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REPORT ON



Workshop Participants, September 2014

THE TRANSITIONAL JUSTICE STAKEHOLDERS' WORKSHOP

JUBA, SOUTH SUDAN

SEPTEMBER 2014

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1. INTRODUCTION

The United Nations Development Programme (UNDP), in collaboration with the Ministry of Justice (MoJ), organized a two-day workshop in Juba from 22-23 September 2014 to provide technical advice and raise awareness among relevant stakeholders on transitional justice and to share experiences from other countries with functional transitional justice mechanisms. Workshop participants were drawn from the MoJ, the Judiciary of South Sudan (JoSS), Non-Governmental Organizations (NGOs), the South Sudan Peace and Reconciliation Commission (SSPRC), embassies, the donor community, United Nations (UN) agencies and several other government departments. Out the 35 participants that attended the workshop, six were female.

Local and regional transitional justice and international law experts presented and led discussions on various aspects of transitional justice including; truth and reconciliation, reparations and memorialization, traditional justice mechanisms, accountability and regional experiences. The workshop was funded through financial resources from the UNDP Bureau for Crisis Prevention and Recovery, (BCPR) and the Government of the Netherlands.

2. PRESENTATIONS

2.1 The Concept of Transitional Justice: Professor Akolda Man Tier

Professor Akolda Man Tier, the chairperson of the National Law Reform Commission, defined transitional justice (TJ) as a concept of law and justice used in the context of political transformation with the aim of achieving truth, justice, and reconciliation for past violation of human rights, by addressing the root causes of conflicts or violation in order to ensure a lasting peace and respect for human rights. He also noted that TJ is closely related to reconstruction and social economic development as part of the process of state-building. To have a clear understanding of TJ, reference was given to the situations and/or root causes of conflict which include social, cultural, and economic factors, and can take place under the following circumstances:

- Prolonged periods of authoritarian, one party, or military rule, which alienate the public from participating in public life.
- Religious and ethno-linguistic differences.
- Imposition of religious laws as the laws of the land, and making them applicable to all persons as was the case in Sudan.

Professor Akolda, presented ways in which conflict was addressed in transitional situations:

1. **Peace agreements:** A case in point is the Comprehensive Peace Agreement (CPA) between the Government of Sudan and the Sudan People's Liberation Movement (SPLM) in 2005. He emphasized that similar resolutions or agreements should analyze all issues that led to the crisis, such as discrimination and marginalization. Sustainable resolution of disputes should offer forward-looking solutions like the equitable distribution of power and resources, equal opportunities to all citizens, reintegration of the armed forces that took part in the conflict and if possible, constitutional amendments.
2. **Accountability for violation of human rights:** In this vein, those responsible for human rights violations, take individual responsibility through prosecution either nationally or at the

- international level such as the International Criminal Court or a hybrid court which is a combination of national and foreign judges, prosecutors and lawyers.
3. **Amnesty:** Amnesty involves forgiveness. No charges are proffered, such as was with the case of Anyanaya 1 in 1972 in Sudan.
 4. **Truth and reconciliation commissions:** In response to queries by participants, Professor Akolda explained that while possible at the national level, amnesty for crimes against humanity e.g. genocide was not supported by the UN under the Rome Statute. He argued that a truth and reconciliation commission could serve as a viable option since it involves confession and forgiveness between perpetrators and victims, as was the case in South Africa. In addition, this fast tracks the healing process and the building of social cohesion and restoration of trust between members of the society.

2.2 Transitional Justice Options - Truth and Reconciliation: David Deng

Like Professor Akolda, David Deng, Research Director of the South Sudan Law Society (SSLS), defined transitional justice to mean or include the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. To that end, it may include both judicial and non-judicial mechanisms (with differing levels of international involvement or none at all), individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination. Deng explained that the main objectives of the transitional justice strategy is to foster respect for the laws of war, create individualised guilt, reduce perverse incentives of political accommodation/amnesty, build common ground on core facts and divorce military from politics. Deng noted that various transitional mechanisms or options are available and these include commissions for truth, reconciliation and healing, hybrid courts, and reparation commissions.

