



## South Sudan Law Society

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# Truth and Dignity Commission: A Proposal to Reconcile the Many Truths of South Sudan from 1972 to the Present

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“There is never just one truth: we each carry our own distinct memories, and they sometimes contradict each other; but debunking lies and challenging dishonest denial can go far in allowing a country to settle on one generally accurate version of history. There are some facts that are fundamental enough that broad acceptance of their truth is necessary before real reconciliation can take place.”

- Priscilla Hayner, *Unspeakable Truths*<sup>1</sup>

## Introduction

As the conflict in South Sudan enters its ninth month, the humanitarian crisis deepens. Close to 140,000 internally displaced persons (IDPs) have sought refuge in United Nations (UN) bases throughout the country and many more are struggling to survive in the bush or in informal camps. Approximately 1.7 million people, or 1 in 7 people in South Sudan, have been displaced by the conflict.<sup>2</sup> Four million people, about a third of the population, face dangerously high levels of food insecurity. According to the United Nations Children’s Fund (UNICEF) and the World Food Program (WFP), almost one million South Sudanese children under 5 years of age will require treatment for acute malnutrition in 2014—50,000 children could die in the course of this year.<sup>3</sup>

Peace talks mediated by the Intergovernmental Authority for Development (IGAD) in Addis Ababa have made little progress towards either a permanent ceasefire or a longer-term political settlement. The two warring parties—the Government of South Sudan and the Sudan People’s Liberation Movement-in-Opposition (SPLM-IO)—signed a cessation of hostilities agreement on 23 January, a recommitment to this on 5 May, and an “agreement to resolve the crisis” on 9 May, but all three agreements were violated immediately after they were signed.<sup>4</sup> On 25 August, the parties signed an implementation matrix for the cessation of hostilities agreement. IGAD also released a Protocol on Agreed Principles on Transitional Arrangements Towards Resolution of the Crisis, though the SPLM-IO refused to sign the document due to certain provisions that it felt favored the Government.<sup>5</sup> At this writing, fighting continues in parts of Upper Nile and Jonglei states.

This paper is the third in a series of working papers developed by the South Sudan Law Society (SSLS) to stimulate thought on issues of truth, justice and reconciliation in South Sudan’s peace process. The paper proposes the establishment of a truth commission, called the Truth and Dignity Commission, to investigate and report on patterns of human rights abuses in South Sudan from 1972, the date of the signing of the Addis Ababa Agreement and the establishment of the first regional government in southern Sudan, to the present. Rhetoric from the warring parties in the current conflict clearly points towards unresolved historical grievances and contrasting narratives of past conflicts as a driver of violence. Unless South Sudanese are able to reconcile these conflicting narratives in a manner that is responsive to the many diverse experiences in the country, the past will continue to revisit itself on the present in violent and unpredictable ways.

## What is ‘truth’ and why is it important?

Among the first questions that nations emerging from a period of civil conflict must struggle with is whether to discuss openly the terrible events that characterized the war or to try to forget and move on. Examining the facts and circumstances of a recent conflict can sometimes be seen

as a threat to a new and fragile peace. This is why the people of Mozambique, after their long and brutal civil war, made a collective decision not to discuss the past. Cambodia too is often cited as an example in which people decided not to scrutinize past atrocities in the immediate aftermath of the conflict.<sup>6</sup>

Such collective decisions to turn a blind eye to the past are rare. In most cases, countries willingly choose to reexamine their histories of conflict in an effort to better understand how and why violence arose and what can be done to reduce the chances of its recurrence.<sup>7</sup> Establishing the truth in these circumstances may be more of an exercise in narrowing the range of “permissible lies,” rather than determining a universal truth, but if done well, it can help to foster coherence in a nation’s recollection of its past and dispel the silence and denial that often accompany large-scale human rights abuses.<sup>8</sup>

### What is the Truth and Dignity Commission?

The proposed Truth and Dignity Commission would be a temporary body established to investigate and report on violations of international human rights and humanitarian law that occurred within the territory of South Sudan from 1972 to the present.<sup>9</sup> The establishment of the Truth and Dignity Commission in South Sudan would constitute a first attempt by the Government to come to terms with the serious human rights violations committed by state and non-state actors against the civilian population.

Truth commissions arose in the 1980s as mechanisms employed by states emerging from conflict or periods of authoritarian rule in an effort to come to terms with their histories of human rights abuse. The first truth commission was established in Uganda in 1974, but it was not until 1983, when the National Commission on the Disappeared was established in Argentina, that truth commissions began to gain prominence. Since then, more than 40 truth commissions have been established around the world in the aftermath of conflicts, transitions from authoritarian rule, or in otherwise stable states seeking to come to terms with a particularly abusive aspect of their history.<sup>10</sup>

Most truth commissions share a number of common characteristics: (1) they are focused on past, rather than ongoing events; (2) they investigate a pattern of events that took place over a period of time; (3) they engage directly and broadly with the affected population; (4) they are temporary bodies, that aim to conclude with a final report; and (5) they are officially authorized or empowered by the state under review.<sup>11</sup> Truth commissions by definition work closely with victims and survivors not only as sources of information, but also as rights-holders and partners. The victim-centered orientation of truth commissions is one factor that sets them apart from criminal justice mechanisms, which must balance sensitivity to the interests of victims against a need to protect the rights of the accused.

Truth commissions are typically tasked with a number of objectives, which may include: uncovering, clarifying and formally acknowledging past abuses; addressing the needs of victims; promoting individual criminal accountability; outlining institutional responsibility for serious crimes and recommending institutional reforms; promoting reconciliation; and reducing the likelihood that past injustices contribute to contemporary conflicts.<sup>12</sup> The function around which truth commissions organize most of their operations is the gathering of testimonies from victims, witnesses and perpetrators. They may also examine official documents, visit places that contain evidence and conduct studies into particular aspects of a country’s history. At the end of their mandate, truth commissions issue a report that aims to provide an accurate and impartial record of human rights violations and offers recommendations designed to promote social and political

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transformation.

A proposal for a truth commission has already been introduced in the context of the 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 shall be negotiated by the stakeholders in the negotiations.<sup>13</sup>

Though the document was only signed by the IGAD heads of state, including president Salva Kiir, and the SPLM-IO did not sign, the fact that a truth commission is being considered marks an important achievement for human rights organizations in their efforts to promote peace, truth and justice in South Sudan.

## Truth, Justice and Accountability

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 than 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. Moreover, holding perpetrators of atrocity crimes 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. The subsections below delve further into the relationship between truth, justice and accountability in post-conflict states.

