The UN Security Council and Transitional Justice: South Sudan

AN EARLY ASSESSMENT OF UNMISS’ SUPPORT TO THE PEACE PROCESS

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The UN Mission in South Sudan (UNMISS) was not originally designed to address issues of transitional justice. Established in 2011 following the secession of South Sudan from Sudan, UNMISS was initially mandated to support State-building and economic development. However, in late 2013, a brutal non-international armed conflict broke out across the country, dividing the population along ethnic grounds, displacing millions of civilians and leading to nearly 400,000 conflict-related deaths over a four-year period. In early 2013, an UNMISS human rights report found that both parties to the conflict had perpetrated serious human rights violations, including ethnically-targeted killings, forcible displacements, large-scale rapes and other acts amounting to war crimes and crimes against humanity. In the context of the continuing armed conflict, the Security Council dramatically shifted UNMISS’ mandate in May 2014, curtailing its State-building focus and demanding that it focus on protection of civilians, facilitating humanitarian delivery, human rights and support to an eventual peace process. Within this new mandate, the Council stressed “the urgent and imperative need to end impunity in South Sudan and to bring to justice perpetrators of such crimes,” calling on UNMISS to support such justice efforts.

In 2015, President Salva Kiir and former Vice President Riek Machar signed the Agreement for the Resolution of the Conflict in South (ARCSS), Chapter 5 of which laid out a set of transitional justice commitments of a future Government of National Unity. The Security Council subsequently mandated UNMISS to support the ARCSS, including limited support to a transitional justice process, which would be largely led by the African Union (AU). In 2016, South Sudan again descended into non-international armed conflict, with both parties violating the terms of the ARCSS. Two years later, the parties signed a revitalized agreement (RARCSS), which again contained a transitional justice chapter. The Security Council similarly mandated UNMISS to support the parties and the AU in implementing these provisions.

This study examines UNMISS’ implementation of its transitional justice mandate from 2014 to present, based on an in-depth literature review and interviews with a range of experts. The study benefited from a two-week research trip to South Sudan in 2018, during which the author led a cross-cutting study of UNMISS’ mandate implementation, including in areas of human rights and justice. It is guided by the central question: How has the Security Council’s approach to transitional justice in South Sudan been implemented by UNMISS on the ground, and what impacts can be identified? To address this question, the study is broken into three sub-questions: (1) what were the transitional justice goals and approaches by the Security Council?; (2) How were the Council’s decisions implemented in the field?; and (3) What impact did UNMISS have and what enabled or inhibited its mandate implementation? The study concludes with some more general points and recommendations about transitional justice based on the South Sudan experience.
Prior to the outbreak of the civil war, the Security Council did express some limited goals with respect to justice, but these were initially focused on the Government. For example, in 2012, a Security Council resolution called upon the Government “to combat impunity and hold accountable all perpetrators of human rights and international humanitarian law violations.” However, this call was not paired with a demand on UNMISS to support the Government’s anti-impunity work. It is also worth noting here – though beyond the scope of this study – that the Council was not always united on how transitional justice would be addressed in its resolutions. In its 2015 deliberations, for example, Council members were united on the issue of accountability in principle but were divided on whether accountability should be part of the immediate efforts to push for a peace deal.

When the non-international armed conflict first broke out in late 2013, the Council’s approach to justice was primarily focused on human rights monitoring and investigation, as well as support to institutional capacity-building in the justice sector (prisons, courts, police, and legislation). According to the Council, the UN’s human rights report of May 2014 raised a grave concern of serious human rights violations committed by both parties to the conflict, requiring the UN to adopt a strong anti-impunity stance. In its first mandate renewal following the outbreak of the armed conflict, the Council called on UNMISS to monitor and investigate serious human rights violations and to support the AU commission of inquiry into South Sudan. At the same time, the dramatic shift in mandate away from State-building meant that the capacity-building support to South Sudan – which had previously included large-scale support to national justice institutions

The Council’s Goals and Approach in South Sudan
I. The Council’s Goals and Approach in South Sudan

– dropped significantly. This reduction in support to the State was seen as necessary, given that the Government was committing human rights violations and violations of international humanitarian law in the conflict. But it also meant that the very poor justice capacities of South Sudanese institutions did not increase much during this period.

From 2014 onward, the Council gradually increased its emphasis and sense of urgency with regard to justice and ending impunity. For example, Resolution 2187 in 2014 speaks of the “increasingly urgent need to end impunity and bring to justice” perpetrators of serious abuses, calls on UNMISS to report more frequently, and asks the Secretary-General to report specifically on the issue of accountability. However, it was not until 2015 that the Council explicitly laid out a role for UNMISS in the area of justice and accountability in the context of the war.

In August 2015, the Intergovernmental Authority on Development (IGAD) brokered the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), temporarily putting a halt to hostilities and preventing the armed conflict from spreading to the region. Chapter 5 of the ARCSS included a set of commitments on transitional justice, including the requirement that the newly established Government of National Unity should establish a truth, reconciliation, and healing commission; a hybrid court to try serious crimes under the joint auspices of the AU and the Government of National Unity; and a compensation/reparation commission. The agreement further specified that the parties would seek the assistance of the UN and the AU in implementing the transitional justice provisions.

