

# Transformative Justice in South Sudan

## The Transformative Potential of a Contextualized Transitional Justice Process

*Livia Rötchlisberger*

**Abstract** This chapter takes the ongoing conflict in South Sudan as a starting point for assessing the concept of transitional justice as such and its implementation in the country in particular. Following a brief description of the conflict and the peace processes, the author sheds light on the shortcomings of the established concept of transitional justice in the situation at hand. Then, the author outlines the alternate concept of transformational justice and takes a closer look at its implications on the situation in South Sudan. The author highlights existing initiatives of transformative justice and is very much in favour of their victim-centered approach.

### 1. Introduction

The current situation in South Sudan looks disastrous: the civil war, which started in 2013 has reached its fifth year and no peaceful end is in sight. Newly agreed ceasefires are constantly violated by government, opposition and rebel forces. While more than two million people had to flee to neighboring countries, another two million are internally displaced and face, apart from the constant insecurity and safety issues, the consequences of an increasingly severe famine.<sup>1</sup>

The African Union has delegated the mandate to support the establishment of peace in the newest nation of Africa to the Intergovernmental Authority on Development (IGAD), an East African organization with its headquarters in Addis Ababa. In 2015, the IGAD, supported by the

<sup>1</sup> Human Rights Watch, World Report 2018, South Sudan, retrieved on 29/10/2018 available at: <https://www.hrw.org/world-report/2018/country-chapters/south-sudan>.

United Nations' troika for South Sudan, consisting of the United Kingdom, the United States and Norway, has managed to bring the current president, Salva Kiir, and the leader of the opposition and previous vice president, Riek Machar, to one table to negotiate a peace agreement, called the Agreement on the Resolution of Conflict in South Sudan (ARCISS). The externally negotiated agreement foresees a traditional transitional justice toolkit and standardized procedures in order to ensure peace and stability in South Sudan and create the sustainable infrastructure that the nation needs to develop its economic and social potential. Until today, none of the conveyed responsibilities have been assumed or implemented by any of the contracting parties.

Taking into account the criticism of the concept of transitional justice, the theoretical process that was established by IGAD for the reconstruction of South Sudan faces several challenges, two of which completely impede an advancement in the process: First of all, the conflict is still ongoing; civilians face constant insecurity and instability, with no functioning civil institutions or legal infrastructure that could protect them from abuses and provide them with a protection of their basic rights. Second, the main perpetrators of the mass atrocities are still in power. A fact that leads on the one hand to a lack of political will to implement any of the conditions for transitional justice to take place, and on the other hand to a lack of trust among the society towards the government and its institutions. The transitional justice process that was so thoroughly drafted by the IGAD and Western powers, is therefore condemned to fail.

Transformative justice is a new approach that attempts to respond to the criticism and challenges of transitional justice. It focuses on the process rather than the outcome and shifts from the legal aspect to the social and political, stressing the importance of the context and the participation of the local population in all aspects of the transformation.

Recent initiatives of the IGAD and the government of South Sudan to resolve the conflict seem to consider the arguments of transformative justice.

*In which way these political initiatives move beyond the theoretical approach of ARCISS, but still fail to accurately address the criticism of transitional justice shall be elaborated in this chapter.*

This chapter starts with an overview of the conflictual situation in South Sudan, including a historical detour in order to understand the roots of the current conflict. It then continues with a critical elaboration of the

traditional concept of transitional justice, followed by a presentation of a definition and the main features of transformative justice. In the last part, the chapter focuses again on the situation in South Sudan and argues that the currently employed tools for transitional justice lack the transformative power and that a bottom-up and contextualized approach is necessary to achieve the desired societal transformation and achieve sustainable peace and justice.

## 2. Conflictual situation in South Sudan

After a two decades long fight for secession from the North, South Sudan eventually reached independence on the 9<sup>th</sup> of July, 2011. With support from an international troika, consisting of the United States, the United Kingdom and Norway, the Comprehensive Peace Agreement (CPA) was signed six years before, paving the way for the referendum on self-determination, held in 2011, and the establishment of a constituency for South Sudan. Set in position of power through the CPA were those who had been fighting the independence war: members of Sudan People's Liberation Army/Movement (SPLA/M), led by Salva Kiir. At the expense of political and civil groups, the military assumed power in the constitution of the new state<sup>2</sup>.

### 2.1 *Establishment of SPLA/M*

In order to understand the reasons for SPLA/M's powerful position in the newly independent state it is important to consider the historical development since the 1980s, when a group of Sudanese Nuer established a military base in Southwestern Ethiopia for the purpose of fighting for secession of the Southern part of Sudan. In 1983 they were joined by an armed group of Dinka rebels, led by John Garang<sup>3</sup>.

In contrast to the idea of the Nuer separatist movement, Garang advocated for a unified, democratic and secular Sudan, where Muslim,

<sup>2</sup> Mamdani, 'Who is to blame in South Sudan?', Boston Review, 2016, retrieved on 23/07/2018, available at: <http://bostonreview.net/world/mahmood-mamdani-south-sudan-failed-transition>, p. 6.

<sup>3</sup> Although South Sudan is a multiethnic society and no tribe forms a majority, the Dinka and Nuer together constitute more than 57% of the population.