Commissions for Truth, Reconciliation and Healing

The purpose of such commissions is to establish a historical record of human rights violations over a specified time period by receiving testimonies from victims, witnesses, and perpetrators. He noted that in most conflict and crisis situations, there is never just one truth, as various sections of society carry their own distinct memories. There are however some facts that are fundamental, and their broad acceptance as the truth is necessary before real reconciliation can take place.

Deng explained that the main questions that nations emerging from a period of civil conflict like South Sudan must struggle with, is whether to discuss openly the terrible events that characterized the war or to try to forget and move on. This includes examining whether the facts and circumstances of a recent conflict can sometimes be seen as a threat to a new and fragile peace. This consideration informed the decision of the people of Mozambique, in making a collective decision not to discuss the past, after a long and brutal civil war. Cambodia too is often cited as an example wherein the people decided not to scrutinize past atrocities in the immediate aftermath of the conflict. However, countries like South Africa did establish a Truth and Reconciliation Commission.

A proposal for a truth commission has already been introduced in the context of the Inter-Governmental Agency for Development (IGAD) sponsored peace talks on the crisis in South Sudan taking place in Addis Ababa. The 25 August Protocol states that the parties shall: establish during the transitional period, a National Commission for Truth, Reconciliation and Healing, which will be hybrid in

composition, to spearhead efforts to address the legacy of conflict in South Sudan. The terms and mandate of the Commission can be negotiated by the stakeholders in the peace agreement.

Deng proposed that in order to have a meaningful transitional justice framework, stakeholders need to allocate responsibility for truth, accountability, reconciliation and healing to four separate institutions (which should be provided for in the legislation enacted during the transitional period):

1. **Commission for Reconciliation and Healing:** Spearheading efforts to rebuild relationships and restore trust between individuals and communities. It can build upon the gains of current and past initiatives and its membership can be nominated by stakeholders to the IGAD mediation.
2. **Truth and Dignity Commission:** Documenting and reporting on human rights abuses going back to 1972.
3. **Special Court for Serious Crimes (SCSC):** Investigating and prosecuting individuals responsible for crimes against humanity, genocide and other serious violations of International Humanitarian Law (IHL) since 15 December 2013. It can be a hybrid court including international and South Sudanese judges, prosecutors, investigators, lawyers and staff. It has to be established through agreement between the Government of the Republic of South Sudan (GRSS), the African Union (AU) and the UN.
4. **International Criminal Court (ICC):** The transitional government can ratify the Rome Statute and sign a declaration stating that it would apply back to independence. If timeline is not met for the Special Court for Serious Crimes (from 15 December 2013), the matter should be referred to the ICC.

2.3 Transitional Justice Options - Reparations and Memorialization in South Sudan: Taban Romano

Taban Romano, Senior Legal Aid Attorney of the South Sudan Law Society, explained that reparations involve the act of dignifying the victims of violations of human rights and international law through measures that alleviate their suffering, compensate their social, moral and material losses, and reinstitute their rights. He further noted that reparation is a means through which a post-conflict State provides redress, as far as possible, to victims of gross human rights violations, and re-establish a broader system of legal and social norms. Romano noted that reparations may take different forms including:

- Compensation
- Restitution
- Rehabilitation
- Satisfaction

Romano noted that war leaves a lot of damage in its wake, therefore, reparations restore the dignity of victims by acknowledging the wrongdoing, thus helping people to truly move on and heal. Any victim of systematic and gross human rights or humanitarian law violations is entitled to a remedy or reparations. The eligibility however, is determined by the type of violation, the time of occurrence of the violation, and the type of beneficiaries. Bearing in mind that many people are victimized by conflict, a definition of victims should be adopted to allow for a just and fair criteria for awarding reparations.

Romano contended that States have a legal duty to acknowledge and address widespread or systematic human rights violations, in cases where the State caused the violations or did not act to prevent them. However, in doing so there are some policy considerations to follow such as victim participation and inclusivity, documentation of victim information, gender sensitivity, and accessibility of benefits.