In October 2015, the Council endorsed the ARCSS and called on all parties to implement its measures. It further modified UNMISS’ mandate to include support to some key provisions of the ARCSS, including the cessation of hostilities, disarmament, demobilization and reintegration (DDR), and the development of a new constitution. The Council tasked UNMISS with support to IGAD and the AU in the implementation and public dissemination of the ARCSS, including the transitional justice provisions. Specifically, the Council requested that the UN be ready to provide technical assistance to the AU and IGAD for setting up the hybrid court for truth, reconciliation and healing commission. This was not without disagreement in the Council: Russia, Venezuela and Angola all abstained on Resolution 2241 in 2015, disagreeing with inclusion of a mandate to support the hybrid court.

There was little opportunity to implement any of the ARCSS provisions, as the parties again descended into armed conflict in 2016, causing further mass displacements, tens of thousands of deaths, and widespread human rights violations. A cessation of hostilities in December 2017 was quickly broken as fighting continued. When, in 2018, the IGAD again oversaw the signing of the Revitalized ARCSS (RARCSS), its Chapter 5’s transitional justice provisions were more or less the same as the prior agreement, though with less detail on some issues like implementation of the hybrid court. The UN was again listed alongside the AU and IGAD as an organization that would assist the parties in fulfilling their transitional justice commitments. Soon after the RARCSS was signed, the AU formally requested the UN to provide technical assistance in setting up a hybrid tribunal as part of a transitional justice approach in support of South Sudan. The subsequent Council resolution took note of this request and again asked the Secretary-General to make technical assistance available to the AU and the Government of South Sudan.

In the context of this peace process, the Council’s approach to transitional justice has four main characteristics. First, it mandated UNMISS with a human rights monitoring and investigation role, compiling a factual base for future justice processes. This took place during a massive increase in human rights violations at the outset of the 2013 conflict, where the Council rapidly shifted UNMISS from a mission almost entirely set up to support the South Sudanese Government to one tasked with monitoring its behavior alongside other conflict parties. In discussions with UNMISS human rights officials in Juba in 2018, however, it was not clear whether this mandate was meant to feed directly into judicial processes and/or future hybrid court activities. The UN’s evidence-gathering mandate
and procedure is not a forensic one to establish individual criminal accountability in a court; it is rather designed to feed into the UN's human rights reports and public advocacy, which are more focused on patterns of actions by the parties to the conflict. Nonetheless, the significant shift to human rights monitoring and investigation demonstrates a strong push by the Council for UNMISS to play a role in establishing the record of violations during the war and end the culture of impunity, potentially even laying the groundwork for future criminal accountability.

Second, the Council's approach to both the 2015 and 2018 peace agreements was the result of the relatively peripheral role of the UN in both agreements. While mentioned several times in the agreements – in particular in the provisions around the ceasefire – the UN was only a witness, neither a guarantor nor a direct signatory to the agreements themselves. And in the transitional justice chapter of the agreement, the parties only commit to seeking the UN's assistance. Without a more direct role of the UN within the agreement, the Council could only encourage UNMISS to provide the technical support requested by the AU in 2018.

Third, the Council mandate from 2014 to 2017 did not include a rule of law component, essentially dropping all of the advisory and capacity-building work of the mission during that period. However, in 2017, the Council reinstated a small rule of law component, which played a small but important rule of law capacity-building component throughout the armed conflict, even while significantly reducing the mission's broader State-building mandate. This was important – as the subsequent section elaborates – because it allowed the mission to continue to engage with justice authorities in tangible ways, including support to mobile courts that try sexual and gender-based crimes, helping bring perpetrators of crimes in the protection of civilians sites to justice, and advisory support to the Government.18

Fourth, the Security Council's activities were complemented by a range of other actors, including importantly the UN Human Rights Council, but also the Special Representative of the Secretary-General (SRSG) on Sexual Violence in Conflict, the Sanctions Committee on South Sudan, and the Panel of Experts. In April 2016, following UNMISS' reporting on widespread human rights violations during the armed conflict, the Human Rights Council established an independent international Commission on Human Rights in South Sudan. It was composed of three independent experts with a mandate to monitor human rights, assess past reports of violations to establish a factual basis for transitional justice and reconciliation, and to provide guidance on transitional justice issues to the Government of National Unity.19 Importantly, this Commission had a mandate to preserve evidence and clarify responsibility for alleged gross violations of human rights, something beyond the usual evidence-gathering mandate and capacities of UN peace operations.