Christians and Animists have equal rights<sup>4</sup>. Through the support by the Ethiopian neighbor and Garang's autocratic nature, he managed to take over control of the rebel group and formed the SPLA. In line with his idea of inclusivity he invited other Sudanese elites, such as Riek Machar, a Nuer, as well as Lam Akol, a Shilluk, to join the movement. Nevertheless, his intolerance against criticism regarding his personal vision of an all-encompassing Sudan as well as his dictatorial leadership style resulted in a disagreement with Machar and other officials, who intended to fight for an independent South Sudan. The disagreement led to an internal split of the rebel group reaching its peak in 1991 when Machar commanded the killing of hundreds of Dinka in the area of Garang's home region, Bor<sup>5</sup>. The region was left devastated and during the famine that followed, thousands of civilians died<sup>6</sup>. Machar and Akol separated from the mainstream SPLA/M and formed their own rebel group<sup>7</sup>. After several years of separate struggles, rival alliances and bloody clashes, Machar and Garang remerged their movements in 2002 and fought together for independence from the North of Sudan<sup>8</sup>. In 2005, shortly after Garang died and Salva Kiir took over the leadership of SPLA/M, the North finally surrendered to the quest of the South and the Comprehensive Peace Agreement (CPA) was signed by representatives of the South and the North<sup>9</sup>.

Mahmood Mamdani, an expert in political science and member of the investigation committee that was sent to South Sudan in 2013, argues that the agreement as well as the Interim Constitution that was drafted thereafter by the Western powers, constitute the roots of the current conflict. He believes that those documents legally transferred the power to the military groups while they left out the participation and consideration of other political groups. Instead of inaugurating a new area, the individuals

<sup>4</sup> The following paragraph is based on information from: Steven Costello, 'A Second "split" for South Sudan', Carnegie Council for Ethics in International Affairs, 2017, retrieved 29/10/2018, available at: [https://www.carnegiecouncil.org/publications/articles\\_papers\\_reports/0093](https://www.carnegiecouncil.org/publications/articles_papers_reports/0093).

<sup>5</sup> Mamdani (note 2), p. 9.

<sup>6</sup> Standley, 'Reclaiming the Past in Southern Sudan', BBC News, 2006, retrieved on 29 09 2018, available at: [http://news.bbc.co.uk/2/hi/programmes/from\\_our\\_own\\_correspondent/5133324.stm](http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/5133324.stm).

<sup>7</sup> Sudan Tribune, 'South Sudan VP Affirms Apology for Bor Massacre', Sudan Tribune, 2012, retrieved on 29/09/2018, available at: <http://www.sudantribune.com/spip.php?article42124>.

<sup>8</sup> Tisdall, 'Riek Machar, the Former Rebel Fighter Ready for a New Battle', The Guardian, 2012, retrieved on 29/09/2018, available at: <https://www.theguardian.com/world/2013/jul/04/riek-machar-south-sudan-ambitions>.

<sup>9</sup> Mamdani (note 2), p. 5.

that destabilized the country and its society were given the power to rule over their victims<sup>10</sup>.

## 2.2 *Creation of South Sudan*

Between 2005 and 2011, the Interim Constitution of Southern Sudan (ICSS) served as the national constitution and paved the way for the referendum of self-determination of the people of South Sudan, the establishment of a new constitution and the creation of an administrative, legal and technical infrastructure. At the Conference of all Political Parties of South Sudan, which was held a year before independence, the decision was made to establish a transitional government of national unity, where all parties should be represented. Shortly after independence and with the unquestioned support of the troika, the SPLA/M ignored the request and resumed power, on a legal, self-acquired basis, giving itself the right to rule until 2015<sup>11</sup>. The Transitional Constitution that entered into force with the establishment of the new state of South Sudan in 2011, proclaimed a presidential government where the head of state is also the head of government and armed forces<sup>12</sup>. Salva Kiir, head of SPLA/M became president of South Sudan and appointed Riek Machar as his vice president<sup>13</sup>.

After the referendum for self-determination, the transitional government that was set in place by the troika and the international community, was supposed to implement the foundations of the new state. Due to the fact that there was a lack of skilled human resources and a biased selection of candidates, the ministerial positions were occupied by generals of the SPLA/M and their relatives. As an opposition politician told Mamdani during the investigation in 2013, “the state became SPLM and SPLM became the state”<sup>14</sup>. The concentration of power in the hands of the SPLA/M was not only highly debated among the intellectuals but

<sup>10</sup> Mamdani (note 2), p. 6.

<sup>11</sup> Mamdani (note 2), p. 13.

<sup>12</sup> Deng, ‘Defining the Nature and Limits of Presidential Powers in the Transitional Constitution of South Sudan: A Politically Contentious Matter for the New Nation’, *Journal of African Law*, 2017, p. 23–39 (25).

<sup>13</sup> Human Rights Watch, ‘The Impact of the Comprehensive Peace Agreement and the New Government of National Unity on Southern Sudan’, 2016, p. 1–28 (20), retrieved on 29/10/2018, available at: <https://www.hrw.org/report/2006/03/08/impact-comprehensive-peace-agreement-and-new-government-national-unity-southern>.

<sup>14</sup> Mamdani (note 2), p. 13.

the public also claimed that an inclusive participation was missing in the drafting process of the constitution<sup>15</sup>.

Apart from the dissatisfaction of the society in regards to the missing inclusivity in the political sphere, the differences between Kiir and his vice president Machar became a debated issue. Compared to the idea that the international media defends, the friction between the two leaders is not merely based on ethnic differences, but much more on disagreement regarding the building of the new state and the extension of the term of Kiir's presidency, which was supposed to be renewed in 2015<sup>16</sup>. In 2013, the contest for power became more hostile and Kiir dismissed his vice president Machar and shortly after that, all the ministers. The party split into two groups. After the splitting, the SPLM in Opposition (SPLM-IO), the group led by Machar, was accused of having planned a coup d'état. Kiir used the supposed attempt as a pretext and commanded the killing of Nuer people in the capital, Juba<sup>17</sup>. It was Kiir's violent act and the bloody defense by the Nuer themselves that mark the beginning of the current civil war<sup>18</sup>.