### Truth Commissions versus Criminal Justice Mechanisms

Truth commissions and criminal justice mechanisms serve different purposes in post-conflict societies. Courts of law are subject to strict rules of procedure designed to protect the rights of both the complainant and the accused. They receive and assess evidence in order to substantiate the particular elements of a legal claim, and may exclude information that speaks towards the broader context in which the harms occurred. Truth commissions, on the other hand, allow for a more general analysis of the social and historical context and can better identify patterns of abuse across a large number of cases and over a longer period of time. Whereas judicial facts are not necessarily victim-centered, truth commissions put the concerns of victims at the center of all that they do as both sources of information and as primary recipients of the truth commission's services.

Some truth commissions are designed with the specific aim of promoting criminal justice. The Truth and Reconciliation Commission in Peru, for example, created a quasi-independent unit within the commission specifically dedicated to preparing cases for prosecution and its final report made clear that criminal justice was a prerequisite for reconciliation. In 2005, pursuant to the Commission's recommendations, Peru created a new National Criminal Court to handle human rights cases.<sup>14</sup> That same year, the former president of Peru, Alberto Fujimori, was detained in Chile and extradited to Peru to face charges for serious human rights violations and corruption. In 2009, he was convicted and sentenced to twenty-five years for crimes committed

during the war.

In other cases, truth commissions and criminal justice initiatives can work at cross-purposes to one another. In South Africa, for example, despite instances of collaboration, the relationship between the Truth and Reconciliation Commission and the National Prosecuting Authority was strained. When senior members of the security services found out that they were being investigated for involvement in criminal activity, they offered to testify in front of the commission in order to benefit from the amnesty being offered. According to a senior prosecutor, his team served to “chase all the sheep into the corral of the truth commission.... Without us, a lot wouldn’t have come out. The big breakthroughs of the commission were because we started chasing these people.”<sup>15</sup> Later, when commissioners provided the National Prosecuting Authority with a list of three hundred cases with specific names recommending criminal investigation, the prosecutor’s office failed to act.

Despite the mixed results, experience shows that in practice, truth commissions usually do not undermine efforts to counter impunity. Even if a commission report does not immediately lead to prosecutions, the information it compiles may be useful to courts later on when trials are initiated. In Chad, for example, eight years after the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories (1991-92) concluded its work, the commission report was submitted as evidence in charges against the former president Hissène Habré on the international level.<sup>16</sup> In Guatemala, the report of the Commission for Historical Clarification was introduced as evidence in a court case in Spain against the president of Congress in Guatemala, José Efraín Ríos Montt, for his involvement in atrocities committed in the early 1980s. This case resulted in an international arrest warrant and extradition order for Ríos Montt in Spanish courts.<sup>17</sup>

Truth commissions can also help to build local demand for justice and accountability and thereby create conditions conducive to criminal prosecutions. In Argentina, for example, the National Commission on the Disappeared released its report *Nunca Más* (Never Again) in 1984 and it was an immediate bestseller. The implementation of its recommendations for criminal prosecutions had mixed results early on. Five military generals were tried and put in jail as a result of the evidence put forward in the report, but in 1989, incoming president Carlos Menem granted them pardons. Nonetheless, the demand for accountability continued to grow and by late 2009, 1,400 persons had been charged or were under formal investigation and 68 had been convicted for crimes committed during the war.<sup>18</sup>

In South Sudan, it is widely recognized that a culture of impunity in the political and military class is among the issues that contributed to the outbreak of the current conflict. It is therefore important that any truth commission in South Sudan be designed in a manner that supports efforts to promote justice and accountability. Judging by the manner in which the IGAD-sponsored peace talks are proceeding, it is likely that the outcome of the mediation process will be some sort of compromise between the two warring parties. Indeed, the parties already committed to forming a government of national unity in the 9 May agreement. Though a compromise solution may be the only possible outcome, such an arrangement would complicate efforts to promote justice and accountability in the short-term, as the perpetrators of human rights abuses or their supporters would likely be included in the transitional government.<sup>19</sup> In such a scenario, it might be advisable to form a truth commission early on in the transition to prepare the ground for a criminal justice mechanism to be established towards the end of the transitional period, in order to ease the country into the accountability process.

### Treatment of Amnesties

The use of amnesties in the context of truth commissions must be handled carefully. Of the dozens of truth commissions that have been formed since the 1980s, the Truth and Reconciliation Commission in South Africa was the only one that allowed amnesties for perpetrators of serious human rights violations who testified before it. Since that time, a clear prohibition on amnesties for war crimes, crimes against humanity and genocide has emerged on the international level. Such amnesties are now considered to be violations of international law, particularly the rights truth, to access to justice, to reparation and rehabilitation, and to ‘never again’ or the guarantees of non-repetition.<sup>20</sup>

Since 1999, in those rare cases where truth commissions have considered amnesties for serious crimes, the United Nations has refused to cooperate.<sup>21</sup> In 2005, for example, Indonesia and Timor-Leste created a Commission of Truth and Friendship through bilateral agreement. The Commission’s terms of reference gave it the power to recommend amnesty, including for serious crimes. As a result, the UN refused to associate itself with the Commission. To the extent that the UN and bilateral donors would not support any provisions of a peace agreement that involve amnesties for serious crimes, the inclusion of such a provision in the mandate of a truth commission would bring into question its legality and sustainability.

The Commission for Reception, Truth and Reconciliation in Timor-Leste (which preceded the Commission for Truth and Friendship) also allowed for an amnesty, but persons suspected of murder, sexual offenses, organizing or instigating the violence or undertaking other serious crimes were not eligible. Instead, the Commission only offered amnesties to perpetrators of lesser crimes who admitted and apologized for their acts and agreed to undertake community service or make symbolic reparatory payments. The perpetrators were then reintegrated into communities through the indigenous East Timorese process of *adat*. Applications for this process were reviewed by the office of the prosecutor of the Serious Crimes Unit to ensure that there was no evidence of serious crimes.<sup>22</sup>

In addition to the international prohibition on amnesties, there are other reasons that the signatories to a peace agreement might not want to include an amnesty for international crimes. A provision that prevents a victim from bringing a case to court may violate a country’s constitution. Article 20 of the Transitional Constitution of the Republic of South Sudan, for example, states: “The right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to courts of law to redress grievances whether against government or any individual or organization.”<sup>23</sup> Amnesties for serious crimes would therefore be susceptible to attack in national courts and may not offer the parties that much protection. Nor would they offer protection in other countries where action could be brought under universal jurisdiction, or in international tribunals such as the International Criminal Court. There are also political costs that may be incurred, since advocating for an amnesty to be on the table in the context of peace talks may be perceived as an admission of guilt.<sup>24</sup>

Were South Sudan to include an amnesty provision in its truth commission, it should be a limited amnesty along the lines of what was offered by the Commission for Truth, Reception and Reconciliation in Timor-Leste. Given the accessibility of customary courts throughout the country, South Sudan could consider whether there might be a role for customary reconciliation mechanisms in reintegrating perpetrators into host communities. The circumstances for such reintegration would have to be carefully assessed to take into consideration the nature of the conflict in South Sudan. For example, in situations where the perpetrator and victim are from distant communities, the reintegration of perpetrators into the community might not be an



appropriate solution. The provision of amnesty should also be attached to some cost for the perpetrator, such as an apology, community service or the payment of compensation, in order to promote accountability. As customary courts in South Sudan are technically prohibited from adjudicating criminal matters, they would not be authorized to sentence perpetrators to prison.