Finally, it is worth highlighting that the Council's approach to transitional justice took place during periods of active fighting and/or high risks of relapse. It is only very recently (in 2020) that the parties have appeared to take the RARCSS process seriously and begun implementing its provisions, opening the door to more meaningful progress on the transitional justice provisions. In fact, from 2014 to the time of writing this study, the Council's overriding concern has been the protection of civilians, hundreds of thousands of whom were displaced by the conflict and have been living in UNMISS' protection of civilians sites. This is evidenced by the Council's decision to raise the troop ceiling of the mission, first to 12,000 following the outbreak of the armed conflict and then again to 17,000 in 2016.20 As several UNMISS officials noted, the mission has been consumed with the security and protection aspects of its mandate, leaving less attention and fewer resources for issues like transitional justice.21
A Mission Strategy

In order to understand how UNMISS has approached transitional justice, a broader view of the mission’s strategic approach is needed. Following the 2015 signing of the ARCSS and Security Council Resolutions 2241 in 2015 and 2304 in 2016, a “South Sudan Task Force” launched a comprehensive strategic assessment to set priorities for the UN’s engagement in South Sudan. In November 2016, the recommendations were transmitted to the Security Council via a special report of the Secretary-General. The central points of the report were that the operating environment in South Sudan was extraordinarily restrictive, that the peace agreement was not being implemented seriously, and that there was a very real risk of further atrocities in the immediate future. The report recommended that UNMISS maintain a focus on its four core tasks – protection of civilians, facilitating humanitarian assistance, monitoring and investigating human rights, and support to the peace process – while paying special attention to transitional institutions that were inclusive and could have a positive impact on the lives of the South Sudanese.

Under the leadership of SRSG David Shearer, UNMISS developed its Mission Concept on the basis of this mandate. The Mission Concept created two broad priority areas for UNMISS: protecting civilians and building durable peace. While these two priorities were viewed as complementary, they could be emphasized differently depending upon the situation on
the ground: when conflict dynamics escalated, UNMISS would increase its emphasis on protection; if the situation improved, it could place greater emphasis on the activities around building a durable peace.23

Importantly, issues of transitional justice were not placed under the longer-term “durable peace” category but were instead considered part of UNMISS’ immediate protection work. Under the protection priority, in addition to the more traditional protection tasks, “peaceful coexistence, reconciliation and social cohesion” were included as key priorities, as were issues around accountability for human rights violations. Specifically, the protection priority of the Mission Concept spoke to the need to support the establishment of accountability mechanisms laid out in Chapter 5 of the ARCSS (Transitional Justice), including support to a hybrid court for South Sudan. According to UNMISS officials, this reflects the importance and priority SRSG Shearer placed on transitional justice, elevating it as a key priority in the mission. But this does not mean transitional justice is not limited to protection. “While we have prioritized transitional justice within the strategy under protection, UNMISS sees Chapter 5 of the peace agreement as a crucial aspect of the durable peace work of the mission,” a UNMISS official explained. “We see it as strategically connecting our work to limit violence now with our longer-term efforts at durable peace.”24

The Mission Concept thus laid out an anticipated two-year set of conditions for South Sudan that included several issues related to transitional justice: a reinvigorated peace process based on inclusive national dialogue, reduced levels of violence between the parties, reduced number of human rights violations, and some progress of transitional justice processes such as criminal accountability for human rights violations. Unlike many other settings, where transitional justice was positioned as a longer-term post-conflict goal, UNMISS placed clear emphasis on it as an immediate and integral part of its support to the peace process as well as a link to longer-term peace.

### Transitional Justice Strategies

In addition to the broader mission strategy, UNMISS, Rule of Law and Human Rights components developed tailored transitional justice strategies for their work.25

The Rule of Law Advisory Section’s “Strategy for Advancing Mutually-Reinforcing Transitional Justice Mechanisms in South Sudan,” provides recommendations for both the UN and South Sudanese actors. Broadly, the strategy recommends that the various strands of the transitional process envisaged in the peace agreement should work together in a complementary way, coordinated by a single entity. In follow-up to this recommendation, UNMISS and the UN Development Programme (UNDP) supported the Ministry of Justice in setting up a technical committee to coordinate the transitional justice work going forward.

Other key areas in the transitional justice strategy include:

- The development of effective victim/ witness protection programmes (including psycho-social support), which are largely absent in South Sudan but essential for viable trials in a hybrid or other court;
- Given the poor knowledge of transitional justice in much of South Sudan, expanding outreach and sensitization programmes to build a common understanding across the South Sudanese population of the transitional justice mechanisms, and to allow for broad based consultations prior to designing Government-led approaches;
- Advice on how to design truth, reconciliation, and healing processes so they complement and reinforce the other mechanisms in the peace agreement;
- Support to national efforts to build justice capacities, taking into account the primacy of the host Government in executing transitional justice programming; and
II. UNMISS' Mandate Implementation

• Support to sustainable reparations programmes, while also keeping expectations realistic as to what reparations is likely to deliver.