### 2.3 *Civil war and peace processes*

As the continental authority, the African Union (AU) assumed the role of the mediator in the conflict, appointed representatives and committees and mandated the IGAD to lead the peace negotiations<sup>19</sup>. In 2014, the AU appointed a commission to investigate into the human rights violations taking place in South Sudan. Although the final report describes the happenings in South Sudan as criminal acts that are not prosecuted because of the legal breakdown that the country faces, Mamdani submitted a separate opinion, arguing that the violence is political and that

<sup>15</sup> Deng (note 12), p. 26.

<sup>16</sup> Tsidall (note 8).

<sup>17</sup> Mamdani (note 2), p. 3., as well as Human Rights Watch, World Report 2014, South Sudan, retrieved 29/10/18, available at: <https://www.hrw.org/world-report/2014/country-chapters/south-sudan>.

<sup>18</sup> Mamdani (note 2), p. 9.

<sup>19</sup> Lucey/Kumalo, 'How the AU can promote transitional justice in South Sudan', East Africa Report, Institute for Security Studies, 2017, retrieved on 29/10/18, available at: <https://issafrica.org/research/east-africa-report/how-the-au-can-promote-transitional-justice-in-south-sudan>, p. 1–20 (3–5).

a more complex response is needed to re-establish justice<sup>20</sup>. Due to the fact that the AU did not want to interrupt the peace negotiations that were going on in 2014 with the publication of the report and the very critical separate opinion, they were only published a year after submission. Fortunately, although only in 2015, the recommendations eventually influenced the drafting of the Agreement on the Resolution of the Conflict in South Sudan (ARCISS)<sup>21</sup>. ARCISS, signed in 2015 after a successful mediation by IGAD and external pressure from the troika<sup>22</sup>, is an extremely well-structured document with a detailed procedure to follow for the establishment of a transitional government, the deployment of humanitarian assistance and the development of South Sudan's economic and financial potential<sup>23</sup>. In addition, chapter five of the agreement deals with the transitional justice process that is intended to respond to the mass violence and crimes against humanity that have been haunting the society since 2013<sup>24</sup>.

While the agreement foresaw a start of those processes within a short time after its signing, it remained largely ignored by the warring parties and violence broke out again in 2016, forcing Machar and other members of the opposition to go into exile. The general deterioration of security, safety and the increased level of violence since 2016 led to efforts of the international community, represented through the African Union, the government itself and civil society to enhance peace and stability within the country<sup>25</sup>. While Kiir initiated a national dialogue by the end of 2017, the IGAD built up a revitalization committee to discuss a further advancement in the transitional justice process. What those initiatives concretely support and why their impact on the transitional justice process remains limited shall be discussed in the last part of this chapter.

<sup>20</sup> Mamdani, 'A separate opinion: A Contribution to the AUCISS Report, AU Commission of Inquiry on South Sudan', 2014, retrieved on 29/09/2018, available at: <http://www.peaceau.org/uploads/auciss.separate.opinion.pdf>.

<sup>21</sup> Lucey/Kumalo (note 19), p. 3.

<sup>22</sup> Lucey/Kumalo (note 19), p. 4.

<sup>23</sup> See Intergovernmental Authority on Development (IGAD), 'Agreement on the resolution of the conflict in the Republic of South Sudan', Addis Ababa, Ethiopia, 2015, retrieved on 29/10/18, available at: [https://unmiss.unmissions.org/sites/default/files/final\\_proposed\\_compromise\\_agreement\\_for\\_south\\_sudan\\_conflict.pdf](https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf).

<sup>24</sup> IGAD (note 23), chapter 5.

<sup>25</sup> Vhumbunu, 'The National Dialogue Initiative in South Sudan', African Center for the Constructive Resolution of Disputes, 2018, retrieved on 29/09/2018, available at: <http://www.accord.org.za/conflict-trends/the-national-dialogue-initiative-in-south-sudan>.

### 3. Transitional justice and its limitations

In the next part, a definition of the concept of transitional justice is first presented and then followed by an elaboration of the practical limitations that have been revealed through the experience with this approach in past and current situations.

#### 3.1 *Definition transitional justice*

Transitional justice is a concept that finds its roots in the post-transition periods of authoritarian regimes that shifted to democracies and in reconstruction programs of post-conflict situations in the late 20<sup>th</sup> century in South America and Eastern Europe<sup>26</sup>. With legal mechanisms such as courts, truth commissions, compensation and reparation programs, war torn states and the international community try to respond to mass-atrocities of the past that have victimized entire societies and destroyed states' civil institutions<sup>27</sup>. The aim of transitional justice, as defined by the General Secretary of the United Nations, is to "come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and reconciliation"<sup>28</sup>. In practice, transitional justice remains debated and only proves a limited success. It has failed in many settings and seems to be unresponsive to current conflict and post-conflict situations in other regions of the world.

In the early 21<sup>st</sup> century, the academia and practitioners who have observed the limited success of transitional justice during the past decades, started advocating for a more holistic approach and a focus on the needs of the victims<sup>29</sup>. In particular, Louise Arbour's critique of the neglect of

<sup>26</sup> Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', *Social and Legal Studies*, 2012, p. 171–186 (173).

<sup>27</sup> Soueid et al., 'The Survivor-centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony is a Necessary Component', *George Washington International Law Review*, 2017, p. 125–179 (134).