### Operational and Design Considerations

If a Truth and Dignity Commission were to be established in South Sudan, it would need to be tailored to the specific context in the country. This would require public consultations with stakeholders at all levels, as well as careful coordination and sequencing with existing institutions and with other transitional justice interventions. The subsections below delve further into design and operational considerations that would need to be considered in establishing a credible and effective Truth and Dignity Commission in South Sudan.

#### Timing and Sequencing

The timing and sequencing of transitional justice initiatives is a critical determinant of their success. It is often useful to initiate transitional justice mechanisms soon after a conflict is ended so as to take advantage of the momentum of a political transition. Otherwise, with all the demands made of transitional governments, there is a danger that issues of truth, justice and reconciliation could be put off indefinitely, as happened after the signing of Sudan's Comprehensive Peace Agreement (CPA) in 2005. Transitional justice initiatives can also be useful ways of testing the boundaries of the new political dispensation to see if it is responsive to post-conflict reforms. However, while it might be tempting to initiate all transitional justice interventions immediately upon the signing of a peace agreement, limitations on security, capacity, levels of demand, and the sustainability of the peace process often necessitate pragmatic choices with regard to sequencing.<sup>25</sup>

The general consensus among transitional justice experts is that a truth commission should be given two to three years to complete its task.<sup>26</sup> Public attention is limited and any commission that lasts longer than three years risks losing momentum and focus. The truth commission should also be given a deadline, even if it is extendable. The danger of establishing a commission with an open-ended mandate was apparent in Commission of Inquiry established in Uganda in 1986, which was created with no time limit. It took more than nine years to conclude its work.<sup>27</sup> Prior to commencing operations, the commission should be given a time period of at least three months to prepare itself and decide how to interpret its mandate.

Taking into consideration these standards, and assuming a transitional period of two to three years after the signing of a peace agreement in Addis Ababa, the proposed Truth and Dignity Commission in South Sudan should be established no later than one year after the signing of the peace agreement. This would allow for a 90-day pre-transitional period, a public consultation process, the formation of a transitional legislative assembly, and the enactment of legislation for the commission. The commission should be established with a three to four month preparatory period and be given a three-year time period in which to complete its mandate, with an optional extension of six months. Under such a scenario, the commission would commence during the transitional period and release its report under the elected government that would follow. As mentioned above, the truth commission could help to prepare the ground for an accountability mechanism, such as a hybrid court, to be established towards the end of the transitional period.<sup>28</sup>

### Method of Introduction

Countries emerging from conflict or authoritarian rule have established truth commissions in a number of different ways, including through peace agreements, transition to democracy negotiations, constitutional amendments, legislation, presidential decrees or even court decisions.<sup>29</sup> The manner in which a truth commission is introduced has implications for its perceived legitimacy, independence and effectiveness.

Most African countries have established truth commissions through general provisions in peace agreements followed by more detailed legislation.<sup>30</sup> After the post-election violence in Kenya, for example, a framework of principles and powers for a Truth, Justice and Reconciliation Commission was agreed during the final agenda of the peace talks in 2008. The details of the Commission were then further elaborated upon in legislation that came into force in 2009.<sup>31</sup> Sierra Leone and Liberia followed similar paths, laying out the key aspects of the mandate in the peace agreements, and then enacting legislation to specify the objectives and functions of the commissions. Whereas the peace agreement is able to secure the political leadership's commitment to the truth commission, the legislative process lends democratic legitimacy to the proposal and can help to spur greater local ownership. Parliament is also able to endow the truth commission with stronger powers, such as subpoena and search and seizure powers.

Unlike in Africa, most truth commissions in Latin America were introduced through presidential decree. While presidential decrees are able to establish a truth commission quickly and with minimal need for political compromise, presidential decrees are typically succinct documents that would not be able to provide much detail on the commission's mandate, objectives and functions. Nor would presidential decrees be able to endow the truth commission with subpoena and search and seizure powers. Moreover, in instances where the people serving in the executive played a role in human rights abuses, a presidential decree might lack legitimacy in the eyes of the affected population.

The UN has also played a central role in establishing truth commissions in a number of instances. In Timor-Leste, for example, the United Nations Transitional Administration for East Timor (UNTAET) established the Commission for Reception, Truth and Reconciliation in July 2001 using its Chapter VII powers.<sup>32</sup> It was given full subpoena powers and the authority to search and seize information from anywhere in country with the assistance of the police. An agreement for the Commission on the Truth in El Salvador was included in a UN-brokered peace accord between the Government of El Salvador and the Farabundo Martí National Liberation Front (FMLN) in 1991.<sup>33</sup> The Commission was administered by the UN and funded through contributions from UN member states.

For the United Nations to establish a truth commission in South Sudan using its Chapter VII powers would seem to be an unlikely scenario. Unless the state were to completely collapse as a result of the war, the establishment of a truth commission would have to be done in cooperation with the Government of South Sudan. Indeed, as mentioned above, a proposal for a truth commission has already arose in the context of the IGAD-sponsored peace talks in Addis Ababa.<sup>34</sup> If the final peace agreement includes a firm commitment to a truth commission, including a timeline and implementation modalities, then the details of the arrangement could be worked out in subsequent legislation.

### Substantive Scope

Among the first questions that arise once a state has committed itself to establishing a truth



commission is the types of violations that would be investigated. According to Pablo de Greiff, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, there has been a “worrying trend towards the seemingly open-ended expansion of commission mandates, not just thematically, but functionally, leading to doubts about whether there is any institution encompassing all the competencies required by such expansion.”<sup>35</sup> While one must be careful not to overburden a truth commission, particularly in a situation such as South Sudan where the government is likely to have its hands full managing the transition, the mandate and terms of reference should be broad enough to allow the commission to determine its own areas of focus and to avoid excluding elements of the truth.