Similarly, the Human Rights Division’s strategy contains a broad set of activities geared at supporting transitional justice, within the peace agreement and beyond. It includes priority areas of:

• Advocacy around universal jurisdiction for serious crimes;
• Engagement with regional actors on implementation of Chapter 5 of the peace agreement;
• Engagement with the African Court of Human and People’s Rights and other human rights mechanisms around transitional justice;
• Support to national statutory courts, legislation, and civil/military courts on serious crimes;
• Victim and witness protection support; and
• Monitoring accountability across the South Sudan justice system.26

These strategies have guided the work of both components in supporting the mission’s engagement on transitional justice, including at the strategic level. According to several UNMISS officials, the strategies also work together, under the broad heading of the SRSG’s Mission Concept. “We regularly coordinate across the mission’s pillars on transitional justice, and we regularly work with UNDP and others to be sure our approaches are aligned,” one UN official noted.27

Human Rights Monitoring

According to UNMISS officials, one of the most important elements related to transitional justice has been its work to monitor, investigate and report on human rights violations, aimed at ending a widespread culture of impunity across the country. Here, the mission has placed particular emphasis on major public reports detailing human rights violations by both the Government and the rebel forces during the height of the armed conflict. Especially during SRSG Shearer’s tenure, the frequency and profile of human rights reporting increased significantly and UNMISS officials have highlighted their use in talks with the parties. For example, a major UNMISS human rights report in July 2018 found that Government and opposition forces had perpetrated a wide range of human rights violations against civilians. These reports were the basis for some of the political outreach to the parties, calling for restraint and criminal prosecution for violations.28

From 2016 onwards, UNMISS’ human rights reporting was complemented by regular reports from the UN Commission on Human Rights in South Sudan.29 Importantly, because this commission is independent from the UN peace operation on the ground and not directly involved in supporting the peace process, it has been able to use a broader platform to advocate for transitional justice issues. For example, its reports have regularly detailed the ways in which the conflict parties delayed formation of key transitional justice mechanisms of the peace process, including the hybrid court.30

One of the most important areas of UNMISS’ anti-impunity work relates to Conflict-Related Sexual Violence (CRSV), work undertaken in coordination with the SRSG on CRSV and a team of experts. Since the outbreak of the armed conflict, tens of thousands of South Sudanese have been subjected to rape, sexual mutilation, and torture. UNMISS Human Rights Division consistently reported on CRSV in public reports in October 2018 and February and July 2019.31 A survey by the UN Population Fund found that more than 70 per cent of women living in protection sites in Juba reported having been raped since the start of the armed conflict, mainly by State security forces.32 According to well-respected human rights organizations, the lack of accountability for sexual crimes not only contributed to widespread “normalized” use of sexual violence, but also caused deep societal wounds for which a comprehensive transitional
justice process would be required (though it is worth noting that transitional justice does not have a particularly strong track record on sexual violence). In interviews conducted in 2018 with a wide range of South Sudanese interlocutors, there was a uniform view that the transitional justice provisions of the peace agreement would need to take sexual violence seriously, requiring dedicated and nuanced resources from the UN and others.

Evaluating the impact of this work is difficult, given the many factors influencing rates of human rights violations and subsequent prosecutions. In interviews with dozens of South Sudanese citizens in 2018, there were very mixed views as to the impact of UNMISS’ human rights work, at least in terms of deterring future crimes or countering impunity. Several experts, however, noted the importance of establishing a factual record of past crimes in anticipation of a transitional justice process under the peace agreement. Here, UNMISS’ role as an unbiased investigative actor present on the ground during the height of the atrocities may be an important future reference point.

**Rule of Law Support to Transitional Justice**

UNMISS had initially been given an extraordinarily ambitious State-building mandate, with large-scale capacity development remit in the areas of rule of law and justice. Within the mission, more than 1,000 staff were categorized as providing capacity-building support, with UNDP focusing a multimillion dollar parallel effort to help build the justice, corrections and police. This complemented a broader UN approach focused on State-building, recognizing that South Sudan had some of the worst institutional capacities in the world. Following the outbreak of the civil war in 2013, the Council drastically scaled back the rule of law mandate for the mission, resulting in the complete closure of the Rule of Law and Security Institutions Support Office (ROLSISO) in 2014. A very reduced rule of law presence was reintroduced in mid-2017 in the form of the UNMISS Rule of Law Advisory Section (ROLAS) comprising 12 professionals. From its inception, even with such a small set of resources, ROLAS has proven itself extremely effective in a range of areas related to transitional justice.

One of the most important activities has been support to the creation and deployment of mobile courts across South Sudan. Given the extremely poor infrastructure and lack of State institutional capacity beyond major cities, serious human rights violations went largely unchecked for much of the armed conflict. Even in UN protection of civilians sites, reports of widespread violent crimes and sexual violence have raised worrying signs that the South Sudanese State is unable to address impunity or prevent abuses against its citizens. UNMISS’ and UNDP’s support to mobile courts has allowed national officials to travel to some of the most affected parts of South Sudan (Bentiu, Rumbek, Yambio, Bor, Malakal) and try hundreds of serious criminal cases. More recently, this support has shifted to a “justice hub” model, whereby major urban areas will have all rule of law actors brought together to ensure accountability for serious crimes. According to experts in South Sudan, this work is crucial to showing that there is some justice capacity already in place, building confidence amongst the population ahead of future transitional justice processes.