<sup>28</sup> Annan, 'The rule of law and transitional justice in conflict and post-conflict societies', United Nations Security Council, Reference Number S/2004/616, 2014, p. 1–21 (6), retrieved on 29/09/2018, available at: <https://www.un.org/ruleoflaw/files/2004%20report.pdf>.

<sup>29</sup> De Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', United Nations General Assembly, Reference Number A/HRC/30/42, 2016, p. 1–20, retrieved on 29/10/2018, available at: <https://www.ohchr.org/Documents/Issues/Truth/A-HRC-30-42.pdf>.

economic and social rights in transitional justice processes and her call to target “human rights violations that pre-dated the conflict and caused or contributed to it”<sup>30</sup> led to a wave of contributions from scholars that question the traditional transitional justice measures and call for a transformation or expansion of the concept in order to address structural injustices rooted in historical inequalities.

### *3.2 Limitations of transitional justice*

When the transitional justice approach was first applied, it was in the context of authoritarian military or communist regimes that transitioned to democracies<sup>31</sup>. There was a pre- and a post-context and transitional justice was supposed to deal with the latter. While, during that wave of transitions in the 1980s and 1990s, transitional justice was able to support the reconstructions of state infrastructure, the context has changed nowadays and states are often in gray zones in between authoritarian regimes and democracies and a clear cut of a conflict is not clearly existing<sup>32</sup>. This change of context and the underlying structural inequalities lead to the fact that a society considers survival and safety, together with the fulfilment of basic needs, such as food and shelter, as the most pressing issues. Compared to that, political and civil rights, which are primarily addressed by the traditional transitional justice mechanisms, are given less importance<sup>33</sup>. As Waldorf argues, this focus on political and civil rights at the expense of social and economic rights within transitional justice is connected to the concept of “liberal peace”<sup>34</sup>. This concept of liberal peace is based on the rule of law, democratic elections as well as neoliberal economic reforms. According to this conception of peace, democratic states are less likely to go to war and more prone to stability.

The fact that traditional transitional justice mechanisms, such as courts and amnesties but also truth commissions and compensation pro-

<sup>30</sup> For more information, see Arbour’s speech at <https://news.un.org/en/story/2006/06/183712-poverty-most-serious-and-widespread-human-rights-abuse-un-official-says>, as well as Arbour, ‘Economic and Social Justice for Societies in Transition’, *International Law and Politics*, 2013, p. 1–27 (3).

<sup>31</sup> Balint et al., ‘“Post-Conflict” Reconstruction, the Crimes of the Powerful and Transitional Justice’, *State Crime Journal*, 2017, p. 4–12 (6).

<sup>32</sup> Waldorf (note 26), p. 174.

<sup>33</sup> Waldorf (note 26), p. 175.

<sup>34</sup> Waldorf (note 26), p. 174.

grams, only superficially focus on the needs of the victims or only pretend to be victim-centered, was brought forward by several scholars, including Simon Robins. In his article on transformative justice, he claims that the traditional approaches are usually top-down, imposed by the elites and the international community, who are both far from the local context and far from the communities that are directly impacted by the violence of crimes<sup>35</sup>.

Furthermore, by firmly distinguishing between periods of conflict and post-conflict, transitional justice fails to target continuities that have existed before and continue to foster socio-economic injustices after the end of a conflict. Structural violence, such as existing power inequalities, can hide behind expressions that take on different forms during a conflict, a transition or in a post-conflict situation and continue to shape the systemic domination of one group over the other even after the supposed resolution of a conflict<sup>36</sup>. In order to tackle those structural patterns of inequality that are historically rooted in a society or a given country, the transitional justice mechanisms such as amnesties and trials are not appropriate since they are only successful in well-functioning societies with established legal frameworks<sup>37</sup>. If the goal is to achieve deterrence, a transformation of the society and its institutions is necessary, which cannot be achieved with the traditional tools of transitional justice<sup>38</sup>.

Other traditional mechanisms, such as reparations and compensations or truth commissions are partly more victim centered, or at least pretend to be, but fail to incorporate a long-term solution. They are established with the aim to achieve reconciliation or compensation for the loss after the conflict and exist for a certain time period but terminate without fully achieving those goals<sup>39</sup>. As observed in regards to the truth commission in South Africa, people claimed that even after the mandate of the truth commission came to an end, reconciliation was not yet achieved in the country<sup>40</sup>.

<sup>35</sup> Robins, 'Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal', *The International Journal of Transitional Justice*, 2011, p. 75–98 (76).

<sup>36</sup> Balint (note 31), p. 6.

<sup>37</sup> Daly, 'Transformative Justice: Charting a Path to Reconciliation', *International Legal Perspectives*, 2002, p. 73–183 (104).

<sup>38</sup> Daly (note 37), p. 181.

<sup>39</sup> Gready/Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice', *The International Journal for Transitional Justice*, 2014, p. 339–361 (350).

<sup>40</sup> For more on the South African Truth Commission, see Daly (note 37).

Due to the dependence on the international legitimacy of war-torn states or regions of post-conflict, the structure of the transitional justice process is usually highly influenced by external actors, which are more concerned with the justification of their own norms than with the needs of the local population in the country under consideration<sup>41</sup>. The external discourse that potentially also favors the elite at the expense of the victims can additionally lead to a harmful implementation of transitional justice mechanisms, which are commonly negotiated on the top among elite leaders and imposed on the society<sup>42</sup>.