The drawbacks of an overly restrictive mandate have been apparent in past truth commissions. Chile’s National Commission on Truth and Reconciliation, for example, was only empowered to investigate “disappearances after arrest, executions, and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of persons carried out by private citizens for political reasons.”<sup>36</sup> The Commission did not investigate cases in which people were tortured and survived, and this large class of people was not listed as victims in the Commission’s report. This omission prompted president Ricardo Lagos to establish the National Commission on Political Imprisonment and Torture through presidential decree in 2003 to investigate incidents involving torture survivors. Its report recognized 28,549 people as victims of political imprisonment, of which 1,244 were younger than 18, and 176 were younger than 13.

The mandate of the Commission on Truth (1992-93) in El Salvador, on the other hand, used broader language, covering all “serious acts of violence ... whose impact on society urgently demands that the public should know the truth.” This enabled the commission to self-impose restrictions based on the types of right violations that arose over the course of its work.

Another major substantive question that truth commissions confront is whether to cover economic crimes. In the debate leading to the formation of the Truth, Justice and Reconciliation Commission in Kenya, for example, whether or not to include poverty and land issues in the Commission’s terms of reference was a subject of debate. One member of the negotiating team observed that poverty could arise from impunity and historical wrongs and that Commission’s picture of the past would be incomplete if it did not address these issues. In framing the scope of the Commission’s inquiry, the 4 March agreement stated:

“The Commission will inquire into human rights violations, including those committed by the state, groups or individuals. This includes but is not limited to politically motivated violence, assassinations, community displacements, settlements, and evictions. The Commission will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices shall also be investigated.”<sup>37</sup>

The South African Truth and Reconciliation Commission, on the other hand, did not cover economic crimes. This prompted Ugandan scholar, Mahmood Mamdani, to assert that the commission was creating “the founding myth of the new South Africa” by putting forth a “compromised truth” that “has written the vast majority of victims out of history” in excluding such prominent apartheid practices.<sup>38</sup>

In the South Sudanese context, given the many pressing demands that would be made of the transitional government—including the reintegration of SPLM-IO forces, the reform of an abusive security sector, resettlement of displaced populations, and provision of humanitarian relief to suffering populations—ensuring that the government is not overburdened would be an

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overriding consideration. It would therefore be advisable to strengthen existing institutions, such as the Anti-Corruption Commission, to conduct investigations of economic crimes. Perhaps some sort of formal cooperation between the Truth and Dignity Commission and the Anti-Corruption Commission might even be possible, in which the latter investigates current and past incidents of corruption and shares information with the truth commission to include in its final report.

Lastly, a truth commission in the South Sudanese context would have to determine how to approach abuses committed by external actors, particularly the Government of Sudan. Clearly, the role of the Sudanese government is critical to understanding the pre-independence conflicts in South Sudan. Sudan has also been linked to the current conflict through support to Sudanese militias fighting alongside various armed groups in South Sudan and through weapons transfers to the two main warring groups.<sup>39</sup>

It is not unusual for truth commissions to allow for the investigation of crimes committed by other states. In Timor-Leste, the Commission for Reception, Truth and Reconciliation reported on the role of its neighbor and former occupier Indonesia.<sup>40</sup> The Liberian commission detailed the role of Côte d'Ivoire, Burkina Faso and Libya in fueling the 14-year civil war, and the Sierra Leone Commission was also directed in its mandate to look into the "role of external actors" in the war.<sup>41</sup> However, since the main purpose of a truth commission is for a state to reflect on and remedy abuses for which the state itself is responsible, any focus on the actions of external actors in the South Sudanese context should be appropriately framed so as not to detract from the investigation of crimes that South Sudanese have committed against one another.

### Temporal Scope

In addition to the scope of the substantive inquiry, a truth commission must also determine a time period that would be covered. Truth commission time periods have ranged from under a dozen years (Argentina, 7 years; Sierra Leone, 11 years; El Salvador, 12 years) to 20 years or more (Timor-Leste, 25 years; South Africa and Guatemala, 34 years; Morocco, 43 years; Kenya, 44 years).<sup>42</sup> The Truth and Reconciliation Commission in South Korea was given a sweeping mandate of 100 years that included a 40-year occupation by Japanese forces, a four-year civil war with heavy engagement by U.S. troops, and thirty years of authoritarian rule that lasted until the early 1990s.<sup>43</sup>

The Truth, Justice and Reconciliation Commission in Kenya was tasked to investigate events between Kenya's independence on 12 December 1963 and 28 February 2008 when the National Accord was signed. The mandate thus covered crimes committed after the elections, though a separate Commission of Inquiry into the Post-Election Violence (also called the Waki Commission after a court of appeals judge named Chair Justice Philip Waki) was formed to investigate the violence that occurred after the 2007 presidential election. The Waki Commission's inquiry was small in scale as its recommendations were expected to feed into the work of the Truth, Justice and Reconciliation Commission.

If South Sudan were to adopt a similar approach to that of the Truth, Justice and Reconciliation Commission in Kenya, it would have to go back the Torit mutiny on 18 August 1955 and the start of Sudan's first civil war. People old enough to remember their experiences from those days would be in their 70s or older by now, which would make it difficult to receive firsthand testimonies. Such a sweeping mandate would place an unmanageable burden on the commission. A more advisable approach and the one recommended by this paper would be to focus on violations committed since 1972, when the Addis Ababa peace agreement was signed bringing an

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end to Sudan's first civil war and establishing the first regional government in southern Sudan. As the main purpose of a truth commission is for the state to examine human rights abuses for which the state itself is responsible, a time period starting when southern Sudanese were first given an opportunity to govern themselves would seem to be appropriate.