With regard to memorialization, Romano noted that all post-conflict and divided societies confront the need to establish a delicate balance between forgetting and remembering. It is crucial that memorialization processes do not function as empty rhetoric commemorating the dead, while losing sight of the reasons and the context for past tragedies and obscuring contemporary challenges. Quoting George Santayana, Romano noted that, “those who cannot remember the past are condemned to repeat it”. Memorialization is a process through which society acknowledges past human rights abuses and transforms them into tools for understanding both historical and contemporary injustices. Romano stressed that memorialization has both private and public objectives which should be taken into account. In this regard, consideration ought to be given to timing, risks, integrity, victim-centred and inclusiveness, integration, and a locally-driven process. The options for memorialization for South Sudan would include:

- Authentic sites
- Symbolic sites
- Documentation
- Commemorations

In conclusion, Romano recommended that immediate steps should be taken to protect mass graves and commemorate the dead, and efforts should be made to document violations of international humanitarian and human rights law. He further recommended that the peace agreement includes language regarding memorialization activities, the creation of a truth, justice and reconciliation commission to conduct research and make recommendations about memorialization activities and the conducting of research to identify victim and survivor preferences for memorialization.

2.4 Transitional Justice Options - Accountability: Professor Alfred Lokuji

Professor Alfred Lokuji, from the University of Juba, made a thorough case for accountability as one of the elements of transitional justice. Referring to the situation in South Sudan, he stressed that all rules are suspended during conflict, people become traumatized due to fear, while loss of lives and other human rights violations occur. When societies get to that level, it becomes difficult to restore the rule to normalcy. He elaborated that during conflict there are three main categories of actors: (i) perpetrators who abuse the rights of others (ii) victims in the hands of perpetrators and (iii) by-standers.

Alfred gave the example of the current Jewish laws which look at individual perpetrators of the Holocaust as an example of demanding accountability. He noted that perpetrators may be individuals, political leaders, soldiers, a group, or an institution. He cited the case of Chile and South Africa as examples where institutions of the State violated human rights. In such situations, there has to be a clear mechanism of identifying the perpetrators and apportionment of individual responsibility.

Alfred argued that the basic concept of demanding accountability is that victims know what crimes were committed with impunity, perpetrators are brought to justice, and a message is sent out to the whole world that there is no longer room for impunity. He offered that perpetrators who are convicted

should also be made to pay compensation to the victims and never to be allowed to hold any public office as a way of discouraging impunity.

Participants discussed whether there can be accountability when fighting is still raging on or whether transitional justice issues will not derail peace talks. Alfred explained that it is difficult to talk of transitional justice or accountability in the current situation. However, since transitional justice seeks durable peace by stopping war, accountability should form part of the peace agreement. The society must agree what kind of peace to embrace and acknowledge that crimes have been committed and those responsible need to answer, as was the case after World War II when Japanese and German officers were tried individually for the crimes they committed during the war. In his concluding statements Alfred proposed that, in order to embark on the transitional process, there is need to stop fighting, give a name to the process that will help to restore normalcy, and put in place a mechanism to ensure that the country does not go back to conflict.

2.5 Justice and Accountability (Hybrid Court) by David Deng

David Deng explained that in the context of peace negotiations, warring parties sometimes view truth commissions as a means of avoiding criminal accountability for human rights violations. As a result, it is often easier to obtain their commitment to a truth commission in a peace agreement as opposed to a criminal justice mechanism. Mediators should not encourage such types of trade-offs. Truth and accountability, along with institutional reform, reparations and memorialization, are integral components of a holistic approach to transitional justice, and all are needed if a country is to come to terms with a legacy of massive human rights violations. Holding perpetrators of atrocities accountable for their actions and ensuring that victims are provided with remedies are binding legal obligations on the State. These obligations cannot be avoided by establishing a truth commission. Accountability can be achieved through national courts, international courts that have the jurisdiction to try such offences, or by the setting up of a hybrid court.