In addition, and also due to the external influence, the local context remains largely ignored. International standardized transitional justice mechanisms that have been used in other situations are applied, despite the fact that they are ill-suited to address the challenges and achieve reconciliation and justice in a specific context<sup>43</sup>. This, together with the ignorance of the needs of victims and local communities further leads to the fact that the entire procedure depends on the will of the social group holding the power. In cases where the government has not passed through a transition or the dictator of the previous regime or the perpetrator of the crimes is still in power, the process is hindered.

In sum, transitional justice faces political and pragmatic challenges that impede a successful processing of the past violence that hit a country and its society. The goal of ensuring accountability, serving justice and achieving reconciliation as set by the United Nations Security Council, is only rarely reached.

#### **4. Transformative justice**

Transformative justice, on the other hand, is an alternative concept to transitional justice responding to the aforementioned points of criticism. It offers a victim-oriented, participative and holistic approach to deal with mass atrocities of the past. How transformative justice is defined and what features the mechanisms consist of will be elaborated in this part.

<sup>41</sup> Daly (note 37), p. 181 and Mutua, 'What is the Future of Transitional Justice', *The International Journal for Transitional Justice*, 2015, p. 1–9 (7).

<sup>42</sup> Robins (note 35), p. 78.

<sup>43</sup> Evans, 'Structural Violence, Socioeconomic Rights and Transformative Justice', *Journal of Human Rights*, 2016, p. 1–20 (5).

### 4.1 *Definition transformative justice*

Transformative justice is a concept that responds to the critics of transitional justice. It includes aspects that can unfold the transformative potential of transitional justice and lead to the achievement of the originally set goals: reconciliation and deterrence<sup>44</sup>.

In very general terms, transformative justice demands a holistic, victim-oriented and long-term strategy to deal with the mass atrocities of the past. According to Robins, “transformative justice is defined as transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level”<sup>45</sup>. Compared to the traditional concept of transitional justice, the focus is not laid on legal issues or on issues at state or institutional levels, but rather on social injustices, the needs of communities and inequalities that are historically rooted<sup>46</sup>. In Matthew Evans’ words, another scholar of transitional justice, “transformative justice emerges in the context of the need to address structural violence and socio-economic rights issues that are produced and reproduced by conflict and authoritarianism”<sup>47</sup>.

### 4.2 *Characteristics of transformative justice*

While scholars stress different tendencies that transformative justice or the expanded version of transitional justice should take on, they generally agree on features that the process and its institutions should consist of. Those characteristics and why they are decisive for transformation to take place, are presented in the following part.

Placing the victims in the center of the approach is an argument brought forward earlier by the United Nations Human Rights Council in a report of the Special Rapporteur on the promotion of truth, justice,

<sup>44</sup> It remains a debate among scholars if transformative justice is a completely new concept, or simply the extension or improvement of transitional justice. For more information on that debate, see Clara Sandoval, ‘Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition’, International Center for Transitional Justice, New York, 2017, p. 166–201.

<sup>45</sup> Gready/Robins (note 39), p. 340.

<sup>46</sup> Gready/Robins (note 39), p. 340.

<sup>47</sup> Evans (note 43), p. 9.

reparation and guarantees of non-recurrence in 2004<sup>48</sup>. Based on previous experiences of the United Nations, the report highlights the importance of the participation of victims not only as testimonies in truth commissions and trials, but also during the drafting process of transitional justice measures, follow-up mechanisms and advocacy work<sup>49</sup>.

Robins takes these arguments further and demands an ethnographic approach for transitional justice that analyzes the traditional institutions, such as families and communities, and exactly responds to their needs and the needs of the victims themselves<sup>50</sup>. He argues that the broad consultation and participation of victims has to be achieved at all levels of the drafting and implementing process of transitional justice in order to question the imposition of traditional measures by elites or external actors<sup>51</sup>. By doing so, Robin argues, a specific and culturally contextualized concept can be created that brings the victims the justice they need<sup>52</sup>. Culturally embedded, the process and its institutions also benefit from a higher degree of legitimacy<sup>53</sup>.

Evans adds that the participation of victims not only increases the legitimacy of the mechanisms, but that it also gives marginalized people the possibility to become activists for their own rights<sup>54</sup>. This goes in line with Robins' argument that the victims, when participating in the development of transitional justice measures become empowered and are enabled to act on behalf of their own needs<sup>55</sup>. Evans further reminds us that those needs are also reflected in the agency of local civil society organizations as well as trade and labor unions and that a consultation of those movements has to be considered when planning and promoting the transformative justice mechanisms<sup>56</sup>.

Moreover, transformative justice places its focus on socio-economic rights and needs, which are sometimes more pressing than the political and civil rights targeted through traditional transitional justice mecha-

<sup>48</sup> De Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', United Nations General Assembly, Reference Number A/HRC/30/42, 2016, p. 1–20, retrieved on 29/10/2018, available at: <https://www.ohchr.org/Documents/Issues/Truth/A-HRC-30-42.pdf>.

<sup>49</sup> De Greiff (note 48), p. 9–11.

<sup>50</sup> Robins (note 35), p. 76.

<sup>51</sup> Robins (note 35), p. 77.

<sup>52</sup> Robins (note 35), p. 78.

<sup>53</sup> Soueid (note 27), p. 142.

<sup>54</sup> Evans (note 43), p. 8.

<sup>55</sup> Gready, Robins (note 39), p. 357.