For the end date, the truth commission could investigate incidents up until the signing of a peace agreement in Addis Ababa, if and when that happens. This would enable the truth commission to compile information on the many conflicts that proliferated in South Sudan during the eleven years of peace that followed the Addis Ababa Agreement (1972-83), Sudan's second 22-year civil war (1983-2005), the six-year interim period (2005-11) that followed the signing of the Comprehensive Peace Agreement in 2005, the period immediately after independence (2011-13), and the current civil war (2013-present). To provide a more thorough investigation of the current war, events since the 15 December 2013 could also be tasked to a separate institution that would feed into the truth commission and be used to build criminal cases, as the Waki Commission did in relation to Kenya's post-election violence.<sup>44</sup>

### Role of Civil Society

Civil society participation is critical throughout the life of the truth commission. At the outset, civil society advocacy and awareness-raising is often necessary to get a proposal for a truth commission onto the agenda. The National Truth Commission in Brazil, for example, was established as a result of a demand made by civil society at a national conference on human rights in 2008, which led to a parliamentary debate on the issue.<sup>45</sup> In Liberia, the input of independent civil society representatives helped to ensure the inclusion of justice elements in the final peace agreement, including a truth commission, avoiding an amnesty and vetting of the security forces.<sup>46</sup>

Unofficial documentation efforts by civil society can help to build local demand for truth and justice and provide a truth commission with important sources of information once it is established. In Guatemala, for example, the Recovery of Historical Memory Project of the Catholic Church's Human Rights Office (REMHI), served as a precursor to the formal truth commission. The REMHI gathered thousands of statements by training over six hundred local interviewers and working through church networks.<sup>47</sup> Non-governmental organizations in Argentina also provided copies of their case files to the National Commission on the Disappeared, which included the information in its final list of victims.<sup>48</sup>

In addition, consultations with civil society organizations, victims and other concerned citizens can help to ensure that the commission's mandate is tailored to the specific circumstances in the country in question. If sufficient time is available, these consultations can be quite extensive. In Liberia, after the chair of Liberia's transitional government attempted to form the commission unilaterally, the United Nations Mission in Liberia (UNMIL) initiated an outreach process with a number of civil society organizations, culminating in a three-day conference in which a number of experts met with Liberian stakeholders to exchange opinions on how best to coordinate throughout the truth and reconciliation process. These activities provided a foundation for a two-week legislative effort by Liberians that ultimately produced a draft of The Act to Establish the Truth and Reconciliation Commission in June 2005.<sup>49</sup>

### Composition and Selection

Truth commissions are typically led by anywhere from three to seventeen commissioners.<sup>50</sup> The commissioners are the public face of the commission and their personal and moral authority is

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critical to ensuring public trust and confidence. If commissioners are linked to the subject matter in question, it can greatly complicate the commission's work. In Kenya, for example, when the chairperson of the Truth, Justice and Reconciliation Commission was linked to illegally acquired land and other crimes, the commission struggled with litigation and internal disarray, paralyzing its operations for two years.<sup>51</sup>

The process of commissioner selection should be transparent and inclusive so as to ensure the independence and integrity of the truth commission. One approach could be to invite nominations from the public or a predetermined set of stakeholder groups and then form a panel to review nominations, interview finalists, undergo public scrutiny, and recommend a shortlist to appointing authority. The selection process for the Truth and Reconciliation Commission in South Africa, for example, involved an independent selection panel and public interviews of finalists.<sup>52</sup> The selection panel, which included human rights organizations, first called for nominations from the public. Three hundred nominations were received. The panel then selected 50 individuals to invite for public interviews. Twenty-five names were selected and forwarded to president Mandela, who picked 17.

To give added independence, some truth commissions reserve a number of positions for international commissioners and staff. Examples of such hybrid truth commissions include Sierra Leone, Guatemala, Solomon Islands and Kenya. In Kenya, the Panel of Eminent African Personalities, which had been sponsoring the peace talks, was given the authority to select the three international commissioners.<sup>53</sup> Similarly, in Sierra Leone, the Special Representative of the Secretary General was appointed as the selection coordinator and an inclusive panel was formed that identified four national commissioners based on public nominations and interviews.<sup>54</sup> The office of the UN High Commissioner for Human Rights (UNHCHR) nominated the three international members, and the president of Sierra Leone was responsible for formally appointing both the national and international commissioners.

As noted above, a proposal for a hybrid truth commission has already been introduced in the context of the IGAD-sponsored peace talks on South Sudan. If this proposal is included in the final peace agreement, the international commissioners could be drawn through nominations from a variety of intergovernmental organizations. For example, one commissioner each could be nominated from IGAD, the AU, the UN and the International Conference of the Great Lakes Region (ICGLR). The remaining three commissioners could be nationals nominated by stakeholders to the peace agreement. Seven commissioners would provide a good number in that there would be enough people to manage investigations on the scale that would be required in South Sudan but not so many that decision-making would be rendered cumbersome.

The selection criteria should ensure that commissioners are selected based on their qualifications and experience. In terms of professional background, the individuals selected as commissioners should be selected from a variety of disciplines. To the extent possible, the three national commissioners should be selected so as to represent the diversity of South Sudan, including fair representation of women.<sup>55</sup> A minimum of 30 percent of the commissioners should be women, including one of the three South Sudanese commissioners, in line with the international standard for women participation in governance.<sup>56</sup> This would be an important means of creating an environment conducive to participation by female victims. Commissioners must also be able to commit themselves to full-time work on the commission.

Whereas the commissioners would focus mainly on developing commission policies and determining the final content of the truth commission report, the regular staff would be responsible for the bulk of the day-to-day operations. In line with practice elsewhere, the Truth

and Dignity Commission in South Sudan should expect to employ a large and professional staff, consisting of human rights experts, investigators, legal experts, researchers, social workers, translators and technology experts. Kenya's Truth, Justice and Reconciliation Commission, for example, employed more than 400 staff and the Truth and Reconciliation Commission in South Africa employed 300 people in four large offices around the country.<sup>57</sup>

### Testimony Collection

The primary activity of a truth commission is the collection of testimonies from victims, witnesses and perpetrators. Detailed information management systems are required to process the huge quantity of information collected by a truth commission. The Truth and Reconciliation Commission in South Africa, for example, collected 22,000 testimonies in three years, the Truth and Reconciliation Commission in Peru collected 17,000 testimonies in two years, and the Commission for Reception, Truth and Reconciliation in Timor-Leste collected 7,669 individual statements—comprising close to one percent of the country's total population—in two-and-a-half years.<sup>58</sup> Perpetrator statements too provide valuable sources of information for many truth commissions. In Sierra Leone, approximately 10 percent of the 7,706 statements collected by the Truth and Reconciliation Commission were obtained directly from perpetrators.

Some truth commissions allow for statement collection from the diaspora. In Ghana, for example, the National Reconciliation Commission entered into a formal partnership with a U.S.-based organization called Advocates for Human Rights, which trained American pro bono lawyers to assist in statement-taking.<sup>59</sup> The commission ultimately received more than 1,600 statements from people living in the United States, the United Kingdom, and in a refugee settlement in Ghana. Advocates for Human Rights also held several public hearings in the United States, for which commissioners traveled from Liberia to take part.