The workshop heard that in an attempt to promote justice and end impunity for the atrocities committed by warring factions in South Sudan, the parties can adopt the example of Sierra Leone where during its 11 year civil war, the UN and the Sierra Leone Government jointly established the Special Court for Sierra Leone (SCSL) in 2002. Its mandate was to try “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”. The SCSL represents an early example of a “hybrid” tribunal. The SCSL is not part of the Sierra Leonean judiciary, but does include some aspects of Sierra Leonean law (although none of these laws have been used by the SCSL). The SCSL also employs Sierra Leoneans as staff members and has its permanent seat in Freetown, Sierra Leone. At the same time, while it is not a UN body, it has jurisdiction over international crimes, and employs international staff, including a majority of international judges and prosecutors who investigate and bring cases against those responsible for violations of human rights and humanitarian law.

2.6 Regional Experience in Transitional Justice - southern Africa: Professor Kasaija Phillip Apuuli

Professor Kasaija Phillip Apuuli from the Department of Political Science, Makerere University, Uganda shared regional experiences on the various transitional justice initiatives that have taken place in southern and eastern Africa.

With regard to the southern African experience, examples were drawn from post-apartheid South Africa which culminated in the establishment of Truth and Reconciliation Commission. Other examples were drawn from the civil war in Mozambique which was a product of the Cold War and pitted the ruling party (FRELIMO) against RENAMO (the opposition movement). Traditional healing was employed in Mozambique as a way of moving the society forward after several years of human rights violations.

In coming to terms with the past, these countries established Truth and Reconciliation Commissions (TRCs) and did not focus on a specific event. Attempts were made to paint the overall picture of certain human rights abuses, or violations of international humanitarian law over a period of time. Apuuli noted that such institutions exist temporarily and for a pre-defined period of time, which ceases upon the submission of a report of their findings.

TRCs must have a legal basis. For instance the South African TRC was based on the South African Truth and Reconciliation Act (1994) and the Constitution of 1996. With regard to their mandate, TRCs should have a wide mandate including; establishing a complete picture of the causes, nature and gross violations of human rights, facilitating the granting of amnesty to persons making full disclosure, unravelling the facts and whereabouts of victims, making recommendations on how to avoid violations in future and determining reparations due to victims. The South African Truth and Reconciliation Commission made significant achievements in that it:

- Enabled the South African community to draw a line on the past
- Identified some of the persons who carried out human rights excesses during the conflict
- Promoted reconciliation (though this has been doubted; see Jay Vora and Erika Vora (2004); Graybill and Lenegran (2004))

However, despite its achievements, the major criticism of the South African TRC, is the granting of amnesty without prosecutions and the enormous budget it required (US\$18 million per year).

According to Apuuli, the Mozambican civil war between FRELIMO and RENAMO was characterized by massive human rights violations. The two parties entered into the General Peace Agreement (1992) and this was followed by several traditional practices to reunite the society, such as the tradition of performing cleansing rituals to purify people from the experiences of wartime atrocities and be reintegrated into the community. The ritual of social integration was divided into three parts. The first part was designed to help the ex-soldier overcome his/her acquired identity (military) to become an ordinary person and cleanse the person spiritually and physically. A person would take a steam bath, and then wash with water fortified with various herbs. The second aspect was the winning of the favour (propitiation) of the spirits by announcing to the dead relatives that the 'lost sheep' was back home. The third aspect entailed reconciliation with the spirits of the dead persons killed by the ex-soldier. This involved a symbolic 'encounter' with the victims, asking for forgiveness by showing remorse, the requesting of compensation (cash or goods) by the dead who speak through the traditional healer, and holding sessions wherein former enemies (in person or relatives) were brought together for reconciliation. The advantages of the Mozambican approach was that the communities were involved and this helped in speeding up the reconciliation.

2.7 Regional Experience in Transitional justice - eastern Africa: Professor Kasaija Phillip Apuuli

Professor Apuuli also shared experiences relating to the east African region. These countries include Rwanda, Burundi, Democratic Republic of Congo, Uganda and Kenya. In this region, transitional justice mechanisms have ranged from traditional, to national, and international mechanisms. Unlike the South African experience, Rwanda for instance refused to grant blanket amnesty to perpetrators of the genocide. Accountability was required and this included prosecutions both at the local, national and international level levels.