<sup>56</sup> Evans (note 43), p. 13.

nisms, such as trials and truth commissions. In his article, Waldorf argues that in situations where the basic needs such as survival and safety are not met, transitional justice mechanisms will not be considered a priority. The needs are a result of everyday injustices, which are usually rooted in structural inequalities that date back to periods before the conflict under consideration<sup>57</sup>. As Clara Sandoval argues, the justice mechanisms should therefore also target the conditions that made those inequalities possible and transform these structures in order to achieve sustainable justice<sup>58</sup>. Existing power structures are thereby challenged<sup>59</sup>.

By considering the above-mentioned necessary characteristics for transformative justice to enhance a societal transformation with the aim to achieve reconciliation and deterrence it becomes obvious that the measures have to be contextualized. A standardized tool-kit that follows international norms and is imposed by external actors cannot be successful. Erin Daly correctly sums up that “each country’s transitional path consists of a unique constellation of social, historical, political, economic, racial, religious, military, and other factors”<sup>60</sup>. He insists on the necessity of “yet-to-be-tried” mechanisms, established in accordance to the particular needs of a particular country<sup>61</sup>.

Some of the authors and in particular Robins argue that transitional justice has to be applied in coordination with other fields, such as development, conflict transformation and/or peacebuilding<sup>62</sup>. Lambourne elaborates on the peacebuilding aspect, by including a political, economic, psychosocial and legal dimension to the traditional transitional justice tools in order to add a transformative power. In her opinion peacebuilding mechanisms of which an essential part is the termination of an armed conflict, have a transformative potential that can be used when applied in the context and with the participation of the civil society<sup>63</sup>.

In regards to development strategies, Evans argues that a transitional justice approach has to apply similar mechanisms as poverty reduction

<sup>57</sup> Waldorf (note 26), p. 175.

<sup>58</sup> Sandoval, ‘Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition’, International Center for Transitional Justice, New York, 2017, p. 166–201 (177).

<sup>59</sup> Robins (note 35), p. 355.

<sup>60</sup> Daly (note 37), p. 77.

<sup>61</sup> Daly (note 37), p. 111.

<sup>62</sup> Sandoval (note 58), p. 176.

<sup>63</sup> Lambourne, ‘Transitional Justice and Peacebuilding after Mass Violence’, *The International Journal of Transitional Justice*, 2009, p. 28–48 (35).

strategies. When targeting the root causes of structural poverty, the mechanism can contribute to a transformation of those conditions that allow the injustice<sup>64</sup>.

## 5. Transformative justice in South Sudan

Looking at the particular situation in South Sudan, the points of criticism of the traditional concept of transitional justice are clearly present. This part of the chapter starts with an elaboration on why the currently planned process for transitional justice is deemed to fail. It then critically examines the other initiatives that have been brought forward by the government itself and the leaders of IGAD. Last, the chapter concludes with an overview of suggestions from civil society organizations and what measures they propose to achieve peace, reconciliation and long-term justice in South Sudan.

### 5.1 *ARCISS—condemned to fail*

Although ARCISS is in theory an extremely accurate and detailed agreement between the warring parties for the transitional justice process to take place in South Sudan, it also illustrates the practical challenges that the obsolete approach faces in real contexts. First of all, the fact that newly-agreed ceasefires are constantly violated and the war continues to ravage the country hinders any advancement in the process. There is no clear post-conflict situation, leading to an increased level of insecurity and a lack of stability that could enhance any reconstruction programs. In addition, the lack of security results in a higher perceived importance of basic survival needs and socio-economic rights by the local population, which are not addressed by the traditional transitional justice process.

Second, the political will to implement any of the measures of transitional justice is heavily questioned. The perpetrators of previous mass crimes and human rights abuses still hold the power in their hands. If the transitional justice process was to be started in an equitable way, in particular Kiir and Machar would face severe consequences<sup>65</sup>.

<sup>64</sup> Evans (note 43), p. 9.

<sup>65</sup> The latter may have lost his position of power, but still holds a key role in peace negotiations.

Third, the way the conflict resolution agreement was drafted and then negotiated constitutes another limiting factor to a successful implementation of the mechanisms. Instead of taking into consideration the local context, the structural injustices within the society and the needs of the communities, the agreement appears to be highly standardized and academic, with references to international norms and the opinion of external actors. This is illustrated by the fact that the agreement was negotiated only with members of the South Sudanese elite and under the pressure of the international community<sup>66</sup>. This restricted participation during the negotiation process through the power-holding elite constitutes another obstacle. It is in particular this elite, consisting of former military officials, that has been fighting the struggle for independence from Northern Sudan and committing undocumented war crimes since the 1980s. Considered “criminals” by members of the South Sudanese society, this questioned group who is mandated by IGAD for the transitional justice process to take place in South Sudan impedes any establishment of trust towards governmental institutions. In particular, as for past human rights abuses, such as the Bor massacre, accountability has not been officially investigated for.

The influence of external actors and standardized international norms also becomes apparent in the ignorance of the fact that South Sudan does not possess the necessary infrastructure in order to start the transitional justice processes. The two decades long civil war and the outbreak of violence just after independence in 2013 have left the new nation without any administrative, technical and legal infrastructure. Although, as mentioned above, it was the Transitional Government’s responsibility to create state infrastructure, the necessary human and financial resources were not available at that time, resulting in a delay and finally in an incomplete establishment of this infrastructure.

Taking into consideration that since the signing of the agreement none of the conditions for transitional justice to take place have been established and the agreed ceasefires are constantly violated, the weaknesses of this approach becomes evident.

<sup>66</sup> Mamdani (note 2), p. 5.