In the South Sudanese context, the truth commission would encounter the same logistical challenges that humanitarian organizations struggle with on a regular basis, including limited road infrastructure in rural areas, a long rainy season that makes travel by road throughout much of the country impossible for eight months a year, low literacy rates and a multiplicity of vernacular languages. Security risks would also be a major concern. Even if a permanent ceasefire were secured in Addis, South Sudan would remain fragile and tense for many years to come. Security concerns are particularly acute around the time of the release of truth commission reports. This became tragically apparent in Guatemala, where two days after the Church-based truth project released its report documenting years of atrocities in Guatemala's civil war, the project director, Bishop Juan Gerardi Conedera, was brutally bludgeoned to death at his home.<sup>60</sup>

### Public Hearings

Another major consideration for truth commissions is whether or not to allow for public hearings. There are many examples of truth commissions that have made effective use of public hearings. The truth commission hearings in Morocco were broadcast throughout the Arab world on Al-Jazeera television.<sup>61</sup> In South Africa, an hour-long Sunday night television show called The Truth Commission Special Report, had the largest audience of all South African news or current affairs shows of the time.<sup>62</sup>

Providing space for victims and perpetrators to make statements in public can help to raise the profile of the truth commission, and shift the focus from the final report to the overall process. Ultimately, only a small fraction of the people giving testimony would be able to participate in public hearings, so whether or not public hearings are conducted would not directly affect the



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commission findings, but hearings do help to assure the public that the evidence is being presented in a transparent and impartial manner. In planning for public hearings, security issues should be given serious consideration.

Opportunity should also be provided to people accused of wrongdoing to formally respond to the accusations. The commission, however, should refrain from cross-examining victims and witnesses, as this would be out of line with the victim-centered orientation of truth commissions. In Ghana, for example, a perception of hostility towards victims arose due to aggressive questioning during public hearings.<sup>63</sup> Conversely, in Peru, the commissioners chose not to ask any questions during the victim hearings, based on an understanding that they would offer respect by only listening to victim testimonies.<sup>64</sup>

A protection program for victims, witnesses and others providing information to the truth commission must also be established at the outset. Due to the scale of truth commission operations, the witness protection system would need to cover a large number of people at a reasonable cost. The commission would have to develop protocols for protecting the identity of informants, including the possibility of holding secret meetings with people at high risk of being targeted for sharing information.

### Powers of Investigation and Reporting

The truth commission's powers of investigation and reporting play an important role in determining its effectiveness. The strongest commissions are given subpoena and search and seizure powers. This enables them to compel compliance from individuals and institutions suspected to have information that could be of use to the commission. The Commission for Reception, Truth and Reconciliation in Timor-Leste, for example, was equipped with full subpoena powers and it had the power to search and seize information from any location in the country with the assistance of the police.<sup>65</sup> The South African and Sierra Leonean truth commissions were equipped with similar powers, though in the case of South Africa, the Truth and Reconciliation Commission decided not to issue subpoena or search orders against several key individuals and institutions to avoid upsetting various parties.<sup>66</sup>

Another major distinction lies between those truth commissions that are empowered to name perpetrators and those that are prohibited from doing so. The Truth and Reconciliation Commission in Liberia stands out, in this regard. The Commission's report named over 150 individuals that it recommended to be prosecuted for involvement in criminal activity, and several dozen others to be barred from public office for a period of thirty years.<sup>67</sup> Among those named were president Johnson Sirleaf and many other prominent politicians.

Morocco and Guatemala provide contrasting examples. The Equity and Reconciliation Commission in Morocco was prohibited from "invoking individual responsibility," and the mandate made clear that the commission should play no role in criminal prosecutions.<sup>68</sup> The mandate of Commission for Historical Clarification in Guatemala, also stipulated that the Commission could not "attribute responsibility to any individual in its work, recommendations and report," and that its work "would not have any judicial aim or effect."<sup>69</sup>

### Financial Autonomy

Financial autonomy is an important characteristic of strong truth commissions. By empowering the truth commission to manage its own budget and to engage in independent fundraising efforts, the state can avoid any perception that it is using its financial support to influence the



commission's work. In most truth commissions, the national government provides a portion of the funding, which is then supported by donations from the international community. It should also be noted that the financial independence of the truth commission must be situated within a broader context of government transparency and good administrative practice.

A number of countries have demonstrated a firm commitment to their truth commissions through the amount of funding allocated to the institutions. The Liberian government, for example, paid for almost 60 percent of the budget of its truth commission, contributing \$1.5 million USD per year, or one percent of the total national budget. At \$7.5 million USD, the Liberian commission is in the middle-range of truth commissions when it comes to total budget. The South African Truth and Reconciliation Commission cost \$18 million USD for its first two-and-a-half years and the Peru commission had a two-year budget of \$13 million.<sup>70</sup>

Given South Sudan's considerable oil wealth, the state should be in a good position to provide robust support to a Truth and Dignity Commission. Establishing regional offices throughout the country will be vital to ensuring that the commission obtains a sufficient amount of testimony. The government should ideally commit to supporting the commission for at least four years from the outset. This would cover three years of operations and one year to wind up after the commission report is released. Supplementary funds could be solicited from the UN and other donors.

## Recommendations

Truth commissions do not offer a panacea. In order to fully address its legacy of conflict and human rights abuses, South Sudan would need to establish a truth telling mechanism alongside other transitional justice mechanisms, such as criminal prosecutions, institutional reforms, reparation schemes and public memorials. While there are no guarantees, such a holistic approach would improve the chances for a truth commission to stimulate positive and transformational change. As Priscilla Hayner observes, "If done well, ...and if given the necessary resources and support, a truth commission can change how a country understands and accepts its past, and through that, if it is lucky, help to fundamentally shape its future."<sup>71</sup> To support efforts in this regard, the SSLS recommends the following:

1. **Include provisions for the Truth and Dignity Commission in any agreement that comes from the IGAD-sponsored peace talks in Addis.** The peace agreement should include a clear commitment along with implementation modalities and timeline, but the details of the mandate, objectives and function of the truth commission should wait for subsequent legislation. The commission should be given search and seizure and subpoena powers, it should identify suspected perpetrators both individually and institutionally, and more broadly, it should be designed to support efforts to promote criminal accountability.
2. **Hold six months of public consultations to obtain input on the design of the truth-telling process.** These consultations should be held at the national, state and local level, if possible, and should commence immediately upon the signing of a peace agreement. Independent actors, including civil society organizations, international non-governmental organizations and intergovernmental organizations should take the lead. If IGAD, the AU, the UN and the IGCLR are to play a role in commissioner selection, they should also be involved in the consultations. The consultation process should take no longer than six months so as to avoid delays in enacting the truth commission legislation and establishing the commission.