The *Gacaca* courts or “justice on the grass”, stood as an impressive innovation in the area of transitional justice. The *Gacaca* represented the first attempt to involve the entire population in carrying out justice and reconciliation. *Gacaca* was adopted because of the idea that, the problem of recurrent conflicts should be handled in public (a system of participatory justice). Further, the system ensures voluntary appearance before the courts and social pressure ensures the enforcement of the punishment. The main advantages of the *Gacaca* is that it is cheap, involves the whole community, and truth can be easily established through confessions and individualization of criminality. However, the system also has some disadvantages such as compulsory attendance by all members of the community. Sometimes there are false accusations (confession procedure) and the system may not guarantee the due process rights of the accused, as well as denial of appeals in some cases.

2.8 The National Platform for Peace and Reconciliation - Agenda for peace and reconciliation: Dr. Bernard Suwa.

Dr. Bernard Suwa, made a well-articulated presentation about the National Platform for Peace and Reconciliation (NPPR). NPPR sees its role as that of creating space for diverse grassroots voices calling for peace, healing, and national reconciliation to unite and send powerful pro-peace and anti-war messages to the political leaders of South Sudan. Citing Archbishop Daniel Deng Bul, a senior leader of the NPPR, Dr. Suwa noted “...our job is to put the voices together, to speak together, so that we move together as one.” Dr. Suwa emphasized that the NPPR is an open and inclusive space without formal membership. Everyone is welcome into that space, and everyone is free to offer ideas on how peace, healing, and reconciliation can be achieved in South Sudan. The NPPR’s vision is to achieve “...a transformed South Sudan where our painful historical experiences are addressed and healed, and where a deep culture of forgiveness, reconciliation, justice, peace, inclusivity and accountability is embraced.” It is an ambitious target, but as Nelson Mandela said, “...it always seems impossible until it’s done.” Doing nothing is not, and should not, be an option for all peace-loving South Sudanese.

According to Dr. Suwa, since its launch on 5 April 2014, approximately 113 organisations have walked into the NPPR space and pledged to work with and or support the NPPR’s peacebuilding approach. Dr. Suwa explained the genesis of the NPPR: When war broke out in December 2013, it quickly took a tribal dimension, pitting different tribes against each other, and especially the Dinka against the Nuer. The NPPR was therefore an instinctive human reaction by South Sudanese to shield themselves from the machinations of politicians who wanted to polarize the communities for their own political interests. There are many strong voices who hold the view that the need for political power by both sides has taken precedence over the need for peace in South Sudan, hence the lack of substantive progress in the peace talks. There are also suspicions that each side is re-arming for an all-out war during the dry season.

Realizing the importance of a wide public engagement, Dr. Suwa stated that, rather than engage at the top political level, the NPPR decided to devote more time and resources to mobilizing communities at the grassroots level. The NPPR is now using its contacts in; political circles; civil society; the diplomatic community; and the media to amplify grassroots voices calling for peace. This has already attracted the interest of the US State Department and other development partners. A lot of effort is also being devoted to rebuilding the “people-to-people” inter-dependence that existed before the war pulled individuals and communities apart. The NPPR’s strategic calculation is that, when grassroots voices calling for peace have been amplified, and past community inter-dependences rebuilt, then the politicians will realize that they have been disempowered by the instinctive need for self-preservation that will have taken root among many South Sudanese. As a result, they will have no choice but to listen to and act upon the peacebuilding voices from the grassroots in order to win hearts and minds.

Dr. Suwa noted that the space provided by the NPPR is also giving people at the grassroots level the opportunity to actively participate in the debate on the big national issues that are likely to take centre stage when the guns fall silent. These are issues like justice and accountability, devolution of power, reconstitution of the security services, civic participation in governance, and promulgation of a national constitution among many others. These are some of the fundamental political issues that caused the conflict in the first place. He noted that at least two academics from the United States and South Africa had already expressed interest in studying the NPPR concept. It would be good for the international media to tell the NPPR story to the world through the voices of the people who conceived it, and those who have already embraced it as one of the efficacious means of re-establishing peace in South Sudan.

