jurisdiction by the victim’s State. Beyond the unwilling and unable tests, when nations apply their jurisdiction extraterritorially, their assertion must adhere to a principle and claim that it is much stronger than that of a citizen’s State or the State where the purported crime occurred. If not, the State must still show that the alleged offenses violated international norms and agreements in order to justify the violation of another State’s territorial sovereignty,”⁸³ and the consequent applicability of passive personality jurisdiction.

Despite this legal accreditation, most countries with the ability and means to invoke passive personality for political reasons desist from doing so. The urge to activate passive personality by countries whose citizen’s endured violence was higher in the advent of the South Sudanese conflict; however, that urgency has since waned. The impetus behind the deterioration of the urge is that all the regional powers that could have the jurisdiction of passive personality available to them have experienced massive political upheavals of their own: Ethiopia and Sudan have had their own internal wars, Kenya and Uganda have faced civil unrest that have seen their governments implicated and accused of gross human rights violations. In most cases, violations involved other foreign nationals as well. Political expediency dictates that it is in the best interests of these countries to avoid embracing or invoking passive personality jurisdiction against the Republic of South Sudan. Otherwise, to create an imbalance, the potential rewards from engaging in a passive personality jurisdiction are much lower than the losses it attracts.

VII. Parties Altering the Terms of the Peace Agreement to Exclude Accountability

The express provisions of Chapter VIII (4) of R-ARCSS permit parties to amend it as long as it receives two-thirds vote from members of the Joint Monitoring and Evaluation

⁸² Eric Talbot Jensen, ‘Exercising Passive Personality Jurisdiction Over Combatants: A Theory in Need of a Political Solution’ (2008) 42 Int’l L 1107

⁸³ *ibid* 82

Commission (JMEC) and Council of Ministers.⁸⁴ In principle, the parties to the agreement, if they so choose, can invoke the very articles of amendment to alter the agreement in a manner that excludes the entire TJ process or be specific and only exclude the mechanism that applies to HCSS.

While the preclusion of the TJ process by parties to R-ARCSS falls within the realm of possibilities, and the inclusion of TJ and formation of HCSS serves as a compromise between the competing urge to institute accountability akin to an international tribunal on one side and on the other, the African Union mantra of “African solutions for African problems,” any attempt to neutralize the accountability apparatus embedded in Chapter V of R-ARCSS by the parties to the agreement can possibly trigger a referral to the International Criminal Court (ICC) by the UNSC. Although a middle ground can be forged, it would require crafting an alternative avenue of accountability that is nonetheless rooted in the South Sudanese cultural means of conflict resolution.

However, what is the precise alternative and acceptable conflict-resolution mechanism? The most likely alternative is to establish a path toward a restorative justice approach. However, how and exactly what does this approach entail? Broadly speaking, a restorative justice approach is based on a “harm-centric approach: the centrality of victims, obligation of offenders (meaning of accountability), role of community, and active engagement of all parties in the justice equation are distinctive.”⁸⁵ This sense of justice extends, by and large, to “focusing of righting the wrong done to both parties,”⁸⁶ unlike traditional justice mechanism where retribution is rule-based and conducted regardless of the victims’ reaction or perceptions. In the context of South Sudan, where the victim–perpetrator status is fluid and transient, and justice remains paramount, no system is more apposite than a restorative justice process.

Additionally, since the emphasis of a restorative approach is generally predicated on a harm committed more than the rules broken, in the event that such a process is adopted, the State will be spared from the laborious task of establishing the broken law and all the residue that accompanies it, beyond the daunting task of adducing evidence, proof, and criminal attribution of guilt and liability of perpetrators in its legal *strictu sensu*. Combined with the

⁸⁴ *ibid* 79

⁸⁵ Howard Zehr and Harry Mika, *Fundamental Concepts of Restorative Justice* (Routledge 2017)

⁸⁶ *ibid* 85

plasticity of the restorative process to offer victims and perpetrators the chance for closures, usually in the form of apologies, questions or even clarifications, is a much more effective means of reconciling divided post-conflict societies than remedies or other forms of justice proffered by traditional court systems.⁸⁷

VIII. Conclusion

Generally, when the decision of overlooking past crimes in the service of national reconciliation is made easily, the costs, both moral and social, are high.⁸⁸ However, the opposite seemed more pronounced in South Sudan. Given its political stagnation compounded by an amnesty proffer to potential perpetrators of human rights crimes and other crimes within the remit of Chapter V of the R-ARCSS at a time when regional countries that also serve as guarantors of the agreement are facing their own political turmoil, which are in many ways akin to those formerly experienced by South Sudan, all seem to incentivize the wholesale abandonment of the TJ process at a much lower cost to South Sudan. Increasingly, it becomes difficult to argue or persuade South Sudan's political leadership of the need to hold onto Chapter V of R-ARCSS.

However, it is inconceivable to allow perpetrators of human rights to remain unscathed, while their victims were shamed and tormented emotionally, and the top leadership brass of the country remained divided and unconvinced about the need to institute mechanisms that ultimately serve the goals of justice. A better compromise that would ensure the accountability of perpetrators while guaranteeing justice and equity for victims may lay in South Sudan's restorative and traditional reconciliation and healing mechanisms.

Therefore, instead of refraining from providing alternative dispute resolution mechanisms and other restorative justice approaches, R-ARCSS members along with other stakeholders should confront and increasingly engage with these processes, which are much more familiar to the South Sudanese masses as they are to the country's leaders.

⁸⁷ United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programs 2006
<https://www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf> accessed 12 March 2025

⁸⁸ Diane F Orentlicher, 'Swapping Amnesty for Peace and Duty to Protect' (1996) 3 ILSA J Int'l & Comp L 713