## 5.2 *Existing transformative initiatives*

### 5.2.1 *National Dialogue Initiative*

After the renewed outbreak of violence in 2016, president Kiir reacted by initiating a national dialogue, composed of South Sudanese citizens, within and outside of the borders of South Sudan, members of the government, political parties and civil society organizations as well as academia and think-tanks and international non-governmental organizations<sup>67</sup>. The aim of the national dialogue was to discuss the outcome of local consultations in all regions of the country in intermediate regional and then in a final national conference in order to find a popularly supported resolution of the conflict starting to be implemented by mid-2018.

Regarding the critical examination of the conflict resolution roadmap for South Sudan, Kiir's initiative appears to respond to the critics of transitional justice. With his national dialogue, he targets a broad consultation of the local population, a contextualization of the mechanisms and a focus on the needs of the victims. By giving the communities the possibility to shape the peace negotiations, he increases the legitimacy of the process. As surveys find, the general initiative of the national dialogue has a wide acceptance within the South Sudanese society but also on an international level<sup>68</sup>.

While in theory it is clearly more victim-oriented and contextualized than ARCISS, the national dialogue fails to live up to these standards on the ground. When digging deeper, the participation of key stakeholders remains limited and the main opposition leaders distanced themselves from the process, due to the lack of pre-consultations, transparency issues and the biased selection of committee members<sup>69</sup>. Despite the fact that the exclusion of the opposition in the national dialogue presents a controversy in regards to its actual methodology and aim, Kiir did not initiate a reorganization based on the critical arguments brought forward

<sup>67</sup> Vhumbunu, 'The National Dialogue Initiative in South Sudan', African Center for the Constructive Resolution of Disputes, 2018, retrieved on 29/09/2018, available at: <http://www.accord.org.za/conflict-trends/the-national-dialogue-initiative-in-south-sudan>.

<sup>68</sup> Vhumbunu (note 67).

<sup>69</sup> Sudan Tribune, 'South Sudan sets conditions for "meaningful" dialogue', Sudan Tribune, 2017, retrieved on 29/09/2018, available at: <http://www.sudantribune.com/spip.php?article62335>.

but continued the process<sup>70</sup>. A contested national dialogue in a climate of war and insecurity further hinders the execution of the regional and local consultations, reflected in small numbers of people attending those consultations<sup>71</sup>. The restricted number of attendees also reflects the mistrust and loss of confidence of the population towards the government and its initiatives. The national dialogue, theoretically intended to enhance societal transformation, remains a debated and politicized instrument, limited to and in the hands of the power-holding elite.

### 5.2.2 *Revitalization Forum*

South Sudan's High Level Revitalization Forum (HLRF) is an initiative of the leaders of IGAD to advance the peace process and regenerate the vision to achieve the planned milestones enlisted in the ARCISS. It foresees several necessary steps to be taken in 2017, including the negotiations of a permanent ceasefire, the implementation of the mechanisms listed in ARCISS as well as the revision of its schedule and newly set elections for August 2018<sup>72</sup>. Eligible to participate in the forum organized by IGAD are the warring parties involved in the signing of the ARCISS.

The initiative to establish a forum and revise and re-discuss the implementation of the conditions of ARCISS bears the characteristics of transformative justice. The leaders of IGAD have realized the obvious obstacles that impede the peace process and react accordingly. According to the critics of transitional justice, it is necessary to coordinate those efforts with other fields, such as peacebuilding. As the initiators of the forum have become aware of the necessity of establishing peace and stability before starting any reconstruction process, one outcome of the forum was the decision to consider the establishment of respected ceasefires by all warring parties a first priority. Furthermore, and in particular considering the recommendations from Mamdani's separate note, the organization has understood the obsolescence of certain provisions of ARCISS and initiates a revision of those. The aim is to generally find a solution that is more contextualized and appropriate to the needs of the conflict in South

<sup>70</sup> Vhumbunu (note 67).

<sup>71</sup> Vhumbunu (note 67).

<sup>72</sup> See Verjee, 'South Sudan's High Level Revitalization Forum, Identifying Conditions for Success', Policy Brief, United State's Institute of Peace, 2017, retrieved on 29/09/2018, available at: <https://www.usip.org/sites/default/files/PB228-South-Sudan-s-High-Level-Revitalization-Forum.pdf>.

Sudan and is based on primary peace building efforts. One of the main outcomes of the meetings of the forum is the so called “Bridging Proposal”, which is supposed to be a middle ground roadmap regarding the implementation of the ARCISS. It was released in the second phase of the forum in May 2018 but got rejected by all the opposition factions because of the allegedly increased power it gives to Salva Kiir<sup>73</sup>.

Despite the fact that the forum tries to alleviate the obstacles that hinder the implementation process of the mechanisms of ARCISS, several points of criticism concerning transitional justice are not taken into consideration. As the broad rejection of the “Bridging Proposal” shows, the outcomes lack broad support by the South Sudanese society. The forum completely disregards the consultation of the population or the needs of the victims but is merely based on negotiations reached among the top level and in particular between the government and the leaders of IGAD. Eligible to be part of the discussions in the forum are the ones who have signed the previously agreed ARCISS, hence the elite leaders of the government, the opposition and a few representatives from civil society organizations<sup>74</sup>. Newly established organizations or opposed parties remain excluded. In addition, the access to the forum for the South Sudanese population is further restricted through the forum’s meeting place, which is located outside of South Sudan. A victim-oriented approach, based on a wide consultation of the population, is therefore out of reach, resulting in a limited success of the forum and its outcomes. Apart from the rejection of the “Bridging Proposal”, other newly agreed ceasefires remain non-respected. The Khartoum Declaration, which constitutes the most recent attempt to impose a ceasefire on the warring factions at the end of June 2018, got violated just a few hours after entry in force<sup>75</sup>.