UNMISS’ ROLAS and Human Rights Division have also provided important support to the legislative aspects of the peace process. For example, it supported the development of legislation that would incorporate international crimes into the national legal framework of South Sudan. A key recommendation by UNMISS was for South Sudan to adopt the Rome Statute as the basis for domestic criminal law for serious crimes (South Sudan already incorporated the Geneva Conventions but it is not clear that they are sufficient to establish criminal penalties as the basis for a hybrid court or other trials). Unfortunately, as of the time of writing, delays in the promulgation of the laws under the previous Government meant that the draft laws were yet to be tabled before the revitalized transitional National Legislative Assembly.
Public Awareness and Sensitization

Public understanding of transitional justice issues has been extremely limited, leading to high risks of misunderstandings and unmet expectations. A priority for UNMISS has been to support the parties’ outreach efforts, not only to build better public understanding but also to ensure that the process reflects the needs of a broad swathe of the population. Given that the 2015 peace agreement did not result in a Government of National Unity, this outreach has been especially important to counteract the impression that the consultations may have been one-sided.

In addition to its broader support of the national dialogue process, in 2019, UNMISS supported civil society-led transitional justice working groups in launching awareness forums in Bor, Yambio, Wau, Torit and elsewhere. UNMISS also facilitated a 2019 visit to Uganda by South Sudanese government officials and civil society leaders to learn how Kampala had adopted international crimes under its national laws. Specifically, this work was meant to sensitize the National Legislative Assembly and Government’s representatives as well as civil society to the upcoming transitional justice processes, including the hybrid court, and also provide a channel for the public to influence the course of the transitional justice approaches going forward. While this work was seen as positive, in April 2019, a news report that the South Sudanese Government had paid a US firm to block the establishment of the hybrid court dealt a serious blow to the process.

Victim’s Voices and Protection

South Sudan has essentially no legislative or institutional protections for victims or witnesses to serious crimes (nor do they have the capacity to provide legal representation), an especially urgent problem for the criminal justice system and also for future transitional justice processes. UNMISS Human Rights Division, partnering with UNICEF and UNDP, have taken forward a Peacebuilding Fund project in Bentiu and Bor to establish victims’ networks that would help future trials in courts at national and international level as well as support a truth and reconciliation commission and any reparation programmes.
This section provides a brief assessment of progress made towards the transitional justice goals set by the South Sudanese peace process, focusing on what factors either enabled or inhibited implementation of UNMISS’ mandate.

A Limited Role for Transitional Justice

At the national level, UNMISS appears to have played an important role in keeping transitional justice high on the agenda of both the conflict parties and the international community. SRSG Shearer’s clear prioritization of the issue, as well as UNMISS’ high-profile roles in supporting public outreach and sensitization has been seen as helpful in this regard. The very wide readership of UNMISS’ human rights reporting too has been crucial in driving public discourse around human rights violations. It is worth noting that the UN Commission on Human Rights in South Sudan was created on the basis of UNMISS reporting of serious human rights violations.43

At the same time, it is important to note that the UN is a fairly peripheral player in the actual implementation of Chapter 5 of the peace agreement. UNMISS officials were clear that the UN’s role is largely a supportive one, providing technical and advisory support to processes.
that are either run by the South Sudanese or the AU. Several officials noted that this marginal role meant they had little ability to directly influence the course of the process. This has meant that some of the structures being set up to support transitional justice may not align with best practice. For example, the structure of the hybrid court that is contemplated by the parties is overwhelmingly dominated by international/African judges and prosecutors. Some experts interviewed for this study cautioned that insufficient roles for South Sudanese in the court could lead to a lack of local buy-in and affect the sustainability of the court, even if this structure accords with UN guidance.44

An Incomplete Justice Sector

One of the greatest challenges in supporting transitional justice in South Sudan is the near total lack of judicial capacity in much of the country. When UNMISS was first deployed in 2011, one of its highest priorities was to help build up the institutions of State across South Sudan, but this work was almost entirely curtailed following the outbreak of the armed conflict in 2013. During the armed conflict, very little progress was made on building a better police force, judicial system or on criminal prosecutions across the country. Equipped with the 12-person Rule of Law Advisory Section, UNMISS has collaborated with UNDP to contribute a remarkable amount to bolstering this capacity, helping to set up mobile courts that have tried hundreds of cases, many for the kinds of serious crimes that might be eligible for a transitional justice process. The more recent progress towards static judicial capacities in major urban areas is another positive signal that South Sudan is building its own capacities towards a functioning rule of law system, but much remains to be done if it is to be ready for large-scale criminal cases and/or truth and reconciliation processes at the national level.