3. **Explore connections between truth commissions and customary justice and reconciliation mechanisms and processes.** Customary or traditional justice and reconciliation processes could complement the efforts of the truth commission, for example, by using customary court forums for periodic community-level public hearings on thematic issues, or to support the reintegration of perpetrators into communities. The circumstances and role of customary courts must be carefully determined in relation to the particular dynamics in the South Sudanese conflict. Any such process should not allow amnesties for serious crimes.

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<sup>1</sup> PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2<sup>nd</sup> ed.) (2011) [hereinafter UNSPEAKABLE TRUTHS].

<sup>2</sup> United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), *South Sudan Crisis: Humanitarian Snapshot*, 26 Aug. 2014, available at [https://radiotamazuj.org/sites/default/files/South\\_Sudan\\_Humanitarian\\_Snapshot\\_26August2014.pdf](https://radiotamazuj.org/sites/default/files/South_Sudan_Humanitarian_Snapshot_26August2014.pdf).

<sup>3</sup> World Food Programme (WFP), *Children in South Sudan Cannot Wait for Famine Before World Acts*, 25 Jul. 2014, available at <http://www.wfp.org/news/news-release/joint-news-release-children-south-sudan-cannot-wait-famine-world-acts>.

<sup>4</sup> Intergovernmental Authority on Development (IGAD), Agreement on Cessation of Hostilities Between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/Army (in Opposition) (SPLM/A in Opposition) (23 Jan. 2014), available at [http://www.sudantribune.com/IMG/pdf/signed\\_agreement\\_cessation\\_of\\_hostilities\\_.pdf](http://www.sudantribune.com/IMG/pdf/signed_agreement_cessation_of_hostilities_.pdf); IGAD, Recombitment on Humanitarian Matters in the Cessation of Hostilities Agreement Between the GRSS and the SPLM/A in Opposition) (5 May 2014), available at

<http://cewarn.org/attachments/article/252/Recommittment%20to%20Humanitarian%20Matters%20of%20COH,%2025%20May'2014.pdf>; IGAD, Agreement to Resolve the Crisis in South Sudan, Addis Ababa (9 May 2014) [hereinafter IGAD, 9 May Agreement], available at [http://www.sudantribune.com/IMG/pdf/agreement\\_to\\_resolve\\_the\\_crisis\\_in\\_south\\_sudan.pdf](http://www.sudantribune.com/IMG/pdf/agreement_to_resolve_the_crisis_in_south_sudan.pdf).

<sup>5</sup> IGAD, Implementation Modalities in Support of the Agreement on Cessation of Hostilities Between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/Army (in Opposition)(SPLM/A-IO) (24 Aug. 2014), available at <http://www.southsudan.igad.int/attachments/article/251/Implementation%20Modalities%20for%20CoH.pdf>; IGAD, Protocol on Agreed Principles on Transitional Arrangements Towards Resolution of the Crisis (25 Aug. 2014) [hereinafter IGAD, 25 August Protocol].

<sup>6</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>7</sup> There is an emerging recognition that survivors have a right to the truth, which includes the right to know the identity of the perpetrators who caused them harm, the causes of human rights abuses, the circumstances and facts of violations, and ultimately the fate and whereabouts of victims. This right has been particularly emphasized in situations of forced disappearances.

<sup>8</sup> As the writer Michael Ignatieff has said, "The past is an argument and the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies." *Articles of Faith*, 25 INDEX ON CENSORSHIP 113 (1996).

<sup>9</sup> The name is taken from a truth commission established by the government of Tunisia in June 2014 to investigate gross human rights violations committed by the Tunisian state since independence. United Nations Development Programme (UNDP), *Tunisia Launches Truth and Dignity Commission*, 9 Jun. 2014, available at <http://www.undp.org/content/undp/en/home/presscenter/articles/2014/06/09/tunisia-launches-truth-and-dignity-commission/>.

<sup>10</sup> Due to a lack of consensus on the definition of a truth commission, statistics on the number of truth commissions that have been created range from less than two dozen to more than 75. Eric Brahm, *What is a Truth Commission and Why Does it Matter?*, 3 PEACE & CONFLICT REVIEW 1-14 (2009), available at <http://www.review.upeace.org/index.cfm?opcion=0&ejemplar=17&entrada=83>.

<sup>11</sup> UNSPEAKABLE TRUTHS, *supra* note 1. The Public International Law and Policy Group (PILPG) notes that successful truth commissions tend to share the following characteristics: "These include: (1) establishing the legitimacy of the commission through consultation with the public and the choice of a sponsor; (2) articulating a properly tailored mandate; (3) selecting neutral and respected personnel; (4) providing for adequate resources and funding; (5) delineating specific activities and powers to enable the commission to fulfill its objective; and (6) producing a final report with concrete and manageable recommendations." TRUTH AND RECONCILIATION COMMISSIONS: CORE ELEMENTS (May 2013) [hereinafter PILPG, CORE ELEMENTS], available at

[http://syriaaccountability.org/wp-content/uploads/PILPG-Truth-and-Reconciliation-Memo-2012\\_EN.pdf](http://syriaaccountability.org/wp-content/uploads/PILPG-Truth-and-Reconciliation-Memo-2012_EN.pdf).

<sup>12</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>13</sup> IGAD, 25 August Protocol, *supra* note 5.

<sup>14</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> The Guatemalan authorities refused to enforce the order from the Spanish courts. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The 25 August Protocol includes a provision that would exclude individuals suspected of having committed war crimes or crimes against humanity from the transitional government, but even if the parties were to agree to such a provision, it is likely that perpetrators of human rights abuses or their supporters would still be incorporated into the government, to some extent. See IGAD, 25 August Protocol, *supra* note 5.

<sup>20</sup> See General Assembly Resolution, U.N. Doc. A/RES/60/147 (2006), available at

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/60/147](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/147); see also Economic and Social Council (ECOSOC), Commission on Human Rights, Promotion and Protection of Human Rights: Impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc.

E/CN.4/2005/102/Add.1 (Feb. 8, 2005), available at <http://www.derechos.org/nizkor/impu/principles.html>.

<sup>21</sup> LESLIE VINJAMURI AND AARON P. BOESENECKER, ACCOUNTABILITY AND PEACE AGREEMENTS: MAPPING TRENDS FROM 1980–2006, CENTER FOR HUMANITARIAN DIALOGUE (HD CENTRE) (Sep. 2007), available at [http://www.hdcentre.org/uploads/tx\\_news/79Accountabilityandpeaceagreements-Mappingtrendsfrom1980-2006.pdf](http://www.hdcentre.org/uploads/tx_news/79Accountabilityandpeaceagreements-Mappingtrendsfrom1980-2006.pdf).