<sup>73</sup> Sudan Tribune (note 69).

<sup>74</sup> See signatories of the ARCISS, which are also eligible to participate in the forum: Intergovernmental Authority on Development, ‘Agreement on the resolution of the conflict in the Republic of South Sudan’, Addis Ababa, Ethiopia, 2015, retrieved on 29/10/18, available at: [https://unmiss.unmissions.org/sites/default/files/final\\_proposed\\_compromise\\_agreement\\_for\\_south\\_sudan\\_conflict.pdf](https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf).

<sup>75</sup> See the Khartoum Declaration: Intergovernmental Authority on Development, ‘Khartoum Declaration of Agreement between Parties of the Conflict of South Sudan’, Addis Ababa, Ethiopia, 2018, retrieved on 29/10/18, available at: <https://igad.int/programs/115-south-sudan-office/1874-khartoum-declaration-of-agreement-between-parties-of-the-conflict-in-south-sudan>.

### 5.3 *Promising approaches for transformation*

Looking at these initiatives that only respond to part of the critics of transitional justice but mainly ensure that the power is kept in the hands of the political elite, the situation seems hopeless for the people of South Sudan. But, while the government of South Sudan, Western powers and the leaders of IGAD still try to impose their resolutions of the conflict through top-down measures or economic sanctions, civil society organizations have advanced much further. Compared to the elitist approach of the initiatives of the government and the IGAD leaders, the proposals of civil society organizations from South Sudan and other African countries are much more in line with the aspects of transformative justice. Among those initiatives are in particular two projects that deserve special attention. They both academically address the needs of the conflicting parties and propose a contextualized and victim-centered resolution of the conflict. The report “Perceptions on Transitional Justice in South Sudan—Intersection of truth, justice and reconciliation”, written by David K. Deng, the research director of the South Sudanese Law Society, presents the results of a survey regarding the perception of truth and justice of the South Sudanese population. The data collection was done by means of a survey in a few selected regions of the country and clearly reveals that at the community level, the discussions around transitional justice are still considered necessary. While the analysis sheds light on the needs of the victims of the conflict and on their perception of justice, the report ends with a list of recommendations for the transitional government, the signatories of ARCISS as well as civil society organizations. Deng’s proposal is simple: He insists on developing a “South Sudanese-owned and driven transitional justice program”<sup>76</sup>, as only then a societal transformation and long-term stability is achievable.

The second initiative is part of a broader project<sup>77</sup> called “Enhancing African responses to peacebuilding”, proposed by three partner organi-

<sup>76</sup> Deng/Willems, ‘Perception of Transitional Justice in South Sudan, University for Peace’, UPEACE Center The Hague, 2016, retrieved on 29/09/2018, available at: [http://www.upeace.nl/cp/uploads/hipe\\_content/Perceptions-of-Transitional-Justice-in-South-Sudan---Final-Report.pdf](http://www.upeace.nl/cp/uploads/hipe_content/Perceptions-of-Transitional-Justice-in-South-Sudan---Final-Report.pdf).

<sup>77</sup> For more information on the project, see: <https://www.prio.org/Projects/Project/?x=1754> and consult Lucey/Kumalo (note 19) and Lucey/Kumalo, ‘Democratise or Disintegrate, how the AU can help South Sudan’, East Africa Report, Institute for Security Studies, 2017, retrieved on 29/10/18, available at: <https://issafrica.org/research/east-africa-report/democratise-or-disintegrate-how-the-au-can-help-south-sudan>.

zations: The Institute for Security Studies in South Africa, the Peace Research Institute in Oslo and New York University's Center on International Cooperation. It contains three articles that deal with the conflict in South Sudan and suggestions of how the African Union and the IGAD can move forward and support a transitional justice program in South Sudan. Again, the proposal is people-oriented, based on research with local institutions in South Sudan and it takes into consideration the aspects of transformative justice. Although both suggestions address the criticism of the original transitional justice process proposed for South Sudan, they lack the political and international support to receive the necessary attention to be realistically considered a solution.

## 6. Conclusion

Mass atrocities, ordered killings of civilians, internally displaced people, millions of refugees, consequences of a severe famine, violated ceasefires, unsuccessful peace negotiations, corrupt politicians and international interference—the headlines of news articles around the world on the conflict of South Sudan are changing day by day. They reveal the inhumane tragedy that is taking place in the newest nation in the world.

While international organizations are insisting on their standardized transitional justice process to establish peace and process the human rights violations that have been committed since 2013, the government and the power-holding elite agree to those roadmaps in theory, but provide zero support in practice. The unsuccessful approach has led to a review of the process and new initiatives. Although the National Dialogue from Kiir and the High Level Revitalization Forum proposed by IGAD address the criticism of the traditional transitional justice concept, they lack wider public support. Whereas those initiatives officially aim at establishing peace and justice, they guarantee that the power is kept in the same hands of the elite and ignore the needs of the communities and the structural inequalities.

Initiatives from civil society organizations in South Sudan and other African countries target exactly those preexisting injustices. By proposing a victim-centered approach, consultations of communities and the participation of the society in the establishment of a transitional justice process, they argue that a transformation of those structures, that form the underlying causes of the conflict, is possible. It remains therefore only a question of when the IGAD and other external actors that lead the peace negotia-

tion process by being able to exert enough pressure on the power-holding elite, recognize the pragmatic proposals of civil society organizations and implement those suggestions to achieve peace and justice in South Sudan.

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