3. DISCUSSIONS

Participants posed several questions during discussions after each of the sessions. Most of the questions centred around the role of traditional authorities in transitional justice, the best way of promoting reconciliation, and how to divorce the military from politics as well as the role of the ICC vis-a-vis the national sovereignty of South Sudan.

It was noted that traditional authorities can play a very key role in reconciliation and promoting peace within their communities as it is already within their legal mandate as provided in the Local Government Act 2009. With regard to the separation of the military from politics, it was noted that this is possible pursuant to constitutional, justice and security sector reforms. Akolda emphasized that even in the current legal regime, the Election Act bars the organized forces from contesting in elections. However the military is seen as part of politics because of the link between the name of the ruling party - SPLM and the name of the military - SPLA. He noted that the name is misleading and inconsistent with realities of a modern democratic society.

Regarding the question about the ICC, Deng explained that it can only intervene upon invitation by the government or if South Sudan signed the Rome Statute. Even so, this does not take away the country’s responsibility to prosecute crimes. The ICC only exercises its jurisdiction where the State is unwilling or unable to genuinely investigate and prosecute the perpetrators of the crimes. The example of Kenya was used to illustrate this point.

4. CONCLUSION

The workshop facilitated dialogue between the participants who were drawn from all sections of South Sudanese society. No resolutions were made, since the purpose of the workshop was to raise

awareness among stakeholders and to provide a common understanding of the concept of transitional justice. It was concluded that similar workshops should be conducted in the future to create a common understanding of the concept of transitional justice.

Annex 1: Agenda

Objective: To increase the awareness of stakeholders on the concept of transitional justice

TIME	TOPIC	SPEAKER
8:30-9:00	Registration	
9:00-9:30	Welcome address and objectives of the workshop	Hon. Mr. Jeremiah Swaka - Under Secretary, Ministry of Justice
	Remarks by Ambassador of The Netherlands Embassy in South Sudan	
	Remarks by UNDP Country Director	Balazs Horvath
	Keynote address	His Excellency Mr. Paulino Onyango - Minister of Justice
9:30 – 9:00	The concept of transitional justice	Prof. Akolda Tier
10:00-	Discussions	
10:30		
10:30-	Coffee break	
11:00		
11:00-	Transitional Justice Options – Truth and reconciliation	David Deng
11:30	Discussions	
11:30-		
12:00		
12:00-	Transitional Justice Options – Reparations and memorialization	Taban Romano
12:20	Discussions	
12:20-		
12:45		
12:45-2:00	LUNCH	
2:00-3:00	Transitional Justice Options – Accountability	Prof. Alfred Lokuji
3:00-3:15	TEA BREAK	
3:15-3:45	Transitional Justice Options – Accountability	Prof. Alfred Lokuji
3:45-4:30	Discussions	
DAY TWO		
9:00-9:20	Transitional Justice Options – Justice and Accountability	David Deng
9:20-9:50	Discussions	
9:50-10:20	Regional experiences in transitional justice - Southern Africa	Prof. Kasaija Apuuli
10:20-	Discussion	
10:50		
10:50-	TEA BREAK	
11:15		
11:15-	Regional experiences in transitional justice – East Africa	Prof. Kasaija Apuuli
12:00	Discussions	
12:00-		
12:30		
12:45-2:00	LUNCH	
2:00-2:30	The National Platform for Peace and Reconciliation (NPPR): The agenda for peace and reconciliation	Dr. Bernard Suwa
2:30-3:00	Discussion	
3:00- 3:45	Feedback and queries from participants	Dr. Rowland Cole
3:45- 4:00	Closing Ceremony	
4:00:4:30	Tea and Departure	

Annex 2: Facilitators

1.	Prof. Akolda Man Tier – Chairman, National Constitutional Review Commission
2.	David Deng – Research Director, South Sudan Law Society
3.	Taban Romano – Senior Legal Aid Attorney, South Sudan Law Society
4.	Prof. Phillip Apuuli Kasaijja – Associate Professor, (Faculty of Political Science) Makerere University
5.	Prof. Alfred Lokuji – Vice Chancellor Academic Juba University
6.	Dr. Bernard Suwa – Secretary General Committee of National Healing and Reconciliation, Republic of South Sudan