Another one of the most important challenges is the lack of legal basis for transitional justice. As noted above, while South Sudan incorporated the Geneva Conventions into its domestic legislation, there are currently no legal provisions to cover the kinds of serious human rights violations amounting to international crimes (crimes against humanity, war crimes and genocide) that would be covered by a hybrid court.45 Given the extremely slow process of forming a Government of National Unity, and the difficulties in getting draft legislation through to the time of writing, this presents a significant challenge for the broader transitional justice work of the UN and its partners. At the same time, UNMISS officials stressed that many of the individuals within the newly formed Government have expressed enthusiasm about the draft legislation that has been worked up (but not yet passed) with UNMISS’ recommendations, so this may move forward in the coming period.

A Divided Population

South Sudan’s non-international armed conflict has left the country deeply polarized, with competing narratives around who is to blame for the majority of the human rights violations during the fighting. Part of a transitional justice process will need to combat this polarization, to help build a common narrative based on an accepted set of facts. Here, UNMISS’ human rights reporting is already playing an important role. Its high-profile reports on violations by both parties to the conflict have pointed to culpability by all parties. Moreover, its investigations contain important indicators of where the most serious crimes have taken place. For example, UNMISS’ human rights reports provided a basis for the UN Commission on Human Rights in South Sudan to look for mass graves that were brought to the attention of national and regional judicial institutions and to demand accountability for serious human rights violations.46

While the lack of forensic capacity within UNMISS means its reporting is unlikely to be admissible in the hybrid court or other criminal trials, having an impartial factual account of the armed conflict could well be helpful in a future truth and reconciliation commission, as well as criminal courts at national and regional level. As one UNMISS official stated, “we see the full range of our human rights work as potentially contributing to transitional justice.”47
An Increasingly Strong Civil Society

The civil war led to a dramatic reduction of political space across South Sudan, with the National Security Service taking a far more aggressive stance towards political activities and civil society. During a 2018 visit, for example, it was impossible to formally meet with many South Sudanese NGOs without authorization from the National Security Service, an inhibition explicitly designed to limit their interaction with foreign actors. Nonetheless, an extraordinarily robust civil society network has emerged around the issue of transitional justice. The Transitional Justice Working Group for South Sudan offers an umbrella for dozens of organizations to advocate for specific issues, demand implementation of Chapter 5 of the RARCSS, and share information about efforts to combat impunity. According to several experts in UNMISS, engaging with these groups is a key aspect of the mission’s work, in particular when it comes to sensitizing the population about the RARCSS.

Challenging Timing

The peace process has moved in fits and starts, beginning with the 2015 peace agreement, then descending into renewed armed conflict, and culminating in the 2018 revitalized agreement. Because of this, the timing of transitional justice processes has been problematic. For example, under the 2015 agreement, with UNMISS and UNDP support the Government proceeded with public consultations around South Sudan, gauging perceptions of how the transitional justice process should be managed. These consultations have generated important information and public buy-in to the peace process. However, as stipulated in the 2018 agreement, public consultations should be managed by a Government of National Unity, something that has only very recently been formed at the time of writing. What then should the South Sudanese do with the earlier round of consultations? Some within UNMISS expressed concern that these earlier consultations would be seen as biased towards President Kiir, perhaps insufficiently reflecting the views of the opposition-oriented communities.
Uneven Political Will

The revelations that the Government had hired a consulting firm with the express instruction to thwart the hybrid court sent a clear message that not all South Sudanese leadership had accepted the entirety of the peace agreement. While it is difficult to assess, quite possibly the many delays that have occurred in the passage of legislation, setting up key mechanisms to support transitional justice, and establishing a budget for the work of South Sudanese institutions could be a reflection of low levels of enthusiasm within parts of Government for a robust transitional justice process. Certainly, before the formation of the Government of National Unity (composed of officials from both the former government and the opposition), the hybrid court was not seen favorably.

Here, the less central role for the UN may have helped. According to UNMISS officials, the Government claimed to be willing to support a transitional justice process with the AU in the lead, particularly in the case of the hybrid court, though several doubted whether this was the case. Additionally, having the UN Commission on Human Rights in South Sudan separate from UNMISS has allowed the UN to issue strong messages on transitional justice without drawing the mission too much into the political fray.

Unrealistic Expectations

A 2019 study of dozens of citizens’ perceptions across South Sudan found that understanding of transitional justice mechanism in the peace process is very low and varies significantly across communities. More than half of respondents hoped that the truth and reconciliation process would be launched first, while fewer than half hoped for the hybrid court to be established first. There was a great deal of interest in individual reparations for victims, rather than collective compensation for violations during the armed conflict. And, worryingly, the survey found a growing sentiment that transitional justice is a retributive form of addressing past crimes. UNMISS officials also expressed concern of South Sudanese expectations as to the level of international support to a reparations scheme as
being well out of step with the likely contributions: the international community is very unlikely to pay for any forms of restitution in South Sudan. During a 2018 visit to South Sudan, a range of interlocutors suggested that transitional justice should account for crimes occurring well beyond the 2013-2018 period, including South Sudan People's Defence Forces activities up to 30 years ago.