<sup>22</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>23</sup> Government of South Sudan, Transitional Constitution of the Republic of South Sudan (2011), available at

[http://planipolis.iiep.unesco.org/upload/South%20Sudan/South%20Sudan\\_Transitional\\_constitution\\_2011.pdf](http://planipolis.iiep.unesco.org/upload/South%20Sudan/South%20Sudan_Transitional_constitution_2011.pdf).

<sup>24</sup> PRISCILLA HAYNER, NEGOTIATING JUSTICE: GUIDANCE FOR MEDIATORS, CENTRE FOR HUMANITARIAN DIALOGUE (HD CENTRE) (Feb. 2009) [hereinafter NEGOTIATING JUSTICE], available at

<http://www.ictj.org/sites/default/files/HDCenter-Global-Negotiating-Justice-2009-English.pdf>.

<sup>25</sup> EDUARDO GONZÁLEZ, ELENA NAUGHTON AND FÉLIX REÁTEGUL, CHALLENGING THE CONVENTIONAL: CAN TRUTH COMMISSIONS STRENGTHEN PEACE PROCESSES?, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (ICTJ), at xiv (June 2014) [hereinafter CHALLENGING THE CONVENTIONAL], available at

<http://ictj.org/sites/default/files/ICTJ-Report-KAF-TruthCommPeace-2014.pdf>.

<sup>26</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>27</sup> *Id.*

<sup>28</sup> For additional information on a proposal to establish a hybrid court in South Sudan, see DAVID K. DENG, SPECIAL COURT FOR SERIOUS CRIMES: A PROPOSAL FOR JUSTICE AND ACCOUNTABILITY IN SOUTH SUDAN, SOUTH SUDAN LAW SOCIETY (SSLS), TRANSITIONAL JUSTICE WORKING PAPER NO. 2 (May 2014), available at

[http://sslawsociety.org/public\\_html/SSLS\\_SCSC\\_Proposal\\_for\\_a\\_Hybrid\\_Court.pdf](http://sslawsociety.org/public_html/SSLS_SCSC_Proposal_for_a_Hybrid_Court.pdf).

<sup>29</sup> The only truth commission to date established through judicial process is the Truth and Reconciliation Commission of Canada. UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>30</sup> As Priscilla Hayner observes, when the proposal for a truth commission is introduced in the context of a peace agreement, it is important that the relevant provisions be left broad enough to allow for wider consultation with affected populations. NEGOTIATING JUSTICE, *supra* note 24.

<sup>31</sup> BACK FROM THE BRINK, *supra* note 37. The idea for a truth commission in South Africa first arose in the context of the negotiations to end apartheid, but it was not until after Nelson Mandela was elected president in 1994 that serious discussions began to take place. President Mandela pushed for the introduction of a bill for the Truth and Reconciliation Commission (1995–2002) in parliament and the Promotion of National Unity and Reconciliation Act was passed into law in 1995. UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>32</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>33</sup> *Id.*

<sup>34</sup> IGAD, 25 August Protocol, *supra* note 5.

<sup>35</sup> Pablo de Greiff, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non- recurrence, U.N. Doc. A/HRC/24/42, August 28, 2013 [Hereinafter De Greiff Report] at 9, available at <http://www.refworld.org/docid/522dba6c4.html>.

<sup>36</sup> Decree Establishing the National Commission on Truth and reconciliation, Supreme Decree no. 355, Chile, 25 Apr. 1990, reprinted in NEIL J. KRITZ (ED.), TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, UNITED STATES INSTITUTE OF PEACE (USIP) (1995).

<sup>37</sup> OFFICE OF THE AU PANEL OF EMINENT AFRICAN PERSONALITIES, BACK FROM THE BRINK: THE 2008 MEDIATION PROCESS AND REFORMS IN KENYA 125 (2014) [hereinafter BACK FROM THE BRINK].

<sup>38</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>39</sup> Samuel Oakford, *Weapons are Streaming into South Sudan*, VICE NEWS, 26 Aug. 2014, available at <https://news.vice.com/article/weapons-are-streaming-into-south-sudan>.

<sup>40</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>41</sup> *Id.*

<sup>42</sup> De Greiff Report, *supra* note 35.

<sup>43</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>44</sup> The appropriate structure and mandate for such an institution would have to wait until the African Union Commission of Inquiry on South Sudan (AUCISS) delivers its final report. If the AUCISS is able to compile a body of evidence that paves the way for criminal trials, then prosecutors and investigators could begin investigating cases directly. However, if the AUCISS is not able to compile sufficient evidence of international crimes, if the perpetrators are not named, or if the report is not made available for the purposes of criminal justice, then there may be need to establish a separate institution to compile additional evidence and make recommendations for criminal justice mechanisms.

<sup>45</sup> EDUARDO GONZÁLEZ AND HOWARD VARNEY (EDS.), TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (ICTJ) (2013) [hereinafter TRUTH SEEKING], available at <http://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>.

<sup>46</sup> NEGOTIATING JUSTICE, *supra* note 24.

<sup>47</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>48</sup> *Id.*

<sup>49</sup> PILPG, CORE ELEMENTS, *supra* note 11.

<sup>50</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>51</sup> BACK FROM THE BRINK, *supra* note 37, at 133.

<sup>52</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>53</sup> BACK FROM THE BRINK, *supra* note 37, at 129.

<sup>54</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>55</sup> The National Reconciliation Commission in Ghana is good practice in this regard; three of the nine commissioners were women. TRUTH SEEKING, *supra* note 45, at 18.

<sup>56</sup> Resolutions and Decisions of the Economic and Social Council, Official Records, Supplement No. 1, U.N. Doc. E/1990/90 (1990), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/1990/90](http://www.un.org/ga/search/view_doc.asp?symbol=E/1990/90).

<sup>57</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Jacob Bathanti, *Bishop Gerardi: A Life Devoted to Social Justice*, GUATEMALA HUMAN RIGHTS COMMISSION (GHRC) (n.d.), available at <http://www.ghrc-usa.org/AboutGuatemala/TimelineGerardiWebsite.pdf>.

<sup>61</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer, U.N. Doc. 1/48/954/S/1994/751, Annex II (23 Jun. 1994), available at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Guatemala-Charter.pdf>.

<sup>70</sup> UNSPEAKABLE TRUTHS, *supra* note 1.

<sup>71</sup> *Id.*