The range of expectations across South Sudan places UNMISS in a difficult position. On the one hand, it has a mandate to support the provisions of the peace agreement, which includes a certain amount of advocacy for transitional justice as it is articulated in Chapter 5 of the RARCSS. On the other hand, the long history of the UN in South Sudan has been characterized by enormous amounts of international support, from the 20-year humanitarian Operation Lifeline Sudan, to extraordinarily large amounts of development and humanitarian aid following the country’s independence. In interviews with major donors based in Juba in 2018, it was clear that these levels of support would not extend to paying for the South Sudanese peace process, particularly given the role of the political leadership from both parties to the non-international armed conflict. Chronic failures of the Government of South Sudan to budget for key provisions of the peace agreement – including, for example, President Kiir’s reticence to pay for the cantonment process of opposition troops, points to a likely shortfall in funding for the transitional justice mechanisms as well. How to maintain public enthusiasm for the peace process, while simultaneously calibrating expectations towards reality, is a major challenge for the UN and its partners.

Limited Rule of Law Capacity

The principal components addressing transitional justice in UNMISS are human rights and the rule of law. Of these, human rights has a well-staffed section, present in all of the main mission sites, and a broad mandate from the Council. In contrast, in 2014 the Security Council chose to end UNMISS' State-building mandate in the face of gross human rights violations, essentially stripping the mission of any rule of law capacity. This was only slightly reconstituted in 2017. However, the dramatic reduction of the rule of law capacities of UNMISS – staffed at only 12 people – has meant it has few resources to support the sweeping scope of transitional justice envisaged in RARCSS. Despite this, the mission has provided important legislative, technical, and advisory support to the parties, helping to shape and improve national judicial capacities even during active fighting on the ground.
Based on the above analysis, the following section offers some broader conclusions and recommendations for the Security Council, UN Secretariat, and peace operations leadership.

**1. BUILD SECURITY COUNCIL UNITY ON TRANSITIONAL JUSTICE**

Disagreements within the Council over the role of UNMISS in supporting transitional justice in South Sudan point to a broader set of ideological differences of opinion across the Permanent Five members. In general terms, Russia, China and various elected members have taken the view that the Council should play a restrained role in pressing for transitional justice, whereas the Permanent Three and many Western countries have pushed for a far more ambitious role for the UN in such settings. The divisions may have weakened the Council’s ability to exert leverage over the conflict parties. Council members should renew efforts to arrive at common positions about transitional justice generally in order to improve the chances of unified approaches in future conflicts.

**2. MANDATE CLEAR ROLES FOR PEACE OPERATIONS**

One of the benefits of the RARCSS is that it articulates a clear and fairly limited role for UNMISS in supporting transitional justice for South Sudan. Helpfully, the Security Council mandate also offers a clear set of tasks related to the peace agreement, including a provision that any support would be limited to advice and technical support, and would be done within existing resources. This may help to reduce expectations that UNMISS will be able to deliver major change on the ground. However, there remain some question areas. For instance, how might the human rights work of UNMISS feed into a transitional justice process (e.g. can the...
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The mandate to provide technical, advisory, and logistical support to Chapter 5 of the peace agreement is a limited one, but nonetheless would require significant resources to be fully implemented. The Council’s 2014 decision to eliminate UNMISS’s rule of law component and, thereafter, introduce a limited capacity in 2017 with roughly 12 professionals does not reflect the likely demands that are being placed on the mission today. Particularly in the light of the 2018 revitalized agreement – which spells out specific tasks for technical and advisory support – greater dedicated rule of law and human rights resources should be provided to the mission. Here, the Security Council should do more to draw insights from the field to ensure that resources match mandates.

5 Establish Clear Roles

The notion of good and bad cops is simplistic, but the South Sudan experience does point to the utility of a division of responsibility, particularly around messaging on human rights and justice. For example, due to its independence, the Commission on Human Rights in South Sudan offers the UN the chance to attribute responsibility for serious crimes, and also make more advocacy-leaning public statements pushing for the creation of the hybrid court. These kinds of statements might be difficult for UNMISS, which has a range of responsibilities in-country and might not be able to adopt such a direct advocacy role. “We still have to operate in this country and work with all actors – having an independent voice that can be more loudly calling for specific justice outcomes helps us,” one UN official said. This does not mean each entity should go its own way, of course, as the following recommendation notes.

6 Develop a Holistic Strategy

A clear lesson from the UNMISS experience is the importance of having both a mission-wide strategy and a strategy for transitional justice, with links between the two. In discussions with UN leadership in Headquarters, the UNMISS mission strategy is often referred to as an example of best practice, helpfully giving direction to all mission components on how to prioritize and link their work to overarching goals of the mission. Likewise, the mission’s transitional justice strategies in human rights and rule of law offer a set of actionable recommendations, both for UNMISS and for South Sudanese partners involved in transitional justice implementation. However, it is not clear the extent to which these various strategies are explicitly linked in practice.
Having a single transitional justice strategy for the entire UN family in-country would be an ideal, if difficult, objective.

7 ENGAGE CIVIL SOCIETY

The most robust and influential proponents of transitional justice are not the parties to the agreement, they are the range of civil society groups dedicated to human rights and accountability. Where UNMISS has been most successful, it has been collaboratively with civil society, engaging and empowering them to expand the understanding and impact of transitional justice work across the country. Particularly in a highly divided country where the political leadership may have uneven enthusiasm for transitional justice, providing strong support to civil society is the crucial element for success.

8 TAKE A BROAD VIEW OF TRANSITIONAL JUSTICE

In interviews with UNMISS officials, it was clear that they viewed much of the human rights, rule of law, and institutional support work of the mission as supporting eventual transitional justice processes in South Sudan. This included human rights monitoring and reporting, enabling mobile justice courts, work on Sexual and Gender-Based Violence accountability, and a broad range of legislative support. It may also include the UN’s work on Security Sector Reform and DDR, though UNMISS officials were cautious to raise expectations too much in these areas. Given the patchy implementation of the peace process by the parties, taking a broad view of what constitutes transitional justice has allowed the mission to push forward on important initiatives even absent progress on the peace agreement itself.

9 BALANCE INTERNATIONAL AND NATIONAL INFLUENCE

One of the lessons from other transitional justice processes concerns the importance of balancing the roles of international and national actors. In other hybrid courts – for example, in Cambodia, Sierra Leone, and Timor Leste – international judges and prosecutors played important complementary roles to national counterparts (though not always without friction). In the case of the South Sudan hybrid court, however, the current plan envisages a dominant role for international judges and prosecutors, leaving South Sudanese counterparts in a more marginalized role. While this reflects both the highly polarized nature of South Sudanese politics at present (and the likely difficulty in identifying clearly neutral officials for the court), there is a risk that the court will be viewed as an external imposition, not garnering widespread buy-in from the local population.

10 UNDERSTAND AND SHAPE PUBLIC EXPECTATIONS

A recurrent challenge has been the expectations of the South Sudanese in terms of the timeframe, scope, and benefits of a transitional justice process. Given the multi-decade history of South Sudan in which it has consistently been the recipient of enormous levels of humanitarian and development aid, there is a deeply felt expectation that the UN and international donors are ready to deliver significant funds into the restitution and reparations aspects of the peace agreement. There could be an even greater role by the Security Council in calibrating these expectations even more clearly in mandates, and certainly more resources for public outreach and communications for UNMISS would help get a more realistic message out.

11 BUILD COMPLEMENTARY PROCESSES

One of the key recommendations of UNMISS’ transitional justice strategy is for the various processes under the peace agreement to be taken forward in a complementary and coordinated way. This is particularly important in transitional justice, where processes like a truth and reconciliation commission needs to be carefully aligned, timed and coordinated with a hybrid court and a reparations scheme. A clearer instruction – within the peace agreement and the Council resolution – as to what entity is responsible for coordinating the various
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processes would be helpful. It will also be important to consider more clearly the issues of non-recurrence, institutional reform, and strengthening civil society, none of which are particularly emphasized by the Council mandates to date.

12 DRAW ON COMPARATIVE EXPERIENCE

While South Sudan presents a unique mixture of conflict dynamics and a legacy of violence that dwarfs many other settings, the transitional justice approach would benefit from even greater input from prior experiences. Several UNMISS officials pointed to successful engagements with South Sudanese interlocutors, where they were able to point to other African peace processes that had adopted relevant justice approaches for the South Sudanese setting. Within the UN, having a more systematic lessons learned repository on transitional justice, and equipping future missions with transitional justice experts (which they already do via the mediation support team in some instances) could build on this positive experience.
References


5 Ibid.


13 See accompanying study by Security Council Report for more detail.

14 UNMISS officials pointed out that the implementation matrix of the agreement became vaguer in the 2018 version of the agreement.


17 Interviews, Juba, December 2018.

18 Adam Day, Assessing the of the United Nations Mission in South Sudan / UNMISS.


21 The author spent two weeks in South Sudan in 2018 interviewing UNMISS officials for a report by the Effectiveness of Peace Operations Network. See, Adam Day, Assessing the of the United Nations Mission in South Sudan / UNMISS.


23 UNMISS Mission Concept 2017 [on file with author].

24 Interview, May 2020.

25 UNMISS Civil Affairs also has a detailed strategy for its work on inter-communal reconciliation and conflict reduction. While it is beyond the scope of this paper to consider this in detail, it is worth pointing out the centrality of civil affairs’ work to transitional justice.

26 Interview with UNMISS, April 2020.

27 Interview with UNMISS, April 2020.


For more detail on the fieldwork conducted on CSRV, see, Adam Day, Assessing the of the United Nations Mission in South Sudan / UNMISS.

Ibid.

UNMISS’ 2011 Mission Mandate.


Ibid.


Interviews with UNMISS officials, 20 April 2020.


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